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With a foreword by the Honourable Secretary for Justice Elsie Leung

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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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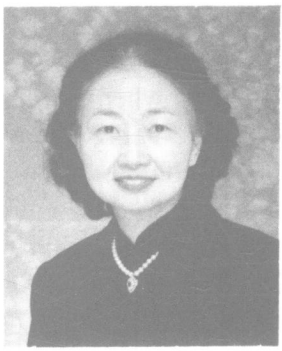
Foreword

Message from the Secretary for Justice

It gives me much pleasure to write this Foreword for the 1998 Edition of the Hong Kong Student Law Review.

"It stands as a monument slowly raised, like a coral reef, from the minute accretions of past individuals, of whom each built upon the relics which his predecessors left, and in his turn left a foundation upon which his successors may work." These immortal words were used by an eminent American jurist to describe the operation of common law, but they equally apply to the process of research, without which our law would not be able to develop to meet the ever-changing needs of the community. More often than not, legal research is a time-consuming and arduous task, which is fraught with difficulties. Only those who are truly dedicated will do it in their leisure. I was immensely impressed when I found that this Law Review was a voluntary endeavour of Hong Kong law students. I offer them my heartiest congratulations for the excellent work that they have done, and my sincerest wish for this Law Review to enjoy continued success.

1997 was a historic year for Hong Kong and China. Our reunification with the motherland has unfolded a challenging and exciting new era and, in the legal sphere, a fertile ground for research and experiment. The question of how the two different legal systems may, on the one hand, retain their respective independence and, on the other hand, interact to their mutual benefit remains largely unexplored. The recent debate over the criminal jurisdiction of the Mainland and the Hong Kong Special Administrative Region is only one example. The resolution of such issues requires wisdom, diligence, patience and, most important of all, mutual understanding and respect. People with solid legal training, a broad outlook and commitment to serve the community are best placed to shape the future of our legal universe. We look to our young law students to prepare themselves for their unique role in history, for that is their mission and destiny.



MS. ELSIE LEUNG
Secretary for Justice
Hong Kong Special Administrative Region
December 1998

Message from the Dean

At a time when increasing concerns about the quality of law graduates in Hong Kong are being expressed, the publication of yet another volume --- now the fourth volume --- of the *Hong Kong Student Law Review* is a powerful testimony to the continued vitality of the law student community at HKU, their high academic standards, their commitment to research and scholarship, and their sense of social responsibility. Texts build up a special bond between authors and readers. The authors of the articles in this volume are all students, while --- and I hope this would be so --- for most of their readers, student days are already distant memories. Yet reading establishes this special bond, and in it readers can experience vicariously the life, the world and the dreams of the authors.

I am so proud of these authors, and of the many editors, translators, researchers, business managers and other helpers --- all of them students in our Faculty of Law --- who have contributed their very best to the collective effort of the publication of this volume. The first volume of the *Hong Kong Student Law Review* appeared in autumn 1994. In the Foreword to the second volume published in 1995, I wrote of `the imagination, dedication and diligent efforts' of the founders of the journal in creating a new source of legal literature for Hong Kong. Today, I would like to pay tribute to the impressive work of generations of law students since 1994 in carrying on faithfully the work of the founders of the journal, thus keeping alive their noble dreams and ideals. We can see that standards of excellence have been achieved and have been maintained. It is not easy to found a journal, but it is even more difficult to keep it going. This is why I think the students' efforts are admirable and are to be congratulated in the warmest way.

Some of the articles in this volume are products of the constitutional transition that Hong Kong has just gone through. These include those on the right of abode in Hong Kong and on the impact of the transition on enforcement of arbitral awards. There are also articles on issues of human rights and law reform, such as pornography, tobacco advertising and title registration. The bilingual abilities of Hong Kong law students are evidenced by an article written in English on laws written in Chinese. I am also happy to see that students have not limited their writings to traditional core areas of the law, but have engaged in philosophical reflections (see the articles on postmodern jurisprudence and on euthanasia), and have broadened their concern to include groups that are underprivileged or discriminated against in our society (see the articles on unattended children and on homosexuals).

I have often told students, particularly at orientation functions for new entrants to the Faculty, that university education is not limited to professional training for career purposes, but that it is a precious opportunity for intellectual and personal growth. Life itself should be a process of growth, of constantly surpassing and transcending oneself and reaching up to higher levels. Much of such growth consists in learning, and learning is a life-long challenge. Research and writing is an important means of learning, and a major vehicle of personal and intellectual growth. And so the venture of the *Hong Kong Student Law Review* is ultimately an adventure in personal and intellectual growth.

Albert H Y Chen
Dean
Faculty of Law
University of Hong Kong

December 1998

Preface

Another year, and another edition of the Student Law Review.

1998 had not been a good year for Asia, and we in Hong Kong have not been spared the economic turmoil currently embroiling the region. There is little doubt, however, that "things will only get better", for both Hong Kong and the legal profession at large.

The controversy surrounding the Right of Abode issue further demonstrates the need for more legal research and academia, so as to better refute the politicisation of the law. In this mission, the law student's role is crucial in standing up for what is right, rather than what is expedient. The Review gives a clear and resonating voice to the legal scholar, echoing loud in the corridors of power.

As with all other processes of evolution, the Review has undergone many changes over the years.

In this, our fourth edition, we stride further along the bilingual road with two short essays written purely in the Chinese language. In addition, our readers may note that the length of the introductory abstracts has been increased, in both tongues. Finally, inserted are many other changes of a technical or stylistic nature, for the overall better enjoyment of the Review by our readers. We can only hope that these will be well received.

We are delighted to have the Secretary for Justice, Ms. Elsie Leung, accept our invitation to compose the foreword for this edition. We thank the Secretary for Justice for her kind words and wish her a successful tenure in office.

A long overdue vote of thanks must be given to the Faculty of Law at the University of Hong Kong, whose support in every respect has been unflinching and constant. The Faculty's continuous financial and logistical support has ensured not only our survival, but our success. A very special note of acknowledgement must go to the Friends of the Faculty, from whose generous donations we draw and rely upon. A list of our Friends may be found later in this issue: we thank them for their support in the only way we know how.

Finally, a personal note of thanks to our Dean, Mr. Albert Chen, without whom we would truly not be in existence today. His enthusiasm and open-

door has been greatly appreciated, and I wish him only the best. This being my last edition in charge, I offer my greatest note of thanks to the hard-working and diligent staff here at the Review, and wish the next generation of editors all the best for the future. They will need it.

Charles Mo
Editor-in-Chief
HKSLR

December 1998

RIGHTING THE RIGHT OF ABODE*

公平對待居留權問題

MICHELLE NG YUN-YUN**

In 1997, Hong Kong's sovereignty was returned to China. This is not only a major landmark in her history, but it also poses significant changes in the way of life and on the international status of Hong Kong. For a long time, immigration from China has been an inevitable and ambivalent issue in Hong Kong.

In recent years, many Hong Kong residents visited mainland for work purposes and married mainland wives. Though their children did not have the right of abode in Hong Kong before 1 July 1997, they could obtain the right on that very day according to Article24 of Basic Law. The number of these children was estimated to be 75,000. Many parents smuggled their children into Hong Kong and surrendered them to the police, on the belief that their children could obtain a right of abode in Hong Kong if their stay was extended beyond 30 June 1997. The Hong Kong government had reiterated its intention to repatriate all illegal immigrants. The Immigration Ordinance was amended immediately after transfer of sovereignty. Under the Ordinance, these children will be sent back unless they entered Hong Kong with a one-way permit and a certificate of entitlement affixed to it. Lawyers, academics and human rights organizations have denounced the above provision as a violation of the Basic Law.

It is submitted that these mainland children born to Hong Kong permanent residents have a right of abode in Hong Kong. According to Article 8(4) of Hong Kong Bill of Rights Ordinance, they have the right to enter and freedom of movement. Requiring these children who already have the right of abode in Hong Kong to return and join the queue to get the one-way permit and certificate of entitlement would effectively dispossess them of their right.

Children's rights are protected by the Hong Kong Bill of Rights

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* This paper was originally written as an assignment for the "Human Rights in Hong Kong" course. The focus is on the first instance decision in the *Cheung Lai Wah* case. The Court of Appeal and Court of Final Appeal judgments are dealt with separately in the addenda to this paper.

** The author expresses her deepest gratitude to Professor Johannes Chan for his invaluable guidance and immense patience throughout the different stages of writing this paper. The author also wishes to extend her heartfelt thanks to Mr. Eric Cheung for generously sharing his views on the *Cheung Lai Wah* case with the author.

Ordinance, the International Covenant of Civil and Political Rights, the International Covenant of Economic, Social and Cultural Rights and the Convention on the Rights of the Child. The importance of family and the rights of children to live with their parents are well recognized. It is submitted that the regulations under the newly amended Immigration Ordinance have seriously violated the rights of these mainland children.

The author shares the concern of the government, namely the territory's resources cannot cope with the large influx of mainland children immigrant. However, the government is not entitled to dispossess the children of their constitutional rights for reasons of political and administrative expediency. It is submitted that the amendment to the Immigration Ordinance (No. 3 Ordinance) should be repealed and that programs should be launched to educate the parents not to have their children come to Hong Kong immediately. The final choice of whether and when to come to Hong Kong, of course, should lie in the hands of the parents and the children.

一九九七年，香港的主權回歸中國。這不但是香港歷史上的一個里程碑，也牽涉到香港的國際地位及人們生活方式的改變。一向以來，來自中國大陸的移民都是香港的一個不可避免，而又充滿矛盾的問題。

近年來，有相當多的香港居民往內地工作，並與當地居民結婚生子。根據《基本法》第二十四條，這些爲數約七萬八千個本來沒有香港居留權的內地兒童，會從九七年七月一日起擁有此權利。有很多這類兒童的家長會安排子女偷渡入境， 然後向警方自首，誤以爲只要能逗留至九七年七月一日後就能獲得居留權。

政府曾多次強調要全數遣返這些非法入境的兒童，因此在回歸後即修改《入境條例》。根據新例，這些兒童須持有有效旅遊證件〔即單程證〕和附貼在該證上的有效「居留權證明書」入境，否則便會遭到遣返。對此，法律界、學術界及人權組織皆批評此條例與《基本法》有抵觸。

作者認爲，這些在內地出生的香港永久性居民的子女享有香港居留權。根據《香港人權法案》第八條第四段的規定，他們同時享有入境權及自由遷徙的權利。將這些兒童遣返，要求他們排隊申請單程證及居留權證明書，實際上等於剝奪了他們的居留權。

兒童的權利受到《香港人權法案》、《公民權利和政治權利國際公約》、《經濟、社會和文化權利國際公約》及《兒童權利公約》的保障。其中家庭的重要性及孩童與父母一起生活的權利更備受重視。作者認爲新入境條例的規定嚴重違反了這些內地兒童的人權。

作者關注到政府的顧慮，如果大量的新移民兒童湧入香港的話，

本港的資源是不足以應付他們的需要。不過，政府也不能因政治和行政權宜而剝奪這些兒童的憲法權利。作者建議特區政府廢除《入境條例》的修正案〔第三號法例〕，並加強宣傳、教育及鼓勵這類父母不要馬上把孩子接來香港。當然，父母和子女們應擁有是否來港，及何時來港的最終決定權。

I. Introduction

On July 1 1997[1], Hong Kong passed a major landmark in her history. She turned from a British colony into an "inalienable part of the People's Republic of China"[2]. The change in sovereignty has significant implications not only on the international status of Hong Kong, but also on the status and way of life of the people of Hong Kong. As a consequence, it has received considerable attention from the general public, lawyers and academics worldwide.

One aspect of the changeover, that has been the subject of intense scrutiny is the problem of mainland immigration to Hong Kong, now the Hong Kong Special Administrative Region (HKSAR).

Immigration from mainland China has always had an inextricable link with Hong Kong. The majority of Hong Kong's population comprises of mainland migrants who arrived in spates during the 1800s and 1900s, turning Hong Kong from "a barren island with hardly a house upon it"[3] into a densely populated region of over six million people. These migrants brought with them money, entrepreneurial skills and labour that contributed to the building up of Hong Kong.[4] At the same time, the irregularity and bulk that has characterized their arrival has imposed significant strains on Hong Kong's economic and social resources.

To understand the present controversy surrounding the illegal

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1 Article 1, *Joint Declaration of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of HK*, signed in Peking on 19th December 1984; entered in force on 27th May 1985 upon exchange of instruments of ratification. (Hereinafter referred to as "*Joint declaration*").

2 Article 1, *The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China*, adopted on 4th April 1990 by the Seventh National People's Congress of the People's Republic of China at its Third Session. (Hereinafter referred to as the "*Basic Law*").

3 *per* Lord Palmerston, British Foreign Secretary, quoted in "HK Government Information Service", *Hong Kong 1984*, (Hong Kong: HK Government Printer, 1984), 236.

4 Lau, S.K., *Society and Politics in Hong Kong* (Hong Kong: Chinese University Press, 1984)

immigration of children into Hong Kong, it is necessary to have a grasp of the development of Hong Kong's immigration law. A brief review of this will also demonstrate the close ties immigration from the PRC has with Hong Kong society.[5]

During the first years of colonization, the colonial government allowed people complete freedom of movement in both directions across the borders between Hong Kong and mainland China.[6] Immigration control was born with the enactment of the *Passports Ordinance 1923* by the colonial legislature seeking to regulate admission of persons into Hong Kong.[7] Chinese people, however were exempted from these regulations.[8] The flood of immigration (resulting from the civil war between the Kuomintang and communist during the 40's) imposed a severe pressure in the finance and social resources of Hong Kong. Following the fall of Guangzhou and during the civil war between the Kuomintang and the Communists in the 1940s imposed pressure on the territory's financial and social resources. To combat the problem, the Hong Kong legislature enacted two pieces of legislation. The *Immigration Control Ordinance 1940*[9] imposed restrictions on the entry into and stay in the colony. The *Immigration Control Ordinance 1949*[10] provided that all people, including Chinese people, need entry permits or travel documents to enter the colony.[11]

In May 1950, the Hong Kong government, for the first time in it history, restricted the entry of immigrants at the Hong Kong-PRC border by a daily quota system.[12]

The *Immigration Ordinance 1971*[13] was significant in that it created the terms, "Hong Kong Belongers", "Chinese residents", "Resident United Kingdom Belongers" and "Others".[14] The right to land in Hong Kong and the corresponding limitation on removal and deportation is also of considerable significance. Illegal immigrants who do not have the right to land in Hong Kong are liable to both removal and criminal prosecution.

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5 The following paragraphs are a brief summary of an article by Chen, A., "Immigration Law in Hong Kong" (1988) 33 McGill Law Journal 632.

6 Lui, T., "Undocumented Migration in Hong Kong", paper presented at the 6th Seminar on Adaptation and Integration of Immigrants, organised by the International Committee for Migration in Geneva, 11-15 April 1983.

7 Ordinance No. 35 of 1923.

8 *Ibid.*, see regulations set out in schedule to *Passport Ordinance.*

9 Ordinance No. 32 of 1940.

10 Ordinance No. 4 of 1949.

11 *Ibid.*, Section 18.

12 Endacott, *A History of Hong Kong*, (Hong Kong: Oxford University Press, 1973).

13 Ordinance No. 55 of 1971.

14 Under the Ordinance, only Hong Kong Belongers had the full right to reside in Hong Kong in the sense that they may not be removed and deported.

The "touch-base" policy adopted by the government in 1974 provided that illegal immigrants arrested in the border region or in Hong Kong's territorial waters would be repatriated but all those who avoided capture and subsequently established contact with relatives in the urban areas would be given permission to stay. This policy as adopted to avoid a creation of second class citizens in Hong Kong.[15]

However, it became progressively more difficult for the existing social services infrastructure to cope with the growth in population and its density. Yet another flood of immigrants in 1978-1980 forced the government to abandon its lenient policy. Thus, the *Immigration (Amendment) (No.2) Ordinance 1980* was passed.[16] All illegal immigrants arriving from Hong Kong after 23rd October 1980 were to be repatriated. This measure proved to be highly effective and the number of illegal immigrants decreased. However, the problem of illegal immigrant children persisted, and it is this problem which is the focus of this paper.

II. Background

With the flourish of business ties across the border, regular visits to the mainland for work purposes has become a norm for many Hong Kong residents. Many of these Hong Kong people who traveled northwards for business purposes, married mainland wives who have no right of abode in Hong Kong, who subsequently bore children and were arranged to enter Hong Kong by illegal means. The problem became more acute in the early part of 1997, with Mainland children coming into Hong Kong illegally in large floods in the hopes that they will not be repatriated upon the commencement of Article 24 of the *Basic Law* on 1st July 1997.

The Hong Kong government estimate that around 75,000 Mainland children have the right of abode in Hong Kong under Article 24 of the *Basic Law*, of which 35,000 are still waiting to come.[17] However, the number may be much larger than this estimate. In April 1997, the Guangdong Public Security Bureau revealed that the Bureau has received 137,859 applications since 1993 from children born to Hong Kong parents for settlement in

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15 "Hong Kong Government Service", *Hong Kong 1981* (Hong Kong: Government Printer, 1981) 145.

16 Ordinance No. 62 of 1980.

17 "Repatriation of illegal immigrants violates Basic Law?", *Ming Pao*, 10 April 1997 (hereinafter referred to as "MP"). It was argued that this estimation is inaccurate as it is based on results from the 1991 population census.

HKSAR.[18] 95,214 of these applications have been approved by Chinese authorities and passed to Hong Kong officials who in turn approved 62,228 of these applications. Of these, more than 27,000 children are still waiting to come to Hong Kong. The remaining 42,000 outstanding cases to be processed by the Guangdong authorities.[19]

Entry into Hong Kong from the mainland is regulated by the system of entry and exit permits. All those seeking to enter Hong Kong from China must obtain an exit permit from the Chinese authorities.[20] The procedure is rather complex. The applicant first applies to the exit and entry branch of the province in which his/her bank account is located. Following verification of his/her information, it will be transferred to the Guangdong Security Bureau for handling, then to the Hong Kong Immigration Department for further verification. If no problem is found, the Bureau will make arrangements in accordance with the daily quota of permits to be allocated.[21] One-way permits must be obtained for settlement in Hong Kong while two-way permits are issued for visits to the territory. Priority is given to children whose parents are in Hong Kong and who are without care in the Mainland, and to those whose mother/father have been granted a one-way permit, in which case the child can accompany the parent to the HKSAR.[22] Those who have been granted permits by the PRC authorities are invariably given permission by the Hong Kong Immigration Department to enter and remain in Hong Kong.[23]

In anticipation of the large numbers of mainland children wishing to settle in Hong Kong after 1 July 1997, the daily quota of one-way permits was increased from 75 to 105 in November 1993. The number was raised to 150 in July 1995, with 66 of these places being given to children gaining right of abode on 1 July 1997.[24]

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18 "42,000 more children seek abode", *South China Morning Post*, 18 April 1997 (hereinafter referred to as "SCMP"); and "Minimum 60,000 children can come to Hong Kong", *MP*, 18 April 1997.

19 *Ibid.*

20 Article 17 of the *Law on the Control of the Exit and Entry of Citizens* promulgated on 22 November 1985, and Article 3 of the *Interim Measures for the Administration of Chinese Citizens on Passage to or from the Regions of Hong Kong or Macao for Personal Affairs* promulgated on 25 December 1986.

21 *Supra* note 18,"Minimum 60,000 children can come to Hong Kong".

22 *Supra* note 18, "42,000 more children seek abode".

23 Clarke, "Freedom of Movement' in Wacks (eds), *Civil Liberties in Hong Kong*, (Hong Kong: Oxford University Press, 1988) 327; and Ghai, *Hong Kong's New Constitutional Order: the Resumption of Chinese Sovereignty and the Basic Law*, (Hong Kong: Hong Kong University Press, 1997) p. 172.

24 Ngan, "Social Welfare" in *The Other Hong Kong Report 1997*, (Hong Kong: Chinese University Press, 1997), quoting Law, C.K., *Green Paper on Policies for New Arrivals from Mainland China*, (Hong Kong: C.K. Law Legislative Councilor's

Despite this, the waiting time is long, sometimes in the vicinity of ten years. This can partially be attributed to corruption in the one way permit system. It has been reported that bribes from HK$20,000 to HK$30,000 have to be paid to government officials for a one-way permit.[25] Families who cannot afford the bribe money become frustrated and resort to smuggling their children in or letting them overstay the duration prescribed by their two-way permits.

The children are usually smuggled into Hong Kong. The parents then surrender them to the police. When the parents appeal against repatriation on humanitarian grounds, the children are often issued forms allowing them to remain legally in Hong Kong for prescribed periods which can be extended (commonly called "walk-free" permits). Most families mistakenly believe that their children can obtain a right of abode in Hong Kong if their stay is extended till after 30 June 1997.[26] This situation has been exacerbated by rumors that there will be a general amnesty after the handover on 1 July 1997. The Immigration Department revealed that 94 children surrendered themselves to the authorities in 1994, but the figure jumped to 540 in 1996 and rocketed to an alarming 1500 in the first four months of 1997.[27]

In response to this situation, the designate government of HKSAR has reiterated its intention to repatriate all illegal immigrant children found in Hong Kong in the pre-handover months, irrespective of their status. This has to be done to ensure the orderly and staggered arrival of mainland children so that the present resources can cope with the situation. This stance was supported by the Guangdong Public Security Bureau as well as the State Council Hong Kong and Macao Affairs Office, both of which emphasized that the right of abode in HKSAR must be obtained by legal means and in accordance with procedure.[28] Such announcements have prompted much criticism by human rights activists and lawyers, and the much publicized repatriation of the child Chung Yeuk-lam in April 1997 by the Hong Kong government aroused public sympathy for the child and

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Office, 1996); and "Illegal immigrants can't stay despite July 1 status", *SCMP*, 2 April 1997.

25 "Time to review one-way permits", *SCMP*, 9 April 1997; and "Children in mass appeal for residence", *Hong Kong Standard*, 1 April 1997 (hereinafter referred to as "HKS").

26 "Temporary stay permits for most illegal immigrants", *SCMP*, 1 April 1997.

27 "The Basic Law and Illegal immigrant children", *Sing Tao Daily*, 12 April 1997; "Plan for China child immigrant list", *HKS*, 25 April 1997; and "'No amnesty' as more illegals caught", *HKS*, 9 July 1997.

28 *Supra* note 24, "'Illegal immigrants can't stay despite July 1 status'" and "HKSAR to pass laws to repatriate illegal immigrant children", *MP*, 5 April 1997.

attacks on the government.[29]

Immediately after the handover, many parents of illegal immigrant children surrendered their children to the authorities in hope of an amnesty. The Immigration Department, however expressed its intention to deport the two thousand or more illegal immigrant children who had tried to obtain permanent residency since the handover.

The HKSAR Executive Council approved the *Immigration (Amendment) No. 5 Bill* (various amendments to the *Immigration Ordinance* have been made before 1 July 1997) in its first post-handover sitting and tabled it in the Provisional Legislative Council for passage into law on 9 July 1997.[30] The *Immigration (Amendment) (No.3) Ordinance* (hereinafter referred to as the "*No. 3 Ordinance*") was signed by Chief Executive Tung Chee-hwa on 10 July 1997.[31] Under the Ordinance, mainland children entitled to the right of abode in HKSAR under the *Basic Law* will be sent back unless they had entered the territory with a "certificate of entitlement" issued by the Immigration Department.[32] The Ordinance has retrospective power and "shall be deemed to have come into operation on 1 July 1997."[33] The Bill and the Ordinance were subject to severe attacks by parents of the mainland children,[34] lawyers and academics.[35]

Subsequently, several of the mainland children obtained Legal Aid to challenge the decision to deport them in court, and a meeting of the Bar Association gathered around 100 lawyers willing to offer *pro bono* services to these children. The first of the test cases was heard in the Court of First Instance before Mr. Justice Brian Keith in late September 1997, and judgment was delivered on 9 October 1997.[36] The judgment upheld the government's decision to remove the children, and an appeal was launched against the ruling by both sides. The government confirmed that the approximately 1,500 illegal immigrant children already in Hong Kong would not be repatriated until the judicial process is completed. As most of them are under 18, there are no plans to detain them.

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29 "Right of Abode cannot be taken away", *MP*, 5 April 1997; "Outrage as child deported", *SCMP*, 23 April 1997.

30 "Legal warning on new abode rules", *SCMP*, 9 July 1997.

31 Ordinance No. 124 of 1997.

32 Section 2AA inserted by the Ordinance provides that status can be established by the production of a valid travel document, a valid HKSAR passport or a certificate of entitlement, but mainland immigrant children will not be entitled to the first two documents.

33 *Immigration (Amendment) (No. 3) Ordinance 1997*, Section 1(2).

34 "'Betrayed' parents hide children", *SCMP*, 9 July 1997.

35 *Supra* note 30, "Legal warning on abode rules", "Lawyers deplore changes", *SCMP*, 9 July 1997; "The law is the loser in the SAR", *SCMP*, 11 July 1997.

36 *Cheung Lai Wah and Others v The Director of Immigration* [1997] 3 HKC 64.

III. The Issue

The main issue surrounding this controversy is the right of abode and when they can exercise their right of abode in Hong Kong of mainland children born to Hong Kong permanent residents. These children did not qualify for the right of abode in Hong Kong before 1st July 1997, but by virtue of Article 24(3) of the *Basic Law*, they have acquired such a right after the handover.

Article 24(3) of the *Basic Law* (hereinafter referred to as "*BL* 24(3)") states:

> "... The permanent residents of the Hong Kong Special Administrative Region shall be:
> Chinese citizens born in Hong Kong before or after the establishment of the Hong Kong Special Administrative Region;
> 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 Hong Kong Special Administrative Region;
> Persons of Chinese nationality born outside the Hong Kong of those residents listed in categories (1) and (2);
> ...
>
> The above-mentioned residents shall have the right of abode in the Hong Kong Special Administrative Region and shall be qualified to obtain, in accordance with the laws of the Region, permanent identity cards which state their right of abode. ..."[37]

Many of these children have parents who satisfy the criteria of Article 24(1) or (2) of the *Basic Law* and wish to exercise their right of abode immediately by coming to Hong Kong to join their families. The government is opposed to a sudden influx of mainland immigrant children. It is in favour of a policy of orderly and staggered arrival so that local resources can gradually adapt to the increase in population. The *Immigration (Amendment) (No. 3) Ordinance 1997* made it impossible for these children to land and remain in Hong Kong unless they came through

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[37] Schedule 1 of the *Immigration Ordinance 1971*, headed "Hong Kong Permanent Residents", identified permanent residents of Hong Kong prior to 1 July 1997. It was repealed and substituted by a new Schedule 1, headed "Permanent Residents of the Hong Kong Special Administrative Region", by section 5 of the *Immigration (Amendment) (No.2) Ordinance 1997*, which came into effect on 1 July 1997. The new Schedule complied with and is worded in a similar fashion to Article 24 of the *Basic Law*.

the one-way permit system.

Section 2AA of the *No. 3 Ordinance* provides:

> (1) A person's status as a permanent resident of the Hong Kong Special Administrative Region under paragraph 2(1) of Schedule 1 can only be established by his holding of --
> (a) a valid travel document issued to him and of a valid certificate of entitlement also issued to him and affixed to such travel document;
> (b) ...
> (c) ...
>
> A person's right of abode in Hong Kong by virtue of his being a permanent resident of the Hong Kong Special Administrative Region under paragraph 2(c) of Schedule 1 can only be exercised upon the establishment of his status as such a permanent resident in accordance with subsection (1) and, accordingly, where his status as such a permanent resident is not so established, he shall, for the purposes of this Ordinance, be regarded as not enjoying the right of abode."

Section 2AB of the *No. 3 Ordinance* provides:

> (1) Any person who –
> (a) immediately before 1 July 1997 did not enjoy the right of abode in Hong Kong under this Ordinance as then in force
> (b) is not the holder of a valid Hong Kong Special Administrative Region passport or valid permanent identity card; and
> (c) claims to be a permanent resident of the Hong Kong Special Administrative Region under paragraph 2(c) of Schedule 1, may apply to the Director for a certificate of entitlement.
>
> ...
>
> (5) For the removal of doubt, it is hereby declared that the making of an application under subsection (1) does not give the applicant the right of abode or the right to land or remain in Hong Kong pending the decision of the Director on the application."

Applications for a certificate of entitlement have to be in the manner prescribed in a notice in *Gazette Notice (Extraordinary) No. 21 of 1997.* A claimant residing in mainland China must apply for the certificate of entitlement through the Exit and Entry Administration of the Public Security Bureau in which he is residing. Applications for one-way permits in China would automatically be treated as an application for a certificate of entitlement.

In effect, these provisions will make it impossible for mainland children who entered Hong Kong illegally before or after 1st July 1997 to remain in HK as lawful permanent residents. Since they ordinarily resided in China, they would have to go back to the mainland to apply for a

certificate of entitlement and wait for the application to be approved by both the mainland authorities and the Hong Kong Immigration Department before they can enjoy their right of abode in HKSAR.

Lawyers and academics, notably Margaret Ng, Nihal Jayawickrama, Albert Chen, Gladys Li, Paul Harris, have denounced the above provisions as violating the *Basic Law*. The main thrust of their arguments is the concept of human rights as being inherent to human beings and cannot be taken away. The right of abode of the mainland children is guaranteed by Article 24(3) of the *Basic Law*. Since it is a fact that these children enjoy a right of abode and are permanent residents in Hong Kong, they have the right: (1) to land in Hong Kong;[38] (2) not to have any condition of stay imposed on them;[39] (3) not to have a deportation order made against them;[40] and (4) not to have a removal order made against them.[41] Imposing additional criteria on their rights violates the *Basic Law* which lists out the criteria for right of abode and which has overriding power.[42] The retrospective nature of the *Immigration (Amendment) (No. 3) Ordinance 1997* was criticized, and accusations that the legislation discriminates against mainland children were also made.

The Government defended its measures, claiming that retrospective powers are necessary to dispel the rumors of an amnesty that is being spread around.[43] The need for orderly arrival of immigrants and the unfairness of illegal immigration on those who complied with legal procedure were stressed. The Government also claimed that the legislation only provides for detailed implementation of Article 24 of the *Basic Law* (hereinafter referred to as "*BL* 24").

These measures and the case of *Cheung Lai Wah and Others v The Director of Immigration*[44] combine to raise serious problems. The clash between the exercise of the right of abode by these mainland children and the government policy of orderly arrival (which is backed by China), gives rise to concern that the rights of a minority can be sacrificed for the "public good" as deemed by the government. There are also important implications for the degree of autonomy enjoyed by the HKSAR, and its relationship to the PRC.

This paper approaches this controversy from the perspective of the

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38 *The Immigration Ordinance 1971* (Cap 115) Section 2A(1)(a).

39 *The Immigration Ordinance 1971* (Cap 115) Section 2A(1)(b).

40 *The Immigration Ordinance 1971* (Cap 115) Section 2A(1)(c).

41 *The Immigration Ordinance 1971* (Cap 115) Section 2A(1)(d).

42 *Supra* note 30, "Academics say illegal immigrant children can stay despite no proof of identity", Hong Kong Economic Journal, 25 April 1997; "Legal warning on new abode rules" and *supra* note 35, "Lawyers deplore changes".

43 "Bill's retrospective powers defended", *SCMP*, 9 July 1997.

44 *Supra* note 36.

rights of the children,[45] their right of abode in Hong Kong and any other rights to which they are entitled, such as the right to family and the right to education. To ascertain whether the HKSAR and PRC governments are according adequate respect to these rights, an international standard based on treaty law and customary international law will be used.

IV. Immigration Control in the HKSAR

Nationality and immigration law are traditionally within the realm of sovereign states. As Hong Kong is not a state, justification for the exercise of immigration control in the HKSAR cannot be easily found in traditional international law concepts. However, it is submitted that the exercise of immigration control functions by the HKSAR is legitimised by the autonomy guarantee in the *Joint Declaration* (hereinafter referred to as "*JD*").[46] The *JD* is the result of negotiations between the British and PRC governments on the future of Hong Kong, in an attempt by both governments to maintain the confidence of Hong Kong people and to ensure a smooth transition. It has the character of an international treaty and is registered with the United Nations. Article 3(1) of the *JD* provides that the HKSAR is established under Article 31 of the *Constitution of the People's Republic of China*,[47] and under the principle of "one country, two systems". To implement this principle, the HKSAR shall enjoy a "high degree of autonomy".[48]

The *Basic Law* (hereinafter referred to as "*BL*") originated from Article 3(12) of the *JD*. It is the mini-constitution of the HKSAR and elaborates on the policies adopted by the PRC in relation to Hong Kong as stipulated in the *JD*. Again, a "high degree of autonomy" is emphasised.[49]

According to Ghai, the "imperative" of "one country" requires that Chinese nationality should apply in the HKSAR.[50] Thus, the *Nationality Law of the People's Republic of China*, as it is one of the national laws listed in Annex III of the *BL*, should apply to the HKSAR by virtue of Article 18 of

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45 Since the situations surrounding the presence of these children in Hong Kong may be many and various, the situation that is adopted for the purposes of this paper is that of a child born to a Hong Kong man who has already acquired permanent residency in Hong Kong at the time of the birth of the child in China. It is also assumed that the child has been smuggled into Hong Kong prior to 1st July 1997 and has remained until after that date.

46 *Supra* note 2.

47 *The Joint Declaration,* Article 3(1).

48 Article 3(2) and Part 1, Annex I of the *JD*.

49 *The Basic Law,* Article 2 and Article 12.

50 *Supra* note 23, p. 158.

the *BL*.[51] The other aspect of the principle is the "two system" element. To implement this, Ghai asserts that a different regime of "quasi-nationality" should be established in Hong Kong.[52] To maintain the separation between the HKSAR and the mainland, a system regulating movement between the borders is necessary.[53] Some form of distinction between Hong Kong people and mainlanders should also be drawn. This in turn necessitates immigration control and the drawing up of criteria as to persons allowed to reside in Hong Kong.

Part XIV of Annex I to the *JD* sets out China's policies regarding the HKSAR in matters of right of abode, travel and immigration. It lists out the categories of persons entitled to the right of abode in HKSAR, which forms the basis of *BL* 24. As to "use of travel documents", it provides that "entry into the Hong Kong Special Administrative Region of persons from other parts of China shall continue to be regulated in accordance with the present practice."[54] In addition, "the Hong Kong Special Administrative Region may apply immigration controls on entry, stay in and departure from the Hong Kong Special Administrative Region by persons from foreign states and regions."[55] A largely identical provision is found in Article 154(2) of the *BL*.

Another provision relating to entry into HKSAR is Article 22(4) of the *BL* (hereinafter referred to as "*BL* 22(4)". It provides that for entry into the HKSAR, "people from other parts of China must 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 People's Government after consulting the government of the Region." This article seems to contradict the earlier provisions for autonomy in the HKSAR, but it will be subsequently argued that *BL* 22(4) is not a derogation from the autonomy in respect of immigration control exercisable by the HKSAR, contrary to Keith J's observation in *Cheung Lai Wah*.[56]

V. Rights of Mainland Children

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51 *Basic Law,* Article 18 provides that "The laws in force in the Hong Kong Special Administrative Region shall be ... National laws shall not be applied in the Hong Kong Special Administrative Region except for those listed in Annex III to this Law ..."

52 *Supra* note 23, p. 158.

53 *Ibid.*

54 *The Joint Declaration,* Part XIV, Annex I.

55 *Ibid.*

56 *Supra* note 36.

A. Right of Abode

In view of the immigration control exercised by the HKSAR, the key question facing the mainland children is whether they are subject to it. If the answer is affirmative, then they must fall under the regulatory regime imposed by the *No.3 Ordinance*.

The irony of this question is that persons having the right of abode have the unqualified right to enter into and remain in Hong Kong and are not subject to removal or deportation. Thus the requirements in the *No.3 Ordinance* should have no effect on them; yet the purpose of the *No. 3 Ordinance* is to prevent the children from asserting and exercising their right of abode before evidence is adduced for its proof.

The stance taken by the opposing sides – the HKSAR and Chinese governments on one side and the lawyers, academics and human rights activists on the other side – are interesting. Their bipolar attitudes towards the concept of human rights can be discerned. The HKSAR government and the Chinese government have expressed the view that *BL* 24 confers the right of abode to specified categories of mainland children, but these rights must be "obtained by legal means". What this means is that children who did not come to Hong Kong through the official one-way permit system have to "go back and join the queue".[57] In April 1997, the spokesman for the PRC State Council Hong Kong and Macau Affairs Office gave an explanation regarding nationality and right of abode of Hong Kong residents. He also included a statement that Chinese nationals must obtain the right of abode in accordance with the *BL*.[58] It is submitted that such statements reflect that both the HKSAR and PRC governments view human rights as something conferred upon by the state, which have to be obtained in accordance to state-specified procedures, and which can be taken away by the state should there be a failure to comply.

Such an observation is consistent with the criticism directed against the official view by Margaret Ng, who commented that the *No. 3 Ordinance* "means that people's rights guaranteed in the *BL* could be taken away if the administration agrees."[59] The "legal" side is in favour of the view that human rights are inherent and cannot be taken away by the authorities for the sake of political expediency. Such is the essence of the East-West dichotomy on the concept of rights. However, it is submitted that the

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57 *Supra* note 24 and 28. Both Elsie Leung, Secretary for Justice in the HKSAR, and Wong Yinggang, Vice-director of the Guangdong Public Security Bureau, have made statements to this effect.

58 "Introduction to nationality and right of abode policies regarding Hong Kong residents", *People's Daily*, 14 April 1997.

59 *Supra* note 35.

"legal" view is more consistent with international conceptions of human rights as being "equal and inalienable" as well as fundamental.[60]

B. Right to Enter Hong Kong and Freedom of Movement

Closely linked with the concept of the right of abode is the freedom of movement and the freedom from arbitrary deprivation to enter "one's own country", as provided for in Article 12(4) of *the International Covenant on Civil and Political Rights 1966* (hereinafter referred to as "*ICCPR*").[61] However, the concept of "one's own country" is inappropriate for use in HKSAR, for the simple reason that it is not a country by a special administrative region. Thus, the local version set out in the *Hong Kong Bill of Rights Ordinance* (hereinafter referred to as "*HKBORO*") is more appropriate in the present circumstances.[62] The purpose of the enactment of the *HKBORO* is to incorporate the provisions of the *ICCPR* as applied to Hong Kong[63] into domestic law.[64] Although it has no overriding status, the provision for the continued applicability of the *ICCPR* in Article 39 *BL* arguably gives it an entrenched status, given that the provisions of the *ICCPR* are adopted almost word for word in the *HKBORO*, subject to minor changes.[65]

Article 8(4) of the *HKBOR* states that, "No one who has the right of abode in Hong Kong shall be arbitrarily deprived of the right to enter Hong Kong."[66]

It is contended that the key word for interpretation is "arbitrarily". A question immediately arises as to whether this refers to unlawful deprivation or simply unjust deprivation of the right. As the meaning of this word is ambiguous, it is submitted that reference to the *travaux preparatoires* of the *ICCPR* could be made as a supplementary means of interpretation.[67]

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60 Preamble, *Universal Declaration of Human Rights*, adopted on 10 December 1948, GARes 217A (III), by a vote of 48 to none, with 8 abstentions.

61 CCPR/C/79/Add.57; UN Treaty Series vol. 999, p. 71. The *ICCPR* entered into force on 23 March 1976. There are 127 state parties to the Covenant as of 1994.

62 *Hong Kong Bill of Rights Ordinance* (Cap. 383).

63 The UK ratified the Covenant on 20 May 1976 and extended it to Hong Kong along with some reservations.

64 *Hong Kong Bill of Rights Ordinance* (Cap. 383), Section 2(3) repealed in April 1997 by the decision of the *Standing Committee of the National People's Congress* as of 1 July 1997.

65 Explanatory note to the Draft *HKBORO 1991*.

66 The *ICCPR* equivalent is Article 12(4), "No one shall be arbitrarily deprived of the right to enter his own country."

67 Articles 31-33 of the *Vienna Convention on the Law of Treaties 1969*, which, although not extended to Hong Kong by either Britain or China, have arguably

While there is relatively little mention of the meaning of the word in the discussion of Article 12(4),[68] the Drafting Committee of the Commission of Human Rights in its 9th session discussed in detail the meaning of the word "arbitrary" in the context of "arbitrary and unlawful interference" in Article 17(1) of the *ICCPR*. The use of the word "arbitrarily" was heavily criticized by State representatives as being too vague and capable of many possible interpretations.[69] However, one very useful observation made by certain State representatives was that the General Assembly had considered the word when Article 12 of the *Universal Declaration of Human Rights* (hereinafter referred to as "*UDHR*")[70] was adopted, that the term "arbitrary" was preferable to "unreasonable" as the former conveys both the notion of illegality and unreasonableness.[71] Therefore, it is submitted that an arbitrary deprivation of the right to enter Hong Kong by those enjoying the right of abode may occur even if there are lawful measures restricting it, provided that such measures are unreasonable.

As in the present situation, the right of this group of mainland children to enter Hong Kong is deprived by the requirement under the *No. 3 Ordinance* of the production of a certificate of entitlement and a valid one-way permit, which could only be applied for in the mainland. These mainland children are already in Hong Kong, despite the fact that their entry was illegal when it occurred (they did not have right of abode and hence had no right to land in Hong Kong prior to 1st July 1997). To require them to leave Hong Kong territory now, when they enjoy the right of abode and cannot be deported,[72] to join the queue for one-way permits and certificates of entitlement which they must show to re-enter HKSAR, would be effectively depriving them of the right to enter Hong Kong for many years.

Such a requirement is plainly unreasonable. *BL* 24(3) guarantees the children's right of abode in clear terms. It sets out the criteria for such a right: (1) Chinese nationality; (2) born outside Hong Kong; (3) with parents in satisfying the criteria in either Article 24(1) or Article 24(2). Nowhere in *BL* 24 can the words "one-way permit" or "certificate of entitlement" be

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achieved status of customary international law and which in any event, it is submitted, is of high persuasive value.

68 See Bossuyt, M.J., *Guide to the 'Travaux Prepartoires' of the International Covenant of Civil and Political Rights*, (Martinus Nijhoff Publishers, 1987), pp. 260-263.

69 E/CN.4/SR/375, E/CN.4/SR.376. Note that the word "arbitrarily" in the context of Article 6(1), "No one shall be arbitrarily deprived of his life" was also seriously criticised during the drafting process: E/CN.4/SR.90, E/CN.4/SR.98, E/CN.4/SR.139, E/CN.4/SR.140, E/CN.4/SR.311. See Bossuyt, *ibid.*, p. 122.

70 *Universal Declaration on Human Rights,* Article 12 provides, "No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence".

71 E/CN.4/SR.374, E/CN.4/SR.375, E/CN.4/SR.376, see Bossuyt, (*supra* note 68).

72 *The Immigration Ordinance* (Cap 115), Section 2A(1).

found. It is contended that Professor Albert Chen's argument is correct.[73] It is the fact that these children are offspring of Hong Kong permanent residents that entitles them to the right of abode in HKSAR, not any further proof of this fact, which should in any event be illegal as a corollary right to the right of abode is the right not to have conditions imposed on one's stay.

It is also submitted that the government cannot rely on section 11 of the *HKBORO*,[74] as it had often done in the past to assert the non-applicability of the *HKBORO* to Mainland born children in similar situations.[75] It is noted that the words in s. 2AA(2) of the *No.3 Ordinance* that "where his status as such a permanent resident is not so established, he shall, for the purposes of this Ordinance, be regarded as not enjoying the right of abode in Hong Kong" will serve to deny the right of abode to these mainland children unless they comply with regulations and until they go back to China, and follow the applicable procedures. This will effectively render the status of these children the same as those mainland-born illegal immigrant children who did not and do not enjoy the right of abode in Hong Kong. It is anticipated that a possible argument of the government may be that since the children as of now do not in effect enjoy the right of abode (as they cannot satisfy the requirements of s. 2AA and s. 2AB, they are not entitled to protection under the *HKBORO*.

However, that this line of argument is doomed to failure. As Professor Chen has argued, the right of abode enjoyed by these children is a fact. Proving these children satisfy the criteria listed in *BL* 24 would be a relatively simple process, involving verification of records such as the parents' record in the Immigration Department.[76] Moreover, it has never been the stance of the government to dispute the status of these children. No claim has ever been raised by the government that any of these children do not the Article 24(3) criteria. Throughout the whole issue, the government has put repeated stress on orderly and staggered arrival of the new

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73 *Supra* note 42, "Academics say illegal immigrants children can stay despite no proof of identity".

74 *Hong Kong Bill of Rights Ordinance* (Cap. 383), Section 11 states, "As regards persons not having the right to enter and remain in Hong Kong, this Ordinance does not affect any immigration legislation governing entry into, stay in and departure from Hong Kong or the application of any such legislation." This section is the result of the reservation made by the UK when ratifying the *ICCPR* on behalf of Hong Kong.

75 As in *Wong King-lung and Others v The Director of Immigration* [1994] 1 HKLR 312, which facts can also be applied to the present situation with the only major difference being the applicants in the case did not enjoy the right of abode in Hong Kong at the time of the trial. Also see *R v Director of Immigration ex parte Hai Ho-tak* (1994) 4 HKPLR 324.

76 This observation is also made by Eric Cheung, "'Three violations' by the *Immigration (Amendment) (No.3) Ordinance*", *MP*, 21 July 1997.

immigrants, and that following procedure is a pre-requisite to getting the right of abode. It is submitted that the sole purpose of the *No. 3 Ordinance* is to regulate the flow of immigration. Requiring them to return to PRC to prove their status does not serves the purpose of verifying their identity but rather to ensuring that the number of mainland entrants coming to Hong Kong per day is in accordance with the fixed quota. As there was never any dispute about the children's status, it is clear that the government has tacitly agreed that the children do satisfy *BL* 24, and thus they cannot rely on the *No. 3 Ordinance* to disapply the *HKBORO* in relation to the children.

The relationship between *BL* 22(4) and *BL* 24(3) must be discussed.[77] Keith J. ruled in *Cheung Lai Wah* that *BL* 22(4) applies to persons who enjoy the right of abode in Hong Kong under *BL* 24, and thus this "derogation from Hong Kong's high degree of autonomy ... is expressly sanctioned by Article 22(4)."[78] It is submitted, with due respect, that Keith J's interpretion of the relationship between *BL* 22(4) and *BL* 24(3) is erroneous. He cited Part XIV, Annex I of the *JD* as the basis of *BL* 22(4). This may be correct, but this is also precisely where the error lies. Keith J relied on the words "in accordance with the present practice" in ruling that as there was a one-way permit quota system in force in 1984 when the *JD* was signed, persons in mainland China who wish to exercise their right of abode under *BL* 24(3) must first obtain a one-way permit. It is contended that the connection is wrongly drawn. It must be borne in mind that in 1985, mainlanders did not have a right to abode in Hong Kong, unless they had "ordinarily resided" in Hong Kong for a continuous period of seven years.[79] "Hong Kong Belongers" who have the right of abode in Hong Kong and went back to the mainland temporarily did not need to apply for a one-way permit to re-enter Hong Kong, as they have the unqualified right to enter Hong Kong.[80] Thus, only those who did not have the right of abode in Hong Kong need to apply for a one-way permit.[81]

Mainland children born of Hong Kong permanent residents do not have this problem as they are Hong Kong resident by virtue of *BL* 24(3). Therefore, like the previous category of "Hong Kong Belongers", they too can enter Hong Kong freely and do not have to hold a one-way permit. Thus, the "present practice" referred to in the *JD* only refers to the practice in relation to those who do not have the right of abode in HKSAR. Therefore, the application of article 24(3) should in no way be curtailed by *BL* 22(4).

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77 See p. 10 of text.

78 See *supra* note 36.

79 Paragraph 1 of the old Schedule I to the *Immigration Ordinance 1971.*

80 *Ibid.,* Section 2A(1).

81 Cheung, E., "Undermining our Rights and our Autonomy", [1997] 3 HKLJ 297.

C. *Rights of Children*

Freedom of movement and to enter Hong Kong is a general right in the sense that it applies to people of all ages, as guaranteed by the non-discrimination clauses in Articles 1 and 22 of the *HKBORO*.[82] However, it has been increasingly recognized in the last two centuries that children are legal persons in their own rights independent of their parents, and at the same time form a group that should be accorded special protection due to their status.[83] Thus, Article 20(1) of the *HKBOR* and Article 24(1) of the *ICCPR* include a separate provision protecting the rights of every child as guaranteed in the *HKBOR* and the *ICCPR* without discrimination.[84] There is also a special provision in the *International Covenant of Economic, Social, Cultural* Rights (hereinafter referred to as *ICESCR*")[85] providing for special measures of protection and assistance to be given to children and young persons without discrimination.[86]

The most important policy statement in respect of the rights of children is the *Declaration on the Rights of the Child 1959*,[87] which lays down ten principles for safeguarding the rights of children. These principles are encompassed in the first comprehensive treaty on the rights of children – *The*

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82 Article 1 *HKBOR* states, "The rights recognised in this Bill of Rights shall be enjoyed without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." The corresponding article in the *ICCPR* is Article 2(1). This clause is also found in Article 2 *UDHR*. Article 22 *HKBOR* 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 corresponding article in the *ICCPR* is Article 26.

83 Alston, "International Protection of Children", in Bernhardt, *Encyclopaedia of Public International Law*, vol. 1, (Amsterdam: North-Holland Pub. Co., 1995).

84 *Hong Kong Bill of Rights,* Article 20(1)provides that "Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State."

85 UN Doc. E/C.12/19943/WP.13; UN Treaty Series, Vol. 993, p.3. Adopted by the General Assembly of the United Nations on 16 December 1966, and entered into force on 3 January 1976. There are 129 State Parties as of 1994.

86 Article 10(3) *ICESCR*: "Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage and other conditions ..."

87 Adopted by the General Assembly of the United Nations on 20 November 1959, as Res. 1386(XIV).

Convention on the Rights of the Child 1989.[88] Both the UK and the PRC have ratified the Convention (hereinafter referred to as the "*CRC*"). It was extended to Hong Kong on 7 September 1994, and has also been extended to the HKSAR by the PRC.[89]

There is at present no domestic legislation incorporating the *CRC* into domestic law. According to the traditional common law position, unincorporated treaties are not part of English law and individuals cannot derive rights from them.[90] This view has always been followed in Hong Kong.[91] However, the famous jurist Mann asserts that this principle is no longer tenable because the "ultimate aim is to reach a decision which protects this country against a possible breach of its international duties."[92] This view is supported by Higgins, "an unincorporated treaty can *always* be looked at, so long as rights of individuals are not founded upon it alone and so long as it is not suggested that it takes away rights existing under common law."[93] Their views are supported by recent case law regarding provisions of the *European Convention of Human Rights*.[94] Although the position of Hong Kong judges are somewhat inconsistent as to the use of unincorporated treaties, there have been instances where they have been relied on.[95]

The framework for protection of mainland children's rights under the *CRC* is advanced below.

First, Article 2 of the *CRC* provides for the enjoyment of rights by each child without distinction.

Under Article 3(1), the best interests of the child shall be a primary consideration in all actions concerning the child. Article 3(2) requires State Parties to ensure to each child such protection and care as is necessary for his/her well-being, taking into account the rights and duties of his/her parents,

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88 Adopted without a vote by the General Assembly of the United Nations on 20 November 1989. UN GA Res. 44/25; Annex, (1989) 28 ILM 1448-1476. The Convention entered into force on 2 September 1990. There are 164 State parties as of 1994.

89 *Diplomatic Note from the Permanent Representative of the People's Republic of China to the Secretary-General of the United Nations*, dated 20 June 1997.

90 *International Tin Council Case* [1990] 2 AC 418.

91 *Winfat enterprises (Hong Kong) Co. Ltd. v AG of Hong Kong* [1985]1 AC 733.

92 Mann, F.A., *Foreign Affairs in English Courts* (Oxford: Clarendon Press, 1986), pp. 94-104, quoted in Mushkat, *One Country, Two International Legal Personalities: The Case of Hong Kong* (Hong Kong: Hong Kong University Press 1997).

93 *Ibid.*, p.174 quoting Higgins, "The Relationship between International and Regional Human Rights Norms and Domestic Law" (1992) Commonwealth Law Bulletin 1268 at 1274.

94 *Ibid.*, citing Stalker, "Decisions of British Court During 1993" (1993) BYIL 455-463.

95 *R v Director of Immigration and the refugee status Review Board, ex parte Do Giau and Others* [1972] HKLR 287; and *R v Director of Immigration, ex parte Le Ty Phong and Others* [1993] 3 HKPLR 641.

and to this effect, States shall take all appropriate legislative and administrative measures.

Article 5 requires States to respect the responsibilities, rights and duties of parents to provide appropriate direction and guidance to the child in his/her exercise of his/her rights under the *CRC*.

Under Article 7(1), a child has a right to know and to be cared for by his/her parents; and under Article 7(2), parties shall ensure the implementation of these rights in accordance with their international obligations.

Under Article 9, a child shall not be separated from his/her parents against his/her will, except when competent authorities determine so in accordance with law that separation is in the best interests of the child.

In accordance to the above article, Article 10 obliges States to deal with applications by a child or his/her parents to enter or leave the State for family reunification in a positive, humane and expeditious manner.

Lastly, under Article 28, all children have the right to education, in particular free and compulsory primary education.

It can be seen that the *CRC* accords prominent status to the family. Indeed, its emphasis on family unity is seen in its Preamble, "... convinced, that the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community."

This recognition of the importance of the family is also reflected in the international human rights covenants. The *ICCPR* states that "the family is the natural and fundamental group unit of society and is entitled to protection by the society and the State."[96]. The *ICESCR* provides that "the widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly ... while it is responsible for the care and education of dependent children." [97]

It can be noted that there is a repetition of standards in the various human rights instruments. This repetition and duplication of language may indicate an emerging norm of customary international law.[98] The large number of State parties to these treaties constitute the first requirement for establishing the existence of an international norm -- general State practice; whereas the binding nature of these treaties, and the compliance of States

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96 Article 23(1) *ICCPR*, corresponding to Article 19(1) *HKBOR*.

97 Article 10(1) *ICESCR*.. There is no corresponding provision as the *ICESCR* has not been incorporated into domestic law. However, the above argument for the application of unincorporated treaties applies.

98 *Statute of the International Court of Justice 1945,* Article 38(1)(b).

with these standards as evidenced by their inclusion in the constitutions constitute the second requirement of *opinio juris* i.e. a belief that the practice is rendered obligatory by a rule of law requiring it. If this argument succeeds, both the HKSAR and the PRC governments will be bound by the aforementioned provisions since customary international law is binding on all international actors and is not limited to members of treaties.

The one-way permit system has often been the subject of criticism and recommendations for improvement. This is highlighted by the *Concluding Observations of the Committee on Economic, Social and Cultural Rights in Consideration of the Reports Submitted by States Parties under Article 16 and 17 of the Covenant.* Paragraph 26 records, "The Committee is particularly disturbed at the problem of split families in Hong Kong . . . children who are separated from parents and siblings. The Committee is of the view that this situation is the result of Hong Kong's present immigration law, and considers that the separation of families is inconsistent with the obligations under Article 10 of the Covenant."[99] A recommendation was made for the immigration law to be improved by amending the provisions resulting in split families. It also expressly criticized the one-way permit system, saying that it is not an adequate solution due to the "very lengthy delay."[100]

If the previous system is frequently criticized, the present system under the *No. 3 Ordinance* is arguably even worse in its violation of the rights of the mainland immigrant children. First, this *Ordinance* specifically strips the children of their right of abode by imposing additional conditions on its exercise. Second, to fulfil the requirements under the Ordinance, the children will be forced to go through the one-way permit system, which is fraught with corruption and inefficiency and has already been criticized by an international organization. Third, such a system deprives the children of the right of family life and to the care and protection by their parents, as expressly guaranteed in Article 5 and Article7 of the *CRC*. Should the HKSAR repatriate these children pending the completion of a judgement in favour of the government, it would engage the responsibility of enacting legislation that has the inevitable result of separating children and their parents, in violation of Article 9 of the *CRC*. In doing so, HKSAR will demonstrate that it has no respect for the rights of the children, the rights and duties of the parents and its own duties under international law to recognize and assist the parents in fulfilling their duties. How can all this be in the "best interests of the child"?

In addition, arguably the HKSAR government is discriminating against

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99 See *Bill of Rights Bulletin*, v.3 n.3, April 1995, Appendix D, 71, 75-76

100 *Ibid.*, paragraph 27 of the *Concluding Observations*.

mainland born children since children born of Hong Kong permanent residents who live in foreign countries do not need to hold a one-way permit and certificate of entitlement to enter the territory. This will be a violation of the numerous non-discrimination provisions in various human rights instruments.

The PRC government will also be internationally liable. It is also a signatory to the *CRC*. Due to rampant corruption and inefficient bureaucracy, mainland children have to wait for years before they can re-unite with their families in Hong Kong. During this period, they are deprived of the care and guidance of their parents. The long waiting time results in frustration and many of these children choose to risk their lives and sneak into Hong Kong instead. The PRC will arguably incur international responsibility for not respecting the right to life of these children. Being labeled "small snakespeople" and treated with dislike by local people is also humiliating. This may have a great negative impact on the children's psychology and self-esteem. If the impact is so severe as to "grossly humiliate him before others or drives him to act against his will or conscience",[101] this may constitute "degrading treatment" under Article 3 of the *European Convention of Human Rights and Fundamental Freedoms*,[102] similar provisions of which are found in Article 3 of the *HKBOR*, Article 5 of the *UDHR* and Article7 of the *ICCPR*.

It may be mentioned here that not only is the right of the family respected under international law and that the HKSAR and PRC governments have the international duty to give effect and assist the implementation of the right. This right is also expressly by the *Basic Law*, which is the constitutional document of the HKSAR. Under Article 37, "... the right to raise a family shall be protected by law." It is arguable that implicit in the right to raise a family is the right for the family to live together. Thus, repatriation of the mainland children currently in HKSAR would be a violation of a constitutional right. The *No. 3 Ordinance* which legitimises this action should thus be void for contravening the *BL*, which supremacy over other laws is guaranteed by *BL* 8 and *BL* 11.

VI. Conclusion

The current policies advanced by the HKSAR and PRC governments

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101 *First Greek Case*, Report of 5 November 1969, Vol. II, Part 1, p.1 (European Court of Human Rights).

102 *European Treaty Series*, No. 5. The Convention entered into force on 3 September 1953. All members of the Council of Europe are members to the Convention. Article 3 states, 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

stand in breach of the rights of the mainland immigrant children under the *JD*, the *BL*, the *HKBORO*, and also under international instruments such as the *ICCPR*, the *ICESCR*, the *UDHR* and the *CRC*.

It has been argued that allowing those children who entered Hong Kong illegally to stay would be unfair to those who waited in the queue. The author also shares this concern; however, the question of unfairness does not affect the constitutional rights of such children. The right of abode under *BL* 24(3) applies to all mainland children who satisfy the criteria. It is not negatived by any element of illegality or unfairness. Furthermore, arguments presented in this paper are also advanced on behalf of those waiting in line for one-way permits and certificates of entitlement.

Similarly, concerns held by the HKSAR government over the ability of the territory's resources to cope with the sudden influx of immigration; and anxiety held by the local population as to the sudden large number of "outsiders" "invading" the territory within a short space of time are all understandable. All these should not be a pretext or excuse for the authorities to enact legislation interpreting the *BL* in such a way as to effectively deprive the children of their rights. Neither a constitutional right, nor a human right, can be dispossessed by reasons of administrative or political expediency, hostility or illegality or concerns of unfairness. The HKSAR government cannot use the *No. 3 Ordinance* as a defence to its failure to observe and give effect to the rights of the children, since a state may not invoke the provisions of its internal laws as justification for its failure to perform under a treaty.[103]

Four solutions may be suggested. The most obvious is to repeal the *No. 3 Ordinance* which is the crux of the problems. The result will be allowing all Mainland children who fulfil the criteria under *BL* 24(3) to come to Hong Kong. The obvious disadvantage with this approach is that the influx of children is likely to cause a strain on the territory's resources. These may lie in the areas of housing supply and the provision of medical, dental and child-care services. The area that will bear the brunt of the strain is primary education. A sudden increase in the number of children requiring compulsory and free education is not a simple matter that can be solved by adding more places in schools. Hong Kong schools are currently undergoing a change from half-day to full-day primary education. Under the present demand, 200 more primary schools have to be built.[104] A sudden

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103 Article 27 of the *Vienna Convention on the Law of Treaties*. This is another provision in the *Vienna Convention* that has arguably achieved the status of customary law by virtue of the wide utilisation and compliance by States.

104 Wen, W.P., "Why not mention *BL* 22?", 16 July 1997. Other reports, however, note that only 70 more schools are needed. See "Education Department allows 500

addition of 60,000 children would require a further 2,000 places to be added. The quality of the education may also foreseeably deteriorate, which has already led to complaints by local parents.[105]

Numerous problems may also arise from the mainland children's point of view. Many of these may result from the inability of the territory's resources to adapt to the increase in demand within a short period of time, especially in a time of economic downturn. Other problems may exist in the form of discrimination and inadequate care and guidance.[106]

The second approach is to amend *BL* 24 under *BL* 159. The HKSAR may propose amendment bills for consideration by the National People's Congress. However, the procedure is complex. Furthermore, Eric Cheung has persuasively argued that to do so would be a violation of the *BL* itself, as Article 3(12) of the *JD* expressly provides that the basic policies of the NPC to the HKSAR would remain basically unchanged for 50 years.[107]

The third approach is to refine the one-way permit system. By increasing the efficacy of the system through the elimination of corruption and bureaucracy and the introduction of a waiting list of immigrants, much of the inconsistency surrounding the system and the length of waiting time will be reduced. A defect of this approach lies in the difficulty of stamping out corruption. Moreover, even an improved one-way permit system will not be a "solution" in the strict sense, as it is the *existence* of the system and its corollary, the certificate of entitlement scheme, that are the main culprits causing the problem. An alleviated problem is still a problem.

The last approach is to wait for the Standing Committee of the National People's Congress (SCNPC) to give an explanation as to the interpretation of *BL* 24(3) and *BL* 22(4). It is submitted that this may be the most likely solution, as both sides to the *Cheung Lai Wah* case have appealed to the Court of Appeal in the HKSAR. Any subsequent decision is also likely to be appealed by the losing party so it is probable that the case will come before the Court of Final Appeal. Article 158 of the *BL* provides that whereas the SCNPC shall authorise the courts of the HKSAR to interpret provisions of the *BL* on their own, it reserves the power of interpretation on matters which "are the responsibility of the Central People's Government, or concerning the relationship between the Central Authorities and the Region",

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mainland immigrant children to continue their studies", *Express News*, 11 October 1997.

105 "Why not mention *BL* 22?", *ibid.*

106 The reason for this problem is the fact that the mothers of many of these children are still waiting for one-way permits to come to Hong Kong. This has led to some fathers having to give up their jobs and rely on social welfare alone in order to take care of the children.

107 See *supra* note 76.

when the interpretation will affect the judgement of the case.

It is submitted that the present situation falls within this category, for although the HKSAR is given the power to establish its own immigration control system, the present matter concerns the settlement of mainland-born children in the HKSAR. It also involves the immigration branches of both governments. Thus, a most probable outcome to this case may lie in an authoritative interpretation of the relevant provisions of the *Basic Law* by the SCNPC, which will act as a precedent for later cases. Therefore, it appears that the fates of the children, and the degree of autonomy to be enjoyed by the HKSAR in immigration matters will lie in the hands of the SCNPC. However, given the previous stance taken by the PRC government backing the enactment of the *No. 3 Ordinance* by the HKSAR government, and its statement concerning the "correct" method of obtaining the right of abode in the HKSAR, the author is a rather pessimistic on the probable interpretation. The consequences are far-reaching when one bears in mind that the case not only has considerable impact over the lives of thousands of children, but also has significant implications about the HKSAR-PRC relationship, in particular the degree of autonomy to be enjoyed by the HKSAR. It would be unfortunate indeed if the SCNPC's first interpretation of the *BL* is one that disregards the plight of its citizens, international standards of human rights and the "one country, two systems" concept that is the foundation of the *BL*.

Considering all four solutions, the author suggests that the HKSAR government should adopt an active stance instead of passively wait for an interpretation by the SCNPC. Indeed, the HKSAR government would stand at an advantage by adopting the first solution and repealing the *No. 3 Ordinance*, which does not stand up to legal scrutiny. There is also another method of tackling the problem – to educate Hong Kong parents of the difficulties that would be faced by their children and persuade them to not exercise their right immediately.[108] Encouragement could also be provided in the form of setting a definite date for their settlement in Hong Kong. The final choice, as Margaret Ng argues, lies with the children and their parents. It is not a choice that the government can make for them.[109] The author realises that this approach will not totally eliminate the problem, but it is submitted that the government will certainly be viewed in a more positive light by adopting a softer, more subtle method that shows due respect to the rights of its residents, rather than by practising a hard-line policy that victimises young children and their families by forcibly stripping them of their rights.

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108 *Ibid.*

109 "Losing Sight of a Right", *SCMP,* 15 April 1997.

VII. Addendum I

The appeal against Keith J.'s decision in *Cheung Lai Wah & Others v Director of Immigration*[110] was heard before the Court of Appeal in March 1998. Arguments were canvassed on behalf of the Mainland immigrant children concerning the unconstitutionality of the *No.3 Ordinance* and the certificate of entitlement scheme, as well as the invalidity of the retrospective provision of the *Ordinance*. The Immigration Department appealed against the judge's ruling that *BL* 24(3) covers illegitimate children of permanent residents of the HKSAR.

Judgement was delivered on 2nd April 1998.[111] The Court held unanimously that both the *No. 3 Ordinance* and the certificate of entitlement scheme are constitutional. The basis for this ruling is that the certificate of entitlement is only a document showing the applicant has proved his status to the satisfaction of the Director of Immigration, and not the only way of proving status. Applicants may choose to satisfy the Director of his status by any means and whatever proof he/she has. Moreover, the requirement that applications should be made to the Exit and Entry Administration of the Public Security Bureau (BEEA) was also held to be reasonable. This is because most of the applicants reside in China and to provide for otherwise would encourage illegal activities such as unlawful landing, and thus defeat any scheme aimed at orderly settlement.

The requirement of the exit permit is validated under a construction of *BL* 22(4) and *BL* 24 together. The Court agrees with Keith J. that the effect of reading these two constitutional provisions together is that all persons seeking to enter HKSAR from China, including those qualified to the right of abode in the HKSAR under *BL* 24(3), should obtain approval before coming to HKSAR. The *No.3 Ordinance* and the certificate of entitlement scheme (which includes the requirement of the exit permit) are designed to provide a procedure for those qualified under *BL* 24(3) to establish their status in compliance with *BL* 22(4). Thus the control of the PRC authorities over the quota of persons allowed HKSAR is provided by the *BL* itself and thus is not unconstitutional.

The Court also unanimously upheld Keith J.'s ruling on the father/child definition that it also covers illegitimate children born to male Hong Kong permanent residents.

However, the Court was divided on the question of the retrospective

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110 See *supra* note 36.

111 *Cheung Lai Wah (An Infant) and Others v Director of Immigration* [1998] 1 HKC 617. A detailed analysis of the judgement is beyond the scope of this paper, but a brief summary on the Court's judgement of the relevant issues is offered.

provision. It was decided by a majority that the retrospective provision does not affect the Mainland immigrant children who had arrived in Hong Kong before 1 July 1997, while it does affect those who entered Hong Kong after the handover.

Both sides to the dispute have already appealed to the Court of Final Appeal. The case is likely to be heard in December 1998. It remains to be seen whether the matter would be referred to the SCNPC for an interpretation of the relevant provisions, in particular *BL* 22(4) and *BL* 24.

VIII. Addendum 2[112]

Since the addition of *Addendum 1*, the case has proceeded to the Court of Final Appeal in January 1999, and judgment was delivered on 29th January 1999.[113] The unanimous judgment of the Court (Chief Justice Li, Mr. Justice Litton PJ, Mr. Justice Bokhary PJ, Mr. Justice Ching PJ and Sir Mason NPJ) detailed the process by which the Court came to its conclusion. After dealing with preliminary matters, the Court considered its constitutional jurisdiction, drawing its authority from, and also limiting its jurisdiction to, the *BL* itself, which was enacted by the National People's Congress pursuant to Art. 31 of the *PRC Constitution*. The Court also considered the proper approach to the interpretation of the *BL*, adopting a purposive approach and giving a contextual regard for its language. It was decided, after a detailed examination of the power of interpretation of the *BL* under Art. 158, that it was not necessary to make a reference to the SCNPC.

Having dealt with the constitutional and jurisdictional issues, the Court proceeded to analyze the constitutionality of the *No. 3 Ordinance*, mainly the relationship between Art. 24 and Art. 22(4). Its conclusion that the phrase "people from other parts of China" does not include permanent residents of the HKSAR (of which the mainland migrant children forms a part) is consistent with the argument advanced by the author earlier in this paper. Accordingly, the *No. 3 Ordinance* is ruled to be unconstitutional to the extent that it requires permanent residents of HKSAR to hold a one-way permit before they can exercise their right of abode in HK.[114] This offending requirement was thus severed from the *No. 3 Ordinance*, other parts of which are held to be constitutional. However, the retrospective provision is judged to be unconstitutional and thus excised.[115]

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112 This Addendum only offers a brief recount of key issues in the CFA decision and the subsequent controversy surrounding it. It is not an attempt at detailed legal analysis.

113 FACV No. 14 of 1998, FACV No. 15 of 1998, FACV No. 16 of 1998.

114 P. 62 of the judgment.

115 P. 67-72 of the judgment.

Furthermore, the Court concurred with the Court of Appeal and the Court of First Instance in ruling that there should be no distinction between children born in or out of wedlock. Finally, arguments on the legality of the Provisional Legislative Council were considered and its legality was upheld.

The CFA judgment, with its widespread ramifications, has radiated waves of vastly diverse reactions throughout HKSAR and the Mainland: elation and victory for the mainland migrant children and their families, confusion and occasional hostility from the HK public, applause from lawyers and academics,[116] and open denunciations from mainland legal scholars and local NPC deputies.

It is expected that the CFA judgment will lead to a surge of mainland migrant children into the territory. The HKSAR government is already attempting a re-allocation of resources to cope with the anticipated influx, and this will be reflected in the Government Budget for the coming financial year. Aside from maintaining a balance in the already strained economy, the Government also has to face political pressure from those who interpreted the CFA judgment as a claim by the Court that it has powers of review over acts of the NPC and thus is usurping its Sovereign authority. Following the strong attack on the judgment by Mainland legal scholars, calls were made for the Court to "rectify" its judgment; otherwise several local NPC deputies would propose to put the judgment on the agenda of the forthcoming NPC annual meeting for discussion.

The HKSAR Government then took the unprecedented step of applying to the Court for a "clarification" of certain parts of its judgment regarding the Court's position vis-à-vis acts of the NPC and the SCNPC. This, again, has led to great controversy concerning the potential damage to the judicial independence and rule of law of the territory. The Court considered the Government's application and consented to "clarify" part of its judgment, saying that it "did not question the authority of the SCNPC to make an interpretation under Art. 158 which would have to be followed by the courts of the region"; and also that the Court did not and cannot, "question the authority of the NPC or the SCNPC to do any act which is in accordance with the provisions of the *BL* and the procedure therein."[117]

The SCNPC has indicated its "acceptance" of the Court's "clarification", and there has thus far been no attempt to put the issue before the SCNPC. It is to be hoped that the "constitutional crises" will be settled by the SCNPC's statement, and that whatever damage that has already been

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116 See, for example, "Abode verdict a resounding victory for the Rule of law", SCMP, 3rd February, 1999.

117 See "Justices clarify ruling: we were not challenging NPC", SCMP, 27th February 1999.

done to HKSAR's legal system by the recent developments will not uproot confidence in the territory. All parties concerned in this issue have emphasized the importance of "one country, two systems" and their adherence to this overriding principle; but it must be remembered that the repeated payment of mere lip-service will do more to shake HKSAR's foundation than to consolidate it. The practical implementation of this concept involves mutual respect and a willingness to resolve matters through discussion leading to enhanced understanding. The present controversy is an indication that "one country, two systems" holds very different implications for different parties, and it is the author's belief that disputes of such constitutional significance will continue to recur unless more effort is made on both sides to heighten legal awareness of the different systems. Perhaps another valuable lesson from this case is that human rights and constitutional issues should never take a second seat to the economy; rather, recognition of the importance of both is essential to the healthy development of HK society.

EUTHANASIA — THE BARRIER RIDDEN ROAD TO LEGISLATION

安樂死 — 通往合法化的崎嶇路程

BELINDA WINTERBOURNE

Euthanasia has long been a controversial topic. The question concerns whether one can end another's life upon their request, and there is no simple and clear-cut answer to this question Various sectors of society, comprising of patients and their families, medical practitioners, the general public, legislators, judges and the government all hold different points of view. Nonetheless, a close examination and study on this topic is essential to shed light to the direction of its future development.

As far as the topic is concerned, there is currently no outstanding idea formulated. Different schools of thoughts have their own values and beliefs with their own supporters. Legal recognition or non-recognition of euthanasia as well as the reasoning behind the judgement in other countries also reveals the unique characteristics of each nation. Indeed, there is no one system of law on this topic that can be singled out or even generally be recognized in every jurisdiction.

Despite its uncertainty, a legal vacuum in this aspect should not be tolerated. While medical practitioners need clear and proper legal guidance regarding the practice of euthanasia, physical and psychological torture to dying patients and their families should be minimized as much as possible. It is suggested that the adoption of a humane perspective would perhaps be more suitable for the resolution of this problem.

The following article illustrates the current position of Hong Kong on euthanasia. . In addition, a general discussion is given regarding its pros and cons to different audiences and foreign experiences on legalization and adjudication. It is suggested that legislation and regulation in the practice of euthanasia is essential to render recognition and acceptance within the society.

安樂死，一直成爲社會上備受爭議之課題：究竟任何人可否按他人之要求協助此人結束生命而免受道德非議或法律制裁？不同人仕和組織，病人及其家屬，醫務人員，社會大眾，立法者，司法者及政皆各持己見。這些意見值得深思和研究，從而決定人類未來應朝那個大方向前進。

到目前爲止，關於這方面的討論的主流意見還未形成。不同的思

想學派均有其依附者和支持，而這些學派實質上也代表髮不同的價值觀和信念。個別國家或地區在是否於法律上承認安樂死和在其判案推論方面已切實反映當地人民的獨特價值取向和民情。事實上，我們還沒有一套放諸四海皆準的方案。

話雖如此，我們斷不能就此卻步，任由這方面的法律真空，醫務人員要不無所適從，要不閉門造，而絕望可憐的病者及其家屬受沒完沒了的折磨，既是精神上也是肉體上的。如果我們能從人道立場出發，問題會否得以更解決？

香港在這方面的發展如何？本篇將論及安樂死對不同對象的好壞影響，其他國家的立法和司法經驗。同時，作者會闡明香港應先行立法管制安樂死，才可以讓社會承認和接受的。

I. Euthanasia - The Debate

"He who pretends to look on death without fear lies. All men are afraid of dying, this is the great law of sentient beings."[1]

Death has always been considered a sort of evil—something that is unnatural.[2] When one thinks of death, one conjures up the image of a violent murderous death instead of a peaceful death with dignity. Some people suggest that human suffering is God's test of one's will power. When animals suffer they may be granted a painless exit by mercy killing; however, when humans suffer their suffering is often prolonged by technology. It seems ironic that humans who can express their feelings and their wish to die are not allowed to fulfill that wish while pets and animals might be granted an "easy way out."

Euthanasia has been a very controversial subject. This paper will focus on the question of whether euthanasia should be legalised, and the varying attitudes towards euthanasia in different countries.[3]

II. Voluntary or involuntary euthanasia

Euthanasia may either be voluntary or involuntary. It is voluntary

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1 Principle of Jean-Jacques Rousseau (1712-78), quoted in Enright, D.J., *The Oxford Book of Death* (Oxford: Oxford University Press, 1983) p. 22.

2 Extracted from the tapes on "Dialogues on Death & Dying" by Kubler Ross.

3 Reference will be made to Hong Kong's position in this area although it should be noted that Hong Kong does not have any actual legislation on euthanasia. Legislation often reflects the progress of society, and perhaps the people in Hong Kong are not yet ready for such a controversial piece of legislation. Perhaps there is a fear that the government would use it to suppress undesirables.

when the patient requests that his life be terminated; it is involuntary when someone else decides to end a patient's life. This paper will focus on voluntary euthanasia, in particular, opposition to it. It will also ask why euthanasia should be allowed and under what circumstances. With improvements in nutrition and life-style habits as well as improvements in medical knowledge and technology, people's lives are being prolonged and extended. However, is quality of life being sacrificed for quantity of life?[4] In this context, voluntary euthanasia has emerged as a realistic and dignified alternative.

III. Death and the role of religion

To understand the opposition to euthanasia, it is useful to explore its ethical and moral aspects. Religion plays an important role in many people's lives and it significantly influences their attitudes towards death.[5] While Christians believe that man should tolerate pain for a greater reward that comes later, Hindus believe that death is as fundamental as life.[6] According to Islam, each life is ordained by God to last a certain number of days and years and no human act or will can alter this.[7]

All of these differing views from various religions carry a common message: death is an inevitable part of life that should not be interfered with, and even if it is accompanied by suffering, nothing could or should change it. These different points of view help to explain some of the moral dilemmas people face in deciding whether to ask for assistance in ending their own lives or whether to agree to assist someone else end his or her life. St. Thomas Aquinas neatly summed up in one sentence what many people believe, "When we should die is God's decision, not ours."[8]

IV. Euthanasia - the core meaning

Euthanasia has been described as a painless, peaceful, or good death.[9]

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4 For example, comatose patients are often kept alive on life-support machines for years on end, living a vegetative existence.

5 For example, Christians recall that Christ died a long, suffering and painful death nailed to the cross and did not ask God to relieve him of that pain.

6 Hindus believe that everyone passes through a cycle of life beginning with birth and ending in death; thus, one does not fear death which is the inevitable.

7 Kastenbaum, R. & B., *Encyclopedia of Death* (New York: The Oryx Press, 1989) pp. 247-260.

8 Aquinas,T.S., *Summa Theologica,* (Domus Editorialis Marietti, 1940) II, ii, Question 4, Article 5.

9 *Supra* note 7, p. 114.

It has also been described as "assisted suicide" or "mercy-killing." (Although some may question how any "killing" could be considered merciful.) Others talk of personal autonomy[10] or the right to do what one pleases with one's life.

A. From the law's perspective

Carrying out or helping someone to fulfill their wish to die is not simply a moral issue, but also a legal issue.

The *Suicide Act, 1961* of the United Kingdom section 2(1) stipulates that:

> "A person who aids, abets, counsels or procures the suicide of another, or an attempt by another to commit suicide, shall be liable on conviction on indictment to imprisonment for a term not exceeding fourteen years."[11]

The equivalent Hong Kong legislation, section 31 of the *Offences Against the Person Ordinance* stipulates that it is an offence to assist anybody, in any way, to take his or her own life. Thus, it is an offence to aid a person to commit suicide.[12]

B. Case of R v McShane[13]

A case illustrating the inflexibility of the law is that of R v McShane. In this case, the appellant was in financial difficulty. Though her grandmother had left part of her estate in trust for her, it was provided that the appellant's mother should receive the income from that estate during her lifetime. The appellant's mother was elderly and ill, and often talked of committing suicide. The appellant left fatal doses of pills with her mother advising her that "whisky and barbiturates is fatal."[14] The appellant was convicted of attempting to counsel or procure her mother's suicide.[15]

While the appellant's motives in leaving drugs with her mother is open to question, little attention was paid to whether her mother was in extreme pain and whether she did want to die. In other words, her mother's interests

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10 *Ibid.*, p. 117.

11 Smith, J.C. and Hogan, B., *Criminal Law Cases and Materials*, 5th ed. (London: Butterworths, 1993) pp. 425 – 426.

12 This law applies even to a doctor who aids his patient to commit suicide.

13 *R v McShane* [1977] Crim LR 737.

14 *Supra* note 11, p. 426.

15 *Ibid.*

were not taken into account by the court at all.

V. Active vs Passive Euthanasia

Euthanasia can be active or passive. Active euthanasia involves a positive act to induce or bring about death; for example, a lethal injection into a patient's body. Passive euthanasia, on the other hand, involves an omission in the treatment of a patient.[16] Both active and passive euthanasia strives to achieve the same result: death. Society is more willing to accept the withdrawal of treatment than the active administration of a lethal dose of medicine to a patient. In cases of passive euthanasia, an illness takes its natural course when life sustaining medical treatment (e.g. life-support machine) is withdrawn, while with active euthanasia, death is induced by the administration of a drug. With the former, nature is allowed to take its course; with the latter, there is an interference with nature.

The issue lies on whether there is a moral distinction between active and passive euthanasia. Why is it permissible to withhold treatment, but not to accelerate the death of someone who will die sooner rather than later? Why should the patient or close relatives of the patient not be given the right to let nature take its course?

The World Medical Association (WMA) considers euthanasia as an unethical act.[17] The distinction made by the WMA between active and passive euthanasia appears to be too preservation-oriented; it does not take into account a patient's wish or rights to decide the nature of treatment he or she desires.[18]

VI. The Competent and Incompetent patient

The competent patient is defined as one who is capable of making his or her own choices while the incompetent patient cannot.

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16 Mason, J.K. and Smith, M., *Euthanasia Law & Medical Ethics*, 4th ed. (London: Butterworths, 1994) p. 314.

17 "Euthanasia, that is the act of deliberately ending the life of a patient, either at his own request, or at the request of his close relatives is unethical. This does not prevent the physician from respecting the will of the patient to allow the natural forces of death to follow its course in the terminal phase of sickness" – Statement by the World Medical Association quoted in Freeman, M.D.A., *Medicine, Ethics and the Law* (London: Stevens & Sons, 1988) p. 111.

18 Foley, K.M., "The Supreme Court and Physician Assisted Suicide - The Ultimate Right" (2 January 1997) 336 The New England Journal of Medicine, 50-53.

A. The Incompetent Patient

A classic case involving an incompetent patient is *Airedale NHS Trust v Bland*.[19] Tony Bland, as a result of the Hillsborough disaster, had his lungs crushed and punctured and an interrupted supply of oxygen to his brain; as a result, he suffered irreversible damage to the higher centres of his brain. He was declared to be in a persistent vegetative state.[20] The central issue was whether artificial feeding and antibiotic drugs could be lawfully withheld from an insensate patient with no hope of recovery. This act was essentially passive euthanasia where the patient would be allowed to die as a result of a pre-existing illness.

The principle of the sanctity of life prevented Tony from being unhooked from his life support machine; but Lord Keith got around the principle by stating that:

> "The principle [of the sanctity of life] is not an absolute one. It does not compel a medical practitioner on pain of criminal sanctions to treat a patient, who will die if he does not, contrary to the express wishes of the patient. It does not authorise forcible feeding of prisoners on hunger strike. It does not compel the temporary keeping alive of patients who are terminally ill where to do so would merely prolong their suffering."[21]

Lord Goff also cited the "double effect" doctrine[22] and how it could be perceived as lawful. The majority decision in the House of Lords held that there was no need to prolong a patient's life unnecessarily; however, the judges did distinguish between an act and an omission. It would be lawful to withdraw life sustaining treatment but unlawful to administer a lethal dose; thus, the life of a terminally ill patient was still in the hands of the courts and not of him or herself. This distinction made by the court seems artificial since removing a feeding tube is arguably an act in itself. If euthanasia was legalised, then there would be no need to go to courts to determine whether one's life was worth preserving or not.

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19 *Airedale NHS Trust v Bland* [1993] 1 All ER 82.

20 *Ibid.*

21 *Ibid.*

22 *Ibid.* For example, a doctor in the course of treating a patient dying of cancer, could lawfully administer painkilling drugs even if the effect of that could also bring about the patient's death.

B. The Competent Patient

Doctors are allowed to discontinue life support treatment, artificial hydration and nutrition, for an incompetent patient. If prolonging the life of the patient would not be to his or her benefit.[23] There is no doubt that actively administering a patient with a lethal dose is contrary to English law. However, as mentioned earlier, the double effect doctrine would still be in operation if the doctor's main objective was to relieve pain. Thus, even if the patient dies as a consequence of a pain-relieving dosage, the doctor would not be guilty of an offence.[24]

The sanctity of life or the universal right to life, is what hinders a competent patient from being assisted to die. Article 2 of The *European Convention on Human Rights* stipulates that "everyone's right to life shall be protected by law."[25] The right to life is supposed to be born with us, being owners of that right, people should be allowed to take their own lives, or be assisted if such needs should arise. Article 8 stipulates "everyone has the right to respect for his private and family life, his home and his correspondence."[26] A respect for one's private life could also include a respect for one's wish to die.

VII. The Position of Hong Kong

Although there are no laws governing Hong Kong's position on euthanasia, section 31 of the *Offences Against the Person Ordinance* makes it an offence to aid someone in committing suicide. Many opinions have been voiced on this subject—most notably from the medical community.

The Hong Kong Medical Association's ethics committee, which conducted an internal study on euthanasia, endorsed the view that doctors should respect a patient's wish to reject resuscitation if on the verge of death; however, they had no comment with regard to the creation of euthanasia laws.[27] Dr. Huang Chen Ya believes that should euthanasia laws be legislated, then they should be monitored strictly to prevent doctors from using them as an opportunity to "bury their mistakes."[28] Basically, if society

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23 *Ibid.*

24 *Ibid.*

25 European Convention on Human Rights Article 2. There are exceptions to this right, basically it includes: self-defense, force used in execution of a lawful arrest and force used for stopping a riot.

26 Jacobs, F.G., *The European Convention on Human Rights* (Oxford: Clarendon Press, 1975).

27 "Patients' right-to-die backed", *Eastern Express*, 22 January 1996.

28 "Strict Control urged on Euthanasia Laws", *South China Morning Post*, 11 July 1995.

accepts euthanasia, there must be an effective monitoring mechanism to ensure that it is not abused.

VIII. Doctor's Dilemma

Although the debate on euthanasia only arose recently, the practice of euthanasia has existed long before there was any legislation.[29] The following two cases illustrate arguments which arouse in the debate regarding the legalisation of euthanasia.

A. The case of Dr. Derek Humphry[30]

Derek Humphry[31] faced a dilemma: his wife was going through the final, painful, stages of cancer and she was experiencing great pain since her bones broke at the slightest movement. She begged Derek to help her end her life; he discussed the issue with a friend who was a doctor and they both agreed that there was no hope of recovery for his wife. The doctor mixed a vial of pills—which would allow for a peaceful death and administered them to Derek's wife. While it is true that Derek and Dr. Joe were only fulfilling the wishes of his wife by assisting her in committing suicide, their act put them at risk for it could be considered as "murder." If there had been legislation to regulate euthanasia or assisted suicide, then doctors would not have to bear the risks of being accused of murder when assisting their patients.

B. The case of Dr. Benjamin Bry

Benjamin Bry, a 71 year old internist in New York City, faced a similar dilemma with an elderly couple who were both terminally ill with cancer.

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29 For example, it was discovered that King George V of England did not die naturally in 1936 as had been believed for decades. In fact, he was injected with a fatal dose of morphine and cocaine at night so that his death would be reported by the prestigious morning *Times* and not by the sensationalistic afternoon papers. He had been dying for months, but was only hours from death when the Royal Physician complied with his wishes to end his life. Pence, G.E., *Classic Cases in Medical Ethics* (U.S.A.: McGraw-Hill Publishing Company, 1990) p. 45.

30 Humphry, D., *Final Exit - The Practicalities of Self-Deliverance and Assisted Suicide for the Dying* (Eugene, Or: The Hemlock Society, 1991) pp. 15-16.

31 Derek Humphry is a noted journalist and author in Britain and the USA before launching the Hemlock Society in 1980 in California. He has written and co-authored ten books on civil liberties, racial integration, and voluntary euthanasia. He was also president of the World Federation of Right to Die Societies 1988-1990 and still serves on its board.

They were in terrible agony and wanted him to help them die.[32] The law prohibited him from providing any help, but his sympathy for them prevailed; in the end, he gave them a supply of pills to "help" them end their lives.

The cases of Dr. Joe and Dr. Benjamin Bry illustrate the ethical dilemmas that medical practitioners face when addressing issues of euthanasia. This indicates that despite legal prohibitions against euthanasia, it can still be practiced behind "closed doors." It is time for a regulatory body to be established to monitor these acts, and to determine whether the patient is truly capable of deciding whether he or she is ready to die.

IX. The Ultimate Danger

A letter published in the Journal of the American Medical Association is a chilling reminder of the dangers inherent in unregulated euthanasia.[33] Debbie was a patient who was in severe pain. When a resident doctor saw her she said, "Let's get over with this."[34] Believing that she wanted to die, he gave her a lethal injection when in fact, she merely wanted relief from her pain.

The reaction of the medical profession was extremely critical: they condemned the resident's actions as criminal, unprofessional and unethical. The criticism stemmed from the fact that the resident had never met the patient in his life and had not studied her chart, or consulted her family or the attending doctor. In addition, he had not spoken to the patient; instead, he made his own interpretation of her statements. This is exactly the sort of danger that a doctor could face if there is no legislation to provide guidance.

A. Is euthanasia really necessary?

One could argue that apart from euthanasia, there are other alternatives available to relieve a person's suffering. An obvious example is hospice care which aims at relieving patients of both physical and mental suffering by trying to keep the patient more comfortable and at ease. However, a patient may not opt to go into hospice care. Usually it is the family physician who decides whether to refer a patient for hospice care.[35] (The criteria usually

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32 Lemonick, M.D., "Defining the Right to Die", *Times Magazines*, 15 April 1996, p. 45.

33 Anonymous resident, "It's Over, Debbie" (1988) Journal of American Medical Association 259, 272.

34 *Ibid.*

35 Christakis, N.A. and Escarce, J.J., "Survival of Medicare Patients after Enrollment in Hospice Programs" (18 July 1996) 335 The New England Journal of Medicine, 172-178.

being that the patient is quite close to death before making the referral.)

Although hospice care does have a noble aim in trying to allow a patient to die in a comfortable environment, it still does not relieve the patient from the pain and suffering that he or she may be experiencing. It does not provide the patient with a choice to end his or her life any quicker in order to stop the suffering once and for all.

B. The other side of hospice care

Studies have shown that hospitals are more concerned with diagnosis, treatment, recovery, and rehabilitation than with palliative care. According to the World Health Organization, palliative care is the "active total care of patients whose disease is not responsive to curative treatment."[36] This would mean neither hastening nor postponing death; priority is placed on providing one form of treatment after the other, trying to combat a disease despite the fact that some patients are terminal. A patient is seldom ever asked about how he or she is feeling. There is generally a lack of personal care and attention that could be linked to a lack of time and resources.[37]

The existing system of hospitalization therefore has much to be desired. Presently, machines take precedence over human contact. A person's dying moments are spent in an intensive care unit stuck to machines, deprived of the care, love and support of a human that one would need for better recovery. This might be one of the reasons why a sick person may want to opt for euthanasia instead of hospice care. This is not necessarily a good thing but at least the patient would seem to be in control of his or her own life.

X. Countries who have or had legalised euthanasia

A. Holland

Holland is one of the countries which adopts a more "advanced"

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36 White T., "Partners in Care" (2 November 1994) 90 no. 44 Nursing Times, 58.

37 The following case provides a useful illustration of the lack of "personal care" in a hospital or hospice. A 57-year-old woman was weak but alert. She was woken up by a nurse to have her pulse checked whereupon she asked as to whether she could have a drink. The nurse said she would be back in a few minutes. Fifteen minutes later, a doctor passed and the patient once again asked for a glass of water, whereupon the doctor said that it was coming. Another five minutes later, the patient almost choking said, " Listen, a glass of water please. All I want is water. I'm choking for water, cold water." It was only then that a nurse offered the patient a glass of water. Mills, M., Davies, H.T.O., Macrae, W.A., "Care of dying patients in hospital" (3 September 1994) 309 British Medical Journal, 585.

attitude towards euthanasia.[38] However, the right to euthanasia is not readily granted as according to Dutch law, doctors must adhere strictly to guidelines provided by the legislation.[39] These guidelines include:[40]

- the patient must be in intolerable pain,
- the patient must have asked repeatedly to die, and
- relatives and another doctor must be consulted

B. Australia (Northern Territories)

The Northern Territory of Australia had recently attracted international scrutiny when it passed The *Rights of the Terminally Ill Act 1995*. Provisions similar to those in Holland were set out to make sure that euthanasia would not be abused; however, the Senate voted to overturn the law.[41] Though the legislation was relatively short-lived, it is still useful to examine it. The guidelines included:[42]

- a person must be over 18 years of age and of sound mind,
- two medical practitioners (one must be qualified in the treatment of terminal illness) must be satisfied that the patient is suffering from an illness that will "in the normal course and without the application of extraordinary measures, result in his/her death." The patient must have made the decision to die "freely, voluntarily and after due consideration," and
- a qualified psychologist must examine the patient to make sure that he or she is not depressed.

C. The double-edged sword

The guidelines provided prevent the abuse of euthanasia by inappropriate candidates such as a depressed individual. The legislation provides doctors with guidelines which save them from having to make moral or ethical decisions. Also, the requirement of being examined by two medical practitioners prevents a doctor from "covering up" his mistakes by simply injecting the patient with a lethal dose and claiming that the patient had asked for euthanasia.

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38 "Euthanasia Broadcast", *South China Morning Post*, 21 October 1994.
39 "The Dutch Way of Dying", *Economist*, 17 September 1994, p. 23.
40 "Euthanasia Broadcast", *South China Morning Post*, 21 October 1994.
41 "Canberra vote kills right to die law", *South China Morning Post*, 25 March 1997.
42 Tattam, A., "The Final Frontier" (18 September 1996) 92 Nursing Times, 52-53.

Questions do remain since it is still up to someone else other then the patient to determine whether one is fit to die or not. Thus, in a way, it defeats the whole argument that everyone has the right of access to euthanasia. However, there is simply no way to be completely free from scrutiny for one simple reason: without scrutiny, who could prevent its abuse or misuse? Euthanasia is undoubtedly a double-edged sword.

XI. Countries prohibiting euthanasia

Opinion polls in many Western countries have found majority support for allowing euthanasia in certain circumstances but legislators are still reluctant to create legislation specific to the right to die. For example, in the United States, four state legislatures have rejected bills to allow assisted suicide while British, Canadian, and European Parliaments have failed to gain support for legalized euthanasia.[43] However, it appears to be extremely rare for a doctor to be charged for helping a terminally ill patient die.

A. The United States - Doctor Kevorkian

Jack Kevorkian has helped a number of patients suffering from terminal illness to die. Each time he has been tried and acquitted—the most recent on October 3 1996. In that case, he helped a patient in the final stages of Lou Gehrig's disease and another patient suffering from bone cancer to die by inhaling carbon monoxide. It is important to note that it was the patients who actually removed the clip on the tubing that allowed carbon monoxide to flow into their masks. Dr. Kevorkian's lawyers argued that his actions fell under a provision of the law in Michigan which prohibited the use of any medication or treatment to accelerate a patient's death, as long as the intention of the doctor was to relieve the patient of pain or discomfort.[44]

The act of euthanasia in most circumstances is considered to be illegal, which is why Dr. Kevorkian has returned to court time and time again. However, all of these cases are jury trials, which illustrates that jury members could be easily swayed by considering what a burden to the family would terminally ill patients be if they were to be terminally ill or in a vegetative state.

Was the act murder, manslaughter or was it euthanasia? In order to prove murder, there should be both a mental element and the act itself. The death of the person has to occur within a year and a day of the infliction of

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43 "To Cease Upon the Midnight", *Economist*, 17 September 1994, p. 19.

44 "'Dr Death' Acquitted Again", *South China Morning Post*, 3 October 1996.

the injury, and the person must have had malice aforethought.[45] A conviction of murder would require both an actus reus and mens rea, but there would be no guarantee that the doctor who has committed euthanasia would have the mens rea element. A person would be guilty of manslaughter on the other hand if:

> (a) he kills or is a party to the killing of another with the fault required for murder but acted under diminished responsibility, provocation or in pursuance of a suicide pact, or of voluntary intoxication; or
> (b) he kills another by an unlawful and dangerous act or by being reckless[46]

The only section that may fit in would be the commission of an unlawful and dangerous act. Injecting a person with lethal drugs could be considered unlawful and dangerous.

Adding a criminal element to the actions of Jack Kevorkian does not seem to fit in morally; after all, he was merely helping to alleviate someone in extreme pain. Should death be the result, at least it was anticipated by the patient, and a definite cure to his or her pain and suffering.

Dr. Kevorkian argued that the reason why he is always acquitted is because he had done nothing wrong. According to him, taking someone off a life-support machine and starving them to death is more cruel than ending their misery once and for all. He even went so far as to suggest that it carried undertones of what happened in Nazi-Germany.

B. United Kingdom - Paul Brady

Doctors are not the only people who commit euthanasia; relatives who see their loved ones in pain may also want to assist a relation to die. Again, the law does not provide clear guidelines and often these relatives are treated as criminals for their role in trying to help a relation die in order to provide relief from a miserable and long-suffering existence. This happened in Scotland, where Paul Brady admitted killing his terminally ill brother. The High Court in Glasgow held that he had acted out of compassion or sympathy and he was formally admonished and allowed to walk free.[47] At first, Brady had been charged with murder and later it was reduced to culpable homicide;

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45 *Supra* note 11, pp. 392 – 402.

46 *Ibid.*, pp. 403 – 450.

47 Christie, B., "Man walks free in Scottish euthanasia case" (19 October 1996) British Medical Journal, 961.

Thus the Crown showed leniency in the judgment by reducing the murder charge to culpable homicide allowing the judge to exercise the discretion to allow the man to walk free..

It is suggested that judges should not be called upon time and again to decide on these issues but rather legislators should provide clearer guidelines.

C. Why Australia changed its mind.

The Northern Territories of Australia had been hailed for its ground-breaking step of legalising euthanasia but then the State decided to intervene and repealed the law thereby dividing Australia on the euthanasia debate.[48] Personal experience apparently played a role in the members' decision-making process.[49] South Australian Premier John Olsen believed that the States and Territories should have had the right to make their own laws. Moral issues appeared to have come to the fore.[50] Senator Ron Boswell was quoted as saying that, "tyrannical regimes are ever-anxious for weaker sanctions on the talking of life."[51] A fear of a reoccurrence of the horrors of the Nazi regime or perhaps of the government eventually taking control of a person's life seemed to be a driving force in many members' vote. Despite public opinion supporting euthanasia, the Senate voted against it. The government may not want to tackle the issue head-on, for fear that other States would follow suit in legalising euthanasia. However, legalisation does not necessarily equate with abuse, but the lack of legislation does encourage "back-door euthanasia."

XII. Legalisation not a stamp of approval

A. Australia - Case of Bob Dent

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48 Green, S., "Euthanasia splits a Nation", *South China Morning Post,* 4 April 1997. Victorian MP Kevin Andrews introduced a private members bill called the Euthanasia Laws Bill to overturn last year's legislation that made Australia's Northern Territory the first in the world to legalise voluntary euthanasia.
Ibid. Senator Kay Patterson watched her mother die of cancer. She remembered her mother begging her to let her die, but the next day her mother was feeling a bit better and even wanted her friends to be invited over. She could not have imagined that she would have wanted her mother to die on any chosen day.
Democratic Senator Lyn Allison on the other hand told of how her grandmother used to say that it would have been a blessing to be allowed to die in one's sleep, and instead she died an agonizing death. She voted against the Andrews bill.

50 *Ibid.*

51 "Canberra vote kills right to die law", *South China Morning Post*, 25 March 1997.

Bob Dent, a resident of Darwin, became the world's first person to commit a legal suicide. He wrote a day before he died: "If you disagree with voluntary euthanasia then don't use it, but don't deny my right to use it."[52] His son, Rod Dent, was formerly a strong advocate of the right of terminally ill patients to end their lives; however after his father's death, he completely changed his attitude. He believed that euthanasia was "unworkable and degraded the medical profession."[53] He believed that had his father been better cared for, he would not have chosen to die. These doubts make legislators wonder whether it is actually a risk to allow people to use the law, since there may be claims that people were compelled to adhere to euthanasia laws just because the law was there.

B. Case of Janet Mills

The second patient to take her life under the law was Janet Mills, a 52 year old woman who suffered from a rare and incurable form of skin cancer. Her death sparked more criticism. Sydney's Anglican Dean Boak Jobbins said it was a shame since, "we no longer have anything to offer the terminally ill, the aged or the disabled but a quick exit at the end of a needle."[54] However, for Janet, the road to death was not easy: she was forced to make a public appeal for a doctor to come forward to sign her application after four specialists changed their minds at the last minute. Her case illustrates that even when there is a law allowing euthanasia, it is difficult to put it into practice since many practitioners may themselves be reluctant to perform the "mercy killing."

C. The Australian Legislature

Before the senators' vote on the private member's bill to repeal the law on voluntary euthanasia, debates were held to hear the different arguments for and against laws on euthanasia. Aboriginal and Torres Strait Islander Minister John Herron warned that legislation would broaden euthanasia laws. He even added that doctors charged in World War II in the Nuremburg war crimes trial had been accused of carrying out euthanasia. [55] Perhaps a distinction should be drawn here: what happened to the victims in World War

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52 "Roller Coaster of Pain' Ends Calmly", *South China Morning Post* , 27 September 1996.

53 "Mercy Killing Son Wants End to State Suicide Law", *Hong Kong Standard*, 4 December 1996.

54 "Second Cancer Patient Takes Life Under Law", *South China Morning Post*, 7 January 1997.

55 "Cancer victim appeals for euthanasia", *Hong Kong Standard*, 19 March 1997.

II was not voluntary, and in most cases the victims were healthy people unlike the situation under euthanasia where the people are very ill and wish to die.

In contrast a nurse suffering from a rare, terminal, intestinal cancer made an impassioned plea to senators to be allowed the right to die and urged them to vote against overturning the world's first euthanasia law. She asked that people, "listen to those of us who are terminally ill and too sick and weak to argue."[56] Her statement is very reflective of the state of the debate: most of those who are arguing for or against the legislation are able-bodied and healthy people while the terminally ill patient's views are not always properly represented?

D. Holland

Australian patients are not the only ones who have difficulty in gaining access to euthanasia. Dutch patients, as mentioned earlier, still face difficulties in spite of the fact that euthanasia is legal there. The main constraints are as follows:[57]

- doctors refuse to discuss euthanasia;
- doctors agree with it first and then refuse later;
- doctors are on leave when the patient's condition deteriorates;
- their deputy refuses to honour an agreement on euthanasia

This indicates that despite legalisation, euthanasia is still not widely accepted and practised. This is an indication that there is still no absolute acceptance for euthanasia, even in countries that have legalised it. In Australia there had been continuous efforts to try to scrap the law which permits euthanasia and they finally succeeded.

XIII. Patients - What do they ask for?

Few doctors in Britain are known to carry out euthanasia and virtually nothing is known about their attitudes towards it. The Department of Anatomy at Cambridge University conducted a survey amongst practitioners and hospital consultants in one area of England. They were asked: "In the course of your medical practice, has a patient ever asked you to hasten his or

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56 *Ibid.*

57 Sheldon, T., "Dutch Patients Complain about Poor Access to Euthanasia" (19 October 1996) 313 British Medical Journal, 961.

her death?"[58] The following table illustrates their responses.

Table One: Pattern of Patients' Requests. [59]

Response	General Practitioners (n = 169)	Consultants (n = 104)	Total (n = 275)
Had been asked to hasten death	109(64)	54(52)	163(60)
Had been asked for:			
--passive euthanasia only	22(13)	17(16)	39(14)
--active euthanasia only	42(25)	11(11)	53(19)
--both passive and active euthanasia	45(27)	26(25)	71(26)
Total who have been asked for active euthanasia	87(51)	37(36)	124(45)
Had not been asked to hasten death	60(36)	50(48)	110(40)

* Values are numbers (percentages) of doctors

The results revealed that there were increasing requests for euthanasia and patients were not afraid to ask for it. Thus, doctors are placed in a difficult position, having to deal with a tug of war between their duty and moral beliefs. These figures also indicate a desire to have access to euthanasia or an "easy way out." However it does not necessarily give a full picture as to the problems and motivations behind the requests.

A. Staunch support for euthanasia

An article written by Madeleine Simms[60], which suggested that euthanasia should only be legalized when the patient is suffering from an

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58 Ward, B.J., Tate, P.A., "Attitudes among NHS Doctors to Requests for Euthanasia" (21 May 1994) 308 British Medical Journal, 1332-1334.

59 All figures are quoted from "Attitudes among NHS Doctors to Requests for Euthanasia" (21 May 1994) 308 British Medical Journal, 1332-1334.

60 Simms, M., "Ethics and euthanasia" (30 April 1994) 308 British Medical Journal, 1165.

incurable physical condition, drew an angry response from a reader who was suffering from severe spina bifida. She feared that it would establish in law the view that incurably disabled people are right in wanting to die and should be helped whereas able- bodied people must be kept alive at whatever the costs. It ignored the fact that people contemplating suicide are usually depressed. It seems that people generally come to the conclusion that the disabled are suicidal because of their disability, and since it is incurable, the only way out is death. [61]

This shows us that had euthanasia been legal, many people who have lost the will to live because they have lost an arm or a leg would turn to euthanasia simply because it was an easy way out. It would take away a person's right to soldier on with their lives simply because there was an easier option available. But then there should be no reason why other patients should be denied a chance to have access to euthanasia. Provided that sufficient guidelines and regulations are in place, it could prevent abuse and misuse.

XIV. Legalization – A Virtual Impossibility

The road to the legalisation of euthanasia has been fraught with obstacles. The difficulty is that governments usually side with minority groups who do not want to have euthanasia legalized. Euthanasia is often looked upon as a drastic measure for a desperate person. A myriad of reasons could be given to not legalize euthanasia but are they valid? Possible reasons as to why legalization may be difficult in some cases are discussed below.

A. The Hippocratic Oath - The Irony

A contributing factor to the non-acceptance of euthanasia as a choice for patients could be attributed to the medical profession itself. The Hippocratic Oath is taken by every doctor when he or she is admitted into the medical profession. One part of the Oath states that he or she "will prescribe [a] regimen for the good of my patients according to my ability and my judgment and never do harm to anyone." This statement is interpreted as a duty to keep one's patients alive at all costs, and for as long as possible.

Another part of the oath states that "to please no one will I prescribe a deadly drug, nor give advice which may cause death." This part of the Oath

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[61] However according to the reader, she was depressed for many years and "had euthanasia been legal, I would have availed myself of it." Extracted from "Letters to the Editor" (2 July 1994) 309 British Medical Journal, 53.

could be interpreted as not permitting euthanasia at all since the doctors are not supposed to give advice or administer any drug that causes death. But is that not in contravention with the previous quoted section, that they should "do no harm" to anyone? It could be argued that invasive treatments on patients could actually do more harm than good to the patient. However most doctors nowadays still see preserving life—the longer the better—as a great feat.

The truth is that euthanasia has always been practised although probably not under the scrutiny of the media.[62] Today, as patients are becoming more educated, they know that prolonging life may not always be the best thing that could happen to them. For them, there is one logical solution: euthanasia. This request might raise a lot of controversy. One of the most commonly asked questions would arguably be, whether the patients are sure that they want to die and whether they are capable of making such a decision.

B. The religious and cultural clash

As discussed earlier, cultural differences and religious beliefs can also contribute to the lobby against euthanasia. For some religions faiths, assisted suicide could be viewed as equal to murder and a patient's rights would not be a consideration.[63]

C. The Nazi Nightmare

The haunting past of the Nazi era, when widespread euthanasia programs were carried out, raised fears that if euthanasia were legalised it would create a new sort of extermination camp. Under the guise of "euthanasia" the Nazis killed 90,000 people; they were killed because of their "racial inferiority" or "mental or physical inferiority."[64] Arguably, the Germans merely used euthanasia as a name to mask their real intentions—mass murder—but past experiences do not dismiss our anxieties. The German experience seems to suggest that the power to "kill" or decide as to

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62 For example, the switching off of a life support machine has always been at the discretion of a doctor.

63 For example, even in the Northern Territories of Australia, opposition owing to religions beliefs is present. The Aboriginal people, who make up a quarter of the population, believe that euthanasia is a form of sorcery. Their views were not taken into account when the law was first enacted. Tatam, A., "The Final Frontier" (18 September 1992) 92 Nursing Times, 52-53.

64 Pence, G. E., *Classic Cases in Medical Ethics* (New York: McGraw-Hill Publishing Company, 1990) p. 47.

who should and should not be allowed to die should not fall into the hands of the government. [65] But how can one prevent the government from intervening if they are the ones who legislate? Though most countries are willing to learn from the mistakes of the Nazi era, one cannot help but fear the potential abuses.

D. Just another easy option?

An alarming theory is that patients want euthanasia simply because they do not want to be a burden to their family. In order to have a heavy financial and emotional burden relieved, an elderly suffering from a terminal illness may opt for euthanasia. A recent survey carried out by the University College of London showed that relatives are keener on euthanasia than patients: 28% saying that it would be better for the person to have died earlier and only 4% of the patients actually expressing a wish to do so. The survey showed that children, friends, and officials were more likely to say that an earlier death would be more desirable. Older people were also more likely to ask for euthanasia than young people: 35% of old people wanted to die earlier compared to 20% of young people.[66]

If relatives were truly keen for ill family members to die than the patients themselves, then it would be disastrous if relatives were allowed to decide for them whether they should die or not. The patients could be "killed" for their money or inheritance. This is of course mere speculation, however the possibility of abuse is vast.

XV. A Worrying Trend or Mere Ignorance?

The desire to control the manner in which one dies is growing. This is the case in developed countries since people tend to live longer. The improvement of living standards and life in general has created new diseases that might not be known to poorer and undeveloped nations.

A. "Do-It-Yourself" Death

Derek Humphry's book *Final Exit* has survived many attempts to have it banned. It describes the many ways to end one's life and includes lists of lethal drugs and the quantities to use to make death more effective. It rose

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[65] Glover, J., *Causing Death and Saving Lives* (Harmondsworth: Penguin Books, 1977) p. 186.

[66] Dillner, L., "Relatives keener on euthanasia than patients" (29 October 1994) 309 British Medical Journal, 1107.

to No. 1 on the New York Times list of best-selling books. In the States, no prosecutor attempted to stop the sale of the book, and in Australia, it was initially declared a prohibited import, although an Australian edition was later released.[67] This indicates that the information people need to kill themselves painlessly cannot be suppressed or kept away from them any more.

However, Derek Humphry and the Hemlock Society were severely criticized for publishing this material since unstable mental patients or teenagers with transient, situational depression could now learn how to kill themselves. The Society retorted by saying that it was unlikely to be read by unstable people; in addition, if people could kill with guns, why did not all the countries ban the sale of guns?[68]

If information cannot be suppressed and if there is an indication that this is what the public wants, it is certainly a wonder why governments are reluctant to legislate in this area. One argument may be that they simply do not know enough about euthanasia. Ignorance usually brings opposition.

One theory that has been argued universally was raised in the case of Sue Rodriguez,[69] where the Supreme Court of Canada, in a majority decision, decided against her request for assisted suicide. They reasoned that the relaxation of an absolute prohibition would take them down a "slippery slope." The "slippery slope" theory refers to the potential that a well-intended right to euthanasia could create a Naziesque state where all those who are unworthy of life would be killed.

XVI. First step down the slippery slope?

A. Holland

A historic ruling in the Netherlands by the Dutch Supreme Court has left many people dismayed and skeptical. Doctors in the Netherlands may now agree to requests for euthanasia from patients who are neither terminally ill nor suffering physically. Dr. Boudewjin Chabot was found guilty of assisting the suicide of a healthy and competent woman who had wished to

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67 Singer, P., *Rethinking Life & Death* (Oxford: Oxford University Press, 1994) p. 147.

68 These arguments do leave a big question: would the availability of this sort of information actually increase and encourage more suicides? A patient could always opt to take his own life instead of waiting for the legalisation of euthanasia; however it is not that easy to commit suicide painlessly—especially if the patients themselves are already very sick or disabled. Statistically, for every 50 attempts, only 1 succeeds. Hendin, H., "Suicide in America", *Miami News*, 30 August 1982, p. B1.

69 *Sue Rodriguez v Attorney General of Canada and the Attorney General of British Columbia* [1993] 3 SCR 603.

die since the death of her two sons. The Supreme Court accepted that the doctor had followed the guidelines to establish that his patient was competent, was suffering unbearably and had a voluntary, well considered, and durable wish to die.[70] This suggested that mental suffering could now be a basis for a request for euthanasia and assisted suicide; one did not have to be in a terminal state to qualify for it.

Holland is well ahead of other countries in its development of euthanasia laws but this decision is a step closer towards allowing competent people who are simply bored with life to end their lives. The increasing laxity might alarm other countries and prevent them from enacting any euthanasia laws at all, for fear that they would go down the same path as Holland.

B. Jack Kevorkian

Doctor Jack Kevorkian himself was on a slippery slope when he recently assisted in the suicide of a woman in her 40s with chronic fatigue syndrome.[71] Arguably, only those who are chronically ill, who have an incurable disease or are in a persistent vegetative state should be given access to assisted suicide. Once this line is crossed, we may start finding that even "healthy" people, that is, people without any physical diseases but who are merely depressed, may resort to euthanasia to end their "miserable" lives.

XVII. Euthanasia - for whom?

A. The terminally ill patient

Throughout this dissertation, emphasis has been placed on why people or governments accept or do not accept euthanasia and why there should be legislation. There should be restrictions as to who should be allowed to have access to euthanasia. In order to better understand this argument, it would help to have a definition of the term "terminally ill". A terminally ill person by definition is technically beyond curative therapy; all the doctor or physician can do is to relieve his or her suffering. In general, terminal illness begins when three conditions have been satisfied. First, the diagnosis of the illness has been made and other remedial conditions eliminated. Second, the advent of death is certain and not far off, and third,

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70 Sheldon, T., "Judges make Historic Ruling on Euthanasia" (2 July 1994) 309 British Medical Journal.

71 "Physical Assisted Suicide" Letters to the Editor (6 February 1997) 336 British Medical Journal.

medical and nursing efforts have turned from curative to palliative."[72]

According to English law,[73] to kill a patient while in the process of relieving pain does not constitute murder.[74] If the treatment is done in good faith but the patient happens to die in the process, it will not constitute murder; however, a doctor would be liable if the aim was to actually "kill" the patient but not relieve him or her of pain. It is difficult to draw a distinction as death ultimately relieves the patient of all pains. It would be difficult to prove a doctor merely intended to relieve pain but not to "kill" a patient since both may require large quantities of drugs.

B. Why for a selected group only?

Although it may seem unjust that a select group of individuals should be allowed to "benefit" from euthanasia, it should be remembered that a line has to be drawn. Euthanasia is not legal in many countries, and yet, doctors and ordinary people have been acquitted mainly because of the strong ethical and moral dilemma that people face when confronted with this issue.

A survey conducted in Australia showed that voluntary euthanasia is widespread; doctors have helped almost a third of terminally ill patients to end their lives although doing so is illegal.[75] A study carried out by Monash University's Centre of Human Bioethics and the School of Community Medicine at the University of New South Wales, found that 3.5% of deaths were caused by doctors administering lethal doses of drugs sometimes without the patient's explicit request, and 24.7% of deaths were a result of withholding potentially life-prolonging treatment.[76]

This trend shows that without proper legislation, doctors do not have guidelines as to how and when euthanasia should and should not be allowed. Those who are terminally ill, should be allowed to have access to euthanasia, since there is technically no chance of recovery, and survival might involve pain and suffering. Unless clear guidelines are set, those who are physically capable may turn to euthanasia as a first resort and not the last. Perhaps such a delicate matter should be handled on a case by case basis. No one in this world would have the exact same medical history and conditions of illness. Legislation would merely generalise by stating that only those with

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72 *Supra* note 17, p. 104.

73 *Supra* note 16, p 329.

74 *R v Adams* [1957] Crim LR 365; In this case, Dr. Adams treated a patient who was incurably ill with increasing doses of opiates, he was tried for murder and was acquitted. Devlin J commented that "the doctor is entitled to relieve pain and suffering even if the measures he takes may incidentally shorten life."

75 "Mercy Killing 'Widespread'", *South China Morning Post,* February 1997.

76 *Ibid.*

terminal illness could have access.

XVIII. The other side of the coin - Diagnostic difficulties

It is easy to say that someone with terminal illness should be given access to euthanasia, but in practice it is a complex matter. The following hypothetical examples highlight how difficult it would be to give a patient the "all-clear" to access euthanasia.

Example 1: A 60 year old man with stomach cancer was referred for chemotherapy. While on treatment he deteriorated, and could not eat. The treatment was about to be stopped when an x-ray revealed a non-malignant narrowing of his stomach which was corrected by a simple surgical procedure.[77]

Example 2: A young woman with breast cancer developed severe back pain and required morphine for control. There was no obvious cause for the pain and she was put into the category of "advanced disease". A gynecologist asked to see her and identified a misplaced intra-uterine contraceptive device which caused a pelvic infection resulting in the back pain; a course of antibiotics cured her.[78]

These examples illustrate that patients with what is believed to be a terminal illness may, in fact, have a stable condition that was initially undetectable. The patient might be listed as a "hopeless" case and be eligible for evaluation as a candidate for euthanasia. These examples illustrates error may arise merely in classifying patients into those who have terminal illness and those who do not. They may be suffering pain that could be cured and it may be a pain not even related to the disease, however, the origin of the pain has to be identified by the doctor first, and sometimes this is just not possible.

XIX. Euthanasia for patients with HIV Disease

The presence of human immunodeficiency virus facilitates in an illustration of why only the terminally ill should have access to euthanasia and why it should be legalised for this particular group. A survey was recently carried out between November 1994 and January 1995 on attitudes and practices of physicians in the San Francisco Bay area regarding physician-assisted suicide for patients with the acquired immunodeficiency

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77 *Supra* note 17, p. 105.

78 *Ibid.*

syndrome (AIDS). They were given a hypothetical case.[79] and asked to consider whether to prescribe a lethal dose of narcotics for possible use at some future date if the patient asked for it.

The results was that 48% of the respondents in 1995 said they would be likely to grant Tom's initial request for assistance while 51% of the physicians responded that they would provide assistance if Tom was adamant. When asked to estimate the number of times they had granted an AIDS patient's request for assistance in committing suicide, 53% of the 117 respondents to the survey replied that they had done so at least once.[80] These figures illustrate that if physicians are so prepared to aid patients who are in great pain and suffering, even if it means flouting the law, then perhaps regulatory laws should be created. At the moment, most governments prefer to turn a blind eye to the fact that there is euthanasia being committed everywhere behind "closed doors."

A. China - support for euthanasia

It may be hard to believe, but even senior medical scholars in China supported the creation of a law on "mercy killing" to relieve patients suffering from incurable diseases. Wu Zhaoguang, a professor at Shanghai's hospital stated that:[81]

> "Doctors are duty-bound to cure patients' sickness, but they have to alleviate the pain of patients with incurable disease. It is a humane practice to grant doctors and patients the right to carry out euthanasia in accordance with the law."

Although the NPC has not legalised such a "controversial issue," it at least shows that humane treatment for the dying is not entirely a Western concept. The professor's view is a reflection of the increasing recognition of a patient's right to decide what should be done to his or her body.

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79 In brief, the case was as follows: Tom is a 30 year old gay computer programmer diagnosed with AIDS. He has severe wasting syndrome and painful oral ulcers and has responded poorly to treatment for his third episode of pneumonia. There is no neurological impairment, and he is mentally competent. He is mildly depressed, but is not pronounced given the seriousness of his condition. In Massachusetts Medical Society, "Physican-Assisted Suicide and Patients with Human Immunodeficiency Virus Disease" (6 February 1997) 336 The New England Journal of Medicine, 417-421.

80 *Ibid.*

81 "Doctors back law on 'mercy killings'", *South China Morning Post*, 15 March 1996.

XX. Possible alternatives

It would be logical to say that legalizing active assisted suicide would be more acceptable if the patient was not subject to fatigue, family pressure, financial pressure and perhaps a fear of death. Yet, people are desperately trying to find ways to justify euthanasia. It is hypocritical to think that in this modern age, where one could choose whether to have a child or not, the sex of the child, and perhaps even eternal life—through cloning one is not allowed to have a choice to die and exercise the right to self-determination. The preservation of life seems to dominate the minds of all; the sanctity of life is often used as an excuse by the courts to prevent people's access to euthanasia. Why should people not be allowed to kill themselves, especially when living only means pain and suffering to them when people are allowed to kill a foetus, their own flesh and blood, through abortion?

XXI. Where does this lead us?

An easy option now would perhaps be to "sleeping dogs lie." Patients can find doctors who are sympathetic enough to help them die; thus, public emotions should not be stirred and legislative time should not be wasted. From this dissertation, one can see that doctors have no obligation to keep a person alive if the effort would prove to be futile. The general public consensus would seem to support the view that people should not be kept alive just for the sake of life itself. When it comes to euthanasia, it would seem that the law itself is in conflict with morality and judges seem to find it hard to convict a person who's intention was to relieve the pain and suffering of another. Yet how do you prove that the patient really wanted or expressed a wish to die?

A. Euthanasia's negative impacts

There are negative implications in legalising euthanasia: there is the possibility that people who are poor and powerless would be forced to resort to euthanasia simply because they could not afford life-sustaining medical expenses. Roger B. Dworkian compared this to "...saving society's health care dollars by refusing to provide futile care for Homeless Joe [but] not for Donald Trump."[82] Hypothetically speaking, if one of the patients does not have a realistic chance of living beyond a week, and there is a long line of people waiting for a hospital bed, it may encourage the doctor or physician to

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[82] Dworkin, R. B., *The Role of the Law in Bioethical Decision Making* (Bloomington: Indiana University Press, 1996) Chapter 6.

resort to euthanasia.

Legislation could prevent the occurrence of "underground" euthanasia, and bring it to the surface, therefore making it easier to monitor. As one can see, countries which have legalised euthanasia, do have strict guidelines as to who should be eligible. Strict control would be the only way to "keep an eye" on the situation.

XXII. Conclusion

In spite of the many possible abuses if euthanasia were to be legalised, euthanasia, in principle, would be justifiable if it was used to help someone with a terminal illness to die with dignity.

Legislation has been suggested throughout this essay as a possible mediator, since it could be used to monitor a practice that does exist behind closed doors in this society. Although medical science continues to advance, one could never be sure whether a patient's illness could be completely cured, and whether the patient is just requesting euthanasia for fear of a painful death. Legislation could act as guidelines for doctors, indicating which categories of patients could have access to euthanasia.

Holland and the Northern Territories in Australia could be used as examples of what sort of legislation Hong Kong should be aiming for. Hong Kong is still a step behind when it comes to recognising patient's rights, although, advance directives are slowly gaining recognition in Hong Kong. With debates going on all over the world, Hong Kong should legislate first before the practice begins in society as by then it would be too late, since there would be no guidelines for doctors to follow, except for their own instincts.

Euthanasia is a complex subject and it creates both moral and ethical conflicts. People will always find it hard to accept that death should come when you want it to. Death is a choice where there is no turning back. The nightmares from the Nazi era haunt us still with images of able-bodied people injected with lethal doses of drugs to further the goal of an Aryan race. This fear has to be conquered and legislation has to be created to provide checks and balances so that these activities do not occur behind closed doors.

THE DEREGULATION OF PORNOGRAPHIC MATERIALS AND ITS IMPACT ON SOCIETY

對色情刊物不作管制會爲社會帶來重大衝擊

JOSEPHINE CHONG

Pornography has long been a great concern of Hong Kong's society. Much effort has been exerted by the government to combat this industry such as carrying out investigations and prosecuting merchandisers of pornographic material. However, the law in this area is not clearly defined, thus rendering many of these materials tolerable by the general public. Question arises to whether it is for the government to impose further restrictions and control through stricter laws or should the burden be shifted to the public, thus resolved by norms dictated by social and cultural morals.

In this article, the author unveils the merits and demerits of the deregulation of pornographic materials in Hong Kong. Apart from the background and its trend of development, the definition of pornography under different cases is also examined. It is suggested that various inconsistent definition of pornography led to complexities and difficulties in determining the extent to these materials should be suppressed. Moreover, the views of feminists from different backgrounds and cultures are also examined.

The article explores whether it is within the government's power to limit adult's access to pornography. It is suggested that if pornographic materials are considered morally unacceptable, then the control posed by government will be just as morally unacceptable as it violates one's freedom of choice. The author then explores desirable consequence claimed to be brought about by pornography. It is suggested that legal restriction on pornographic materials is in fact an infringement of the freedom of speech. It is for the government to justify that the advantages brought about by such regulations outweigh the detriment due to the infringement. From the point of view of equality, censorship may lead to sexual discrimination to women, for it hinders the freedom of speech which many feminists fight for in order to promote women's equality, this in turn undermines the objective of equality. It is suggested that illegalization of pornography is of little significance to combating the problem, for it would only force the industry to go underground. Women will then be more vulnerable to abuse. Finally, the author emphasizes that Chinese ideology does not see sex with a negative attitude. The two major schools of thought, the Confucian and the Taoist, treat sex as essential to life and beneficial to one's health. Thus the

government and court should be very cautious in creating law governing this aspect.

The close relationship between crime and pornography is also raised and discussed in the article. Many have been condemned for making use of women's body to make profit. It is concluded that both the government and courts have the ultimate responsibility to strike a balance and make a judgement call in order to maintain the individual's dignity and women's equality.

色情刊物的泛濫一直受到香港市民的關注。政府已很費勁地去打擊這猖獗的行業，例如進行調查及對販賣色情作品的人作出訴訟。可是，在這範疇裏的法律多是十分含糊的，至使市民大眾一直對這些刊物作出容忍的態度。因此，究竟法例上的限制能否打擊這些色情的刊物呢？還是應將重擔轉卸到市民上，讓他們就自己的需要來作出選擇？

在本文中，作者向我們揭示了消除色情刊物管制的可取和不可取之處。他首先陳述了色情刊物的背境及定義。可惜的是，它的定義在每一情況中都有所不同，因此我們很難去斷定那些色情刊物需要受到管制。作者亦考察一些持有不同意見的女權主義者如何看這問題。我們可以觀察到，當中一些女權主義者對色情刊物亦抱有接納的態度。

跟著，另一個爭論點便是政府應否管制成人接觸色情刊物的權利。作者指出若這些色情刊物是在道德上令人厭惡的，那麼政府對此作出的管制也同樣是在道德上令人厭惡的，原因是這樣妨礙了個人的私人選擇。作者隨著列舉數項色情刊物所能帶來的好處，例如可以使人從刊物上得到性的釋放。文中亦討論到法律對色情刊物的限制實是一種對自由言論的侵犯，因此政府應確保受保護的利益能蓋過對言論侵犯的影響。從平等的角度看，對色情刊物的審查會引致對較乏力和較不受歡迎的一群(也就是女性)受到歧視，從而削弱了追求平等的目標。這是因爲此等管制會阻礙自由言論的發展，而自由言論正是很多女權主義者所希望爭取的，從而提升女性的平等權利。若我們將色情刊物列爲違法的，實際上就是迫使它在地下運作。女性亦因此更易受到剝削。最後作者強調中國的學術思想對性亦有正面的看法，其中兩個學術主流--儒家和道家，都分別認爲性乃是生活中重要的東西，而對個人的健康亦有所裨益。因此政府和法庭應在制訂這方面的法律時抱有仔細的態度。

另一方面，作者提醒我們罪行和色情刊物的關係，而很多人已遣責那些利用女性身體賺達利潤的人。因此作者在文章的終結時道出政府和法庭也有一項責任，就是求取一個平衡點和作出相當的裁決，去維持人們個人的尊嚴和女性應有的平等地位。

I. Introduction

Many people regard pornography as an insult to the dignity and self-respect of women believing it creates serious harm to women through its effects on its viewers. Others see pornography as an evil in itself—believing its widespread use is symptomatic of a crisis of values in both Asian and Western societies. Pornographic material has been labeled as matter falling under the jurisdiction of the Hong Kong Special Administrative Region. As a result, considerable energy has been expended by the government at all levels in defining and proscribing pornography, as well as investigating and prosecuting pornographic dealers. There is no doubt that community standards in Hong Kong have changed and that the public reaction one might have expected twenty years ago is not as strong or as negative today; materials that once would have been banned are now being tolerated by segments of the community. Admittedly, these materials are often tolerated because the law is unclear as to what constitutes pornography but overall the attitude of members of the community seems to be more tolerant toward sexually explicit materials than in the past. Once the substantial objective of legislation is recognized, the court should determine whether the criminal prohibition of pornographic material is proportional and appropriate to the maintenance of a woman's dignity and her attainment of equal status in society. The court must not only consider if the right in question is a significant issue but also if the limitation imposed on the right is justifiable. Furthermore, the court needs to analyze the constitutionality of anti-obscenity laws in reference to pornography's impact on its consumers and on the traditional moral fabric of Hong Kong's society. This paper explores both the merits and demerits in deregulating the publication of pornographic materials in Hong Kong.

A. Background on pornography: the views of feminists

A definition of pornography is essential if the government is to enact effective legislation against pornography. In particular, its definition will be relevant to publishers and consumers;[1] thus, the meaning of obscene or pornographic materials cannot be an abstract one. If the definition relates to the issue of discourse than pornography may have a different kind of meaning.[2]

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1 For instance, in the case of *Mohan Gulabrai Mirchandani v. R,* the definition of pornography becomes controversial for those who could determine which words and images the law will suppress.

2 Gordon, B., *Variety: The Pleasure in Looking* (Vance, Carale, 1989).

Pornography can be defined as the explicit depiction of men and women as sexual beings. For some, pornography is a window through which they may glimpse at the sexual possibilities that are open to them.[3] According to proponents of this view, anti-pornography feminists are trying to shut women's sexuality away behind the locked doors of political correctness by defining the debate on pornography in their own illusory terms. For example, Andrea Dworkin, one of the leading feminists against pornography, clearly shows her hatred of pornography by calling it "the graphic description of the lowest whores".[4] Dworkin's definition is clearly not that of the literal Greek translation; instead, it is more about her personal beliefs than about the realities of pornography.[5]

Individualist feminism insists on the principle of self-ownership; they contend that a woman's choice to receive and accept pornography should be respected. They insist that a woman should be left free to accept pornography regardless of the content as a woman's body is a woman's right.[6]

Radical feminists view sex as a social construction: they do not believe that current expressions of sexuality are inherent in human biology but rather they are products of culture.[7] For radical feminists, the struggle to define pornography is a part of their attempt to control sexuality itself. They point out pornography is oppressive and claim that pornography is within the discourse of power.[8] For better or worse, it is necessary to treat anti-pornography feminists with more respect than they are currently being given. Thus, it is important to consider the substance of their definitions.

II. The moral issue of placing legal restrictions on pornographic materials

It is the moral issue that concerns us most and several questions could be raised. First, are pornographic materials in and of themselves morally objectionable? Second, is it right for the government to limit consenting adults' access to obscene and pornographic materials? If pornographic materials are considered to be morally objectionable, it could also be argued that government restrictions are morally objectionable as an unwarranted

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3 *Ibid.*

4 McElroy, W., A *Woman's Right to Pornography* 1995, p. 43.

5 *Ibid.*

6 *Supra* note 4, p. 123.

7 *Supra,* note 4, p. 44.

8 See Brown, B., *Troubled Vision. Legal Understandings of Obscenity*, (New Formations, 1993).

intervention upon a private act.[9] Sex is a private choice and not a political matter open to debate. Pornography is defined as the representation of explicit (private) sexual activity and its use is for sexual (private) activity; it should not come under the scrutiny of legal regulation unless it falls within the public sphere (e.g. causes physical harm). [10]

If pornographic materials is morally objectionable, then the production, distribution and consumption of such materials are also morally objectionable. A court may interpret the key words of the obscenity definition as "undue exploitation of sex."[11] If the interpretation was to merely include sexual explicitness according to a moral standard, it would be difficult to find either a rational connection between the legislative objective and the means chosen to attain it. Thus the government has a great duty to make the definition clear in its meaning and to regulate the pornographic industry for the benefit of all. It is important for the government to take a moral stance and make the legislation work. The real problem underlying the issue is the fact that the continuing debates over the definition of pornography allow the proliferation of the materials to continue unabated. It is necessary to have to tackle the problem and eliminate it as a moral influence of objectionable nature; thus, it is not a matter of morality but a matter of whether pornography provides benefits to people or causes harm to them.

A. Beneficial effects on those who read pornographic materials

There seems to be no solid evidence that pornography harms anyone. In fact, studies have shown that sexual materials can have a number of benefits. The individual may find sexual release through such materials, and may in fact be unable to do so otherwise through other means. Egoism studies argue that it would be quite wrong for the government to restrict pornographic materials that are enjoyed by so many people and have not been proven to be harmful.[12] However, one must consider the benefits of pornography and weigh them against the possible harms it may cause in order to determine the overall benefit to the individual. Everyone is believed to have pornographic thoughts—such thoughts are natural. It has been claimed that Pornography may arouse these same feelings and produce a healthy reaction, aiding our psychological make up, as it were, just as

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9 Hall, S., *The Rediscovery of "Ideology": Return of the repressed in Media Studies*" .

10 Thornton, N., *The Politics of Pornography A Criticque of Liberatism and Radical Feminism.*

11 Mahoney, K, " R v Keegstra: A rationale for regulating pornography" McGill Law Journal, 251.

12 Barry, V.,*Applying Ethics* (California: Wadsworth, 1985) p. 93.

medicine helps the body do its job.[13]

B. Pornography is free speech applied to the sexual realm

Sexual expression is an integral aspect of human freedom; hence, governments that repress human rights in general have always suppressed sexual speech. Pornography does not necessarily exhibit explicit or implicit violence in its production. Thus, when the obscenity law was implemented, the government needed to prove that the rights and interests protected by the law outweighed the expression right being infringed. This equality approach, adopted in *R v Keegstra*,[14] requires a balancing of the harms that flow from regulating sexual expression against the harms actualized through the promotion of women's inequality in pornography.[15] Courts must be guided by the values and principles of a free and democratic society which include respect for human dignity, a commitment to social justice and the equality of all people.[16]

In February 1992, the Supreme Court of Canada embodied the MacKinnon or Dworkin perspective on pornography into law through its decision in *Butler v Regina*.[17] The court restricted the importation of material that "degrades" or "dehumanizes" women. The court recognized pornography to be an aspect of free expression, but ruled that the prevention of harm to women was more important than freedom of speech.

C. Censoring pornography would undermine rather than advance equality objectives

Free speech has always been the strongest weapon to advance equal rights causes and censorship has always been the strongest weapon to defeat it. Groups that are against pornography contend that women are disempowered and marginalized by men in pornographic materials.[18] Pro-censorship feminists, especially MacKinnon and Dworkin, have gone even further by not only criticizing pornography but also attacking consensual

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13 *Ibid*

14 [1984] 19 C.C.C (3ed) (Alta Q.B).

15 See Lynn, *The Intervention of pornography*, 1993. p. 78.

16 *Ibid.*

17 [1992] 1 S.C.R 452. *Supra* note 15, p. 78.

18 Andrea Dworkin, "Against the Male Flood: Censor, Pornography and Equality", 1985 Harv. 1.Women's L.J. 20-21 ("Women have had to prove human status before having any claim to equality. But equality has been impossible to achieve perhaps because really women have not been able to prove human status.").

heterosexual intercourse.[19] Indeed, in MacKinnon's book "Only Words," she argues that pornography has no connection with free speech whatsoever; it is merely an act of sexual subordination and sexual terrorism.[20] In the case of *Barnes v Glen Theatre Inc.*,[21] the U.S. Supreme Court held that nude dancing was morally offensive and upheld a complete ban on nude dancing. On the other hand, the anti-censorship feminists claim that pornography could have beneficial effects on women.[22] Pornography could "defy traditional stereotypes of women's ability to attain sexual pleasure."[23] If pornography was restricted or banned, then women would suffer a repression of their sexuality.[24]

In Hong Kong, the government implemented the "*Control of Obscene and Indecent Articles Ordinance*" to restrict the publication of pornographic materials. However, the law does not clearly define what type of photographic or verbal depictions are considered obscene or indecent. In *Sham Kow-Ling v Obscene Articles Tribunal*,[25] the court decided that it is not permissible to rely on books or articles of a similar nature to the one in question to show the climate of literature, art, or learning prevalent at a particular time in society—to a certain extent, the content of reading material should be respected. For instance, in *Ming Pao Weekly v Obscene Articles Tribunal (HK)*,[26] the publication of a semi-nude photo of Madonna in January 1994 was classified as "indecent" while in *Attorney-General v. Tai Nga Ting and Ko Chun Man*,[27] and *Attorney-General v. IPP Industrial Company Ltd.*,[28] the issue of whether the material itself was obscene and what impact it had on the public was raised.

Even if it were possible to censor all sexist pornographic images, what about sexist images in the media which regularly feature the injuring, raping or killing of women? What about popular films (from *Basic Instinct* to *Pretty Woman*) and magazines (from *Glamour* to *Cosmopolitan*) which remains saturated with sexist images and language?[29] Censoring pornography would

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19 Lynn, S.C., *Feminist Offensive: Defending pornography and the splitting of sex from sexism*, p.974. For example, Dworkin claims that "intercourse remains a means or the means of physiologically making a woman inferior."

20 *Supra* note 4, p. 44.

21 [1992] US Supreme Court.

22 *Supra* note 19, p. 974.

23 *Ibid.*, p. 750.

24 *Ibid.*

25 Unrep, Obscene App No 1 of 1991, 21 Feb 1992, ' The Politics of Pornography A Critique of Liberalism.'

26 SCMP 19 Oct 1994.

27 Mag App No. 792/1985.

28 Crim App No. 397/1984.

29 Greenfield, K., *Our Conflicting Judgments about Pornography.*

suppress many works that are especially valuable to women and feminists.[30] Any censorship scheme would discriminate against the least popular, least powerful groups in our society—including feminists.[31] By undermining free speech, censorship would deprive feminists of a powerful tool for advancing women's equality. Finally, since sexual freedom and freedom for sexually explicit expression are essential aspects of human freedom, censoring such expression would undermine human rights severely.

D. Legitimizing pornography would protect women sex workers, who are stigmatized by our society

Making pornography illegal would further alienate and endanger many female sex workers. Some feminists argue that laws would drive pornography underground.[32] Women who are victims of pornography would become even more reluctant to go to the police for help. Therefore, it is essential to legalize pornography to stop abuses inflicted upon female sex workers.

E. The impact of People's Republic of China's sovereignty on sexuality and pornography in Hong Kong

As Hong Kong is now under the sovereignty of People's Republic of China it is essential to examine the theories of "discourse" and "context" of pornography against this backdrop. Though Hong Kong is a city dominated by Chinese, it has been heavily influenced by Western ideas. Therefore, we need to study the Chinese perspective on sexuality and to consider how it may influence Hong Kong's legal system's regulation of pornography. One needs to understand what is the Chinese ideology of sexuality which is adopted from Confucian and Taoist thinking.[33] The Taoist's believe that sexual activities need to be cherished and if applied practically they will benefit one's health.[34] Similarly, Confucianists treat sex as an essence of life and well being. Studies by the Confucians have proven that sexual intimacy has positive effects on societies.

In fact, gay pornographic literature was accepted in China until the early twentieth century. The earliest literary description of homosexual life in China was by Hsing-Chien Pai who was a famous poet and writer during

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30 Strossen, N., " Hate speech and pornography. Do we have to choose between freedom of speech and equality." (1996) Case Western Reserve Law Review, 460.

31 *Ibid.*

32 *Supra* note 4, p. 144.

33 Chiu, A., "Construction of Readership within the law of pornography in Hong Kong".

34 *Ibid.*

the Tang dynasty.[35] Hsing claimed that human sexuality is not limited to heterosexual relationships and that homosexual intercourse is just one expression of human nature.[36] There is also evidence that the Chinese treat sexual life more rationally as a matter of the universe.[37] The Chinese perceive pornography as material which can improve life, maintain the cosmic order, and help one to enjoy life and not to dehumanize women.[38] As a matter of fact, the Chinese idea of pornography would have been taken into account by adjudicators in the Obscene Articles Tribunal. Obscenity has existed just as long as the distinction between private and public behavior, yet during the Ming Dynasty, pornography emerged as a distinct government concern. Therefore, what is crucial is how the legal discourse of Chinese customs will help to govern what laws are created.

F. Link between crime and pornography

Various studies have shown that pornography does lead to crime; and criminals also profit substantially in the trade of pornographic materials. Society certainly does not want to encourage these people and the banning pornography it would help to fight organized crime.

Both liberal and radical feminists condemn the free market for making a profit by using women as "body parts."[39] Both groups believe that the commercialization of sex demeans women.[40]

According to utilitarianism theorists, legalizing pornography would remove the profit motive, but the real question is whether there is any harm.[41] They contend that society has a duty to set certain standards of sexual conduct because it provides the greatest good for the greatest number of people.[42] However, it is up to the individual to determine what is best for himself or herself. If pornography provides long-term benefits, then it is good for that person; furthermore, regulating pornography by the government removes the right of choice from the individual which arguably is not a proper step to be taken by the government.

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35 *Ibid.*

36 *Ibid.*

37 For example, "The Arts of the Bedchamber arise from treatise on sexual hygiene and take place between medicine proper and pseudo-scientific Taoist practices, which aimed to prolong life and attain immortality" See Van Gulik, Robert H (1961) 123.

38 *Supra* note 35.

39 *Supra* note 4, p. 124.

40 *Ibid.*

41 Barry, V., *Applying Ethics* (Belmont, California: Wadsworth, 1995) p. 88.

42 *Ibid.*

III. Conclusion

It could be said that obscenity laws advance the interests of women, while pornographers advance the interests of the dominant male group by the subordination of women. If that is the case, obscenity laws is necessary and requires the government's reasonable assessment as to where a line should be drawn between competing interests. In prohibiting the undue exploitation of sex through depictions of violent, degrading and dehumanizing images, the government needs to strike a balance. Therefore, it is arguable that pornographers should justify any limitation to women's right to equality and the court should justify any limit on freedom of expression which obscenity laws create.

Those in favour of laws have argued that the publication of pornographic materials is needed to protect female prostitutes from being victimized. Keeping the industry visible is the best way to monitor how women within it are treated. It is the only way to bring public opinion to bear on their abuse. Those against laws have argued that pornography consists of words and images, over which the law should have no jurisdiction. On a personal level, every woman has to determine what she considers to be acceptable; therefore, women have to act as their own censors and their own judges of what is appropriate.

Radical feminists reject the idea that sex is based on biology or what they call "sexual essentialism," that is, the notion that sex is a natural force. Others would argue that everyone's intellect is formed by a combination of biological and cultural influences. (For example: the influence of one's parents, school, books, etc.) A woman's ability to reason and to control herself could be influenced by her environment.

The courts should determine whether the criminal prohibition of pornography is proportional and appropriate to the ends of maintaining an individual's dignity and women's equality. Anti-pornography feminists have greatly criticized pornography, but nonetheless, we must contextualize such legal discourse against history. In this way, the anti-pornography feminists' argument can be neutralized.

TOBACCO ADVERTISING AND FREEDOM OF EXPRESSION

IS THE BAN ON TOBACCO ADVERTISEMENTS AN INFRINGEMENT OF FREEDOM OF EXPRESSION?

香煙廣告與表達自由

HELENA LEUNG*

This essay examines whether the government control on tobacco advertising violates the right of freedom of expression guaranteed in the Bill of Rights Ordinance.

Foreign tobacco companies dominate a large part of the market in Hong Kong and advertisements were commonly used in attracting customers. After passing the Smoking (Public Health) Ordinance in 1982, the Smoking (Public Health) (Amendment) Ordinance was passed to further increase the control on tobacco advertisements. At the same time, the Broadcasting Authority also restricts the tobacco advertisements in electronic media through the drafting of the Code of Practice.

Tobacco companies jointly protest that the new law contravenes the freedom of expression guaranteed by the Hong Kong Bill of Rights Ordinance. A number of schools with different thoughts supporting the freedom of expression accept a certain degree of government control, and the Bill of Rights Ordinance also expressively states that the exercise of such freedom is subject to restrictions. It must be exercised with "special duties and responsibility", and all such restrictions to be "provided by law" and "necessary"

The author points out that the definition of 'expression' in the Bill of Rights Ordinance is broad and ambiguous. However, case law in Europe and Canada have established "commercial advertising" as one of the forms of freedom of expression. Therefore, if these judgments were followed, tobacco advertisements would fall into the scope of "expression" as protected by the Bill of Rights Ordinance.

The restrictions imposed by the Smoking (Public Health) Ordinance as part of the Laws of Hong Kong on tobacco advertisements satisfy the

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requirement of 'provided by law'. The author suggests that the question of whether such restrictions are necessary should be assessed by reasonableness and proportionality. For reasonableness, the government must prove that the amendment of the Ordinance would attain their objective, which is to protect public health, reduce tobacco consumption and protect teenagers from inducement to smoke. Supported by various medical evidences, the hazardous nature of tobacco is of no doubt. It is also undeniable that tobacco companies use advertisements to attract potential smokers. So the government control is basically reasonable. As for proportionality, the impact of those legislative measures on basic human rights should be considered. A recent case in Canada established that under similar circumstances, the impairment of legislative measures on fundamental human rights and freedom must be minimal. Under the new Ordinance, a fine is imposed only upon contravention. The punishment is not in proportion to the huge revenue of tobacco companies. Broadly speaking, the general ban on tobacco advertisements satisfies the above requirements.

However, the result is different when specific restrictions are considered. For example, when tobacco advertisements are banned in printed media, not only their revenue is adversely affected, but the right of citizens to obtain information is also deprived of. At the same time, the restriction on the broadcasting media allows 'accidental or incidental' occurrences of tobacco advertisements and hence reduces the effectiveness of the restriction.

In conclusion, a compromise can be attained between the ban on tobacco advertisement and the upholding of freedom of expression while a total ban is not justifiable. Before the new Ordinance receives any challenges, the government should prepare more evidence to support the reasons for imposing these restrictions so as to discharge the burden of proof under article 16 of the Hong Kong Bill of Rights Ordinance.

本文乃探討政府對香煙廣告的禁制是否有觸犯《人權法案條例》中所確保的表達自由。

外國的煙草公司支配了香港大部份的市場，並通常以廣告吸引顧客。政府繼 1982 年頒佈《吸煙（公眾衛生）條例》後，於 1987 年再通過《吸煙(公眾衛生）修訂法案》以加強對香煙廣告的管制。同時，廣播事務管理局亦透過制定專業守則限制各電子傳媒的香煙廣告。

煙草業齊聲抗議新法例有違《人權法案條例》中所確保的表達自由，但是多個支持表達自由的思想學派皆接受受到政府一定程度的管制。根據《人權法》，這種自由的行使並不是毫無限制的，而是要符合「應有的職責及責任」，和所有的限制又必須是「依法訂立」和「必要」的。

作者指出「意見表達」在《人權法》中定義相當廣泛和含糊，然而歐洲及加拿大的判例法已確立「商業廣告」乃表達自由的其中一種方式。因此香煙廣告是受到《人權法》的保障。

很明顯，新《吸煙(公眾衛生)條例》乃香港法例的一部份，因此它所載對香煙廣告的限制已完全符合「依法訂立」的要求。作者認爲，要判斷此限制是否「必要」，則須從「合理」和「相稱」兩個原則來考慮。於「合理」方面而言，政府必須論證新條例的修改能達到它預期的目的，亦即是保障公眾衛生，減少香煙銷量以及保護青少年免受不良引誘。在多種醫學證據支持下，香煙的危害性不容置疑，而香煙公司以廣告招徠大量的潛在顧客亦是無可否認的，故此政府的管制基本上是合理的。於「相稱」方面而言，我們要考慮的就是立法措施對基本人權的衝擊。近期的一宗加拿大判例裁定，在類似的情況下，立法措施對牽涉到的權利或自由必須只能作最少程度的侵犯。在新條例當中，對觸犯禁制香煙廣告的人士只作罰款，其款額相對於煙草公司的鉅額盈利，遠遠說不上是「不相稱」。概括來說，禁制香煙廣告大體上是能夠符合上述的要求。

然而，當考慮到個別的限制時，情況就各有殊異。例如禁制香煙廣告出現在印刷媒體，一方面影響到出版界旳收入，而禁止載有香煙廣刊的印刷品在香港印刷或派發，亦間接剝奪了市民獲得外地資訊的權利。與此同時，在廣播媒介中實施禁制，卻又同時允許香煙廣告「意外或偶然」地出現，這很大程度上削弱了禁制的功效。

作爲結論，在禁制香煙廣告和維護言論自由兩者之間是可以妥協的，但全面的禁制是沒有足夠的理據支持。政府在新法例未受到挑戰前，應準備更多的證據去支持它所作出的禁制，以履行在《人權法》第 16 條中的舉證責任。

I. Introduction

The smoking pattern in Hong Kong is different from Western countries especially in terms of its smaller number of smokers. According to a general household survey made by the Census and Statistics Department, the total number of smokers of all Hong Kong people aged 15 or above is 740,400 which constitute 14.8% of the total population. The age of starting smoking is also comparatively late. In 1995, about 35% of smokers started smoking when they were 11 to 12 years of age and 24% first smoked when they were aged 13 to 14.[1] Therefore, even though tobacco products have been promoted in Hong Kong for many years, the tobacco industry still treats

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1 HKCOSH, *Eighth Annual Report of the Hong* Kong *Council on Smoking and Health* (Hong Kong: HKCOSH, 1995) p. 25.

Hong Kong as a market for potential expansion. Hong Kong children and women became the main target groups for tobacco promotion. In 1997, following the international trend against smoking, the Hong Kong government passed the *Smoking (Public Health)(Amendment) Ordinance 1997* which will come into operation very soon. Several amendments, especially those on advertising ban, were the subject of heated debates between the government and the tobacco companies which argued that the amendments infringed their right to freedom of expression. This essay will examine whether the government's control on tobacco advertising infringes the right to freedom of expression and to what extent the government should impose restrictions in this area.

II. Background

Hong Kong's tobacco market is dominated by foreign companies. They see Hong Kong as a gateway of trade expansion into the PRC, which is the biggest tobacco market in the world. Several dominant tobacco companies in Hong Kong are from the United States, namely Philip Morris, R.J. Reynolds Industries Inc. and Brown & Williamson.[2] Their vast resources and marketing skills allow for huge expenditure on tobacco promotion. Among these giant companies, Philip Morris has been the most successful in terms of marketing tobacco products, showing a remarkable growth in sales.[3] One of its brands, *Marlboro,* has been Hong Kong's most popular cigarette for decades.[4] The famous *Marlboro* cowboy image is an American hero with rugged good looks and a carefree lifestyle. Together with the well-known slogan "Come to where the flavour is. Come to *Marlboro* country." the company has succeeded in capturing people's imagination and attention. Other brands by Philip Morris include *Merit, Virginia Slims, Benson & Hedges,* and *Parliament*, each having its own different target groups and promotion strategies. Phillip Morris' huge business extends all over the world in over 170 countries, although it focuses

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2 United States General Accounting Office, *International Trade. Advertising and Promoting U.S. Cigarettes in Selected Asian Countries* (GAO, 1992) pp. 54 and 57 - in 1990, the market share for U.S. cigarette brands in Hong Kong among six Asian countries (Malaysia, Japan, Taiwan, South Korea and Indonesia) is the highest, about 75%. Further, their relative percentages of aggregate advertising expenditures in Hong Kong is also relatively high, about 11%.. Tobacco Institute of Hong Kong Limited, *Report to the Broadcasting Authority* (Hong Kong: Tobacco Institute, 1984) p. 1 - they are the fundamental member of the Institute.

3 Taylor, P., *Smoke Ring, the Politics of Tobacco* (London: Pitman Press, 1984) p. 29.

4 HKCOSH, *Eighth Annual Report of the Hong Kong Council Smoking and Health* (Hong Kong: HKCOSH, 1995) p. 29 - about 51% students smoke *Marlboro.*

substantially on the vast Chinese market.[5]

R.J. Reynolds has five main cigarette brands: *Winston*, *Salem*, *Camel*, *Vantage* and *More*. Under the challenge of the *Marlboro* cowboy, it rebuilt the image of *Camel* into a cartoon character *Joe Camel* in 1988. The 'reform' successfully made *Camel* American's fifth best-selling brand.[6] *Joe Camel* is so influential among teenagers that it draws strong public criticism. The objective of using a cartoon character is to lure children into smoking so that it becomes one of their habits before they can make informed decisions. Medical organisations like the American Medical Association and Surgeon General, Mr. Antonia Novello have called for the voluntary removal of this cartoon image from advertisements. However, this advertisement does not attract the same proportion of smokers in Hong Kong since the local target group of teenagers of *Camel* is small.[7] Much of R.J. Reynolds' profit in Hong Kong comes from another brand, *Salem,* which is popular among adults and is the second best-selling cigarette.[8]

The tobacco industry has developed various methods and style of advertising. Generally, the US cigarette advertising campaigns in Hong Kong are either thematic or tactical.[9] Thematic campaigns usually focus on a particular brand in combination with images like American culture, leisure or modern lifestyles. This type of campaign is international in scope, for example, Philip Morris' *Marlboro* brand is always advertised with the cowboy image, no matter in which country. Tactical campaigns are carried out according to the time factor, especially for special events like the Lunar New Year. In addition, the big tobacco companies may also promote a particular brand that sells in one area only, for example, Brown & Williamson's *Hilton* cigarettes are marketed in Hong Kong only. This kind of promotion strategy is convenient for the company, allowing it to concentrate on the distinct characteristics and restrictions of one market. In terms of the means of promotion, the use of printed media is the most popular since many newspapers and magazines have wide circulation.

Another method is by electronic media, especially television where tobacco companies can create vivid images through the use of video. Since

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5 *Supra* note 3, p. 30.

6 Signorielli, N., *Mass Media Image and Impact on Health: a Sourcebook* (London: Greenwood Press, 1992) 95 - a study by the *Journal of the American Medical Association* shows that *Joe Camel* has attracted a large proportion of young smokers under 18, an increase from 0.5% in 1988 to 32.8% in 1992.

7 *Supra* note 1, p.29, survey shows that most students smoke *Marlboro* (51%) and *Salem* (40%). *Camel* only constitute 2%. Interestingly, only 14% of students found *Camel* advertisement attractive.

8 *Ibid.*

9 *Supra* note 2, p. 67.

the banning of tobacco advertisements on television, sponsorship has become a more popular means of promotion among the companies. By sponsoring different types of programmes and campaigns, the tobacco companies are building up an image as public benefactors, providing revenue and jobs while promoting sports and arts activities. Advertisements can also be displayed in the form of billboards and posters located in public transport, harbour tunnels and external wall of buildings. Transit and display advertisements are usually enormous in size and capable of attracting the attention of many people.

A less popular method is to advertise by association. Huge tobacco companies usually diversify their business into different areas in order to stabilise their business and increase their social influence, for example Philip Morris has diversified into beer, soft toys, soft drinks, property development, paper and packaging. R.J. Reynolds invests in food, beverages, packaging, oil and the fresh fruit business.[10] Therefore, it is not surprising to find their brand names on non-tobacco products. The sale and sampling of tobacco branded items can help to draw people's attention towards the brand.

Tobacco is regarded as a harmful product and a threat to public health. Thus, despite Hong Kong's free market economy, the government has interfered by imposing restrictions on sales, packaging and bans on advertising. It also set up a statutory body in 1987 - the Hong Kong Council on Smoking and Health, aimed at controlling the spread of smoking through constructive policies. The Council has regularly released a series of television commercials to remind the public of the harmful effect of smoking. The Olympic Gold Medallist Miss Lee Lai Shan was involved in one of these commercials, persuading youngsters to lead a healthy, smoke-free life.[11] In accordance with the Ordinance, a "smoke-free" policy was carried out to set up non-smoking areas in restaurants and public transport. More recently, the Council took a further step to encourage the setting up of non-smoking areas in the workplace, which was not required by the Ordinance. Other programmes like the "Quit Campaign 1997" and "No Tobacco Day" aimed at inviting smokers to quit smoking, and educating the general public about the dangers of smoking.[12]

III. Current Control and the Proposed Bill

The Hong Kong government's attitude towards the tobacco business

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10 *Supra* note 3, pp. 35-36.

11 HKCOSH, *Newsletter of the Hong Kong Council on Smoking and Health* (Hong Kong: HKCOSH, August 1997) p. 3.

12 *Ibid.* pp. 4-5.

can be traced back to the 1960s when it established an *ad hoc* committee on smoking, which in turn introduced restriction on smoking in public places and on public transport. Education programmes were launched to raise public awareness of the dangers of smoking. Negotiations were also carried out between the government and the tobacco companies which resulted in the formulation of a voluntary code of practice.[13] Since then, the government has been slow to legislate or to form any new policy in this field. By 1980, statistics on deaths from lung cancer and heart disease again drew the government's attention to the issue of smoking restrictions. The number of deaths from lung cancer in 1981 was almost twice the number in 1972. This represented a 62% increase in terms of the proportion of death by lung cancer to the total number of deaths, and smoking was attributed to be the major cause of lung cancer and heart disease.[14] International studies also began to suggest that non-smokers could be seriously affected by passive smoking. This led to a public call for stricter anti-smoking control in order to persuade smokers to quit and to protect non-smokers' interests. A turning point in anti-smoking legislation was the enactment of the *Smoking (Public Health) Ordinance* in July 1982 which required compulsory health warnings on cigarette packets and advertisements, stating: "Hong Kong Government Health Warning: Cigarette Smoking Is Hazardous To Your Health". Aimed at protecting non-smokers, the Ordinance partly prohibited smoking on ferries, mass-transit railways and in cinemas, and completely prohibited smoking in elevators. Non-smoking areas were then extended to schools, hospitals, government offices and restaurants. Positive measures included public health education and anti-smoking campaigns aimed at discouraging youngsters from taking up smoking as well as promoting a smoke free environment for non-smokers. A year after the enactment of the *Ordinance*, a series of education programmes were introduced at district and school levels, often taking the form of exhibitions, carnivals, design and slogan competitions and seminars for school teachers. These programmes were proved to be successful; many people began to be aware of the harmful effect of smoking and there was a drop of 16% in the number of smokers in 1984.[15] In response, the tobacco industry established in 1983 the Tobacco Institute of Hong Kong Limited, aimed at protecting the industry's interests against government control. As a result, the government saw a need to set up a particular organ to replace the ad hoc committee. Thus, the Hong Kong Council on Smoking and Health was set up as a permanent organ to propose

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13 Mackay, J.M. and Barnes, G.T., "Effects of Strong Government Measures against Tobacco in Hong Kong", *British Medical Journal* (1986) 292, 1435-1437.

14 *Ibid.*

15 *Ibid.*, p. 1536.

and undertake controls on the tobacco industry. The Council successfully obtained the support of the government to prohibit advertising on television in December 1990 and in cinemas in August 1992.[16] New and stronger warnings were also introduced: "Smoking Can Kill," "Smoking Can Cause Cancer," and "Smoking Can Cause Heart Disease".

The existing standards for tobacco advertising are specified in Part IV of the *Smoking (Public Health) Ordinance* and the Codes of Practice issued by the Broadcasting Authority. The Authority is an independent regulatory body established under the *Broadcasting Authority Ordinance* in September 1987. Its functions include approving application for and renewal of licences, supervising different types of broadcasting media for the compliance with related regulations, dealing with complaints, gathering relevant information and, most importantly, issuing *Codes of Practice*.[17] These *Codes* lay down standards for licensees to follow, and they include fairly elaborate *Codes* on tobacco advertising. Details of what should or should not be shown are not specified in order to maintain the freedom of expression.

On 11 April, 1997, the government introduced to the Legislative Council the *Smoking (Public Health) Bill*, which tried to conform to the World Health Organisation's Five Year Action Plan for a 'Tobacco Advertising Free Region by the year 2000'.[18] Under this *Bill*, the whole of Part IV of the *Ordinance* is to be repealed and substituted by the following clause:

> **"11. Prohibition of all forms of tobacco advertisement**
> (1) No person shall advertise any tobacco products or expose the name or mark of a tobacco product in any medium or manner whatsoever.
> (2) No person shall advertise any goods or services using a tobacco brand element.
> (3) No person shall manufacture any goods, import for sale or general distribution or advertise any goods or services having the appearance of a tobacco product or of the package of a tobacco product."

Section 11(4) provides limited exemptions to subsection (1) and (2) on tobacco advertisements in foreign live broadcast or foreign publications circulated in Hong Kong. Upon strong opposition from the tobacco industry, the legislators proposed amendments through the *Smoking (Public Health)(Amendment)(No.2) Bill* on 17 April, 1997 which was passed into law on 24 June, 1997 with certain concessions. The highlights of the *Bill* include prohibitions on displaying tobacco advertisements, placing such

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16 *Supra* note 11, p. 2.

17 *Broadcasting Authority Ordinance* (Cap. 391) s. 9A and s. 19.

18 *Ibid.*, p. 5.

advertisements on the Internet, and sponsorship by cigarette brand names.

As mentioned, advertising in electronic media is further regulated by the Hong Kong Broadcasting Authority. Several broadcasting media are under the Authority's jurisdiction, namely, the two terrestrial television broadcasters, Asia Television Ltd. (ATV) and Television Broadcasts Ltd. (TVB); a Hong Kong based satellite television operator, Hutchvision Hong Kong Ltd. (links with STAR TV); a subscription television broadcaster, Wharf Cable Ltd.; two commercial radio broadcasters, Hong Kong Commercial Broadcasting Co. Ltd. and Metro Broadcast Co. Ltd.; and a public broadcaster, Radio Television Hong Kong (RTHK).[19]

Hence, tobacco advertising is governed by different legislation and administrative standards. This paper will examine two main sources of control: the *Smoking (Public Health) Ordinance* and the *Codes of Practice* issued by the Broadcasting Authority. While the principal objective of each is to protect public health, there are minor differences between them concerning the scope and manner of control.

IV. Freedom of Expression

The increasing legislative control on tobacco advertising has aroused strong opposition from the tobacco industry. The essence of its protest is based on the protection of to the right of freedom of expression since advertisement is a means to provide information. Freedom of expression is protected by Article 16 of the *Hong Kong Bill of Rights Ordinance (HKBRO)*:[20]

> (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, either orally in writing or in print, in the form of art, or through any other media of his choice.
> (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

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19 HKBA, *Report of the Hong Kong Broadcasting Authority September 1995 - August 1996* (Hong Kong: the Government Printer, 1996) 9 - Its jurisdictions over RTHK is based on a memorandum of understanding between RTHK and Broadcasting Authority and is more restrictive that its statutory jurisdiction over other commercial licensees.

20 *Hong Kong Bill of Rights Ordinance* (Cap 383) hereinafter HKBRO Article 16. The source of Article 16 is Article 19 of the *International Covenant on Civil and Political Rights*. Although the status of BORO is challenged by the Provisional Legislature, freedom of expression is still guaranteed by the *Basic Law* (Articles 27 and 39), subject to the interpretation of the SCNPC.

provided by law and 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.

Before going into the tobacco industry's arguments, several issues must be clarified: a) the theoretical justification for protecting freedom of expression; b) the meaning of freedom of expression in the Bills of Rights Ordinance and c) whether tobacco advertising constitutes a form of expression.

A. Theoretical Justifications

According to the consequentialist theory, open discussion is an essential element for the discovery of truth.[21] This theory holds that the government should not suppress the communication of ideas since individuals will be deprived of the valuable opportunity of access. It is also impossible for the government to know what is the truth or what is suitable for the public. In fact, there is no absolute right or wrong which enables the government to exercise its right to exclude any information and ideas. Individuals should be allowed to have adequate access and decide for themselves. This theory was further elaborated by Justice Holmes in *Abrams v. US*,[22] where he stated that the 'market' of thoughts and ideas should be competitive. Consequentialists have also stressed that freedom of expression is important to guarantee democracy and accountability of the government.[23] People should have the right to receive information about government's policies and thus be able to question its actions. Election of legislative councillors is also based in part on the doctrine of freedom of expression. Debates are held among candidates in which they introduce and explain their policies. Alternatively, the non-consequentialist theory approaches the issue from an individual's perspective.[24] It assumes the rational nature of human beings who are able to have independent ideas and judgment. Freedom of expression enhances the development of individual autonomy against governmental restrictions. Despite these different perspectives, both theories accept a certain degree of governmental restriction so long as it does not damage the fundamental interest of individuals and the community.

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21 Mill, J.S., *On liberty* (London: Everyman, 1972) ch. II.

22 (1919) 250 US 616. Justice Holmes said that 'the best test of truth is the power of the thought to get itself accepted in the competition of the market'.

23 *Supra* note 21.

24 Barendt, E., *Freedom of Speech* (Oxford, Clarendon Press, 1985) p. 18.

B. Meaning of Freedom of Expression

The first paragraph of Article 16 of the HKBRO states that the right to hold opinions is absolute, and not subject to any interference.[25] The second paragraph regarding the nature of the freedom of expression is more important, however. It contains three elements: the freedom to seek, to receive and to impart information. These elements guarantee the public a right to be fully informed and impose a duty on the media to impart information to the public.[26] There are further safeguards to this right. The right of access to information and ideas is extended to information and ideas of "all kinds" and "without regard to frontiers". This means that no matter what the information is and where it is generated, everyone is entitled to receive it. The scope of "information and ideas" has been construed broadly by the European Court of Human Rights to include information and ideas that are inoffensive to even those which "offend, shock or disturb" the State or other sectors of the population.[27]

In comparison, the right to freedom of expression is much more restricted than the right to hold opinions. It is subject to the limitations set out in paragraph three of Article 16. The right to freedom of expression should be exercised with "special duties and responsibilities". This phrase only appears in this article, implying that it is a specific requirement with regard to the freedom of expression. The purpose of this requirement is to prevent an abuse of the freedom since this can affect social peace and arouse the sensitivities of others.[28] Thus, the responsibility of exercising this right to freedom of expression justifies self-restraints and governmental restrictions. The exhaustive nature of the restrictions further requires a narrow interpretation. There should be channels for challenging these restrictions and the onus of justifying these restrictions should lie on the body which imposes them.[29] Article 16(3) permits restriction in four areas: the rights or reputation of others, national security, public order; and public health or morals. The Government's ban on tobacco advertising is based on

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25 HKBRO, s. 5 - An exception is in the case of emergency.

26 Boyle, K., "Freedom of Opinion and Freedom of Expression", in Chan, J. and Ghai, Y. (eds.), *The Hong Kong Bill of Rights: A Comparative Approach* (Hong Kong: Butterworths Asia, 1993) pp. 316-318.

27 Article 19 and The Hong Kong Journalists Association, *Urgent Business: Hong Kong Freedom of Expression and 1997* (London: Article 19, 1993) 20, quoting from *Handyside v. UK* (1976) 1 EHRR 737, para.49.

28 Ghai, Y., "Freedom of Expression", in Wacks. R. (eds.) *Human Rights in Hong Kong* (Hong Kong: Oxford University Press, 1992) p. 386.

29 *Supra* note 27, p. 21.

the last ground of public health and morals. The standard of health and morality may vary at different times and places. It has been suggested by the European Court of Human Rights that states could have a wide degree of discretion in determining what restrictions are necessary under this ground of justification.[30]

Apart from the above permitted grounds of restrictions, Article 16(3) further requires that the restrictions must be "provided by law", which is similar to the requirement of "prescribed by law" in Article 10 of the European Convention on Human Rights. According to the European Court's judgment in *The Sunday Times v. The United Kingdom*[31], this requirement means that the law must be adequately accessible and formulated with sufficient precision, whether it is provided in common law or statute.[32] This means that the wordings must be precise enough to allow people to avoid a breach of the requirement.[33] The first requirement of accessiblility is likely to be fulfilled provided that the law is made known to the public.

Another requirement is that the restriction must be 'necessary'. The European court stated that 'necessary' is not as high of a standard as 'indispensable', but it is more stringent than 'reasonable' or 'desirable'. It also implies the requirement of a 'pressing social need' and the principle of proportionality.[34] However, this kind of interpretation has not been accepted by Hong Kong courts since 'necessity' is not a question of general liberty or freedom. The Privy Council is of the opinion that the decisions in other jurisdictions are persuasive only and that the situation in Hong Kong is different.[35] As Lord Jauncey said in *Ming Pao Newspapers Ltd v. A-G*[36] :

> It must be remembered that the role of the European Court of Human Rights, in relation to the domestic legislation of contracting states differs markedly from the role of the Hong Kong courts in relation to legislation which is claimed to contravene the entrenched provisions of the Bill.

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30 *Handyside v UK* (1976) 1 EHRR 737.

31 (1979) 2 EHRR 245.

32 *R v Sin Yau Ming* [1992] 1 HKCLR 127,141. The court stated that it will consider the decisions of European Court of Human Rights and any common law jurisdictions which contain a constitutionally entrenched Bill of Rights.

33 Shannon, D., "Commercial Free Speech and the Law in Hong Kong" (12 January 1993) a paper presented in an International Symposium on Advertising, 5.

34 *Derbyshire Country Council v. Times Newspapers* [1993] AC 534 at 550H and *The Sunday Times v. The United Kingdom* (1979) 2 EHRR 245.

35 *Tam Hing Yee v. Wu Tai Wai* (1991) 1 HKPLR 261 at 269 and *A-G of Hong Kong v. Lee Kwong Kut* (1993) 3 HKPLR 72 at 91.

36 (1996) 6 HKPLR 103.

Accordingly, it is not surprising that the Hong Kong courts have found themselves not assisted by substituting 'necessary' for 'pressing social need'. However, the standard of 'necessity' may further depend on the doctrine of 'margin of appreciation' which has been discussed by the Judicial Committee of the Privy Council in the *Ming Pao* case[37]. This doctrine suggests that "when a government tries to prove the necessity of an interference, it should appreciate complex factors and balance conflicting considerations of the public interest... such appreciation should be at least on the margin of the powers conferred by the law."[38]

As the scope of 'margin of appreciation' may vary for different jurisdictions, it allows the detachment of national and international implementation on the basis of state sovereignty. In the present case, it is natural to assume that the protection of public health against tobacco advertising would be subject to a wide margin of appreciation since universal consensus is unlikely to exist on this moral issue.[39] The regional difference in smoking patterns is such that there is hardly any common standard in considering the 'necessity' of the *Ordinance* and the *Codes*. With a wide margin of appreciation accorded by the court, it is easier for the government to establish the necessity of its measures.

C. Is Advertising a Form of Expression Protected by Article 16?

Before considering whether the Hong Kong government's ban on advertising is legitimate, it is necessary to consider whether this type of advertising falls within the definition of 'freedom of expression' under Article 16. 'Expression' is widely defined as either 'orally, in writing or in print, in the form of art, or through any other media of his choice'. Notwithstanding this wide definition, there are ambiguities regarding commercial advertising. The ambiguity arises due to the perspectives of different theories. Consequentialists would argue that commercial advertisements do not provide the elements of democracy or accountability of government. They would regard the promotion of dangerous products like alcohol and cigarettes as against the public interest. Protection for such advertisements which are based on the hope of making profit only and not providing information or educating the public cannot be justified under

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37 *Ibid.*

38 Secretariat General of the Council of Europe, *Proceedings of the Sixth International Colloquy about the European Convention of Human Rights* (Strasbroung: Martinus Nijhoff Publishers, 1988) pp. 294-5.

39 McGoldrick, D., *The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights* (London: Clarendon Press, 1991) p. 467.

freedom of expression. Public interest is thus undermined. Such arguments were accepted in United States and Indian case law.[40] Non-consequentialists may support protection of commercial advertisements since they encourage a competitive market of information and ideas, which will in return allow personal development of autonomy. People can determine what is true and false and make their own decision.

In the legal perspective, it is well established in European and Canadian case law that commercial advertising is a form of freedom of expression.[41] In *Irwin Toy Ltd. v. A.G. Quebec*[42], the court held that 'expression' can be defined in terms of content and form. An activity is expressive if 'it conveys or attempts to convey a meaning: its meaning is its content. Activities cannot be excluded from the scope of guaranteed freedom of expression on the basis on the basis of the content or meaning conveyed'.[43] Thus, the rationale is that all content of expression are protected notwithstanding the meaning or message sought to be conveyed. In *McIntyre et al. v. Canada*[44], residents of Quebec challenged the constitutional status of the *Charter* of the French Language which prohibits the use of English on commercial signs outside the business premises, or in the name of the firm. They claimed that the *Charter* of the French Language had infringed freedom of expression under section 33 of Canadian Charter of Human Rights and Freedoms and the counterpart section 52 of the Quebec Charter of Human Rights and Freedom. Both sections are equivalent to article 19 of the *International Covenant of Civil and Political Rights ('ICCPR')*. The United Nations Human Rights Committee accepted their claim and held that 'commercial .advertising' is under the scope of article 19. Similarly, since article 16 of HKBRO is also an equivalent section to Article 19, 'commercial advertising' is within the scope of freedom of expression in Hong Kong jurisdiction.[45]

Commercial advertising in general is a means for every business to attract consumers attention in order to convey a message in relation to its products. Tobacco advertising is no exception. Therefore, tobacco advertising can be said to have an expressive content and its form of

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40 *Valentine v. Chrestensen* (1942) 316 US 52 and *Hamdard Dawakhana v. Union of India* AIR 1960 SC 554. Note that the United States Constitution only protects 'speech', which is a narrower term than 'expression'.

41 *Church of Scientology v. Swenden* - European Human Rights Commission. *Barthold v. Federal Republic of Germany* [1985] HRLJ 309 - European Court of Human Rights. *RJR-MacDonald Inc. v. AG of Canada* [1995] 127 DLR (4th) 1 (SCC) 146.

42 [1989] 1 Canada Supreme Court Report.

43 *Ibid.*, p. 968.

44 (1993) 14 HRLJ 174.

45 *R v. Sin Yau-ming* [1991] 1 HKPLR 88 - affirmed that decision of Human Rights Committee are of direct assistance to the interpretation of the HKBRO.

expression can by no means be said to be violent. Tobacco advertising should then be seen as a kind of commercial advertisement which falls within the protection of Article 16 of the HKBRO.

V. Various Forms of Restrictions

Provisions concerning tobacco advertisement are mainly found in Part IV of the Ordinance. Any person who contravenes these provisions (sections 11-13) commits an offence and is liable on summary conviction to a fine at level 4[46] and a fine of $1,500 per additional day for a continuing offence.[47]

The scope of restrictions depends on the meaning of 'advertisement'. It is defined in the old Ordinance as any announcement to the public made or to be made in any manner. This is however repealed by the 1997 Amendment Bill which substituted the term 'advertisement' for 'advertising', the latter of which means an act undertaken by any means to allow the public to see, hear or know the statement for commercial interest. The focus of the definition was shifted from the means of promotion to the effect on receiver. Moreover, an 'act' is wider than an 'announcement' since the former includes tacit illustrations. The meaning of 'tobacco advertisement' is also defined specifically under s. 14 of the Ordinance. In brief, it should contain any express or implied inducement, suggestion or request to purchase or smoke cigarettes, or relate to smoking for promotion. With the exception of sponsorship, any advertisement mentioning the tobacco trade name will constitute a tobacco advertisement. The new Amendment Bill contains two additional elements, namely the illustration of related products and any displayed object, in addition to advertisement, which mention the trade name of the tobacco companies. Therefore, the scope is much wider than the previous definition.

A. Printed Media

Section 11 of the *Ordinance* provides that "no person shall print, publish or cause to be published a tobacco advertisement in a printed publication" with the exception of those for passengers of airlines or shipping companies; for tobacco trade or 'in house' magazines; or for circulation entirely outside Hong Kong. Notwithstanding the commencement date of the Ordinance, this total ban of tobacco advertising on printed publication is

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46 *Criminal Procedure Ordinance* (Cap. 221) s. 13(c)(2) - fine of level 4 means $10,001 to $25,000.

47 *Supra* note 46, s. 15.

to be introduced on 31 December, 1999.

B. Display

The display of tobacco advertising was prohibited by section 12: "No person shall display or cause to be displayed; or publish or distribute for the purpose of display or cause to be published or distributed for the purpose of display, any tobacco advertisement in writing or other permanent or semi-permanent form." This section does not apply to displays on the stalls of licensed hawkers, in premises of retail dealers or of a tobacco manufacturers. A two-year period was given for the removal of the existing displayed advertisements.[48] The removal of tobacco advertisement was guaranteed by the newly-added section 14A. It allows a magistrate, upon the application of the Secretary for Health and Welfare or an authorised public officer, to order the disposal of any particular tobacco advertisement or the removal of any advertising structure, as long as the magistrate is satisfied that an offence under this Ordinance has been committed. Special allowance is made for the price marker or the price board at premises where tobacco products are sold.[49]

C. Broadcasting Media

The broadcast of tobacco advertisement by radio or visual images was already banned by the old *Ordinance* in 1989. The previous provision stated that 'no person shall broadcast a tobacco advertisement for reception by the members of the public'. The Ordinance substituted the phrase 'for reception' by 'intended for general reception' under section 13.

Details of restrictions are further provided by the *Codes* which govern commercial television, radio, satellite television, satellite radio and subscription television. These *Codes* of advertising standards can be examined together since their wording is the same. Clause 8(aa) of each *Code* concerns the general standard for advertising which says that the licensee shall not broadcast an advertisement for an unacceptable product, even if the effect publicised is indirect only. Clause 8(c) is more specific. It applies directly to tobacco advertising. Sub-paragraph (1) provides that "the licensee shall not broadcast any material which advertises any item or product which contains... tobacco plant... and which is used for smoking...

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48 *Supra* note 46, s. 1 - This section shall come into operation on the 2nd anniversary of the day of enactment.

49 Section 15(6) of the *Ordinance* - some conditions should be complied with for this allowance.

or incite, offer or accept sponsorship or any form of commercial promotion for such item or product." It is for the Broadcasting Authority to examine the contents of the advertisement and make sure that the advertisement as a whole is intended for an acceptable product or service. For example, an advertisement of a corporate image with a tobacco brand name shall be deemed to be a tobacco advertisement and should be excluded from any broadcasting media.[50] The same assumption applies to events with titles bearing the brand names of tobacco sponsors unless certain conditions are satisfied.[51]

D. Sponsorship

Sponsorship by tobacco companies is not specifically allowed or prohibited in any section. It is also not considered to be a kind of tobacco advertisement under section 14(2)(iii)(B). This section provides that the definition of tobacco advertisement shall not apply to any advertisement or object which includes the name of the company "as the sponsor of an event or as congratulating another person or thing on a achievement of, or event relating to, such person or thing and which does not mention the words 'cigarette', 'smoking', 'tobacco', 'cigar' etc."

Tobacco promotion through broadcasting media and event sponsorship are interrelated. Since the banning of broadcasting advertisements, tobacco companies have engaged in sponsorship as an alternative. While participants of the sponsored events are exposed to the influence of advertisements, the ultimate power of sponsorship comes from the indirect help of broadcasting media. As mentioned, television and radio are very powerful media. Whenever a tobacco brand name appears on the screen, it can immediately reach the minds of a great number of people. As sponsorship is not directly restricted in the new *Ordinance*, the focus should be placed on the provisions concerning indirect advertising in the broadcast media. Section 14(3) is added in the 1997 *Ordinance* which states that "any accidental or incidental appearance of any tobacco product or the trade mark, trade name, brand name or logo of any tobacco product where no valuable consideration has been or is intended to be given for such appearance is not a tobacco advertisement." Similar wording appear in the *Codes*: the term advertisement does not include "incidental or natural references to goods or services in the course of a programme which are justifiable in programme context and do not obtrude on programme interest or entertainment." This

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50 Clause 8(c)(2) of the *Codes*

51 Clause 8(c)(3) of the *Codes* and clause 9 of the Supplementary Standard on Programme Sponsorship in the same Code.

permission of 'accidental or incidental' advertising creates a loophole for tobacco brands to have prime-time exposure on television through sponsorship. Provided that the licensee does not receive payment or other valuable consideration for broadcasting the advertising matter, tobacco promotion may be broadcast without penalty.

E. Film and Internet

Exhibition of tobacco advertisements in cinema was prohibited by section 13A. On the other hand, with the increasing popularity of the use of the Internet as a kind of entertainment in recent years, section 13B of the *1997 Ordinance* was introduced to prohibit tobacco advertisement in this field. It specifies that "no person shall place or cause to be placed a tobacco advertisement on the Internet." Exceptions were allowed by section 13B(3) in "any private correspondence on the Internet and is not for commercial purpose."

F. Sampling of Tobacco Products

Previously, promotion by sampling tobacco products is only prohibited if it is directed at minors. The control on teenagers as a targeted group was extended to adults by section 15A(2) of the *1997 Ordinance* which states that "no person shall, for the purposes of promotion or advertisement, give any cigarette, cigarette tobacco, cigar or pipe tobacco to any person." The scope of restrictions is also expanded by section 15A(3) to include the giving of tobacco products, gifts, token, stamp or tobacco branded objects for the purpose of promoting tobacco products.

G. Tobacco-branded items

The use of tobacco brand-names on tobacco products is a kind of indirect tobacco advertising. Section 14(2)(b) provides that "any object, other than a tobacco product, which is displayed to the public, whether for sale or otherwise, in the course of conducting any business or provided any service... contains any trade mark or brand name of a tobacco product or any pictorial device associated therewith... shall be deemed to be a tobacco advertisement." Thus, any advertisement by a tobacco product manufacturer or distributor will be considered to be a tobacco advertisement except it is for a non-tobacco product or service. It also applies to the situation of any accidental or incidental appearance of any tobacco-branded items under s. 14(3). It seems that advertising by tobacco-branded items is not under governmental control, but it is indirectly covered by section 15A(g)

which prohibits the giving of tobacco-branded items.

H. Imposition of Warnings

The requirements of health warning is specified in Part III of the *Schedule of the Smoking (Public Health)(Notices) Order*. There are four standard Hong Kong government health warnings on advertisements; each of them shall feature prominently at different quarters of the year: 1) from 1 January to 31 March - Smoking Can Kill; 2) from 1 April to 30 June - Smoking Can Cause Cancer; 3) from 1 July to 30 September - Smoking Harms Yourself and Others; 4) from 1 October to 31 December - Smoking Can Cause Heart Disease. For the format, section 5(4) of the Order states that warnings should be "placed in a separate panel within the advertisement which is distinguished from the remainder of the advertisement by means either of a line or by being of a different colour; and occupies not less than 20% of the surface of the advertisement."

After looking at different forms of restrictions, it should be noted that there are several important changes in the *1997 Ordinance*: a total banning of tobacco advertising on printed publication, billboards and Internet; and the prohibition of sampling tobacco products among adults. This of course aroused the opposition from the tobacco industry on the grounds of their impact on freedom of expression and Hong Kong economy.

VI. Freedom of Expression: An Analysis

A. Provided by Law

Any interference with freedom of expression should find some basis in domestic law. The term 'law' in Article 16 may include statutory rules, delegated legislation and unwritten norms. *The Smoking (Public Health) Ordinance* and *Codes of Practice* definitely falls into these categories. They can also satisfy the requirement of accessibility since they are published in the gazatte and the annul reports of Hong Kong Broadcasting Authority respectively. The wordings of the laws carry sufficient precision which enables individuals to foresee the consequences following a given action.

B. Objectives of Restrictions on Tobacco Advertising

There is not much controversy over the accessibility and foreseeability of these two sources of law. Rather, the focus should be placed on the government's objectives of enacting them. The objectives are important to determine whether governmental control is legitimate and whether the means

to achieve those ends are appropriate.

1. The Smoking (Public Health) Ordinance[52]

The 1982 Ordinance is described as 'a clean air bill in another form'.[53] When the Legislative Council considered the Bill, its main concern was to heighten the community's awareness of the danger of smoking and to reduce the incident of smoking. Public health education must be aggressive and directed at the younger generation. Ideally, the smokers will become more considerate and young people will be discouraged from smoking. In addition, they aimed at striking a balance between the interests of non-smokers and smokers.[54] Thus this *Ordinance* attempts to achieve several objectives.[55] In brief, the government wanted to establish no-smoking areas especially in public places and transportations; to promote public health education; to insert a government health warning on cigarette packets and advertisements; and to control tobacco advertising. All these objectives can be regarded as legitimate under the ground of protecting public health.

2. Codes of Practice

The *Codes of Practice* set out the standards reflecting social acceptability and attitudes on the content of programmes and advertisements. The Broadcasting Authority will from time to time amend its *Code of Practice* to reflect public opinions. If the broadcasters breach the Code, the Broadcasting Authority can impose sanctions on them, including warnings and penalties. With respect to advertising, all the *Codes of Practice* banned tobacco advertising on television and radio from 1 December, 1990.[56] In the sponsored programmes, the licensees should not intentionally mention the brand name, product, services or the slogan of the company. Exceptions are allowed in imported programmes such as films or sports activities.[57]

C. Justification of the restrictions

In terms of legislative amendments, the *1997 Ordinance* will soon

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52 *Smoking (Public Health) Ordinance* (Cap. 371).

53 Hong Kong Legislative Council, *Hong Kong Hansard* (Hong Kong: the Government Printer, 28 July 1982) p. 117 from the speech of Mr. Chan Kam Chuen.

54 *Ibid.*, p. 116 from the speech of Dr. Ho Kam Fai.

55 The Department of Health & Welfare, *Consultation Paper on Anti-smoking Proposals* (Hong Kong: Government Printer, August 1992) pp. 1-2.

56 *Supra* note 52, s. 13.

57 Details of the clauses are already mentioned above.

replace the *1982 Ordinance*, whereas the Code will be updated. Under the new *Ordinance*, the government bears the burden of proof on the ground of necessity. It must satisfy both the tests of rationality and of proportionality. The ban on tobacco advertising is the main restrictions to be examined in this paper, i.e. whether it is necessary to have such a ban in order to achieve the protection of public health. The first part of the analysis will deal with these issues from a general perspective and the second part will focus on different sections specifically.

1. Restrictions in general

Rationality

The government must show that there is a causal connection between its objectives and the legislative amendments. The general objective of the *1982 Ordinance* is the protection of public health with the supporting objectives of reducing tobacco consumption and protecting young people from inducement. As the government believes that tobacco advertising is the major factor in inducing and increasing tobacco consumption, the means of achieving the objectives in question is a ban on all tobacco advertising in any form.

When the government enacted anti-smoking legislation in the 1980s, nicotine and carbon monoxide in tobacco smoke were recognised as major causes of premature death. At that time, it was estimated that about 1600 and 2100 people in Hong Kong died from lung cancer and coronary heart disease respectively every year in association with smoking.[58] Smoking is generally responsible for 10% of deaths in Hong Kong which is seven times as many as those caused by traffic accidents.[59] Supporting evidence provided by the World Health Organisation (WHO) shows that in societies where smoking as an established habit, smoking is responsible for 90% of lung cancer deaths, 75% of bronchitis deaths, and other diseases of the vascular system.[60] The impact of passive smoking was another factor in the government's determination to protect public health. The US Surgeon-General has said that, "Non-smokers' exposure to tobacco smoke may exacerbate allergic symptoms; carbon monoxide in smoke-filled rooms may harm the health of persons with chronic lung or heart disease."[61] Opposition to smoking has become more intensive among non-smokers over the years.

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58 Government Information Service, *Hong Kong Government Anti-smoking Fact Sheet* (Hong Kong: the Department, 1983-) p. 1.

59 *Supra* note 13.

60 *Supra* note 58, p. 3.

61 Hewat. T, *Modern Merchants of Death* (Victoria: Wrightbooks Pty Ltd., 1991) p. 56.

As smoking is hazardous to one's health and tobacco is a well known harmful product, the government is responsible for taking measures to forestall its promotion so as to protect public health by curbing the tendency to smoke. It is also a normal government attitude to give priority to the health of the public.

To examine further the rationality of the restrictions in the *1997 Ordinance*, it is necessary to look at the present consumption rate and public perspectives concerning tobacco advertising.

The general themes of many tobacco advertisements like success, freedom and glamour are aimed at all consumers; the themes do not distinguish between smokers and non-smokers. A study by the UK Department of Health suggests that advertising does stimulate cigarette consumption.[62] Even Mr. Emerson Foote, the former Chairman of McCann Ericson an advertising agency supported the counter argument, "I am always amused by the suggestion that advertising, a function that has been shown to increase consumption of virtually every product, somehow miraculously fails to work for tobacco products."[63] In Hong Kong, fewer than one in seven people smoke. It is unbelievable that an industry with only one seventh of the potential market would deny that their aim of advertising is to attract new customers. With Hong Kong's smaller proportion of smokers, the Hong Kong tobacco industry should not follow the argument of their foreign counterparts. Apart from the size of the potential market, it is more useful to look at the estimated annual consumption volume of cigarettes. According to the Annual Report of the Department of Accounts and Audit, the estimated private consumption expenditure on cigarettes dropped from the highest point in 1982 of $11,336,534 to the lowest point in 1987 of $4,607,085. It then followed a gradual rise to $7,291,713 in 1989 and dropped again to $6,930,466 in 1990. Interestingly, the year of 1982 was when the *Smoking (Public Health) Ordinance* was enacted whereas 1989 marked the amendment of the Ordinance to ban broadcasting tobacco advertisements. As there is a distinctive drop in both years, it seems that the anti-smoking legislation and measures are effective at least in keeping private expenditure on cigarettes at a lower level (within $6,000,000 and $7,000,000). However, these statistics are criticised by the Tobacco Institute as unreliable; it argues that there must be other factors influencing the result.[64] It is true

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62 *Ibid.*

63 Winstanley, M., Woodward, S., and Walker, N., *Tobacco in Australia: Facts and Issues 1995* (Victoria: Victorian Smoking and Health Program, 2nd ed., 1995) p. 297.

64 The Tobacco Institute has pointed out some limitation of the study: 1) it is an 'estimation' rather than a measurement; 2) it includes all tobacco, including pipe tobacco and therefore may marginally overstate cigarette volume. Asia Market Intelligence Ltd., *Report on Factors Influencing the Demand for Tobacco, prepared*

that there are other factors affecting peoples'choice of becoming smokers such as peer influence. Given that it is impossible to hold other factors constant, the advertising ban would still have contributed to a decrease in the consumption rate to a certain degree.

In addition, the government does not put its focus on individual's right to choose, but rather on protecting those who are not mature enough to make an independent choice, i.e. children and teenagers. Regular studies were carried out by the Hong Kong Council on Smoking and Health, and the University of Hong Kong on youth smoking and tobacco promotion. In 1994, there was an increased incidence of smoking experience in Primary 3 to 6 and the trend continued to rise in secondary school students from 21% in Form 1 to 37% in Form 3. Further studies show that Hong Kong school children are well aware of tobacco advertising. They were asked to nominate the most attractive tobacco advertisement and most popular brand of cigarettes etc. The results turn out to be very similar. The two advertisements perceived to be attractive were *Marlboro* (31%) and *Salem* (22%); the two brands which most students liked to smoke were also *Marlboro* (37%) and *Salem* (32%); and finally the two brands which most students usually smoked were again *Marlboro* (51%) and *Salem* (40%). These two brands happened to be among the five top-selling and most heavily advertised brands in Hong Kong. A relationship has been found between the attractiveness of a particular tobacco brand advertisement, preference for the brand and the brand that the students usually smoked in ever-smokers. Taking *Marlboro* as an example, the odd ratio between preference for the brand and usually smoking the brand is 35.7: a very strong relationship.[65] There is also a strong relationship between the attractiveness of *Marlboro* advertisements and preference for *Marlboro* (odd ratio 3.9). The odd ratio between the attractiveness of *Marlboro* advertisements and usually smoking *Marlboro* is 4.0. This means that students who found *Marlboro* advertisements attractive are four times as likely to smoke *Marlboro* than those who do not find *Marlboro* advertisements attractive. Furthermore, ever-smokers find tobacco advertisements to be attractive.[66] Even primary school children have the ability to recognise tobacco brand names. One study required them to identify brand names and logos of different types of products. Among the three most successfully identified

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for the Tobacco Institute of Hong Kong Limited (Hong Kong, AMI, September 1992) p. 18.

65 The bigger the odd ratio, the stronger the relationship - HKCOSH, *Hong Kong Council on Smoking and Health Annual Report 1994-1995* (Hong Kong: HKCOSH, 1995) p. 29.

66 *Ibid.* The percentage of ever-smokers and never-smokers who found Marlboro advertisements attractive are 55% and 21% respectively.

brands, the top two were tobacco products: *Marlboro* (95%) and *Salem* (95%) and the third was *Garden Bakery* (94%).[67]

According to the government, there is a rational connection between its objective of protecting public health, reducing the level of consumption and protecting youngsters from the influence of tobacco advertisement on the one hand, and the ban on tobacco advertising on the other.

Proportionality

Proportionality involves a balancing exercise for the court, requiring it to consider the relationship between the legislative measures and their impact on a fundamental right. Relevant factors include the nature of the right, the extent of the infringement, the achievement of the stated goals, the appropriateness of particular means and the extent of punishment or sanctions.[68]

Tobacco advertising is directly and indirectly related to a number of industries such as the press, broadcasting companies, sports and arts organisations. It also involves lawful competition and to a certain degree reflects the spirit and importance of a free economy. The ban on advertising would surely affect the revenue, the employment rate and competition among different economic sectors.[69] In order to have a smooth development of commercial and industrial sectors as well as international relationship between Hong Kong and other countries, free transmission of information should be maintained. In addition, since the government is deriving revenue from the import and manufacture of tobacco products, it is unfair to deprive the industry of the right to promote the sale of its products, as long as the product is permitted to be sold publicly.[70]

The government would argue that its goal identified in the relevant laws is to curb tobacco use rather than tobacco products because the former is the direct cause of fatal diseases. The ban on tobacco advertising then appears only to be a governmental tool in response to the public concern over increasing tobacco use. It is true that there are many alternative methods to

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67 Peters, J., Betson, C.L., Hedley, A.J., Lam, T.H., Ong, S.G., Wong. C.M. and Fielding, R., "Recognition of Cigarette Brand Names and Logos by Young Children in Hong Kong", *Tobacco Control*, pp. 150-155.

68 *Andrews v. Law Society of British Columbia* [1989] 1 S.C.R. 184-185.

69 Northern Ireland Department of Health, *Health Committee Second Report: The European Commission's Proposed Directive on the Advertising of Tobacco Products* (London: HMSO, 14 December, 1992) p. 74.

70 Hong Kong Legislative Council, *Hong Kong Hansard* (Hong Kong: the Government Printer, 19 March 1986) p. 804 from the speech of Mr. Clydesdale.

curb tobacco use and a total ban may not be necessary,[71] for example, it would be possible to increase sales taxes, enlarge health warnings or carry out more health education. Therefore, the new amendment is only a tool for the government to satisfy the demand of part of the population. The infringement of freedom of expression is actually out of proportion to the goal.

Other important issues include the aim and types of advertising being restricted. In the former issue, the government believes that tobacco advertising carries two main aims. The first is to encourage people to consume a particular brand. According to the general household survey of the Census and Statistics Department, the percentage of smokers over all persons aged 15 or above is only 14.8%. This shows that the tobacco market in Hong Kong is comparatively less mature than that of foreign countries. The number of potential smokers is still great. Thus the second aim is to recruit new customers.[72] In order to maintain their existing sales levels against the high death rate of smokers, the companies need to recruit potential addicts. Most of them are youngsters since they are easier to persuade and have a longer life expectancy. As the secretary of the British Medical Association in the press conference of an anti-smoking campaign said, "It is not our aim to take cigarettes away from old people who are dependent on them... We must help people to resist the pressures to start smoking. And that means protecting children because it's kids who start smoking, rarely adults." Therefore, it is necessary to control the consumption rate as well as to protect children and teenagers from the influence of tobacco advertising. In addition, the public health issue should prevail over the economic interest of the tobacco manufacturers.

Tobacco companies claim that their advertisements do not affect total consumption, nor do they encourage non-smokers to smoke.[73] First, the tobacco industry is an oligopoly dominated by several big tobacco corporations and there is little product differentiation. Advertising becomes their method of inter-company rivalry, getting a larger market share and maximising the profits of each firm. Another function of advertising is to introduce new brands and products. In order to keep up with consumers' tastes in products, tobacco companies tend to produce new brands with different target groups; for example, the target groups for *Camel* and *Virginia Slims* are teenagers and women respectively. Moreover, with an increasing concern over the hazards of smoking, the tobacco companies have invented

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71 *AG v. Guardian Newspapers* (No.2) [1990] 1 AC 109 at 283 and *Derbyshire Country Council v. Times Newspapers* [1993] AC 534 at 550H.

72 *Supra* note 69, p. 47.

73 Tobacco Institute of Hong Kong Limited, *Report to the Broadcasting Authority* (Hong Kong: Tobacco Institute, 1984) p. 1.

some 'safer' cigarettes with low tar and nicotine. Advertising helps to persuade smokers not to quit smoking but stick to a less harmful brand. It is also useful for tobacco companies to introduce their brands to foreign markets. One of the effects of tobacco advertising is being denied by the industry: the increase of total consumption. The industry disputes the argument that their advertisements aim to capture young smokers.[74] As there are other reasons that lead to the increasing number of young smokers such as the influence of peers and parents, the industry claims that the new amendments are not in proportion to the government's objectives.

The proportionality test was applied in the recent Canadian case *RJR-MacDonald Inc. v. Attorney General of Canada.*[75] In this case, RJR-MacDonald Inc. sought a declaration that the Tobacco Products Control Act ('T.P.C.A.') was *ultra vires* Parliament and invalid as an unjustified infringement of freedom of expression protected by s.2(b) of the *Canadian Charter of Rights and Freedoms* ('the Charter'). This controversial issue made its way to the Supreme Court of Canada which held that the *Act* was not *ultra vires* but declared several sections to be inconsistent with the right of freedom of expression and thus of no force or effect. The sections involved concern restrictions on advertising, trademarks, health warnings, retail displays and sponsorship, which are similar to the provisions in the *1997 Ordinance.*

This Canadian case is highly persuasive in Hong Kong for several reasons.[76] First, both Canada and Hong Kong have a capitalist system where tobacco corporations play an important role. Second, both places seek the protection of human rights and recognise the importance of freedom of expression guaranteed in the Charter and the BORO. Third, there are social and economic burden created by the tobacco products in both places. In addition, this is the most relevant case concerning the relationship between the ban on tobacco advertisement and the freedom of expression. Therefore, it is worthwhile to examine this case in greater detail.

There were two contentions submitted by the Applicants.[77] First, the T.P.C.A. is ultra vires the Parliament of Canada under the *Constitution Act 1867*; second, the T.P.C.A. violates the freedom of expression guaranteed in section 2 of the *Charter* and the violation cannot be justified in the context of a free and democratic society. Most importantly, while tobacco companies

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74 *Ibid.*, pp. 1-4.

75 *RJR - McDonald Inc. v. Attorney General of Canada* (1995) 127 DLR (4th) 1 (SCC) 46-52.

76 LeGresley, E., "Remarks for Hong Kong Forum on Tobacco Advertising" in *Hong Kong Council on Smoking and Health, Forum on Tobacco Advertising and the Bill of Rights in Hong Kong*, 16 April 1996, p. 13.

77 The Applicants were RJR-Macdonald Inc. and Imperial Tobacco Ltd.

can sell cigarettes legally throughout Canada, the ban on tobacco advertising deprives them of a commercial means of communicating with the users of the product. Since Hong Kong does not have similar constitution to that of Canada, this essay will only focus on the second contention as a matter of relevance.

In applying this case to the *Smoking (Public Health) Ordinance*, the analysis should follow the three components of the proportionality test.[78] First, there should be a rational connection between the legislative objective and the means adopted to achieve the objectives in question. The measure ought not to be arbitrary, unfair or based on discriminatory considerations. This is equivalent with the test of rationality.

Second, the means chosen to achieve the objective should impair as little as possible the right or freedom at issue. The assessment of the impairment must take into account the nature of the restrictions and the way they operate.[79] Considering the general ban on tobacco advertising, there are many alternatives to achieve the objective of protecting public health which carry a lower level of impairment to the freedom in question. However, this does not necessarily mean that a total ban on tobacco advertising is out of proportion. Although the requirement is 'to impair as little as possible', it is not difficult to satisfy as long as the impairment is within a reasonable limit. In this second component, the court distinguishes between informative advertisement and lifestyle advertisement.[80] Purely informational advertising has little impact on consumption. It includes advertisements for introducing new brands, carrying the tar contents etc. In contrast, lifestyle advertising, which includes most tobacco advertising, does affect the level of consumption because it creates different attractive images of the brands for market competition. The latter type of advertising would have a greater impairment of freedom and fail to satisfy the test. Accordingly, only a partial ban on lifestyle advertising is more appropriate.

If the second component is applied in the present case generally, the penalty imposed in the *1997 Ordinance* is comparatively lenient. A breach of the provisions in Part IV of the *Ordinance* only results in a maximum monetary penalty of $25,000 and $1,500 for each additional day the offence is continued. This punishment is not in proportion to the huge revenue of the tobacco companies which are not afraid of challenging the boundaries of legislation.

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78 *Supra* note 75.

79 *Ibid.*

80 *Ibid.*, p. 23.

2. Specific restrictions

In addition to the concern about a total ban in general, specific restrictions in different sections should also be examined. The element of rationality should be considered in terms of the influential power of the media and the means of control because these reflect whether a particular kind of advertising is powerful enough to increase consumption or influence youth's perception. Moreover, the test of proportionality requires the focus on the actual application of such a section and the extent of exceptions available. Sometimes, even if there is a rational connection between the objective and the particular restriction, the exceptions will render the application ineffective to achieve such an objective. As a result, freedom of expression will be impaired to a great extent.

Printed Media

Printed publication is a powerful medium for advertising. Women and teenagers have been recognised as potential markets for decades. Special brands like *Vogue* and *Camel* have been marketed solely as women's and teenagers' cigarettes respectively.[81] Apart from newspaper in general, tobacco advertisements appear more frequently in magazines for these two target groups. Smoking is associated with glamour, style, sex appeal and independence which may influence youth's perception. There is, however, no restriction on the contents of advertisements in magazines. On the other hand, anti-smoking information is seldom provided. There is in fact some link between acceptance of tobacco advertising and a lack of health reports on smoking hazards. It is believed that the greater the dependence on the income from tobacco advertising, the less likely the magazine is to cover health issues.[82] For example, three national news weeklies of *Times*, *U.S. News* and *Newsweek* failed to cover the health dangers of smoking. Between 1970 and 1986, they included 64 articles about cigarettes which mostly dealt with political or business issues only.[83] In addition, since

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81 *Supra* note 63, p. 296.

82 The British Medical Association, *Smoking Out the Barons: The Campaign Against the Tobacco Industry* (Britain: John Wiley & Sons, 1986) p. 133.

83 STAT, *Stopping Teenage Addition to Tobacco, A Community Organiser's Manual* (Springfield: Stop Teenage Addition to Tobacco, 1992) p. 24. Following serious criticisms, *Newsweek* in 1984 published an article which contained a strong statement about the hazards of smoking. This resulted in a loss in that issue of over half of its usual $1 million tobacco revenue. – Warner, K.E. " Cigarette Advertising and Editorial Bias in Australian Newspapers" February 7, 1985, *New England Journal of Medicine,* 312 at 384-88.

printed publication is usually temporary in nature, it supplies the function of combining interactive tobacco promotional items, such as advertisements about give-away items like lighters and T-shirts associated with cash coupon catalogue offers. This promotional technique is favourable to the magazine itself because a lookout for additional information about the offers in the following issue of magazine is usually required.

In order to avoid the influence on teenagers and the expense of public health education, the government saw the need to impose a total ban on advertising in printed media in the *Ordinance*, allowing a two-year period of transition. Since printed media is powerful, its impact to increase consumption justifies a rational connection between the objectives and the ban. This has received strong opposition from the tobacco industry and the press which are skeptical of the proportionality of such measures. Revenue is their main concern. Magazines claim that the loss of revenue resulting from a ban on tobacco advertising would mean their closure. The tobacco industry also raises the indirect problem of foreign publications. Section 11 applies to "any local newspaper" and "any printed document published or distributed in Hong Kong."[84] The term "newspaper" is defined in the *Registration of Local Newspapers Ordinance* which means any printed documents.[85] Therefore after two years, no tobacco advertisements will appear in local publications. How about foreign publications? By analogy, the new amendment will effectively ban the public distribution of foreign newspapers and magazines which carry tobacco advertisements, such as *Times* and *Newsweek* from the United States. A dilemma is created since on the one hand the citizens are deprived of valuable news and information from these magazines. On the other hand, if public distribution is allowed, tobacco advertisements will still appear and thus greatly weaken the government ban. Issues of inequality will also arise between local and foreign publications. Accordingly, the application of section 11 becomes out of proportion because the act of banning tobacco advertising merely in 'local' printed media does not effectively achieve the objective of reducing the impact of advertising. Such a ban would also affect personal autonomy with respect to reading foreign publications.

Display

Advertising through outdoor billboards and transit system signs is popular among tobacco companies. This type of advertisement is big and clear enough and extends to different neighbourhoods near schools, churches,

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84 *Supra* note 56, s. 11(2)(a) and s. (b).

85 *Ibid*., s. 2.

parks, shopping centres and city streets. Compared with other methods of promotion, displayed advertising is more permanent in nature and can be seen over and over again. In Hong Kong, billboard advertising is usually located at transport facilities such as bus-stops, MTR, piers and cross harbour tunnel entrances. Such exposure at important transport nodes helps promoting pro-tobacco messages to people of different walks of life. In additional, it is not surprising for billboard companies to express their reluctance to rent space for anti-smoking advertisements. As they are well-paid by the tobacco conglomerates, they are unlikely to take the risk of losing such a financial source. Thus, it seems that only a one-sided message from the tobacco industry can reach peoples' minds through this type of advertising.

The *Ordinance* imposes a total ban on displayed advertisements. Tobacco companies may argue that a total ban is not necessary because the effect is not so great. Unlike foreign countries, however, the effect of displayed advertisement might be greater in Hong Kong due to its high concentration of people and the popularity of public transport among youth; for example, advertisement in the MTR would draw greater attention than that on a foreign highway. Among the media through which advertisements were reported to have been seen recently by students, billboard advertisements constituted 46%, whereas advertisements through posters and MTR stations were the same (42%).[86] Under this situation, a total ban may be necessary to reduce influence on students. As it is crowded everywhere in Hong Kong, a partial ban on particular areas or transports would be of no practical use. Nonetheless, the government has already left an exception to stalls of licensed hawkers or premises of retail dealers and manufacturers. As display advertising is not circulative, this exception can be said to be proportionate. Section 12 has already narrowed the impact of display advertising to a reasonable degree.

Broadcast Media

Watching television and listening to the radio are very popular leisure activities in Hong Kong. Statistics shows that there are about 1.75 million television households with about 5.69 million viewers who are aged four years or above. The percentage of households that own more than one television set and a video cassette recorder is 78% and 65% respectively.[87]

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[86] Survey by the COSH - Hong Kong Council on Smoking and Health, *Hong Kong Council on Smoking and Health Annual Report* 1994-95 (Hong Kong: HKCOAH, 1995) 27.

[87] Hong Kong Broadcasting Authority, *Report of the Broadcasting Authority September 1995 - August 1996* (Hong Kong: the Printer, 1996) p. 13.

These broadcasting media reach the homes of people of all ages and they provide entertainment, information and education. With such a wide coverage of viewers and listeners, both media are capable of exerting powerful influence on the community as a whole. This establishes the element of rationality and has resulted in the government's determination to impose a total ban on tobacco advertising in order to avoid harmful influence on teenagers. A partial ban was suggested by the tobacco industry by way of scheduled broadcast times, but it was regarded as contradictory to the governmental objective of protecting and promoting public health. This is because the government could not in reality prevent children from watching television or listening to radio at late time slots. It is regarded as inadequate to place the responsibility solely on their parents. However, despite this total ban on broadcasting tobacco advertising, people can still perceive tobacco brand names indirectly from such media through the broadcast of sponsored events. Thus, the proportionality of section 13 highly depends on the exception provided in section 14(3), which will be considered below.

Sponsorship

Sponsorship is regarded as another way of promoting tobacco and giving respectability to the smoking habit. To the government's surprise, it has proved to be an effective means of promoting products. The tobacco companies can have the direct benefits of advertising through attendance and live coverage as well as indirect advantages by replaying in highlights, news reports, or reproducing in newspaper articles, magazines and radio coverage. The degree of coverage is also high. For example, in the television coverage of the R.J. Reynolds's *Winston* Cup racing series, the *Winston* logo on cars and billboards was shown for over 11 hours, which is equivalent to the spending of $15.5 million in television advertising.[88] In addition, as the recipients of funds usually express gratitude for the beneficence of the tobacco company as a donor, the company's good will is enhanced. It is common for tobacco companies to treat adolescents as the target group of most sponsored events.[89] The purpose of sponsorship is thus to remind these potential consumers the existence of the brand and to reinforce public awareness of the brand name. Two kinds of sponsorship are most popular, namely those of sports and cultural events. Sports sponsorship links

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[88] Hong Kong Council on Smoking and Health, *1996 Conference on Smoking and Health: Smoking and Health 2000 Conference Proceedings* (Hong Kong: HKCOSH, 1996) p. 40.

[89] There is evidence from Australia that children's cigarette brand preferences are more heavily concentrated than adult's preferences on the brand which is most frequently promoted by sponsorship on television. - *Supra* note 82, p. 174.

tobacco products to healthy images which are contrary to the real nature of the product. Tobacco companies know that many youngsters reject smoking because of the fear of impairing their athletic achievement. Therefore, these companies are willing to spend over $100 million per year to promote tobacco products with sports sponsorship which seems to play a role in overcoming such a hurdle.[90] In particular, sponsorship is most powerful when it relates the brand with sports participants, who are the idols of the teenagers, for example, a popular poster of Michael Jordan, the star of Chicago Bulls basketball team, features him flying towards the basket. Another focus of the same poster is a *Winston* advertisement hanging prominently from the stadium ceiling.[91] Cultural events are also popular for sponsorship. They can be further divided into art sponsorship and mass cultural sponsorship. Unlike sports sponsorship, arts sponsorship does not provide much television exposure but prestige and respectability.[92] These events are also cheaper and receive fewer restrictions than sponsoring sports. Tobacco companies become the patrons of orchestras, theatres, opera, ballet and singers. Mass cultural events are another popular area for cultural sponsorship. This includes sponsorship of discos and pop groups which are especially attractive to children and teenagers. Needless to say, this type of sponsorship is used for impressing the young.

The reason for a call for a total ban on tobacco sponsorship is the impact on children and teenagers. Notwithstanding whether they are smokers or not, they are willing to participate in tobacco-sponsored activities.[93] Examples of popular sponsored events are *Salem* Tennis, *Marlboro* Car Racing, *Mild Seven* Music Festival and *Kent* Christmas Eve Movies. The study of the *Marlboro* sponsored racing vehicles said that, 'This repeated exposure, even for relatively short periods, of the name or logo is likely to have a significant impact on the viewer's subsequent responses to it.'[94] Teenagers who are not yet mature would be subject to such influence. Tobacco brand and advertisement recall is heightened among them after viewing sponsored events.[95] The Hong Kong government noticed this problem and originally intended to ban tobacco advertising altogether,

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90 *Supra* note 83, p. 28.

91 *Ibid*

92 Hong Kong television channels seldom broadcast art events because they are comparatively less popular.

93 The percentage of ever-smokers and never-smokers who have watched or participated in cigarette sponsored activities are 62% and 52% respectively. HKCOSH, *Hong Kong Council on Smoking and Health Annual Report 1994-95* (Hong Kong: HKCOSH, 1995) p. 29.

94 *Supra* note 63, p. 278.

95 Ledwith F., "Does tobacco sports sponsorship act as advertising to children?" (1984) 43 *Health Education Journal*, 85-89.

including sponsorship. Considering the impact of sponsorship, it seems that such a ban has a rational connection with the objective of reducing consumption. But sponsorship is different from direct advertising on printed and broadcasting media since it is difficult to prove that people are under direct influence of such advertising. Participants in sponsored events do not necessarily support the brand and may not purchase tobacco products. The government can at most prove that there is a possibility to cast an influence on teenagers' attitude towards tobacco products.

The proposed ban on sponsorship may not be proportional either. This may be due to the concern over the economic importance of tobacco sponsorship. As a result of the ban on regular advertising, tobacco companies may be willing to spend more money on sponsorship which enables them to out-bid other competitors. Sports and cultural organisations often would be unable to resist such offers. Without their huge sponsorship, Hong Kong would not have so many high-profile international activities like the *Viceroy* Cup and the *Salem* Tennis Tournament which provide opportunities for people to meet some well-known sport stars. Consequently, the government allows tobacco sponsorship in the new *Ordinance*.

As mentioned, the impact of sponsorship was accelerated by section 14(3) because tobacco brand names in sponsored events can appear on the screen and publication, provided that no valuable consideration is given. Guidelines for interpreting 'accidental and incidental' advertisement is not given in the *Ordinance* which may be manipulated by the tobacco companies in promoting their products through sponsorship and film characters etc. For example, it is common to have tobacco brand names on the racing cars which render accidental advertising inevitable. In this case, this section is proportionate since the absence of this exception would make the report of sponsored events impossible. Yet, the application of section 14(3) would affect the effectiveness of other sections. Accidental coverage of sponsored events may occur on billboards, posters, magazine, radio and television. As a result, the direct ban on these media under section 11, 12 and 13 would be greatly weakened.

Film and Internet

Similar to sponsorship, the use of cigarettes by characters in films falls into the category of 'accidental or incidental' advertising, provided that no direct or indirect benefit is received by the movie-makers. As watching movies is one of the most favourite leisure activities among teenagers, this becomes another loophole for promoting tobacco products aimed at them. Several tobacco brands can be easily found in well-known movies, including

those produced for children. For example, Philip Morris's *Marlboro* has its brand exposed when Lois Lane chain-smokes in the film 'Superman II'. Similarly, Walt Disney's 'Who framed Roger Rabbit' features *Lucky Strike* and *Camel* cigarettes.[96] A rational connection between the ban and government objective is difficult to establish because this kind of promotional techniques is much more implicit than that of sponsorship. It would be quite remote to prove that the viewing of tobacco brand names can increase consumption. It is also argued by the tobacco industry that such an exemption for films should not be narrowed since the freedom of expression in creating films would be seriously affected. Section 13A could be considered as out of proportion.

The Internet is a new area of restriction. Again, the reason for imposing such restrictions is the increasing use of the Internet among the young. Information of a different nature can enter into the international network without censorship by any authorised authority. In Hong Kong, users enjoy almost complete freedom to post and to retrieve any information they wish. Government censorship is practically impossible with over 100 licensed Internet Service Providers. In April 1998, the Hong Kong Internet Service Providers Association (HKISPA) adopted a voluntary *Code of Practice* which provides that members who adopt the *Code* will not knowingly host any illegal content or facilitate any illegal activities, and will make reasonable efforts to investigate any legitimate complaint about any illegal content or activities.[97] Notice that the *Code* is voluntary in nature, and only works with the members' cooperation. Thus, the exemption of private correspondence on the Internet provides a channel for tobacco messages to reach people easily. Even for commercial purpose, a holder of a Public Non-Exclusive Telecommunications Service Licence does not have the ability to censor tobacco advertisements from a foreign server. The rationality and proportionality of this new restriction can only be proved in the future.

Sampling of Tobacco Products

The sampling of cigarettes is always accompanied by other products. Among the giant tobacco companies, Philip Morris is most active in using this method of promotion. One example is in 1990 to 1992 when the company packaged two packs of *Peter Jackson* cigarettes selectively with

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[96] It was public knowledge that legislation were breached by the secret money or other consideration passed between tobacco companies and film makers, e.g. Philip Morris paid US$42,500 to have Marlboro appear in 'Superman II' - *Supra* note 63, p. 285.

[97] Hong Kong Internet Service Providers Association: http://ed.twobirds.com/template/archives/news.27-8-97-2.htm.

soft drinks, key rings, brass cigarette lighters and music cassettes containing popular rock music in order to attract different types of people. Coupons for movies and concerts may sometimes be given in exchange for empty cigarette packs. This increases the exposure of tobacco brand names and generates unlimited advertising opportunities. Studies show that about 8% of students had been given free publicity cigarettes in streets, pubs, bars or karaoke lounges. In addition, about 5% of students had the experience of using empty cigarette packs in exchange for admission tickets for movies, concerts, sports competitions or other entertainment; and 6% in exchange for free gifts or discounted goods.[98]

It is argued that this kind of individual sampling of products is comparatively less influential and thus does not justify a total ban. There is little rational connection between the protection of public health and the sampling of goods. However, the exchange for other goods and coupons with empty cigarette packs may greatly encourage teenagers to smoke especially when the coupons are for popular events. The cigarette brand names and logos on non-tobacco goods were also perceived as tobacco advertisements by many students.[99] On the point of proportionality, section 15A, which makes it a criminal offence to give duty free tobacco gifts and other tobacco products would be out of proportion to achieving public health protection. Adults are unlikely to take up smoking or smoke more merely by receiving a free packet of cigarettes.

Tobacco-branded Items

By diversifying their businesses, tobacco companies can attach their brand names to non-tobacco products. This generates increased exposure for the names and results in unrestricted advertising opportunities. The new *Ordinance* allows a designated range of non-tobacco products carrying tobacco brand names. Well known examples include *Cartier* and *Dunhill* toiletries, jewellery, leather goods and stationery; *Yves St Laurent* perfumes and fashions; the *Alpine* diary; and the *St Moritz* mail-order fashion catalogues. Apart from selling luxury tobacco-branded goods, tobacco companies extended indirect advertising into areas of leisure and entertainment. R.J. Reynolds has been cooperating with musical organisations like Polygram to produce compact discs and musical videos

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98 Survey by the COSH - Hong Kong Council on Smoking and Health, *Hong Kong Council on Smoking and Health Annual Report* 1994-95 (Hong Kong: HKCOSH, 1995) p. 27.

99 *Ibid.* Survey by the COSH show that tobacco advertisements were seen recently on many goods by the students: lighters (50%), ashtrays (37%), T-shirts (28%), compact discs (26%), hats (21%), jeans (18%), pens (15%) etc.

known as *Marlboro* Red Hot Hits. Several popular pop singers appeared on the screen indirectly promoting the tobacco brand name. Philip Morris also arranges *Salem* Holiday which associates with overseas tours.

There is a call for banning this kind of indirect advertising. But despite the impact of popular singers, it is difficult to find any causal connection between the objective of public health protection and the use of tobacco brand names on non-tobacco products. There is no direct evidence to show that the selling of tobacco-branded items increases consumption. If this kind of advertising is banned, the goodwill of tobacco brand names will be destroyed and it is against the free market policy to prohibit the diversification of business. In fact, brand diversification is a legitimate marketing technique in all industries which enables companies to strengthen their business in different product areas. Tobacco companies can shift their focus from solely promoting tobacco products to other products and business. This does no harm to the issue of public health. Therefore, it is justified to exclude tobacco-branded items as a kind of tobacco advertising under s. 14(2)(i), but s. 15A(g) which prohibits the giving of tobacco-branded items is out of proportion.

Imposition of Warnings

The imposition of health warnings on tobacco packages and advertisements is the main element of the smoking control policy since it is the means of promoting public health and increasing public awareness of the risks of smoking. Studies show that frequent text changing in a rotational system of health warning is useful to increase awareness.[100] An effective warning should be visible, understandable, believable and easily recalled by smokers.[101] The present warnings are simple enough for public understanding but it has been suggested that it would be more authoritative if they are issued on behalf of the 'Medical Society' instead of 'The Hong Kong Government', because doctors' advice is more persuasive.[102] Moreover, the Hong Kong Council on Smoking and Health suggests

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100 Borland R., Naccarella L, Hill D., "Public Response to the 1988 Quit Campaign: the 1988 Household Survey" at *Victorian Smoking and Health Programme. Quit Evaluation Studies No.4, 1988.*(Melbourne: Victorian Smoking and Health Programme, 1990) pp. 30-55.

101 Fischer, P.M., Krugman, D.M., Fletcher, J.E., Fox, R.J. and Rojas, T.H. "An Evaluation of Health Warnings in Cigarette Advertisements using Standard Market Research Methods: What Does it Mean to Warn?" 1 (1993) *Tobacco Control*, pp. 279-285.

102 Hong Kong Legislative Council, *Hong Kong Hansard* (Hong Kong: the Government Printer, 19th March 1986) 814 from the speech of Mr. Lee Yu-tai.

expanding the panel of warning in the advertisement, a move which has received strong opposition from the tobacco industry.[103]

It is true that the imposition of warnings can increase public awareness on the hazardous nature of smoking but a rational connection between the imposition and the aim of reducing consumption is difficult to establish. As Mr. Justice Brossard said, "... even in the absence of evidence from impact studies, the rationality of not allowing the attribution of negative messages is sufficiently established... I recognise only of a possibility, not of a probability (for the imposition of warning to discourage consumption)..."[104] Although the rational connection is weak, the imposition of warnings does not impair the freedom of expression. It only covers part of the advertisement area, and does not exclude the rights of tobacco companies to advertise. Thus, the requirement of including warnings is a kind of positive restriction and is within the proportionality test.

VII. Conclusion

It is possible to reach a compromise between a total ban and the right to freedom of expression. Without tobacco advertising, the public can still freely choose between good health and cigarettes. There is no prohibition on selling and importing tobacco and free enterprise in this area is still allowed. The main problem is that a total ban would be too strict for society to bear. It seems unfair to eliminate the right of manufacturers to advertise their product while the sale of tobacco is allowed. To the extent that the supporting purpose of public health protection is to protect youngsters from inducements to smoke, a total ban on tobacco advertising goes beyond that purpose. Likewise, if the purpose is to reduce consumption, a total ban in all advertising is also out of proportion since there is no constructive evidence proving the element of necessity. Therefore, despite the public support, a total ban on tobacco advertising in general does not justify limiting freedom of expression under article 16.[105]

If the test of RJR-MacDonald is followed, a partial ban would be more justifiable then a total ban. The test of rationality and proportionality would only justify section 12 concerning the ban on display advertising and the imposition of health warnings. As discussed above, the advertising ban on

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103 Tobacco Institute of Hong Kong Ltd., *Anti-smoking Suggestion by the HKCOSH* (Hong Kong: the Institute, 1984) p. 3.

104 *RJR-MacDonald Inc. v. AG of Canada* (1995) 127 DLR (4th) 1 (SCC).

105 Studies shows that about 50% of respondents supported a total ban on all forms of tobacco advertising - Hong Kong Council on Smoking and Health, *Public Opinion on Banning of Tobacco Advertisements and Sponsorship 1995* (Hong Kong: HKCOSH, 1996) pp. 2-3.

printed media under section 11 would arouse the issue of inequality between local and foreign publications. In addition, the application of section 14(3) would make sections 11, 12 and 13 unable to operate to their greatest effectiveness. Therefore, it is not effective for the government to make an advertising ban on printed and broadcasting media but leave an exception for 'accidental and incidental' advertising in sponsorship and film. It is better not to make an outright ban but concentrate on controlling the content or form of advertising. For example, the government could ban lifestyle advertising only. This however requires clear guidelines for the tobacco companies to follow, and for censorship by the Hong Kong Broadcasting Authority. Apart from directing advertising, sections concerning tobacco advertising through film, Internet, sampling of products and tobacco-branded items are unnecessary. The reason is that there is no clear evidence showing a rational relationship between such activities and the increased consumption. Before receiving new challenges in the Ordinance, the government should prepare more evidence to prove rationality and proportionality since it carries the burden of proof under Article 16.

THE IMPACT OF HONG KONG'S TRANSFER OF SOVEREIGNTY ON THE ENFORCEMENT OF ARBITRAL AWARDS

香港主權移交對執行仲裁判決的影響

RICHARD S. GRAMS*

Hong Kong's economic success is largely contributed by the world class legal system of which arbitration regime forms an integral part. The readily enforceability of arbitral awards in international level make arbitration a preferred method of resolving cross-border commercial disputes than court judgements. However, the transfer of sovereignty from United Kingdom to People's Republic of China ("PRC") creates a legal lacuna in the arbitration regime due to the divergent practices in Hong Kong and PRC. The uncertainties about enforcement of arbitral awards will negatively affect commercial confidence. This article explores the extent of the impact of the transfer of sovereignty on the enforcement of arbitral awards.

In early years, arbitration regime remained unsophisticated. It evolved gradually in the pre-1997 period, with the establishment of Hong Kong International Arbitration Centre, adoption of Model Law and amendment of the Arbitration Ordinance. The domestic awards can be enforced by summary procedure or by a common law action Hong Kong courts, in general, favour enforcement of arbitral awards. Overseas award will either be treated as Convention awards or Foreign awards. The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 ("the Convention") provides international standards for enforcement of awards overseas. These awards can also be enforced summarily or through an action on the award. However, the application of the Convention is subject to reciprocity. PRC has made attempts to bring its arbitration regime in line with international standards. Three separate enforcement regimes govern domestic, foreign-related and foreign awards. Disputes are usually settled in accordance with domestic arbitration law. The Convention is limited by the reciprocity and commercial reservations. The international arbitral award enforcement regime is thus far from satisfactory.

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* The author wishes to acknowledge the generous assistance of Katherine Lynch whose supervision of this project combined with encouragement and invaluable advice throughout the many drafts.

After the handover, the Convention no longer applies in relation to the cross-border enforcement of arbitral awards across the Hong Kong-PRC border. However, the parties can still enforce PRC awards by bringing a common law action. Enforcement of HK awards in other parts of the PRC is more difficult. The PRC judiciary, who will be adjudicating HK awards as domestic awards, has little experience dealing with awards not made in by the domestic arbitration tribunals. The second problem is conflict of reservations. Some Convention awards might not be enforceable in HKSAR if commercial reservation is held to apply. The imposition of the commercial reservation would negatively affect laissez faire in Hong Kong.

The author has provided possible solutions in this article. The Central People's Government can issue a declaration to the United Nations depository, stating that the Convention would apply to the enforcement of HK awards as though they were non-domestic awards. However, the inherent defect of suggesting a relaxation of the PRC's exercise of sovereignty over Hong Kong undermines the effectiveness of the declaration. Also, a declaration concerning the conflict of reservations may contravene Basic Law Articles 8 and 153. A second possible solution is the issuing of a Memorandum of Understanding which states the reservation(s) to be applied to awards in Hong Kong. Thirdly, both HKSAR and PRC make new law to treat other's awards as non-domestic awards. The parties themselves should consider stipulating an alternative third Contracting state to conduct the arbitration to ensure that their award will be enforceable under the terms of the Convention.

The author submits that it is urgent that some combination of the above approaches be taken as soon as possible. Otherwise, HKSAR's status as a regional commercial and arbitration centre will be diminished.

在香港主權移交前，仲裁個案與日俱增。然而，於九七年後，中國與香港法律的不同使執行上產生了困難。這些有關執行的疑問對商界信心造成負面的影響。

仲裁判決的執行對香港十分重要。香港的仲裁制度在九七年前已漸趨成熟。香港國際仲裁中心的成立及仲裁條例的修訂有助其發展。普遍來說，本港法庭較傾向執行仲裁判決。本地仲裁判決可透過簡易程序或普通法訴訟執行。而海外的仲裁判決則會被視爲「公約判決」及「外地判決」。公約本身已提供執行海外仲裁判決的國際標準。然而，公約的施行會因應「互惠待遇」而有所保留。

中華人民共和國努力改善其仲裁制度，以達至國際水平。執行制度就以「本地」、「外國相關」及「外國」區分。大多數的糾紛按本地仲裁法解決。而<紐約公約>的應用則受制於互惠待遇及商業限制。國際仲

裁判決的執行因此仍未臻完善。

主權移交以後，公約不再適用於中港關係。在香港，當事人可透過普通法執行中華人民共和國的裁決。然而，在中國執行香港的仲裁判決則比較困難。中國司法部缺少經驗處理非當地機關裁定的本地裁決。此外，關於不同限制間的矛盾，若商業限制適用於香港，有些公約裁決便不予執行。這對本港的自由貿易有負面的影響。

作者於本文提供了一些可行的解決方法。中國政府可發出聲明，視香港的裁決爲非本地裁決；亦即是說公約會適用於香港的裁決。然而，這亦暗示中國對香港的主權行使有所放寬。而一個關於限制衝突的聲明亦有可能抵觸 <基本法>第八及一五三條。此外，亦可透過備忘錄，定明哪種對仲裁的限制在香港特區適用。再者，香港特區政府及中華人民共和國政府可制度新法，視對方的仲裁判決爲非本地裁決。雙方當事人可指定一個第三國家去進行仲裁，以確保裁決可根據公約執行。

作者認爲以上可行的解決辦法應盡快實行。否則，香港作爲地區性的商業中心的地位將會受到影響。

I. Introduction

It has been suggested that an effective system for resolving commercial disputes is a prerequisite for economic prosperity wherever the free flow of capital is permitted.[1] The global movement of capital requires the certainty which can only be established by an effective and reliable mechanism for resolving disputes and enforcing the outcomes. A case in point is Hong Kong, a tiny outcrop on the southern coast of China, which was previously a British colony. Amazingly, in just over forty years, with virtually no natural resources and stiff competition from the West, Hong Kong went from a backwater-cum-trading post to a regional economic powerhouse, becoming the third largest financial centre in the world after New York and London.

There are many reasons for Hong Kong's economic success but undeniably, one crucial factor has been its world class legal system. Hong Kong's modern and efficient system of courts and arbitration regime has

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[1] Ghai, Y., "The Rule of Law and Capitalism: Reflections on the Basic Law" in Wacks, R. (Ed) *China, Hong Kong and 1997: Essays in Legal Theory* (Hong Kong University Press, Hong Kong, 1993) p. 344; Friedman, M., "Free Markets and Free Men" from Chinese University of Hong Kong *25th Anniversary Lecture Series* (1990) p. 61.

inspired the necessary confidence to attract capital to the Asia Pacific region.[2] The modernization of Hong Kong's dispute resolution system has closely followed developments in financial centres elsewhere, giving Hong Kong one of the most progressive arbitration and arbitral enforcement regimes in the world. For instance, fairly recent changes made to Hong Kong's *Arbitration Ordinance* (Cap. 341) provides a dual system for the regulation of domestic and international arbitration where the parties are free to choose between the two. Collectively, these changes reflect a global trend towards greater party autonomy and make arbitral awards more final. Since arbitral awards are more readily enforceable internationally than court judgements, it has become a preferred method of resolving cross-border commercial disputes.[3] In the twilight years of British rule, from the mid-1980's to 1 July 1997, Hong Kong's international trade, shipping and construction industries steadily increased in the use of arbitration and the enforcement of arbitral awards.[4] This activity was predominantly focused in Hong Kong but in the wake of reforms in the People's Republic of China ("PRC"), activity was also diverted there.

However, on 1 July 1997, the United Kingdom restored sovereignty over Hong Kong to the PRC. The handover was accompanied by profound changes to Hong Kong's constitutional and political system. Hong Kong's transition from a British colony to a Special Administrative Region ("SAR") was complicated by the fact that the principal blueprints for the transfer of sovereignty, the *Joint Declaration*[5] and the *Basic Law*,[6] provided only a bare framework, leaving many of the detailed arrangements to be worked out between the Hong Kong government and the Central People Government of the PRC.

The constitutional and legal difficulties which have surfaced since the

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2 Arbitration is a method of dispute resolution by which two or more parties refer a dispute regarding their respective rights and obligations to an arbitrator or panel of arbitrators for determination in a judicial manner. The determination of the dispute is rendered in the form of an arbitral award which is intended to be binding on the parties and can be enforced through judicial means in the same way as any judicial order.

3 Lloyd-Williams, M., "International Arbitration: The Impact of 1997" (December 1996) Hong Kong Lawyer p. 40, at p. 41.

4 Caldwell, P., "Asia's Arbitration Centre" (December 1996) Hong Kong Lawyer p. 37.

5 *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*, signed on 19 December 1984. [hereinafter "*Joint Declaration*"]

6 *Basic Law* of the Hong Kong Special Administrative Region adopted by the Seventh National People's Congress of the PRC on 4 April 1990.

handover[7] are understandable given the fact that Hong Kong's handover represents an experimental attempt to graft a territory with its own liberal constitutional government and capitalist economy, operating in accordance with the rule of law, onto a communist state with a command-based economy and a developing legal system[8] which has been inimical to the rule of law. However, whether due to oversight or indifference, numerous lacunae in the interpretation and application of Hong Kong law have emerged from the transitional period following the handover.

One gap in the law is generating serious practical implications for the continuity of cross-border enforcement of arbitral awards. The return of Hong Kong to the PRC means that some arbitral awards will no longer be enforceable on either side of the Hong Kong-PRC border in the same manner as before the handover. This problem has been compounded by fears within the international business community that the transfer of sovereignty has brought such extensive changes to Hong Kong's legal system and arbitration system which will no longer enforce any arbitral awards in Hong Kong. Given the huge volume of two-way PRC trade and investment coordinated through Hong Kong and the growing tendency of parties to rely on arbitration, the cross-border enforceability of arbitral awards[9] has become a vital institution which underpins commercial confidence. As such, it is impossible to overstate the significance of any problem which threatens the continuity of this institution. Virtually any party with trade or investment interests in Hong Kong or the mainland PRC may be affected by some aspects of this problem.

The purpose of this dissertation is twofold: to promote a clearer understanding of how the transfer of sovereignty has adversely impacted mutual cross-border (i.e. Hong Kong–PRC) enforcement of arbitral awards made in Hong Kong and the PRC ("Hong Kong/PRC awards") and to offer

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7 *HKSAR v Ma Wai-kwan, David, Chan Kok-wai, Donny and Tam Kim-yuen* [1997] 2 HKC 315; "Looking beyond 2007", *South China Morning Post*, 14 May 1998; "Slow steps along direct path", *South China Morning Post*, 16 May 1998; "The struggle for power", *South China Morning Post*, 14 June 1998; "Executive branch stands at crucial crossroads", *South China Morning Post*, 12 July 1998; "Restrictions will clip Legco's Wings", *South China Morning Post*, 17 July 1998; "Constitutional balance", *South China Morning Post*, 18 July 1998.

8 The legal system of PRC follows the civil law tradition rather than the common law model.

9 The problem is particularly important to the arbitral awards between HKSAR and the mainland PRC.

practical recommendations[10] to parties who may potentially become involved in arbitration or enforcement proceedings connected with either Hong Kong or the PRC.

The first part of this dissertation provides a framework of reference for the problem, by explaining the historical background of the handover and identifying some of the more salient legal implications accompanied by the resumption of sovereignty by the PRC. Secondly, an attempt will be made to describe the pre-handover system for recognizing and enforcing arbitral awards in Hong Kong and the mainland PRC. Following this is an analysis of the problem caused by the handover on the enforcement regimes in Hong Kong and the mainland PRC, together with a list of suggested measures for parties affected or will potentially be affected to minimize the impacts of the problem.

II. The Transfer of Soverignty

At midnight on 30 June 1997, 145 years of British rule over Hong Kong came to an end and sovereignty over Hong Kong was restored to the PRC.[11] British colonial rule had brought an effective legal system based on the English common law model, efficient administration and a nearly-representative liberal constitutional government. Not only is the reintegration of Hong Kong with the PRC's legal, political and economic system extraordinary but the fact that the transfer of sovereignty has left intact much of what existed before the handover.

The starting point for understanding the transfer of sovereignty and its impact on the legal and constitutional framework of Hong Kong is the *Joint Declaration*. Signed by the PRC and United Kingdom governments in 1984 and carrying the status of a binding international treaty, the *Joint Declaration* set out the 'first principles' on which subsequent arrangements concerning the handover were framed and implemented. The relevant provisions are: (1) Hong Kong will become a Special Administrative Region of the PRC;[12] (2)

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10 This dissertation is intended to provide an overview of certain aspects of the continuing cross-border recognition and enforceability of arbitral awards. It does not purport to be comprehensive nor should it be construed as a substitute for legal advice for parties seeking guidance on such matters. Parties contemplating arbitration or the enforcement of an arbitral award in Hong Kong are urged to seek competent legal advice.

11 A detailed discussion of Hong Kong's history is outside the scope of this paper however a fascinating account of Hong Kong's legal and constitutional history may be found in Wesley-Smith, P., *Constitutional and Administrative Law in Hong Kong*, (Hong Kong: Longman, 1995) Chapter 2.

12 Article 3(1), *Joing Declaration.*

the Hong Kong SAR will enjoy a "high degree of autonomy" except over foreign and defense affairs;[13] (3) laws previously in place will remain basically unchanged;[14] (4) the constitutional, legal and economic arrangements will remain in place for 50 years from the handover;[15] (5) a Sino-British Joint Liaison Group[16] constituted by delegations from both governments, was commissioned to consult each other and make recommendations on matters to facilitate a smooth transition in the lead up to and following the transfer of sovereignty.[17]

From these provisions, it seems that Hong Kong's government and legal system established by United Kingdom will remain intact, notwithstanding the change of sovereignty. However, we shall see the changes by closer examination of the *Basic Law*, which implements the spirit of the *Joint Declaration.* As a foundation document rooted in international law, the *Joint Declaration* forms an integral part of Hong Kong's new constitutional framework. Pursuant to Article 3(12), the principles of the *Joint Declaration* were subsequently enshrined and articulated in the *Basic Law* which was drafted and adopted by the PRC government in 1990. Authority for the *Basic Law* may be found in Article 31 of the *Constitution of the PRC.* In effect, the *Basic Law* is the 'mini-constitution' of the Hong Kong SAR.

The transfer of sovereignty over Hong Kong has virtually affected every facet of relations between Hong Kong and the PRC and the effects of this transition are only now becoming clear. The remainder of this paper will show that the transfer of sovereignty has created a legal vacuum in Hong Kong-PRC cross-border arbitral enforcement arrangements. Given the staggering volume of two-way PRC trade and investment conducted through Hong Kong and the growing tendency of parties to rely on arbitration and enforcement apparatus on disputes involving both sides of the SAR border, this legal vacuum may prove to be the most intractable legacy of the handover.

III. Enforcement of Arbitral Awards before the Handover

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13 *Ibid,* Article 3(2).

14 *Ibid,* Article 3(4).

15 *Ibid,* Article 3(12).

16 Hereinafter known as "JLG".

17 See *supra* note 12, Article 5.

A. Hong Kong's Arbitration Ordinance

Despite the uncertainties surrounding Hong Kong's political and economic future after the handover, the territory experienced unprecedented economic growth over the past 15 years. Since the end of World War II, Hong Kong has been primarily an entrepôt economy, serving as a conduit for an estimated US$18 billion annual flow in trade and investment with the PRC and other countries in the region.[18] Although Hong Kong's strategic geographical location and its ideal harbour facilities account for some of the cross-border trade, they are insufficient to account for Hong Kong's rise to become the third largest financial exchange centre in the world.[19] A more complete explanation for Hong Kong's status as an economic powerhouse is that during the period of unprecedented growth in Asia, Hong Kong offered the most appealing combination of 'soft infrastructure' in the region: a modern banking system; an efficient securities exchange; all of which are carefully regulated by a relatively clean and non-interventionist[20] administration operating in the context of a legal system which recognised and respected property rights.

International trade and investment conducted in the scale found in Hong Kong cannot exist without this soft infrastructure because in a free market, capital moves predominantly in the direction of the greatest anticipated returns[21] which is almost invariably where the highest degree of certainty may be found. Hong Kong has prospered because its legal system has evolved to cope with disputes arising from the massive number of local and international commercial transactions which are conducted within and across its border. It is submitted that Hong Kong's rise as an arbitration and enforcement centre is more than just a coincidence with its development as an international commercial centre–there is a causal relationship between the two. The development of an effective arbitration regime in Hong Kong has been a key factor in the territory's economic transformation because it has lent credence to the certainty and finality of Hong Kong's dispute resolution system. In turn, this has helped to sustain a predictable business climate.[22]

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18 Gilpin, D., "The Harvard Prophecy" (1996) 12 Hong Kong Business (No.5) p. 26.

19 Davies, K., The Economist Intelligence Unit, "Hong Kong to 1994: A Question of Confidence" Special Report No.2022, (1994) The Economist p. 13.

20 The most recent efforts by Hong Kong's financial authorities to deal with the Asian economic crisis suggest that the government's time-honoured policy of 'positive non-interventionism may by changing.

21 Friedman, M., see *supra* note 1, p. 66.

22 By the same token, the sophisticated demands of trade and investment interests have provided the impetus for developing Hong Kong's arbitration system. Without these interests, there would have been no need for a world class arbitration regime.

With more international capital and trade heading towards Hong Kong, there is a need for a world class arbitration system because many jurisdictions in the world still subscribe to a territorial approach which is hostile to the enforcement of foreign judgements, but yet adopts a more modern and universal approach to recognizing and enforcing arbitral awards. Arbitration has become the dispute resolution method of choice for cross-border transactions chiefly because arbitral awards are more widely enforceable and this lends itself to greater commercial certainty.

The *Arbitration Ordinance*[23] was originally promulgated in 1963.[24] However, until the more recent round of amendments to the *Ordinance*, Hong Kong's arbitration regime remained relatively unsophisticated and inspired little confidence. Arbitration was easily derailed by litigation, proceedings were straight-jacketed by archaic rules and the awards were often unenforceable. Without an officially-recognized arbitral institution to facilitate and supervise self-regulated arbitration, parties had no choice but to appoint their own tribunals to conduct arbitration on an ad hoc basis. The main problem was that disputes frequently arose over the procedural rules to be agreed upon, which escalated costs and sometimes parties even refused to participate in the proceedings. The *Ordinance* itself provided for an irregular patchwork of arbitration rules; it accorded arbitration tribunals with very limited powers, as well as afforded limited recognition and enforcement of arbitral awards made outside Hong Kong.[25] Limited tribunal powers, judicial interference with arbitral awards were so common and triumphant parties often found themselves deprived of the finality of their awards regardless of what had been agreed in their arbitration agreements.

The development of Hong Kong's arbitration regime prior to the handover showed a gradual process of evolution which kept pace with the steady increase in the volume and sophistication of arbitration conducted in the Territory.[26] Successive amendments to the *Arbitration Ordinance* and other legislation related to arbitration from the 1970's to the 1990's mirrored

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23 Cap. 341 of the Laws of Hong Kong. [hereinafter "*the Ordinance*"]

24 The original *Arbitration Ordinance* was based on the *English Arbitration Act* of 1950.

25 Kaplan, N., Spruce, J. & Moser, M.J., *Hong Kong and China Arbitration Cases and Materials*, (Hong Kong: Butterworths Asia, 1994) p. 221.

26 See *supra* note 6, and Morgan, R.J.M., "The Transition of Sovereignty To The People's Republic of China and The Arbitration Regime In Hong Kong: The Issues And Their Management" in (1997) 12 *Mealy's Arbitration Report* (No. 5) p. 17 and footnote 5.

changes in United Kingdom and elsewhere: the adoption of the *Convention*[27] and the *UNCITRAL Model Law*[28] and meaningful procedural reform.

In 1985, the Hong Kong International Arbitration Center[29] was established,[30] making institutional arbitration possible for the first time. Apart from facilitating the training and registration of arbitrators, parties are provided with the option of taking their disputes to the HKIAC for arbitration, as an alternative to an ad hoc tribunal. HKIAC arbitration services have afforded greater certainty and confidence in achieving a binding determination of disputes than had been the case previously when parties had to appoint arbitrators on their own.

The adoption of the *Model Law* in 1990[31] is regarded as the most significant reform in Hong Kong's arbitration regime[32] chiefly because it provided arbitrators with a reliable and internationally-recognized framework for conducting arbitration proceedings in Hong Kong under any international arbitration agreement.[33] It also gave the widest possible scope to the meaning of international arbitration. As Morgan points out,[34] section 34C(2) of the 1990 amendment stipulates that Article 1(1) of *Model Law* would not limit its application in Hong Kong to international arbitration of a commercial nature only. As a result, the *Model Law* applies to any arbitration with a foreign element conducted in Hong Kong as long as it satisfies the definition of 'international' set out in Article 1(3) of *Model Law*. This laissez-faire approach to international arbitration proved to be a boon to the HKIAC and to Hong Kong's reputation as an international arbitration centre. Within two years after the 1990 amendment was put into force, the HKIAC saw a four-fold increase in arbitration cases.[35]

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27 *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958* (330 UNTS 38, No. 4739, 1959) (hereinafter "*the Convention*"). The Convention was extended by declaration to Hong Kong on 21 January 1977 but did not come into force until 21 April 1977.

28 UNCITRAL Model Law on International Commercial Arbitration. [hereinafter "Model Law"]

29 Hereinafter "the HKIAC".

30 The HKIAC was incorporated in Hong Kong as a company under the *Companies Ordinance* and limited by guarantee.

31 The *Model Law* was adopted by way of amendments to the *Arbitration Ordinance,* viz *Arbitration (Amendment) (No. 2) Ordinance*, section 20, No. 64 of 1989.

32 Morgan, R.J.M., "The English Arbitration Act 1996 and Reform of Arbitration Law in Hong Kong and Singapore: A Brave New World?" (July 1997) ADRLJ 160.

33 This is defined in section 2, *Arbitration Ordinance.*

34 Morgan, R.J.M., see *supra* note 26.

35 Even in the year which immediately followed the adoption of the *Model Law* (1990-91) the number of arbitrations conducted at the HKIAC doubled; see *supra* note 4.

It should be obvious that the 1990 amendment went beyond simply bringing together a set of internationally recognized regulations to govern international arbitration; in effect it created a dual system of domestic and international arbitration. The original significance of this dual system was that the *Model Law* would govern the conduct of international arbitration whereas domestic arbitration rules[36] would govern domestic arbitration agreements.[37]

The promulgation of the *Arbitration (Amendment) Ordinance* in 1996[38] (the "*1996 Provisions*") consolidated the *Ordinance* as a whole and further harmonized Hong Kong's arbitration regime by reconverging domestic and foreign arbitration, making it possible[39] for parties to a domestic arbitration agreement to opt out of the domestic regulations and choose to have the dispute settled through arbitration conducted under international rules instead. Conversely, parties to a domestic arbitration can expressly elect to have the *Model Law* applied instead, as provided for under section 2L of the *Ordinance*.

Taken together, the series of amendments to the *Ordinance* over the years have significantly streamlined Hong Kong's arbitration regime in two main respects. First, the new rules have given parties more autonomy and made arbitration conducted in Hong Kong more efficient and reliable. Second, the *Ordinance*, reflecting the common aims of the *Convention* and the *Model Law* of upholding the primacy of the arbitration tribunal and the finality of awards, and of limiting judicial interference in enforcement, has significantly enhanced recognition and enforcement of awards by the court, bolstering confidence in Hong Kong's reputation as an international arbitration centre.

B. Recognition and Enforcement of Arbitral Awards in Hong Kong

The making of an arbitral award or settlement agreement[40] represents only the first stage of reaching a binding settlement in a dispute. In practical terms, an arbitral award or settlement agreement cannot be enforced against an opposing party until the award has been converted into a court

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36 Set out under Part II of the *Arbitration Ordinance*.

37 This is defined in section 2.

38 No. 75 of 1996.

39 Section 2M.

40 Under section 2C of the *Ordinance*, agreements made in writing between parties to an arbitration agreement in settlement of their dispute will be treated as arbitral awards for the purpose of their enforcement.

judgement.[41] The converted award is then enforceable like any judgement.

In principle, the process of converting an arbitral award or settlement agreement into a court judgement seems relatively straightforward.[42] In situations where summary enforcement is available, the party in whose favour the award was made simply makes an application[43] to the Court of First Instance[44] ("the court") for an order[45] to enforce the award as if it was a judgement.[46] This summary procedure circumvents the formalities of trial.[47] Where summary enforcement is not available,[48] the party seeking enforcement must commence a common law action on the award, in effect retrying the issues raised in the arbitration proceedings.[49]

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41 Kaplan, N., Spruce, J. & Cheng, T.Y.W., *Hong Kong Arbitration Cases & Materials* (Hong Kong: Butterworths, 1991) p. 191.

42 In practice, however, the recognition and enforcement of arbitral awards made outside the jurisdiction in which enforcement is sought is often frustrated by judicial territorialism. With the emergence of economic globalization, a trend developed towards universal acceptance of one of the key principles of the *Model Law* and *the Convention*—judicial/arbitration regimes which are no less receptive to overseas awards than to domestic awards. More will be said about the recognition and enforcement of awards made overseas in the following section. By contrast, recognition and enforcement of awards which are made within the same jurisdiction usually present fewer difficulties.

43 The process actually involves two stages. First the party seeking enforcement makes an *ex parte* application to the court to enter judgement in the terms of the award. The other party has fourteen days following service of the court's order within which to apply for an order to set aside leave. Only after this mandatory fourteen day period has expired without application to set aside can the party seeking enforcement actually enforce the award: *Rules of Supreme Court* Order 73 rule 10; *Zhejiang Province Garment Import and Export Co. v. Siemssen & Co.(Hong Kong) Trading Ltd.* [1993] ADRLJ 183.

44 In Hong Kong, under section 2(1) of the *Ordinance* and *Rules of Supreme Court* Order 73 rule 10, jurisdiction for enforcing all arbitral awards falls to the Court of First Instance which was formerly known as the High Court.

45 *Rules of Supreme Court* Order 73.

46 The party seeking enforcement can also request that an actual judgement be made: see *supra* note 1, p. 194.

47 Kaplan, N., see *supra* note 25, p. 199 for an account of the summary enforcement procedure.

48 This happens when there is no written arbitration agreement.

49 Obviously, the principal advantage of summary enforcement is that it obviates the considerable expense and delay of retrying the original dispute between the parties but its peremptoriness leaves it open to be used as an instrument of injustice against parties which may have been deprived of justice in defending themselves in the arbitration. Therefore, most jurisdictions in which arbitration is popular have implemented sophisticated rules which restrict the circumstances under which summary enforcement may be granted.

1. Domestic awards

The principal benefits brought by the amendments to the *Arbitration Ordinance* since 1990 have been the replacement of an uneven mix of outdated statutory and common law rules governing the conduct of domestic arbitration proceedings and the recognition of domestic awards with a codified framework which is in line with the *Model Law*.

The *1996 Provisions*, in particular, dovetail a dual arbitration regime with the recognition and enforcement principles of the *Model Law* and the *Convention*.[50] The distinctions between domestic awards and overseas awards have been preserved but as mentioned previously, the so-called opting out provisions enable parties to choose whether their arbitration in Hong Kong will be governed by domestic or international[51] arbitration rules. The resulting framework is much more flexible than the one it replaced and provides a more unitary and articulate system for conducting arbitration and enforcing awards. A few of the more important reforms include restating the proposition that an arbitration agreement must be in writing in much broader terms[52] according parties more autonomy,[53] granting more and greater powers to arbitration tribunals such as powers to order security for costs[54] and the power to make binding determinations as to jurisdiction.[55] There is even an amendment which gives power to the HKIAC to appoint an arbitrator in certain circumstances, a power formerly within the exclusive jurisdiction of the court. The 1996 Provisions have also reduced the opportunities for interference with arbitration by the court and increased the support which the court may give to arbitration proceedings.[56]

Domestic awards are enforceable by way of the summary procedure[57]

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50 Those principles include upholding the primacy of the tribunal, finality of awards and limiting judicial interference.

51 Model Law.

52 Section 2AC of the *Ordinance*—e.g. where the agreement may only be evidenced in writing [section 2AC(c)], or where the parties' agreement merely refers to written terms [section 2AC(d)], etc.

53 *Arbitration Ordinance* (Cap. 341), Article 19, Schedule 5.

54 *Ibid*, section 38(3).

55 *Ibid*, section 30.

56 *Arbitration Ordinance* (Cap. 341), Section 2GC.

57 By an application made under section 2H of the *Ordinance* which, after 27 June 1997 will be replaced by section 2GG by virtue of the *Arbitration (Amendment) Ordinance* No. 75 of 1996.

or by a common law action on the award.[58] Awards made in Hong Kong under the *Model Law*[59] are enforceable in Hong Kong in the same manner.[60] The court's jurisdiction to grant leave for summary enforcement of any arbitral award is discretionary and not available as a matter of right.[61] However, because of the influence of the *Model Law* and the *Convention*, the discretion is seldom refused.[62] In general, where a leave to summarily enforce an award is refused or later revoked,[63] the party seeking enforcement must commence an action on the award. Although the *Ordinance* allows the enforcement of overseas awards in Hong Kong in essentially the same manner as domestic awards, the defences it provides against the enforcement of domestic awards are broader than those of overseas awards and Convention awards in particular.[64] The common law grounds[65] for setting aside an award only apply to domestic awards[66] whereas Convention and Foreign awards will only be set aside where the grounds under section 44(1) to (2) and section 37(1) and (2) of the *Ordinance* are made out, respectively. Naturally, the burden of proof rests with the party resisting enforcement.[67]

Through the influence of the *Convention*, the *Model Law* and international norms, Hong Kong's enforcement regime has adopted an attitude which presumes the correctness of awards[68] and is one which leans decidedly towards enforcement.[69] A party resisting enforcement or seeking leave to set aside a domestic award is not permitted to treat those proceedings

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58 *Halsbury's Laws of Hong Kong* , Vol 1, *Arbitration* [25.190] (Hong Kong: Butterworths, 1995).

59 International awards.

60 Section 2M of *Arbitration Ordinance* (Cap. 341).

61 *Standard Civil Engineering Co. v. A-G* [1986] HKLR 1142 cited in Morgan, R.J.M., *The Arbitration Ordinance of Hong Kong: A Commentary* (Hong Kong: Butterworths Asia, 1997) p. 60.

62 See *supra* note 58.

63 For instance, in the event, *inter alia*, that the defending party successfully pleads grounds for setting the award aside, such as a cross-claim or where the validity of the award is called into question of other relevant grounds set out.

64 See *supra* note 58.

65 The common law grounds for setting aside a domestic award are summarized in Kaplan, N., see *supra* note 25, pp. 194-195. Suffice to say the common law grounds for setting aside an award are broader and more numerous than those available under the Convention or (under Part III of the Ordinance) with respect to foreign awards.

66 Morgan, R.J.M., see *supra* note 61, [2H.03].

67 *China Nanhai Oil Joint Service Corp. Shenzhen Branch v. Gee Tai Holdings Co. Ltd.* [1994] 3 HKC 375.

68 *Broadgate Square plc v. Lehman Brothers Ltd.* [1995] 1 EGLR 97.

69 Following the example of the English courts, the court will not set aside leave to enforce any domestic award unless there exists real doubt as to the validity of the award: *Middlemiss and Gould v. Hartlepool Corp.* [1972] 1 WLR 1643.

as an appeal[70] and except in the most limited instances (i.e. under section 44(3) of *the Ordinance* on the grounds of public policy), the court will not enquire into the merits of any award.[71] Since the court's jurisdiction to grant leave for summary enforcement is discretionary and the Ordinance adopts a presumption in favour of enforcement, unless the party resisting enforcement is able to prove one of the grounds set out under section 44(2), the court must grant leave to enforce but even where such grounds are proven, discretion may still be exercised in favour of granting leave to enforce.[72]

2. Overseas awards

As indicated earlier, for the purpose of enforcement, the *Ordinance* distinguishes between domestic awards and international awards made in Hong Kong under the *Model Law* and awards made overseas. Overseas awards will either be treated as Convention awards[73] or as Foreign awards.[74] The two categories are mutually exclusive; according to section 2(1) of the *Ordinance*, Convention awards are awards which are made in a state or territory other than Hong Kong which is a party to the Convention[75] whereas Foreign awards will be overseas awards to which the Convention doesn't apply,[76] so by default, these will be subject to enforcement in accordance with the *League of Nations (Geneva) Protocol on Arbitration Clauses 1923* or the *Geneva Convention on the Execution of Foreign Arbitral Awards 1927.*[77] Article VII(2) of the *Convention* has the effect of displacing the Geneva provisions between states and territories which have become parties to the *Convention.* With 119 countries worldwide having ratified the

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70 *Shenzhen Nan Da Industrial and Trade United Co. Ltd. v. FM International Ltd.* [1992] 1 HKC 328.

71 *Qinhuangdao Tongda Enterprise Development Co. v. Million Basic Co. Ltd.* [1993] 1 HKLR 173.

72 *Supra* note 67.

73 Governed by Part IV of the *Ordinance.*

74 Governed by Part III of the *Ordinance.*

75 The so-called "Convention countries" or "Contracting states": Article II(1).

76 As such awards were made in a state or territory which is not a party to the *Convention.*

77 These international treaties, incorporated into the Ordinance in Schedule 1 and 2 respectively, were extended to Hong Kong by virtue of the United Kingdom's accession. [hereinafter "*Geneva Provisions*"]

Convention,[78] the *Geneva Provisions* have receded in significance making the *Ordinance*'s Part III something of a dead letter.[79] For the purpose of the current discussion and in the context of Hong Kong's role as an international arbitration centre, the *Convention* is definitely more important[80] for the remainder of this paper, discussion of awards made overseas will be confined to Convention awards.

The *Convention*[81] was adopted on 7 June 1959 but was not ratified by the United Kingdom until 1975[82] and though it was extended to Hong Kong in 1975,[83] it was not made effective in the colony (as it then was) until 21 April 1977. Prior to that date, the *Geneva Provisions* applied to the recognition and enforcement of all awards made overseas.

The *Convention* provides international uniform standards for the recognition and enforcement of awards made overseas. The overall effect on Contracting states has been to limit judicial interference, giving primacy to awards made by international arbitration tribunals, and rendering those awards final.

Although the *Convention* was supposed to apply universally to the recognition and enforcement of all international arbitral awards regardless of whether the states or territories in which awards are made are Contracting parties or not,[84] in practice most states have adopted the "reciprocity reservation"[85] subject to which enforcement of overseas awards in accordance with the *Convention* will only be possible if the state or territory in which the arbitration was conducted was itself a Contracting state. Some other Contracting states[86] also ratified the *Convention* subject to a second reservation, namely the "commercial reservation"[87] whereby an international award will only be recognized and enforced under the *Convention* if the legal relationship out of which the award arose is considered to be 'commercial'

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78 Journal of International Arbitration, April 1998 (Institute for Transnational Arbitration Treaties and the Southwestern Legal Foundation) online version at http://www.un.org/Depts/Treaty/final/ts2/newfiles/part_boo/xxii_boo/xxii_1.html

79 *Supra* note 25, p. 232.

80 Mau, S.D., "Hong Kong's Experience with the New York Convention: An Introduction" (1996) 9 Transnational Lawyer 393, 395-399, for a succinct history of these treaties and a comparison of their aims and influence on cross-border enforcement of arbitral awards.

81 *Supra* note 27.

82 *Arbitration Act* 1975.

83 By way of the *Arbitration (Amendment) Ordinance* (No. 85 of 1975) and then by a declaration made by the U.K. government on 21 January 1977.

84 This is known as the "universality principle".

85 Article I(3) and X of the *Convention*.

86 This includes PRC.

87 Article I(3) of the *Convention*.

according to the national law of the state in question. Since Hong Kong's status as a Contracting 'state' was originally by virtue of UK government's ratification of the *Convention* subject to the reciprocity reservation, in the years prior to the handover, the recognition and enforcement of awards in Hong Kong was also made on the basis of reciprocity.

Under Article III of the *Convention*[88] and subject to either or both reservations mentioned above, Contracting states agree to recognize awards which are made in other Contracting states (i.e. other than where enforcement sought) as binding, regardless of the nationality of the parties themselves, and agree to enforce them in accordance with their normal procedural rules and conditions which are no less onerous than those which would apply to the enforcement of domestic awards. In other words, paramount importance is given to the nationality of the award, rather than to the nationality of the parties. Also, by virtue of Article I(1), an award cannot be recognized or enforced as a Convention award within the same state as the award was made.[89] It is also worth pointing out that it is the date of enforcement, rather than the date on which the award is made which is relevant; thus, an award made in a Convention country will be enforceable in Hong Kong pursuant to the *Convention*[90] even if the state or territory in question had not been a Contracting state on the date which the award was made.[91]

Like domestic awards and settlement agreements, Convention awards may be enforced either summarily[92] or through an action on the award[93] depending on the circumstances in which such awards are made. Commencing an action on the award will also be necessary where the party against whom enforcement is sought is able to show why summary leave to enforce should be set aside.[94] The defences against enforcement of a domestic award are not available to a party seeking to resist enforcement of a Convention award.[95] According to section 2H,[96] 36(1) and 42(1) of the

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88 Section 42(2) of the *Ordinance*.

89 By definition, these would be enforceable in Hong Kong as domestic awards in accordance with section 2H of the *Ordinance* (now section 2GG).

90 This is done by virtue of Part IV of the *Arbitration Ordinance*.

91 *Supra* note 41, p. 206; per obiter Chan CJHC, *Hebei Import & Export Corpn v Polytek Engineering Co. Ltd* [1998] 1 HKC 197.

92 *Arbitration Ordinance* (Cap. 341) section 2H, now section 2GG.

93 *Ibid*, section 36(1) and 46(1).

94 *Supra* note 66, [2H.03].

95 *Supra* note 58.

96 Now section 2GG, see *supra* note 57.

Ordinance, the statutory summary procedure[97] is available whether the award is a Convention award or a Foreign award.

A party seeking to enforce a Convention award under the summary procedure simply makes an *ex parte* application for leave to enter judgement in terms of the award.[98] If leave is granted, the court's order will be served on the other party who will have fourteen days in which to apply for an order to set aside leave under *Rules of Supreme Court* Order 73, Rule 10(6). Unless and until the fourteen day period has expired without an application to set aside leave being made by the party on whom the order has been served, or without the court disposing of such an application, no further action to enforce the award can be taken. It is submitted that this enforcement procedure which narrowly circumscribes limits for resisting enforcement is fair for both parties because it affords parties against whom an award is being enforced with a reasonable opportunity to rightfully challenge enforcement yet it prevents injustice to the enforcing party.

As mentioned previously in relation to domestic awards, the court's jurisdiction to grant leave for summary enforcement is discretionary. However, since the *Ordinance* and case law are imbued with a strong presumption in favour of enforcement, unless the party resisting enforcement of a Convention award is able to prove one of the grounds set out under section 44(2),[99] the court must grant leave to enforce. Even where such grounds are proven, a residual discretion provided under section 44 may be exercised in favour of granting leave to enforce the award anyway.[100] Moreover, the principle that a party seeking leave to set aside a domestic award or otherwise resisting enforcement will not be permitted to treat proceedings as an appeal applies equally to Convention awards[101] and except in the most limited instances (i.e. under section 44(3) of the *Ordinance*, on the grounds of 'public policy'),[102] the court will not enquire into the merits of any award.[103]

From what has been said in the preceding paragraphs about the inapplicability of the *Convention* to awards made and brought for

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97 This is set out under section 2H of the Ordinance (now section 2GG).

98 *Rules of Supreme Court* O73 r10(1).

99 Article V(1)-(2) of the *Convention.*

100 *Supra* note 67.

101 *Supra* note 70.

102 And even then enforcement will be refused only if the court concludes that 'basic notions of morality and justice would be violated if the court were to enforce award such as where the award had been contrived through fraudulent, criminal, oppressive or unconscionable conduct: *Qinghuangdao case*, see *supra* note 67; see *supra* note 58, p. 13.

103 *Supra* note 72.

enforcement in the same state or territory,[104] it should be obvious that Hong Kong's transfer of sovereignty has undoubtedly affected its status as a Contracting state and could prevent awards made in the PRC from being recognized and enforced as Convention awards in Hong Kong and vice-versa.

C. *Arbitration and Enforcement of Arbitral Awards in the People's Republic of China*

Until 1995, China's arbitration laws were comprised of a diffuse collection of national and local statutes and occasional pronouncements of the Supreme People's Courts. In an effort to bring its arbitration regime in line with international standards, the PRC embarked on extensive reform which was carried out in two stages: in 1991 with the promulgation of the *Civil Procedure Law*[105] and in 1995, with the coming into force of the *Arbitration Law*.[106]

The provisions of the *Convention*, the *Model Law* and international norms are reflected in the *Arbitration Law* which replaced the previously fragmented system for regulating domestic and international arbitration with a more unitary one. The domestic and international arbitration and enforcement regimes remain sharply demarcated however. In effect, the new *Arbitration Law* gives rise to separate domestic and international arbitration regimes and three separate enforcement regimes[107] governing domestic, foreign-related[108] and foreign awards.[109] Reform of the PRC's arbitration machinery, as well as most of the substantive and procedural elements,[110] are dealt with in the *Arbitration Law*[111] while many of the

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104 Article I(1) of the *Convention*.

105 This was promulgated by the National People's Congress on 9 April 1991.

106 This was promulgated by the National People's Congress on 31 August 1994.

107 Tang, H.Z. & Wang, S.C., "The People's Republic of China - Updated Version" in unpublished manuscript kindly provided to the author, p. 3.

108 Foreign-related awards are awards made in the PRC but involving a "foreign element".

109 Foreign awards refer to awards made overseas but brought to the PRC for enforcement.

110 Apart from the particular regulations governing the conduct of proceedings, which are contained in the corresponding Arbitration Rules of the tribunals concerned.

111 For example, it provides for the establishment of domestic and international arbitration commissions [Chapters 2 and 7 respectively], stipulating regulations for the conduct of arbitration proceedings [Chapter 4], sets out the circumstances under which the People's Court may refuse to enforce an award [Chapter 5], the Arbitration

enforcement provisions are contained in the *Civil Procedure Law*.

1. Domestic Awards

Most disputes arising between PRC natural and legal persons[112] are settled through arbitration conducted by tribunals which are appointed by domestic arbitration commissions.[113] The domestic arbitration commissions were established[114] in twelve urban centres across the PRC soon after the *Arbitration Law* came into force. Most trade and investment disputes involving foreign elements[115] are arbitrated through CIETAC[116] while marine disputes are arbitrated through CMAC.[117] The awards made by either domestic or international tribunals[118] are enforceable just as in Hong Kong.

While PRC natural and legal persons have the right to choose between PRC domestic arbitration rules or foreign arbitration law to govern domestic arbitration proceedings,[119] it is not possible to opt out of the domestic regulations and in favour of the international regulations, as parties are free to do so in Hong Kong.[120] Moreover, the domestic arbitration tribunals serve as the exclusive forum for arbitration where only PRC natural and/or legal persons are concerned; unless parties cannot take their dispute to either of the PRC's international arbitration tribunals, CIETAC or CMAC, and neither are there provisions in PRC law for referring a domestic arbitration to an overseas tribunal.[121] Since the domestic tribunals are composed of local arbitrators with little or no direct experience in conducting proceedings according to foreign arbitration rules, it is generally more practicable for parties to a domestic arbitration to allow their dispute to be settled in

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Law also spells out the procedures for handling virtually all aspects of arbitration proceedings [Chapter 4].

112 Article 2, *General Principles of the Civil Law* of the PRC, adopted by the 6th National People's Congress on 12 April 1986.

113 Article 32, *Arbitration Law*.

114 *Ibid.*, Chapter 2.

115 For example, where the legal relationship involves a non-PRC entity or person.

116 China International Economic and Trade Arbitration Commission.

117 China Maritime Arbitration Commission; as of May 1995, local CIETAC and CMAC arbitration centres have been established in eight major urban centres in the PRC, including Shanghai and Beijing.

118 This also includes written settlement agreements: Article 49, *Arbitration Law.*

119 Article 32, *Economic Contract Law*.

120 Wang, S.C., "Practical Differences in Arbitration Procedures in China and Hong Kong", an outline of a presentation given at the International Commercial Arbitration: Asian Update Conference, 13-15 November 1997, pp. 2-3.

121 In despite of the fact that domestic awards may be taken to foreign jurisdictions for enforcement.

accordance with PRC domestic arbitration law.

2. Foreign & Foreign-Related Awards

It is important to point out that while the PRC *Arbitration Law* has obviously been influenced by the provisions of the *Model Law*, the *Model Law* itself has not been formally adopted, in respect of either the domestic or international arbitration regimes. Although the influence of the *Model Law* has brought domestic arbitration more closely in line with international norms, many differences remain, particularly in respect of enforcement procedures. For example, although all awards made in the PRC (whether by domestic tribunals or CIETAC or CMAC) are deemed to be final,[122] the PRC enforcement regimes provide much wider grounds for setting aside awards than *the Convention* permits, rendering domestic and CIETAC awards anything but final. The discrepancies between the PRC enforcement regimes and international norms have marginal impact on foreign awards per se; first because foreign awards constitute a tiny percentage of the awards for which enforcement is sought in the PRC courts[123] and second because *the Convention* applies to these adjudications. Where the discrepancies do merit concern is in the enforcement of the foreign-related awards (i.e. CIETAC and CMAC awards) both in terms of the number of cases and the dollar values which these disputes represent. These are much more numerous[124] and although they are usually voluntarily enforced by the parties themselves, they have presented special difficulties when adjudicated on.[125]

The PRC ratified the *Convention* subject to both the reciprocity and commercial reservations in 1987[126] prior to the promulgation of the *Arbitration Law*. Nevertheless, the provisions which relate to the recognition and enforcement of Convention awards were incorporated into the *Civil Procedure Law* which was promulgated in 1991 and not the

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122 Article 60, *Arbitration Law*.

123 Surprisingly, as of August 1997, only 10 foreign awards brought to PRC for enforcement since 1949: see *supra* note 104, p. 33.

124 *Ibid.* Precise statistics unavailable.

125 *Ibid.*, pp. 33-35. In fact, according to Tang, it is not unusual for the People's Intermediate Court to refuse to enforce CIETAC award, sending the case back to CIETAC for re-arbitration.

126 Pursuant to the *Decision of the Standing Committee* of the Sixth National People's Congress dated 2 December 1986.

Arbitration Law. A separate *1987 Notice* by the Supreme People's Court[127] reinforced and elaborated on these provisions.[128] The relevant provision in the *Civil Procedure Law* is Article 269, which compels the Intermediate People's Court[129] when seized of an application[130] to enforce a foreign award, to handle the application in accordance with the relevant international treaty.

In theory, this means that summary enforcement is available[131] to the party seeking enforcement and that the court must defer to the *Convention*'s provisions governing the validity of awards and grounds for refusing enforcement. However, since the PRC's accession to the *Convention* is subject to both the reciprocity and commercial reservations, it also means that recognition and enforcement of a particular award will depend on whether the award was made in another Contracting state and whether, according to the definition provided in the *1987 Notice*,[132] the legal relationship out of which the dispute and the award arose can be considered 'commercial'. In practice, proceedings in which one of the parties has made an application to set aside a Convention award[133] frequently show that the court considers the merits of the award, contrary to the aims and principles of the *Convention*.

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127 *Notice on the Implementation of China's Accession to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards,* issued by the Supreme People's Court on 10 April 1987. [hereinafter "*1987 Notice*"]

128 Stipulating in particular: a) that the Intermediate and Supreme People's Courts shall duly implement the provisions of *the Convention*; b) in the event of conflict between the provisions of the *Civil Procedure Law* and those of *the Convention*, *the Convention*'s provisions shall prevail; c) applications for enforcement shall be made pursuant to Article 269 of the *Civil Procedure Law*; d) the Intermediate People's Courts shall have exclusive jurisdiction for hearing applications to enforce Convention awards; e) "commercial" legal relationships to which the PRC's commercial reservation shall apply shall include those of a "contractual or non-contractual nature which specifically refer to relationships of economic rights and obligations arising out of contract, tort or in accordance with relevant stipulations in law".

129 Actually, the *1987 Notice* of the Supreme People's Court stipulates that the party seeking enforcement may apply to the Intermediate People's Court in the locale where the party against whom enforcement is sought lives (if that party is a natural person) or has a principal place of business (if a legal person) or where property belonging to that party is located.

130 Pursuant to Article 269 of *Civil Procedure Law.*

131 Provided however, that no application to set the award aside has been made to the court under Article 269, *Civil Procedure Law.*

132 *Supra* note 127.

133 Strictly speaking, it is inappropriate to refer to Convention awards per se in the PRC context since the term is not defined in PRC law as it is in Hong Kong law. Instead, these are referred to as "awards involving foreign elements": Chapter 2.

The difficulties in the enforcement of domestic awards, it has to be said that China's record for recognizing and enforcing Convention awards has been steadily improving. By virtue of the *1987 Notice*, applications made to the PRC courts for enforcement of overseas awards which satisfy the reciprocity and commercial reservations cannot be set aside except on the exclusive grounds set out in Part V of the *Convention*. As the PRC judiciary has acquired more experience in handling these awards, irregularities[134] have been lessened, and thus earning the confidence of the international business community. Nevertheless, problems with the enforcement regime, including corruption and direct interference by the PRC authorities, continue to be reported.[135]

Apart from these more egregious abuses of the enforcement process, it should be noted that even when due process is observed, the PRC international arbitral award enforcement regime is still far from satisfactory by international standards. In an effort to combat local protectionism and interference by local authorities, the Supreme People's Court in August 1995 issued *a directive* to all local courts requiring them to suspend proceedings on any cases[136] for which refusal of enforcement is contemplated and refer such cases to the high level People's Court for review and final ruling. It is submitted that this *directive* has given disgruntled parties an unintended appeal mechanism which is antithetical to the *Convention* and which, at the very least, poses potential for causing undue delay and injustice to the party seeking enforcement.

3. Enforcement of Domestic Awards

Discussion of the PRC domestic enforcement regime has been left to the end of this section for the sake of contrasting it with the country's system for recognizing and enforcing Convention awards. Compared with the provisions for setting aside Convention awards[137]-which take their reference from Article V of the *Convention*–domestic awards are much easier to have

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134 Irregularities were reduced at least in the main CEITAC centres in Shanghai and Beijing.

135 Accredited to Justice Ren Jianxin of the Supreme People's Court, in a *Work Report* delivered to the National Conference on Politics and Law, December 1992 cited in *supra* note 34, p. 14; Moser, M., "Michael Moser" an interview in *The New Gazette,* December 1995, pp. 32-35.

136 The directive is applicable to all awards, whether the award in question is a domestic, foreign-related (CIETAC or CMAC) or a foreign award.

137 Article 269, *Civil Procedure Law.*

set aside. Principally, that is because the grounds for refusing enforcement of a domestic award, set out in Article 217 of *Civil Procedure Law*, although modeled loosely on the *Convention*, are much wider than those provided by the *Convention*.[138] Two of the grounds provided have no equivalent in the *Convention* and are so open to subjective interpretation by the court which might invite abuse.[139] Perhaps the most alarming fact, as Morgan points out,[140] is that Article 217 does not appear to provide parties to domestic arbitration awards with any redress in the event of a breach of due process.[141]

Finally, the fundamental difference between PRC law and common law jurisdiction like Hong Kong's highlights another considerable disadvantage faced by parties seeking to enforce domestic awards in the PRC relative to parties coming to the PRC to enforce Convention awards. Hong Kong's legal system follows the common law tradition which places importance on the gradual accretion of legal precepts from the procession of cases over time in accordance with the doctrine of precedent.[142] Statutes may change overnight but legal principles tend to endure. The PRC has a socialist legal system which follows the civil code tradition which does not recognize any equivalent to the common law doctrine of precedent. As a result, despite the unmistakable influence of the *Model Law* and the *Convention* in shaping current PRC arbitration law, the common overarching principles of the *Model Law* and the *Convention*—viz, the presumption of correctness of awards, the pro-enforcement bias, upholding the primacy of the tribunal—cannot insinuate themselves indirectly on the legal system through the cases as they do, for example, in Hong Kong.[143] For parties seeking to enforce Convention awards in the PRC there is some comfort in the fact that the *1987 Notice* constrains the courts to uphold the finality of the award except where the Convention's narrow grounds for refusal are satisfied. By comparison, the courts handling applications to enforce domestic awards are under no

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138 The six grounds listed under *ibid*, Article 217.

139 Namely, that the main evidence for ascertaining the facts was insufficient (Article 217(4)), and that the law was applied incorrectly in making the award (Article 217(5)).

140 *Supra* note 34, p. 20.

141 For example, where no proper notice of the appointment of a tribunal was given or where the party was unable to present its case.

142 The doctine of precedent is also known as *stare decisis*.

143 Just a final note on this: in legal systems which have no doctrine of precedent, legal principles change with the posited law which usually takes the form of legislation. Arguably, in a country like the PRC this may leave a sense of impermanence about the law which, while perhaps administratively convenient, may ultimately work at odds with the confidence of the market and the capital which moves with it.

such obligation.

IV. Problems with Enforcement after the Transfer of Sovereignty

In the lead up to the handover, it was recognized that all of the multilateral treaties and agreements by which Hong Kong had been bound as a dependant territory of the United Kingdom would formally lapse in effect with the transfer of sovereignty to the PRC.[144] As mentioned above in Part II, under the terms of the Joint Declaration and in accordance with the PRC Constitution[145] and the Basic Law,[146] on 1 July 1997 Hong Kong became a Special Administrative Region of the PRC. In other words, it is merely a separate legal district within a unitary state and all sovereign acts now need to be exercised by the PRC government on behalf of the Hong Kong SAR.

Apart from the fact that Hong Kong is not competent to ratify the *Convention* on its own, another difficulty lies in the *Convention* itself. Article I(1) dictates that the *Convention* can only apply to the recognition and enforcement of awards which were made in a state or territory other than the one in which enforcement is sought.

From the current state of affairs vis-a-vis the application of the *Convention* to Hong Kong and the PRC, two separate but related legal problems have emerged. These will be explored before turning to a discussion of possible solutions in Part V.[147]

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144 This is because international treaties cannot apply as between different parts of the same sovereign territory. Moreover, Hong Kong cannot enter into international treaties on its own behalf because at international law, declaring an intention to be bound by international treaty requires sovereign power which Hong Kong did not and will not, after the handover, possess.

145 Article 31

146 The preamble and Article 1.

147 These problems as well as a host of others which have so far not materialized were foreseen and discussed by many, including the respective delegations to the JLG, in the lead up to the handover and in fact proposals had been put forward within the JLG. For a time prior to the handover it was believed that there was a danger that *the Convention* and the relevant provisions of *the Ordinance* would not apply to the enforcement of awards which had been made in other Convention states and which had been brought to Hong Hong—in other words that *the Convention* would cease to apply in respect of all arbitral awards enforced in Hong Kong. This view was founded in public international law; it took the position that the governments of the United Kingdom and the PRC should jointly issue a *Declaration* to the Secretary-General of the United Nations (as depositary of the *Convention*) in respect of the

A. The First Problem: Lapse of the Convention

1. Lapse of the *Convention* with respect to PRC Awards

The first problem is that strictly speaking,[148] the *Convention* no longer applies in relation to the cross-border enforcement of arbitral awards across the Hong Kong/PRC border after 1 July 1997 with the consequence that all such awards are only enforceable as domestic awards.[149] According to Article I(1) of the *Convention*, the *Convention* does not apply to the enforcement of awards which are made in the same state as enforcement sought; accordingly section 42(1) of the *Ordinance* does not apply to awards made in the PRC which are brought to Hong Kong for enforcement.[150] The *Ng Fung Hong* decision served as the first 'test' case articulating this proposition after the handover. The plaintiff sought summary enforcement of a CIETAC award in Hong Kong. The award was made before the handover but the enforcement proceedings in Hong Kong were not commenced until after the transfer of sovereignty. At the Court of First Instance, Findlay J concluded that after 1 July 1997, the *Convention* no longer applied to the enforcement of an award made in the PRC and therefore was no longer enforceable as a Convention award.[151] Thus, in the circumstances of the case, summary enforcement of such an award was not possible.

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extension/continuation of the *Convention* to Hong Kong. Fortunately, that *Declaration* was made by the PRC government on 6 June 1997 followed by a corresponding *Declaration* made by the U.K. government on 10 June 1997 ("*June Declaration*"). The *Declaration* provides that: a) the government of the United Kingdom will cease to be responsible for the *Convention*'s application to Hong Kong after 1 July 1997 and that, b) the *Convention* would apply to Hong Kong with effect from 1 July 1997 and that, c) the PRC government would assume responsibility for the international rights and obligations arising from the application of the *Convention* to Hong Kong after 1 July 1997. As a consequence of the *June Declaration*, there can be no doubt that the *Convention* continues to apply to the enforcement of Convention awards in Hong Kong although the question of which reservations apply to Hong Kong still remains unanswered for the moment.

148 The writer emphasizes this because although strictly speaking the Convention no longer applies, there may be ways of overcoming this problem (and the second problem concerning the conflict of reservations) and these will be discussed in Part V.

149 *per* obiter Chan CJHC *Hebei Import & Export Corp. v. Polytek Engineering (No.2)* [1998] 1 HKC 192, 196.

150 *Ng Fung Hong v ABC* [1998] 1 HKC 213. (hereinafter "*Ng Fung Hong*" case)

151 As it was made, by definition of section 2(1) of the *Ordinance*, pursuant to a "domestic arbitration agreement".

Clearly, the significance of the *Ng Fung Hong* decision, for the present discussion, is that parties seeking to enforce arbitral awards made in the PRC must do so by bringing an action on the award.[152] The *Ng Fung Hong* decision is undoubtedly correct and is reinforced by the decision in *Hebei Import & Export Corp v. Polytek Engineering (No.2).*[153] In the *Hebei* case, it was held that although leave to enforce a CIETAC award was set aside on public policy grounds,[154] the *Convention* did apply since enforcement proceedings had been commenced in Hong Kong prior to the handover.

Curiously, the impact of this first problem on the enforcement of PRC awards in Hong Kong is not likely to be as great as it will be on the enforcement of Hong Kong awards in the PRC. This is because even if, as the *Ng Fung Hong* decision suggests, reference may no longer be made to the *Convention* in the enforcement of PRC awards, the *Convention* will continue to indirectly apply in Hong Kong.[155] Although the parties will incur greater expense and inconvenience, for example, in enforcing their CIETAC awards in Hong Kong, they will still be able to do so[156] by bringing a common law action on the award.[157]

2. Lapse of the *Convention* with respect to Hong Kong Awards

By contrast, the impact on the enforcement of Hong Kong awards in other parts of the PRC is likely to cause much hardship. Parties resisting enforcement will be able to apply to have Hong Kong awards set aside under Article 62 of *Arbitration Law*, invoking grounds listed under Article 217 of *Civil Procedure Law*.[158] It may be recalled that treating Hong Kong awards as domestic awards for the purpose of enforcement in the PRC is even more

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152 The *Ng Fung Hong* case also addresses the uncertainties of whether Hong Kong courts may still give leave for summary enforceability of Convention awards and/or Foreign awards (e.g. made in Taiwan, etc) under the *Geneva Provisions* set out in Part III of *the Ordinance.*

153 [1998] 1 HKC 192. (hereinafter "*Hebei*")

154 Section 44(3) of the *Ordinance.*

155 This is done by virtue of the common law: see Wesley-Smith, P., *The Sources of Hong Kong Law* (Hong Kong: Hong Kong University Press, 1994) pp. 87-179.

156 It is open for the plaintiff in the *Ng Fung Hong* case to do so.

157 In fact Mr. Anthony Neoh, SC advised participants at the 1997 International Commercial Arbitration: Asian Update Conference (Hong Kong, 13-15 November 1997) that CIETAC awards continue to be enforceable in Hong Kong after the handover.

158 Instead of Article 269, which refers to the narrower grounds under the *Convention.*

disadvantageous since the domestic regime does not provide grounds for setting aside an award when due process has been breached.[159] Moreover, the *Convention* will not continue to apply indirectly to the enforcement of Hong Kong awards there because there is no recognition of the doctrine of precedent in PRC law. Although the enforcement provisions of the *Model Law* and the *Convention* have helped to guide the drafters of legislation, there is scant evidence that the principles and ideals enshrined in the *Model Law* and the *Convention* have insinuated themselves on the judiciary of the PRC. It should also be kept in mind that in contrast to the Intermediate People's Courts which have jurisdiction over enforcement of overseas awards, the PRC judiciary who will be adjudicating Hong Kong awards (as domestic awards) has little or no experience in dealing with awards not made by the domestic arbitration tribunals. It has also been reported that problems with local protectionism and various forms of interference with the enforcement of arbitral awards have been most keenly felt at the level of the local People's Courts.[160]

For all these reasons, it is submitted that the main impact of which the current state of affairs is having and will continue to have on cross-border enforcement of Hong Kong/PRC awards is that the arbitration process and the means of enforcing arbitral awards will become less certain and less final. Arguably, in the present economic climate, such circumstances can only undermine the confidence of parties trading with and investing in Hong Kong and the PRC.

B. The Second Problem: Conflict of Reservations

The first problem affects the enforcement of awards on both sides of the SAR border but for the reasons explained above, will most affect parties seeking enforcement of Hong Kong awards in the PRC. By contrast, the second problem has its most direct impact on the Hong Kong enforcement regime.[161]

This problem has its origin in the fact that Hong Kong's legal system has been structured around the implementation of the *Convention* subject to the reciprocity reservation whereas the PRC ratified the *Convention* subject to both the reciprocity reservation and the commercial reservation. With the

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159 *Supra* note 141.

160 Justice Ren Jianxin, see *supra* note 135.

161 This is almost a mischaracterization, however, arguably, the impact of this second problem will be felt by parties coming with awards made in other Contracting states worldwide.

continuing application of the *Convention* to Hong Kong by virtue of the *June Declaration*,[162] the result is that adjudication on the enforcement of all Convention awards in Hong Kong must contend with a conflict of reservations.

Numerous difficulties can be anticipated from this problem. Some Convention awards might simply not be enforceable in Hong Kong if the commercial reservation is held to apply – in addition to the reciprocity reservation—and the legal relationship which gave rise to the dispute is not of a sufficient "commercial" nature. Disputes over the commercial question would be inevitable and would escalate the costs of arbitration in Hong Kong. Possibly the worst case would be a state of continuing uncertainty regarding whether the enforcement of Convention awards in Hong Kong is subject to both reservations or just the reciprocity reservation. Over the long term, leaving the conflict of reservations unresolved will sustain doubts about the finality of awards and the certainty of their enforcement in Hong Kong and erode Hong Kong's reputation as an international centre for arbitration and commerce.

It is submitted that the imposition of the commercial reservation would represent a step backward from Hong Kong's laissez-faire approach to international arbitrations. Readers are referred to Morgan's excellent account of the reasons for the Hong Kong SAR retaining the reciprocity reservation alone.[163] Extending the commercial reservation to Hong Kong would be inconsistent with the manner in which Hong Kong adopted the *Convention* (and the *Model Law*) in the first place. Imposing the second reservation now would adversely disrupt Hong Kong's arbitration system and not simply its enforcement regime because of the interlinkage between the *Model Law* and the *Ordinance*. The *Ordinance* expressly provided[164] that the application of the *Model Law* would not be limited to international commercial arbitrations – arbitrations with foreign elements only need to meet the definition of "international" as provided for in Article 1(3) of *Model Law* for the *Model Law* to apply. Adding commercial reservation would limit the scope of international arbitrations conducted in Hong Kong and would betray the presumption in favour of enforcement which is enshrined in both the *Model Law* and the *Convention* and around which Hong Kong's arbitration regime has operated.

For the above reasons, measures to resolve these problems are urgently

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162 Yet there is no statement one way or the other made by the PRC government.

163 *Supra* note 34, p. 17.

164 Section 34C(2) of *Arbitration Ordinance*(Cap. 341).

needed.

V. Possible Solutions

A range of palliative measures have been identified for resolving or at least mitigating the impact of the two problems which were discussed in Part IV.[165] These measures range from direct bilateral coordination at the highest levels of the PRC and Hong Kong SAR governments to contractual arrangements made by parties themselves to protect their interests in commercial transactions which may be affected by the problems.

The most direct approach for resolving the first problem would be for either or both governments to take official action to permit Hong Kong awards to be treated as if the *Convention* applied.

1. Declarations pursuant to the Convention

This first step would involve the PRC government issuing a declaration pursuant to Article 1(1) of the *Convention.* The declaration would be made to the Secretary-General of the United Nations as depositary for the *Convention* but would have the effect of amending the PRC government's obligations with respect to the application of the Convention to Hong Kong awards being enforced in the PRC.

The legal foundation for such a declaration can be found in the second sentence of Article I(1) which provides that "[the *Convention*] shall also apply to arbitral awards not considered domestic awards in the State where their recognition and enforcement are sought". Essentially, through making the proposed declaration,[166] the *Convention* would apply to the enforcement of Hong Kong awards as though they were non-domestic awards with the consequence that the only grounds for refusing such awards would be those

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165 Many of the following approaches were originally proposed by others including Morgan (note 3o, p. 389; note 28, pp. 15-21; note 62, pp. 64-65) and by the British delegation to the JLG which has come to be known as the *Edwards report (i.e.: Report of the Working Party on Legal and Procedural Arrangements between Hong Kong and China in Civil and Commercial Matters* (October 1992)). By virtue of the *June Declaration*, the responsibilities of the government of the United Kingdom over the international rights and obligations arising from the *Convention* in respect of Hong Kong ended with the handover. Accordingly, many of the proposals contained in the *Edwards Report* which had originally envisaged action to be taken by the UK government and which would possibly have had the binding force of international law are no longer feasible.

166 Local legislation would need to be enacted by both governments to incorporate the terms of the Declaration into domestic law.

contained in the *Convention.*[167]

Taking this approach one step further, the proposed declaration also provides an opportunity for the PRC government to address the conflict of reservations by issuing an unequivocal statement (in the same declaration) about which reservations apply to the enforcement of awards in Hong Kong pursuant to the *Convention.*[168] Alternatively, this conflict of reservations could be resolved by making a separate declaration to the Secretary-General of the United Nations.

There appears to be no precedent in international law for applying the *Convention* in this way, although this approach has received considerable support.[169] However, several difficulties are anticipated with this proposed approach.

The first difficulty is really an inherent defect of the proposed declaration itself. It requires the PRC government to act in a way which might suggest a relaxation of the PRC's exercise of sovereignty over Hong Kong. With respect, the writer disagrees with Morgan's suggestion[170] that the proposed declaration would not disclose any sovereignty implications for the PRC government.[171] For ideological reasons, the PRC government has shown itself to be extremely sensitive to the issue of sovereignty in relation to any territory which is considered to be part of China. This sensitivity is quite evident in both the *Joint Declaration*, the *Basic Law* and in statements issued by the PRC government in relation to Macau, Taiwan, Tibet and other

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167 In accordance with Article 269, but not with Article 217 of *Civil Procedure Law.*

168 Such a statement may be consistent with international practice, if Article 15 of the *1977 Vienna Convention on Succession of States in Respect of Treaties* (hereinafter "the *Vienna Convention*") is regarded as correct.

169 *Supra* note 157 above, p. 4; see also *supra* note 34, p. 20.

170 *Supra* note 34 above, p. 20.

171 Morgan's assumption on this point is that whatever is not expressly ruled out by provisions of the *Joint Declaration* or *Basic Law* would be permitted within the constraints of the *PRC Constitution* and PRC law—proceeds from a western liberal perspective, which, in relation to Chinese jurisprudence and constitutional ideology, is untenable. For instance, it is doubtful that the PRC government would have countenanced any effort by SAR government to implement treaties which PRC has declared itself bound by, such as the *Convention*, on the grounds that Article 13 of the *Basic Law* (supported by Articles 96, 152 and 153) justifying such an exercise of 'autonomy'(see *supra* note 26, p. 9). The writer submits that Morgan is wrong on this point. See Chang, D., "How China Sees It" in McGurn, W., (ed) *Basic Law, Basic Questions* (Hong Kong: Review Publishing Co. Ltd.,1988) Chapter 8 for a closer analysis of how the concepts such as "autonomy" and the "one country, two systems" principle are construed within PRC constitutional law.

regions within mainland China.[172] As such, it is doubtful that the PRC government would be prepared to issue the proposed declaration unless it could be coupled with an unequivocal statement that notwithstanding the treatment of Hong Kong awards as non-domestic awards, Hong Kong remains under the sovereignty of China.

Another difficulty, which relates to a declaration concerning the conflict of reservations, is that such a declaration might be contrary to the *Basic Law*.[173] A declaration by the PRC government that the *Convention* would henceforth apply, subject to both reservations, might contravene Article 8 as it amounts to a change of "laws previously in force" and/or Article 153 (i.e. that the PRC central government has failed to give due consideration of the "needs and circumstances of the [SAR]" when deciding how the *Convention* should apply to Hong Kong. Another perhaps more constitutionally acceptable way of solving the conflict of reservations to avoid any contravention of Articles 8 and 153 would be to leave arrangements concerning the reservations to the SAR. This seems to be provided under Article 96.[174]

2. Memorandum of understanding

This is an adaptation of a elegant proposal[175] advanced in the *Edwards report*[176] and endorsed by Morgan.[177] It is submitted that the judiciary or the executive branch of the PRC and Hong Kong SAR could conclude a Memorandum of Understanding ("MOU") to provide the continued mutual cross-border enforcement of Hong Kong and PRC arbitral awards. The MOU could also expressly state the reservation(s) applicable to awards enforced in Hong Kong. Article I(1) of the *Convention* or some other

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172 For a discussion of the jurisprudential principles underpinning these sensitivities, see Corne, P.H., *Foreign Investment in China - The Administrative Legal System*, (Hong Kong: Hong Kong University Press, 1996) p. 22.

173 It might also be contrary to the terms of the *Joint Declaration*

174 See *supra* note 34, p. 17.

175 An adaptation because after the *June Declaration*, the government of the United Kingdom cannot jointly issue a MOU with the PRC government concerning the application of *the Convention* to Hong Kong as recommended by paragraphs 1.10 & 1.11 of the *Edwards report*.

176 *Report of the Working Party on Legal and Procedural Arrangements between Hong Kong and China in Civil and Commercial Matters* (October 1992) paragraphs 1.10 & 1.11

177 *Supra* note 66, p. 390; note 34, p. 20 and its footnote 141.

arrangements[178] provide the most compelling legal foundation for arrangements to treat each other's awards as Convention awards in accordance with the MOU.[179] It is understood that action along these lines is already being taken, although neither government have made any concrete public statements about which specific measures are being implemented.[180]

This approach appears to be consistent with a purposive interpretation of Articles 95 and 153 of the *Basic Law*.[181] It is submitted that a formal agreement made between the judiciary or executive branch of the government on both sides of the SAR border whereby co-operation will be given in treating each other's awards as non-domestic awards would constitute the kind of assistance envisaged by both Articles 95 and 153.[182]

It must be pointed out that a MOU does not carry the binding force of a bilateral treaty at international law so the proposed MOU would have no legal effect unless it was incorporated into the domestic law of the PRC and the SAR by enactment. While a MOU supported by legislation would permit parties to rely on its provisions, such legislation is always subject to amendment. This underscores the principal disadvantage of this approach as compared with the proposed declaration to the United Nations *supra*. However, because this proposed MOU—whether or not supported by local legislation -- would represent only an agreement between the PRC and SAR governments, it would not insinuate to the PRC side any loss of sovereignty over the SAR. To that extent, the MOU approach may be preferable to the declaration.

3. Reciprocal legislation

A third possible solution would involve making new law on both sides of the SAR border to accommodate a policy of treating each other's awards as non-domestic awards. Such legislation would merely give domestic

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178 In fact, a draft text of a Memorandum of Understanding appears in the *Edwards Report* (in "Annex A: United Kingdom/PRC Memorandum of Understanding Concerning the Recognition and Enforcement of Arbitral Awards").

179 Article 15(2) of the *Vienna Convention* could provide an alternative legal basis.

180 "Forging mutual links on legal aid", *South China Morning Post*, 29 March 1998, p.4.

181 The purposive interpretation is "[the Hong Kong SAR and the PRC judiciary] may render assistance to each other".

182 In fact, this approach was referred to by Neoh, see *supra* note 157, p. 5.

effect to what may already be the correct position at international law.[183] The idea of enacting new legislation to give effect to such a policy has already been discussed in the context of the proposed declaration and a MOU. How this third solution differs, however, is that it would not be based upon any formal declaration or MOU.

Morgan gives a concise account of various possible forms which this approach could take.[184] Ideally, the SAR and PRC governments would enact reciprocal national legislation[185] and practice directions for the respective courts. This would ensure that Hong Kong awards are enforceable as if they were Convention awards anywhere within the mainland PRC.

A second less ideal approach would involve the promulgation of legislation not by the Central People's Government of the PRC but by the respective regional governments.[186] The main drawback of reciprocal legislation being made at the regional level in the PRC is that the resulting legislative framework would be more open to amendment than national law.[187] This could result in a patchwork of laws regarding recognition and enforcement of Hong Kong awards which would undermine the certainty of enforcement.

The principal advantage offered by all of the official measures outlined above is that they would have the binding force of law on either side of the SAR border. This would allow parties to rely on arbitration and the enforcement of their awards without having to resort to a third jurisdiction[188] for arbitration. In effect, any of these solutions–or perhaps some combination of them–would restore the pre-handover framework for mutual enforceability of Hong Kong-PRC arbitral awards.

The main drawback of the last two solutions stems from the fact that they would be implemented between the PRC and SAR governments only. Accordingly, they would not have any binding force in international law and

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183 According to the *Vienna Convention*, that in the absence of a contrary declaration by the PRC government as a successor state, the *Convention* still applies to the SAR on precisely the same terms as it did under the British rule.

184 *Supra* note 34, pp. 20-21. Apparently, consultations regarding this kind of approach (which might or might not be combined with one of the other approaches outlined herein) between the PRC authorities and the Hong Kong executive have been ongoing for the past 2 years. So far, informal assurances have been given to the SAR government that the PRC authorities intend to implement some kind of bilateral framework for restoring mutual cross-border enforceability of Hong Kong/PRC awards.

185 Paragraph 1.9 of *Edwards Report.*

186 *Ibid.*, paragraph 1.12.

187 For this reason, primarily, this was not the preferred approach of the *Edwards Report.*

188 Another Contracting state will do.

could be amended at any time by either the PRC or SAR governments. This would be true even if domestic laws were made to carry the MOU or inter-judiciary agreement into effect. For this reason, only the first option offers the degree of permanence and commercial certainty needed to sustain faith in Hong Kong's and the PRC's arbitration and enforcement regime.

4. Taking matters into one's own hands

In the meantime, while the two governments are working out a plan to effectively solve these two problems, parties who could be exposed to the transitional difficulties of enforcing Hong Kong-PRC arbitral awards on either side of the border should take appropriate steps in planning and carrying out their transactions to minimize any adverse impact. Parties contemplating commercial transactions which could conceivably require them to bring an arbitral award to either SAR or the PRC especially, should consider stipulating[189] an alternative third Contracting state in which to conduct the arbitration to ensure that their award will be enforceable under the terms of the *Convention.*[190] Naturally, this will incur additional cost for parties. Parties with doubts about whether their intended transactions will be deemed "commercial" in the event they need to enforce an arbitral award on either side of the SAR border may wish to reconsider carefully whether to proceed with the transaction.

As explained in Part IV, the greatest impact of the first problem will be on the enforcement of Hong Kong awards in the PRC whereas the second problem will primarily affect enforcement of Convention awards in Hong Kong. It should be possible to devise some combination of the above solutions in a way that eliminates both problems.

In the event that no official action is taken to solve the two problems identified above, the worst case is that all Hong Kong and PRC awards will continue to be treated as domestic awards which will mean that they cannot be enforced in accordance with the *Convention*, as illustrated in the *Ng Fung Hong* decision. At the very least, this will entail additional expense to enforce such awards by bringing an action on the award.[191] For parties bringing Hong Kong awards to the mainland PRC courts for enforcement, the

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189 This can be done in appropriately drafted dispute resolution clauses.

190 In fact this appears to be the 'remedy' of choice for many already, see paragraph 1.7 of *Edwards Report*; Fung, D.R., "Mutual Legal Assistance as between Hong Kong and the Mainland in the Run-up to and beyond 1997" (1996) 62 JCIArb 85-88.

191 *Supra* note 150.

wider grounds for setting aside awards there under the domestic enforcement regime may also reduce the likelihood of successful enforcement.

As mentioned previously, there is a possibility that the effect of Article 15(2) of the *Vienna Convention* in international law is that the *Convention* still applies to the SAR on precisely the same terms as it did prior to the handover. If this interpretation is correct, it could either mean that no positive action may be required either by the PRC or SAR government to solve the conflict of reservations or simply that Article 15(2) provides a basis in international law for both governments to incorporate provisions in their respective domestic laws to give effect to the arrangements. It is submitted that regardless of which is the more correct view, both governments should amend their arbitration laws and issue the appropriate practice directions anyway, if only to more dispositively fill the legal vacuum. If the conflict of reservations remains unresolved, it will make arbitration and the enforcement of all Convention awards in Hong Kong more uncertain. Over time, this will invariably lead to an erosion of commercial certainty[192] which will gradually undermine the confidence of international business community. It is therefore urgent that some measured combination of the above approaches should be taken as soon as possible.

Many in the legal and business community have recognized that these problems could drive up the risks (and costs) of Hong Kong-PRC cross-border trade and investment and if unabated, they threaten to undermine confidence in Hong Kong as an international arbitration centre.[193] Others have interpreted these problems as portending the end of Hong Kong's level playing field for conducting business and degeneration of its legal system.[194]

VI. Conclusion

The transfer of sovereignty has undeniably altered Hong Kong's constitutional arrangements and legal system. Hong Kong's arbitration regime has been changed as well. However, these changes have not been as

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192 With an attendant loss of faith in the "autonomy" and the "one country, two systems" principles?

193 "Hong Kong's Rocky Return to Chinese Sovereignty" *Oxford Analytica - Asia Pacific Daily Brief* (online version), 10 September 1997, p. 3; International Commercial Arbitration: Asian Update Conference, Keynote Speech by Chan CJHC, 13 November 1997.

194 "Legal Grey Areas Clouding Contracts", *South China Morning Post*, 6 July 1997, p. 5; Halford, G.R. & Linning, A.H., "Managing the Transition in 1997" (January 1996) International Commercial Litigation p. 26, at pp.26-27.

pervasive or as degenerative as some commentators had predicted.[195] For instance, predictions that the transfer of sovereignty would render all Convention awards unenforceable in Hong Kong, or that Hong Kong awards would be completely unenforceable in the PRC never had any basis in fact. Nevertheless, the transfer of sovereignty created a legal vacuum in Hong Kong-PRC cross-border arbitral enforcement arrangements and unless action is taken to counteract the impact of that legal vacuum, Hong Kong's role as a regional commercial and arbitration centre could be permanently hamstrung. The *June Declaration* forestalled the total lapse of the *Convention*'s application to Hong Kong and avoided a potential legal vacuum,[196] at least in respect of the enforcement of awards made in Contracting states. However, the *June Declaration* did not address the problem of conflict of reservations. Will Convention awards only be enforceable in the SAR subject to both the reciprocity reservation and the commercial reservation, or to the reciprocity reservation alone? Would a declaration by the Standing Committee of the National People's Congress or the PRC judiciary regarding the reservation issue be contrary to the spirit or the provisions of the *Joint Declaration* and/or the *Basic Law*? Principles of public international law, judicial practice and Hong Kong's wider commercial interests would seem to dictate that only the reciprocity reservation should apply but until this quandary is resolved through the proper channels, followed by an appropriate practice direction, all awards brought to Hong Kong for enforcement will be impacted by additional enforcement costs and uncertainty.

Perhaps more importantly, the transfer of sovereignty has rendered many awards currently unenforceable as Convention awards on either side of the SAR border. In the years leading up to the handover, awards made in the PRC constituted the lion's share of Convention awards brought to Hong Kong for enforcement.[197] As matters stand, *the Convention* no longer applies to the cross-border enforcement of Hong Kong/PRC awards, with the result that such awards can only be enforced as domestic awards in either jurisdiction. It is submitted that permitting such a state of affairs to continue would deal a body blow to cross-border trade and investment primarily because the PRC's less advanced domestic enforcement regime remains dogged by problems which defy the kind of certainty and predictability which the international business community and litigators require in order to

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195 *Ibid.*

196 "Failure to agree on treaties 'risks disruption to litigants'", *South China Morning Post,* 14 January 1997, p. 3.

197 *Supra* note 34.

place confidence in a legal system.[198]

It appears that various branches of the SAR and PRC governments may already have taken steps to implement some combination of the above proposed measures,[199] although neither government has publicly explained in concrete terms how the problems will be dealt with.[200] The writer recommends that whichever approach is adopted, the new procedures should be implemented as soon as possible because until they are, parties seeking to enforce awards in Hong Kong and/or the PRC face undue uncertainty and expense. As emphasized repeatedly in this dissertation, pressures caused by rising uncertainty and costs of arbitration will, over time, cause the international business community to resort to arbitration outside Hong Kong, drastically reducing the amount of arbitration conducted in Hong Kong and ultimately diminishing the SAR's status as a regional commercial and arbitration centre.

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198 As mentioned previously, the obverse situation of PRC parties trying to enforce awards under Hong Kong's domestic regime is less problematic because *the Convention* will continue to apply indirectly through the *Arbitration Ordinance* and Hong Kong case law.

199 Asia Information Associates Ltd., "Arbitration Law to Enter into Effect Soon" (17 November 1997) China Business Summary p. 4, at pp. 4-5.

200 "Forging mutual links on legal aid", *South China Morning Post*, 29 March 1998, p. 4.

POSTMODERN JURISPRUDENCE IN HONG KONG

香港後現代法學理論

IVY WONG TUN-KEI*

"Let us wage a war on totality: let us be witnesses to the unpresentable; let us activate the differences and save the honour of the name."

Jean Francois Lyotard, The Postmodern Condition, 1166.

Throughout history, there are different perceptions and opinions on law. This gives rise to various legal theories, some of which advocate morality and some universality. However, as people start to stress the importance of individuality and minority interests in the modern world, none of the traditional legal theories alone seem to be sufficient to reflect these changes in our society. People begin to cast doubt on the orthodox jurisprudence. This era of nihilism helps to lead to the development of a new legal theory called "postmodernism".

Postmodernists deny the universal legal concept. They suggest that our law should take into account the differences of different groups, like the feminist groups and the racial minorities. In particular, an influential French postmodernist Jean Francois Lyotard urges the postmodern society to "wage a war on totality" and take note of these minority interests.

On first encounter, it seems that the postmodern jurisprudence is in conflict with our traditional jurisprudence of the rule of law The rule of law promotes equality, impartiality, objectivity, generality and certainty, whereas postmodernism activates differences and subjectivity. In fact, these two theories do not necessarily clash with each other; instead they can work in harmony. Postmodernists do not attempt to abolish the traditional notion of the rule of law; rather they try to improve upon it by deconstructing and reconstructing the traditional legal jurisprudence.

Hong Kong serves as an example of how postmodernism is at work. Postmodernists argue that the study of jurisprudence always involves the study of a legal subject, and they often portrait such a legal subject as indeterminate, unstable and inferior. The Hong Kong people were lacking in a political and cultural identity under the British rule prior to 1997, and

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thus may serve as an indeterminate legal subject for study. The Hong Kong situation is unique and it deserves a different kind of treatment, whether legally or politically.

In her post-1997 era, Hong Kong neither adopts the Western nor Eastern ideologies in their absolute terms. She adopts a hybrid approach – merging political and legal theories of both cultures and developing a new approach of her own that has never been adopted before. Hong Kong becomes a special administrative region, and she has her mini-constitution for the very first time. It follows neither the orthodox liberal constitutionalism nor the traditional socialist constitutionalism. It advocates neither the Western negative human rights nor the Eastern positive human rights. It adopts neither a liberal nor socialist approach in interpreting the Basic Law. Instead, it tries to blend the two seemingly conflicting traditional jurisprudence into a new kind of jurisprudence called postmodernism. Hong Kong enjoys her high degree of autonomy and practices capitalism under the sovereignty of the PRC. She advocates a protection of the individual rights and at the same time a respect for other people's rights in the society. She adopts both common law principles and Chinese rules of interpretation in interpreting the Basic Law. Hong Kong is no doubt living in a postmodern era. She demonstrates how postmodern jurisprudence is at work in reality and illustrates how the HK "differences" are being recognized in law.

在歷史的進程中，存在了對法律不同的概念和意見。這衍生了各式的法律理論，其中有主張道德，也有主張普遍性。但是，當人們開始強調現代社會中的個體及小數利益，便似乎沒有一個單一的傳統法律理論足以反映社會的變化。人們因而開始對保守的法學理論存疑。這個虛無主義的時代促進了一種新的法律理論，稱爲後現代主義。

後現代主義學者否定了普遍性的法律理論。他們建議我們的法律應顧及不同組織間，好像女權主義及小數民族，的差異。一位具影響力的法國後現代主義學者 Jean. F. Lyotard 特別指出後現代社會應向概括主義宣戰，和照顧小數利益。

從第一印象來看，後現代法學理論似乎和傳統的法治法學理論互相衝突。這是由於法治提倡平等、公平、普及和確實。反之，後現代主義則著重差異和主觀。事實上，這兩種理論並不一定互相抵觸，反而，他們可互相融合。後現代主義學者並沒有嘗試廢除傳統的法治理念；他們嘗試以整頓傳統法律法學理念改進它。

香港便是後現代主義運作的例子。後現代主義學者認爲法學理論多涉及法律主體的研究，他們多把法律主體描繪成不明確，不穩定及次等。在 1997 年前英國的統治下，香港人缺乏政治及文化的身份，因而

成了不明確的法律主體以供研究。香港的情況是獨一無二的，所以在法律和政治上應得到不同的對待。

在 1997 後的歲月，香港沒有絕對採納西方或東方的意識形態。她融合了這兩種文化下的政治及法律理論，繼而發展一種空前的新手段。香港成爲了特別行政區，並首次擁有自己的微型憲法。它既沒有追隨保守的自由憲法主義，也沒有運用傳統的社會憲法主義。它也一概沒有倡儀西方消極人權或東方積極人權。它採用了一種非自由主義的，也非社會主義的方針來詮釋<基本法>。代之，它試圖融合兩種似乎相斥的傳統法律理論，成爲一項新的法律理論，稱作後現代主義。在中華人民共和國的主權下，香港擁有高度自治和實行資本主義。她力行保護個人權益及同時間尊重社會中其他人的權益。她運用了普通法原則和中國詮譯規則來詮譯<基本法>。香港無疑正處於後現代時刻。她全面地展示了後現代主義在現世的運作及闡明了法律怎樣確認香港的不同之處。

I. A Prelude on Postmodernism

Jurisprudence is always an interesting subject, for it is forever developing and expanding. There may be no disagreement on what is the law, but opinions towards this subject vary. This gives rise to different perceptions of law resulting in different legal theories. Naturalism stresses the necessary connection between law and morality. It emphasizes on the natural law's universality and constancy, its standing as a "higher" law, and its discoverability by reason.[1] It resorts to the divine power as legitimacy to law. It secularizes law and claims that law should be constant, universally accepted and recognized. Realism however advocates that law is in flux, law is moving and changing. It is skeptical about formalism. It recognizes the inconsistency and partiality of law, and it tries to overcome these weaknesses of law by calling for order, unity, identity, security and popularity.[2] Modernism portrays society as a unified totality. It yearns for a unitary and totalizing truth.[3] It pursues homogeneity and uniformity. Despite the considerable influence these theories have made in the circle of legal jurists, they fail to encounter and tackle the complexities of today's modern world and fast-moving trends.

In the era of decolonization and the awakenings of feminist/ethnic movements, one acknowledges the inadequacy of each of these theories alone.

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1 Wacks, R., *Jurisprudence* (Great Britain: Blackstone Press, 1995) p. 100.

2 Lyotard, J.F., *The Postmodern Condition: A Report on Knowledge* (USA: University of Minnesota Press 1984) 73.

3 *Supra* note 3, p. 12.

We no longer believe in any single set of legal theory, whether it is one that relies on God's reason or one that rests on human rationale. We "recognise the impossibility of any ultimate foundation or final legitimation...This recognition comes after the failure of several attempts to replace the traditional foundation that lay within God or nature with an alternative foundation lying in man and his reason. These attempts were doomed to failure from the start because of the radical indeterminacy..." of our modern society.[4] As we enter into the world of technological advancement and scientific innovation, we shift our faith in God to an appreciation of human reasoning. Ironically, the more we rely on human reason, the more confused and uncertain we become. We are no longer certain what is right and what is wrong; we no longer trust the "so-called" neutrality of law; we no longer confide ourselves in large concepts and universal comfort zones like the notion of democracy, the discourse of universal rights, nor the objectivity in the Rule of Law, because we all see the injustices done to the individuals in our "objective" world. We cast doubts on formalism and essentialism.[5] It is the "radical indeterminacy" that has caused the dilemma. We do not know which set of theory we can confide in because it seems that none of them can really depict the reality and none of them is entirely convincing. We begin to seek a more sophisticated theory that can take into account the subjective differences in cultural, historical and social background of each society and each individual. We call this era of nihilism and rigorous deconstruction of traditional jurisprudence "postmodernism". This paper aims at analyzing postmodernism with reference to a French jurist Jean Francois Lyotard's statement of postmodernity. It also takes note of a potential contradiction between postmodernism and the rule of law, and further assesses the contribution of postmodern jurisprudence to the rule of law in the Hong Kong Special Administrative Region (HKSAR).

II. A Quote from Jean Francois Lyotard

Jean Francois Lyotard, an influential philosopher of postmodernity, had explicitly criticized the classical legal theories and had shed light on what we could do to correct the wrongs and injustices we have done to our postmodern era. He said,

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4 Mouffe, C., "Radical democracy: modern or postmodern" in Ross, A., *Universal Abandon? The Politics of Postmodernism*, 34, quoted by Wacks, R., *Jurisprudence* (Great Britain: Blackstone Press, 1995) p. 229.

5 Jacques Derrida is one of the more notable poststructuralist who denies essentialism and an impossibility of rights discourse. See *supra* note 2, p. 236

> "The nineteenth and twentieth centuries have given us as much terror as we can take. We have paid a high enough price for the nostalgia of the whole and the one, for the reconciliation of the concept and the sensible, of the transparent and the communicable experience...The answer is: Let us wage a war on totality; let us be witnesses to the unpresentable; let us activate the differences and save the honour of the name."[6]

The above quotation more or less summarizes the postmodernist hostility towards universal consensus and homogeneity. We have all seen the difficulties in realizing a universal human rights standard, and we have all heard the protests from the minorities in every part of the world. We have witnessed "as much terror as we can take" and there has been too much disappointment resulting from the failure of universal concepts. Lyotard sought to deconstruct and "wage a war" on totality. He urged us to witness the "unpresentable", namely those who are often disguised under the vague general principles of the rule of law. The most notable example being the feminist protest against the "reasonable man" test, which they argue is essentially a test of a reasonable white middle-class male that fails to address to their feministic issues. Other examples include China's argument against a universal human right standard. It advocates the notion of "Asian values" and alleges that an international standard of human rights fails to recognize the special economic and social conditions of the People's Republic of China (PRC).

In his statement, Lyotard had also advocated marginality, differences, flux, dispersal, plurality and localism.[7] He rebuked orthodox jurisprudence of modernity, which construes law as a coherent body of general rules and principles reflecting the will of the sovereign. We live under a grand notion of the Rule of Law indulging ourselves in the "process of interpreting pre-given texts"[8] and adhering to general rules. Everything we do we do by the book, and we do it in the name of law, without ever really recognizing the true spirit behind it. In practice, we have brought injustices to the "unpresentable(s)" without heeding to their cries and screams. Now, as Lyotard puts it, perhaps is the time for us to "save the honour of the name", to finally give a voice to the "unpresentable(s)" and genuinely answer the call

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6 *Supra* note 3, p. 82.

7 Freeman, M.D.A., *Lloyd's Introduction to Jurisprudence* (London: Sweet & Maxwell, 1994) p. 1148.

8 Douzinas, C., Warrington, R. & McVeigh, S., *Postmodern Jurisprudence: The Law of Text in the Texts of Law* (London: Routledge 1991) p. xi.

of these less noticeable and unrepresented populace.[9] Perhaps we should start to recognize the different conditions and needs of these different groups of minorities and individuals. It is time for the law to take into account of their differences.

III. An Encounter of Postmodernism and the Rule of Law: Disposal of the Latter?

In order to understand the potential contradiction between postmodern jurisprudence and the classical notion of the rule of law, one must understand the differences between the two discourses. I have accounted for the underlying theories of postmodernism in the preceding paragraphs, but what concepts does the rule of law denote? How is it different from the theory of postmodernity?

According to the classical definition given by A.V. Dicey, the "rule of law" or "supremacy of law" consists of three essential elements.[10] First, everyone is equal before the law. Anyone coming before the court will be given the same kind of treatment and procedure of litigation. Second, the law is supreme. No one is above the law. Every person, despite their differences in social rank, wealth, religion, or gender, has the same duties to obey the law and be liable for his/her own behavior like anyone else because "(j)ustice is blind...to the differences between individuals".[11] Third, a constitution should articulate the protection of individual rights.

The rule of law stresses equality, impartiality, objectivity, generality, and certainty.[12] These characteristics seem to be the very qualities strongly rejected under the postmodernism because postmodernists argue that the "(e)xception to the rule, counter-tradition or minority perspective can no longer be objectively justified."[13] They want to include some elements of subjectivity into the law. The rule of law upholds an independence of law from politics, while postmodernism explicitly touches on politics. The

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9 "Postmodernist, feminist and ethnic critiques give a voice to the echoes of what has been almost silenced down the long corridor of the time of law. They all challenge the white male order of the world and its claim to present a timeless universal rationality." See *Supra* note 9, p. xii.

10 Dicey, A.V., *Introduction to the Study of the Law of the Constitution* (London: Macmillan 1959) ch IV.

11 *Infra* note 13 at p. 14

12 A current reiteration of the characteristics and principles of the rule of law can be found in Westley-Smith, P., *An Introduction to the Hong Kong Legal System* (Hong Kong: Oxford University Press, 1993) pp. 14-15.

13 *Supra* note 8, p. 1151.

former preserves generality, while the latter reprimands homogeneity. In other words, are the postmodernists trying to "wage a war" on the rule of law? Are they seeking to deny and undo the rule of law? Not necessarily so, the answer is both yes and no. Postmodernists are merely trying to deconstruct and reconstruct the traditional legal jurisprudence. Every deconstruction is in fact a reconstruction. After a rigorous deconstruction, there creates a common place where postmodernism and the classical rule of law can mingle and tinkle in harmony, where we can still preserve the "totality" and recognize the "differences" as we shall see in the case of the HKSAR.

IV. A Postmodern Discourse on Constitutionalism in the HKSAR

A. The Legal Subject

Postmodernists criticize the conventional jurisprudence for its lack of a legal subject.[14] They believe that an analysis of a legal subject is crucial in legal jurisprudence because subjectivity affects all forms of legal understanding. A legal subject should be socially construed. Postmodernists portray a legal subject as a moribund that is inferior, unstable and indeterminate.[15] This moribund is in fact a reflection of the Hong Kong people in the pre-1997 era. They were lacking of an identity, both culturally and politically. They belonged to neither the Western guilt culture nor the Eastern shame culture; they were neither British citizens nor Chinese citizens.[16] They were an entirely different kind of species cultured by political and historical legacy, and according to the postmodernists the internal perspective of these indeterminate species is the central object of legal studies.[17]

The Hong Kong people become the legal subject of postmodernist jurisprudence. Perhaps it was their lack of a definite identity and their sense

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14 Balkin, J.M., "Understanding Legal Understanding: The Legal Subject and the Problem of Legal Coherence" (1993) 103 YLJ 105. According to Balkin, subjectivity helps to understand legal coherence, subjects bring purposes to legal understanding which in turn is a source of power over the legal subject.

15 *Supra* note 8, pp. 1148-49.

16 MacNeil, W., "Righting and Difference" in Wacks, R., *Human Rights in Hong Kong* (Hong Kong: Oxford University Press, 1992) pp. 95-96.

17 James Boyle follows Foucault and argues that modern political and legal argument "can best be understood as a debate over the essential characteristics of the subjects whose actions those arguments describe and prescribe". See *Supra* note 2, p. 230. See also Boyle, J., "Is subjectivity possible? The postmodern subject in legal theory" 62 UCLR 489.

of indeterminacy that had made Hong Kong a special case. This had caused China and Britain to tailor-make a new political design to suit the unique Hong Kong situation. For the first time we saw the establishment of a special administrative region, and for the very first instance did we have a constitution in Hong Kong. The two sovereigns invented the Hong Kong Basic Law (HKBL) that follows neither the British colonial system nor the socialist constitutionalism because neither one of these traditions alone can fit into the Hong Kong situation.

B. Constitutionalism – The HK Basic Law

I have mentioned earlier of Dicey's account of the rule of law. The Western liberals believed that the fundamental principles lying under the rule of law are neutrality, securing the rights of the autonomous individual and limiting the arbitrary power of the government. On the other hand, the Marxists viewed the rule of law as biased. They suspect that the rule of law was only a means employed by the bourgeois to manipulate, abuse and exploit the working force; it was only a sweet coat of poison. Thus, we have two very different traditions of constitutionalism. Liberal constitutionalism aims at protecting individual human rights and limiting the government by pre-determined rules, separation of powers, and democracy. This notion is very well accepted in the Western world.[18] In contrast, socialist constitutionalism emphasizes the people's democracy and the leading role of the party. It considers law as an instrument to unify powers; a socialist constitution is therefore only fundamental but not supreme.[19] The PRC Constitution is an example of such.[20]

Essentialists would say a constitution could only take one of these two forms of constitutionalism: either you follow the liberal approach or you follow the socialist approach. This is because the traditional essentialist jurisprudence insists on monism where there is only one kind of subject position, only one essence of a subject, with only one essential trait. According to these legal theorists, there can be only one kind of constitutional jurisprudence and only one way of interpreting the

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18 Although England does not have a written constitution, it has been well recognized as a country practising liberal constitutionalism.

19 Nwabueze, B.O., *Constitutionalism in the Emergent States* (London; C Hurst, 1973) 1. See also Brunner, G., "The Functions of Communist Constitutions: An Analysis of Recent Constitutional Developments" 3 RSL, at 121-153.

20 The PRC Constitution is enlisted with the overriding four Basic Principles: (1) keeping to the socialist road; (2) upholding the people's democratic dictatorship; (3) maintaining the leadership of the Chinese Communist Party; and (4) supporting the primacy of Marxist-Leninist-Mao Zedong Thought.

constitutional law. Liberal constitutionalism has an essential trait of promoting individual rights, while socialist constitutionalism an essential trait of escalating state's power. Postmodernists deny essentialism; they advocate the notion of "via media" which accounts for a hybrid situation.[21] It adopts a median approach and follows neither one of the extremes. The Hong Kong situation is unique in itself. It deserves a different kind of treatment and a different form of constitutionalism. If anytime at all, this should be the time to "activate the differences" of Hong Kong. Consequently, we have the birth of the HKBL, which incorporates both and yet neither the liberal and/or socialist constitutions. The HKBL creates a new political identity. Hong Kong becomes a special administrative region enjoying a high degree of autonomy while upholding a principle of "one country two systems".[22] The post-1997 era is the time when we can finally witness the "unpresentable", namely the Hong Kong people who had been hidden in disguise lacking a determinate social and political identity for over a century.

V. A Postmodern Discourse on Rights in the HKSAR

The HKBL recognizes two fundamentally conflicting rights discourses. It recognizes the International Covenant of Civil and Political Rights (ICCPR) that advocates negative liberty,[23] and it includes a replica of a set of positive rights guaranteed by the PRC Constitution.[24] An essentialist will most likely be confused: which notion of liberties prevails, negative or positive?

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21 See *supra* note 17, p. 108.

22 Preamble and Articles 2 & 5 of the HKBL. Although the HKSAR is "an inalienable part" of the PRC and the PRC has resumed its sovereignty over HK, the HKSAR maintains its previous common law and capitalist systems.

23 Article 39 of the HKBL. Negative liberty advocates minimum government interference and maximum individual rights. The development of negative liberty in the Western world is indebted to Locke, Rousseau, and Kant. Locke promoted property rights, and his ideas were incorporated into the English and American Bill of Rights. Rousseau advocated civil and political rights, which were included in the French Declaration of Rights of Man and Citizens 1789. Kant strove for individualism, and his ideas gave rise to Mill's nation of *laissez- faire*. Their theories provided the basis for the 1948 Universal Declaration of Human Rights, which in turn contributes to the formation of the ICCPR.

24 For example, Article 27 of the HKBL conveys the same idea as Articles 37 & 39 of the PRC Constitution guaranteeing the freedom from arbitrary arrest and unlawful search. Also, both Article 30 of the HKBL and Article 40 of the PRC Constitution guarantee individual freedom and privacy. It is evident that the PRC Constitution denotes positive liberty that stresses on duties and obligations of the state and citizens, a collective right rather than individual right.

The Hong Kong people may prefer negative liberty because it guarantees maximum protection of their rights. The Chinese authority, on the other side, may want to uphold positive liberties so as to safeguard its power and sovereignty. We seem to be pulled by both sides, yet to neither. There seems to be no definite answer to the question, yet it is precisely the moment when postmodernism could come into play and provide an alternative solution. Postmodernists would criticize the liberal rights discourse for assuming "the possibility of an autonomous, rational, individuated subject"[25] rather than an unstable and indeterminate subject. At the same time they would criticize the socialist negative rights discourse for adopting the value of "connection", "totality" and "collectivity" thereby tyrannizing over "any viable conception of the individual...difference, variety, and plurality."[26] In other words, postmodernism supports both and neither rights discourse.

As postmodernist Derrida argues, "the absence of an ultimate meaning opens an unbounded space for the play of signification".[27] When there is uncertainty and indeterminacy, there is room for creativity and innovation. It is a time for us to "deconstruct" the traditional notions of negative and positive liberty and "reconstruct" a balance between the two. During the time around the change in sovereignty over HK, the government advocated from time to time through the TV media: "[I]f we protect our rights and respect the rights of others, HK will be a better place." It advocated not only the protection of individual rights, but also the collective rights of the others. Perhaps India can give a more evident illustration of this postmodernist concept.

India has formally incorporated both negative and positive rights into a single constitutional instrument. It subsumes both the Universal Declaration of Human Rights (UDHR) and the International Covenant of Economic, Social and Cultural Rights (ICESC), granting each an equal status.[28] However, it does not fuse the two. Instead, it maintains the separateness and distinction between the two concepts. Whenever there is a conflict between the two, judicial interpretation will come into play and help to determine which is the prevailing rights discourse, taking into account each individual case and provision.[29] As can be seen from the case of India postmodernism, though sometimes accused of being too indeterminate and indefinite, can often serve as a platform for reconstruction and innovation.

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25 Wacks, R., "The End of Human Rights?" 24 HKLJ 387.

26 *Supra* note 17, p. 102.

27 Derrida, J., *Of Grammatology* (Baltimore: Johns Hopkins University Press 1974) p. 69.

28 The UDHR denotes negative rights, while the Soviet-sponsored ICESCR talks of positive rights.

29 *Supra* note 17, p. 108.

VI. A Postmodern Discourse on Semiotic Analysis in the HKSAR context

Another theme of postmodernism is language gaming. Postmodernists challenge structuralism, which took the view that language is a system of relational differences with an ultimate meaning. Structuralists believe that in order to understand the meaning of a word, one would need to compare such word to other words whereby eventually one would find out the ultimate meaning of the word. They name this ultimate meaning a "center", "subject" or "origin".[30] In this respect, postmodernist theorist Derrida disagreed. He argued that if language were a system of relational differences, then it would be impossible to truly "center" or define a word. "[A]ny attempt to define a word or a sign takes us not closer to its...real meaning, but actually further away from it, because we define a word...by other words, none of which can ever be the original word itself."[31] Thus, interpreting a language can only defer and delay the coming of the original meaning. By putting Derrida's argument into the context of the HKSAR, we can see the difficulties in achieving a truly accurate and precise interpretation of the provisions in the HKBL, especially that it has blended in both Western liberal ideas and Eastern socialist ideas. It would be very difficult to interpret the HKBL for each word in the constitution can be interpreted to mean two entirely different ideologies and concepts. Should the court adopt a liberal or socialist approach in interpretation? On one hand, the court should recognize the high degree of autonomy of the HKSAR in its economic, social and political arenas;[32] on the other hand, it needs to take into account the Chinese sovereignty over the HKSAR.[33] This creates a situation where "an unbounded space" has been opened up, and the notion of "via media" comes into play. Postmodernists would follow neither the liberal approach nor the socialist approach, but rather they would blend the two conflicting ideologies and come up with a completely new way of interpreting the constitutional provisions. The HKSAR courts have apparently adopted the postmodernist approach. They recognize the fact that "(s)ome parts of the Basic Law will more sensibly be interpreted according to the common law...since they have to be read in the context of common law doctrines (e.g. economic questions)..., while others may be

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30 Derrida, J., "Structure, Sign and Play", in *Writing and Difference* (Chicago: University of Chicago Press, 1978) p. 286.

31 See *supra* note 17, p. 107.

32 Article 2 and 5 of the HKBL. See also chapters V, VI and VII of the HKBL.

33 Chapters II and VIII of the HKBL.

subject to Chinese rules of interpretation (e.g. matters within Chinese responsibility)".[34] This approach "deconstructs" any absolute socialist or liberal interpretation of the HKBL, and "reconstructs" a new way of interpretation that can take into account the "differences" between the two political systems and at the same time can preserve both.

VII. A Final Note

The HKSAR can be considered as a product of postmodernist jurisprudence. At the dawn of the 1997 change of sovereignty, HKSAR entered into a postmodern era leaving it behind the orthodox essentialism and structuralism. It reflects how postmodernism is at work in reality. As the HKSAR has demonstrated, postmodern jurisprudence has succeeded in getting rid of the concept of "totality" and activating the "differences" of the indeterminate legal subjects. Deconstruction of conventional jurisprudence is however not the end of the matter, it helps lead to a reconstruction of new ideas and concepts that can incorporate both the merits of traditional jurisprudence and the new theories of the modern society. It can preserve the universal truth and at the same time cater for the different needs of the legal subjects. In the author's opinion, postmodernism should therefore be considered the most welcomed and celebrated period in legal jurisprudence.

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[34] Ghai, Y.P., *Hong Kong's New Constitutional Order The Resumption of Chinese Sovereignty and the Basic Law* (Hong Kong: Hong Kong University Press 1997) 187. The first case that has adopted this interpretation approach is *HKSAR v Ma Wai Kwan David & Ors* [1997] 2 HKC 374. The counsel in the case referred the court to Ghai's text.

UNATTENDED CHILDREN IN HONG KONG: THE UNSOLVED PROBLEM AND THE LEGISLATIVE SOLUTION

本港兒童缺乏看管之現象—問題當前立法求變

BROOKE MONTEGEMERY

The problem of unattended children has a long history in Hong Kong. Children being left home alone by their parents are either seriously injured or killed. Public outcry and calls for legislation to cope with the problem have followed each tragedy and yet the government has always taken a passive role in solving the problem, resulting in numerous tragedies. It was until the break out of the Ho Man Tin Fire in 1991 that the government came under enormous pressure from the stirred-up public to investigate the controversial issue of enacting a legislation to punish parents who leave their children alone at home.

The proposed "home alone legislation" was recalled and resulted in the "Consultation Paper on Measures to Prevent Children from begin Left Unattended at Home". The Consultation Paper itself conveys a strong message that the government is now aware of the severity of the problem and disapproves parents leaving their children home alone. At the same time, the media were rife debating for and against the proposed legislation. Deterrence and education were cited as the main reasons supporting the legislation. The reasons against were the difficulties in determining punishment, the adverse effect on working women and the limited achievement of implementing the proposed legislation.

The writer focuses criticism on the rationale used to justify the abandonment of the proposed legislation. In determining punishment, the writer submits that counseling is a better alternative to fine and imprisonment which defeat the educational spirit of the law. The writer then goes on to criticize the injustice caused by such law is not attracted to the adverse effect on the poor working class which was claimed by the government, but rather the reluctance of the government to take responsibility for its own children. The writer further submits that that implementation of the proposed legislation, if accompanied by day care services, would be very productive in solving the problem of unattended children.

The introduction of a "home alone legislation" is supported by the territory's most precious constitutional document, the Hong Kong Bill of

Rights Ordinance, and the internationally recognised Conventioin on the Rights of the Child. However, the rights of child in Hong Kong are no fully protected due to the lacuna of the existing Offences Against the Person Ordinance. In conclusion, the writer supports the enactment of the proposed legislation" to protect the fundamental right of children, the right to life.

在香港，兒童缺乏看管的問題已有一段歷史。那些被父母單獨留於家中的兒童，有些不幸嚴重受傷，而另一些更慘被奪去性命。每宗悲劇皆激起公眾的強烈抗議，亦喚起要求立法解決問題的聲音。可是，政府卻經常處於被動狀態，引致悲劇接踵而生。直至九一年何文田大火發生後，政府才於公眾壓力下對這個極富爭論性的問題作出探討，研究立法懲罰那些把子女單獨留於家中的父母。

正因爲此，有關單獨留於家中的條例之建議重新獲得注視，繼而引進了一份「防止兒童缺乏看管之措施」的諮詢文件。文件本身所表達的強烈訊息，是政府現已明白到問題何其嚴峻，亦反對家長把子女單獨留於家中。同時，媒介也就應否立例展開了激烈辯論。支持者以法例的阻嚇及教育作用爲他們的兩大理據，而反對者則指出在決定刑罰方面的困難、立例對在職女性的負面影響以及條例所能達到的有限成果。

作者集中批評維護立法背後的依據。在決定刑罰方面，作者認爲罰款和入獄破壞了條例本身的教育精神，而輔導則屬一個較佳之選擇。對於此法所造成的不公義，作者認爲這並非如政府所指是歸咎於貧窮工作階級所要面對的負面影響，而是基於政府不願負上照顧兒童的責任。作者繼續指出，若有日間托兒服務相配合，實施建議中的法例將能在解決問題上有極大之成效。

引進有關單獨留於家中的條例，實是得到本港最寶貴的憲制性文件《香港人權法案條例》和獲得國際間承認的《兒童權利公約》的支持。不過，基於現存的《侵害人身條例》的漏洞，兒童權利在香港未能得到全面的保障。總括來說，作者支持制定建議中的法例，以保障兒童的基本權利—生存的權利。

I. Introduction

An estimated 67,000 children under the age of 10 are left home alone

every year in Hong Kong.[1] Most of these unattended children are either seriously injured or killed in accidents in their own homes. Public outcry and calls for legislation to protect such children have followed each tragedy and yet the government has failed to enact the laws necessary for making such forms of neglect a crime.

Although the problem of unattended children has a long history in Hong Kong, the call for legislation did not reach its peak until 1991-1992. It was at this time that the government came under pressure to debate the controversial issue of punishing parents who leave their children alone at home. The debate volleyed in the media lasted for several months. Concerned organizations and individuals made their opinions clear and yet those opinions were as diverse as the people who made them. Eventually the government investigated the issue through public consultation. Despite the majority of respondents from the Hong Kong Council of Social Service considered that the proposed "home alone legislation" would prove effective, all plans for such legislation were scrapped.[2]

This paper gives an overview of the events that led to the 1991-1992 debate on "home alone legislation" and furthermore discusses the extent of the home alone problem and the divergence of the Consultation Paper and the responses of various organizations. The writer's criticism focuses upon the rationale used to justify the abandonment of the proposed "home alone legislation". The paper also examines the efficacy of existing domestic law and international human rights norms that are designed to protect children. This paper concludes with a discussion concerning why there is a need for legislation and how such laws can be enforced.

II. The Problem

The problem of unattended children is nothing new, but it took a tragic and senseless accident to stir up public opinion and eventually rally the government to take action. The statistical data on the extent of the problem shows little improvement with the passing of time and leads to the conclusion that public education drives and child care improvement reforms have not

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1 Hong Kong Society for the Protection of Children, "Keeping Children Safe" (1996) HKSPC Annual Report, p. 3. Not all of these children are left home alone while their parents work. An estimated 36% (around 24,000) children are left alone while parents attend to family affairs or go shopping.

2 The Hong Kong Council of Social Service, "Members Agencies Response to the Consultation Paper on Measures to Prevent Children from Being Left Home alone" (1991) Appendix 2, p. 4. It was found that 51.3% of the respondents felt that legislation would prove effective and only 33.3% felt that it would be ineffective. 15.4% abstained from answering.

been fully effective.

A. The Ho Man Tin Fire

On 11 January 1991, a young mother in Ho Man Tin went to the market leaving behind her 4 children, ages ranging from 18 months to 4 years old. Although she left the children unattended for merely less than 2 hours, that was sufficient for the children to start a fire that ended in the deaths of all four of them.[3] An inquest followed and neighbours reported that the parents frequently left the children alone at home[4] even though the children had started a small fire while home alone only months before their deaths.[5] Social workers later discovered that the family lived less than a 5 minutes' walk from a nursery.[6] The then coroner of Hong Kong, Winston Leung, blamed the deaths on parental neglect and called for legislation.[7] What later came to be known as the Ho Man Tin Fire was the impetus for renewed calls for "home alone legislation" and resulted in the government's "Consultation Paper on Measures to Prevent Children from being Left Unattended at Home" (October 1991). The remaining question is: did the tragedy compel the government to actively work to protect the unattended children? As Priscilla Lui, director of Against Child Abuse, almost prophetically, pointed out in 1991, "How many more children must die to make us hear their voices...?"[8]

B. The Extent of the Problem

Following the Ho Man Tin fire, reports of the high number of home alone fatalities began to circulate and public opinion was stirred. The statistics were shocking. In 1988, an all time high of 34 child deaths was reported as having resulted from a child being left home without adult supervision.[9] An equally startling number of 27 children died in 1989.[10]

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3 "Four Unattended Children Killed in Blaze", *South China Morning Post*, 12 January 1991, p. 1.

4 *Ibid.*

5 "Legislation Opposed in Child Survey", *South China Morning Post,* 1 January 1992, p. 2.

6 "Legislation Needed to Prevent Child Deaths", *South China Morning Post,* 17 December 1991, p. 26.

7 *Ibid.*

8 "Fears on Parents and the Law 'Whipped Up'", *South China Morning Post,* 16 December 1991, p. 6.

9 Social Welfare Department, "Consultation Paper on Measures to Prevent Children from Being Left Unattended at Home" (1991). [hereinafter "Consultation Paper"]

10 *Ibid.*, p. 2.

The Commissioner for Census and Statistics estimated that in 1989, 6.5% of all households with children under the age of 13 age left their children home alone for 2 hours or more during the past 7 days prior to the census. This amounts to approximately 66,700 children being left home alone.[11] In that same year, the Hong Kong Council of Social Service noted in their "Paper on Concern for the Rights of the Child" that the issue of home alone legislation was "a question for more in depth study".[12] Unfortunately, such a study did not begin until after the Ho Man Tin fire and 44 other home alone related deaths in 1990-1991 were reported.[13] Even after the study was completed, little or nothing (in the form of enacting legislation) was done to protect the unattended child.

The statistics did not improve with time. Between January 1990 and February 1991, the Fire Services Department responded to 166 emergency calls involving 212 children found to be left unattended in locked flats.[14] Between 1991 and 1994, 67 more children under the age of 10 died while being left home alone.[15] Not only does the death toll remains high, but the number of parents who are leaving children home alone may very well have increased. In a 1994 study by the Hong Kong Council of Social Services, it was found that 35% of families reported that they had left children, 10 years old and younger, home alone when parents were "going to market" or "working".[16]

The staff at Against Child Abuse reported that while conducting home visits they frequently came across cases of children being left home alone. In such cases, the social worker could only talk to the child through the door to determine if he or she was safe. They would ask the child how to contact the parent but more often than not the child did not know. If after one hour, the parent still have not returned home, the social worker will call the police.[17]

The facts are that children are still being left home unattended and as a result their lives are at risk. The power of social workers and staff of

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11 *Ibid.*, p. 1.

12 Hong Kong Council of Social Service, Joint Working Party on Draft Convention on the Rights of the Child, "Paper on Concern for the Rights of the Child" (1989) p. 1.

13 Government of the United Kingdom and Northern Ireland, "Initial Report of the United Kingdom of Great Britain and Northern Ireland in respect of Hong Kong under Article 44 of the Convention on the Rights of the Child" p. 4. (Note: the date of this report was not available, however, interested non-governmental organizations in Hong Kong received the report in February 1996.) [hereinafter "Initial Report"]

14 *Ibid.*

15 *Ibid.*, p. 5.

16 Ho, W.S., Yeung, K.C. and The Hong Kong Family Welfare Society, "Child Minding Needs in Butterfly Bay, Tuen Mun" (1995) p. 3.

17 Telephone interview with Grace Ma, Against Child Abuse, on 19 December 1996.

concerned non-governmental organizations to protect the unattended children are limited because of weaknesses in the laws.

III. The Media Debate

Following the Ho Man Tin Fire and during the 3-month public consultation period, the Hong Kong newspapers were rife with editorials and articles arguing for and against the proposed legislation. Deterrence and education were cited as the main reasons for supporting legislation. Difficulties in determining punishment, enforcement, and the effect on working women were cited as the main reasons for rejecting the legislation.

Pro Legislation

Tom Mulvey, Director of the Hong Kong Family Welfare Society, was in favour of legislation which he believed would act as a deterrent and would also help to educate parents "into seeing this practice of leaving children unattended is unacceptable". Mr. Mulvey dismissed the theory that such legislation would act only to deprive poor women and stated that "only" 36% of married women are in the work force.[18] San San Ching, director of the Council of Early Childhood, felt that legislation would be effective in forcing parents to seek alternative child care services.[19] Dr. Wong Chung Kwong, consultant child psychiatrist at the Chinese University, cited cultural reasons for enacting legislation, "Chinese culture is such that the law does have an important control on the psyche. It will definitely be some kind of yardstick if the law says no".[20] Mr. Hui Yin Fat, director of the Hong Kong Council of Social Service and then member of the Legislative and Executive Council, stated that he was "supporting legislation all the way" and went on to cite the deterrent effects.[21] Both Mary Beyns, director of the Hong Kong Children and Youth Services,[22] and San San Ching[23] insisted that punishment for parents should not involve imprisonment or fines, but rather something in the way of mandatory counseling. Furthermore, all proponents made it clear that the improvement of child care services should be paramount to the proposed legislation.

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18 *Supra* note 8.

19 *Ibid.*

20 *Ibid.*

21 "Punish Parents as Last Resort", *South China Morning Post*, 17 December 1991, p. 10.

22 *Ibid.*

23 *Supra* note 8.

C. Opposed

Perhaps the strongest argument against the proposed legislation is that on its own it is not a sufficient solution. This is certainly true, but the point is made moot by the fact that proponents have insisted that legislation must go hand in hand with supporting services and public education.

Ms. Linda To Kit-lai, co-ordinator of Harmony House (a women's refuge centre), strongly opposed legislation because she felt that it would punish parents for whom the necessary services are not available. She went on to say, "Fining or jailing her (a woman who has left her children home alone) would not help the children".[24] This is once again another moot point, as proponents of legislation have overwhelmingly agreed that the punishment should take the form of mandatory counseling. Ms. Chan Yuen-han, director of the Women's Affairs Committee of the Hong Kong Federation of Trade Unions, touched upon another important point in the argument against legislation; the fact that the law would affect poor working women more than any other groups.[25] In response to that the writer should say that home alone legislation is more likely to (positively) affect poor children than any other groups.

Obstacles in enforcing a home alone law were touched upon in greater details in the government consultation paper which shall be discussed below in section IV.

IV. Consulting the Public

At the centre of the controversy was the government-issued Consultation Paper of October 1991.[26] Responses to the Paper were accepted until 31 December 1991. At the same time, the Hong Kong Boy's and Girl's Club Association conducted a survey and found that 54 % of the respondents were in favour of the proposed legislation while only 16.8 % were against it.[27] The paper itself conveys a strong message that the government disapproves of parents who leave children home alone. Form the cover photograph[28] to the statistics (many of which have already been mentioned in this paper) to the 4 possible solutions listed in the consultation

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24 "Child Law Fails to Solve Problem", *South China Morning Post*, 18 December 1991, p. 5.

25 *Ibid.*

26 Consultation Paper.

27 *Supra* note 5.

28 The cover photograph features a pair of young eyes staring through a closed iron grid door. The caption reads "Everyday in Hong Kong Innocent Children are Locked Up: A Child Left Alone is a Child in Danger".

paper,[29] it is evident that the government had finally taken note of the severity of the problem.

The 4 possible solutions mentioned are (1) provision of child care services, (2) mutual help, (3) public education, and (4) legislation. Of the four solutions, the most controversial is that of legislation and 7 of the 11-page document are devoted to outlining the pros, cons, implications, and difficulties of the proposed legislation.

Assuming that legislation is implemented, the Consultation Paper asks the following questions:

> (1) Is existing Hong Kong legislation sufficient (in particular, section 26 of the *Offences Against the Person Ordinance* (Cap. 212) and the now repealed *Protection of Women and Juveniles Ordinance* (Cap. 213) section 34(2)(a)) to make the act of leaving a child at home unattended a crime?
> (2) If not, should the government amend existing legislation or should legislation be introduced?
> (3) With regard to the introduction or amendment of any legislation, the
> (4) following should be considered: (a) age limit of the child, (b) circumstances that constitute leaving a child home unattended, (c) obligation to report, and (d) power of entry.

The Consultation Paper points out that there is no specific legislation dealing with the unattended child in most commonwealth jurisdictions. The exceptions are: New Zealand, New South Wales, Victoria, Australia, Ohio, USA, Ontario and Manitoba, Canada. In fact, none of these jurisdictions have ever used the legislation to punish parents. Furthermore, the Ontario Government states that their legislation serves an educational and deterrent purpose.[30]

The Consultation Paper also notes that he "power of entry" issue may have serious human rights implications. The current power of entry by police officers and social workers can only be used in cases where child abuse of a very serious nature is suspected.[31] The authors of the Consultation Paper also noted that, "Legislation does not automatically produce responsible parents".[32]

The Hong Kong Council of Social Services asked its member agencies

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29 Consultation Paper, p. 2.
30 *Ibid.*, p. 4.
31 *Ibid.*, p. 7.
32 *Ibid.*, p. 8.

for feedback on the government Consultation Paper and 39 agencies responded.[33] It was found that 51.3% of the respondents felt that legislation would prove effective, while only 33.3% felt that it would be ineffective.[34] When asked if they supported legislation the respondents were evenly divided, 46.2 % were in support and 46.2 % were not.[35] There were also respondents who believed that legislation would prove effective. However, they still did not support enacting the legislation. The reason given was that until public education drives and child care reforms had proven inadequate, it would not be fair to introduce legislation.[36]

As for the other questions posed by the Consultation Paper, the majority of member agency respondents felt that existing legislation would be sufficient if amended[37] and the age of the child should be 10 years old.[38] The concept of reasonability was widely used for determining the circumstances that constitute leaving a child home unattended (e.g. "without reasonable supervision", 'for a time that is unreasonable", "without taking reasonable safety precautions"). Respondents were almost evenly divided over the question regarding the obligation to report. Those who felt that reporting should be obligatory qualified their conclusion by stating that reporting should be encouraged but not necessarily mandatory. Those against obligatory reporting noted that an obligation to report does not even exist in cases of suspected child abuse.[39] An overwhelming majority, however, felt that police officers and social workers should be endowed with the power of entry. This was also qualified by stating that the power should only be used in "serious cases".[40]

If the suggestions and majority views of the member agency responses had been seriously considered, the government would have amended the existing legislation to read "any person over 16 years of age who has custody, charge or care of a child under the age of 10 years old and leaves such a child without reasonable supervision for a period of time that is unreasonable and/or without taking reasonable safety precautions, then that person shall be

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33 *Supra* note 2, p. 1.

34 *Ibid.*, p. 4.

35 *Ibid.*

36 *Ibid.*, p. 5.

37 *Ibid.* Of the 18 respondents, 8 were in favour of amending existing legislation, 4 felt that specific and separate legislation is needed, 3 said that existing legislation is sufficient, and 3 abstained from answering.

38 *Ibid.*, p. 6. Of 12 respondents 6 were in favour of an age limit of 10 years, 3 said 12 years old, 1 was in favour of 9 years old, 1 for 13 years old and 1 for 14 years old. It was stated that children under the age of 10 are not capable of handling dangerous situations.

39 *Ibid.*, p. 7.

40 *Ibid.*, p. 8.

guilty of an offence and liable to mandatory counseling, refusal of which may be grounds for a fine or imprisonment". In a paper presented at the "Seminar on Measure to Prevent Children Being Left Unattended at Home", Elsie Leung proposed similar wording, but she felt that punishment should constitute a fine and/or imprisonment.[41] The writer believes that such a penalty would defeat the spirit of a home alone law and that penalties involving fine or imprisonment should only be used as a last resort, such as in the case of a repeat offender or parents who refuse to attend the mandatory counseling sessions.

Why did the government decided not to introduce home alone legislation? In the end it was the Legislative Council who had the final word; 10 of the 14 members in the adjournment debate opposed the proposed legislation. The theme of the opposition centred around the injustice that such a law might cause the poorer communities, in fact, the injustice is the reluctance of the government to take responsibility for the safety for its children. Mrs. Peggy Lam Pei Yu-dja felt that if home alone legislation were enacted "the social problems created would be greater than any beneficial effects it could have".[42] Yet this begs the question of what social problem could be greater than an average of 21 child deaths a year? Mr. Federick Fung Kin-kee said "the shadow of punishment would be counterproductive".[43] But if punishment were to take the form of counseling, it could become greatly productive instead. Such punishment would prove counter-productive only for the government, who would be responsible for financing the counseling and the desperately needed day care places. An ideal result of home alone legislation would be the imposition of an obligation on the government to provide adequate day care services for those families in need.

V. Existing Domestic Law and International Human Rights Norms

How would the proposed home alone legislation fit into the puzzle of existing domestic law and international human rights norms? Very easily. In fact, the abandonment of the home alone legislation is a blatant contradiction of the spirit of one of the territory's most precious constitutional document. The *Hong Kong Bill of Rights Ordinance* (Cap. 383) Articles 19 and 20. The *Convention on the Rights of the Child*, now ratified in Hong Kong, also guarantees the protection of children by the state.

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41 *Supra* note 2, p. 4.

42 "Home Alone Law Opposed", *South China Morning Post*, 19 December 1991, p. 6.

43 *Ibid.*

In order to uphold the spirit of these documents, the most likely option involves an amendment to the *Offences Against the Person Ordinance* (Cap. 212) sections 26 and 27.

A. The Hong Kong Bill of Rights Ordinance (Cap. 383) Articles 19 and 20

The incorporation of the International Covenant on Civil and Political Rights into Hong Kong law as the Hong Kong Bill of Rights Ordinance (Cap. 383) in 1991 was a momentous occasion.

In order to understand the child's basic right to protection, Articles 19(1) and 20(1) should be read concurrently. Article 19(1) guarantees that the family is entitled to protection by the state and Article 20(1) promises that the child is entitled to protection by virtue of his/her status in the state. Read together, one might believe that the child, as a member of the family and by virtue of his/her status in the state, would receive the elusive protection by the state. The fact that home alone legislation has not been introduced contravenes the child's basic right to life and protection. Ironically there has been a move in the law that will protect the privacy of a minor. The Law Reform Commission proposed the introduction of a law that would impose a maximum jail sentence of 5 years on people who listen in on others' phone calls or open mail belonging to another including their own child.[44] It seems odd that the government is so willing to protect the privacy of a child, yet unwilling to protect the life of the child. If the basic rights of the child are to be truly and wholly protected, such protection should begin with the right to life.

B. Convention of the Rights of the Child

In September 1994, the United Nations *Convention on the Rights of the Child* was formally extended to Hong Kong. The Convention attempts to place duties on the government to ensure the rights of children. Of the 54 Articles, the ones most relevant to the introduction of a law to protect unattended children are Articles 6 and 19. Article 6 states the most basic right of all; the child's right to life. Article 19(1) of the Convention echoes the theme of State responsibility for the welfare of the child by stating "States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of ...neglect or negligent treatment... while in the care of parent(s), legal guardian(s), or any

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[44] "Eavesdropping Parents Could End Up in Prison", *South China Morning Post*, 19 December 1991, p. 1.

other person who has the care of the child".

Article 5 of the Convention holds that the State must respect the parental right to protect children and Article 18 states that it is the family unit that has the primary responsibility of bringing up the child. But what happens when the family does not provide adequate protection for the child? John E.B. Myers notes that "while parental rights are fundamental, they are not absolute".[45] Authority that the State may use to protect the child may come in the form of either the police powers or *parens patriae*; the inherent government authority to protect persons such as children who are unable to protect themselves.[46]

Clearly the spirit of the Convention is that the State is obliged to protect the child when the parents have failed to do so and to enact such legislation as is necessary for the protection of the child.

C. *Offences Against the Person Ordinance (Cap. 212) Sections 26 and 27*

The rights of children are spelt out clearly in the documents mentioned above, yet these basic rights are not fully reflected in the laws of Hong Kong. The closest it comes to protecting the neglected child is the *Offences Against the Person Ordinance* (Cap. 212) sections 26 and 27.

As it now stands, these 2 sections are not sufficient on their own to protect the unattended child. Section 26 specifies that the child should be under two years of age and as Elsie Leung pointed out, children of such a young age are more easily carried out of the home and are less likely to be left at home. It has also been theorized that there is a cultural element leading to the belief that children over the age of 6 are "mini-adults".[47] This erroneous belief may be responsible for the large number of parents who leave 6 to 10 year olds home alone. Section 26 does nothing to protect children in this age bracket. Furthermore, proponents of legislation have consistently stated that any home alone legislation should be in reference to children of 10 years old or younger.

Section 27 is irrelevant to the home alone problem because it seems to refer specifically to non-accidental injury of the child by stating that the neglect must be "wilful". In the case of unattended children, the parents

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45 Myers, J.E.B., "The Child, Parent and the State" in Price-Cohen, C. & Davidson, H.A., (eds) *Children's Rights in America· United Nations Convention on the Rights of the Child Compared with United States Law* (United States of America: American Bar Association, 1990) p. 90.

46 *Ibid.*

47 Lam, W.F., "Latch Key Children in Hong Kong: Their Needs and the Implications for Social Services" (1986) (unpublished MSW Dissertation HKU).

intentionally leave their children alone, but do not recognize their actions as a risk to their welfare. Because of this, it would be difficult to prove the *mens rea* element of the offence.

Furthermore, neither sections are capable of reflecting the spirit of a home alone law, as the penalties for both offences involve fine and/or imprisonment.

VI. Making Home Alone Legislation Work

The measure with the greatest potential of reducing the number of home alone deaths is that of child care services. The government's plans to expand the availability of child care services is mentioned in the Consultation Paper. It is also stated that "...it is not envisaged that the demand can be met in full in the near future, bearing in mind that resources are not unlimited and that the primary responsibility for ensuring the safety of the children should rest with the parents.[48] Indeed, the needs have not been met. In 1991 it was reported that there was a need for at least 10,000 more day-care places.[49] The Hong Kong Society for the Protection of Children reports that as of October 1996 there was still a shortfall of about 10,000 day-care places. The situation for children under the age of 2 is acute, as there are now only 1,000 places for children of that age bracket.[50] In short, child care resources continue to be lacking.

By "mutual help" the government is referring to community mutual help groups which "have been organized by the Social Welfare Department and non-governmental organizations from time to time".[51] The goal of a mutual help group is to encourage parents in particular neighbourhoods to help each other with child care. Ideally, mutual help groups would benefit the poor, prevent children form being left home alone, and save the government the expense of subsidized child care services. However, the reality is that poor families rarely have the time to look after their own children much less to become active in a mutual help group that would involve caring for the children of other families.

As an alternative to improving child care services, public education has the potential for being an effective measure in preventing children from being left home alone. It is my opinion that legislation is capable of falling into the category of public education. It is obvious from the statistics (see Part II

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48 *Supra* note 2, p. 3.

49 *Supra* note 42.

50 *Supra* note 1, p. 2.

51 Hong Kong Council of Social Service, "Seminar on Measures to Prevent Children from Being Left Unattended at Home—Report on Group Discussion (Group 3)" (October 1991) p. 2.

Section B of this paper) that previous and present government drives to educate the public on the home alone problem have failed to reduce the death toll.

The arguments against legislation are riddled with weaknesses. There is considerable argument that it would be unfair to introduce legislation at a time when day-care places are lacking and public education on the home alone problem has ebbed. If non-punitive legislation (i.e. use of mandatory counseling as punishment) can be introduced, such legislation would not only serve the dual purpose of education and deterrence, but may serve a social purpose as well. Law as social reform is not an unusual or new concept. Punishment in the form of rehabilitation or psychiatric treatment is often used in the courts. There is no reason why a social ill in the form of child neglect cannot be criminalized and punished by the state. Neither is the fact that the government would be forced into a position of responsibility a good reason for abandoning the legislation. That responsibility is already encapsulated in the *Bill of Rights Ordinance* Articles 19(1) and 20(1).

VII. Conclusion

The Enactment of home alone legislation would serve three main functions. First, the idea that legislation acts as a deterrent and a yardstick would be implemented. Clearly, the government feels that leaving children attended is wrong and they wish to take measures to prevent this. It is equally evident that there are parents who do not recognize the dangers or do not feel that this is wrong. As Elsie Leung has pointed out, the mere fact that the proposed legislation is controversial "shows that the standard of parental care is not uniform".[52] Law is meant to be normative; a yardstick for acceptable behaviour within the community. Secondly, such legislation will act to increase awareness for the right of children. Thirdly, it will reinforce the spirit of the Hong Kong Bill of Rights Ordinance Articles 19 and 20, and the *Convention on the Rights of the Child* Articles 18 and 19 by forcing the government to take both legislative and social action to protect the unattended child. The Consultation Paper noted that "legislation does not automatically produce responsible parents",[53] but perhaps legislation can encourage responsible parenting by pressuring the government to take responsibility for the protection of the rights guaranteed to the child by law. As was stated in a Hong Kong Social Service Group discussion on the issue of unattended children, "Legislation might be a way to impose pressure on the government and the Social Welfare Department to understand the need of

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52 *Supra* note 3, p. 2.

53 *Supra* note 2, p. 8.

the public and enhance service to match with legislation.[54] Introduction of home alone legislation would be on the legal responsibility of the State to protect the child as well as on the social implications that such a law would carry.

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54 *Supra* note 51.

UNEQUAL OPPORTUNITY FOR EQUAL OPPORTUNITIES: A JUSTIFICATION FOR EQUAL OPPORTUNITIES LEGISLATION FOR HOMOSEXUALS

平等機會中的不平等 —— 爲同性戀者成立平等機會條例的理由

CHIU PIT-MING*

The 1991 Hong Kong Bill of Rights fails to provide for inter-citizenship relationship and it is an undeniable fact that the previous legislation is insufficient in protecting gays and lesbians against sexual-orientation discrimination It is time for the government to fill in the gaps.

Today, homosexuality is still a social taboo However, the author urges, in the interest of justice, that this problem should not be taken lightly. Society and its values are ever evolving; people should therefore put down their prejudices towards the homosexuals

The author points out challenges for homosexuals in their quest for equality and rights. One example is cultural relativism, which concerns the erosion of the Chinese tradition of individuals subordinating to community by the western notion of individual rights. The author sees this as a weak argument since tradition is not a shield against human rights; but rather, that the doctrine of human rights echoes the essence of Confucianism.

The reservation on the part of the government concerning this isue was demonstrated in its tug-of-war with legislator Anna Wu over the issue in 1995. Instead of enacting the appropriate legislation, the government turned to civil education and the funding of homosexual support groups to "soothe" the controversy.

The condemnation of homosexuality, according to the author, is based on three main grounds: social stability, morality and freedom of the heterosexuals to discriminate. In response, the advocates for equal opportunities argue that it is unfair to treat conducts not generally done as unnatural and that the rejection of non-procreative sexual activity is absurd. The author further asserts that the media is responsible for creating a negative image of homosexuals. The allegation that homosexuals encourage undesired sex-role models for children is unsound there is not

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enough reliable scientific evidence, as of yet, for the formation of such an argument against homosexuality.

As for the rights of homosexuals, the author has applied the principle of justice that each individual has the right and obligation to maintain a just and equal society, meaning that homosexuals are entitled to equal treatment. In fact, protecting the rights of homosexuals does not necessarily imply endangering that of the heterosexuals. Mutual respect is the trick for harmony between the two groups.

The law should defend homosexuals, as they constitute a disadvantaged status group in society. There should be tolerance of minority groups instead of tyranny of the majority. Furthermore, the author alleges that the effectiveness of legislation depends on the recognition and co-operation of all citizens, thus, civil education can perform a complementary role by cultivating a pluralistic liberal political culture.

Yet, the author realizes that when it comes to issues of freedom of speech, religious activities, marriage and parenting rights, the notion of equality for homosexuals may not seem to be appropriate.

The author also refers to foreign experiences in the U.S.A., Australia, Denmark, Ireland and the Netherlands in the article.

The Equal Opportunities Commission was set up in 1996 to enforce the enacted equal opportunities legislation, to handle complaints on the alleged violation of the legislation and to provide guidance and education to citizens.

It is hoped that the HK government would enact legislation on equal opportunities for homosexuals in the foreseeable future, which would manifest the government's determination in promoting the equality principle, and granting the victims a right to sue, so as to modify societal prejudice.

The voyage has just begun.

在一九九一年通過的<香港人權法案條例>中，並未包括公民間的關係。在以往的條例中，對於保護男同性戀者及女同性戀者免受性別取向歧視並不足夠。現在是讓政府來填補這空缺的時候。

直到今天，同性戀仍是社會中的忌諱。但作者認爲，以公平起見，他們不應該受到輕視。社會及人民的價值觀不斷改變，人們應該放下他們對同性戀的成見。

不過，作者指出在推行同性戀平等機會及權利時會遇到一些挑戰，例如中國傳統思想主張的應犧牲個人利益來成全社會整體利益的觀念，和推行同性戀者平等機會及權利是互相違背的。但是作者認爲傳統儒家思想也重視人權，所以訴諸傳統　無效的。

除此之外，從政府於一九九五年，立法局議員胡紅玉動議平等機會條例時的保留態度，可見政府並不支持以立例來保護同性戀者的權

益。反之，政府透過公民教育及資助支持同性戀者團體來平息這次風波。

作者認爲對同性戀者的指責主要是基於三大原因，一、社會安定；二、社會的道德標準；三、非同性戀者的歧視自由。支持同性戀者平等機會的人於反駁時指出，把大部分人普遍不做的行爲視爲違反常理是不公平的，而傳媒亦要爲醜化同性戀者的形象而負責，以及因同性戀　不能生育而排斥他們更是沒有道理。直至目前爲止，仍沒有可靠的科學証據去找出同性戀的成因，所以不能因此推論同性戀者會爲兒童作出一個不良的性角色榜樣。

至於同性戀者的權利，作者認爲從公平的角度來說，每個人都有權利和義務去維持一個公平和平等的社會，所以同性戀者也應得到同等的待遇。其實，去保護同性戀者的權利並不代表會危害非同性戀者的權利，互相的尊重才是和諧相處的秘訣。

因爲同性戀者是社會的少數份子，法律更應保護這群人。社會應該容忍少數份子而非只顧及大多數人的利益。作者亦認爲立法的成效在於人們對平等機會之重要的認知和合作，所以公民教育對於培育多元化的政治氣候起著相輔相承的作用。

不過作者認爲，在言論自由，宗教活動，婚姻以及養育子女方面，同性戀者應和非同性戀者享有同樣地位則有商榷的餘地。

作者在文章裏亦參考了美國、澳洲、丹麥、愛爾蘭及荷蘭在這方面立例的例子。

平等機會委員會在一九九六年成立，它的作用在於執行已制定的平等機會條例，處理有關違反條例的投訴，以及提供指引和教育市民。

在可見的將來，作者希望政府能成立平等機會條例保障同性戀者，以示推廣平等原則的決心，並爲受害者提出控訴的機會，以糾正社會人仕的偏見。

這行程還是剛開始。

I. Introduction

In 1991 Hong Kong enacted its first Bill of Rights. Section 7 of the *Bill of Rights Ordinance (BORO)* confines the scope of the bill to relationships between individuals and government and public authorities. The case law has affirmed that the *BORO* does not govern inter-citizen relationships. In recent years, human rights claims have revealed that the *BORO* is not a useful tool in achieving equal opportunities because of its limited scope. Though the government has enacted three pieces of equal

opportunities legislation to outlaw sex[1], disability[2] and family status discrimination[3], there are still areas of discrimination that are not covered, for example, sexual orientation.

This paper is divided into four parts. In the first part, the author will examine the present legal system and the protection of the right to equal opportunity for homosexuals. Then the claim that equal opportunity is a human right will be explored. The second part will focus on the arguments that oppose equality for gays and lesbians. Furthermore, a counter argument using justice theories will be applied to make two points. It will be argued that there is a need for equal opportunities legislation to promote social justice. A position will be taken on the extent of the use of such a legislative measure. The limits of law and the role of education will be discussed in the third part of the paper and the final part will focus on the content and implementation issues that were experienced in other jurisdictions.

II. Bill of Rights and Anti-discrimination

The Hong Kong *BORO* consists of three parts. The first part is the preliminary section consisting of seven articles, mostly dealing with the status of the *BORO* and its effect. The second part is the *Bill of Rights (BOR)* and is virtually a mirror image of Part II of the *International Covenant on Cultural and Political Rights (ICCPR)* with some minor changes. The third part contains the exceptions and deals with some relevant reservations applicable to Hong Kong and the 'freeze periods' for some legislation whose effect shall last for one year after the commencement of the *Ordinance.*

Article 22 of the *BOR* provides that:

> 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 first sentence states the principle of the rule of law that everyone is equal before the law. The second part calls for positive action by the government to outlaw discrimination on any grounds. It is argued that

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1 *Sex Discrimination Ordinance* (Cap. 480).
2 *Disability Discrimination Ordinance* (Cap. 487).
3 *Family Status Discrimination Ordinance* (Cap. 527).

discrimination on the grounds of sexual orientation is no exception[4]. In 1995, when the Human Rights Committee of the United Nations made recommendations to Hong Kong, it proposed that Hong Kong adopt 'comprehensive anti-discrimination legislation aiming at eliminating all discrimination prohibited under the covenant.'

However, section 7 of the *BORO* provides as follows:

> 1. This Ordinance binds only-
>
> the government and all public authorities; and
>
> any person acting on behalf of the government or a public authority.
>
> 2. In this Section-
>
> "person" includes any body of persons, corporate or unincorporate.

The scope of the *BORO* is limited by section 7 as private individuals are not obliged to protect the rights of other individuals. Therefore, the *BORO* would not have an anti-discriminatory effect in general because it would not affect inter-citizen relationship. This has some merit, as Article 22 does not actually attempt to outlaw discrimination itself, but rather, to require the government to enact such legislation. Andrew Byrnes points out that the effect of Article 22 is to reiterate the state obligation of Hong Kong in the implementation of the covenant without any self-executing effect.[5] The government has agreed to commence a study on discrimination and the possibility of anti-discrimination legislation.

The effect of section 7 was decided in the case of *Tam Hing-Yee v Wu Tai-wai*[6] Where the court exaggerated the effect of the section and held that it applied to legislation regulating inter-citizen relationship. This was disappointing to human rights activists because it would mean that a private individual could enjoy a right from the legislative provision to interfere with the rights of another individual. To rectify this situation, the Legislative council passed an amendment to the *BORO* in 1997 and section 2(3) was amended as follows:

> It is hereby declared to be the intention of the legislature that the provision of

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4 Edwards, G., "Discrimination on the margins of the law the 'forgotten' forms of discrimination in Hong Kong: age, sexuality, and race", in *Seminar on Hong Kong Equal Opportunities Law in International and Comparative Perspective held on 10-12 November 1997 in Furama Hotel Hong Kong.* (vol. 3).

5 Byrnes, A., "Equality and Non-discrimination" in Wacks R. (ed) *Human Rights in Hong Kong*, (Hong Kong: Oxford University Press, 1992) 225, 244.

6 *Tam Hing-yee v Wu Tai-wai* [1992] 1HKLR, 185.

> this Ordinance, including the guarantee contained in the Bill of Rights, apply to all legislation, whether that legislation affects legal relations between the Government, public authorities and private persons, or whether it affects only relations between private persons.

Unfortunately, the provisional legislature passed a piece of legislation repealing the amendment.[7] This means that the *BORO* effect is still limited by section 7 as interpreted in the *Tam Hing-yee* case.[8]

Though the government proposed the anti-discrimination legislation in response to pressure from the Legco members[9], the fact that it had enacted laws to regulate inter-citizen relationships could be viewed as implying that infringement of human rights more often comes from the people rather than the government. The concept of human rights is actually broader than the mere protection of citizens from government exploitation. It also involves a regulation of the relationships among individuals. The *ICCPR* also calls for the protection of such infringement of rights and the government should play a more assertive role.

A. The Right to Freedom Against Discrimination As a Human Right

Article 1 of the *Universal Declaration of Human Rights* of the United Nations provides that 'All human beings are born free and equal in dignity. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.' The emphasis on the equality of all human beings reflects that the basis of human rights is the individual. Another human rights scholar, Rhoda E. Howard stated that '[H]uman rights adhere to human beings by virtue of being human and for no other reasons. Every human being ought to have human rights, regardless of status or achievement' and that 'human rights are private, individual and autonomous'. They should not be mediated by social relations. They are consequently individual and no authority other than an individual is required to make human rights.[10] The respect of individual human rights will be the starting point of this paper.

Human rights legislation is usually directed at the protection of the rights of the individual against state intervention. The *ICCPR* is an

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7 *Legislative Provisions (Suspension of Operation) Ordinance* (Cap. 538) s. 2.

8 *Bill of Rights (Amendment) Ordinance* (1997) s. 2(3).

9 Petersen, C.J., "Equality as a Human Rights: The Development of Anti-Discrimination Law in Hong Kong" (1996) 34 Col. J. of Transnational Law, 335 at 365.

10 Howard, R.E., "Dignity, Community, and Human Rights" in Abdullahi Ahmed An-Na'im (ed) *Human Rights in Cross-Cultural Perspectives*, (Philadelphia: University of Pennsylvania Press, 1991) p. 82.

embodiment of such liberal-democratic rights. A second generation of rights developed in response to free market capitalism. The capitalist society created a widespread exploitation of the working class and the call to provide redress led to the new concept of economic rights. This was especially advocated by the socialist state and resulted in the *International Covenant on Economic, Social and Cultural Rights (ICESCR)* which aims at protecting economic rights. This rights movement did not end there and a third generation of rights came as developing countries strove for their places in the world market. They called for development rights and the right to environmental protection, which was a response to rapid industrial development in the post-war period.[11]

Ensuring rights against discrimination for the homosexual community is far from being an easy job. The nature of the rights that this community is fighting for is not new as they include basic rights such as freedom of expression, privacy and equality. It is not the nature of these rights that is controversial, but rather the status of the group itself which causes the adverse reaction.[12] People who deny the right of equality in areas like marriage and employment to the homosexual community claim that homosexuals are anti-social and would degrade public morality. Homosexuals should, therefore, not be treated as equals.

The homosexual community is not recognized in the same way as other disadvantaged or minority groups, but this does not mean they do not deserve the same protection. The concept of rights is evolving. In the post-war period, many minorities gained equal rights, which were unprecedented in the past. The endorsement of the Committee on the Elimination of Discrimination Against Women (CEDAW) and the Convention on the Rights of the Child (CRC) is a vivid reflection of the protection of minority and the socially disadvantaged groups. The fact that all human beings are deserving of equal treatment and opportunity is being increasingly recognized.[13]

Movements promoting equality and rights for disadvantaged groups face many challenges, including resistance from traditional Chinese culture. They claim that in Chinese tradition, the individual is placed beneath the community[14]. The claim of individual rights would only destroy the traditional social bonds in society and would thus result in the degradation of morality. Cultural relativism is invoked to reject any imposition of human rights ideas in Chinese society, as such concepts are considered alien and

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11 Heinze, E., *Sexual Orientation: A Human Right: An Essay on International Rights Law* (Dordrecht: Martinus Nijhoff Publishers, 1995) p. 82.

12 *Ibid.*, p. 85.

13 *Ibid.*, p. 71.

14 Moody, P. R., *Tradition and Moderinization in China and Japan* (Belmont, Calif: Wadsworth, 1995) p. 32.

Western in nature.

The principle of cultural relativism, however, is refutable. The greatest attack comes from cultural dynamism, which attacks relativism for ignoring the fact that cultural changes are common place in Chinese society. This is especially true for a modern and open society like Hong Kong. The inhabitants enjoy a high degree of interaction with the outside world and many foreign values and customs are adopted.

The idea of individual rights, for example, has found its root in the territory. It is obvious that after the June 4th massacre in Beijing, local inhabitants of Hong Kong have became more conscious and alert to their own rights. Though the concern is mainly to protect themselves from the infringement of their rights by the government, the concern of infringement of rights by other individuals is also on the agenda.

Another argument against cultural relativism is put forth by Abdulllahi A. Au-Na'im. He suggested that an internal cultural dialogue could be adopted to evaluate the internal cultural legitimacy of human rights and a compromise may be made to give a place to human rights in traditional values.[15] There are many scholars who argue that the concept of human rights was actually incorporated in Chinese traditional values. Studies of Confucian ideas revealed that this philosophy advocates democratic ideas and even freedom of speech. This shows that the use of tradition as a shield against human rights is not absolutely valid. Tradition is always subject to interpretation, and there is no consensus on how this should be undertaken or by whom.

Clarifying the direction of rights advocacy for the homosexual community is important. There should be no denying that the right to equality is not a new or unacceptable concept in Hong Kong. However, homosexuality is an unwelcomed facet in society[16]. The crux of the question would be whether the homosexual community should enjoy equality along with other people or more specifically, heterosexuals, even if the public does not accept them. The answer to this question may be found by appealing to the principle of justice. It is the purpose of this paper to argue that the government should play a more assertive role in achieving social justice and equality for homosexuals; with the enactment of equal opportunities legislation being the most effective way.

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15 *Supra* note 6, pp. 1,3.

16 Home Affairs Branch, Hong Kong Government, *Equal Opportunities: A Study on Discrimination on the Ground of Sexual Orientation – A Consultation Paper*, para. 51.

B. Equal Opportunities for Homosexuals

Discrimination against homosexuals is common throughout the territory. There are divergent views on whether homosexuals deserve equal opportunities protection. Even the government itself has reservations on the desirability or need for legislative measures to create equal opportunities.

The first move in striving for equal treatment in law for the homosexual community came in the 1980s when the Law Reform Commission examined the laws governing homosexual conduct. It recommended the decriminalization of homosexual conduct in private between males over 21 years of age. A public consultation paper was issued in 1988 and in 1990, the Legislative council passed a motion calling for an amendment of the *Offence Against the Person Ordinance* (Cap 212) removing the criminal penalties on homosexual acts committed in private by consenting men who have reached the age of 21.

Decriminalization only solved part of the problem for homosexuals, as the widespread problem of discrimination in society was not eradicated. Therefore, advocates of homosexual rights shifted their focus to the equal opportunities legislation. In the 1994-95 Legislative council Session, the then Legco member Anna Wu introduced a private member's Bill known as the *Equal Opportunities Bill (EOB).* It covered many grounds of discrimination including race, age and sexuality. In addition, an accompanying bill, the *Human Rights and Equal Opportunities Bill (HREOC)* proposed the establishment of the Human Rights and Equal Opportunities Commission (EOC). However, the government blocked the establishment of the EOC at the outset by invoking the *Royal Instructions* to prevent the introduction of the *HREOC Bill* on the grounds that this involved financial implications.[17] Anna Wu, in response to the government's move, separated her *Bill* into 3 parts in the hope that some of them could be passed.

The government feared that the comprehensive *Equal Opportunities Bill* would be passed, so it proposed two bills on its own and asked Legco members to choose its proposal over Wu's. The areas that the government's Bill covered were discrimination on the basis of sex and disability. These areas were chosen because they are not contentious. The government insisted on taking the initiative because it did not want the Legislative council to 'usurp' its control over the legislative process, and thereby risking passage of a law at odds with the government policy. The government expended a

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[17] Clause 24 of the Royal Instruction (a constitutional document in Hong Kong before 1 July, 1997) forbids any unofficial member to move any motion or amendment which would have the effect of imposing a charge upon the revenue if the colony, except upon the recommendation of the governor.

lot of effort to lobby the legislators against Wu's EOB. A confidential memorandum was issued to raise questions concerning the impact of the Bill.[18] Ultimately, all three bills by Wu were defeated in the Legco.

The efforts were not all in vain as the government did promise to carry out consultation on three grounds namely: age, family status and sexuality. A number of Wu's proposals were incorporated in the *Sex Discrimination Ordinance* and the *Disability Discrimination Ordinance*. The results of the consultation were analysed and consultation papers were issued.[19] However, the methodology of the consultation on discrimination on the ground of sexual orientation was disappointing, as it seemed that the government manipulated the results and used them as an excuse not to legislate for anti-discrimination legislation. The questions in the survey were misleading and had a general pre-conception that homosexuals are abnormal. For example, the first few questions in the questionnaire asked the interviewees whether they agreed that 'only heterosexuality is normal' and homosexual/bisexual behaviour affects other people' and 'homosexuality/bisexuality corrupts young people'. The questions seemed to presume that the public holds such views towards homosexuals. Another example is the question of whether the interviewees would mind shaking hands with homosexuals/bisexuals or going to the movies with them. The phraseology of the question suggested that there is something wrong with homosexuals, and it is thus desirable to limit contact with them.

It was also argued that until homosexuals feel safe self-identifying, it would be difficult to gather sufficient testimony on their experiences of discrimination.[20] The accuracy of the survey is therefore put into question.

The report revealed that public acceptance of homosexuality is low. It was believed that if anything was to be done to remedy the situation, it should be through education rather than attempting to outlaw discrimination. The government claimed that since homosexuals are not tolerated in society, anti-discrimination legislation is not appropriate. Instead, aid to homosexual support groups and public education were the measures to be taken.

As George Edwards asserts,[21] mere civil education is not enough. It is not sensible to ask someone who has prejudice against another how to eliminate the prejudice. The general public would be unwilling to condemn

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18 The questions include the fear of the employment of homosexual teachers in school and other general homophobic concerns regarding the introduction of the bill like the possible effect on the family system in the community and the ethical degradation.

19 *Supra* note 6.

20 *Supra* note 4, p. 14.

21 Edwards, G., "Equal Opportunities and Sexuality: Civil Education is not enough", May (1996) The New Gazette 54.

conduct that they are now practicing.

The government's preference of using only education in lieu of anti-discriminatory legislation is difficult to justify. By placing emphasis on education, the government undermines the role of law in the promotion of equality and justice. Although it does not mean that other measures proposed, such as civil education and funding for homosexual organizations are useless, the government should do more in the securing of equality for homosexuals.

III. Arguments Against Equal Opportunities for Homosexuals

Common arguments justifying discrimination against homosexuals in employment and rights to private life include the following:[22]

3. Homosexuals are deviants who will undermine social stability.
4. People have the right to hire, house, or serve whomever they want in their businesses.
5. The overall good of society (as defined by its most dominant values) may be enhanced if discrimination is allowed.
6. Protection of homosexuals from discrimination undermines morality.
7. Protection of lesbians and gays encourages harmful role models for children.
8. The right to freedom of religion may conflict with the right to non-discrimination.

Basically, these arguments are based on three grounds. The need for the preservation of 1) social stability, 2) morality, and 3) freedom of heterosexuals to discriminate. The first two grounds should be dealt with at the same time while the last ground requires a more theoretical argument.

The morality claim is based mainly on the argument that homosexual behaviour is unnatural. This roots from the belief that only sexual intercourse between members of the opposite sex is natural; all other sexual orientation being unnatural as it is not found in the animal kingdom. This argument confounds the law of nature and the law of man.[23]

The law of nature refers to natural phenomenon and is descriptive in nature. For example, water boils at 100 degree Celsius and freezes at zero

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22 Samar, V. J., "A Moral Justification For Gay and Lesbian Civil Rights Legislation" 27 J. Homosexuality 57,65.

23 Leiser, B. M., "Homosexuality and the 'Unnaturalness Argument'" in Gruen, L. and Panichas, G. E. (eds) *Sex, Morality and the Law* (New York, London: Routledge, 1997).

degree Celsius. Human law, however, is prescriptive. They are just artificial conventions to regulate human relations or conduct.

Homosexuality does not violate the law of nature because it is only descriptive in the sense that so long as some practice may be conducted, it is natural. Therefore, as there is homosexual conduct among human beings, it is part of natural law. As for the law of man, if homosexuality violates the law because it is artificial and not practiced by other animals, then by analogy, all artificial conduct is violating the law. Such an argument is not valid, for it cannot explain why artificial sexual conduct is unnatural but not other artificial conduct like using computer. The artificiality of conduct could be one of the differences that distinguishes humankind and other animals.

If one accepts the argument that homosexual conduct is unnatural because it is uncommon or abnormal, that would render members of the elite class abnormal as well since they can do what others cannot. The fact that some conduct is not generally done does not suggest that it is 'unnatural' in any sense or thereby impossible.

To claim that homosexuals are deviant because they use their sexual organs for a purpose contrary to the primary sexual use of reproduction is akin to saying that man should not swim because the anatomy of the human body is not amphibious in nature. The fact that man actually use their organs for pleasure (e.g. playing football with their feet) means that it is not "unnatural" nor is it important to be "natural".

To explore the essence of the morality claim, the stereotyping of homosexuals is worth examining. The moral concern towards homosexuals is usually related to their behaviour and attitude rather than the sexual act itself. The two major types of stereotyping are: 1) homosexuals (especially gay men) are child molesters and 2) homosexuals are promiscuous.[24]

These two generalizations about homosexuals are strengthened by representations in the media. Homosexuals are usually stereotyped as sex machines, rapists and child molesters. The sexual orientation of a murderer is strongly emphasized if he or she is a homosexual. Such images feed the existing homophobia.

New natural law theorists like John Finnis pointed out that the only valuable sexual activity is the activity open to procreation in heterosexual marriage. Therefore, even the pro-recreational heterosexual activities are simply instrutmentalizations of the human bodies for mutual use and pleasure. Homosexual activity is non-procreative and recreational. Homosexual activity, therefore, should be discouraged along with pro-recreational

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[24] Mohr, R. D., *Gays/Justice: A study of Ethics, Society, and Law* (New York: Columbia University Press, 1988) p. 56.

heterosexual activities.[25] If the argument that homosexual activity is corrupt is valid, the anti-discrimination legislation seems unnecessary because society should not do anything to protect people exercising corruptive activities.

This argument is stronger in comparison to the claims that homosexuals are promiscuous or sex-crazed as the case against recreational sex equally applies to people of all sexual orientations. However, it may be too limiting to distinguish recreational sexual activity from sexual activity open to procreation. The rejection of the value of non-procreative sexual activity is not fair because it ignores the fact that the same elements of affection and concern exist between the partners in such activities as exists between the procreative activities. Sterile couples are one such example. The fact that there are promiscuous gays and lesbians does not suggest that all homosexuals share such attitudes.[26] There are also promiscuous heterosexuals. Therefore, the fact that homosexual activity is non-procreative is not a valid reason for discrimination.

The attitude of the public towards homosexuality is often prejudiced. In the *Nature of Prejudice,*[27] Gordon Allport observes that prejudice is a combination of unfounded judgments and an accompanying feeling. He defines prejudice as 'an aversive or hostile attitude towards a person who belongs to a group, simply because he belongs to a group, and is therefore presumed to have the objectionable qualities ascribed to the group'. This definition suits the attitude of the public towards the homosexuals well. Once a man or women comes out and discloses his or her homosexual identity, others may easily categorise him or her as sex-crazed or promiscuous.

Social bias of homosexuals may be linked to the transgression of social meaning about gender that acceptance of homosexuality could bring. Traditionally, men are defined as people attracted to the women and women to men. This could be called as the normative-heterosexual paradigm.[28] Heterosexuality defines gender roles and sexual relationships. There is a hierarchical relationship between males and females. Men and masculinity are superior in relation to female and femininity. Homosexuality has transgressed the social-constructed sex-role and is therefore opposed by those who want to preserve the traditional gender roles and stereotypes. Male homosexuality has even more significant social meaning because gay men

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25 Finnis, J., *Moral Absolutes: Tradition, Revision, and Truth* (Washington DC: The Catholic University of America Press, 1991) pp. 85,86.

26 *Ibid.*, p. 38.

27 Allport, G. W., *The Nature of Prejudice* (Cambridge Mass: Addison Wesley Publication, 1954) p. 12.

28 *Supra* note 11, p. 33.

appear to surrender their masculine privileges and also threaten the masculine privileges of other males.[29] Therefore, gay men have a lower approval in the society than lesbians do.

Other morality claims against homosexual behaviour include the argument that equal protection of homosexuals is harmful to the children as it would encourage undesired sex roles model for them. This is an argument without grounds. Homosexuality is the outcome of a complex interaction between individual needs and environmental pressures and constraints.[30] There is not yet reliable scientific evidence to prove the reasons for the homosexuality[31]. Moreover, equal protection does not equate to approval, and in the end, sexual values are still mainly taught through parents and teachers.

The last justification of the right to discriminate against homosexuals is based on individual rights. It must be admitted that some forms of unequal treatment are justified, for example it is fair to favour a person who has special qualifications to work at a job. However, unequal treatment is fair only if and when it is justified. Justification includes proof either by reference to physical evidence or by deduction from a non-controversial premise or at least one that is plausible. It could therefore be held that the discrimination against homosexuals is unfair because it is unfounded and involves prejudice. In the next part, the justice theory would be used to discuss whether such a right to discriminate ought to exist in a just society.

A. Justifying Equal Opportunity Legislation for Homosexuals

The court in Hong Kong concurred with the conception that discrimination must be justified. In *R v Man Wai-keung*[32], the court stated the principle for unequal treatment. Judge Bokhary stated in the judgment that:

[T]he starting point is identical treatment. Any departure therefore must be justified. To justify such a departure it must be shown: one, that sensible and fair-minded people would recognize a genuine need for some difference of treatment; two, that the difference embodied in the particular departure selected to meet that need is itself rational; and, three, that such departure is proportionate to such need.

Though the above judgment was concerned with application of the Article 10 of the *Bill of Rights*, the principle is identical to that adopted by the

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29 Balkin, J. M., "The Constitution of Status", (1997) 106 Harvard Law Review 2313 at 2361.

30 West, D. J., *Homosexuality Re-examined* (London. Duckworth, 1977) p. 85.

31 *Ibid.*, p. 86.

32 *R v Man Wai-Keung* [1992] 2 HKPLR 164, 179.

Human Rights Committee on equality and non-discrimination.

The concept of equal treatment stated does not strictly mean equal treatment for all persons. As Dworkin explained, the truly meaningful sense of equality is not whether any deviation from equal treatment is permitted, but what reasons for the deviation are consistent with equal concern and respect. The importance of equality is that individuals are treated 'with a lively sense of [his] own equal worth, and pride in [his] own convictions.'[33] The fact that there may not be a sound moral reason to reject homosexuality is important as it makes us reconsider the need to protect them from discrimination. They should have the right to pursue their own conception of what is good without unfair interference.

This leads us to the more detailed analysis of the principle of justice. Different moral claims actually reflect different perceptions of what is 'good' among individuals. From the above analysis, we can observe that there is no persuasive moral claim against homosexuals. According to John Rawls, the overriding principle is the need to respect individuals in their pursuit of their perceptions of what is 'good'; which may also be regarded as what is 'right'. If we draw a distinction between 'good' and 'right', there is a moral basis for demanding that law be neutral between conflicting conceptions of what is 'good' so that people can pursue it within a general framework of rules that is neutral towards their ends. This is the basis for the theory of John Rawls and can be summarized as the principle of 'right' over 'good'.

In his book, *A Theory of Justice*[34], Rawls describes his version of the principle of justice in society. The two principles are:

1. Each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all.
2. Social and economic inequalities are to be arranged so that they are both:

(a) to the greatest benefit of the least advantaged, consistent with the just savings principle, and

(b) attached to offices and position open to all under conditions of fair equality of opportunity.

These are the conditions for a just society. John Rawls proposes a contractual society in the sense that everyone in society has the obligation to abide by the rules of a just society. A just society is not one that realizes

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33 Dworkin, R., *A Matter of Principle* (Oxford: Clarendon Press, 1986) p. 108.

34 Rawls, J., *A Theory of Justice* (Oxford: Clarendon Press, 1972) p. 302.

the good life of the community but one that permits its members to pursue their own conception of what is 'good' under certain conditions.

This theory is based on Kant's assumption about the personal moral capacity of people. It presupposes the individual's capacity to conceive what is 'good', and to have a sense of justice.

There are some objections to this principle. First, it can be argued that equality of moral agencies must be accorded to equality to those whose pursuit of moral good requires the imposition of their conception of what is 'good' upon others. This may also be analogous to the claims of those who justify discrimination against homosexuals because they think that they are actually imposing 'good' ideas on them. The weakness of this paternalistic argument hinges on its presuppositions. If such a conception is adopted, then the distinction between 'good' and 'right' is untenable because those who claim they are 'good' would have the legitimate reason to infringe on the 'right' of others. It then leads one to ask 'What is "good"?' We have already seen that homosexuals may not be 'bad' since the argument against 'goodness' is not valid. If we assert that no one is able to determine the 'goodness' of any sexual orientation, then the argument cannot justify the accord of equality to the anti-homosexuals camps. It is not to argue that no paternalistic claims could be valid. It may be agreed that paternalism in the instances in which it preserves and enhances an individual's ability to rationally consider and carry out his own decisions should be accepted.[35] However, under such a paternalistic claim, there is no reason to prohibit homosexuality as such prohibition is not conducive to the rational choice for the individual in their sexual orientation.

Respect for the rights of the homosexual community in their pursuit of what is 'good' does not mean that the rights of the people opposed to homosexuality cannot be protected. They should be protected to the extent that they are still able to hold their conceptions of 'goodness' without irrational interference. This would be a kind of 'fair terms of cooperation' as promoted by John Rawls. He explained that 'as equal persons we are willing to cooperate in good faith with all members of society over a complete life'. To this, let us add: "to cooperate on a basis of mutual respect". This could be done through measures like the prohibition of public display of homosexual obscene material. Also, a balance must be maintained between the rights of the homosexual community and other communities who find homosexual behaviour unacceptable. However, limitations of homosexual rights should not be excessive, as it would defeat the purpose of the legislation. That means reservations should be limited to that which is necessary for preserving the 'comprehensive view' of those who are against

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35 Dworkin, G., "Paternalism", (1972) 56 Monist 64, 84.

homosexuals to balance others' rights and pursuance of their conception of what is 'good'. Since what is at stake is of central importance to homosexuals, for example, employment and housing, it is essential to take caution in how their rights are curtailed.[36] So long as the homosexual community is not a threat to the pursuit of what is 'good' discrimination must be prohibited.

B. The Neutrality of Law

The concept of "the neutrality of law" must be explored to gain a greater understanding of the above described theory. As already argued, there is a need to protect minorities in their pursuit of what is 'good'. Neutrality of the law would mean that the law could enable different people to pursue their own conceptions of 'good'. Raz, in his book, *Morality of Freedom*[37], pointed out that neutrality of law is impossible. His major argument is that the neutrality is impossible because the policy of neutrality can not avoid the situation that some conceptions of 'good' are more popular.

The law cannot coerce the majority to adopt the conceptions of the minority. It is also impossible in practice for the state to be totally neutral in its policy to promote all existing conceptions of 'good' equally. Limited resources would lead to the promotion of the conception of 'good' held by the majority. However, neutral laws would permit an equality of opportunity for those people who pursue different perceptions of 'good'. The state does not have to promote any particular values, save the value that everyone should be free from discrimination in their practice what they believe to be 'good'.

There are objections to this idea of equal opportunity. It can be argued that it is right for the government not to discriminate against homosexuals but there is no need for legislation to prohibit discrimination, as it would be infringing the rights of other individuals. As Andrew Sullivan points out, a claim for anti-discrimination legislation is 'curiously blind to [its] illiberal dimensions'. This argument tries to strike a balance between the liberals and conservatives in the hope that the private lives of the individuals would be shaped by a shift in public mores.[38] The concern is worthy of attention because the general public may have adverse feelings towards the general prohibition of discrimination and it would be 'illiberal' if the prohibition is too wide-ranging. However, the argument seems to preserve social stability

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36 *Supra* note 4 at 63.

37 Raz, J., *The Morality of Freedom* (Oxford: Clarendon Press, 1986) p. 95.

38 Sullivan, A., *Virtually Normal. An Argument About Homosexuality* (London: Picador Press, 1995) p. 170.

at the expense of homosexual rights. If there is a concept of 'right' over 'good', then the lack of opportunity for a portion of the people to pursue their own 'good' must be rectified. 'Social stability' is not an excuse for the public to do something unjust in nature but it must be emphasized that the concept of neutrality of law does not mean that one group of 'good' concepts that conflicts with another will be permitted to infringe on the rights of others without restriction. The right of others to follow their notion of 'good' must be safeguarded. The law is neutral in the sense that it provides a society in which pluralism can take place. The principle of co-existence is essential in laying down the limitations of anti-discrimination legislation. This will be further discussed below.

C. The Achievement of a Just Society

There is another critque of John Rawls's theory which points out the impossibility of people in possessing a moral personality as men are not rational and reasonable.[39] Therefore, the just society is not possible. John Rawls has provided his solution to this problem. He pointed out that the assumption is only a formal one. It provides that people know that their agreement would not be in vain and the cooperation is conducive to effectiveness and regularity.[40] However, since each person does not know what is good for him nor his position in society, known as 'the veil of ignorance', to achieve a just society, a notion of what is primarily good and a list of various things falling under this heading is thus needed as guidance. The basic idea is to ask what are the basic social conditions needed to enable persons to pursue their conceptions of what is 'good' and to develop and exercise their two moral powers.[41] The basic conditions he proposed are as follows:

1. The basic liberties which include the freedom of thought and liberty of conscience.
2. Freedom of movement and free choice of occupation.
3. Powers and prerogatives of office and positions of responsibility.
4. Income and wealth, understood broadly as all-purpose means.
5. Social bases of self-respect: these bases are those aspects of basic institutions normally essential if citizens are to have a lively sense of

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[39] For a full discussion of the qualities of the original position, which is an important assumption in the John Rawls' theory, refer to his article, "The Basic Liberties and their Priority" in McMurin (ed) *Liberty, Equality, and Law* (Salt Lake City, Utah: University of Utah Press, 1987) p. 1.

[40] *Ibid.*, p. 31.

[41] *Ibid.*, p. 21.

> their own worth as persons, and to be able to develop and exercise their moral powers and to advance their aims and ends with self-confidence.

The theory of justice is challenged as non-neutral as many values are not compatible with it. The most striking example is the impossibility of Nazis existing in a liberal society.[42] Alasdair MacIntyre even condemns liberalism on the grounds that it has destroyed the moral vision that binds people in communities. Such accusations show that liberalism is by no means neutral in its consequence.[43] The world is full of conflicting views which may not only be due to conflicting interests but also to the differences in the moral understanding of the 'good'. Such criticisms are rejected by claims that the kind of mutual respect required by the theory of justice is neutral. Colin Bird points out that mutual respect embodied in the liberal state is based on the principle that one ought to have respect for the authority of the individual in making value judgments. The public, therefore, has good reasons in refusing to accept this as a comprehensive doctrine but as a guiding principle for co-existence. Thus, it is neutral in value[44]. To embrace the concept of mutual respect, the government and each individual must allow the population at large to hold a variety of personal beliefs, and at the same time feel that this does not compromise or threaten their personal convictions. Of course, the arena of mutual respect is not boundless. It should permit actions falling beyond the realm of mutual respect.

In this section, the application of the justice theory to the case of equal opportunities legislation for homosexuals has been discussed. In short, a just society should permit homosexuals to pursue their own perception of what is 'good' and the law ought to play a role in achieving this right.

D. The Role of Law in Attaining Equal Opportunity for Homosexuals

Having already examined the moral argument against homosexual behaviour and the need for justice in society with moral disagreement, the role of law in achieving equality where there is moral disagreement and intolerance of homosexuality will now be discussed.

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42 Macedo, S., *Liberal Virtues: Citizenship, Virtue, and Community in Liberal Constitutionalism* (Oxford: Clarendon Press, 1990).

43 Moore, M., *Foundations of Liberalism* (Oxford: Clarendon Press, 1993) p. 178.

44 This argument is an important response to the claim that the so-called 'good over the right' principle is not neutral on its own because it is on the outset prejudicial to the comprehensive doctrine which tends to limit the liberty of the others like the fundamentalists. For details, refer to his article, "Mutual Respect and Neutral Justification", (1997) 107 Ethics 62.

1. The extent of the role of law in establishing equal opportunity

The priority of the 'right' over the 'good' implies that the law should protect minorities in their pursuit of what they deem to be 'good' because they are often in a disadvantaged position. J.M. Balkin argues that homosexuals belong to a status group, which is disadvantaged in the social hierarchy. He argues that a homosexual identity is a "central feature of one's existence" and "affects many aspects of one's life".[45] As a result of the discrimination that accompanies homosexuality, it is possible that homosexuality falls within the "other status" in Article 26 of the *ICCPR*. Homosexuals belong to a minority group in society with significant identity. They are even sometimes condemned as immoral, abnormal and deviant.[46]

As homosexuals are a disadvantaged minority, their chances of pursuing their what they conceive as 'good' is not equal to that of the majority (heterosexuals). In a democratic society, people with different views should be able to cooperate with one another. This is the essence of John Rawls's theory of justice, which, when applied to the issues at hand, calls for equal treatment of the homosexual community. Some criticize this theory on the grounds that there is a conflict between the rationalist believers whose beliefs are equally reasonable. The resolution of this conflict is hence impossible as it is not 'just' to ask any side to forgo their own 'comprehensive doctrine'.[47]

Gutmann and Thompson developed an idea of 'deliberative democracy' which they describe as 'a conception of democracy that secures a central place for moral discussion in political life.'[48] The rationale for this kind of democracy is that the promotion of reasonable discussion and mutual respect among citizens over disagreements is most conducive to a just society. An important principle of this democracy is reciprocity, meaning that 'citizens making moral claims appeal to reasons or principles that can be shared by fellow citizens who are similarly motivated.'[49]

The mutual respect embodied in this 'reciprocity' not only has an instrumental value for the sake of social stability but it also has moral value for the constitution. Therefore, the 'liberty' and 'fair opportunity' that are

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45 *Supra* note 11, at 226.

46 *Ibid.*

47 Agostino, F., "Value Pluralism, Public Justification , and Post Modernism: The Conventional Status of Political Critique" (1995) 29 The Journal of Value Inquiry 351, 358.

48 Gutmann, A. and Thompson, D., *Democracy and Disagreement* (Cambridge Mass: Belknap, 1996) 1.

49 *Ibid.*, p. 55.

proposed in the principle of deliberative democracy are not simply means to promote social stability but are also virtues. "The aim of such a process is not to induce citizens to change their first-order moral belief. It is, rather, to encourage them to discover what aspects of those beliefs could be accepted as principles and policies by other citizens with whom they fundamentally disagree."[50]

It is admitted that when both parties in the conflict have equally reasonable positions, the principle may leave issues unresolved because mutual respect is not the same as finding common ground on an issue. The conflict between the pro-choice and pro-life camps in the abortion debate is an example. However, it is believed that equal opportunity for homosexuals is not one such example. The discussion above has shown that the argument against equal opportunity for homosexuals does not have a valid basis. By Rawls' theory of justice, the basic right for the homosexual community is to be protected. As with many rights, equal opportunity legislation for homosexuals must have its limitations.[51]

For the deliberative democracy, the boundaries of an equal opportunity principle are best set by well-informed moral discussion in the political process. The deliberative perspective on opportunity consists of two principles that govern opportunities. The first is the basic opportunity principle, which obliges the government in ensuring that all citizens can secure the resources necessary to live a decent life. The second principle is the fair opportunity principle. This principle governs the distribution of highly valued goods that society should apportion fairly among individuals. A democratic government should aim at finding the level and scope of basic opportunities that conforms with the two stated principles of justice.

There are certain basic rights that must not be compromised, if equal opportunities legislation is to be meaningful. These areas include equal opportunity in employment, access to education and the provision of service and goods. This is because access to the above is essential for survival in a modern society. Based on the principle of reciprocity, a claim for such rights is justified if we wish to cultivate a civilized society.

Moreover, the content of the legislation should be mutually acceptable in the sense that they are conducive to the mutual respect between the homosexuals and heterosexuals. The implication it has is that the harassment or public vilification on the ground of homosexuality should be prohibited because it is adverse to the mutual respect regarding the personal autonomy of homosexuals.

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50 *Ibid.*, p. 93.

51 *Ibid.*, p.200.

2. Some exceptions considered

Freedom of speech

The extent of equal opportunity is not unlimited. People who are against homosexuals should still have the right to express their viewpoint in private or in public, short of vilification. This is because to prohibit such freedom of speech would be to disrespect their capacity to hold their conception of what is 'good'. However, it is argued that public vilification should be prohibited because it may cause public annoyance and may stir up discontent among the public, which would have enormous effect on the authority of the homosexuals.

Religious activities

Another permissible exception is the religious authority. The conflict between the homosexuality and the religious belief may be impossible to reconcile. People with religious beliefs may have a particular conception of what is 'good'. The mere presence of homosexuals may be totally unacceptable to them. Under such circumstances, the denial to homosexuals of the right of participation in such religious activities and institutions is consistent with the so-called 'fair terms of cooperation' in John Rawls' theory and thus should be allowed. This exception is included in the Bill.[52] Moreover, it is also a measure in upholding the freedom of religion.

Marriage and parenting rights

The controversy of whether homosexuals should be accorded the right of marriage like heterosexuals is a heated ethical issue. The following analysis attempts to lend some help in resolving the dispute.

The right to family life is a basic liberty recognised in the *ICCPR*.[53] To determine whether this right should be accorded to homosexuals equally should, firstly, depend on an examination of the nature of marriage. If marriage is considered a sentimental, emotional and financial bond between two persons, the denial to homosexuals of such right cannot be justified. According to the principle of mutual respect, equality is preferred unless the act of a certain group would infringe on the autonomy of the others. The grant of the right of marriage to homosexuals would not have such an effect if the essence of marriage would not be mutated by the possession of such a

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52 *Equal Opportunities (Family Responsibility, Sexuality and Age) Bill* (1994), s. 86.

53 International Covenant on Civil and Political Rights, Article 24(2).

right by homosexuals.

There are some arguments against homosexuals' right of marriage, namely that marriage bears the aspiration of procreation which homosexuals are unable to fulfill.[54] However, the claim is hard to sustain since there are many couples who are sterile or have no plans to have children.

Homosexual companionship could be the same as a heterosexual marriage in terms of commitment. Therefore, same-sex marriage should be allowed. That would mean a legally recognized companionship should be granted.

On the issue of rights of adoption or artificial reproduction, there seems to be some complication because the relationship does not only involve two homosexuals but extends also to their children. The foremost concern in the granting of the right for homosexuals to adopt or carry out artificial reproduction would be the best interest of the child,[55] which is also the criteria used by the court in determining child custody.[56] It means placing the child in the healthiest environment for his psychological and sociological development. It is justifiable to deny homosexuals these rights if they are incapable to providing such an environment for their child. However, it is revealed that there is no significant difference in terms of general intelligence, sexual identity and gender-role preferences and other social relationship between children raised by homosexual and heterosexual parents.[57] The parenting styles and emotional adjustments between homosexual and heterosexual parents are also similar. In this regard, homosexuals should be allowed to adopt or to benefit from artificial reproduction.

3. The active role of law in eliminating discrimination

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54 This argument was made by some natural law theorists like John Finnis and Aquina. See Macedo, S., "Sexual Morality and the New Natural Law" George R. P. (ed) *Natural Law, Liberalism, and Morality: Contemporary Essays* (Oxford: Clarendon Press, 1996) pp. 27-48.

55 It must be specified that in this paper, the adoption rights argued for would be applicable to both gays and lesbians while the right to artificial reproduction only points to lesbian, meaning artificial insemination. It is also argued on this basis that these rights are recognised for heterosexuals despite the moral disapproval raised.

56 Allen, M. and Burrell, N., "Comparing the Impact of Homosexual and Heterosexual Parents on Children: Meta-analysis of Existing Research", (1996) 32 J. Homosexuality, 19, 20.

57 Green, R., Mandel, J. B., Hotvedt, M. E., Gray, J. and Smith, L., "Lesbian Mothers and Their Children: a Comparison with Solo Parent-heterosexual Mother and Their Children", (1986) 15 Archives of Sexual Behavior 167,185 and Reilly, T., "Gay and Lesbian Adoptions: A Theoretical Examination of Policy-making and Organizational Decision Making, (1996) 23 *Journal Of Sociology and Social Welfare* 99,102.

The role of law is not only restricted to regulating the behaviour of citizens but also extends to the promotion of equality in society. This is also stated in the *Equal Opportunities Bill.*[58] It has been proven that the improvement of the psychology of justice is possible through the provision of correct information or personal contacts between the members of dominant and subordinate group. That means the people would tend to modify their beliefs and attitudes towards the socially disadvantaged classes when information and contact with them increases. Moreover, people tend to seek approval from legal norms and social prestige. Therefore, legislative measure is a necessary tool not only in regulating people's conduct but also in helping to promote the concept of justice.[59]

Law can help establish a norm and facilitate the internalization of attitudes or beliefs.[60] In the establishment of norms, the law should be clear so that citizens may know what conduct is prohibited and social harmony would be achieved with time. As Morroe Berger has stated, law is "one of the great movers and changers of basic institutions of all kind, and helps in establishing the conditions favoring group equality in a free society."[61] There may be a long way to go but examples of success do exist.[62] It is, therefore, hoped that clearly written legislation could help promote the equal status of homosexuals in society in the future.

IV. The Limits of Law and Beyond the Law

It may be too optimistic to claim that the law on its own could 'educate' people and nurture respect for homosexuals. The liberal theory used to justify equality for homosexuals puts much emphasis on the institutionalization of the values of justice. Of course, the law could bear a certain role in promoting equality in favour of the socially disadvantaged like the homosexuals. However, it must be admitted that the citizens do not all possess the capacity and inclination to undertake the public work of democratic politics within a shared political reason. The capacity to share

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58 *Supra* note 52, s.2(c).

59 Cook, S. W., "Toward a Psychology of Improving Justice: Research on Extending the Equality Principle to Victims of Social Injustice" (1990) 46 Journal of Social Issues 147, 161.

60 Evans, W. M., "Law as an Instrument of Social Change" in Gouldner, A. W. and Miller, S. M., *Applied Sociology: Opportunity & Problem* (New York: The Free Press, 1965).

61 Berger, M., *Equality by Statute* (New York: Columbia University, 1948) p. 170.

62 Hyndman, P., "Cultural Legitimacy in Law and Policy in Australia" in Abdullahi Ahmed An-Na'im (ed) *Human Rights in Cross-Cultural Perspective* (Philadelphia: University of Pennsylvania Press, 1991) pp. 295, 327.

public reason is not uniform and this may hinder the rational discussion as advocated in the deliberative democracy. The enforcement of such values through the law would also be ineffective. Hence, something beyond law is needed.

A. The Limits of the Law

The effectiveness of equal opportunities legislation for homosexuals largely depends on the willingness of the citizens in maintaining such a pluralist society. However, there are two major tendencies that might destabilize a pluralist democracy.[63] First, citizens may withdraw themselves from the rational discussion. This may make the enforcement of the legislation difficult as it lacks recognition. The effect would be enormous if a large proportion of the population have such a tendency. Social equality would not be achieved successfully. Second, the citizens may be encouraged to pursue a political campaign to force the government to adopt their comprehensive doctrine. The impact of this depends on the political power they possess.

The role of legal and political institutions in promoting the pluralistic atmosphere would be limited as they are not the only values prevalent in the society. The people's conception of moral rights and wrongs is not shaped by the laws or political institutions but, to a large extent, by their assumption oft their social and moral entitlement.[64] In Hong Kong, the majority of the public shares the view that only heterosexuality is normal.[65] This view would certainly have an adverse effect on the achievement of justice through the law because the law cannot have a direct impact on the people's belief. People would not distinguish between a public, political culture and a background culture, and thus would regard the fulfillment of their moral values as the enforcement of justice.[66]

`There is also the problem of enforcement. The values held by law-enforcing agents would be of great importance to the effectiveness of a piece of legislation. If the values embodied in the legislation is recognized by the agents, the willingness to enforce would be higher and vice versa. In this respect, the equal opportunities legislation may be difficult to enforce.

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63 *Supra* note 54, at 35.

64 Bamforth, N., *Sexuality, Morals and Justice: A theory of Lesbian and Gay Rights Law* (London: Cassell, 1997) p. 280.

65 *Supra* note 16, at para. 13.

66 Reidy, D. A., "Education for Citizenship in a Pluralist Liberal Democracy" (1996) 29 Journal of Value Inquiry 25, 36.

B. The Role of Education

It is believed that such destabilization could be minimized by civil education. Education could help provide a justification for the governing principles of justice, encourage citizens to participate in democratic politics and permit citizens to carry out rational discussion. On the whole, education helps to cultivate a sort of political culture that is conducive to a pluralistic liberal democracy.

Civil association and civil education in schools are important in shaping the political culture. The transmission of the idea of equality and reasonable pluralism is a necessary step in the creation of a liberal democratic society. This would be a long-term process as it involves a significant part of society with the target being the long-term stability of the political society. On the content of the education, David A. Reidy says:

> "[S]tudents in the school may be taught and come to understand the governing political principles and their initial freestanding public justification. This means that students must be taught what it means to say that citizens are free and equal moral beings, as well as how this conception of persons as citizens underwrites the value of political autonomy."[67]

It must be noted that students should still be encouraged to pursue their own comprehensive views towards what they regard to be 'personal good'. It is an important part of education as the lack of autonomy in each individual will only create uniformity, which is not desired in a pluralistic society. The role of education is to promote mutual respect and reasoned discussion in society and although it is a long-term task, it is nonetheless crucial. However, it is not a substitute to the role of legislative measures. Instead, legislative measure serves to demonstrate the government's determination in implementing the principle of equality and also act as a propellant for social harmony between the majority of the population and homosexuals.

C. The Role of the Equal Opportunities Commission

The Equal Opportunities Commission (EOC) has proved that equal opportunities legislation could be implemented in Hong Kong. The EOC was set up in 1996 mainly to enforce the equal opportunities legislation enacted in the territory. Its job includes handling complaints on the alleged violation of the legislation. In addition, the EOC shoulders the duty of

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67 *Ibid.*, p. 40.

promoting equal opportunity in the territory. Publicity and educational programmes are carried out to promote the "paradigm shift in preconceived values" towards the minority protected in the legislation.[68] The EOC handles complaints mainly through conciliation. It is based on the belief that the Chinese community treasures harmony more than antagonism. The EOC has also borne the role in providing guidance to citizens on how to conform to the law. Codes of Practice are issued to enable employers or citizens to comply with the legislative provisions. The equal opportunities legislation for homosexuals could also be implemented in similar ways.

D. Law Still Needed

In the preceding section, the limits of the law have been examined. There is no denying that the law cannot perform 'magic' in promoting the shift of values in society on equality, and that education is only complementary to the legislative measure in promoting the liberal culture. However, the argument that laws should not be implemented due to opposition from the general public is erroneous. Such a claim is mainly based on a survey which reveals that the majority of the public regard legislation as a less effective measure. The rejection of legislative measures is understandable but not acceptable. As George Edwards argued, this is like "asking the fox to hold the key to the chicken coop for safekeeping".[69] It is also based on the argument that the Chinese perceives the law as retributive and penalty-imposing rather than preserving the rights of the individual.[70] However it has been argued that the law has its social–transforming role and that the Hong Kong community is evolving and the awareness of the importance of human rights is mounting. Legislative measures could be a good illustration of the government's eagerness in promoting equality. In view of the protection of homosexuals against discrimination, justice should be upheld through legislation.

V. Overseas Experience

Equal opportunities legislation on sexuality has been implemented in many foreign countries or states. The overseas experience discussed here serves two purposes: first, to determine the extent of protection and

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68 Cheung, F. M., "Hong Kong's Anti-discrimination Legislation: Social Context, Philosophy and Challenges of Implementation" in *Seminar on Hong Kong Equal Opportunities Law in International and Comparative Perspective10-12 November, 1997 in Furama Hotel, Hong Kong.*

69 *Supra* note 21, at 54.

70 *Supra* note 68, at p. 6.

exceptions from the legislation and secondly, to look at the ways of implementation.

Though many countries have enacted equal opportunities legislation on sexuality, the content varies from country to country. In brief, the legislation addresses discrimination in public life and it includes equal opportunities in employment[71], education[72], accommodation[73] and provision of goods and services.[74] The *Equal Opportunities Bill* modeled on the Australian legislation has also covered these areas.[75]

A. Content of the Legislation

Concerning the content of the legislation, the prohibition of discrimination mainly applies to the area of public life. This is in line with the above discussion of the extent of the rights of the people in the pursuit of their conceptions of what is 'good'. It is because every citizen in society should be given autonomy and to limit one's private life would be a great hindrance to that autonomy. The existing equal opportunities laws cover mainly three forms of discrimination, being: employment discrimination, discrimination in relation to goods and services and verbal discrimination. Equal opportunity in such areas is important as they are fundamental to the survival of a person. Many countries with equal opportunities legislation also prohibit discrimination in such areas.

Equal opportunities laws cannot ensure fair treatment; they merely give the victims of discrimination a right to sue. Homosexuals may still be unable to enjoy civil liberties as heterosexuals do in society. In a California Supreme Court decision in 1979, it was held that "coming out" at work is protected speech. The court recognized homosexuals as an invisible minority and that if they are to have political rights, they must be free to be open about who they are. They would not be accorded such freedom unless the exercise of it would not deprive them of their jobs or their chance to receive education. The freedom of speech and assembly is denied as long as the gay population is not protected from discrimination in housing and

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71 Many countries or states have enacted legislation prohibiting discrimination; France, the Netherlands and South Australia being examples.

72 South Australia is an example of a state which has prohibited discrimination on the grounds of sexuality in the provision of education.

73 In the South Australia *Equal Opportunities Act* (1984), discrimination in the provision of accommodation on the grounds of sexuality is outlawed.

74 Denmark, France and South Australia have enacted legislation to prohibit discrimination in the provision of goods and services on this ground.

75 *Supra* note 9, at 373.

employment.[76] This shows the importance of the protection of equal opportunities in areas essential for one's survival like employment and housing because without such safeguards, homosexuals are not only deprived of fair treatment in such areas but also their civil liberties.

However, the freedom from discrimination may be controversial when others' civil liberties are involved. The prohibition of verbal attack is one example. Some forms of verbal attack are prohibited in Denmark, Ireland and the Netherlands. The problem with such prohibition is to what extent it should go. A strict limit on 'hate speech' directed at a person based on his sexuality may put unjustifiable limits on the freedom of speech. It may be the reason why many countries do not prohibit mere verbal attack. The prohibition of public speech which might incite discrimination or threaten certain people on account of their sexual orientation is the approach adopted by most countries. This is similar to the principle of the *ICCPR* Article 20(2), applicable to the incitement of discrimination on national, racial or religious ground. It has been argued that the approach on the protection against 'hate speech' directed at homosexuals should be consistent with that of other minorities.[77] It is suggested, therefore, that the more common approach of prohibiting the incitement of discrimination should be adopted so that freedom of speech is not limited unjustifiably for the preservation of equal opportunities for sexual minorities.

Another area where countries differ is the right to marriage. In most countries, marriage is a form of legally registered partnership between one man and one woman. Legalized marriage for homosexuals is not yet implemented and it was argued that it is linked to the Juedo-Christian idea of marriage, which the state reinforces in many ways.[78] It is admitted that legal marriage is not to be accepted in the local community at this stage but some alternative may be considered. From the overseas experience, the denial of the right to marriage is rectified mainly in two ways: the registered partnership system and recognition of cohabitation. The former is available in the Netherlands and Denmark while the latter system is implemented in Germany and France.

The cohabitation system provides less protection for homosexual couples because the rights of cohabiting couples is narrower than that of married couples even in the case of cohabiting heterosexuals. Furthermore, there is a problem of proof because, unlike a marriage, cohabitation does not need registration. In France, couples living together can obtain a certificate

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76 *Supra* note 24, p. 173.

77 *Supra* note 11, p. 168.

78 Cruikshank, M., *The Gay and Lesbian Liberation Movement* (London: Routledge, 1992) p. 81.

from the local authority to prove that they are living together to their landlords and employers, but most local authorities refuse to issue a certificate to lesbian and gay couples. This may be linked to the homophobia of the enforcement agency and also to the difficulties in proving the relationship between two cohabiting partners. The lack of proof would in turn bar their partners from many fringe benefits in employment because it is impossible for the employers to recognize their relationship. In contrast, registered partnership provides *de facto* marriage for homosexuals, and the registration serves as proof of the relationship without having to amend present marriage laws and related legislation. This is therefore the preferred approach. However, there is still a need to give legal effect to the registration so that it would be binding on employers or insurance companies; obliging them to recognize the relationship. In the Netherlands, the registrations only have symbolic significance and this proves to be of minimal help to homosexuals discriminated against in employment and in the provision of services.

However, the registration system is not accepted without criticism. In 1990, the Domestic Partnership law was tabled in San Francisco. The law permits unrelated people living together to register their relationship with the city. The government agreed to provide food and shelter for the partners and to pay medical expenses not covered by insurance. Gay activists were opposed to the law as they feared that the measure would promote assimilation into the mainstream culture. This shows that equal opportunity in forming a family may not be all that welcomed by homosexuals. In addition, gay relationships will continue to be accorded a subsidiary status until homosexual couples have exactly the same rights as their heterosexual counterparts.[79]

B. Exemptions in the Legislation

Exemptions are common for the equal opportunities legislation on sexuality. However, they vary from country to country. The most common exception deals with employment by religious institutions.[80] This is understandable because religious institutions have a particularly strong view of their conception of what is 'good' and the religious position has special meaning to the institution. The exception preserves the freedom of religion. The bill in Hong Kong has a similar exception for appointment in

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79 Stoddard, T. B., "Why Gay People Should Seek the Right to Marry" in Blasius, M. and Phelan, S. (eds), *We Are Everywhere – A Historical Sourcebook of Gay and Lesbian Politics* (London: Routledge, 1997) pp. 753, 756.

80 The proposed anti-discrimination legislation in Belgium and the Netherlands have exception for religious employment.

religious institutions and it extends to charitable bodies and voluntary bodies. It may be in consideration for the neutrality of the law so that the religiousness of their belief should not be the only criteria for exemption.[81] Some organizations may have their particular aims and beliefs and homosexuality is in contravention to their conception of moral 'good'.

However, the mere religious status of an entity affected by the law may not exempt that entity from a state's anti-discrimination statute. In the United States, the courts have considered not only the religious character of the entity but also the plaintiff's connection to the entity. In *Gay Rights Coalition of Georgetown University Law Center v Georgetown University*[82], the court found that Georgetown University's status as a Catholic university to be relevant when determining whether a gay student association, not controlled by the University, would affect the religious entity. It was further held that the association should have a right of equal access and service but not a right to university "recognition". In the employment context, the U.S. court in *Walker v First Orthodox Presbyterian Church*[83] considered not only the obvious religious character of the employer but also the religious character of the job. From these cases, it may be concluded that the exemption for religious or voluntary bodies should not be unrestricted. Exemption should be given in consideration of the character of activities or job. If the activity or job has little relevance to the religious character or the conceptions of what is 'goods' to the association, exemption should not be granted.

The South Australia legislation includes an exemption for clubs and associations. The bill in Hong Kong did not adopt this provision. This exception may not be in accordance with the principle that the law is neutral towards the different conceptions of what is 'good'. Clubs and associations may only involve people of the same interest[84] but may not share a common conception of what is 'good'. Exclusion of certain people on the grounds of sexuality may unjustifiably limit the freedom of the individual.

The anti-discrimination legislation in Queensland makes it lawful to discriminate in employment on the ground of sexuality if the work involves the care or instruction of minors and also where it is reasonably necessary to protect the physical, psychological or emotional well-being of minors having regard to all the relevant circumstances of the case. This kind of exemption

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81 Sadurski, W., "Neutrality of law towards religion", (1990) 12 Sydney Law Review 420, 451.

82 *Gay Rights Coalition of Georgetown University Law Center v Georgetown Universtiy* (1987) 536 A. 2d 1

83 *Walker v First Orthodox Presbyterian Church* 22 Fair Empl. Prac. Cas. (BNA) 762 (Cal. Super. Ct. 1980).

84 *Equal Opportunity Bill* (1994) s.2.

seems to reinforce the stereotype among the public towards homosexuals rather than to eradicate discrimination. The effectiveness of the legislation to reduce discrimination would be affected. Exemptions of this kind are therefore not recommended.

C. Implementation

The enforcement of the present equal opportunities legislation is carried out by the EOC. Its role has already been briefly discussed. In many countries with equal opportunities legislation, commissions of a similar nature have been set up. The principal functions are: 1) to eliminate discrimination on the prohibited grounds[85]; 2) to deal with complaints of unfair treatment or discrimination[86]; 3) to report to the government recommendations for reform of existing law and the enactment of new legislation in promoting equal opportunities.[87]

The second function is worthy of note because it is a very important function to give effect to the legislation and to provide the victim of discrimination with redress against unfair treatment. There are main two ways dealing with complaints: 1) to arrange for conciliation and settlement and 2) to bring the action to court, the latter is carried out only if the former has been resorted in vain[88] but the action may also be brought to a tribunal rather than court. In New South Wales, the Equal Opportunity Tribunal resembles a court; consisting of three persons experienced in anti-discrimination law. The Tribunal may hear cases that have been referred to it by the President of the Anti-Discrimination Board. The President will refer the complaint to the Tribunal if the complaint is incapable of conciliation by the Board, or, if the President has declined the complaint, the complainant has a right under the Act to ask the President to refer the complaint to the tribunal. The setting up of such a tribunal is recommended as the tribunal can invite experts to adjudicate and hence its ability to address the problem may be better. Of course, the scope of power of the tribunal is a issue open to discussion in the future. The other roles of the commission or similar bodies are now also undertaken by the EOC.

VI. Conclusion

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85 An example is the South Australia *Equal Opportunities Act* (1984) s. 11(1).

86 An example is the New South Wales *Anti-Discrimination Act.*

87 *Ibid.*

88 This system is implemented in Australia by the *Human Rights and Equal Opportunity Act.*

This paper has attempted to justify the need for equal opportunities legislation on the ground of sexuality. It is argued that discrimination on ground of sexuality is unreasonable as many allegations about homosexuals are without grounds. Therefore, homosexuals should be given the right to pursue their conceptions of what is 'good'. The justice theory by John Rawls has given a very strong justification for equal rights for people in society with different conceptions of 'goods'. In a democratic society, despite disagreements over certain conceptions, there should be an 'overlapping consensus' so that people can live in a cooperative way. The role of law in society is to serve as a list of the terms of cooperation amongst the people. Though the law cannot modify the prejudices in people's mind, it can help to guide people's conduct and provide redress for the victims of discrimination. It is hoped that the government could enact such a piece of legislation so that equal opportunities in society can be really achieved.

A REFORM OF THE PROPERTY RULES IN HONG KONG & A COMPARATIVE STUDY OF PRIORITY RULES IN OTHER COMMONWEALTH JURISDICTIONS

香港物業條例的改革及其他英聯邦國家優先次序條例的比較研究

JOEY TSE MEI-LING*

Land has long been regarded as a source of wealth and this has necessitated the development of a comprehensive system of regulation in ownership and rights over land There are generally three systems of conveyancing, namely private conveyancing, registration of deeds and registration of title to land. In Hong Kong, the deed registration system is now being used when there should really be a shift towards the system of title registration. The issue is still under debate and a final decision is yet to be reached.

The author begins by summarising the history of title registration that can be dated back to the mid-19th century. The system, also known as the 'Torrens System', has developed extensively in England and Singapore whilst Australia was the first Common Law jurisdiction to adopt it. He then introduces the three basic principles applied in title registration: the Mirror Principle, the Curtain Principle and the Insurance Principle.

Deed registration has been used in Hong Kong for a long time. The fact that this system of registration does not confer title to land or guarantee validity of a deed or other registrable instruments in writing is unveiled. At present, priority between competing interests in land is governed by two distinct regimes: the Land Registration Ordinance and the Common Law rules. The Ordinance applies where the interest is registrable whilst, where the interest is unregistrable or where there is a lacuna in the Ordinance, the Common Law rules of priority apply.

The author goes on to by explain the experience of adopting title registration in other jurisdictions, namely Australia, Singapore and England. In the early stages, there was debate as to whether its introduction should be

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compulsory or voluntary. Yet, the system fails to bring in all the Common Law titles due to the absence of an entirely compulsory registration scheme.

There is an analysis as to how the principles of title registration are worked out in these three countries. Although it may seem that the principles work well, defects do exist. For instance, with the Mirror Principle, the mirror of title may not always give a perfect reflection of the current state of title. The writer also explains how the court resolves the problem that arises when there is a conflict between indefeasibility and rectification of title. The applications of the Curtain Principle (on equitable interests) and the Insurance Principle (on matter of indemnity) in the aforementioned countries are also considered.

Finally we are referred back to the proposed Title Registration System in Hong Kong. The issues concerning registrable interests, non-registrable interests to be protected by Caution, overriding interest and rectification and indemnity suggested in the Bill are detailed and elucidated. The article ends by providing an overview of the title registration system in Hong Kong if the proposal is adopted. The writer points out that "reform is necessary" and urges the government that "only a fresh rethinking of the whole basis and approach to the conveyancing system will enable us to meet future changes".

土地長久以來都被視爲是財富的來源，因此有必要發展一套完備的土地擁有權和土地權利的規例。概括而論，共有三種物業轉易的方法，包括私人物業轉易、契約註冊制度以及業權註冊制度。而香港現時所推行的契約註冊制度應轉移往業權註冊制度去。這提議仍在辯論中而還未能取得最終的決議。

在本文中，作者先向我們概說業權註冊的歷史。它能追溯到十九世紀中葉的時候而澳洲就是當時第一個採用業權註冊的普通法國家。這個制度，亦稱 Torrens System,在英國和新加坡也得到相當的發展。作者隨著便向我們解釋了三個應用在業權註冊制度的原則：鏡子原理、帳簾原理和保險原理。

香港是一長期以來採用契約註冊的地方。作者向我們揭示了這註冊法並不等於把該土地之擁有權，或保證有效之契約，或其他書面的註冊文書賦予契約持有人。香港現時有兩個制度去決定兩項對抗性利益之優先權，分別爲土地註冊條例和普通法。此條例應用於所有註冊和非註冊的利益上。但當條例出現脫漏時，普通法則會補上。

作者跟著便闡釋其他國家包括澳洲、新加坡和英國在採用土地註冊制度的經驗。在早期的階段，便曾經就應否將此制度列爲強制性還是自願性引起一番爭論。然而，此制度在澳洲和英國之失敗乃在於不能將

所有普通法下的擁有權納入法制之中，而這問題亦因土地註冊法的生效而得到舒緩。

作者繼續爲我們分析該三個業權註冊制度的原則如何在三個國家中實踐。雖然這三個原則看似運作得十分完善，可是當中亦存有不少缺點，例如就鏡子原理而言，反映業權的鏡子未必能真正顯示業權的現狀。作者亦解釋到法庭如何解決業權中的不能廢止性和業權的更正所發生的衝突。此外，帳簾原理(關於衡平法利益)及保險原理(關於賠償事宜)亦得到進一步的剖析。

最後，作者再次講及在香港提案中業權註冊制度。他爲我們概說了條例草案中關於註冊權益、受告誡制度保護的非註冊權益、凌駕性權益、更正及賠償的事宜。在文章的末段，作者給我們展示了建議若被採納後香港業權註冊制度將呈現的景象，並指出「改革是必須的」，並向政府主張「只有重新思考物業轉易的基礎和方法才能使我們迎合未來的轉變和趨勢」。

I. Introduction

As a vital source of wealth, land is always in short supply, especially in Hong Kong. A piece of land is commonly burdened with numerous claims over it. This has necessitated the development of a mechanism for regulating the ownership of and rights over land. The priority system is such a mechanism. It is devised to decide the priority between competing claims over the same piece of land. Substantial proprietary rights are affected in that some interests are postponed in favour of others. The state of title or incumbrances in land can be ascertained through a detailed scrutiny of all the title documents relating to a parcel of land. In view of the tedious process of title investigation, different systems of land registration are introduced to facilitate the conveyancing process. Deeds registration is a system under which all deeds and other instruments affecting interests in land are registered. Title registration is designed to serve similar functions but within a different working system. In England, registration of land charges is adopted in unregistered conveyancing. No matter which type of priority system is adopted, it should 'promote the efficient negotiation of property transactions, facilitate private dealings, and reduce the cost of transactions and risks of defective titles'.[1]

Hong Kong is now in the process of moving from a deeds registration system to a title registration system. The *Land Titles Bill* was published in 1994 as a first move towards this significant change. It has generated

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[1] Goo, S. H., *Land Law in Hong Kong* (Hong Kong: Butterworths Asia, 1998) p. 226.

extensive debate but it is still uncertain when it will reach the statute book. The Bill has undergone several amendments and a final version is still being negotiated.

The aim of this paper is to evaluate the priority rules under both the present and the proposed registration systems in Hong Kong with a comparative study of the title registration system elsewhere. The paper will start with a brief introduction to the background of title registration and its basic principles, followed by a discussion on the present deeds registration system. A comparison will then be drawn amongst the title registration systems in Australia, Singapore and England. Finally, the proposed system will be considered and evaluated in the light of the previous comparative analysis.

II. Title registration generally – history & basic principles

A. History

There are generally three principal systems of conveyancing: private conveyancing, registration of deeds and registration of title to land. Experience has shown that registration of title is much more efficient and sophisticated than any other systems. Title by registration is no recent concept. Its origin can be traced back to as early as the mid-19th century[2]. It has been widely adopted throughout the world, both inside and outside the Commonwealth, as the sole or dominant mode of conveyancing. Indeed, it could be said that registration of title is more the rule today and registration of deeds or other systems the exception.[3]

Title registration first received major attention in England and Australia during the mid -1850s.[4] During that time, the then existing systems of unregistered conveyancing by deeds in England and registration of deeds in Australia were deemed defective and the local reformers were concerned to have them replaced. Thus, title registration was strongly advocated as an alternative. Not surprisingly, like every novel invention, it provoked considerable comment and received wide-ranging responses.

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2 For the history of title registration, see Simpson S. R., *Land Law and Registration* (Cambridge: Cambridge University Press, 1976) pp. 40-46, 68-71; Ruoff T. B. F & Roper R. B., *The Law and Practice of Registered Conveyancing* (London: Sweet & Maxwell, 1996) Ch 1; Whalan D. J., *The Torrens System in Australia* (Sydney: Law Book Co., 1982) Ch. 1.

3 Nield, S., *Hong Kong Land Law* (Hong Kong: Longman Asia, 2nd ed., 1997) p. 74.

4 *Supra* note 2.

South Australia

In 1858, South Australia became the first common law territory to adopt a system of registration of title.[5] The system there has been commonly known as the 'Torrens system', so named after Sir Robert Richard Torrens, who was the most influential advocate for the introduction of title registration into this former British colony.[6] As mentioned before, title registration was devised to remedy the deficiencies of the pre-existing system of deeds registration, which had been in existence since 1842.[7] Another significant purpose was to reform the substantive law of real property with all its inherent complexity and obscurity of English land law.[8] The subject soon generated immense public interest as in Australia, unlike England, land was not the luxury of the rich[9] and thus, in Torrens words, land reform had become 'the people's question'.[10] Having been convinced that the new scheme would offer an improvement in the then unsatisfactory system, the public readily embraced the Torrens system. Despite this, an equally intense counterbalance came from the implacable opposition of the legal

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5 *Supra* note 2, Simpson, S. R., p. 68; Ruoff T. B. F., & Roper R. B., para. 2-04.

6 *Supra* note 2, Simpson, S. R., pp. 68-75; Whalan, D. J., pp. 5-8.

7 Whalan, D. J., "The Origins of the Torrens System and its Introduction into New Zealand" in Hinde, G. W. (eds.), *New Zealand Torrens System Centennial Essays* (Wellington: Butterworths, 1971) Ch. 1, 3. A remark by Torrens was illustrative of the unsatisfactory state of the system of deeds registration – 'The present system has grown out of ingenious devices to evade the oppressions of feudal tyrants, but under it we are subject to the tyranny of the legal profession and burdens little less grievous', quoted in Fox, P. M., "The Story Behind the Torrens System" (1950) 23 ALJ 489, 489, For further illustration of the defects of the system, see Pike, D., "Introduction of the *Real Property Act* in South Australia" (1960-62) 1 ALR 169, 176.

8 *Supra* note 2, Ruoff T. B. F. & Roper R. B., para. 2-04. Torrens once commented that '[the] [e]xisting law is complex, uncertain, and ruinously extravagant' and a judge also remarked that 'The *Real Property Act* as it stands at present is a scandal on the legislation of the Colony', both quoted in Fox's essay, see note 7, 489, 490.

9 *Report of the Real Property Law Commission 1861*, XIV (South Australia), "[L]and is a common possession, and a matter of daily bargain, instead of being the luxury of the few, and seldom parted with excepting under circumstances of necessity' cited in Whalan, D. J.", "Immediate Success of Registration of Title to Land in Australia and Early Failures in England" (1967) 2 NZULR 416, 436. It should be noted that at that time, land speculation was the prevailing commercial activity in South Australia. Land often changed hands and the percentage of land-owners in relation to the total population was very large, see note 7, Pike, D., 169. This public attitude towards landholding was described by Whalan, D. J., in his essay as the '*commodity concept*' approach; for details, refer to pages 421-424.

10 Torrens electoral speech, reported in the South Australian Register, 2 February, 1857, 'In Australia the great mass of people are, or confidently look forward to become landed proprietors. In Australia, therefore, thorough land reform is essentially the people's question', cited in Whalan's essay, see note 9, 436.

profession.[11] In view of the unremitting hostility towards the scheme, a landbroker system[12] was introduced under the *Real Property Act of 1861* as a measure to overcome the opposition.[13] This measure was claimed to be instrumental in securing a smooth administration of the Torrens system in its early stages of introduction and even its ultimate success.[14]

The impact of the immediate success of the Torrens system in South Australia was also felt elsewhere. The system has spread speedily throughout Australasia[15] as well as other parts of the world. This widespread application of the Torrens system in different localities clearly demonstrates its worth and general suitability for adoption as a conveyancing device.

England

In England, similar attempts to reform conveyancing were made during the 1850s. The system of unregistered conveyancing by deeds had been condemned[16] and it was recommended in 1830 that a general deeds registry should be set up to cure the evils of private conveyancing.[17] While the attempt proved abortive, the idea of registration of title came into light for the first time.[18] However, the subject did not receive significant attention until a

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11 Torrens himself did not yield to the bitter opposition but firmly encouraged registration of title without professional assistance. An interesting unofficial complaint best indicated his attitude towards the legal profession – 'Thus, as pigs, when they attempt swimming against stream, cut their own throats, the South Australian conveyances, by struggling against the new system, have rendered its effect vastly more disastrous to themselves than it would have been had they complacently submitted to the inevitable necessities of progressive reform', Torrens, *The South Australian System of Conveyancing by Registration of Title* (1859) 30, cited in Simpson, S. R., see note 2, p. 70.

12 Landbrokers are now generally known as licensed conveyances. They are formally appointed under legislation to carry out Conveyancing work. The prescribed qualifications for a licensed conveyancer vary from jurisdictions to jurisdictions.

13 There was no corresponding provision in the *Real Property Act 1857-58.*

14 *Supra* note 9, Whalan, D. J., 419.

15 The Torrens system was adopted in Queensland in 1861, followed by New South Wales, Victoria and Tasmania in 1862, New Zealand in 1870 and lastly Western Australia in 1874, see note 2, Simpson S. R., p. 71.

16 Land transfer under private Conveyancing was described as 'self-perpetuating, repetitive, protracted and costly', Gray, K. T., *Elements of Land Law* (London: Butterworths, 2nd ed., 1993) p. 167. Lord Scarman regarded the system as the 'wearisome and intricate task of examining title' in *Williams & Glyn's Bank Ltd v Boland* [1981] AC 487, 511D.

17 Second Report of the Real Property Commissioners 1830, 17, see note 2, Simpson, S. R., pp. 39-40.

18 *Supra* note 2, Simpson, S. R., p. 40.

Commission was appointed in 1853 to look into the matter. The Commission recommended the introduction of registration of title in its celebrated Report of 1857, upon which the basic scheme of title registration in England today is founded.[19]

Eventually, the first system of title registration was established under the *Land Registry Act of 1862* but it was almost a total failure.[20] Thus, the *Land Transfer Act of 1875* was enacted but once again, little progress was made. These early failures are usually attributed to the fact that registration under the two Acts was on a purely voluntary basis.[21] This is in vivid contrast to the effective measure of compulsion adopted from the inception of the Torrens system in South Australia, which contributed much to the immediate success of the system there. Therefore, it is evident that registration of title cannot operate successfully without some form of compulsion.[22]

Having realised this fundamental truth, an element of selective compulsion was introduced under the *Land Transfer Act of 1897* which provided that registration of title to land could only be made compulsory by Order in Council at the request of a county council in designated areas.[23] Moreover, registration was sporadic in the sense that it was only compulsory upon sale or on the grant or assignment of a lease with a remaining term of more than 40 years.[24] Further radical changes were brought by the *Land*

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19 *Ibid.*, pp. 40-44

20 The reason was that the Act departed from the recommendations of the 1857 Report in three fundamental aspects. First, the Act provided that in order to qualify for registration, a marketable title had to be shown. The registrar did not have any discretion to ignore minor blemishes when examining titles. Almost everything had to be referred to the court for decision. Secondly, the boundaries of each piece of land should be precisely defined and ascertained. This often led to disputes over trifles, which resulted in much expense and delay on registration. Thirdly, instead of confining registration to the ownership of full legal interest in land, partial and equitable interests had to be registered. Therefore, the register was burdened with complicated titles and was prevented from simplifying them: see note 2, Ruoff T. B. F. & Roper R. B., para. 1-03.

21 *Supra* note 2, Simpson, S. R., p. 44.

22 '[I]t is difficult, in the absence of compulsory registration of title, to devise a system under which conveyances of land can be conducted with the facility of sales of goods', Cheshire, G. C. and Burns, E. H., *Cheshire's Modern Law of Real Property* (London: Butterworths, 15th ed., 1994) p. 5.

23 *Supra* note 2, Simpson, S. R., p. 44.

24 *The Land Registration Act 1925,* s.123, as substituted by *The Land Registration Act 1997*, s.1, now provides that apart from sale of freehold land, grant of a lease having more than 21 years to run or an assignment of such a lease, registration is also compulsory upon conveyances by way of gift, conveyances pursuant to a court order, first legal mortgages, assents and vesting deeds.

Registration Act 1925 that repealed the Acts of 1875 and 1897.[25] The most important of these changes was the conferment of power on the Central Government to extend compulsory registration while any county council could still request for the same after an intervening period of 10 years.[26] Despite all this, it was not until 1990 that compulsory registration had been extended to the whole of England and Wales.[27] However, due to the sporadic nature of registration, there remain a large number of unregistered titles that are still governed by the system of unregistered conveyancing today.[28] Thus, it would probably take another extensive period before England can have a unified system of title registration.

Singapore

Title registration was introduced into Singapore by the *Land Titles Ordinance 1956*, which came into effect in 1959. The system there is principally modelled on the *New South Wales Real Property Act 1900-1970*[29]. The current law is contained in the *Land Titles Act 1994 (Revised Edition)*[30] and the rules made under it.

Initially, the new system was met with much opposition from the legal profession. They believed that the archaic substantive law of real property in Singapore should be modernised first before a modern system of title registration was introduced.[31] As will be seen, Singapore still has a dual system of conveyancing as that in Australia. The common law system that operates in respect of unregistered land is governed by the *Registration of Deeds Act*.[32] It is being converted into the registered system under the *Land Titles Act* on a systematic basis. At present, approximately one-third of all land is still under the unregistered system of conveyancing.[33] It is the hope that all land will be brought under the Act in five years' time.[34]

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25 The system of registration of title is now governed by *The Land Registration Acts 1925-97,* supplemented by *The Land Registration Rules 1925*, as amended, and other legislation.

26 *Supra* note 2, Simpson, S. R., pp. 45-46; Ruoff T. B. F. & Roper, R. B., para. 1-05.

27 *Supra* note 2, Ruoff T. B. F. & Roper R. B., para. 1-10.

28 *Ibid.*

29 Tan, S. Y., *Principles of Singapore Land Law* (Singapore: Butterworths Asia, 1994) p. 7.

30 *The Land Titles Act 1994 (Revised Edition)* Cap 157.

31 *Supra* note 29, p. 42.

32 *Registration of Deeds Act 1989* (Revised Edition). Cap 269 is the current version of the *Registration of Deeds Act 1886.*

33 *Supra* note 29, p. 142.

34 *Ibid.*

B. Basic Principles

Registration of title has been adopted in many other countries since its introduction into Australia and England. These include: New Zealand, Germany, Austria, Israel, Canada, various states in the United States of America, Ireland, Malaysia, Singapore, Uganda.[35] Attempts have been made to classify different types of systems of title registration but it is submitted that no genuine classification can possibly be made since every system is unique in itself, with different adaptations and modifications being made in the light of the prevailing conditions of the locality concerned and the corresponding substantive law of real property. As Hogg remarks, "Adaptations and modifications of the Australian system are also known as "Torrens" systems. Thus, there is now an English Torrens system, a Canadian Torrens system and an American Torrens system."[36] Therefore, as suggested in this quotation, the word 'Torrens' can conveniently be used to denote the general system of title registration with its fundamental feature being that the register alone proves title.

Though there is no universal system of title registration, every system does share one cardinal principle. This is that the register alone proves title. There may be differences among these systems but only in the details and not the general principles. Whatever the differences are, the common aim of each system is primarily to simplify conveyancing procedure. According to Ruoff, each system of title registration succeeds or fails according to the degree with which the local law and administration accord with three fundamental principles:[37]

1. The Mirror Principle

This involves the proposition that the register of title acts as a mirror, reflecting accurately and completely the current state of title. The register serves as an authoritative record and any prospective purchaser can ignore anything not recorded on the register. The title on the register is absolute or indefeasible, subject to any incumbrances recorded on the register. However, in order to give priority to certain interests that are thought desirable and to prevent any injustice caused by errors in the registration, the intended perfect reflection is subject to two significant exceptions. The first is the existence of overriding interests which, whether registered or not, are

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35 *Supra* note 2, Simpson. S. R., pp. 80-82.

36 Hogg, J. E., *The Australian Torrens System* (1905), cited in Simpson, S. R., see note 2, p. 77.

37 Ruoff, T. B. F., *An Englishman Looks at the Torrens System* (Sydney: Law Book Company Ltd. of Australasia, 1957), pp. 8-14.

binding on the purchasers nevertheless. Although these interests give rise to much uncertainty to the system, they are either commonly found or can be readily ascertained by an inspection of the land. Another exception to the mirror principle is the power of the court and the Registrar to rectify the register in limited circumstances.

2. The Curtain Principle

This provides that certain equitable interests cannot be registered and purchasers can ignore them unless they qualify as overriding interests or are protected by an entry of a caveat on the register. In other words, purchasers need only concern themselves with registered interests but not those that lie behind the veil. This is particularly important in order to secure the simplification of conveyancing process.

3. The Insurance Principle

The idea embodied in this principle is that the accuracy of the registered title is guaranteed by the government.[38] Any person who suffers loss as a result of the operation of the register is entitled to an indemnity from a central assurance fund.[39] This is important in mitigating the loss to parties affected that may result from any error in the register and any consequential rectification of the register.

III. Priority under the present deeds registration system

Having examined the system of title registration in other jurisdictions and its basic principles, it is now necessary to turn to the current system of registration in Hong Kong before we look at the proposed system.

A. Deeds Registration Generally

The current system in Hong Kong is one of deeds registration. Although deeds registration is widely adopted in many countries to replace

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38 Titles registered under the systems in Fiji, Malaysia, Sudan and Austria are not guaranteed by the government: McCrimmon, L. A., "Compensation Provisions in Torrens Statutes: The Existing Structure and Proposals for Change" (1993) 67 ALJ 904, 920.

39 The title registration system adopted in Germany, Austria and Israel does not provide for an assurance fund and a comprehensive state guarantee of title: Stein, R., "The 'Principles, Aims and Hopes' of Title by Registration" (1983) 9 ALR 267, 267.

private conveyancing, it is more the exception now.[40] Rather, title registration is the dominant mode of conveyance today. However, there are examples of extremely successful systems of deeds registration such as those in South Africa and Scotland. The systems there have been claimed to be nearly as effective as a title registration system.[41] By contrast, deeds registration was almost a total failure in England. It was only of limited application there and deeds registries could be found in the county of Middlesex and the ridings of Yorkshire.[42]

Under a deeds registration system, registration does not confer title to land or guarantee the validity of a deed or other registrable instruments in writing. It merely serves as a record of transactions in land and gives notice of the interests therein to potential buyers. It also gives priority to those claims that are duly registered against any later transactions. Non-registration, however, may postpone a claim to subsequent claims but does not in any way affect the validity of the title. Although deeds registration simplifies the conveyancing procedure to some extent, the main difficulty with this system, however, stems from the very nature of a deed. A deed, even when registered, simply provides evidence of title. It merely indicates that a transaction in land has taken place but does not guarantee the validity of the transaction. Therefore, issues relating to ownership, as opposed to priority, cannot be determined conclusively. Besides, there are interests in land which are created by unregistrable instruments or created without any writing at all. They are certainly matters that affect land but would not be apparent from the deeds register. Therefore, it is still necessary to investigate the chain of title by scrutinising all the title deeds and documents pertaining to a piece of land. This tedious process of tracing the vendor's good root of title, though facilitated by the deeds register to some extent, has to be conducted every time a future transaction is contemplated. It involves a great deal of time and expense in property transactions, thereby rendering

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40 For example, in England, the United States, Scotland, South Africa, Germany, Singapore, Egypt, etc, see note 2, Simpson, S. R., Ch 6.

41 For a brief introduction to the South African system, see note 2, Simpson, S. R., pp. 104-108; for the Scottish system, see pp. 98-104. Despite the success of the Scottish system, title registration was introduced in 1979 to replace the deeds registration system: Willoughby, P. G. & Wilkinson, M., *Registration of Titles in Hong Kong* (Hong Kong: Butterworths, 1995), p. 7. Generally, there were two reasons for the conversion. First, the then existing Conveyancing fees were a third higher than those for registered Conveyancing in England. Secondly, the conversion was mainly a measure to alleviate the excessive workload caused by the shortage of solicitors at that time: see note 2, Simpson, S. R., p. 102.

42 The Middlesex Deeds Registry was set up in 1708. In Yorkshire, a deeds registry was established in West Riding in 1703, in East Riding and Kingston upon Hull in 1707 and in North Riding in 1735: see note 2, Simpson S. R., p. 93.

the conveyancing procedure inefficient.

B. Deeds Registration in Hong Kong

At present, priority between competing interests in land is governed by two distinct regimes: the *Land Registration Ordinance (LRO)*[43], upon which the deeds registration system is based, and the common law rules. The ordinance applies where the interest is registrable and where the interest is unregistrable or where there is a lacuna in the ordinance, the common law rules of priority apply.

The *LRO*[44] is now the oldest piece of legislation in Hong Kong. It owes its origin to the *Irish Act of 1707*[45] and some old English Acts[46]. It is also partly based on the system in Western Australia and Van Dieman's Land (now Tasmania).[47] The purposes of the Ordinance are stated in the preamble as "to prevent secret and fraudulent conveyances, and to provide means whereby the title to real and immovable property may be easily traced and ascertained". In *Kwok Siu Lau v Kan Yang Che*[48], it was said that the effect of the Ordinance was to make registration the test of priority, to compel people to register by imposing harsh terms and to remove the doctrine of notice from property transactions.[49] It has been claimed that the deeds registration system under the *LRO* has operated well, presumably due to the efficiency with which the deeds registries have been administered. However, as it will be seen, the provisions of the Ordinance are not entirely consistent with each other in application and are not adequate to deal with some important issues of priority. Therefore, the doctrine of notice, with all its inherent uncertainty, is still relevant. What follows is an analysis of some of the problems with the current system.

C. Priority of Competing Interests and the Effect of Registration and Non-Registration

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43 Cap 128, LHK, as amended by *The Land Registration (Amendment) Ordinance, No.56 of 1980.* For a detailed account of the mechanism under the LRO, see Goo, S. H., *The Annotated Ordinances of Hong Kong: Land Registration Ordinance* (Cap 128) (Hong Kong: Butterworths, 1996).

44 *Ordinance No.3 of 1844 (repealed).*

45 6 Anne, c. 2.

46 For instance, the Act 7 Anne, c 20, establishing the Middlesex Registry and the Act 2 & 3 Anne, c 4, establishing the West Riding Registry

47 For details, see Thomson, W. K., "The *Land Registration Ordinance* of Hong Kong: Historical and Legal Aspects" (1974) 4 HKLJ 242, 243-247.

48 *Kwok Siu Lau v. Kan Yang Che* [1913] HKLR 52.

49 *Ibid.*, 66, per De Sausmarez PJ.

Generally, the priority of competing interests can be classified into four categories. The relevant provisions of the *LRO* are reproduced for reference as follows:

> **2. Establishment of Land Registry for registration of instruments affecting land**
> (1) The Land Registry shall be a public office for the registration of deeds, conveyances, and other instruments in writing, and judgements; and all deeds, conveyances, and other instruments in writing, and all judgements, by which deeds, conveyances, and other instruments in writing, and judgement, any parcels of ground, tenements, or premises in Hong Kong may be affected, may be entered and registered in the said office in the prescribed manner.
> (2) For the purpose of this Ordinance, "judgements" includes judgements and orders of the High Court, the District Court and the Lands Tribunal.
>
> **3. Priority of registered instruments; effect of non-registration**
> (1) Subject to this Ordinance, all such deeds, conveyances, and other instruments in writing, and judgements, made, executed, or obtained, and registered in pursuance hereof, shall have priority one over the other according to the priority of their respective dates of registration, which dates shall be determined in accordance with regulations made under this Ordinance.
> (2) All such deeds, conveyances, and other instruments in writing, and judgements, as last aforesaid, which are not registered shall, as against any subsequent bona fide purchaser or mortgagee for valuable consideration of the same parcels of ground, tenements, or premises, be absolutely null and void to all intents and purposes. Provided that nothing herein contained shall extend to bona fide leases at rack rent for any term not exceeding three years.
>
> **4. Notice of unregistered instrument not to affect registered instrument**
> No notice whatsoever, either actual or constructive, of any prior unregistered deed, conveyance, or other instrument in writing, or judgement, shall affect the priority of any such instruments as aforesaid as is duly registered.
>
> **5. Period within which instruments to be registered after execution**
> All deeds, conveyances, and other instruments in writing, and judgements, which are duly registered within the respective times next mentioned, that is to say, all deeds, conveyances, and other instruments in writing which are registered within one month after the time of execution thereof respectively, and all judgements which are registered within one month after the entering up or recording thereof, shall severally be in like manner entitled to priority, and shall take effect respectively by relation to the date thereof only in the same manner as if this Ordinance had not been passed.

1. Registrable v Registrable

Registered v Registered

Where both instruments are registered within one month of their execution, priority depends on the order of execution.[50] This backdating effect allows a purchaser to submit his instrument for registration later, within one month of its creation, without affecting its priority. However, this mechanism creates the problem that a person who searches the register cannot get the most up-to-date record of the state of title. In practice, this problem does not give rise to much difficulty, presumably due to the practice of prompt registration and inspection of title deeds. Nevertheless, it could be solved by adopting a priority notice system like the one in England in both registered and unregistered conveyancing.[51] By taking out a priority notice, the purchaser's interest retains priority from the date of creation provided that he submits the instrument for registration within the required period. At the same time, the notice informs searchers of the register that registration of an instrument that takes in priority is pending.

Where both instruments are registered one month after their creation, priority depends on the order of registration.[52] According to section 3(2), a prior unregistered instrument is null and void against a subsequent bona fide purchaser or mortgagee for valuable consideration.[53] So, if A's instrument, which is created before B's, is unregistered, B's instrument, though unregistered, takes priority. However, if A then registers his instrument one-month after its creation before B does the same (i.e. also one-month after its creation), it seems that section 3(1) applies and A's instrument takes priority over B's according to the order of registration. Therefore, in this case, sections 3(1) and 3(2) produce conflicting results. While the situation seems to fall within the wordings of section 3(1), it is difficult to see how an instrument that has been rendered void under section 3(2) could be resurrected by subsequent registration because there is nothing upon which priority can be conferred. Moreover, section 3(1) is expressed as "subject to this Ordinance". Therefore, section 3(2), being the overriding provision, should be followed to resolve this priority problem.

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50 *The Land Registration Ordinance* (Cap 128), s 5.

51 *Ibid.*

52 *Ibid.*, s 3(1).

53 This is so whether the second instrument is registered or not although the provision does not specifically provide so: see note 48, 52, 65, per De Sausmarez PJ. However, if the second instrument is not registered, it has been said obiter in *Kwok Siu Lau* that the holder of the second instrument who has notice of the prior unregistered interest cannot claim to be a bona fide purchaser. But if he registers, notice will be irrelevant under *The Land Registration Ordinance* s.4.

Registered v Unregistered

Where the first instrument is registered and the second is not, there is no directly applicable provision in the *LRO*. However, according to the general principle of registration, the first instrument should have priority by reason of its registration. The result will be the same if one applies the common law rules of priority. At common law, the crucial distinction lies between legal and equitable interests rather than registered and unregistered interests. If the first interest is legal, it binds the whole world. If it is equitable, it also binds the whole world except a bona fide purchaser of a legal estate for value without notice of the prior equitable interest. In our case, registration provides notice to the world of the first interest. Therefore, the second interest is subject to the first.

Unregistered v Registered

As mentioned earlier, an unregistered instrument is null and void against a bona fide purchaser or mortgagee for valuable consideration under section 3(2), whether the subsequent instrument is registered or not. This provision is to be read with section 4 which provides that notice of a prior unregistered instrument is irrelevant when the subsequent instrument has been registered. In *Kwok Siu Lau v Kan Yang Che*[54], it was held that the combined effect of section 3(2) and section 4 was that, in the absence of actual fraud[55], a bona fide purchaser or mortgagee for value whose interest had been duly registered would take priority over a prior unregistered interest even though he had notice of it at the time of registration. However, it has been said that if the second instrument is not registered, notice is equivalent to bad faith.

Where the holder of a subsequent registered instrument is someone other than "a bona fide purchaser or mortgagee for valuable consideration," it seems that no provision in the *LRO* is applicable. Therefore, if we apply the doctrine of notice to resolve this statutory lacuna, an unregistered instrument takes priority over, e.g. a donee's registered instrument because he provides no valuable consideration for the proprietary interest given to him. But if

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54 *Supra* note 48.

55 The term 'actual fraud' was defined in *Battison v Hobson* [1896] 2 Ch 403, 412, per Stirling J as 'fraud in the ordinary popular acceptation of the term, i.e. fraud carrying with it grave moral blame, and not what has sometimes been called legal fraud, or constructive fraud, or fraud in the eye of a court of law or a court of equity'. This definition was quoted with approval in *Mak Him v Chan Hung Pak* [1965] HKLR 87, 93 by Hogan CJ.

the first instrument is then registered in order to secure itself against other competing instruments, there is a competition between two registered instruments and section 3(1) comes into play. The donee's registered instrument then takes priority over the first registered instrument by virtue of his prior registration. This is a striking anomaly because an unregistered instrument loses its priority upon being registered.[56] It is acceptable that someone who does not register his instrument promptly should lose priority but there is no justification for priority being taken away by the act of registration. This is surely against the spirit of the *LRO* that is intended to promote registration.

Unregistered v Unregistered

It is clear that section 3(2) does not require a subsequent purchaser or mortgagee to register his instrument in order to claim priority over the prior unregistered instrument.[57] What is less certain is whether notice is relevant in this context.[58] Section 4 appears to exclude the doctrine of notice only when the subsequent instrument is registered. The inference to be drawn is that if the subsequent instrument is not registered, then notice will be relevant. This argument is consistent with the suggestion in *Kwok Siu Lau v Kan Yang Che*[59] that as between two unregistered instruments, equitable doctrines would no doubt apply.[60] Therefore, the implication is that bona fide in this context means, among other things, absence of notice of the prior unregistered instrument.

2. Registrable v Unregistrable

In this case, if the prior registrable instrument is registered, there seems to be no relevant provision in the *LRO* that applies. However, in accordance with the general principle of registration, the first instrument must take priority. The position will be the same if one applies the common law rules.

Where the first instrument is unregistered, it seems that section 3(2) may apply, yet it is silent on the registrability of the subsequent instrument.

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56 For a Hong Kong example, see *Consolidated Sales Ltd. v Turner C Lynn* [1970] HKLR 222.

57 Supra note 48, 65. It was argued that the legislature could not have intended to postpone a prior to a subsequent unregistered instrument. This was dismissed by De Sausmarez PJ who said, 'That is an argument which would be of weight could not the priority of unregistered deeds inter se immediately be altered or confirmed by the registration of one of them. The penalty is severe, but the escape is easy'.

58 For details, see note 1, Goo, S. H., pp. 270-271.

59 *Supra* note 48.

60 *Ibid.*, 65, per De Sausmarez PJ.

Therefore, the first instrument will take subject to a subsequent bona fide purchaser or mortgagee for value of an unregistrable instrument. However, it is uncertain whether notice is relevant here. Section 4 only expressly excludes notice if the second instrument is registered. An inference may be drawn to the effect that where the subsequent instrument is unregistered because it is unregistrable, notice will be relevant.

Another approach may be taken to resolve this priority problem. Where one of the instruments is unregistrable, it seems unfair to subject it to the regime under the *LRO* and treat it as an unregistered instrument. The *LRO* only deals with priority between competing registrable instruments and so it has no jurisdiction over unregistrable instruments. To interpret the statutory provisions in a way not contemplated by the legislature is artificial. Therefore, the position should be governed by the common law rules/doctrine of notice.

3. Unregistrable v Unregistrable

Again, no provision in the *LRO* is directly in point here. Thus, the position is governed by the doctrine of notice/common law rules.

4. Unregistrable v Registrable

Similar to the above two categories, priority is governed by the doctrine of notice.

D. Unwritten Equities

Unwritten equities are interests in land created without any writing at all. The most common examples are equitable interests arising under a resulting or constructive trust and an equitable mortgage by way of deposit of title deeds unaccompanied by any instrument. It is surprising to find that the *LRO* does not deal with the priority of unwritten equities vis-a-vis other registrable instruments because although they have not been created by instrument, they are nonetheless, if valid, interests affecting land. This major drawback of the *LRO* clearly defeats one of the purposes in the preamble, which is 'to provide means whereby the title to real and immovable property may be easily traced and ascertained'.

Furthermore, the failure of the *LRO* to grapple with the problem of unwritten equities brings into application the old doctrine of notice.[61] This

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[61] For example, see *Financial and Investment Services for Asia Ltd. v Baik Wha International Trading Co Ltd.* [1985] HKLR 103.

doctrine has created much uncertainty. A purchaser of a legal estate cannot know for certain whether he has taken it free of a prior equitable interest because constructive notice depends very much on what inquires are deemed reasonable, which in turn, varies from case to case.[62] Likewise, the owner of an unwritten equity may not even know that he or she has an interest in land because such interests usually arise by operation of law. He or she may not be able to bring his interest to the notice of the purchaser in order to protect his interest. Therefore, the position of both the purchaser and the owner is insecure and vulnerable.

E. Conclusion

The fact that deeds registration confers only priority but not validity renders the conveyancing procedure slow, complex and expensive. Besides, the provisions of the *LRO* are too simple and vague. On close analysis, they create several difficulties in application and there is always room for interpretation. This uncertainty clearly militates against the attempt to establish a priority system on a wholly consistent and logical basis.

IV. Experiences of other jurisdictions - Australia, Singapore & England

As there is no one single system of title registration, nor can any system be said to be perfect, a comparative analysis will serve best to reveal the merits and defects inherent in each system. A critical study of the experience in other jurisdictions may help to shed some light on the proposed system and its future improvement. A note of caution is that a wholesale adoption of another system will only result in local anomalies. Rather, adaptations are required to blend the system with the existing substantive law in the light of local needs and circumstances.

In this part, a comparison will be drawn among the title registration systems in Australia, Singapore and England & Wales. As both the Torrens and the English systems are well known for their historical significance and divergent achievement, they merit significant attention. Singapore, like Hong Kong, was a former British colony and titles to land are based on State (formerly the Crown) leasehold grants. In 1956, a conversion from deeds registration to title registration was designed for the changeover. The current law is now contained in the Land Titles Act 1994 (Revised Edition)[63]

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62 For a local example on this problem, see *Wong Chim Ying v Cheng Kam Wing* [1990] 2 HKLR 111.

63 *The Land Titles Act 1994 (Revised Edition) Cap 157.*

and the rules made under it.

The following comparison will focus on certain aspects of title registration insofar as they are relevant to priority rules.

A. Initial Compilation of the Register

Usually, a system of title registration is preceded by some form of conveyancing already in existence. There may be a deeds register either well-kept or poorly maintained or there may be no register at all. Whatever is the position, the initial compilation of a register of title is inevitably an exacting and lengthy operation.[64] It is also pointed out that the task of compiling the register is relatively more difficult than maintaining it subsequently.[65] Therefore, needless to say, the efficient operation of a title registration system in its early stages depends very much upon the manner in which the register is compiled.

In the early stages of title registration in Australia and England, there was debate as to whether its introduction should be compulsory or voluntary. However, Dowson and Sheppard pointed out that the "critical and decisive antithesis" was between sporadic and systematic compilation of the register.[66] Sporadic compilation refers to the process of registration being operated in a piecemeal manner to scattered parcels of land over an indefinite period.[67] Systematic compilation means the methodical application of registration in an orderly sequence throughout the area concerned.[68] The former can be compulsory, voluntary or both while the latter must be compulsory.

Australia

In Australia, the initial compilation of the register is generally known as the process of "bringing land under the Act". In contrast to the position in England and Wales, registration of title was made compulsory from its inception in all the eight jurisdictions in respect of land alienated in fee by the Crown after the introduction of the Torrens system.[69] This systematic compilation ensures that a significant amount of unregistered land governed by the old system of conveyancing comes under the new system very soon. This effective measure of compulsion has contributed much to the immediate success of the system there.

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64 Dowson, E. M., Sir, *Land Registration* (London: H.M.S.O., 2nd ed., 1956), p. 93.

65 *Supra* note 2, Simpson, S. R., p. 188.

66 *Supra* note 64, Dowson, E. M., Sir, pp. 92-93.

67 *Ibid.*

68 *Ibid.*

69 *Supra* note 9, Whalan, D. J.,418.

However, for titles granted before the commencement of the Torrens statutes, the position appears to be no more successful than it was in England in the early stages since they are to be brought under the Act voluntarily.[70] Generally, if a proprietor has already acquired a sound and good title, he derives no immediate practical benefit from registering it. In such a case, registration only imposes additional expense to confirm what is already good. Likewise, if the title is bad or defective, no proprietor would like to have this disagreeable fact to be disclosed through registration.[71] Therefore, there is little to induce a landowner to register his title. The position in Australia might be more optimistic as compared to that in England since, as mentioned before, the prevalence of land speculation in Australia[72] might induce a landowner to acquire a marketable title by registering it. However, on the whole, the haphazard nature of this sporadic voluntary registration renders the comprehensive adoption of title registration very slow. Today, the old and new systems of conveyancing are still operating side by side in all Australian jurisdictions. It will probably take some time for all the outstanding general law titles to be brought under the Torrens system.

But for the voluntary element in the registration scheme, the register would have been compiled with far greater speed and economy. The Australian jurisdictions should have taken a bolder and more determined step to extend compulsory registration to those titles previously granted. The lesson from the above discussion is that it is advisable to concentrate all available resources and effort on introducing systematic compilation at the outset.

Singapore

In Singapore, there are numerous ways to bring titles onto the register. For land alienated under the old system, applications for registration may be made voluntarily by landowners who must own either in law or in equity, a fee simple, an estate in perpetuity or a leasehold still having a term of 10 years to run.[73] Apart from this voluntary conversion of titles, five ways of compulsory conversion are provided for. First, registration is compulsory in respect of land alienated by the State after the introduction of title registration for an estate in fee simple, an estate in perpetuity or a leasehold term of not

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70 *Ibid.*

71 'If there is one thing more undesirable than another for many titles, it is that they should be brought into the light of publicity. Peacefully reposing in the strongroom of a solicitor's office, their constitution are strengthened and their blemishes concealed if not cured.' Humphry, H. M., "The *Land Transfer Bill*" (1889) 5 LQR 275, 283.

72 *Supra* note 9.

73 *Land Titles Act 1994, (Revised Edition),* s 19.

less than 10 years.[74] Second, where unregistered land is surrendered to the State for the issue of a fresh title, the fresh title is to be registered under the *Land Titles Act (LTA)*.[75] Third, the Registrar of Titles may elect to convert a common law title to a registered one upon conveyance.[76] This compulsory conversion is now being done in phases by the designation of survey districts.[77] Fourth, the Registrar may also elect to bring titles under the *LTA* on examination of instruments registered under the *Registration of Deeds Act*[78]. Fifth, where planning permission is granted for the development of unregistered land, the Registrar must either order the landowner to surrender his title to the State, register the land or certify that the land will remain as unregistered land.[79]

Again, compilation of the register is severely prolonged by the voluntary element in the registration scheme, for the same reasons discussed earlier. Besides, although the third and fourth methods of compulsory conversion are very useful in speeding up the process of conversion, methods like the second one are tainted with uncertainty as the real driving force to register still rests in the landowners themselves.

Like Australia and England, the system fails to bring in all the common law titles due to the absence of an entirely compulsory registration scheme. As a result, the same sort of duality exists in Singapore as in the other two jurisdictions. Up till now, about one-third of the land is still under the unregistered system of conveyancing. It is the hope that in 5 years, all the land will be governed by the *LTA*.[80]

England

From the outset, there was no compulsory registration in England and Wales and the early failures of title registration were attributable to its purely voluntary basis. It was not until 1897 that selective compulsion was introduced. At that time, registration was made compulsory on a sporadic pattern whereby certain areas were designated as compulsory registration areas. Moreover, registration was compulsory only upon conveyance on sale of freehold land, grant or assignment of a lease, which had more than 40 years to run.[81] Since 1 December 1990, the whole of England and Wales has

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74 *Ibid.*, s 8.

75 *Ibid.*, s 13.

76 *Ibid.*, s 21. Before, the Registrar could only do so where the conveyance was for consideration.

77 Registry of Land Titles and Deeds: http://www.gov.sg/molaw/rotd/rotd.html.

78 *Registration of Deeds Act 1989 (Revised Edition)* Cap. 269.

79 *Ibid.*, s 23.

80 *Supra* note 29, p. 142.

81 *Supra* note 23.

become subject to compulsory registration. It is by this sporadic compilation that unregistered land is gradually converted into registered land. However, before 1997 the trigger dispositions failed to cover many parcels of unregistered land. For example, land owned by corporations or held on a family settlement is likely to remain unsold for many decades.[82] Hence, the process of conversion remains extremely slow.

However, this position was much improved by the *Land Registration Act 1997*. The range of dispositions, which are subject to the requirement of compulsory registration, is extended to include conveyances by way of gift, conveyances pursuant to a court order, first legal mortgages, assents and vesting deeds.[83] Moreover, there is also a power to add to the categories of trigger dispositions by statutory instrument.[84] All this will bring nearer the day of universal registration of title.

The new legislation also encourages voluntary first registration through fee concession.[85] Though this change is much welcomed, it is by itself insufficient. As discussed earlier, there is little incentive for a landowner to apply for voluntary registration. The case is stronger here because, unlike Australia, few landowners contemplate selling their land. Moreover, under the English system, the protracted period of title adjudication and the risk of being granted a possessory or qualified title with its official stigma further add to the numerous disincentives. Therefore, it is evident that as far as initial registration is concerned, something more than mere encouragement is needed.

The traditional view that the inherent merits of title registration would enable it to win its way voluntarily is totally unrealistic nowadays. Unless registration of all land is made compulsory, it is highly unlikely that a unified system of title registration can be established.

B. The Mirror Principle - The Register

The register is integral to every title registration scheme. It is intended to give a conclusive and final record of titles and incumbrances in land. As the primary objective of title registration is to simplify the conveyancing process, simplicity and publicity are, therefore, two requirements to which a register must live up.

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82 Megarry, R. E., Sir, *A Manual of the Law of Real Property* (London: Sweet & Maxwell, 7th ed., 1993), p. 98.

83 *The Land Registration Act 1925*, s 123, as substituted by *The Land Registration Act* 1997, s 1.

84 *Ibid.*

85 *The Land Registration Act 1925*, s 145(3), as substituted by *The Land Registration Act 1997*, s 3.

Australia

Like England and Singapore, each title is registered against a title number assigned to the plot of land concerned. By taking the unit of land, with its permanent and fixed nature, as the basis of record,[86] the problems as they exist in England in respect of registration of land charges in unregistered conveyancing are avoided. Under section 3(1) of the *English Land Charges Act 1972*, a land charge has to be registered against the name of the estate owner whose estate it is intended to be affected. Registration and searches on the register must be made against the name of the estate owner "as disclosed by the conveyance to him or her".[87] This practice has given rise to two main problems.[88] First, an incumbrancer may fail to ascertain the correct version of the name of the estate owner as disclosed in his conveyance.[89] As a result, a land charge may be registered against an incorrect name. In such a case, if someone then makes a search and obtains a clear search certificate, the land charge registered by the incumbrancer is void against the person whose certificate is conclusive in his favour.[90] However, it has also been held that registration against names that may fairly be regarded as a version of the correct names is valid and effective against a person who fails to apply for an official search or who applies in the wrong name.[91] For example, the name 'Francis David Blackburn' can be regarded as a version of 'Frank David Blackburn'.[92] Second, an incumbrancer may be unaware that he is dealing with a sub-vendor instead of the real estate owner. If he registers his land charge against the name of the sub-vendor, the registration will be void against the real estate owner.[93]

As opposed to the position in England, the register in Australia retains all the historical records of a parcel of land from the time of first

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86 As Dowson and Sheppard pointed out, the first essential working feature of title registration is 'the transference of primary attention from the mobile, mortal, mistakable persons temporarily possessing or claiming rights over patches of the earth's surface, to the immovable, durable, precisely definable units of land affected and the adoption of these as the basis of record instead': see note 64, Dowson, E. M., Sir, p. 76.

87 *Standard Property Investment plc. v British Plastics Federation* (1985) 53 P & CR 25, 28.

88 *Supra* note 1, Goo S. H., pp. 214-215.

89 *Ibid.*, p. 214.

90 *Diligence Finance Co v Alleyne* (1972) 23 P & CR 346.

91 *Oak Co-operative Building Society v Blackburn* [1968] Ch 730; Riddall J. G., *Introduction to Land Law* (London: Butterworths, 5th ed., 1993), p. 446.

92 *Ibid.*

93 *Supra* note 1, Goo, S. H., p. 214.

registration.[94] This is entirely against the first requirement laid down by Torrens for his measure that 'registration should be capable of indefinite expansion without becoming so cumbrous as to interfere with certainty and dispatch in making searches'.[95] Thus, it is of paramount importance that the register should be purged of dead matter if the system is to work with full simplicity. Once an entry is superseded, the supporting information becomes redundant and should be withdrawn, if not destroyed.[96] In other words, the mirror of title should be polished so that the *current* state of title is always ascertainable at a glance.

Singapore

Like Australia and England, each title is identified by reference to a number in relation to a plot of land. Historical entries are kept off the register. In addition, the register is open to public inspection from its inception as in Australia.

England

The critical problem of accumulation of records, as experienced in Australia, does not exist in England. The register shows only the current state of title and information that supports the current entries on the register.[97] This practice clearly provides a solution to one of the objections to registration of deeds in England a century ago, namely that "the number of deeds requiring registration would destroy the plan by its own weight".[98] This objection deserves equal attention if title registration is to operate successfully since a register of title is no more immune from becoming "congested" than a deeds register if left unpurged of obsolete entries.

Coupled with the registration of title against a title number as opposed to the name of the estate owner, the register seems to work perfectly well. However, it had been suffering from a serious drawback until some years ago. Astonishingly, the register has only been open to public inspection since 3 December 1990, subject to the payment of a fee.[99] Prior to this, no person was allowed to inspect the register without permission from the registered

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94 *Supra* note 2, Whalan, D. J., p. 79.

95 *Supra* note 64, Dowson, E. M., Sir, p. 78.

96 There may be valid reasons to keep those pieces of information separately for historic and emergency reference.

97 *Supra* note 2, Simpson, S. R., p. 79.

98 *Supra* note 64, Dowson, E. M., Sir, p. 77.

99 *The Land Registration Act 1925*, s 112(1), as substituted by *The Land Registration Act 1988*, s 1(1).

proprietor. This denial of a general right of access to the register was almost without parallel in other jurisdictions. It is difficult to understand and rationalise the secrecy of the register when publicity is generally recognised as a powerful protection against error and fraud. The vital principle of publicity should be upheld if the register of title is to serve as a reliable foundation upon which the entire title registration system is based.

C. Rectification of the Register – Exception to the Mirror Principle

Like everything that is man-made, the register is bound to be subject to human frailty. Mistakes and fraud are not uncommon and should reasonably be anticipated. Thus, the mirror of title may not always give a perfect reflection of the current state of title. In view of this, machinery for rectification must be provided for to make good the reflection. This in effect means that an indefeasible title under the system is not truly indefeasible.[100] The crucial question, therefore, is not whether there should be rectification but to what extent should rectification be allowed. Being a significant inroad to the mirror principle, should rectification be qualified to an extent, which does not adversely frustrate the indefeasibility of title? If so, how should we strike a balance between the flexibility provided by rectification and the rigidity inherent in the concept of indefeasibility of title? In other words, to what extent should indefeasibility of title be the governing principle of a registration scheme?

Australia

The Australian registration scheme attaches much weight to the principle of indefeasibility. Registered titles are so sacrosanct that rectification is available only on certain specified grounds. All states, except Victoria, have two sets of provisions, which confer powers of correction on the registrar, but not the court.[101] First, the registrar may correct errors in title certificates or the register and supply omitted entries therein.[102] Second, if the registrar is satisfied that an entry or instrument has been wrongfully or fraudulently obtained or retained, he may summon or require delivery up to him of the relevant document for cancellation or correction.[103] These powers of rectification apply to events both within and

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100 It was pointed out that the term 'indefeasible title' was a misnomer. It is best described as a title which, if examined or attacked at any given point of time, cannot be defeated or annulled, see note 2, Whalan, D. J., pp. 296-297.

101 *Supra* note 2, Whalan, D. J., p. 366.

102 *Ibid.*

103 *Ibid.*

outside the registrar's office.[104]

The main difficulty, which has arisen, is how to reconcile the registrar's power to rectify with the principle of indefeasibility. Although several legal principles can be deduced from case law to assist the registrar in his task, there still remains considerable doubt as to the precise scope of the rectification provisions.[105] For example, much uncertainty centers on the application of the word 'wrongfully' in the relevant provisions. In *De Chateau v Child*,[106] after a memorandum of transfer had been executed, a covenant was added to it by the vendor without the knowledge of the purchaser. The purchaser was bound by the covenant to share in the maintenance cost relating to a right of way. The transfer was then registered by the vendors. It was held that the transfer had become wholly void on the basis that any alteration in a material part of an instrument voids it because it thereby ceases to be the same instrument. Thus, the registration had been wrongly obtained on the ground that it was already legally void before registration. The register was subsequently rectified. However, in *Farrier-Waimak Ltd v Bank of New Zealand*,[107] after a mortgage had been executed, the mortgagee altered the mortgage by making it subject to certain registered liens. The mortgage was then registered. Although the Privy Council was not considering the effect of the rectification provisions, it did hold that as between mortgagor and mortgagee, the unilateral act of the mortgagee did not render the registration void. It could not affect the mortgage as between the parties. The degree of alteration in this case is no less significant when compared to the situation in *De Chateau v Child*. Therefore, it would appear that the different results are unjustifiable. Although it seems clear that there may be wrongful conduct which is not fraudulent and that 'wrongfully' has a wider meaning than 'fraudulently', the meaning of 'wrongfully' still remains in considerable doubt. For similar reasons, there has been a general consensus that the power of rectification is exercisable only in clear cases where no difficult issues of law or fact are involved[108] or where the rights of the parties are settled by judicial proceedings.[109] Thus, it can be seen that judicial discretion, as opposed to the position in England, plays little part under the Torrens system. This, in effect, may promote certainty and security of title, which have been claimed

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104 *Ibid.*, p. 369.

105 *Ibid.*, p. 372.

106 *De Chateau v. Child* [1928] NZLR 63.

107 *Farrier-Waimak Ltd. v. Bank of New Zealand* [1965] AC 376.

108 See e.g. *State Bank of New South Wales v. Berowra Waters Holdings Pty Ltd.* (1986) 4 NSWLR 398; *Manahi Te Hiakai v. The District Land Registrar* (1909) 29 NZLR 130; *Re Macarthy and Collins* (1901) 19 NZLR 545.

109 See for example *Duthie v. The District Land Registrar at Wellington* (1911) 31 NZLR 245.

to be the aims of the whole scheme.

More importantly is the judicial approach towards the registration scheme. Unlike their English counterparts, the Australian courts approach the statutory registration scheme from the statute rather than the general law. This realistic approach to registration shows a judicial recognition of the existence of two different codes of substantial law governing registered and unregistered conveyancing - a view not seriously taken by the English courts. Thus, a clear distinction is drawn between the grounds for rectification provided for in the statutes and grounds extraneous to the scheme, which in any event, should not be applicable. For example, if fraud, error or forgery are stated and defined as the grounds of rectification in the statute, the general law conclusion following from the existence of these elements should be irrelevant. The judicial recognition of a break from the general law surely provides registered titles with greater degree of certainty and security, which the principle of indefeasibility enshrines. Compared to the English scheme, the Torrens scheme, having been approached as a statutory innovation, comes closer to the attainment of certainty without unduly idolising the principle of indefeasibility.

Singapore

Like Australia, the registration scheme in Singapore upholds the principle of indefeasibility. Both the Registrar and the court are given the power to rectify the register.[110]

The Registrar may correct the register in cases of erroneous entries and omissions under section 159 of the *LTA*.[111] Although it is uncertain whether the errors and omissions in question are limited to those of the Registrar, the prevailing view is that a narrow approach be taken. The Registrar's power to rectify should only be exercised in cases of departmental errors or omissions.[112]

The court may also order rectification in cases of fraud, mistake, omission or void instruments under section 160(1) of the *LTA*.[113] Though section 160 is far more wide-ranging than section 159, its effects are limited by section 160(2) which provides that no rectification shall adversely affect a registered proprietor in possession unless he was a party or privy to the fraud, mistake or omission or caused or substantially contributed to the same by his act, neglect or default.

On the whole, a satisfactory balance is maintained between flexibility

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110 *Land Titles Act 1994, (Revised Edition),* ss. 159, 160.

111 *Land Titles Act 1994, (Revised Edition).*

112 *Supra* note 29, p. 164.

113 *Supra* note 111.

and certainty under the Singapore system.

England

The English registration scheme does not treat the principle of indefeasibility as fundamental. Rectification of registered titles is freely available on the widest discretionary grounds, some specific and some general.[114] Both the registrar and the court are empowered to rectify. Rectification is permitted where the court has decided that a person is entitled to an estate or interest in land and as a result of such a decision, rectification is required.[115] The court may also order rectification where a person is aggrieved by an entry or omission from the register or by any default or unnecessary delay in the making of an entry.[116] Apart from these two cases which are confined to the court alone, both the registrar and the court may allow rectification in six other cases. First, where consent is obtained from all the interested parties.[117] Second, where an entry has been obtained by fraud.[118] Third, where two or more persons are registered as proprietors of the same estate by mistake.[119] Fourth, where a mortgagee has been registered as proprietor of the land instead of as owner of a charge and a right of redemption is subsisting.[120] Fifth, where a legal estate has been registered against a person who, if the land had not been registered, would not have been the estate owner.[121] Sixth, in any other cases where, by reason of any error or omission in the register, or by reason of any entry made under a mistake, it may be deemed just to rectify the register.[122] Protection is only given to registered owners who are "in possession" save in exceptional cases.[123]

However, the statutory provisions for rectification are not transparently clear, thereby leaving wide scope for judicial or registrarial interpretation of when the power to rectify should be exercised.[124] It is submitted that the substantial reliance on such discretion and interpretation militates against the certainty of title pursued under the registration scheme. In particular, the wide,

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114 *Supra* note 2, Simpson, S. R. p.80; Ruoff T. B. F. & Roper R. B., para 2-13.
115 *Land Registration Act 1925*, s 82(1)(a).
116 *Ibid.*, s 82(1)(b).
117 *Ibid.*, s 82(1)(c).
118 *Ibid.*, s 82(1)(d).
119 *Ibid.*, s 82(1)(e).
120 *Ibid.*, s 82(1)(f).
121 *Ibid.*, s 82(1)(g).
122 *Ibid.*, s 82(1)(h).
123 *Ibid.*, s 82(3).
124 Jackson, D. C., "Security of Title in Registered Land" 94 (1978) LQR 239.

general ground of justice[125] introduces too great an element of uncertainty into the registration scheme. This is a ground not infrequently relied on[126] with little judicial reflection and discussion.[127] In *Chowood Ltd v Lyall (No.2)*,[128] the register was rectified in favour of a squatter who had acquired title by adverse possession to part of the land registered in the owner's name. The crucial question, therefore, was whether such a provision should carry with it a broad residual mandate to rectify on grounds of justice and equity. In a way, the provision appears to render other grounds of rectification nugatory, leading to a downgrading of registered interests, which may become more vulnerable to attack. The power of rectification was also considered in *Argyle Building Society v Hammond*.[129] Slade LJ in the Court of Appeal suggested that the court had a general discretionary power to order rectification of the register.[130] In *Norwich and Peterborough Building Society v Steed*,[131] however, the Court of Appeal expressly rejected the free-ranging approach espoused in *Argyle Building Society v Hammond*.[132] Scott LJ held that the court's power of rectification was limited to specific statutory grounds. The court did not have a general discretion to order rectification simply because it might be thought just to do so. For this reason, the court was reluctant to order rectification against the registered owner, giving rise to a different result in a factual background similar to that in *Hammond*'s case.

As mentioned before, unlike the Australian courts, the English courts all too often approach the registration scheme from the general law, in want of a registration mentality. This may seem consistent with the fact that the introduction of land registration in England was not intended to have the effect of altering the substantive law. However, it is submitted that to base the exercise of discretion to rectify general law principles comes close to denying the essentials of the scheme altogether and the courts are at risks of undermining the whole edifice of the registration scheme. It seems grotesque that rectification may be ordered if according to the general law, it

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125 *Land Registration Act 1925*, s 82(1)(h).

126 See e.g. *Freer v Unwins Ltd.* [1976] Ch 288; *Epps v Esso Petroleum Co. Ltd.* [1973] 1 WLR 1071; *Orakpo v Manson Investments Ltd.* [1977] 1 WLR 347.

127 Law Com. No. 158, para 3.7.

128 *Chowood Ltd. v. Lyall (No. 2)* [1930] 2 Ch 156.

129 *Argyle Building Society v. Hammond* (1984) 49 P&CR 148.

130 Slade LJ distinguished the case of a party 'deprived of his title as a result of a forged document which he did not execute' from the case where the party 'has been deprived as a result of a document which he himself executed, albeit under a mistake induced by fraud'. He commented that 'when the court comes to exercise its discretion, different considerations may well apply'. However, on the true construction of s 82(1) there is not any paragraph under which the latter case could be brought.

131 *Norwich and Peterborough Building Society v. Steed* [1992] 3 WLR 669.

132 *Ibid.*, 688-689.

is wrong or unjust or impossible to recognise the registered proprietor as the true owner.[133] The reason is that we are returning to unregistered land principles for a solution; principles upon which the registration scheme is supposed to improve. Regrettably, the courts appear to assume that the registered system must mirror the unregistered system.[134] If that is a valid assumption, what is the point of introducing title registration? The registration scheme was originally designed to replace the unsatisfactory system of unregistered conveyancing. It follows that drawing a line between the general law and the statutory scheme should be the realistic approach if the reform is to be genuinely pursued. Constant reference to general law concepts would only render land registration a backward-looking scheme. Thus, it is submitted that although title registration was not intended to have the effect of altering the substantive law, the reality proves otherwise.

As a whole, compared to the Australian Torrens scheme, the English scheme is far from being able to measure up to the indefeasibility principle satisfactorily. Although working practicability of the registration system depends much upon the flexible machinery of rectification, certainty of title is equally important. An unqualified or arbitrary power to rectify can strike at the very roots of the indefeasibility of title. Therefore, it is essential that in order to strengthen this principle, the grounds of rectification should be specified clearly in strict registration terms.

In the light of the above analysis, it is submitted that general law concepts and conclusions should not be imported into the statutory registration scheme. It is contrary to the essential principles of the scheme to approach them as if they are simply part of the general law doctrine. The more persistent the courts are in adopting the general law approach, the less likely is the establishment of registration principles.

D. The Curtain Principle - Caveats and Cautions

There is no doubt that Torrens was 'bitterly critical of the Court of Equity and its interference with common law titles'.[135] In fact, it was this "iniquitous institution"[136] which first directed his mind towards the law reform initiated under his name. Torrens' intention was to simplify the conveyancing process by abolishing the equitable doctrine of notice. This

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133 Ruoff, T. B. F. "The Protection of the Purchasers of Land under the English Law" 32 (1969) MLR 121, 137-138.

134 Smith, R. J. 'Land Registration: Reform at last?' in Jackson, P. and Wilde, D. C. (eds), *The Reform of Property Law* (Aldershot, Hants: Dartmouth, 1997) p. 129, 143.

135 *Supra* note 7, Fox, P. M., 490.

136 *Ibid.*

idea is envisaged in the curtain principle, which provides that certain equitable interests, in particular trusts, are kept off the register. A purchaser will only be affected by registered matters but not the equities that lie behind the curtain. The issue that then arises is whether unwritten equities, which comprise of a significant number of interests in land, are recognised under a title registration system and if so, to what extent and in which manner they are to be accommodated.

As unwritten equities are not registrable, they cannot be protected by means of substantial registration. Instead, protection is afforded to such interests through a caveat system. An entry of a caveat on the register operates as a statutory substitute for the equitable doctrine of notice. This new device has been aptly characterised as 'an anomalous and hybrid creature, the child of statue but sustained by equity'.[137]

A 'caution' is a term used under the English registration system. It has similar functions to a caveat. However, as will be seen, the two differ slightly in operation.

Australia

All of the Torrens statutes in force in Australia make provision for a caveat system. There are various types of caveats and they vary from state to state.[138] Of these, the most common type is a caveat against dealings with registered land. Where such a caveat is lodged, the Registrar is restrained from recording any subsequent dealing adverse to the interest protected by the caveat. In practice, the caveat operates as notice to any intending purchaser of the equitable interest in question. The caveator will be informed of any dealing lodged for registration and has to establish his claim or consent to the registration within a set period. If he fails to take any action, the caveat lapses at the expiration of the period and the subsequent dealing will be registered.[139]

As a significant measure to prevent frivolous claims, all the Torrens statutes provide that where a caveat is lodged without reasonable cause, the caveator is liable to compensate any person who has suffered loss thereby.[140]

Equally clear is that the lodgement of a caveat confers no priority on the protected interest over subsequent dealings.[141] The caveat is nothing

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137 Palmer, K. A., 'Caveats and their Effect on Equitable Priorities' in Hinde, G. W. (eds), see note 7, p. 119.

138 Bradbrook, A. J., McCallum S. V., Moore A. P., *Australian Real Property Law* (Sydney: Law Book Co, 1991) p. 171.

139 *Ibid.*, p. 172.

140 *Supra* note 2, Whalan, D. J., p. 228.

141 *Ibid.*, p. 241.

more than a statutory injunction, which serves as an interim protection. It operates to keep the caveator's interest in status quo until he is given an opportunity to substantiate his claim. Thus, the lodgement does not add to rights, it merely protects a contentious right from being infringed. However, equally true is that the injunctive nature of a caveat tends to hinder, rather than facilitate, the transferability of interests in land. Besides, unregistrable interests are not afforded with a permanent form of protection. Coupled with the failure to accord priority from the date of lodgement, a caveat seriously falls short of providing a satisfactory safeguard for unregistrable interests.

Singapore

Like all the Torrens statutes, the *Land Titles Act* makes provision for a caveat machinery.[142] A caveator may expressly forbid the registration of subsequent dealings, which may affect his interest, subject to his own consent to the interest claimed.[143] The Registrar has to give notification of the caveat to the registered proprietor of the land affected or any person who has an interest in the land and has protected it by an earlier caveat.[144] Where dealing is subsequently lodged for registration, the Registrar has a duty to serve on the caveator a notice to the same effect.[145] The caveator will then have to demonstrate the validity of his claim within 30 days. If he fails to respond within that period, the caveat lapses[146] and the proposed dealing will be registered[147].

As nothing more than a mere claim is necessary for a lodgement, the caveat procedure may be open to abuse. It is thus provided that any person who lodges a caveat wrongfully, vexatiously or without reasonable cause is liable to compensate a person who has incurred pecuniary loss as a result.[148]

In contrast to the position in Australia and England, the entry of a caveat, however, does affect the priority as between unregistrable interests inter se. Subject to fraud, a caveat confers priority on the interest in question over any other unregistrable interest not so protected at the time of such an entry.[149] It is clear that mere knowledge of a prior unregistrable interest does not by itself constitute fraud. In this way, the time of

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142 *Land Titles Act 1994, Revised Edition*, s 115.
143 *Ibid.*, s 115(2).
144 *Ibid.*, s 117.
145 *Ibid.*, s 120.
146 *Ibid.*, s 121(1)(a).
147 *Ibid.*, s 120(1).
148 *Ibid.*, s 128.
149 *Ibid.*, s 49.

lodgement becomes the dominant criterion of priority. Under the Torrens and the English system, however, the equitable maxim, where equities are equal, the first in time prevails, applies instead. Thus, the positive role of a caveat conferred by the *Land Titles Act* has effectively replaced equitable principles in a title registration system. Such an approach, in effect, greatly encourages individuals to utilise the registration scheme and would possibly provide more certainty in the settlement of priority disputes.

Yet, there has been concern that holders of an unregistrable interest arising out of an informal arrangement may not be aware of the existence of their interests and thus, the need to lodge a caveat. Having said that, it should be remembered that the aim of title registration is to do away with the equitable doctrine of notice and any attempt to import such a doctrine back to the system would be alien to its very existence. In any event, a delicate balance between certainty and justice has to be maintained. In this regard, the system in England appears to be more commendable as these interests are overriding without registration.

England

Under the English registered system, interests which are neither registrable nor overriding are known as minor interests. As with their counterparts in other jurisdictions, minor interests are protected by the subsidiary means of an entry on the register. The protection may take several forms, namely, restriction, inhibition, notice or caution.[150] Generally, the entry of a restriction or notice will suffice where the interest is not contested by the registered owner. A caution, in contrast, is necessary if the interest is in dispute. Thus, by its nature, a caution is a hostile device. To avoid any vexatious claims, a misuse of the caution procedure without reasonable cause may result in a claim for damages.[151]

Almost all types of minor interests may be protected by the entry of a caution. It may take the form of a caution against first registration[152] or a caution against dealings[153]. In either case, the caution is intended to provide a limited form of protection by suspending the registration of subsequent dealings until notice has been served on the cautioner.[154] The cautioner is given an opportunity to challenge the registration of the projected dealing or otherwise respond to the notice within 14 days.[155] If he successfully proves

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150 *Supra* note 2, Ruoff T. B. F. & Roper R. B., para 7-01.
151 *Land Registration Act 1925*, s 56(3).
152 *Ibid.*, s 53(1).
153 *Ibid.*, s 54(1).
154 *Ibid.*, s 55.
155 *Ibid.*

his claim, the original caution may be superseded by some other types of entry which will give the interest in question a superior and permanent form of protection.[156] If, however, the cautioner fails to defend his claim, the caution will be warned off.[157] In this respect, a caution is similar to a caveat in Australia and Singapore.

A caution, however, (as in Australia, but not in Singapore) does not in any way affect priority.[158] It does not prejudice the claim or title of any person and has no effect whatever except otherwise provided by the legislation.[159] Despite that, the Law Commission has recommended that the priority of minor interests inter se should be governed by their order of protection on the register.[160] This rule is subject to fraud or estoppel on the part of any person whose interest is protected earlier in time.[161] Such a proposal is mainly intended to improve the existing system of priority rules by introducing a self - contained and comprehensive scheme for priorities of minor interests in registered land.[162]

But the strength of the English system is that in addition to minor interests that are protected by an entry of notice or caution etc, certain interests (of which the owner may not be aware and would not protect them by notice, etc) are overriding without registration. Thus, rights of person in actual occupation, for example, are overriding unless inquiries are made of such person under section 70(1)(g) of the *Land Registration Act 1925*.[163]

E. The Insurance Principle

It appears at first sight that the case for providing indemnity is just as irrefutable as the case for allowing rectification. The general proposition enshrined in Ruoff's third fundamental principle warrants that any person who suffers loss as a result of the operation of the system should be entitled to compensation from an assurance fund. It is generally recognised that the provision of indemnity is concomitant to the unique principle of indefeasibilty of registered titles under the statutory scheme. Thus, unlike the position at common law, a lost right to land is converted into hard cash.

However, it is remarkable to find that in many jurisdictions, seldom

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156 *Supra* note 1, p. 263-264.

157 *Supra* note 2, Ruoff T. B. F. & Roper R. B. , para 36-17.

158 See *Barclays Bank Ltd. v. Taylor* [1974] Ch 137 and *Clark v. Chief Land Registrar* [1993] 2 WLR 141.

159 *Land Registration Act 1925*, s 56(2).

160 Law Com No. 158, paras. 4.97-4.98.

161 *Ibid.*, para. 4.98.

162 *Ibid.*, para. 4.96.

163 There are however certain problems with this provision, which will be mentioned later, see notes 74-78.

claims are successfully made upon the assurance fund. Are these facts evidence of smooth and effective administration? Or are they simply suggesting the inflexibility of indemnity provisions?

More importantly, the absence of state-guaranteed titles in some registration systems[164] warrants the query whether provision for indemnity against loss is essential to the effective operation of title registration.

Australia

With the exception of the Northern Territory, provisions for indemnity against loss are found in the Torrens statutes of all the Australian states.[165] Generally, a person who is deprived of his estate or interest in land as a result of the operation of the registration system and thereby suffers loss or damage may claim compensation.[166] The circumstances from which loss or damage must arise vary from state to state.

In all states except Victoria, a claimant must first bring an action against the individual primarily responsible for the loss. Only when the first attempt is unsuccessful or impossible can a claim be made upon the assurance fund by way of an action against the Registrar as nominal defendant.[167] In contrast, in Victoria, proceedings can be taken directly against the Registrar as nominal defendant and the Registrar may join any other person as co-defendant.[168] This streamlined procedure for recovering compensation surely enables more claims to be dealt with in a more time- and cost-effective way. It also avoids the complication involved in identifying the right defendant to be sued.

In Victoria, no indemnity is payable where the loss is attributable to the fraud or neglect or wilful default of a claimant's solicitor or the solicitor of the person from whom the claimant derives his title.[169] A claimant who sues the wrongful solicitor for negligence may have his loss covered by the professional indemnity insurance. In the case of fraud, the claimant may have a claim against the Solicitors' Guarantee Fund.[170] However, in most instances, a claimant may have difficulties in proving fraud or negligence because of the limited resources available to him as an individual. For example, even in a clear case of fraud, a claim for indemnity may not be

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164 *Supra* note 38; note 39

165 *Supra* note 38, 907.

166 In Victoria, the assurance fund was abolished in 1983 and claims were then paid out of Consolidated Revenue. The term 'assurance fund' will be used in this article for ease of discussion, referring generally to any fund from which compensation is paid.

167 *Supra* note 38, 911.

168 *Ibid.*

169 *Transfer of Land Act 1958 (Vic),* s 110(3)(a).

170 *Supra* note 138, Bradbrook, A. J., MacCallum, S. V. & Moore, A. P., p. 197.

made out since the claimant may have financial difficulties in getting legal service. Therefore, it is suggested that the claimant should be allowed to make a claim upon the assurance fund and then to subrogate the right against the wrongful solicitor to the registrar.[171] The registrar, with the full support and resources of the Government, will be in a better position to bring a successful claim against the wrongful solicitor.

One related matter is the limitation period in a claim for indemnity. Specific provisions imposing limitation periods can be found in all the Torrens statutes, except New South Wales and Victoria.[172] An action to claim compensation has to be brought within the specified period which commences from the date of deprivation.[173] This is so regardless of when the claimant becomes aware of the existence of his claim. This may cause hardship to the claimant since the circumstances giving rise to the deprivation concerned may not become apparent until some later time. If justice is to be done, the limitation period should commence at the time when the claimant knew or ought to have known of the deprivation. In New South Wales and Victoria, the statutes do not provide for any limitation period. It is submitted that a complete absence of a limitation period only engenders uncertainty and is unacceptable. It is recommended that a limitation period in line with the above discussion be imposed.

Another issue relating to indemnity that has arisen is the question whether there should be indemnity at all. In 1989, the Law Reform Commission of New South Wales considered abolition of the state guarantee of title. It argued that the original rationale for the assurance fund, namely, the strong opposition from the legal profession and the concept of statutory indefeasibility, might no longer be sufficient to justify its retention. It stated that there was no evidence suggesting that the concept of indefeasibility had caused significant loss.[174] Loss caused by the registrar or his staff could be dealt with adequately under the ordinary principles of tort law. Rather, the Law Commission suggested the introduction of private insurance to replace the state-backed insurance scheme. Another alternative recommended was that the state would pay indemnity for certain types of loss, e.g. departmental error, while allowing or requiring registered proprietors to insure against loss or damage from fraud, forgery, surveyors' errors and the like.[175]

Despite the arguments put forward by the Law Reform Commission, it is submitted that on the whole the compensation scheme should be retained.

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171 This approach was suggested by the New South Wales Law Reform Commission and the Law Review Committee of the Northern Territory: see note 38, 917.

172 *Supra* note 38, 911.

173 *Ibid.*, 912.

174 *Ibid.*, 920.

175 *Ibid.*, 921.

One of the reasons for the provision of compensation is to compensate persons who would not have suffered loss but for the introduction of the Torrens system. In this way, the compensation scheme goes hand in hand with and has become part of the Torrens system as a whole. In addition, failure to provide compensation, it being a form of protection to innocent persons, will call for another form of protection. This may be achieved by vexatious registration and other expensive and time-consuming precautions to avoid risks of loss, many of which may not even exist at all. Thorough examination of documents may be required before they can be accepted for registration. The social cost of taking such precautions is, therefore, not justifiable. Apart from that, the latitude which the compensation scheme allows the administration in its approach to conveyancing problems and uncertainties will disappear. Protection to innocent persons can only be achieved at the social cost of reduced business efficacy. After all, the assurance fund is not a state fund but is built up as an insurance fund by the contribution of registered proprietors. Besides, the fact that minor loss was caused by the statutory indefeasibility further strengthens the retention of the compensation scheme. It is difficult to provide any justification for the state to gain a windfall by receiving considerable revenue from registration fees while refusing to pay compensation from the fund.

Singapore

In order to claim compensation from the assurance fund[176], a claimant must have been deprived of his land or suffered loss or damage through some act or omission by the Registrar and is unable or is not permitted to bring any other action for recovery of his estate or interest.[177] The court may also take into account the claimant's own default, thereby reducing or denying compensation accordingly[178] (The same approach has been recently adopted under the current English registration scheme). By recognising the principle of contributory negligence, a wider scope is given to the compensation provision. More claims can then be pursued successfully when compared to the situation in Victoria, where a right to compensation is totally barred when the loss is partially attributable to the claimant.

Like most Torrens statutes, the *LTA* provides for a limitation period which commences at the date the deprivation occurred.[179] As mentioned before, this provision will cause hardship in certain circumstances and should

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176 The assurance fund is backed up by a Consolidated Fund whenever the former is insufficient to meet any claim, *Land Titles Act 1994*, s 151(1).

177 *Ibid.*, s 151(5).

178 *Ibid.*, s 155(4).

179 *Ibid.*, s 158.

be amended.

England

Recently, the compensation provisions of the *Land Registration Act 1925* was subject to review. Section 2 of the *Land Registration Act 1997*, which came into force on 27 April, 1997, substituted section 83 of the 1925 Act. Several significant improvements have been made.

First, the scope of the compensation provisions is widened to cover persons who suffer loss as a result of an error or omission in the register, whether or not the register is subsequently rectified.[180] In view of the fact that the policy of the English scheme upholds rectification and indemnity as complementary remedies[181], the new legislation is to be preferred. It cures the previous injustice that no indemnity was payable to a person in whose favour the register had been rectified. What the old law failed to have envisaged is that rectification by itself may not be an adequate remedy in certain cases. It is submitted that rectification and indemnity can only be made truly complementary to each other under the new legislation where the two are not mutually exclusive.

Second, like in Singapore, a principle of contributory negligence is introduced to extend compensation to cases where the loss suffered by a claimant is partly attributable to his own lack of proper care.[182] Unlike the previous position, where such a claimant would be totally barred from obtaining compensation, the new legislation provides for reduced indemnity having regard to the claimant's share of responsibility for the loss.[183]

Third, a very welcome improvement is made in respect of limitation periods. The cause of action in relation to indemnity is deemed to arise when a claimant knows or, but for his own default, would have known of the existence of his claim.[184] In this respect, the English legislation achieves a far better and satisfactory result than its Singaporean and Australian counterparts.

One significant and ambitious proposal addressed by the English Law Commission in its Third Report on Land Registration[185] has not been implemented in the latest legislation. The Law Commission recommended

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180 *Land Registration Act 1925*, s 83(1)(b), as substituted by the *Land Registration Act 1997*, s 2.

181 *Supra* note 2, Ruoff T. B. F. & Roper R. B., para. 2-13.

182 *Land Registration Act 1925*, s 83(6), as amended.

183 *Ibid.*

184 *Ibid.*, s 82(12).

185 Law Commission, Property Law: Third Report on Land Registration (Law Com. No. 158, 31 March 1987).

that indemnity be made available to registered proprietors who suffer loss through the emergence of overriding interests.[186] At present, a registered proprietor automatically takes subject to any overriding interests. No indemnity is payable once an overriding interest, following rectification, is entered on the register.[187] Therefore, an innocent party who relies on the register will only find himself a complete loser after being unwittingly trapped. This inequitable outcome reveals the defects of connecting indemnity with an incomplete record of existing interests. However, as a matter of policy, it has already been decided that the system should remain subject to overriding interests.[188] This being so, the Law Commission proposed that 'as second best to the complete protection of purchasers, the machinery of registered conveyancing ought to be oiled by means of a "state guarantee" of title', thereby providing compensation even where an overriding interest is asserted against a registered proprietor.[189] In the view of the Law Commission, the availability of such an indemnity would also 'go some way to enabling an acceptable balance to be achieved between competing innocent interests'.[190]

In view of the considerable surplus fund accumulated by the Land Registry[191], it is eminently fair to extend indemnity to cover overriding interests. After all, as mentioned before, the registered proprietors pay for the protection they receive by contributing to the assurance fund. It follows that the purpose of the indemnity scheme should be not so much to prevent claims as to spread loss more equitably. The general benefit of a title registration system can only be achieved by taking a broader, insurance-based approach to the indemnity scheme.[192]

V. Priority under the proposed title registration system

The proposal for title registration was first initiated by the former Registrar General, Noel Gleeson, in May 1988 with the setting up of a Working Party on Title Registration. In March 1991, a report and the first draft Bill and Regulation were produced by the RG's consultant. After

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186 Law Com. No.158, paras. 2,9-2.14, 3.29.

187 Law Com. No.158, para. 2.3.

188 Law Com. No.158, para. 2.12.

189 *Ibid.*

190 *Ibid.*

191 In recent years, indemnity payouts amount only to a tiny proportion of the revenue generated from registration fees, see Smith, R. J., 'Land Registration: Reform at Last?' in Jackson P. & Wilde, D. (eds), *The Reform of Property Law* (Aldershot, Hants: Dartmouth, 1997) p. 129, 145.

192 This contention is in line with Ruoff's suggestion that title registration should be operated as an insurance business upon the basis of probable risks, see note 37, p. 14.

intensive discussion, a final version of the working drafts was approved as formal drafting instructions to the Law Draftsman in late 1991. Further working drafts were prepared and considered. After numerous consultation and deliberations, the Bill and the Regulation were published on 4, November 1994. The Bill has been met with opposition from the Hong Kong Law Society on several issues. In the mean time, a final version is still being negotiated. As the current drafts are not available to the public, the discussion here is based on the Bill unless otherwise indicated.

Before we go into the detailed provisions of the Bill, it may be useful to note briefly the general framework of the proposed system. Like Australia, only land granted by the Government will be registered. As far as the register is concerned, only current entries and the supporting information will be kept. Historical records are excluded from the register. Like in most other jurisdictions, the register will be open to public inspection. As in Singapore, a caution will not only operate as a notice, but also confer priority on the protected interest. Possessory titles will be treated as overriding interests under the Bill.

Under the proposed system, interests in land are generally divided into three broad categories: registrable interests, non-registrable interests and overriding interests. The Bill has also provided for rectification and indemnity in appropriate cases.

A. Registrable Interests

1. First registration of land

Only land which is held under a Government lease will be subject to the proposed scheme.[193] In the case of land granted on or after the appointed day, i.e. the date on which the Bill comes into force, first registration of land will take place when a register is opened in relation to the land.[194]

Upon first registration, the absolute ownership of the Government lease will vest in the lessee as registered owner, together with all the rights attaching to the land exercisable by virtue of such ownership, free from all other interests and claims.[195] However, this absolute title is subject to any restriction in the Government lease, any registered matter and overriding interest affecting the land.[196] Further, the power to rectify the register conferred upon the Registrar[197] and the court[198] also qualifies the absolute

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193 *Land Titles Bill*, cl 3(1)(b).
194 *Ibid.*, cl 13(b).
195 *Ibid.*, cl 19(1)(a).
196 *Ibid.*, cl 19(2).
197 *Ibid.*, cl 73.

ownership.[199]

Besides, the absolute ownership conferred upon a registered owner will not relieve him from a duty to which he is subject as trustee.[200] Where the registered owner is a donee, he will continue to hold the land subject to any unregistered interests, subject to which the immediately preceding transferor held the land.[201]

Under the proposed system, it is the act of registration which confers an absolute title, subject to the significant limitations mentioned above. Equally important is the curative effect of first registration upon any pre-existing defects in title. This is essentially what distinguishes a title registration system from a deeds registration one since that would make the register the only proof of title. It follows that a purchaser who deals with a registered owner for valuable consideration does not have to go behind the register and inquire into the circumstances in which the owner was registered as such.[202]

2. Subsequent registration of matters affecting land

Once a register has been opened, any matter which subsequently affects the registered land, if registrable, must be registered to pass the title and any interest in the land.[203] Registration is initiated by the presentation of an application to the Registrar.[204] It is then effected by an entry of the relevant particulars in the register.[205]

Matters which are registrable are not exclusively defined in the Bill.[206] Generally, dealings in registered land such as transfer, assignment, creation of a lease, charge, easement or covenant, charging order, consent or non-consent caution are registrable. The Registrar also has discretion to register a matter whose registration is not provided in the Bill.[207]

There is no time limit within which registration of a matter has to be

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198 *Ibid.*, cl 74.

199 The same applies where the lease is in undivided shares: *Land Titles Bill*, cl 19(1)(b).

200 *Land Titles Bill*, cl 19(3).

201 *Ibid.*, cl 20(2).

202 *Ibid.*, cl 27(1). However, as will be seen, a purchaser still has to conduct separate investigation of overriding interests, which do not appear on the register but are, nevertheless, binding on him.

203 *Land Titles Bill*, cl 26(1). A new unpublished version of the Bill provides that if an instrument is not registered, no title will pass and no court can grant an order for specific performance: Goo, S. H., 'Reforming the Priority Rules in Hong Kong: A Comparative Perspective' in Jackson, P. and Wilde, D. (eds.) see note 191, p. 391.

204 *Land Titles Bill*, cl 2(2)(a).

205 *Ibid.*, cl 2(2)(d).

206 *Ibid.*, cl 4.

207 *Ibid.*, cl 4(d).

made. However, prompt registration is encouraged for two reasons. First, priority depends on the order of application.[208] Indeed, the Bill provides that any person dealing with registered land is deemed to have actual notice of every entry in the register[209], and will thereby take the land subject to it[210]. Therefore, it is desirable to secure the registration of a matter as soon as possible for priority purposes. Second, an additional fee is payable when an application for registration is presented later than three months after the creation of the instrument supporting the application.[211] This clearly provides a substantial incentive to early registration. Further, the Registrar is empowered to compel registration[212] and failure to comply with such an order without reasonable excuse constitutes an offence[213].

As in the case of first registration, the position of a purchaser for valuable consideration is markedly improved upon a subsequent registration of a transfer of land to him. He will acquire an absolute title notwithstanding any possible defect in the assignment. This curative effect of registration essentially turns any doubtful or defective title into an absolute one, thereby enabling a registered owner to pass a better title than that enjoyed by himself. It also greatly simplifies the task of a conveyancing solicitor who is saved from the trouble and expense of going behind the register, save, as will be seen, for making inquiries of overriding interests in the land. At the first glance, it seems that solicitors' lives will be made much easier under the proposed system. Although there is little doubt that their work will be much simplified, the role of solicitors has never been more important. An onerous duty is imposed on them to verify any application presented for registration.[214] This process of verification is fundamental to the efficient operation of the registration scheme. Any reckless or false verification by a solicitor will thus constitute a criminal offence under the Bill.[215] Besides, conveyancing solicitors will still have to peruse Government leases in order to ascertain the terms and conditions therein. Investigation relating to overriding interests, planning considerations and other matters affecting land has to be conducted, though facilitated to a large extent. Thus, it can be seen that solicitors will continue to be an integral part of the conveyancing process under the new system.

With regards to registered dispositions and incumbrances inter se, the

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208 *Ibid.*, cl 30(1).
209 *Ibid.*, cl 22.
210 *Ibid.*, cl 19(2)(b).
211 *Ibid.*, cl 28(1).
212 *Ibid.*, cl 29(1).
213 *Ibid.*, cl 89(5).
214 *Ibid.*, cl 2(2)(c).
215 *Ibid.*, cl 89(7).

general principle of priority is that matters appearing in the register rank in priority according to their order of application for registration, irrespective of the dates of execution of the supporting instruments and notwithstanding that the actual entry in the register may be delayed.[216] The proposed system will therefore avoid the problem associated with section 5(1) of the *Land Registration Ordinance*, whereby the priority of an instrument registered within one month of its execution will date back to the date of execution, thereby taking priority over any matter registered prior to its.

B. Non-registrable Interests to be protected by Caution

1. Caution

Compared to the existing deeds registration system which has failed to grapple with the problem of unwritten equities, the proposed system attempts to deal with all interests in land, whether created by instruments or not. The intention is that by making registration the only test of ownership and priority, the old doctrine of notice would play no part under the new regime. Under the Bill, interests which are not registrable can be protected by the entry of a caution on the register. Failure to protect such interests will result in a purchaser for valuable consideration taking free of them. There are two types of cautions, consent and non-consent cautions. A consent caution can only be entered with the consent of the registered owner.[217] It is intended to protect any dealing in registered land which is not capable of substantive registration. The most common examples are sale and purchase agreements, equitable charges and easements. Where consent cannot be obtained, a purchaser can always register a non-consent caution in respect of which an entry can be made without the consent of the owner. Such a caution also gives protection to a person who claims an interest in registered land[218], usually in circumstances where the interest arises under a resulting trust, constructive trust or proprietary estoppel.

Unlike some title registration systems, a caution under the proposed scheme does not freeze the register. Subsequent entries on the register will not be prohibited.[219] Instead, the general rule is that the interest protected by a caution will take priority over any subsequent dealing on the register.[220] However, there are two important exceptions to this general rule.

Firstly, where the subsequent dealing is dependent upon the subject

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216 *Ibid.*, cl 30(1).
217 *Ibid.*, cl 63(1).
218 *Ibid.*, cl 63(2).
219 *Ibid.*, cl 64(1)(a).
220 *Ibid.*, cl 30.

matter of a consent caution, the dealing will take priority over the caution.[221] For instance, where a sale and purchase agreement is protected by a consent caution, the subsequent registration of a transfer in pursuance of that agreement will have priority over the caution. The Registrar will then remove the caution from the register.[222] More importantly, the Bill provides that upon the registration of the subsequent related dealing, its priority will relate back to and take effect from the priority of the consent caution.[223] This will result in the subsequent dealing taking priority over any matter registered after the caution but before its own registration. Likewise, in the case of a non-consent caution, where an application is subsequently presented for the registration of an interest protected by such a caution, the priority of that interest will relate back to the date of the entry of the non-consent caution.[224]

The second exception to the general rule is that a subsequent dealing will take priority over an interest protected by a consent caution with the consent of the cautioner.[225] However, the Bill does not provide for the same in the case of a non-consent caution.

2. Is notice relevant?

As title registration is intended to do away with the doctrine of notice, it seems that a purchaser for valuable consideration will take free of an unprotected equitable interest notwithstanding he has notice of it. As Lord Wilberforce remarked in *William & Glyn's Bank Ltd v Boland*,[226] 'the law as to notice as it might affect purchasers of unregistered land, whether in decided cases or in a statute, has no application, even by analogy, to registered land'.[227] Cross J also emphasised in *Strand Securities Ltd v Caswell*[228] that it is 'vital to the working of the land registration system that notice of something which is not on the register should not affect a transferee unless it is an overriding interest'.[229] However, the Bill does not contain any provision that expressly excludes notice from the proposed system. Thus, in order to make the position clear, the Bill should provide for the exclusion of

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221 *Ibid.*, cl 64(1)(b)(i).
222 *Ibid.*, cl 65(4).
223 *Ibid.*, cl 30(3)(a).
224 *Ibid.*, cl 30(3)(b).
225 *Ibid.*, cl 64(1)(b)(ii).
226 Williams & Glyn's Bank Ltd. v. Boland [1981] AC 487.
227 *Ibid.*, 504B.
228 *Strand Securities Ltd. v. Caswell* [1965] Ch 373.
229 It must be 'vital to the working of the land registration system that notice of something which is not on the register of the title in question shall not affect a transferee unless it is an overriding interest'.

notice in the clearest and most unequivocal terms.

In contrast, the *LRA* expressly excludes notice from the English registered system.[230] The only type of notice recognised is deemed notice of matters on the register. Despite that, an unprotected minor interest may still affect a purchaser in cases of fraud or bad faith.[231] It has been clear that mere knowledge is not fraud. This traditional dissociation of notice and fraud in the context of registered land is clearly aimed at excluding the equitable doctrine of notice from a registration scheme. However, the decision of *Peffer v Rigg*[232] has brought this clear state of law into some confusion.

In *Peffer v Rigg*, X held a house on trust for himself and Y in equal shares. X later assigned the property to his ex-wife Z as part of a divorce settlement. Z had actual notice of the trust although Y's beneficial interest had not been protected by an entry on the register. Despite this, Graham J held that Z took the property on trust for herself and Y. The judge based his decision on three grounds, of which only two of them are relevant for present purposes.

First, the judge found that as Z had actual notice of the trust, she could not be a purchaser in good faith. The ruling of Graham J seems to produce the effect that a purchaser will still be bound by an unprotected minor interest if he has notice of it, notwithstanding the statutory provision which so expressly excludes such notice. This ground has attracted much criticism as it not only brings back the doctrine of notice but also equates it with fraud or bad faith. To borrow Brightman J's words in *De Lusignan v Johnson*,[233] to fix the purchaser with bad faith in this way 'would be stretching the language' a bit too far.[234] The purchaser was merely taking a legal advantage conferred by registration, an act which deserves premium except in cases of actual fraud. Thus, the revitalisation of notice is contrary to principle. It serves to achieve nothing positive except watering down clear statutory provisions for no good reasons.

Second, the court found that as Z's conduct was fraudulent, a constructive trust should be imposed upon her. Graham J emphasised that it was the unconscionable nature of Z's conduct which attracted the imposition of a new constructive trust by equity. If this is valid, it provides a means to circumvent the aim of a statute.

Another case which merits equal attention is *Lyus v Prowsa*

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230 *Land Registration Act 1925*, ss. 59(6), 74.

231 *De Lusignan v Johnson* (1973) 230 Estates Gazette 499.

232 *Peffer v. Rigg* [1977] 1 WLR 285.

233 See *supra* note 231.

234 *Ibid.*

Developments Ltd.[235] In this case, a constructive trust was imposed where a purchaser had agreed to take a property subject to a third party's rights but later reneged upon such agreement. Here, the fraud which attracts the intervention of equity lies in the unconscionable attempt by the purchaser to deny the equitable interest to which he has undertaken to subject his registered title. Subsequent cases also make clear that a court will not impose a constructive trust unless a purchaser's conscience is affected.[236] In the light of this, the reasoning in *Peffer v Rigg* becomes apparently weak. The fraudulent 'conduct' appears to be simply having notice of an unprotected minor interest. Therefore, it is submitted that to this extent, *Peffer v Rigg* is wrongly decided.[237]

The common principle of unconscionability derived from these two cases suggests a way of counteracting the harshness created by legislation. Equity will not allow a statute to be used as an instrument of fraud. Although the principle itself is quite vague, it is entirely consistent with a registration scheme. As Taylor J pointed out in *Wilkins v Kannammal*,[238] title registration is essentially 'a system of conveyancing, it does not abrogate the principles of equity'.[239] Its aims can be 'amply achieved without depriving equity of the ability to exercise its jurisdiction in personam on grounds of conscience.'[240] It is only the equitable doctrine of notice which is sought to be rooted out.

The conclusion to be drawn is that equity should be allowed to play a role in a registration system. However, this is limited to the extent that it should not frustrate the very purpose of title registration, which is in Lord Wilberforce' words 'to free the purchaser from the hazards of notice - real or constructive - which, in the case of unregistered land, involved him in inquiries, often quite elaborate, failing which he might be bound by equities'.[241] There is little question that the doctrine of notice has played an important role in the development of land law. However, whether it is an appropriate mechanism in modern society is open to debate. At the end of the day, it is a question of balancing the need for certainty and efficiency as against justice. Do we want a black and white system based on registration or non-registration? Or rather, do we just act on an instinctive reaction that

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235 *Lyus v. Prowsa Developments Ltd.* [1982] 1 WLR 1044.

236 *Ashburn Anstalt v Arnold* [1989] Ch 1.

237 However, the case can still be regarded as an application of the equitable principle against unconscionable conduct although on the facts, it is difficult to see how the purchaser's conduct can be treated as unconscionable by simply having notice of the equitable interest.

238 *Wilkins v. Kannammal* [1951] MLJ 99.

239 *Ibid.*, 100.

240 *Oh Hiam v Tham Kong* (1980) 2 BPR 9451, 9453, per Lord Russel of Killowen.

241 *William & Glyn's Bank Ltd v Boland* [1981] AC 487, 503G-H.

a purchaser with notice deserves no statutory protection? All this has to be seen in the context of reform, whose overriding objective is to simplify the conveyancing process. Besides, under the proposed system, the principle of unconscionability and the exception for fraud or bad faith will be more than enough to achieve justice in appropriate cases. Thus, it would be unwise to invoke the doctrine of notice simply to avoid a hard result in a particular case. It should be remembered that the caution procedure is a two-edged sword. Although failure to enter a caution will result in a loss of right against a purchaser, a simple entry affords ample protection to a cautioner. People who do not take any step to protect their interests do this at their own risks and deserve no sympathy. The law is there to assist the public. If people want to avail themselves of it, they should do so in good time instead of causing uncertainty to others' titles. In order to assist those who are genuinely ignorant of registration requirements, the Government should be active in educating the public about the need for registration, perhaps through some massive publicity campaign. It would be futile to launch a reform of which the public has little knowledge. Even the best system cannot simply win its way by itself. Therefore, a registration mentality is necessary for the public to make good use of the system.

Although the Bill improves upon the *Land Registration Ordinance* by attempting to protect unwritten equities through a caution system, it has been suggested that such a proposal might not be realistic. Since most unwritten equities usually arise by operation of law, particularly in the domestic context, the holder of such an interest may not be aware of the existence of his claim nor the legal formalities necessary for its protection. However, under the proposed system, if a beneficial owner in occupation fails to enter a caution to protect his unregistrable interest in the land, the dire consequence is that a purchaser will take the registered land free of the interest. The beneficial owner will then have nothing, except a claim against the vendor for a share in the proceeds of sale, which may not be an adequate remedy. Therefore, it has been pointed out that the proposal will put in jeopardy the occupational interests in the family home.[242]

The position under the English system is much better because the interest of every person in actual occupation of the land or in receipt of rents is made overriding by section 70(1)(g) of the *Land Registration Act 1925*. However, the Bill does not contain an identical provision, presumably due to the conveyancing problems associated with section 70(1)(g). Under the Bill, only the rights of occupiers under a short-term lease will be protected as overriding interests.[243] Hence, the inadequate/limited protection afforded to

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242 *Supra* note 3, p. 81.

243 *Land Titles Bill*, cl 21(1)(f).

other classes of occupiers would become a major concern. This issue will be discussed in greater detail under 'Overriding Interests'.

C. Overriding Interests

1. Generally

Overriding interests constitute a significant exception to the mirror principle which attempts to make the register a conclusive record of title. As mentioned before, the absolute title of a registered owner will be subject to all overriding interests affecting the land, despite the fact that they do not appear on the register.

Generally, overriding interests include those interests which are impracticable to be registered but must nevertheless retain their validity. For instance, the registration of short-term leases will involve the Registry in much extra work in constantly updating the register. The expense is, therefore, not justified. Overriding interests are provided for in almost all systems of title registration. Some are inevitable in any system while others are debatable. In any event, they should be kept to a minimum to reinforce the mirror principle.

Clause 21 of the Bill sets out a list of overriding interests as follows:

(i) Chinese customary rights;
(ii) Public rights;
(iii) Easements[244] and covenants existing on the date of first registration of the land;
(iv) Rights under the Government lease and statutory rights in favour of the Government;
(v) Certain statutory charges;
(vi) Leases for a term not exceeding three years where the lessee is in occupation or receipt of rents;[245]
(vii) Rights acquired by adverse possession;
(viii) Statutory rights in respect of services.

Due to the crack in the mirror, a prospective purchaser cannot simply ignore matters not recorded on the register. In order to avoid the

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244 The modified Bill proposes that easements acquired under the rule in *Wheeldon v Burrows* (1987) 12 Ch, 31 will also be made overriding, whether before, on or after the appointed day: see *supra* note 203, Goo, S. H., p. 393.

245 The new version of the Bill proposes that only a lease for less than three years (not including any option to renew or extend the term of the lease) at the best rent reasonably obtainable without a premium and where the lessee is in possession of the land is overriding: see note 203, Goo, S. H., p. 393.

conveyancing hazard created by overriding interests, a purchaser has to raise requisitions and make inquiries of any overriding interest to which the land may be subject. Under the Bill, a vendor of registered land is required, subject to any contrary agreement, to disclose to a purchaser the particulars of any overriding interests of which he has, or ought reasonably to have, knowledge.[246] Apart from that, the purchaser still has to find out those which are not within the vendor's knowledge, either by inspection or inquiries.

2. Rights of Occupiers

As mentioned above, limited protection is given to occupiers other than short-term lessees, whose interests are made overriding under Clause 21 of the Bill. Occupiers such as a beneficial owner under a bare trust can only protect their interests by means of a caution. However, such a proposal has been regarded as unrealistic in the light of the informal context from which those occupational interests generally emerged.[247] Apart from educating the public of the importance of registration, one may be more interested in some other substantial form of protection. An attractive option would be by way of making all occupational interests overriding. In considering the propriety of such an alternative in Hong Kong, it would be useful to look at the English position under section 70(1)(g) of the *Land Registration Act 1925*.

Section 70(1)(g) provides that the rights of every person in actual occupation or in receipt of rents and profits are overriding. A purchaser can only take free of those rights if he has made inquire of the occupiers and the rights are not disclosed. The crucial term 'actual occupation' is not statutorily defined and thus, has given rise to much litigation over the years. More importantly, recent cases have shown that the doctrine of notice still plays a role under section 70(1)(g).

Generally, there is said to be two different approaches to section 70(1)(g): absolutist and constitutionalist.[248] The absolutist approach insists that the phrase 'actual occupation' must be construed literally, as connoting physical presence at the property.[249] As Lord Wilberforce pointed out in *William & Glyn's Bank Ltd v Boland*,[250] the phrase are 'ordinary words of plain English' and should be construed accordingly.[251] In particular, he

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246 *Land Titles Bill*, cl 40(2).

247 *Supra* note 59.

248 Sparkes, P. 'The Discoverability of Occupiers of Registered Land' [1989] Conv. 342, 345.

249 *Hodgson v Marks* [1971] Ch 892.

250 *Supra* note 241, 487.

251 *Ibid.*, 504F.

denied a notice analogy, 'If there is actual occupation and the occupier has rights, the purchaser takes subject to them. If not, he does not. No further element is material'.[252] Actual occupation is, therefore, a matter of fact rather than matter of law.[253]

The constitutionalists, however, interpret the phrase against the context of the doctrine of notice. It is argued that the absolutist approach only applies to cases where physical occupation is obvious. However, there are cases of marginal occupation which cannot simply be addressed in terms of the 'plain factual test'. In such cases, 'a qualitative assessment of the factual matrix' may be necessary.[254] By rejecting the application of notice, Lord Wilberforce's dictum appears to admit the possibility that a purchaser may be bound by the rights of an occupier which are undiscoverable.[255] In order to avoid grave injustice, the constitutionalists adopt a notice-oriented test for 'actual occupation'. The application of this test is illustrated in *Lloyds Bank Plc v Rosset*.[256]

In *Lloyds Bank Plc v Rosset*, Mr. Rosset purchased a farmhouse in his own name. There was a common intention that the house was to be jointly owned by him and his wife. Before completion, renovation work was carried out on the premises under the direction of the wife. A mortgage was effected for the repair work, of which the wife had no knowledge. The Bank later sought possession from the wife in default of mortgage. The majority of the Court of Appeal found that the constant attendance of the builders constituted actual occupation on the wife's behalf. Together with her lengthy presence during the day, the two factors were sufficient to amount to actual occupation by the wife. The notice-based approach is best enshrined in Purchas LJ's statement. He said that in order to qualify for an overriding interest, the wife must be in actual occupation and appropriate inquiries by the Bank would have elicited the fact of the wife's interest.[257] Such an approach has been heavily criticised. It not only substantially undermines the ruling in *William & Glyn's Bank Ltd v Boland*, but also goes against the weight of authority.

The preferred view is that section 70(1)(g) should be solely governed by the objective test of 'actual occupation'. As long as there is actual occupation, the discoverability of interests is irrelevant. It is suggested that in borderline cases, the court can take into account the likely effect of

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252 *Ibid*, 504 E -F.

253 *William & Glyn's Bank Ltd v Boland* [1979] Ch 312, 332E, per Lord Denning MR.

254 *Supra* note 16, p. 225.

255 *Supra* note 248, Sparkes P., 347.

256 *Lloyds Bank Plc v. Rosset* [1988] 3 WLR 1301.

257 *Ibid.*, 1341D.

inquiries in deciding whether there is actual occupation.[258] In all cases, the issue of actual occupation should be approached as a factual question, not a legal one.

In adopting a provision along the line of section 70(1)(g), the Hong Kong legislature has to take into account seriously the problems discussed above. Purchasers should not be overburdened with the existence of overriding occupational interests. The scope of inquiry should also be made legislatively clear, bearing in mind the different requirement under section 70(1)(g) and the doctrine of notice.[259] Under the Bill, the overriding interests of a short-term lessee are not subject to any proviso regarding inquiry by the purchaser. If such a proposal is to be adopted in the case of other occupiers, their overriding interests should be made expressly subject to fraud and estoppel doctrines. As the Law Commission in England has pointed out in the context of the *Draft Land Registration Bill*, 'the Bill should not be a charter for the unscrupulous'.[260]

Another problem created by the wording of section 70(1)(g) relates to the decisive date of actual occupation. A purchaser is bound by any overriding interests which exist at the time of registration. As registration will only take place after the completion of a transfer to the purchaser, there is a danger that an overriding interest may arise during the period between the completion date and the registration date. Such a registration gap has been remedied by the House of Lords in *Abbey National Building Society v Cann*.[261] It was held that an occupier must be in actual occupation at the date of completion and this state of affairs must subsist at the later date of registration.[262] Therefore, in order to avoid similar conveyancing absurdity in Hong Kong, slightly different wording should be used in the Bill.

Also, in England, purchasers are protected by the overreaching principle even in the cases of rights which might otherwise be protected as overriding interests under section 70(1)(g). Under a trust for sale, the interest of a beneficiary is vested in the proceeds of sale rather than in the property itself. When the property is assigned to a purchaser who pays in the prescribed manner, the beneficial interest is overreached. The purchaser will take the property free of the equitable interest and the beneficial owner can only look into the proceeds of sale.[263] Likewise, in Hong Kong, a

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258 Smith, R. J., 'Land Registration and Conveyancing Absurdity' (1988) 104 LQR 507, 511.

259 S 70(1)(g) requires inquiry to be made of the occupiers whereas under the doctrine of notice, reasonable inquiry is required.

260 Law Com No. 173, para 3.3.

261 *Abbey National Building Society v. Cann* [1991] 1 AC 56.

262 *Ibid.*, 88C-H.

263 *City of London Building Society v Flegg* [1988] AC 54.

purchaser can be protected by the overreaching principle as long as the vendor has power to sell and the purchaser pays to all trustees. Thus, a purchaser can take free of an occupational interest even though it might otherwise qualify as an overriding interest. Thus, what appears at first sight to be a problem for the purchaser is not in fact real if the sale is proper and the purchase money is paid to the right person.

D. Rectification and Indemnity

1. Rectification Generally

In order to maintain the integrity of the register, it is essential to have a fair mechanism to deal with cases of fraud and error. The Bill provides that rectification of the register may be effected either by the discretion of the Registrar or the court in certain circumstances.

The Registrar may rectify the register where the errors or omissions do not materially affect the interest of the registered owner of the land or a charge[264]. Common examples are a change of address or personal particulars. Rectification may also be granted where all the interested parties consent.[265] Further, the registrar must rectify the register if he is satisfied that the registered owner has changed his name.[266] On a true construction, all these cases are largely uncontroversial.

The court may order rectification of the register where it is satisfied that an entry has been obtained, made or omitted by the fraud, mistake or omission of any person, whether the entry is made before, on or after the appointed day.[267] The register, however, cannot be rectified against the registered owner of land who is in possession and has acquired it for valuable consideration[268] nor can it be rectified against a registered chargee who has acquired it for valuable consideration[269] unless the owner had knowledge of the fraud, mistake or omission or he did cause or substantially contribute to the same by his act, neglect or default[270].

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264 *Land Titles Bill*, cl 73(1)(a).

265 *Ibid.*, cl 73(1)(b).

266 *Ibid.*, cl 73(2).

267 *Ibid.*, cl 74(1). The unpublished Bill also provides for rectification in cases of entry made as a result of a void or voidable instrument: see note 203, Goo, S. H., p. 395.

268 *Land Titles Bill*, cl 74(20)(a).

269 *Ibid.*, cl 74(2)(b).

270 *Ibid.*, cl 74(2). The unpublished Bill also provides for rectification against the owner or chargee where he had knowledge of the voidness or voidability of the instrument, or has caused or substantially contributed to the same by his act, neglect or default: see note 203, Goo, S. H., p. 395.

2. Rectification v Indefeasibility

As discussed earlier, the dissociation of fraud and notice should be made clear in statutory terms. The discretion to rectify should not be used as a means to re-introduce general law principles into registered land. It is yet to be seen how a balance will be struck between the potential conflict of rectification provisions and the indefeasibility principle. Much depends on the judicial attitude towards the registration scheme, as we can see from the experience in the English and the Torrens systems. Whatever is the policy, rectification provisions should be precisely worded. Although such a task is by no means simple, it will no doubt narrow the scope for judicial interpretation if the precise ambit of the provisions can be ascertained with relative ease.

The rectification provisions in the Bill appear to be drafted with much generality. Crucial terms like 'fraud' and 'mistake' can be subject to broad interpretation. Thus, certain revision with reference to common law cases elsewhere is desirable. In particular, sweeping wording such as the 'deemed just' provision in the *Land Registration Act* should be avoided.[271]

3. Indemnity Generally

The Bill also makes provision for indemnification in limited and defined circumstances. The basic principle is that a person who suffers loss by reason of an entry in or an omission from the register will be entitled to an indemnity from the Government if such an entry or omission is a result of fraud on the part of any person or any mistake or omission on the part of the Registrar and his staff.[272] However, no indemnity is payable where the person claiming the indemnity has caused or substantially contributed to the loss by his own fraud or negligence or has derived title from a person who so caused or substantially contributed to the loss.[273] Further, the claim for an indemnity must be made within six years from the time when the claimant knew or, but for his own default, might have known of the existence of his claim.[274] Thus, a claimant is relieved from the hardship as experienced under the Singapore and Torrens systems.

4. Principle of Contributory Negligence v Indemnity

Under the Bill, a claimant for indemnity will be totally barred from

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271 *Land Registration Act 1925*, s 82(1)(h).
272 *Land Titles Bill*, cl 75(1).
273 *Ibid.*, cl 75(2).
274 *Ibid.*, cl 78.

obtaining compensation even where the loss is only partly attributable to his own conduct. This position has been amended in other jurisdictions, like Singapore and England, in recognition of the principle of contributory negligence. It is recommended that the Bill should be amended to provide for reduced indemnity having regard to the claimant's share of responsibility for the loss. Such a proposal will serve to achieve greater justice and effectively allow more claims to be pursued successfully.

5. Indemnity against Overriding Interests?

The legislature should also consider whether indemnity should be payable in cases where an overriding interest is asserted against a registered owner. As overriding interests bind automatically, the position of a registered owner will then appear to be quite precarious. Sometimes, it is just a question of choosing between competing claims which may be equally innocent. And there is little reason why an innocent purchaser should be the one who loses. The fact that title registration should remain subject to overriding interests should not prevent the provision for an indemnity in appropriate cases. It is believed that such proposal will serve to achieve a better balance between competing innocent interests. In order to prevent unfounded claims and abuse of this proposed remedy, limitations such as requiring a purchaser to conduct reasonable investigation in the presence of certain specified officials may be imposed. However, this proposal should not be taken as a justification for expanding the categories of overriding interests indiscriminately.

6. Mutually exclusive or supplementary?

Another significant issue concerns the relationship between rectification and indemnity. In some instances, the availability of either one remedy may not be adequate to a particular individual. Therefore, it is significant to see whether the two are supplementary remedies under the registration scheme. If registered proprietors are to be protected adequately, rectification and indemnity should not be made mutually exclusive. Whatever is the policy, the Bill must make the position clear.

7. A state-guaranteed title?

It has been pointed out that a registered title under the proposed system will not be guaranteed by the Government. Instead, it is guaranteed by a solicitor who verifies a registration application. The verification is evidenced by a certificate, without which no registration can be effected. If

a registered owner has suffered any loss which is attributable to the misconduct of a solicitor, a claim can be made against that wrongful solicitor. The Government will only pay an indemnity in cases where there is gross negligence on the part of the Registrar or his staff.

As have been seen, a compensation scheme should be treated as an insurance business. It serves to provide considerable leeway to the administration under a registration system. It also helps to give the public confidence in the system, particularly during the early stages of its implementation. Thus, it is strongly recommended that the proposed system should provide for a Government-guaranteed title and a public insurance scheme.

VI. Conversion of the existing system

On a day to be appointed, the existing system would be converted to a title registration system. There is no need to establish a completely new system. Instead, the present system would be extended with a number of modifications necessary for the transition. The intention is that the new system would remain, as far as possible, operationally the same as it is now.[275]

A. Transition of registrable interests under the deeds registration system

1. Conversion of the deeds register to a land register

In the case of land held under a Government lease granted before the Bill comes into force, first registration will take place automatically on the appointed day.[276] This process is considerably facilitated by the conversion of an existing deeds register to a land register. Where a deeds register has already been created in respect of a plot of land under the *Land Registration Ordinance*, it will, in its present form, be deemed to be a register kept under the Bill on the appointed day.[277] In this way, it is hoped that the transition from deeds registration to title registration will be as simple as possible. It will also help to prevent the possibility of dislocation and minimise the expense incurred during the transitional period.

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275 *Supra* note 41, Willoughby, P. G. & Wilkinson, M., vi.

276 *Land Titles Bill*, cl 13(a). The effect of first registration in this case is the same as that discussed earlier. The modified Bill also provides that the absolute title of an owner who did not acquire the land in good faith and for valuable consideration prior to the appointed day will be subject to a registrable but an unregistered interest under the *Land Registration Ordinance*: see note 203, Goo, S. H., p. 391.

277 *Land Titles Bill*, cl 11(1).

Despite the defects of the present legislation, the deeds registration system has been working remarkably well in Hong Kong and has been highly regarded for its efficiency and reliability.[278] Even the former Registrar General, Noel Gleeson, once remarked that the current system was already 75% of the way towards a title registration system.[279] Due to this fact, it is suggested that the change to title registration will be greatly facilitated by the existing system in practical terms. First, the deeds register is a fairly reliable record and it shows clearly the devolution of title and the details of all incumbrances affecting land.[280] Second, the register is kept by reference to land rather than the owners, which is an essential attribute of title registration.[281]

More importantly, the automatic conversion also means that land previously granted will be automatically registered on the appointed day. This will greatly accelerate the adoption of a comprehensive system of title registration in the long run. This is in vivid contrast to the position in other jurisdictions, notably England, where the problems created by voluntary registration are noteworthy. As mentioned earlier, title registration in England is not compulsory from the outset, and that makes the process of conversion from one system to another extremely slow and complex. This problem, however, will be avoided under the Hong Kong Bill by the provision of an efficient mechanism for the transition.

2. Interests registered under the present system

The Bill provides that priority of registered interests under the current deeds registration system will continue to be governed by the *Land Registration Ordinance*.[282]

In this way, the status quo of existing proprietary interests will be maintained. The downside of this proposal, however, is that the complications and problems associated with the ordinance discussed earlier will still remain to a certain extent.

3. Interests in respect of which a memorial has been registered or accepted for registration under the present system before the appointed day

Under the current system, where an instrument is submitted for registration, the Registrar is required to record the relevant particulars in a

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278 "RG Hopes for Torrens by 1991", The New Gazette, May 1990, 6.

279 *Ibid.*

280 Report of the Registrar General 195-56, para 4.

281 *Ibid.*

282 *Land Titles Bill*, cl 11(2).

memorial record and a Memorial Day book which are available for public inspection. Therefore, a person searching the title can be informed of any new entries which have not yet been perfected in the register. This is mainly intended to minimise the inconvenience caused by the backlog of applications. As another transitional measure, the existing memorial record and Memorial Day book will be retained under the proposed system as the applications record and applications daybook.[283]

Where an interest in respect of which a memorial has been registered or accepted for registration before the appointed day, the Bill provides that the priority of such an interest will be governed by the *Land Registration Ordinance*.[284]

4. Equitable interests which are registered under the LRO but unregistrable under the Bill

Under the *Land Registration Ordinance*, equitable interests are capable of protection if evidenced in writing, such as the interest of a purchaser under a sale and purchase agreement and that of a chargee under an equitable charge. However, such interests will no longer be registrable as dispositions under the proposed system. The Bill resolves this problem by providing that those equitable interests already registered will be protected by a deemed entry of a consent caution on the register.[285] On the appointed day, the interests will be deemed to be protected as if an application had been presented for the registration of a consent caution and the Registrar had registered the caution.[286] Thus, the equitable interest protected by the deemed caution will take priority over any subsequent dealing on the register.[287]

5. A lis pendens registered before the appointed day

A lis pendens is a pending action relating to land. It also includes a bankruptcy petition.[288] A lis pendens registered under the present system will be afforded protection by way of a deemed entry of a non-consent caution on the appointed day.[289] The protection will last for five years from the date of registration of the interest under the existing system. Again, the

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283 *Ibid.*, cl 12.
284 *Ibid.*, cl 11(2).
285 *Ibid.*, cl 11(3).
286 *Ibid.*
287 *Ibid.*, cl 30(1).
288 *Ibid.*, cl 2(1).
289 *Ibid.*, cl 11(3).

protected interest will rank in priority over all subsequent entries on the register.[290]

B. Transition of unregistrable interests under the deeds registration system

A more serious problem arises in the case of interests which are unregistrable under the *Land Registration Ordinance*. The Bill does not provide for the transition of these unwritten equities since they do not appear on the deeds register at present. The only probable result will be that these interests will be extinguished on the appointed day as against the land. Thus, in order to secure protection under the new regime, it is advisable for holders of unwritten equities, such as a beneficial owner under a resulting trust, to arrange for the execution of documents which evidence their interests before the appointed day. Likewise, any person who intends to claim a beneficial interest in land must also issue lis pendens for registration before the appointed day.

C. Conclusion

Generally, the Bill contains straightforward provisions for the transition from the present to the proposed system. Priority of existing interests already registered will continue to be governed by the *Land Registration Ordinance*. Interests which are no longer registrable under the new system will be protected by a deemed caution. Other interest such as existing easements and covenants will be made overriding. Therefore, current proprietary rights are respected to a large extent.

As regards unregistrable interests, they will appear to be extinguished on the appointed day. Because of the potentially serious consequences, the Bill should state clearly the precise position of this class of interests on the appointed day.

As noted earlier, all the existing titles will be perfected by the curative effect of first registration on the appointed day. Although this change will be much welcomed by landowners and intending purchasers, persons who presently have a right to have a transaction set aside will lose this right unless they enter a non-consent caution before the appointed day. It has been pointed out that the intention of the legislation is to provide for the continual subsistence of unregistrable interests after first registration on the appointed day until the property is sold to a purchaser for valuable consideration.[291]

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290 *Ibid.*, cl 30(1).

291 *Supra* note 41, Willoughby, P. G. and Wilkinson, M., p. 47.

Therefore, this class of interest holders should be entitled to register a non-consent caution any time before such a transfer. Accordingly, it is recommended that the Bill should be amended to that effect.[292]

It is uncertain whether there will be a lead-in period. If such a proposal is adopted, it will accord more harmoniously with the transitional mechanism under the Bill. Persons who have not yet registered their interests will then have some time to do so. Those who have an equitable claim in land may also go to the court to establish their claim. It remains to be seen what will be the appropriate length of such a lead-in period, if there is to be any.

VII. Conclusions

As we have seen above, the existing deeds registration system has carried with it considerable defects. Registration only confers priority but not validity. The system is defective in that failure to register will bring adverse consequences while registration will not guarantee a good title.[293] This in turn necessitates a painstaking investigation of the chain of title whenever a transaction is contemplated. Such practice inevitably renders the conveyancing process complex, slow and expensive. Priority under the present system is equally unsatisfactory. Provisions in the *Land Registration Ordinance* have presented several inconsistencies and lacunae in application. The failure to cater for unwritten equities also brings into place the doctrine of notice and all its inherent uncertainties. All this tends to frustrate the effort to establish a logical and reliable priority system.

Therefore, it is evident that reform is necessary. Grafting changes on the present system can only provide short-term benefits. Only a fresh rethinking of the whole basis and approach to the conveyancing system will enable us to meet future changes. As can be seen from the above discussion, title registration constitutes much of an improvement upon deeds registration. The real issue now is: what sorts of detailed provisions relating to the system of title registration will best serve the conveyancers and the community in Hong Kong?

The proposed system under the *Land Titles Bill* brings with it substantial advantages. The principle benefit of the proposed system, as is pointed out in the Bill, is that it provides 'certainty both as to the ownership of land and the interests in that land because, subject to certain exceptions specified in the Bill, no matter may affect land unless the matter is

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292 *Ibid.*

293 *Supra* note 2, Simpson, S. R., p. 21.

registered'.[294]

Second, it recognizes all kinds of interests in land, whether registrable or unregistrable. Registration positively confers priority and more importantly, an absolute title. The curative effect of registration also obviates the need for a tiresome examination of title. It will also enhance the marketability of a great many titles which are otherwise doubtful or defective.

Third, the register itself is the title document. It provides an authoritative and almost conclusive record of title and interests in land. This will essentially reduce the possibility of any fraudulent dealings off the register. A purchaser can simply inspect the register to ascertain the legal situation of the land instead of making a tedious investigation of the chain of title. Likewise, the vendor's task of showing his title is much simplified. The register is also reliable in that it is continuously updated.

Fourth, the conveyancing process is considerably speeded up and facilitated. The time and expense involved in investigating and proving title is substantially reduced. A solicitor's task in drafting a formal sale and purchase agreement is simplified because a vendor may simply agree to sell the title as recorded on the register. Thus, the contract of sale can be confined to live issues without being burdened with detailed provisions as under the existing system. The present assignment will also be replaced by a transfer in a much simpler form. In other words, dealings in land can be effected with efficiency, security, expedition and perhaps reduced costs.

There are however still a number of areas to be worked out. Protection of unwritten equities is always a difficult issue, especially the rights of those in actual occupation of land. There are no hard and fast rules and the subject is debatable. Much depends on how a balance is to be struck between competing claims. In any event, title registration will provide an opportunity to uproot the doctrine of notice. One may claim that a system of registration should not alter the substantive law of property. However, it seems that in order to promote efficiency in property transactions, that will be a necessary evil in some instances.

In view of the risk of dislocation and substantial practical difficulties during the transitional period, the Bill provides for a simple mechanism for the conversion. There will be an automatic transition in the form of an evolution from the present system. Thus, existing proprietary interests are respected to a large extent. Though the status quo will be preserved, a corollary to this is that the complications associated with the *Land Registration Ordinance* will still remain to a limited extent. Perhaps like the existence of overriding interests, it is inevitable that a price has to be paid for

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294 Schedule 2 to the *Land Titles Bill.*

the development of a title registration system. On balance, with the provisions for rectification and indemnity, this price is reasonably justified, and those provisions also serve as a balancing force against any possible injustice under the proposed system.

Not surprisingly, such an important piece of conveyancing legislation has provoked debate among the legal profession. Among others, the cost implications form one of their major concerns. Despite the opposition from the legal profession, constant negotiation with practitioners will ensure that the new system is highly workable in practice. The Bill, after all, is largely the lawyers' law. It takes a diamond to cut a diamond. In any event, active opposition may be a cause for optimism. Experience has proved that passive opposition turns out to be a more powerful, insidious weapon.

Apart from the technicality, the Bill also carries with it a significant social dimension. As the former Registrar-General has pointed out, 'the new law is very much in the nature of a people's law rather than merely some arcane piece of highly technical conveyancing legislation for lawyers only'.[295] Although the technical advantages of the new system may not be apparent to the laymen, it should not in any way prevent the Government from arousing the public's interest. Public familiarity and support will be of immense value to the proposed scheme, especially during the initial stage of its implementation.

It is hoped that the *Land Titles Bill* will reach the statute books, sooner rather than later. Though the proposed system may be expensive to run at the beginning, both in terms of costs and effort, the long-term benefits to the conveyancing community will be substantial. As a powerful revolt against deeds registration, the proposed title registration system will best serve Hong Kong as it enters into the 21st century.

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295 *Supra* note 41, Willoughby, P. G. and Wilkinson, M., at x.

A COMMENTARY ON OFFICIAL LANGUAGES ORDINANCE SECTION 4D

評《法定語文條例》第 4D 條之中文文本

陳穎恩*

In the passage, the author divides his discussion on the Official Languages Ordinance Section 4D into 5 parts. They are the origin of the Chinese version of the Ordinance, the legislative intention of the English version, the accuracy of the Chinese version (which is the main theme of the passage), the deficiency of the terms of the Chinese version and the grammar problem.

Firstly, the Official Language Ordinance is enacted on the 15thFebuary, 1974. The aim of the Ordinance is to establish Hong Kong's official language, ensure its standing and application. Section 4D is used to establish a system to improve the inconsistency of the terms used in the same official language of an Ordinance.

Secondly, Section 4D(1) entrust the Secretary of Justice the power to demand, in the Gazette, an alteration of the wording of the Ordinance in one of the languages in order to establish consistency within the text. But this power is limited in the sense that the Secretary of Justice can demand alterations only when it does not affect the implementation of the Ordinance in another official language. Moreover, the alteration cannot take effect before the time limit of the Legislative Council passing a motion of implementing the Secretary of Justice's order of alteration.

Thirdly, according to Section 10B(1) of the Interpretation of General Clauses Ordinance, the Chinese and English texts in all Hong Kong Ordinances are equally accurate, and both should clearly reflect the legislative intention of the legislators. Moreover one of the texts should accurately reflect the meaning of another text.

As to whether the Official Languages Ordinance Section 4D(1) can achieve this standard, the author chooses to discuss this issue by quoting 2 examples. In one of the examples, the author cited the interpretation of the court to solve the dispute between the Chinese and the English version. The solution is to take into consideration of the intention of the legislature and the separation of powers of the judiciary in order to choose which official language to adopt.

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The author believes the word 'formal alterations' in the English version and the words「形式上的修改」in the Chinese version is different. In the English word 'formal' means alteration of the wording, not substantial alteration of the meaning of the Ordinance but in the Chinese version 「形式上」means alteration of the structure and presentation of the Ordinance which may seriously affect the judicial interpretation of the meaning of the Ordinance.

The author also proposes adopting the words 「徒有其表的字面修改」 instead of 「形式上的修改」 in consideration of the words 「形式上的修改」in the Chinese version will entrust the Secretary of Justice excessive power of alteration. As a result, it may lead of divergence with legislative intention, legislative background and wording of the Ordinance thus not accurately reflecting the legal context of the Ordinance.

Besides, the phrase 「該文本來的字、詞句或片語；與該文本來的字、詞句或片語」 in the Chinese version is different form the phase 'a word, expression or phrase in the text to which the alteration is made; and a word, expression or phrase in that text'. The author propose changing the Chinese version into 「該文本來被修改的字、詞句或片語；與本文內其他的字、詞句或片語」

Fourthly, the author cited some ambiguous terms in the Chinese text and make alterations to improve it.

Lastly, the author makes suggestions about possible changes of some Chinese grammar.

文中作者分五部份討論《法定語文條例》第 4D 條的中文版本的起源、英文版本的法律意義、中文版本的法律真確性(此乃全篇重點所在)、中文版本中未臻完善的字詞以及語法問題。

《法定語文條例》於 1974 年 2 月 15 日生效，是奠定香港法律「雙語化」的重要文件。第 4D 條的增補旨在設立一個機制以改善於同一法定語文文本內用詞之參差。

其二，4D 條第〔1〕款賦予律政司可藉憲報命令對條例的其中一種法定語文作表面上的修改，使其與文本內的其他文字一致的權力的同時，也限制了這種權力的運用：律政司只可在不影響另一法定語文版本的效力下作出修改。而且，在立法局作出決議通過落實修訂律政司的命令的期間屆滿前，該項命令不得生效。

其三，根據《釋義及通則條例》第 10B 第〔1〕款，香港所有條例的中文和英文文本同等真確，並都應清晰無誤地反映立法者的全盤法律意義，而一個語文文本須正確反映另一語文文本的意義。

對於《法定語文條例》4D 條第〔1〕款是否達到這標準，作者選

取了二從句加以探討。其中，作者借助了法庭常用的闡釋指引來解決中英文版本語意上的分歧。通過考慮立法局的意圖和香港法制三權分立的背景，以決定對法例語文的取捨。

作者認爲英文版中的 “formal alterations”與中文版的「形式上的修改」存在分歧。英文 formal 指的是只限文字表面、不涉及本質或意義變更的修改，而中文「形式上」乃指對條文組織結構和表現方式的改變，對於闡釋法律條例的意義有相當的重要性和決定性。

考慮到中文版「形式上的修改」會授予律政司過大的權力，與立法目的、背景和條例語境相違背，並不能真確地反映出條例的法律含意，作者建議以「徒有其表的字面修改」取代「形式上的修改」。

另外，中文版「該文本內的字、詞句或片語；與該文本內的字、詞句或片語」與英文版 “a word, expression or phrase in the text of which the alteration is made; and a word, expression or phrase in that text.” 也明顯出現極大分歧，令人無所適從—作者建議修改中文版爲「該文本內被修改的字、詞句或片語；與文本內其他的字、詞句或片語」。

其四，作者抽取中文版本一些含意模糊的字詞，加此修改以臻完善。

最後，作者就中文版本的語法問題作斟酌，提出修改的建議。

畢竟，本港法例雙語化的工作繁重迫切，忙中有錯是情有可原的。但《法定語文條例》的中文版本理應在所有大法的中文文版中傲視同儕，作者促請立法機關早日正視及解決此遺憾，以免貽笑大方。

一、引言

本文旨在討論《法定語文條例》第 4D 的中文版本。文章分爲五個部份：第一部份，追溯《法定語文條例》第 4D 條的起源；第二部份，探討此條例英文版本所載的法律意義；在第三部份集中討論第 4D 條中文版本的法律準確性，即中文版本能否正確反映出條例的全部法律涵義，並提出改善辦法，這部份將是全篇最重要的部份；在第四部份中，筆者將從中文版本中取幾個未臻完善的字詞，然後嘗試找出較理想的字詞代替；最後一部份討論中文版本的語法問題，如條文是否文意不通、過於冗贅等。

二、《法定語文條例》第 4D 條的起源

《法定語文條例》在 1974 年 2 月 15 日生效，其目的在於訂定香

港的法定語文，並確立法定語文的地位和應用，是奠定香港法律雙語化最重要的文化之一。此條例在二十多年來經過多次修改，其中第 4D 條就是在 1994 年增補的，旨在設立一個改善在同一法定語文文本內用詞參差不齊的機制。全文如下：

> 4D. Attorney General's power to achieve consistency
> (1) The Attorney General may, by order in the Gazette, make formal alternations to the text of an Ordinance in one official language to achieve consistency between --
> (a) word, expression or phrase in the text to which the alternation is made; and
> (b) a word, expression or phrase in --
> i) that text; or
> ii) the text of another Ordinance in the same official language,
> where both such words, expressions or phrases purport to be the equivalent of the same word, expression or phrase in the other official language in the same context.
> (2) No order made under subsection (1) shall come into operation before the expiry of the period within which a resolution providing for the amendment of the order may be passed in accordance with section 34 of the Interpretation and General Clauses Ordinance (Cap 1)
>
> 4D. 律政司達致用詞一致的權力
> (1) 律政司可藉憲命令對條例的其中一種法定語文文本作出形式上的修改，使－－
> (a) 該文本內的字、詞句或片語；與
> (b) i）該文本內的字、詞句或片語；與
> ii）另一條例的同一種法定語文文本內的字、詞句或片語，達致一致，但該權力只可於該兩字、詞句或片語均宣稱是另一種法定語文的同一文意下的同一字、詞句或片語的相對應版本的情況下行使。
> (2) 在立法局依《釋義及通則條例》（第 1 章）第 34 條，通過訂定修訂根據第（1）款作出的命令的決議的期間屆滿前，該命令不得生效。

三、第 4D 條英文版本的法律涵義

第 4D 條第(1)款賦予律政司司長達致條例用詞一致的權力。律政司司長可以藉憲命令，對條例的其中一種法定語文文本作出表面上的修改，使該文本內被修改的字、詞句或片語，與同一文本內的其他字、詞句或片語，或另一條例的同一種法定語文文本內的字、詞句或片語達致一致。但第 4D 條第（1）款亦明確地限制律政司司長運用這種權力：律政司司長只可於該兩字、詞句或片語，均是另一法定語文的同一語景下，具有等效的同一字、詞句或片語的情況下行使這種權力。

而第（2）款則進一步限制律政司司長根據第（1）款所作出之命

令的效力：立法會可以依《釋義及通則條例》第 34 條，通過修訂律政司司長在第（1）款作出的命令的決議，而在立法會有權作出上述決議的期間屆滿前，律政司司長的命令不得生效。

四、中文版本的法律準確性

《釋義及通則條例》第 10B 條第（1）款指出，香港所有法例的中文和英文文本同等真確。作爲法例的真確本，無論中文或英文被本都應清晰無誤地反映出立法者藉法例表達的全盤法律意義。而據香港律政司署在 1986 年 4 月所出版的《中文立法問題討論文件》中指出，一個語文本須正確反映另一語文本的意義。 在本部份，筆者將討論《法定語文條例》第 4D 條第（1）款能否達到上述要求，並嘗試改善未能符合水準的字詞。爲此筆者選取了二從句，加以討論：

(1) "對條例的其中一種法定語文文本作出形式上的修改"
("make formal alterations to the text of an Ordinance in one official language")
中英文版本是否存在分歧呢？英文版本的 "formal alterations"的中文對應詞句爲 "形式上的修改" 。這兩個版本在意義上是否存在著分歧呢？

英文版本中的 formal 是一個常用的形容詞，它的涵義隨著語景的不同而大相逕庭，除了有中文版本所採用的 "形式上" 的意思外，亦可以解作 "表面上的" 、 "字面上的" 或 "徒有其表的" 等等。 如果 formal alterations 是解作 "徒有其表的字面修改" 的話，根據《漢語大詞典》的註釋， "徒" 字解作 "空也" ，顧名思義，這種修改只限於文字表面上，絕對不涉及本質或意上的變更。

中文版本用了 "形式上" 來表達英文版本的 "formal"。翻閱《漢語大詞典》， "形式" 可以解作 "對內容而言，指事物的組織結構和表現方式" 。 一般人也許會認爲一篇文章的 "組織結構和表現方式" 與文章的實質內容風馬牛不相及，甚至以爲兩者有相反的意思。雖然筆者並不否定形式上的改動有時只會對條文產生表面的影響，但是在法律角度上，一條法例的法律意義往往會因其 "組織結構和表現方式" 的改變而有所不同。一個標點符號的擇放位置、句子的先後排列次序等都是 "形式" 的問題，但它們對於闡釋法律條文的重要和決定性卻是不容忽視的。

從以上的討論看來， "形式上的修改" 實在可大可小，它所涉及的層次比 "徒有其表的字面修改" 深，而覆蓋的範圍亦較廣，由不影響

意義的純表面修改（即英文版本中的“徒有其表的字面修改”）到內容的變更都被包括在內。由此可見，中英文版本是存有分別的。既然意思上出現了分歧，應該怎樣解決呢？哪一個版本才具有法律真確性？

當雙語條例出現分歧時，首先應參閱條例的釋義部份，它會對條例內經常出現或載有特別意思的字詞加以闡釋，也許會有助解決分歧。但是，在<<法定語文條例>>第二條的釋義部份中，並沒有提及“formal”或“形式上”這兩個詞。在此情況下，便要借助其他法庭常用的闡釋規則來解決分歧。

首先，應該研究條例的目的和立法者的意圖。這是在所有闡釋方法中最具決定性和最重要的一個，在解決分歧時，應時刻考慮到立法的背景和動機，並盡量讓它們在中英文文本中展示出來。在考慮立法者的意圖和條例目的後，可以清晰地知道中文版本中“形式上的修改”是絕無立足之處的，理由如下：

其一，立法局在 1996 年通過《法定語文條例》第 4D 條只是一個權宜之計，並沒有意圖給予律政司改變法律條文意義的權力。追溯法律雙語化在香港的歷史，法例中文真確本計劃實際上在 1985 年 7 月 16 日才開始，當日行政局決定香港制定的法例應有一份中文真確本， 律政署的法律草擬科因而成立工作小組，探討實施行政局的決定的方案。這個小組在 1992 年完成第一條法例的中譯(《釋義及通則條例》（第一章），並承諾在 1997 年 5 月前把當時全港的 522 條共約 20,865 頁的法例譯成中文。另外，在 1989 年 4 月開始，所有新的主體法例均須以雙語制定。面對如此繁重而迫切的工作，實在難免忙中出錯。因此，立法局透過《法定語文條例》第 4D 條設立一個糾正錯誤的機制，好讓律政司司長可以修改同一語文文本內具有同意和等效的詞用語參差的情況，而律政司司長的權力亦僅限於此。

其二，《法定語文條例》第 4D 條本身的合憲性是一大疑問。香港法律制度中最根本的原則是三權分立，即行政、立法和司法各自獨立運作。即使律政司司長只有權對法例作出“徒有其表的字面修改”（即英文版本的意思），一個委任的行政官員有權作出這樣的修改是否僭奪了立法機關的權力呢？相信立法局在通過此條例時必有以上的顧慮，並會試圖盡量將律政司的權力減至最低。無論此條例的合憲性最終如何，有一點可以肯定的，就是立法局一定不會容許律政司司長擁有修改法例意義的權力，即中文版本中的“形式上的修改”的權力，否則便違背了三權分立的精神。

事實上，從語景也可以發現立法局有意限制律政司司長根據此條例得的修改權力：在第（1）款中，中文版本清楚規定這權力“只”可以於指定情況下行使，而第（2）款亦說明律政司司長的有關命令在立

法會有權通過修訂議前不得生效。再參閱條例內的其他條文，更可肯定立法局這個意圖，例如在第 4B 條第（3）款中，規定律政司司長可以在“不影響條例的涵意下”，藉憲報修改一種法定語文文本，使該文本與另一種法定語文文本在表達方斫協調。條例的上下脈胳可見，立法局刻意箝制律政司司長修改條文的權力。所以，在闡釋律政司司長第 4D 條獲得的權力時，應給予最狹窄的解釋。

總括而言，筆者認爲中文版本所用的“形式上的修改”會授予律政司司長過大的權力，與立法目的、背景和條例的語景不符，並不能準確地反映出條例的法律含義。相反，英文版本可以切合立法目的和語景，因此，筆者認爲英文版本應被採用。

如何改善中文版本？筆者建議用“徒有其表的字面修改”取代“形式上的修改”，這樣中文版本便能表達條文的真正法律意義。當然，如果在中英文版本中加入該權力只在“不影響條例的涵意”的前提下才可行使的規定（見第 4B 條第 3 款），這就更好了。

(1) “該文本內的字、詞句或片語；與該文本內的字、詞句或片語”（“a word, expression or phrase in the text to which the alteration is made; and a word, expression or phrase n that text”）

中英文文本是否存在分歧？中英文文本明顯出現極大的分歧。英文版本的法律意義是律政司司長可以通過對某法例其中一種法定語文文本作出修改，使文本中“被修改的字、詞句或片語”與同一文本中的“其他”字、詞句或片語達致一致。但是，在中文版本中，律政司司長的修改則是爲了使文本中的“字、詞句或片語”與文本中的“字、詞句或片語”一致，筆者完全看不出有英文版本的涵義之餘，也對此感到一頭霧水。

如何解決分歧？正如在討論“形式上的修改”的準確性時所言，《法定語文條例》第 4D 條是一個權宜之計，立法局深知在短時間內用雙語立法和翻譯全港所有英文主體法必然錯漏百出，故透過此條例建立改善的系統，此系統實在有實際和迫切的用途。可是，如單是閱讀中文版本的話，可以發現這個機制根本完全不可能運作，因爲“該文本內的字、詞句或片語”與“該文本內的字、詞句或片語”根本就是一樣，那律政司司長爲何要運用修改權力，去使它們一致呢？中文版本所提供的是一個無意義、一塌糊塗的機制，而英文版本所提供的則是一個可操作的機制，完全符合立法目的，所以應被採用。

如何改善中文版？要將中文版的問題糾正，其實只需要在有問題的第一句和第二句分別加入“被修改”和“其他”，而修改後的中文版本會變成：“該文本內被修改的字、詞句或片語；與文本內其他的字、

詞句或片語”。這樣，中文版本所提供的機制便能夠操作了。

五、中文版本中未臻完善的字詞

中文版本中，有些字詞的運用值得商榷，雖然它們並不會嚴重影響中文版本的法律真確性，但意思比較含糊，實在有改善的必要。以下是兩個例子。

> (1) “但該權力只可於該兩字、詞句或片語均宣稱是另一種法定語文的同一文意下的同一字、詞句或片語的相對應版本的情況下行使” (where both such words, expression or phrases purport to be the equivalent of the same word, expression or phrase in the other official language in the same context)

參閱《漢語大詞典》，“宣稱”有“宣佈”和“公開表示”意思。試問文本中的字詞又怎能挺身宣佈它們是另一種法定語文文本，在同一文意下的同一字詞呢？其實在此語景，第 4D 條英文版本中“purport to be”解作“意指”較爲理想，因爲“意指”表達了文本中的字詞並非自行宣佈與其他字詞相同，而是它們的內在法律意義使然。

> (2) “通過訂定修訂根據第（2）款作出的命令的決議的期屆滿前” (...before the expiry of the period within which a resolution providing for the amendment of the order may be passed...)

“Providing for”是一個非常常用的英文片語，亦正因如，此對“providing for”在不同語景中的闡釋亦要格外留神，筆者事先亦翻閱了多本字典才可以肯定此片語在第 4D 條第（2）款的意思。中文文本採用了“訂定”來代表“providing for”的含義，“訂定”是“修訂”或“校定”的意思。在英文版本中，立法會可通過的決議是用來“providing for the amendment of the order”的，如果“providing for”是解作“訂定”的話，那麼，立法局根據《釋義及則條例》第 34 條通過的決議便是用來“修訂”或“校定”之前對律政司司長所作出的命令的修訂。反觀英文版本，“providing for”在此語景可以譯作“作出”或“落實”，是有規定修訂的意思，具命令的意味，與中文版本截然不同。究竟那一個版本才能真正反映條例的意義呢？

筆者認爲英文版本應被採用。因爲《釋義及通則條例》第 34 條第（2）款指出：“…the legislative council may, by resolution passed...provide that such subsidiary legislation shall be amended...”。從第 34 條第（2）款所用的“shall be amended”看來，立法會所通過的決議是用來對某法例

"作出"修訂的， 而非只是"校定"一個修訂。而用"作出"取代"訂定"後，第 4D 條第（2）款的法律涵義便清晰和精確得多。

六、中文版本中的語法問題

香港律政司署在 1986 年 4 月爲《法定語文（修訂）條例草案》而發表的《中文立法問題討論文件》中，指出爲使雙語法例在應用上獲得接受，成文法的中文文本必須以良好的現代中文編寫。 究竟《法定語文條例》第 4D 的中文版本能否做到如文件中所期望的文從意順呢？

筆者認爲此條例的中文文本在語法上沒有大錯，只是以下句子比較繁複冗長，有斟酌的餘地：

> (2) 在立法局可依照《釋義及通則條例》（第 1 章）第 34 條，通過訂修訂根據第（1）款作出的決議的期間屆滿前，該命令不得生效。

筆者建議此句可改成："立法會可依照《釋義及通則條例》（第 1 章）第 34 條，通過決議對根據第（1）款作出的命令作出修改。而在立法會有權通過此決議的期間屆滿前，該命令不得生效。" 修改後的條文相信會比修改前的直截了當得多。

七、結論

根據以上各份的討論，筆者認爲《法定語文條例》第 4D 條的中文版本應改爲：

> (1) 律政司司長可藉憲報命令對條例的其中一種法定語文文本作出徒有其表的字面修改，使－
>
> (a) 該文本內被修改的字、詞句或片語；與
>
> (b) i）該文本內其他的字、詞句或片語；或
>
> ii）另一條例的同一種法定語文文本內的字、詞句或片語
>
> 達致一致，但該權力只可該兩字、詞句或片語均意指是另一種法定語文的同一文意下的同一字、詞句或片語的相對應版本的情況下行使。
>
> (2) 立法會可照《釋義及通則條例》（第一章）第 34 條，通過決議對根第（1）款作出的命令作出修改，而在立法會有權通過此決議的期間屆滿前，該命令不得生效。

相信經過修改後的中文版本會比原有中文版本更精確，但當然仍有改善的地方。其實作爲香港法律雙語化的重要指導文件，《法定語文條例》的中文版本理應能在所有大法的中文版本中傲視同儕。可是，現在第 4D 條的中文版本含糊不清、糊裡糊塗，實教人感到意外和遺憾，

相信立法機關會早日正視並解決此問題，免得貽笑大方。

A Commentary on Offences Against Persons Act

評《侵害人身罪條例》第26條中文文本

黃美華

Concomitant with transfer of sovereignty, bilingualism has gradually been adopted in executive and legislative institutions in Hong Kong. This change originates with the enactment of Basic Law. However, the problematic adoption of bilingualism has aroused much social concern. By referring to Offence Against Person Ordinance s.26, the writer illustrates the discrepancies between Chinese and English versions and suggests solutions to the problems.

The writer starts the article by pointing out its counterpart in United Kingdom is the Offences Against Person Act. Promulgated in 19th century, the Act states that "any person who unlawfully abandons or exposes any child, being under the age of 2 years whereby the life of such child is endangered or the health of such child is or is likely to be permanently injured, shall be guilty of an offence." The writer explains the language discrepancy by quoting Chinese and English versions respectively.

The writer first seeks guidance from "Interpretation and General Clauses Ordinance" which confirms the parity in legal status between the Chinese and the English versions. In case of discrepancies, it should be interpreted according to legislative purpose and function. The writer illustrates there is no rule of thumb for interpretation by referring to a Canadian case.

The writer then carries out an analysis on the section. First, she disagrees with the translation of "expose" as "遺棄" . While the former connotes "no protection", the latter suggests "breach of duty". Two English cases were quoted to illustrate the traditional judicial view on the interpretation of these words.

Apart from this, the writer also discusses whether the insertion of "or" between "expose" and "abandon" makes the two words independent of each other. The writer then discusses judicial attitude towards errors in interpretation. The court will not grant legal status to erroneous version on the ground of "parity between two language versions" but it will favour the version that expresses legislative purpose. The writer then explains other principles of interpretation.

Finally, amendments on the section were proposed. "Abandon" should

be translated as "遺棄" instead of "拋棄"; "likely" as "可能" instead of "相當可能"; "conviction" as "審判" instead of "程序". Adoption of bilingualism, concomitant with inevitable divergence in interpretation, is a long process. Discrepancies

隨著香港回歸，行政立法等機構亦逐步趨向雙語化，這項轉變早已在制定基本法奠定。但雙語化背後亦產生了許多問題，成爲社會上爭論的焦點。本文的作者透過分析《侵害人身條例》第廿六條，展現了雙語立法所帶來的中英文本歧異的問題。

作者指出有關條文乃源自英國的《侵害人身法案》，英文本早在十九世紀頒布，內容大致是說任何人非法 "expose" 或 "abandon" 兩歲以下的小童以致他生命受到危害，或健康受到或可能受到傷害，即屬違法。件者再一步引述條文的中英文本，并著手解決有關的分歧。

作者首先從《釋義及通則條例》中尋找闡釋指引，道出條文的中英文版本皆有同等的法律地位，若出現分歧，應顧及和考慮其中的目的和作用，找出一個中英文本皆通用的意義。作者并引用加拿大的案例，指出闡釋的方法并不是絕對的。

作者隨著展開對條文的分析。首先，作者針對 "expose" 這字的中英釋義，發現 "expose" 和 "遺棄" 一詞是兩個完全獨立的意思。前者含沒保護的意思，後者則是不履行責任的意思；前者含義狹，後者含義廣。作者并引述兩個英國案例去說明法庭對有關問題的判決。

此外， 作者亦探討把 "or" 放在 "expose" 和 "abandon" 中間，是否意味著兩個獨立的意思的問題。作者及後又出翻譯出現謬誤的時候，法庭會採取的態度。法庭不會單因 "中英文本同樣真確" 的假定而認同錯誤的字眼，而是會側重一個比較能表達立法目的的版本， 作者亦展述其他闡釋的守則。

最後，作者提出對這條文修定的其他建議: 就是把條文中 "abandon"一字的對應詞由 "拋棄" 改成 "遺棄" ， "likely" 由 "相當可能" 改成 "可能" ， "conviction" 由 "程序" 改爲 "審判" 。在總結中，作者提出因翻譯過程而產生分歧是不可避免的，雙語化亦不是一朝一夕的事情，必須制定長遠的目標，以及法律人員通力合作，才能減少未來可能出現的分歧問題。

一、*序言*

《香港特別行政區基本法》第 9 條明確規定，香港立法機構可以用中英雙語立法。第 26 條又規定法律面前人人平等，包括不得因語言歧視某人。《基本法》爲香港中英雙語立法奠定了穩固的憲法基礎。然

而早在七十年代，香港已開始法律中文化的工作，理由有四個：正義、經濟、民族主義、普通法的培植。

雙語立法不可避免地會帶來闡釋的問題。中英文的文化背景差異、翻譯問題、理解不同等等都會造成分歧。我們必須審慎地正視這些分歧及思考其解決方法。

筆者選取了《侵害人身罪條例》第 26 條來分析《條例》中英文文本的分歧問題，繼而找出其解決方法。

二、《條例》簡介

本條例是參照英國 1861 年《侵害人身罪法案》（Offences Against Persons Act 1861）制定的。《條例》的英文文本早在 1865 年 6 月 14 日頒佈，但其中文文本則在 1995 年 2 月 17 日才頒佈爲真確本。很明顯，英文文本爲原文，中文文本爲譯文。

《條例》第 26 條大體上規定，任何人非法 exposes 或 abandons 兩歲以下的兒童，以致該兒童的生命受危害，或健康受到或可能受到永久損害，即屬違法。全文如下：

> 26. Exposing child whereby life is endangered
> Any person who unlawfully abandons or exposes any child, being under the age of 2 years, whereby the life of such child is endangered, or the health of such child is or is likely to be permanently injured, shall be guilty of an offence and shall be liable
> (a) on conviction on indictment to imprisonment for 10 years; or
> (b) on summary conviction to imprisonment for 3 years.

> 26、遺棄兒童以致生命受危害
> 任何人非法拋棄或遺棄不足 2 歲的兒童，以致該兒童的生命受危害，或以致該兒童的健康蒙受或相當可能蒙受永久損害，即屬犯罪——
> (a) 循公訴程序定罪後，可處監禁 10 年；或
> (b) 循簡易程序定罪後，可處監禁 3 年。

斜體字顯示的部份是本文章將探討的分歧。

三、中英文文本分歧問題

在未探討兩文本是否存在意義分歧前，筆者首先從立法者制定的雙語法則中尋找闡釋指引。《釋義及通則條例》第 10B 條指出條例的中英兩文本同等真確，兩者被推定爲具有同等意義。 既然條例的中英文文本具有同等的法律地位，解釋條例就須參照條例中英文兩文本，以二

者爲一體。這是闡釋的基礎，忽略兩者中的任何一文本只會帶來闡釋的不全面，並造成不公義的結果。但兩文本具有同等意義只是一個推定，它可被實證推翻。正如《釋義及通則條例》第 10B 條第 3 款指出“凡條例的兩種真確本在比較之下，出現意義分歧，則在考慮條例的目的和作用後，採用最能兼顧及協調兩文本的意義”。

加拿大最高法院在 *R v Compagnie Immobiliere BCN Limitee* 一案中談及有關立法者定的雙語闡釋法則，法庭指出“《法定語言法》第 8 條第 2 款第 b 項只是一個導引。它是法庭採用的其中一種釋義方法去闡釋立法者的真正精神、目的及意思……它並沒有絕對的效力，它並不一定凌駕其他的釋義方法……”。該法案清楚指出法庭採用的只是它本身一直沿用的釋義守則。由於加拿大以英文及法文雙語立法，其雙語立法所出現的分歧本質與香港的大同小異，故加拿大的判例法對香港雖無約束力，但卻有說服力，香港可作參考，以解決分歧問題。

總括而言，法庭會沿用一般的釋義方法去解決中英兩文本出現的分歧問題。當然條例的立法精神是法庭闡釋的最終依據。

四、中英文文本的分歧

甲 Expose = 遺棄？

《條例》中的 exposing a child 被譯爲遺棄兒童。當筆者首次閱讀該處時，直覺地認爲 expose 並不等於遺棄。一個人可以 expose 小孩而沒有遺棄他。舉例說：父母爲了管教子女，勞心勞力，法寶盡出。其中一種方法就是趕子女出街，以教訓他們不再犯事，不再任性。父母的行爲已經 expose 子女於一個危險的地方，然而他們卻沒有遺棄子女的意思或意圖。那麼究意 expose 是遺棄嗎？

1. 從字典看意義分歧

筆者從三方面去看字典的解釋。首先，查證 expose 一字在英文字典裏的解釋，再查證遺棄一詞在中文詞典裏的解釋，繼而再參考中英對譯詞典，找出 expose 一字的中文對應詞。

根據 The New Shorter Oxford English Dictionary, expose 一字可解作：

1. lay open to something undesirable, as danger etc; subject to risk;
2. place in an unsheltered position; uncover;

3. compel to be out of doors, esp leave an infant to perish for want of shelter.

根據《漢語大詞典》， 遺棄一詞有以下的解釋：

1. 拋棄、丟棄；
2. 對自己應該贍養或扶養的親屬拋開不管。

《辭源》 對遺棄一詞亦有類似以上第 ii 點的解釋：
法律名詞、依法律或契約負有扶養之義務而不履行謂之遺棄。

從字典所看，expose 及遺棄是兩個完全獨立意思的詞。概括而言，前者是指將某人置於一個沒有保護或遮蔽的地方，後者是指不履行責任或義務。明顯地，英文 expose 一字並沒有中文遺棄一詞裏的責任或義務，單單將某人放於一個沒有保護或遮蔽的地方已是 expose，它並不涉及甚麼責任或義務。

《英漢大詞典》 引證了 New Shorter Oxford Dictionary 對 expose 一字的解釋：

i 暴露、顯露、使無遮蔽（或保護等）。使遭受；
ii 棄（嬰兒）於戶外使凍餓而死。

或者有人會提出，expose 及遺棄兩者之間並沒有矛盾之處。遺棄是一個廣義的詞，本身已包括英文 expose 一詞裏的含義。因爲將某人置於一沒有保護或遮蔽的地方，已是不履行責任或義務的表現。筆者並不同意這個說法，理由有兩個。第一、字意：從字面及字義解釋，兩者是獨立意思的字，根本毫不相干。第二、以偏概全、斷章取義：即使在遺棄的廣義中，能找到一點點符合 expose 的解釋，亦並不說明 expose 就是遺棄，不能因此將兩個字的意思輕易地混爲一談。這個論點忽略了遺棄一詞裏的豐富含意。正如，橙是水果的一種，但橙並不等於水果的全意。

2. 從判例看立法精神

法庭的責任是闡釋條例的立法精神，故參考普通法對標的處理是闡釋條例中重要的一環。一方面，法庭可能對有關條例已作出闡釋。另一方面，我們又可查看傳統對有關問題的處理方法。

在 *R v Williams* 一案中，法庭正面地談及 expose 一詞的解釋。案中的相關成文法爲英國 1908 年的《兒童法案》（Children Act）第 12 條，《法案》內容大意爲 expose 或疏忽照顧兒童，而其方式可能導致該兒童受到不必要的苦楚或損傷屬罪行。 由於《法案》性質與本文探討的《條例》相同，同屬保護兒童法律，故有高度參考價值。

案情透露，上訴人爲孩子們的父親，在這裏筆者暫以“父親”代稱之。孩子們的母親於一九零九年四月帶孩子們離開了父親。父親一直沒有他們的消息。直至同年的十月，父親得知他們的住處，便上門尋找他們。接著，父親帶著孩子們跋步走向位於三十里外他住宿的地方。入夜還未到達，天氣又濕又冷，父親打算投宿，可惜旅館全部床位已經出租。雖然旅館的主人邀請父親及其孩子留在一房間內，並答允替他們生火取暖，但父親拒絕了旅館主人的好意，堅持帶著孩子們繼續上路。

父親被控違反《兒童法案》第 12 條。法庭宣判父親的行爲已足夠以 expose 入罪，而並不須論及疏忽。父親上訴，所持的論點爲 exposure 暗示了 abandonment，exposure 必須包括將某人實際留於某處，而企圖傷害某人（exposure must consist of a physical placing somewhere with intent to injure）。上訴庭明確否決其論點，上訴遭駁回，即 exposure 不等於 abandonment（遺棄）。

從案情所見，父親沒有遺棄他的孩子，他沒有將孩子遺留於某處，更沒有“拋開不管”。相反，他的行爲的確只是在一個寒冷的晚上 exposed 了孩子於戶外，他可選擇留宿，但他卻沒有這樣做，他的行爲符合了英文字典裏 expose 的解釋，而不涉及中文遺棄詞語的解釋。

另外，英國兩個判例 *R v White* 及 *R v Falkingham* 也有談及 expose 一字，相關法案是本文論及的《條例》的“英國版”。然而令人失望的是，它們並沒有對法案中的 expose 一詞作出闡釋。但筆者會從案情找出 expose 的解釋，以引證其符合英文字典裏的含義。

在 R v White 一案中，父親與母親分居，而母親負責監管及照顧孩子。一八七零年十月十九日，母親將不足兩歲的小孩放於父親居所門外，並將此事告知父親。父親明知卻讓孩子繼續留在屋外，不理會他。由晚上七時至凌晨一時，小孩一直留在屋外，直至被警方發現時，孩子已又僵又凍。

父親被控違反《侵害人身罪法案》第 27 條。 法庭宣判父親的行爲已 exposed 及 abandoned 了他的孩子而使其生命受到危害。判例對筆者闡釋 expose 一詞沒有多大幫助，因爲法庭只簡單地說父親 exposed 及 abandoned 了他的孩子。但從判例中，筆者可找到符合 expose 於字典裏解釋的實情。父親明知而准許他的孩子留於屋外，而使他受飢餓及寒冷之苦，他的行爲已是 exposed 了他的孩子於一個沒有遮蔽的地方，使其

生命受危害。當然，父親亦沒有盡其法律責任，照料孩子，故亦構成了abandonment的罪行。

在 *R v Falkingham* 一案中，母親串同某人將他三十五日大的嬰兒用毛巾包裹，放在一個裝有綿毛的箱子裏，再請人將他送運到父親處。法庭宣判母親的行爲違反了《侵害人身罪法案》第27條， 並以 exposure 及 abandonment 入罪。母親將孩子於箱內托運，已是 exposed 了他於一個危險的地方。當然，她亦沒有盡其母親的責任去照顧孩子，故亦犯了abandonment的罪行。

事實上，除了 *R v Williams* 一案外，其餘兩個判例均沒有對 expose 一詞作出釋義指引，故只可作爲佐證。

3. Or 的使用

Or 解作或者。《條例》中，or 一字用在 exposes 及 abandons 之間，其目的是爲了表達前後兩個字的獨立意思。如果 expose 及 abandon 是用來表達相同的意思，立法者又何須重覆多寫呢？

4. 翻譯錯誤

假如筆者對 expose 不等於遺棄的推論成立，那明顯地問題出於翻譯錯誤。因爲中文文本在 1995 年才頒佈，而英文文本早在 1865 年頒佈生效，故中文文本爲譯文。

加拿大學者 Pierre-Andre Cote 在 Interpretation of Legislation in Canada 一書中指出：“當兩種文本出現分歧時，法庭應採用普通的闡釋規則去決定那個版本比較能表達立法的目的。” “法庭會側重某一版本而不是另一版本，原因是另一版本並不符合立法草擬的基本規則，或另一版本包括一些明顯的重要錯誤。就算在法律角度上，兩個版本同等真確，明顯地一版本是另一版本的譯文，法律上，兩者同等，事實上，一版本比另一版本有力”。

香港判例 *Chan Fung Lan v Lai Wai Chuen* 一案亦指出：“中文真確本爲原條例的譯本。如果有翻譯錯誤，法庭並不能單單因《釋義及通則條例》第 10B 條宣稱中英文本同等真確，而給予該錯誤字眼法律效力”。

筆者翻查過《條例》的立法歷史， 遺棄一詞是翻譯錯誤，故法庭不應加以採用，而應依賴原文 expose 一字去闡釋條例的立法精神。

5. 不採用的解決分歧方法

法庭還有其他的闡釋守則，例如：在有清晰版及含糊版的情況下，取清晰版；在有含義範圍一廣一窄的情況下，找出兩字的共通含義。筆者並沒有採用這些解決分歧的方法，原因是它們本身有其使用的限制：例如，是否符合《條例》的立法精神？即使能找出兩文本中的清晰版本或共通含義，法庭仍會考慮條例的內容、立法目的、立法背景而作出最終釋義。如果所採用的版本違反立法精神，法庭根本不會採用它。故最重要的闡釋守則是條例的立法精神。

在這裏，遺棄一詞既然是翻譯錯誤，它本身已違反了立法者當初的立法意圖。既是如此，根本並不須討論其他的闡釋守則，而只須以原文條例的真正立法意圖去闡釋其義。

6. 建議

筆者曾考慮多個詞彙，如暴露、顯露、外露等。筆者認爲顯露一詞最能表達英文 expose 一字的含義，因爲顯露有顯示及暴露的意思。

然而使用這詞有一重大毛病，就是不符合文法。在中文裏，顯露並不能當動詞使用，故沒有顯露兒童這樣的用法。退而求其次，可用暴露，但只是暴露兒童也恐怕不足以交待其義。不過，筆者認爲《條例》的翻譯應是清楚嚴謹的，如果文法一環出現問題，應該重組句子，即使累贅一點，也是在所難免的。因此筆者建議 expose a child 翻譯成暴露兒童於危險。

乙 *Abandon = 拋棄？*

《條例》中的 abandon 被譯作拋棄，這是否適當呢？

1. 字典釋義

《英漢大詞典》 這樣解釋 abandon： “i、離棄、丟棄；ii、遺棄、拋棄” 。似乎 abandon 一字既可解作拋棄，又可解作遺棄，而拋棄及遺棄兩者是沒有區別的。然而，當筆者從字典分別查看拋棄及遺棄時，其意卻各有不同。

《辭源》 解釋拋棄爲 “法律名辭。任意不執行曰拋棄。權利皆有爲不爲之自由者。故無論何時得任意不執行曰拋棄。拋棄權利，單稱棄權” 。《新辭典》 又這樣解釋： “指權利主體消滅權利客體對其歸屬關係之法律行爲” 。由此可見拋棄是從權利著眼的。

《辭源》 解釋遺棄爲 “法律名詞。依法律或契約負有扶養之義務而不履行謂之遺棄” 。《漢語大辭典》 又謂 “對自己應該贍養或扶養的

親屬拋開不管”。遺棄是從義務著眼的。

究意 abandon 應譯作含有權利意味的拋棄抑或含有義務的遺棄呢？

2. 判例

從上文提及的判例中，我們可看到 abandon 是從義務著眼的。Stround's Judicial Dictionary of Words and Phrases 綜合判例，對《1861年侵害人身罪法案》中的 abandons or exposes 兒童作出如此解釋：“這些文字包括由一個負有法律義務照顧兒童的人故意不履行照顧義務的不作爲，以及任何對兒童暴露於危險的故意作爲”。從中亦可看出 abandon 是從義務著眼的。

3. 建議

修改建議很簡單，abandon 應譯爲遺棄。

丙 Likely = 相當可能？

翻譯者將《條例》中的 likely 譯作相當可能。相當是副詞，表示程度高，但不到“很”的程度。相當可能即“程度高的可能”，它表達了某程度上的可能性，加插了“程度”的意思。究竟 likely 應譯作最普通的解釋“可能”，抑或有程度意味的“相當可能”呢？筆者從字典、判例、《條例》立法目的三方面去探討這個問題。

1. 字典釋義

《英漢大詞典》對 likely 作出了中性的解釋：“看來要發生的、有傾向的、可能的”，並沒有程度的意味在內。

但 The Shorter Oxford English Dictionary 解釋 likely 爲“that looks as if it would happen, to be realised, or prove to be what is alleged or suggested, probable; to be reasonably expected to do, to be ”。Probable 指「可能」，而不是相當可能。

2. 判例

澳洲判例曾對 likely 作出多個闡釋。雖然判例對香港法院沒有約束力，但卻有說服力。故香港法院可加以參考。澳洲判例 *Tillmanns Butcheries Pty Ltd v Australasian Meat Industry Employees' Union* 指出 likely 可作多

個解釋： "probable"、 "more probable than not"、 "some possibility"、 "material risk that a reasonable man might see it happen"、 "inherently of such character that it would ordinarily cause the effect specified"。在這裏筆者暫不討論以上各種解釋的中文對應詞，然而從以上所見，likely 是可作出多個不同程度可能性的解釋。

英國上議院在 *R v Sheppard* 一案中，對 likely 一字有更廣義的闡釋。案中的相關法例爲一九三三年的 Children and Young Persons Act 第 1 條第 1 款， 有關 "意圖疏忽兒重" 。由於法例性質與本條相同同屬保護兒童法例，故具參考價值。Diplock 勳爵在判例中指出，likely 一詞並不精確，它有多個 "可能性" 的解釋，但在考慮到普通父母沒有診症的經驗及觸犯該法例的嚴重後果，likely 一詞只不包括 highly unlikely。即除了 highly unlikely 外，它可包括其他任何程度的可能性。就算一件事是 unlikely，只要它不是 highly unlikely，它就是 likely 發生的範圍內的一種。

既然 likely 一詞多義，要決定選取那一個意思，便要參考《條例》本身的內容及其立法精神。可惜，香港法院仍未對本條的 likely 作出詮釋。

3. 從《條例》本身作出假設

筆者嘗試從《條例》本身去考慮其立法目的。一方面，《條例》是保護兒童法律，而本條更是爲保護兩歲以下的兒童而設，故應採用可能。只要某人遺棄或將兒童暴露於危險，而可能導致該兒童的健康受到永久損害，便可入罪。另一方面，《條例》表述的是刑事罪行，一經定罪，被告可處監禁 3 年之久，不僅對犯人的後果嚴重，對《條例》保護目標，即犯人的孩子，更嚴重。故應採用相當可能，加以程度上的要求，使被告不會輕易被定罪。

兩個假設走向兩個極端的取向，故很難有結論可言。但即使有結論，它並不一定代表《條例》的真正立法精神。《條例》的立法精神只可由法庭去闡明，這是它的權力。既然法庭仍未對本條的 likely 作出詮釋，翻譯者謬然替它加上 "相當" 二字，就是替法院作出闡釋的決定，假設了立法的精神。這既僭越了法院的權力，亦違反了憲法的精神。爲了避免出現越權的情形，翻譯者應採用最普通及最自然的解釋，讓法院有最大的自由空間在將來闡釋其義。

4. 建議

Likely 最普通及最自然的解釋是甚麼？

判例給 likely 一個廣泛的定義，包括 probable 及 some possibility。根據字典的解釋，likely 可以是 probable，亦可以是 look as if it would happen, be realised，即沒有表達程度的可能。那麼我們應否選取一個有程度字眼的字呢？若果需要，又哪個程度的可能是最能適當表達 likely 一字的呢？可能一詞可否表達 likely 最自然的意思呢？

筆者認爲在中文裏，可能一詞是中性而又自然的。如果要表達不同程度的可能，我們只須在其之前加上副詞，例如：很大可能，很少可能；非常可能；又或者這樣說：可能性高，可能性低。中文裏，分別程度的類別既簡單又分明。Likely 可表達多個不同的可能性，在中文裏，可以是高、低、很高、很低的可能性，爲了避免潛越法庭的權力，應譯作可能，這個中性又自然的詞語。

但如果從英文角度看，卻又帶出闡釋及翻譯問題。英文裏的 likely 可分出更多不同程度的可能性，比中文更複雜。Likely 是 probable，又是 possible。筆者翻查字典，對得出 possible 及 probable 以下的解釋：

> Possible： that may or can exist, be done, or happen; that is in a person's power, that one can do, exert, use; able to do;
> Probable： that may reasonably be expected to happen or be the case; likely;
>
> Possible： 可能的，有可能做到或得到的；可能發生（或實現的）；
> Probable： 很可能發生的，很可能成爲事實的，或有的，或然，大概的，很有希望的；

Probable 比 possible 發生的機會爲高，似乎 possible 譯作可能較爲適當，而 probable 是很可能， 很是副詞，表示程度，相當於甚、非常，肯定是較單說可能爲高。

但 probable 及 possible 本身又可分出不同程度的可能性：more probable, less probable, more probable than not, more possible, less possible 等等。如果 likely 可譯作 possible 及 probable，那麼以上各詞又要怎譯呢？要在中文裏找出英文裏各程度的可能性的對應詞實在非常困難。舉例子說明，如果根據以上的對譯，more possible 直譯應是“很/很大可能”，那麼 more possible 的中文對應詞便會與 probable 相同，但英文裏 more possible 等於 probable 嗎？又或者 more possible 應譯爲“相當可能”，並未到“很可能”的程度，但 less probable 呢？More possible 抑或 less probable 的程度高些？如果區分兩者，相當可能用於那個較適合？

怎樣及誰決定那個英文詞彙的可能性高些？

同樣，probable 是很可能，但中文裏沒有“少很可能”或“不很可能”（less probable）的寫法。More probable 又應怎譯？由很可能變爲很大可能嗎？這樣譯不是又與 more possible 相同？明顯，在可能這一詞上，由於中文文字表達簡單直接，根本不能表達英文文字裏豐富複雜的意思。

筆者曾考慮過將英文裏不同程度的可能分門別類，用同一個中文字表達的方法來解決問題，但這帶出兩個問題：一、誰負責將那些字分門別類？誰決定將那一個字歸於那類？文人或法學學者或法庭？基於甚麼準則去分類？二、歸類是否能真正解決問題，清楚表達英文裏不同程度的可能的意思呢？

在這個問題上，可清楚看到中英文的分歧。筆者認爲中文的表達雖然清楚直接，但始終英文是原文，是原意，我們應該緊貼跟隨其意。由於中文裏沒有足夠的詞彙，爲避免造成釋義上的混亂，以及爲了清楚而完全無誤地表達某個程度，筆者認爲 likely 一字可以不譯，因爲其意實在太廣闊，根本難取 likely 一字裏可能性的最普通，最自然的解釋。

丁 Summary conviction = 簡易程序？conviction on indictment = 公訴程序？

《條例》中的 summary conviction 及 indictment on conviction 分別被譯爲“簡易程序”及“公訴程序”。“程序”一詞包含了經過法院 procedure 的意思，然而它卻忽略了法院最重要的神髓：仲裁及審判。

1. 字典釋義

筆者一連翻查多個相關字眼的解釋。如《英漢大詞典》載有以下的譯義：

> summary conviction：即決裁定、簡易判罪（指不由陪審團參與的直接定罪）；
> summary offence：即決犯罪（指可由簡易法庭審判的輕微罪行）
> summary proceeding：簡易訴訟（即不經辯論而只根據法律條文所作的審判）
> conviction：定罪、判罪

以上所有詞彙均有審判及裁決的意味，但程序一詞似乎欠缺法庭

仲裁的深遠意思。

2. 建議

Conviction 程序改爲審判。審判有審判及仲裁的意思。即 summary conviction 改爲簡易審判，indictment on conviction 改爲公訴審判。

四、總結

雙語立法系統的成立，無可避免地會帶來類似以上的闡釋分歧或其他分歧問題。近些年來，本港的法例、附屬法、規則相繼中文化，案例亦以雙語制定，中英文文本出現分歧的機會亦會相繼增加。加上法律中文化的工作在香港才在起步階段，仍有很多地方做得不完善。時間迫切、人才短缺、法例不完備等等，使法律中文化的工作面對一定的困難。要知道法例雙語化並非一朝一夕的事，爲長遠計，政府實應訂下長遠目標及政策，例如培訓雙語律師及法官、推廣法律中文化的教育工作、翻譯法律等等，藉此奠定穩固的基礎，以糾正過失，繼續長遠地落實法律中文化的工作，亦減少將來文本出現分歧的可能性。

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