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With a Foreword by The Honourable Secretary for Justice Elsie Leung

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A WORD FROM OUR ADVERTISERS

Foreword

Message from the Secretary for Justice

Since its inauguration in 1994, the Hong Kong Student Law Review has made a valuable contribution to legal literature in Hong Kong, and has provided a golden opportunity for students to publish the fruits of their endeavours.

Now that nearly three years have passed since Reunification, it is evident that the transition was extremely smooth. Of course, some controversial legal issues have arisen. The right of abode litigation, in particular, has given rise to a heated debate. I welcome all efforts - whether of practitioners, academics or students - to analyse such issues and to make constructive suggestions. Through the collective wisdom of all concerned we can ensure that our new constitutional order is faithfully implemented, and that the rule of law and independence of the judiciary are firmly maintained.

Law students of today come to their studies at an exciting time. They are the first generation to learn about the Basic Law since it has come into operation. They are analysing ground-breaking constitutional cases immediately after they are handed down. I hope they will do so dispassionately - in the fine tradition of legal scholars - and will produce legal literature that is of lasting value.

This volume of articles is further evidence of the maturity and commitment of our promising law students. I wish them every success in the years to come.

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

Message from the Dean

It is not easy for students to start a law journal; it is even more difficult for the enterprise to be sustained. I am very happy to see that the fifth volume of the *Hong Kong Student Law Review* is being published, and I offer, on behalf of all teaching staff of the Faculty, our warmest congratulations to the editorial team on the publication of this volume.

In the United States, most of the leading legal periodicals are edited and produced by law students. Only the best students have the opportunity to be recruited into the editorial team, and the competition for good grades in coursework is often for the purpose of getting into such editorial teams. It is an honour and a privilege to be on the team.

The situation is not exactly the same here in Hong Kong as we have a different tradition of legal education, and students do not always compete to become editors. But I think it is still an honour and a privilege to be on the editorial team. And it is also true for Hong Kong law students, as it is for their American counterparts, that editing and producing a law journal is an extremely valuable learning experience. One does not only learn to edit; one also learns to read critically, to think carefully, to write well, to research meticulously, and to work with others in teams. Most important of all, one learns how to create and manage a project and to take responsibility for its quality.

I am glad to see that our students take this responsibility seriously. When they graduate and begin to serve society in various positions, they will have new responsibilities to fulfil. I hope that the learning experience that they have in our university will prepare them well for such future challenges. And we as educators shall try our best to ensure that our students' learning experience can be as rich and meaningful as possible.

PROFESSOR ALBERT H Y CHEN
Dean
Faculty of Law
University of Hong Kong

March 2000

Preface

The millennium marks the third year that the Motherland has resumed Sovereignty over Hong Kong. Yet, the controversies that surround it has not yet died down, nor the insatiable thirst to resolve them quenched.

The articles in this volume reflect that attitude among law students of the faculty: The Basic Law and its reference to "Acts of States" are examined and discussed at length along with a critique on the likely implications that the Big Spender Case holds for the Region. With public confidence in the post-Handover government still at an all-time low, the article on Ombudsmän considers the theoretical basis for the existence and need for such an institution in light of the plunging faith in the Administration. Other areas tied in to the laws and structure of the PRC are explored in a piece on Mainland stock markets and a Chinese article is devoted to considering the protection of human rights in Hong Kong and issues that might be raised owing to discrepancies in the Chinese and English versions of the Bill of Rights. Finally, we are greatly privileged to have received a submission from a Mainland scholar whose enthusiasm and support of our Review is much valued.

This year, the Editorial team has also written an article tailored especially for the Review. This, we hope, will be seen as a fore-runner for many other articles to come that are not grade A assignments but truly reflect the views of the student body and their critiques on areas of law that they find controversial.

We are honoured to once again have Ms Elsie Leung, our Secretary for Justice, provide the Foreword for this edition. We would like to express our gratitude for her continued support of our Review and take this opportunity to wish her every success within her term of office.

We must also express our deepest appreciation to the Faculty for their encouragement and assistance of the Board in times of difficulty. A special note of thanks goes out to the Friends of the Faculty, without whose support we would never have come this far.

This volume of the Hong Kong Student Law Review started off with major changes and daring steps forward -- never before taken. For starters, this year we have two Editors-in-Chief as opposed to the traditional one and the size of our editorial team has been greatly reduced to maintain efficiency. Owing to this, we are well aware of the added work load that the team has had to face with and we would like to take this opportunity to thank all those who diligently put their time and effort to make the publication of this volume possible.

We hope you will enjoy this latest edition.

Melissa Chim
Janice Leung
Editors-in-Chief

April 2000

THE FABLE OF BASIC LAW ACTS OF STATE

A LEGAL MYSTERY FOR THE HONG KONG SPECIAL ADMINISTRATIVE REGION

JASON WU CHI-HANG

I. Prelude

Art 19 of the *Basic Law* (*BL* art 19) and s 4(2) of the Hong Kong *Court of Final Appeal Ordinance*[1] (*CFAO* s 4(2)) oust the jurisdiction of Hong Kong courts over "acts of state". Yet, these provisions are silent as to what constitutes "acts of state", who may commit acts of state and who decides what are acts of state, thus leaving a legal mystery for the HKSAR courts to solve. As remarked by Professor Roda Mushkat, the incorporation in the *CFAO* of undefined (or loosely defined) constraints casts doubts on the power in the *Joint Declaration* to vest the Court with the "power of final adjudication"[2]. Added to this legal mystery is the interaction of the doctrine of acts of state with the strange and controversial provision in *BL* art 19 that,

> The courts of the Hong Kong Special Administrative Region shall have jurisdiction over all cases in the Region, except that the restrictions on their jurisdiction imposed by the legal system and principles previously in force in Hong Kong shall be maintained.

This essay is a brief investigation of the contents of the doctrine of acts of state as well as its legal implications on the jurisdiction of HKSAR courts.

A. Basic Presumptions

To facilitate the analysis that follows, several presumptions have to be made.

1. The doctrine of acts of state concerns not only the acts of state in which the court situates, but also the foreign sovereign acts. Such a presumption is adopted because in a comparative study of other legal cultures, the doctrine usually has an international perspective (see in particular the American jurisprudence below). In fact, Lord Denning in *Occidental Petroleum Corp v Buttes Gas & Oil Co*[3] recognized three kinds of acts of state, the second of which is the US style of respect for foreign sovereign acts.

Having said that, since art 19 of the *Basic Law* is found in Chapter II, which concerns the relationship between the Central People's Government (CPG) and the HKSAR, the doctrine of acts of state in *BL* art 19 seems to exclude foreign sovereign acts[4]. However, the international perspective of the doctrine will still be mentioned in Part I of this essay to complete our analysis.

2. In the English common law system, acts of state usually concern executive acts. Yet,

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1 *Hong Kong Court of Final Appeal Ordinance*, Cap 484.

2 Mushkat, R, *One Country, Two International Legal Personalities: The case of Hong Kong*,(Hong Kong: Hong Kong University Press, 1997) p 159.

3 *Occidental Petroleum Corp v Buttes Gas & Oil Co* [1975] 1 QB 557.

4 See Part III " Interpretation of the Basic Law" below.

there is academic opinion that other branches can also commit acts of state[5]. Furthermore, if only executive acts were to be counted as acts of state, this would mean that it has already been presumed that the separation of powers model of government is a precondition to the existence of acts of state. If the act of state in question is a foreign sovereign act, there will be no need for the domestic court to trouble itself over the separation of powers of a foreign state[6]. In our comparative study of the Chinese understanding of the doctrine, it is better to bear in mind that no real separation of power is rooted in the Chinese legal order. In particular, the National People's Congress (NPC) and its Standing Committee (SCNPC) are not merely organs. Their "decisions" and "resolutions" may also be viewed as executive acts. Hence to facilitate our analysis, it is better not to assume that only the nominal executive branch can commit acts of state.

3. The recent amendment to s 66 of the *Interpretation and General Clauses Ordinance*[7] (*IGCO*) and the substitution for "Crown" by "State" in s 2 of the *IGCO* does not pose direct implications on the act of state doctrine. Basically, the amendment was directed to free the "state" from the ordinances of Hong Kong in the absence of express provision or necessary implications. It does not imply that any act done by the "State" would automatically be elevated to the status of act of state. The term act of state carries with it special meaning and it is of paramount importance that no arbitrary meaning is given to this term.

B. Structure of the Present Thesis

The essay's main body will be divided into 3 parts. Part II "Portraits of Acts of State" will focus on different notions of acts of state and their respective implications over the HKSAR courts' jurisdiction. Part III " Interpretation of the Basic Law" will give a short analysis as to which notion of the doctrine will govern the HKSAR in light of the *BL* mechanism and the issue of "facts of state". Part IV " Interaction" will deal with the interaction between the doctrine and the provision in *BL* art 19 that 'The courts of the Hong Kong Special Administrative Region shall have jurisdiction over all cases in the Region, except that the restrictions on their jurisdiction imposed by the legal system previously in force in Hong Kong shall be maintained.' Part V, "What is Left Behind Now?" will discuss what are the "remains" of the acts of state after the analysis in previous Parts. A diagram is also produced for easy reference.

II. Portraits of Acts of State

The vagueness of *BL* art 19 and *CFAO* s 4(2) points to the possibility of diverse interpretations of acts of state. Seemingly, the common law notion has a direct bearing on its interpretation because the *BL* provides for continuity of common law in the HKSAR[8]. Yet, the former Solicitor-General Daniel Fung Wah Kin suggested that the fact of "one country two systems" would make the application of the doctrine slightly different[9]. After

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5 Wang, Guiguo, "A Comparative Study in the Acts of State Doctrine With Special Reference to the Hong Kong Court of Final Appeal", in Wang, G, and Wei Zhengying (eds), *Legal Development in China – Market Economy and Law* (London: Sweet and Maxwell, 1996) at p 277.

6 Singer, M, "The Act of State Doctrine of the United Kingdom: An Analysis with Comparisons to United States Practice" [1981] 75 AJIL 283 at 295.

7 *The Interpretation and General Clauses Ordinance* (Cap 1).

8 See for example art 8, art 18 *Basic Law*.

9 "Solicitor General Rejects Call Over Acts of State", *South China Morning Post*, May 20 1995.

the 1997 handover, landmark cases like the *David Ma* case[10] resuscitated academic discussion over interpretation of the doctrine. Hence, it is of great concern to scrutinize not only the common law approach but also the positions of other jurisdictions regarding acts of state to enrich our understanding. (Yet, this paper will still attach much weight to the common law notion. The civil law notion will not be analyzed in depth because the doctrine was born out of the common law cultures and Hong Kong adopts the common law).

A. Common Law Notion

Any assertion that there is a single common law notion of the doctrine is also misleading. The indiscriminate use of the term "acts of state" to cover different situations has troubled the House of Lords in *Buttes Gas v Hammer*[11]. The reasons for the complexity of the common law doctrine are manifold. Firstly, both English and American jurisprudence contribute to its development. The diversity in their applications of the doctrine makes it obligatory to embark on a comparative analysis. Secondly, the practice of cross-references to other schools of jurisprudence by the English and American courts to found their decisions is not at all lacking. Several important judicial decisions in England have even proceeded to harmonize or unite application of acts of state in both jurisdictions. When two distinct streams begin to merge together, any clear-cut analysis would easily get caught into the torrent. Thirdly, the Anglo-American doctrines are heavily influenced by international law. Interestingly, far from being a set of fixed rules, international norms are ever evolving to adapt to the modern world. The transformation of international norms plays a role in modifying the conceptual framework of acts of state.

1. English Jurisprudence:

The effect of acts of state is that the court cannot question the validity of the alleged acts of state[12]. Yet, it is for the court to decide whether the acts complained of really invokes an application of the doctrine[13]. The rationale behind the rule is that an act of state is essentially a manifestation of sovereign power and hence cannot be challenged by municipal courts[14].

The "Classic English Act of State": Act of State by the Crown

The editor of the *Halsbury's Laws of England* defines act of state as "a prerogative act of policy in the field of foreign affairs performed by the Crown in the course of its relationship with another state or its subject"[15]. As written in Keir and Lawson's *Cases in Constitutional Law*[16], "it is customary to describe the acts of Crown in foreign affairs not as Prerogative acts but acts of state". Curiously, the dichotomy between the exercise of the Crown's power in domestic affairs on the one hand, and that in foreign affairs on the other brings about totally different legal effects for the exercise of much the same power. The origin of such demarcation took place in the 17th century. In *Entick v Carrington*[17], the Secretary of State,

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[10] *HKSAR v David Ma Wai-kwan* [1997] 2 HKC 315.
[11] *Buttes Gas v Hammer* [1982] AC. 888.
[12] *Johnstone v Pedlar* [1921] 2 AC. 262 at 290, per Lord Summer.
[13] *Nissan v Attorney-General* [1970] AC. 179 at 237, per Lord Pearson.
[14] *Salaman v Secretary of State for India* [1906] 1 KB 613, at 639, per Fletcher Moulton LJ.
[15] *Halsbury's Laws of England* vol 18 (4th ed), p 725.
[16] Keir,D, Lawson, H, *Cases in Constitutional Law* (Oxford: Clarendon Press, 6th edn, 1979) p 155.
[17] *Entick v Carrington* (1765) 19 State Trials 1029, quoted by Singer, *supra* note 6 at 288.

acting in the King's name, authorized a search of plaintiff's house. The plaintiff sued for trespass against the persons conducting the search. Lord Camden, the then Lord Chancellor, made it clear that royal authority would not oust the jurisdiction of the court. He based his reasoning on John Locke's philosophy that men entered into society to secure their properties and the Crown could not take away but to protect the sacred property rights of British persons. In contrast, in *Buron v Denman*,[18] the foreigners, not having entered into the social contract, did not gain the protection of the Crown. Henceafter, the exercise of prerogative in foreign affairs directed towards foreigners were singled out as acts of state, ousting the court's jurisdiction.

Such classic English-type acts of state are further categorized by academics, thus pointing to various acts of state[19]. For the sake of simplicity, I will discuss only intergovernmental acts of state and acts of state against individuals. Such simple classification is based on the nature of the claim. If the claim is one concerning an act of the Crown directed towards a foreign government, the act will be classified as an "intergovernmental act of state". If the claim involves an act which implicates individuals, the act will be typed under "acts of state against individuals".

a. Intergovernmental Act of State

"It is an act of the executive *vis-a-vis* another government which incidentally affects individuals but which gives no rights enforceable against the Crown[20]". It is the independent state's assertion of its sovereignty in international affairs and does not, *prima facie*, seek to disrupt the rights of its citizens[21]. These sovereign acts are subject only to international law and the municipal courts are not placed in a position to sit in judgment over them. Examples of such acts are annexation of territory and the administration of treaties[22].

Subsequent cases witnessed the extension of the doctrine's scope of application. It involves the expropriation of private properties in newly acquired land even though the treaty of cession stipulated that the rights of the inhabitants would be respected[23]. It seemed that any imposition of imperial will on the inhabitants will take shelter under the exercise of sovereign power *vis-a-vis* foreigners. In *Winfat Enterprise (HK) Co Ltd v Atttorney General*[24], the Judicial Committee of the Privy Council decided that the municipal court could not enforce the non-expropriation clause in the *Convention of Peking* 1898. Hence, no municipal courts could question the expropriation by the Crown which is alleged to be an act of state. The autocratic nature of the like decisions has paved the way for unrestrained executive actions applying under the guise of intergovernmental acts of state.

Yet, there are still limitations on the use of this notion of acts of state. Where the court finds that the act is done simply to assert a legal right rather than for matter of international policy, the doctrine will not assist the executive government[25]. Furthermore, a statute may oust the

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18 *Buron v Denman* (1848) 2 Ex. 167.
19 Wesley-Smith, P, *Constitutional and Administrative Law in Hong Kong* (Hong Kong: Longman, 1994) pp 91-107.
20 *Ibid* p 92.
21 *Ibid*
22 *Rustomjee v The Queen* (1876) 1 QBD 487.
23 *Supra* note.19 p 94.
24 *Winfat Enterprise (HK) Co Ltd v Attorney General* [1985] WLR 786 at 790, 791.
25 *Supra* note 19 p 103.

application of the doctrine if it provides a cause of action for the aggrieved party[26].

b. Acts of State Against Individuals

These are the executive acts that directly infringe on an individual rights and interests[27]. They differ from intergovernmental acts of state which indirectly affect individual rights. To establish the doctrine to defeat a claim against the executive, certain conditions have to be satisfied. First, the act must be a foreign policy decision made by the Crown (i.e. the sovereign in the UK)[28]. Secondly, it applies only if the act occurs on foreign territory against an alien or the act is committed within the realm (i.e. Britain proper) against a subject of an enemy state[29]. It does not apply to a suit brought by a subject of a friendly nation within the realm[30] but the common law is uncertain in cases where the act is directed towards a British proper outside the realm[31].

Operations of the Notion in Hong Kong if Adopted

Concerning the intergovernmental acts of state, there is an issue as to who can commit such an act. We focus on the acts of "our sovereign". Before the handover, Hong Kong was a British colony. The "Crown" acting in its executive authority that commit acts of state would be the Crown in the UK and in HK. It has been suggested that since most of the cases concerning acts of state concerned the jurisdiction of the UK courts, the Crown is only that in UK[32]. If the act could only be done by the Crown in the UK, the acts of state doctrine would pose no substantial impact on Hong Kong's jurisdiction because the colonial courts could hardly entertain a claim against the act done by the Crown in the UK[33]. Hence, only when the Crown in Hong Kong commits an act of state would the doctrine become more meaningful[34]. The position is that the *Crown Proceedings Ordinance*[35] authorizes proceedings against acts of the Crown carried out in their capacity as the executive authority of Hong Kong[36]. The plea of acts of state may deny the Hong Kong courts' jurisdiction over acts committed by the Crown in Hong Kong.

After the handover, the Crown in Hong Kong is replaced by the HKSAR government. Under the *Joint Declaration* and the *Basic Law*, the HKSAR is endowed with international capacity separate from that of China[37]. The SAR government is entitled to maintain and develop relations with states and international organizations[38], conclude and implement treaties as well as participate in international organizations or conferences[39]. Arguably, although HK is not a sovereign state, its entitlement to such a high degree of external power may support the claim that the HKSAR government can commit acts of state via its

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26 *Supra* note 15 at 726.
27 *Supra* note 19 p 92.
28 *Ibid* p 103.
29 *Ibid.*
30 *Ibid*
31 *Ibid* p 105.
32 Wade, E C S, Bradley, A W, *Constitutional and Administrative Law*, (London: Longman, 1985) p 318.
33 Tai, B, "The Jurisprudence of the Courts of the Hong Kong Special Administrative Region" in Lee, A, (ed) , *Law Lectures for Practitioners 1998*, p 113.
34 *Ibid*
35 *Crown Proceedings Ordinance*, (Cap 300).
36 *Supra* note 33 p 85.
37 *Supra* note 2 p 1-44.
38 See for example art 116 *Basic Law*.
39 *Ibid.*

transactions with foreign countries. The entitlement to such an extent of external power renders the HKSAR government capable of committing acts of state. The HKSAR courts will not sit in judgment as to the legality of the acts but they can still receive the case.[40] On the other hand, the Crown in the UK is replaced by the executive government of the PRC. Under the Chinese Constitution, the Central Authority comprising the President and the State Council is the executive organ of the Central People's Government (CPG). Again, it is unlikely that the HKSAR courts can have the jurisdiction to receive a case concerning acts committed by the Central Authority[41]. Therefore, the acts of state committed by the Central Authority are unlikely to pose substantial influence on the jurisdiction of the HKSAR courts.

Many other uncertainties are left behind by the notion of acts of state against individuals. Before the handover, the position seemed to be very clear. By application of English jurisprudence, Hong Kong is outside the British realm and Hong Kong people may be treated as aliens[42]. The Crown in the UK could commit acts of state in Hong Kong against the Hong Kong people but the doctrine would not avail the Crown in the UK if the alleged acts were directed towards the Hong Kong people within Britain proper[43]. However the post-handover position is ambiguous. Under the "one country" proposition, the HKSAR ought not be regarded as outside Chinese territory. Nor should most of the Hong Kong Chinese citizens be treated as aliens Hence, the Chinese government cannot use acts of state against individual as a shield for direct infringement on Hong Kong people's interests within the HKSAR. (Nevertheless, the recent academic discussion of the extraterritorial application of the Chinese Criminal Law to the HKSAR casts doubts on our presumption[44]. If the Chinese Criminal Law applies to Hong Kong, Hong Kong may also be regarded as outside Chinese territory).

On the other hand, the HKSAR government cannot plead acts of state against individuals in the HKSAR because Hong Kong people within the territory are obviously under its protection.

Another question left behind by the English jurisprudence is the scope of the doctrine. As mentioned above, intergovernmental acts of state extend outside their original ambits, for instance, the conclusion of treaties, to the extent of an expropriation of private properties. Professor Peter Wesley-Smith commented that the "rationale" - the general welfare of the state and the inappropriateness of judicial review on matters of high policy - suggests even the possibility of executive murder in ceded territory[45]. After the handover, it has been of great concern that case law will turn the promise in the *Joint Declaration* and the *Basic Law* on the rights of leases in the New Territories to nothing more than a moral equity without legal protection[46].

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40 Article 35 *BL* states that Hong Kong residents shall have the right to institute legal proceedings in the courts against the acts of the executive authorities and their personnel.

41 See Part III below.

42 British nationality and citizenship are strictly defined. See Wesley-Smith, *supra* note 19 p 327-331.

43 *Ibid* p 92.

44 The relevant part of art 7 of the *Chinese Criminal Law* reads: "This Law shall be applicable to any citizens of the People's Republic of China who commits a crime prescribed in this Law outside the territory and territorial waters and space of the People's Republic of China...) if HKSAR is affected by the extraterritorial application of this law, it is suspected that the Chinese legal practitioner treats HKSAR as "outside the territory of China".

45 *Supra* note 19 p 94-95.

46 *Ibid* p 97.

Hence, even the case law applicable to Hong Kong are is to invite an autocratic executive rule. Article 19 of the *Basic Law* ousts the HKSAR courts' jurisdiction over acts of state such as defence and foreign affairs. Now it is clear that defence and foreign affairs are not the only examples of typically English acts of state. Nonetheless, the autocratic judgments were decided mainly during the Era of Imperialism. The detailed administration of the newly acquired territories was outside the contemplation of the Legislature and the Judiciary. Thus the judges chose to evade the issue by invoking the doctrine[47]. Such judicial restraints have already become anachronistic. Furthermore, the expropriation of land owned by subjects or friendly aliens is governed by acts of state against individuals, and such acts will not be taken outside the courts' cognizance. Moreover, the common law also provides a safeguard against unrestrained "inflation" of the scope of the doctrine by granting power to the court to decide whether the alleged acts constitutes an act of state. For instance, the House of Lords demonstrated in *Nissan* that the acts of state doctrine was not to be unduly broadened so that ordinary routine governmental acts are excluded[48].

The Hidden Current in English Jurisprudence: Act of State by Foreign Sovereign

The above analysis shows that classic English-type acts of state are committed by the Crown. Yet, it fleshes out only half the picture of "act of state in the English sense". Another notion of the English act of state has stayed in the backwater for long time until the US judiciary discovered it and transformed it into an American type of act of state, ousting court's power to inquire into the validity of foreign sovereign acts. Later, English courts made cross-references to this American notion and proclaimed that English law and American law were the same on this point.

The hidden current in England appeared as early as 1674 in *Blad v Bamfield*[49]. In that case, the plaintiff was arrested in England for trespass and trover arising from his seizure of the defendants' goods in Iceland. The plaintiff sought from the Court of Chancery a perpetual injunction restraining the action against him. He justified his seizure on the grounds that he obtained from the King of Denmark letters patent for the sole trade in Iceland. The defendants, on the other hand, claimed that they had a right of trade in Iceland by virtue of the *Articles of Peace* with Denmark. Any purported grant of patent by the King of Denmark was contrary to the terms of the *Articles* and therefore invalid. In response to the defendants' insistence upon the *Articles of Peace* justifying the arrest of the plaintiff and attack on the injunction, Lord Nottingham stated that:

> "To send it to trial at law, where either the Court must pretend to judge of the validity of the king's letters patent in Denmark, or of the exposition and meaning of the articles of peace; or that a common jury should try whether the English have a right to trade in Iceland, is monstrous and absurd."[50]

A much more general principle restraining judicial scrutiny of foreign sovereign act was propounded in *Duke of Brunswick v The King of Hanover*[51]. The crux of the case was an instrument executed by King William IV confirmed by the German Diet which provided that the defendant, who was also a British subject, was to be the guardian of the plaintiff. Under

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47 Morris, H F, Read, J A, *Indirect Rule and the Search for Justice* (Oxford: Clarendon Press, 1972) pp 59-60, quoted in Wesley-Smith *supra* note 19 p 98.

48 *Supra* note 13 at 237 per Lord Pearson.

49 *Blad v Bamfield* (1674) 3 Swans.604.

50 *Ibid* at 607.

51 *Duke of Brunswick v The King of Hanover* (1848) 2 HL Cas 1.

the authority of the guardianship, the defendant sold properties of the plaintiff. The plaintiff started an action against the defendant for an account of certain funds seized in Brunswick and applied to the court to declare the instrument null and void. Giving judgment for the defendant, Lord Cottenham stated:

> "A foreign sovereign coming into this country cannot be responsible for an act done in his Sovereign character in his own country; whether it be an act right or wrong, whether according to the constitution or not, the courts of this country cannot sit in judgment upon an act of a foreign Sovereign effected by virtue of his sovereign authority abroad, an act not done as a British subject, but supposed to be done in the exercise of his authority vested in him as a Sovereign."[52]

Singer commented that the *Duke of Brunswick case* was largely a sovereign immunity case, namely whether a sovereign immunity could be claimed by a British subject. Thus, Lord Cottenham's "sit in judgment" passage may not be clear authority for the non-justiciability of "foreign acts of state[53]". Nonetheless, it is this "sit in judgment" notion that formed the basis of the American notion of act of state.

Still, the hidden current remained silent until the Court of Appeal in *Luther v Sagor*[54] and *Princess Paley Olga v Weisz*[55] referred to American jurisprudence to found decisions on judicial restraint to pass on validity of foreign sovereign acts. In the former, the Court of Appeal added a third ground to the two grounds given by the trial judge for holding that the issue was not triable, and that the US courts drew this inference from the intrinsic nature of sovereignty. In the latter, Scrutton LJ, declared that English law on the point was the same as American law.

The Court of Appeal in these two cases may be criticized as being oblivious to the distinct rationale underlying the American doctrine of act of state. It was an oversimplification to state that English law and American law are the same. Even the US court in *Sabbatino*[56] held that the third ground of decision in *Princess Paley Olga* did not represent the law of the US.

Legal criticisms aside, these two Court of Appeal cases were important for their judicial experiments to harmonize the Anglo-American views and to stir up the hidden current in English jurisprudence. Later, both the Court of Appeal[57] and the House of Lords in *Buttes Gas v Hammer*[58] embarked on a thorough study of "act of state". Lord Wilberforce in the House of Lords tried to deduce from both English and American jurisprudence a general proposition of judicial restraint in the examination of the validity of foreign sovereign acts. Lord Wilberforce stated:

> "In my opinion there is, and for long has been, such a general principle, starting in English law, adopted and generalized in the law of the United States of American which is effective and compelling in English courts. This principle is not one of discretion, but is inherent in the very nature of the judicial process."[59]

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52 *Ibid* at 17.
53 *Supra* note 5 p 284.
54 *Luther v Sagor* [1921] 3 KB 532.
55 *Princess Paley Olga v Weisz* [1929] 1 KB 718.
56 *Sabbatino* 376 U.S. 398.
57 *Supra* note 2.
58 *Supra* note 11.
59 *Ibid* at 932.

2. American Jurisprudence: Act of State by Foreign Sovereign

The act of state doctrine in the US is stated in the Third Restatement of the *Foreign Relations Law* of the United States as follows:

> "In the absence of a treaty or other unambiguous agreement regarding controlling legal principles, courts in the United States will generally refrain from examining the validity of a taking by a foreign state of property within its own territory, or from sitting in judgment on other acts of a governmental character done by a foreign state within its own territory and applicable there."[60]

The nature of the US act of state doctrine concerns judicial restraint to examine the acts of foreign sovereign done within its territory. Unlike the classic English-type act of state, the US doctrine does not apply to the acts of the state where the court is situated (i.e. the acts of US government)[61]. However, the US courts have exercised judicial restraint to pass on validity of US governmental acts along the line of "Political Question Doctrine".

Origin and Rationale

As recognized by Lord Wilberforce in the *Buttes case*, the *Duke of Brunswick case* in the House of Lords was followed in *Underhill v Hernandez*[62] to form the basis of the act of state doctrine in the US. In the US Supreme Court, Fuller CJ borrowed the "sit in judgment" phraseology employed by Lord Cottenham and declared:

> "Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory. Redress of grievances by reason of such acts must be obtained through the means open to be availed of by sovereign powers as between themselves."[63]

The above sweepingly wide term of "respecting independence of every other sovereign States" imbued with the US act of state doctrine an international flavour. Apparently, the US act of state rule based on *Underhill* is similar to sovereign immunity rule required by international law which emphasizes respect of equality among the sovereign states[64]. Early cases in line with the *Underhill*, such as the *Oetjen case*,[65] reinforce this rationale by declaring that "to permit the validity of the acts of one sovereign State to be reexamined and perhaps condemned by the courts of another would very certainly imperil the amicable relations between governments and vex the peace of nations"[66].

However, several US cases have tried to derive jurisprudential authority for acts of state not from international law but from the doctrine of separation of powers as enshrined in the US Constitution. The Supreme Court in *Sabbatino* stated that the doctrine was compelled neither by international law nor the US Constitution but it has constitutional underpinnings. The Supreme Court re-articulated the essence of the doctrine:

> " It arises out of the basic relationships between branches of government in a system of separation

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60 Restatement (Third) § 443.
61 *Ibid* cmt.a.
62 *Underhill v Hernandez* 168 U S 250 (1897).
63 *Ibid* at 252.
64 *Supra* note60 cmt.a.
65 *Oetjen case*, 246 US 297.
66 *Ibid* at 303-304.

> of powers. It concerns the competency of the dissimilar institutions to make and implement particular kinds of decisions in the area of international relations."[67]

The idea that the US acts of state doctrine is derived from separation of powers was reiterated in the Supreme Court by Justice Scalia in *W S Kirkpatrick v Environmental Tectonics*[68].

Out of the logic of separation of powers, the US courts have progressed from refusing to judge the validity of foreign sovereign acts to even refusing to acknowledge that the acts may be offensive in character, for fear that the Executive might be embarrassed in its conduct of foreign policy[69]. Hence, the acts of state doctrine was raised in many cases to foreclose scrutiny of the motive of foreign governmental acts. Such judicial practice based on "fear of embarrassment" gained no repercussions in English cases. In contrast, the English courts can freely admit evidence showing the motive of foreign sovereign[70]. Yet, the scope of application of act of state in the US has recently been narrowed down by the Supreme Court in *Environmental Tectonics* to cases requiring courts to ascertain validity of the foreign sovereign acts only. It is foreseeable that the US courts, in applying the acts of state doctrine, will rid themselves from the influence of the embarrassment doctrine in the near future.

Bearing in mind that Lord Wilberforce in *Buttes Gas* had tired to synthesize the English and the American notions of acts of state into a general proposition of judicial restraint. Whether there will be parallel judicial development in the US to unite the two notions together is uncertain.

3. Interaction between the Anglo-American Acts of State and the International Law

It is worth noting that one major reason why the US Supreme Court in *Sabbatino* refused to exercise its jurisdiction over foreign acts was the lack of unambiguous rules of international law for the court to apply. The Supreme Court stated:

> "It should be apparent that the greater the degree of codification or consensus concerning a particular area of international law, the more appropriate it is for the judiciary to render decisions regarding it since the courts can then focus on the application of an agreed principle to circumstances of fact rather than on the sensitive task of establishing a principle not inconsistent with the national interest of with international justice"[71].

In England, the House of Lords in *Buttes Gas* also refused to examine the validity of foreign sovereign acts on the grounds similar to that employed by the Supreme Court in *Sabbatino*. Lord Wilberforce stated:

> "Leaving aside all possibility of embarrassment in our foreign relations (which it can be said not to have drawn to the attention of the court by the executive) there are – to follow the Fifth Circuit Court of Appeals - no judicial or manageable standards by which to judge these issues, or to adopt another phrase (form a passage not quoted), the court would be in a judicial no-man's land: the court would be asked to review transactions in which four sovereign states were involved, which they had brought to a precarious settlement, after diplomacy and the use of force., and to say that

[67] *Supra* note 56 at 423.
[68] *W S Kirkpatrick v Environmental Tectonics* 493 US 400 (1990).
[69] *Hunt v Mobil Oil Corp*, 550 F.2d 68 (2nd Cir1977).
[70] *Czarnikow v Rolimpex*, [1978] 3 WLR 274.
[71] *Supra* note 56 at 428.

at least part of these were unlawful under international law"[72].

The lack of precise international rules is in effect one of the greatest hindrances for the court to exercise jurisdiction. This partly explains why the courts have devised the act of state doctrine to shelter themselves from the storm of political issues.

However, the development of international law should not be overlooked. If a certain rule of international law has acquired the status of *jus cogens*, meaning a peremptory norm which overrides all other rules of international law, the application of such a norm will not render the courts to descend into a judicial no-man's land. The Third Restatement has predicted that "a claim arising out of an alleged violation of fundamental human rights- for instance, a claim on behalf of a victim of torture or genocide-would (if otherwise sustainable) probably not be defeated be the act of state doctrine, since the accepted international law of human rights is well-established and contemplates external scrutiny of such acts"[73].

A claim arising out of an allegation of violation of fundamental human rights came to the House of Lords in the case *Ex parte Pinochet case*[74] and the rehearing in the House of Lords in Ex parte Pinochet (No 3).[75]

Ex parte Pinochet is a landmark case in that it is the first case where a former Head of State was denied immunity by a municipal court. The main theme in the House of Lord decision was that no immunity nor doctrine of acts of state would apply to protect those who commit high crimes of international law. For the purpose of our analysis, the House of Lords decision also gives a vivid example of how a well-developed international norm would frustrate the claim of acts of state.

Senator Pinochet, the former Head of State of Chile, while undertaking surgery in London, was arrested under warrants issued by the UK magistrates at the request of a Spanish Court. The divisional court quashed the warrants on the grounds that Pinochet was entitled to state immunity. The Crown Prosecution Service appealed to the House of Lords, with Amnesty International as interveners. At the first hearing, the House of Lords, by a majority of three to two, decided that Pinochet was not entitled to state immunity. The judgment of the first hearing was set aside on the grounds that the Committee was not properly constituted. The appeal came for re-hearing and the House of Lords, by a majority of six to one, decided that Pinochet was not immuned from torture and conspiracy of torture as regards to acts done after 8 December 1988, when the UK ratified the *Torture Convention*, (or, for Lord Hutton, the relevant cut-off date was 29 September, 1988 when the Act of 1988 incorporating the *Torture Convention* took effect).

The first hearing and the re-hearing of *Ex Parte Pinochet* dealt mainly with the issue whether limited immunity (immunity *ratione materiae*) is afforded to former head of state Pinocet. Yet in the first hearing, the Law Lords still devoted much coverage of the judgments to consider the issue of acts of state. Lord Steyn stated that crimes of genocide, torture, hostage taking and crimes against humanity are well-established high crimes of customary

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72 *Supra* note 11 at 938.

73 *Supra* note 60 cmt.c.

74 *R v Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte (1) Amnesty International and others Intervening* [1998] 4 All ER 897.

75 *Regina v Bow Street metropolitan Stipendiary Magistrate and Others Ex Parte PINOCHET UGARTE (No 3)* [1999] 2 WLR.

international law and it was wrong for the English court to extend the acts of state rule to cover acts not permitted by international norms. Lord Nicholls also stated that when the Parliament has shown that a particular issue is justiciable, it would not be right for the court to exercise judicial restraint. In the re-hearing, the House of Lords did not give much consideration to the acts of state doctrine. Yet, the reasons for their decisions are still thought-provoking. Lord Browne-Wiilkinson, Lord Hope of Craighead, Lord Saville and Lord Hutton decided that immunity for former Head of State for torture cannot survive the ratification by Britain (or its incorporation into English law) of *the International Convention against Torture and other Cruel, Inhuman or Degrading Treatment*[76] 1984 which confers universal jurisdiction in all Convention states to extradite or prosecute public officials who commit acts of torture. Lord Phillips and Lord Millet even stated that long before the *Torture Convention* came into force, prohibition against state torture had become *jus cogens*. In his *dicta*, Lord Millet commented that the act of state did not differ in any material respect from a plea of immunity *ratione materiae*. Thus, a denial of sovereign immunity *ratione materiae* should be met by a parallel non-applicability of acts of state. Lord Saville, in his *dicta*, also commented that claims of acts of state or non-justiciability also failed because they were also inconsistent with the terms of the Convention.

The *Pinochet case* subordinates sovereignty to the protection of fundamental human rights. By resorting to the conceptions of *jus cogens* and international crimes to found this unprecedented decision, the speeches of the House of Lords were tantamount to proclaiming a new international legal order which affords great weight to certain basic values. Accordingly, the very premise of the non-justiciability of foreign sovereign acts has been shaken. It should be noted that the conceptual foundation of classic English-type of acts of state, which stresses the non-scrutiny of transactions among sovereign states, may also be undermined.

B. Civil Law Jurisprudence

Professor Wang Guiguo has analyzed the position of the continental systems over acts of state[77] and concluded that these countries largely follow the principles adopted by the common law jurisprudence using different terminology. The continental courts and legislation use the terms "acts of government" and "non-justiciable acts" instead of "acts of state". In general, the legal systems of France, Germany, the Netherlands, Italy and Belgium have adopt a similar position. As regards the acts performed by a foreign sovereign, the courts in continental countries tend not to assert their jurisdiction except when individual or private interests are affected. As for the acts of their own nations, the courts usually refrain from sitting in judgment if the acts concern foreign relations, major political matters and defence matters. But these countries are divided as to whether restrictive state immunity or absolute state immunity should be adopted.

C. Chinese Jurisprudence

Article 12 of the *Administrative Procedure Law* (*APL*) stipulates that the People's Court shall not receive suits against an "act of state in areas like national defence and foreign affairs." This provision deals with the relationship between the PRC government and Chinese nationals. It does not speak out the Chinese position for acts of another sovereign.

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76 *The International Convention against Torture and other Cruel, Inhuman or Degrading Treatment* 1984

77 *Supra* note 6 pp 265-270.

Professor Wang observed that the Chinese doctrine of acts of state is similar to that of the continental jurisdictions but also bears some influences of common law countries. True, the *APL* was adopted earlier than the *BL*, but the wording in the *APL* in respect of acts of state is a direct replica of the earlier draft of the *BL*. Those who drafted or interpreted the provisions of "acts of state" have also been exclusively trained in common law countries. Set against this complicated legal background, the Chinese approach towards acts committed by the PRC needs clarification.

Professor Luo Haocai indicated that Chinese scholars generally hold two views of the definition of acts of state. One is that it does not go beyond the ambit of defence and foreign affairs. The other view would treat all kinds of decisions made by the CPG in the exercise of its sovereign function as acts of state[78]. Luo went on to identify two facets of acts of state, one of which is that it is "a political act accomplished in the name of the state by the administrative organ of the state of its executive department, according to the constitution and laws, or upon authorization or delegation of power by the competent organ of the state[79]". The other characteristic of the doctrine includes a manifestation of sovereignty of state which is conducted in the interest of the whole state and for the basic interest of the people[80]". Specifically, whether a political act should be regarded as an act of state depends mainly on three factors. These are whether the act concerns the exercise of sovereign power; whether it concerns the fundamental interests of the whole people and that whether an act should be treated as an act of state ought not be determined merely according to the nature of the organ which has undertaken the act (hence suggesting that non-governmental organs may commit acts of state).

Other than Luo's opinions, Chinese scholars usually classify acts of state into 3 categories: foreign affairs, national defence and public interest. The first aspect is analogous to the common law or civil law approach. As to defence, it has been argued that certain administrative measures like the testing of strategic weapons, the preparation for war and conscription may also be included. If such a contention is adopted, any deaths or grave destruction caused by the test of new weapons within HKSAR would not fall under the court's cognizance. Acts performed for public interests is undefined, but Professor Wang has identified such acts to include the enforcement of martial law and special measures dealing with disasters[81].

Possible Operations on the HKSAR if the Notion Takes Effect

The Chinese approach carries with it a much more autocratic nature. Firstly, as regards the definition of "fundamental public interests" and the organs that can perform acts of state, will the arrest and detention of dissidents in HKSAR be regarded as vital to the fundamental interests of the state and therefore regarded as acts of state? Secondly, Art 12 of the *APL* operates to deny a court's jurisdiction to receive the case concerning acts of state. It seems to suggest that the acts are those directly infringing individual rights. As mentioned above, at common law, acts of state that directly infringe individuals rights do not always assist the government. In contrast, the Chinese notion does not contain similar safeguards.

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78 Luo, Haocai (ed), *The Chinese Judicial Review System*, (Beijing: Peking University Press 1993) p 308.

79 *Ibid.*

80 *Ibid.*

81 *Supra* note 6 at 275.

In addition, since the NPC or SCNPC are in fact both legislative and political organs, their decisions may be regarded as "political acts", thus falling within the Chinese definition of acts of state. Inherently, the NPC can amend the *BL* by passing a decision, claiming that it is an act of state. In reality, the Chinese scholars and officials have more than once articulated that the NPC decision to form the Provisional Legislative Council is an act of state. Although such allegations conflict with the common law notion of the doctrine, they seem to be logical under the Chinese legal framework.

III. Interpretation of the Basic Law

A. Which Notion Should Be Adopted?

From the above analysis, we can see that the acts of state doctrine comprises both "internal acts of sovereignty" and "foreign sovereign acts"; even in the Anglo-American common law culture. However, the fact that the term "acts of state" was mentioned in art 19 *BL* bears great implications. Article 19 of the *Basic Law* is found in Chapter II, the title of which is "Relationship between the Central Authorities and the Hong Kong Special Administrative Region". It seems unlikely that "acts of state" in this context is intended to cover foreign sovereign acts. In the "Report of the inquiry of acts of state and facts of state" (關於"國家行爲"和國家事實的研究報告), the writer (廖瑤珠), who was a member of the Drafting Committee of the Basic Law, also articulated that the issue facing the committee was whether the acts of state doctrine provided sufficient safeguard for the distribution of powers between the CPG and HKSAR. It is true that the phrase "acts of state" incorporated in the *CFAO* is not spelled out in such clarity, but it would be much more arbitrary for us to adopt two different interpretations for exactly the same phrase.

By the same token, even if the HKSAR government had the potential capacity to commit acts of state, the third sentence of *BL* art 19 does not contemplate so. However, under the "one country reality", the Central Authority can authorize the HKSAR government to commit acts of state.

Then, adhering to the internal acts of sovereign as the corner-stone, we shall go on to decide the scope of such acts. Should we adopt the common law notion or the Chinese notion? Seemingly, the continuation of the common law in the HKSAR as well as the fact that the concept had only begun developing in China[82] favour the common law approach. Yet, apart from being the HKSAR's constitution, the *Basic Law* can also be treated as a piece of national law in China. This duality might suggest that its interpretation is subject to a tension between two legal traditions. The Chief Justice's interpretation of *BL art* 24 and *BL art* 22 in light of the common law approach in *Ng Ka-ling and ors v Director of Immigration*[83] has invited acute criticism from the pro-Chinese camp. It is contended that the *Basic Law* should be interpreted in accordance with the Chinese understanding. Since the SAR legal system has yet to accumulate enough judicial precedents for the interpretation of the *Basic Law*, we find insufficient guidance for interpreting acts of state in the *Basic Law*[84].

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82 *Ibid* at 283, 285.

83 *Ng Ka-ling and ors v Director of Immigration* [1999] 1 HKLRD 315.

84 For a detailed analysis of the approach to the interpretation of the Basic Law, see Ghai, Y, *Hong Kong's New Constitutional Order* (Hong Kong: Hong Kong University Press, 1999) pp 189-231.

But one thing is almost certain: the ultimate interpretative power of *BL* art 19 lies in the hands of the SCNPC. First, paragraph 1 of *BL* art 158 expressly vests the power of interpretation to the SCNPC. Secondly, paragraph 3 of art 158 *BL* lays down the scheme by which provisions concerning affairs under the responsibility of the Central Authority or concerning the relationship between the Central authority and the HKSAR to the SCNPC for interpretation. Obviously, *BL* art 19 is one of these provisions. Thus, it is likely that the SCNPC will adopt a Chinese notion of acts of state. It is true that our position is that the doctrine should be interpreted in accordance with the common law notion and it is recommended that the NPC should accept our suggestion, nonetheless, the inherent legal framework may easily lead to a result that we do not desire.

The aforesaid analysis reveals that the Chinese legal understanding of the doctrine contains more inherent loopholes than the understanding of the common law or the European continental jurisprudence. Should the Chinese notion be adopted, the promised high degree of autonomy for HKASR as enshrined in the *Joint Declaration* and the *Basic Law* would become the mere benevolence of the CPG without any legal safeguards.

Having said that, we will see in Part IV that even if the Chinese notion were not adopted, the provision in *BL* art 19 as well as the constitutional framework in China would cause similar effects of acts of state.

B. Facts of State

BL art 19 also stipulates that the courts shall obtain a certificate from the Chief Executive concerning questions of facts of state whenever such questions arise in adjudication. The Chief Executive shall, on obtaining a certifying document, inform the CPG.

Facts of state at common law are related to defence and foreign affairs such as sovereign status of a foreign state or its heads, the commencement and termination of treaties, the commencement and termination of war as well as whether a government is recognized[85]. The courts will accept the facts stated by the Executive in certificates as binding on them.

Fact of state is not act of state. For example, a person alleged to have committed an offence in the HKSAR claims to be a foreign Head of State. Being uncertain as to the real status of this person, the HKSAR court will have to seek a certificate from the Chief Executive to ascertain his identity. If the certificate makes it clear that the accused is really a Head of State, the court will proceed to determine whether the common law gives the Head of State sovereign immunity. Hence, there is a potential safeguard that it is still for the court to determine on the facts provided whether such acts are really acts of state. We can be assured by this common law arrangement that the acts of government are not to be accepted as being acts of state merely because the government says they are provided that the SCNPC does not give broader meaning to acts of state.

Yet, according to Professor Wang, when a certificate includes not only facts of state but also an opinion, and there is no definite answer as to whether the CFA can ignore the opinion[86]. If the opinion states that the Central Authority will regard certain facts as acts of state (though they may not come under the common law notion of the doctrine), pressure on the CFA will

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85 *Supra* note 33 p 99.

86 *Supra* note 6 at 284.

be obvious.

IV. Interaction With Restrictions in BL art 19

Article 19 of the *Basic Law* briefly outlines the jurisdiction of the HKSAR. It provides for independent judicial power, including that of final adjudication for the HKSAR. It then states that the HKSAR shall have jurisdiction over all cases in the Region but the restrictions on Hong Kong's jurisdiction imposed by the legal system and principles previously in force shall be maintained. The phrase "legal system and principles" are capable of being interpreted as not only laws (statutory laws and common laws) but also all constitutional conventions and structural relationships within the colonial legal framework of Hong Kong[87]. Restrictions over Hong Kong's jurisdiction imposed by these colonial and British characteristics survive the handover. Even some previous laws not adopted by the SCNPC may be indirectly maintained by this provision should they impose restrictions on Hong Kong's jurisdiction before the handover[88].

Some of these restrictions bear some influence over our analysis of acts of state. Amongst them, Acts of the Sovereign, Laws enacted by the Sovereign and Sovereign Immunity directly interact with the acts of state doctrine.

A. Act of the Sovereign

1. Contents

Where a person is directly affected by the act of the sovereign in either the public law or private law sphere, the court may not have the power to receive the case. Before the handover, the Sovereign in Hong Kong was the British monarch (the literal meaning of "Crown"). The Crown exists in different and separate forms[89]. In her private capacities as the monarch, no civil actions can be brought against her. Yet, in her public capacities, she may act as Head of State of the UK (the Crown in right of the UK / Crown in UK) under the advice of her ministers. Thus Lord Diplock in *Town Investments Ltd v Department of the Environment*[90] equated the Crown as the government in the UK which comprises collectively and individually all of the Ministers of the Crown. At common law, the Crown was the executive authority of the colonial government[91]. In theory, she directly ruled Hong Kong in the past (through her capacity as Crown in her right of HK / Crown in HK)[92]. In practice the Crown in Hong Kong is merely the executive government of Hong Kong led by the Governor.

In the civil law sphere, after the passage of the *Crown Proceedings Ordinance* (*CPO*), the Crown in Hong Kong can be sued by her subjects[93]. But the Crown in her personal capacity and the Crown in the UK is not affected by this *Ordinance* and the common law position is that the courts in Hong Kong cannot receive the case[94]. If the Crown exercises prerogative

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87 *Supra* note 33 p 81.
88 *Ibid* 81-82.
89 *Supra* note 19 p 110.
90 *Town Investments Ltd v Department of the Environment* [1978] AC 359.
91 *Supra* note 33 p 83.
92 *Ibid.*
93 *Ibid* pp 83-84.
94 *Ibid* p 82.

or statutory powers which affects a person's interests, the individual cannot initiate a civil law action as the rights are not recognized at common law[95].

Yet in the public law sphere, the courts in Hong Kong could embark on a judicial review of the Crown's exercise of prerogative or statutory powers affecting a person's interests[96] or legitimate expectations[97]. Judicial review also applied to acts done by the Crown in HK[98]. However, it was not sure whether the acts done by the Crown in the UK were also subject to judicial review[99].

After the 1997 handover, the sovereign of the HKSAR is the PRC government. The PRC has no personal capacity. In its public capacity, it acts through the Central People's government (comprising the President and the State Council). The HKSAR cannot receive a case against the CPG in civil law sphere. In the public law sphere, pre-handover uncertainties survive. The HKSAR government replaces the Crown in Hong Kong. Owing to art 35 *BL*, the SAR courts can receive cases of private and public law spheres against the SAR government.

2. Interaction With Acts of State

Acts of state may include acts of the sovereign (assuming that the acts of state are not strictly confined to executive acts). Where the acts of state doctrine denies the HKSAR courts' power to judge the legality of the acts, the acts of sovereign doctrine renders the HKSAR courts unable to receive the case. Hence the acts of sovereign doctrine has already "thrown away" most of the alleged acts of state cases committed by the CPG. The only acts of state cases that may pass through this first hurdle are those public law cases committed by the CPG (assuming that the CCSU principle applies[100]) as well as the civil and public law cases committed by the SAR government.

3. Laws Enacted by the Sovereign[101]

Another structural restriction on Hong Kong courts' jurisdiction before the transfer of sovereignty was that the colonial courts of Hong Kong could not question the legality of the Parliamentary Acts even if they contradicted the Letters Patent. The HKSAR Court of Appeal in the *David Ma case* drew a simple analogy between Parliamentary Acts and the decisions of resolutions passed by the NPC and SCNPC. As argued by Assistant Professor Benny Tai, this analogy was wrong but the result was correct[102]. According to Tai, under the Chinese constitutional order and the theoretical framework, neither regional courts nor the Supreme Peoples' Court could challenge the constitutionality of NPC or SCNPC decisions. However, in the *Ng Ka-ling case*[103], the Court of Final Appeal seemed to have decided that

95 *Ibid*
96 *Council of Civil service Union v Minister for the Civil Service* [1985] AC 347.
97 Riggs, R E, "Legitimate Expectation and Procedural Fairness in English Law"(1988) 36 American Journal of Comparative Law 395. See also *R v Inland Revenue Commissioners, ex parte MFK Underwriting* [1990] 1 WLR 1545.
98 *Supra* note 33 pp 84-85.
99 *Ibid.*
100 *Supra* note 96.
101 This paper will focus only on the NPC and SCNPC decisions. And it shall be assumed that the NPC can commit acts of state, otherwise, this part is meaningless.
102 *Supra* note 33 pp105-110.
103 *Supra* note 83.

HKSAR courts can review the validity of the NPC decisions on their compatibility with the *Basic Law*. This part of the judgment has invited acute criticism from Chinese legal scholars as well as the previous draftsmen of the *Basic Law* and this would probably be "dealt with" by China by means not yet known.

4. Acts of State

As mentioned before, even if we assumed that only the executive can commit acts of state, the decisions of the NPC and SCNPC can still be regarded as executive acts, thus forming the potential pool for acts of state (This shall henceforth be referred to as NPC acts of state).

If the simple analogy in the *David Ma case* is correct (though this is unlikely to be so), the provision in- art 19 *BL* that HKSAR courts are subject to existing restrictions has already ousted the HKSAR's jurisdiction over NPC acts of state by maintaining the colonial legal framework. Regardless of whether the Chinese practice will regard certain NPC decisions as acts of state, the provision in art 19 *BL* that the HKSAR courts have no jurisdiction over acts of state will be of no practical significance on the SAR courts' jurisdiction.

This is the case even if the *Ma case* analogy is wrong and Tai's argument is correct.

V. What is Left Behind Now?

A. The Possible Pools of Act of State Cases

A. The Central Authorities' acts:
  a. In the civil law sphere
  b. In the public law sphere
B. NPC or SCNPC Decisions
C. The HKSAR government's acts:
  a. In the civil law sphere
  b. In the public law sphere
D. The sovereign acts of foreign states.

B. Elimination

A. Jurisdiction over the acts of Central Authorities in the civil law sphere has already been eliminated by art 19 *BL* (applying the colonial "Acts of Sovereign" doctrine). There is no need to plead acts of state.
B. Jurisdiction over NPC or SCNPC Decisions has already been taken away by art 19 *BL* (applying the simple analogy of the *David Ma case*, i.e. "Law enacted by Sovereign" doctrine). Even if the *Ma case* analogy is wrong, applying Tai's argument based on the Chinese Constitutional structure, NPC Decisions are still not justiciable.
C. HKSAR without authorization from the Central Authority cannot commit acts of state because art 19 *BL* does not contemplate the fact that the HKSAR can commit acts of state independent of China's authorization.
D. The sovereign acts of foreign states are probably not intended to be covered by art 19 *BL* (but the common law or the Chinese practice will govern this area of law).

C. The Remaining Cases of Acts of State

A. The acts committed by the Central Authority in the public law sphere (assuming the CCSU case applies in this context).
B. The acts committed by the HKSAR with the authorization from China both in the civil and public law spheres.

D. Potential Contents for Acts of State

The SAR courts will probably use the common law notion although we have already seen that the common law is developing and the "foreign sovereign acts" will not form part of art 19 *BL* acts of state. Yet, whether the NPC and SCNPC will use the common law notion or Chinese understanding of acts of state is uncertain. It is hoped that China will not inflate the term in an unrestrained manner to cover even the arrest of political dissidents (In particular, the Chinese notion has no safeguards manifested in the common law "acts of state against individuals" concept, hence, the arrest of Hong Kong dissidents within the HKSAR seems to be purely legal under the Chinese notion). Furthermore, commercial activities conducted by Chinese officials can also be made acts of state via the back-door of "public interests". It is true that the intergovernmental-type act of state is autocratic. Nonetheless, it will be further qualified by the changing international law and when being compared with the Chinese notion, it is far more lenient.

VI. Reflection

The diversity of the notions of acts of state and the recent development of the international norm has already made the doctrine complicated. Coupled with the duality of the interpretation of the BL, the influence of other parts of art 19 *BL* and the Chinese legal structure, the legal fable of Basic Law acts of state with Hong Kong characteristics is created: a mixture of oriental and occidental, a creature meaningful in form but handicapped in reality.

Diagram

Acts of Sovereign (Common law position)

Who commits the acts?	Can case be received?
Pre-handover: Sovereign = Crown	
Personal Capacities	No
Public Capacities	
Civil law sphere: Crown (exercise prerogative & statutory powers)	Probably Not
Crown in UK	No
Crown in HK	Yes
Public law sphere: Crown (exercise prerogative & statutory powers)	Yes
Crown in UK	Uncertain
Crown in HK	Yes
Post-handover: Sovereign = PRC Government	
No personal capacity	NA
Public Capacity	
Central Authorities (President and State Council)	
Civil law sphere	No (see art 22 BL)
Public law sphere	Uncertain
The HKSAR government (replaced Crown in HK)	
Civil law	Yes
Public law	Yes

OMBUDSMÄNIA

CHIM E-LING

I. *Introduction*

> **Om-buds-man** a public official appointed to investigate citizens' complaints against government agencies or officials that may be infringing on the rights of the individual.[1]

In 1809, the Swedes devised a heralded invention known as the *Ombudsmän*. Shortly following this addition to their already sophisticated system of administrative control, there bloomed an epidemic of "Ombudsmänia"[2]; first across the Scandinavian domain all the way through the Commonwealth. By the mid 80's, an estimated number of over a hundred Ombudsmän had emerged[3] – each bearing the sworn obligation of redressing the aggrieved citizen from injustice suffered as a result of maladministration.

The underlying reasons for such a sudden proliferation have been asserted by a great number of scholars to rule out the possibility of country after country blindly following a trend that claims to promote democracy and human rights. The aim of this paper is to question the validity of such assertions by examining whether there is truly a need for an Ombudsmän in society. Should a need for such an institute be substantiated, a model Ombudsmän system shall be illustrated to consider to what has to be done in order to quench the existing need.

This paper focuses on the administrative aspect of the Ombudsmän's work, that is to say the monitoring of the Administration, rather than on its role in redressing the aggrieved. It should also be noted that the object is not to give a detailed account of the Ombudsmän, its work or its development. What is under examination here is the theoretical discussion of whether there exists a genuine need for such an institution or whether it is merely another limb of the bureaucracy created to pacify the discontent public. Alternatives shall be sought to further challenge the establishment of the Ombudsmän "empire". Where it is found to be justified, the correct form of the Ombudsmän shall be examined as a guide for reforms in existing (defective) Ombudsmänship.

The first section of this paper seeks to challenge the claim that the establishment of an Ombudsmän accentuates Liberal Constitutionalism by working in the interest of a limited government and human rights. Other factors necessitating the development of the Ombudsmän will also be considered. To further this point, the argument that there was sufficient existing mechanism prior to the establishment of the Ombudsmän in Hong Kong so as to not warrant an added limb to administrative control shall be duly discussed to determine whether the Ombudsmän office was implemented for constructive ends.

Proceeding from this, a discussion of the downfalls of administrative courts of our former colonial ruler, Britain, shall be made to advance the argument that the system of the Ombudsmän is authentically needed. An attempt to reconcile this need with countries

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1 "Ombudsman", Webster's New World Dictionary: Third College Edition (New York: Webster's New World Dictionaries, 1998), p 945. It should be noted that in order to avoid any chauvinistic connotation to the word, the Swedish plural form "Ombudsmän" shall be adopted in this paper.

2 Rowat, D C, "Recent Developments in Ombudsmanship" (1967) 10 Canadian Journal of Administration 35.

3 Sir Cecil Clothier, "The Value of an Ombudsman" [1986] P L 204, 205.

functioning without an Ombudsmän, or with lesser parallel institutes shall be made. China would also appear to be a country worthy of examination taking into consideration the affiliations it has with Hong Kong.

In the next section, having discussed at length the need for an Ombudsmän, a Utopian system of Ombudsmänship[4] shall be detailed so as to understand the Form that an Ombudsmän should take.

II. The Need for Administrative Control

A. Liberal Constitutionalism

In the course of one's studies in Constitutional Law, the inevitable definition of "Constitutionalism" comes down to simply: the method of containment of governmental powers so as to prevent the abuse of powers. The limited government and the protection of human rights are then instrumental to achieving Constitutionalism in a liberal context.

Having read recurring claims that the implementation of an Ombudsmän would help instill Constitutionalism, it shall be explored in which of the aforementioned instruments the Ombudsmän seeks to develop in a nation, Constitutionalism.

1. Limitation of Governmental Powers

This is attained through three channels:

The Rule of Law

The Rule of Law fundamentally means that everyone, without regards to any personal idiosyncrasies, shall be allowed the benefit of equality before the Law and are equally subject to the Law. The job of the Ombudsmän, however, is not to determine the *legality* of an administrative act (which should be left to the courts to decide) but rather, the *manner* in which it was executed. The Ombudsmän, on the face of it, would seem unable to advance the doctrine of the Rule of Law.

It would seem most unfair that an administrative act falling slightly short of illegality be left to repeat itself solely on the grounds that it was within the ambits of the Law; without regards as to how unreasonable, unwise or reckless the decision or administration was. This injustice is further fortified should the harm caused be more than an illegal administrative act. Could our constitution be as blunt as to allow a complete denial of remedy as a result of the fine line between legality and illegality? Although not in the truest sense a pioneer of the Rule of Law, it cannot be denied that the implementation of the Ombudsmän would serve to supplement the Judiciary where it has failed to deliver justice.[5]

Even where courts are bothered to look into cases of maladministration, as in the Administrative Courts of Britain, Sweden and New Zealand, it could arguably be put that the courts of every progressive society are far too preoccupied with matters not only of legality

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[4] The term "Form", from Plato's concept of the model of perfection, shall be used in reference to this. For more details on the topic of Eternal Forms, see "Greek Philosophy: Plato and Aristotle", *Microsoft Encarta Encyclopedia 99*.

[5] Yardley, D M C, *Local Ombudsmen, the Future* [1987] The Denning Law Journal 163, 164.

but of formality and thus, have become overburdened and inefficient. This inflexibility of the Judiciary and the fact that litigation has become increasingly costly, cumbersome and slow[6] is weakening the courts' ability to uphold the Rule of Law. The Ombudsmän serves as a second-to-naught for those whose justice have been stalled by the downfalls of contemporary court systems.

Stretching the ambits of the doctrine, one could consider the Ombudsmän as serving towards the ends of the Rule of Law by taking into account its supplementary role to the present overworked judiciary.

It has also been affirmed that although in most developing countries, a generally greater degree of administrative discretion could by no means constitute a violation of the Rule of Law, this stands true only in the case where such discretion is in the interest of "economical and social development and not the denial of fundamental freedoms, and, so long as any restriction of individual freedom is no more than absolutely necessary to achieve [the] objectives of development"[7]. Where administrative "mis-discretion" roots from convenience, bad-judgement or undue delay, a violation of the Rule of Law must be said to have been made.

To conclude this point, it seems necessary to quote extensively from the enlightening findings of the International Commission of Jurist:

> "Checks are therefore necessary on the abuse of administrative power, on decisions that are made in excess of authority and even on the improper exercise of a discretion. Besides these checks, it is definitely desirable that certain limits be imposed on administrative discretion.
>
> It is essential to the Rule of Law that an individual or body adversely affected by an administrative decision should be in a position to appeal against it ... if that individual or body felt that the discretion was exercised either intentionally or mistakenly ..."[8]

Separation of Powers

The concept of separation of powers means to divide authority and power amongst the three tiers of the government: the Executive, the Legislative and the Judicial branch.

Though the efforts of Ombudsmänship seem to point more towards the balancing of power between these branches rather than a separation of them (which ought to have been entrenched in the Constitution), an argument could be made that the functions of the Ombudsmän does affirm this principle indirectly.

Should there be no Ombudsmän to supervise the administration, this task will likely befall the Judiciary. One must make clear the point that any ruling by the courts shall be binding; meaning that the courts will then have the power to overrule and, in effect, substitute the decisions or the manner of implementation adopted by the Executive. This contradicts directly the purpose of the separation of powers, since by so allowing, the courts are given the

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6 Rowat, D C, *The Ombudsman Plan. Essays on the Worldwide Spread of an Idea* (Canada: The Carleton Library, 1973) p 47.

7 International Commission of Jurists, *The Dynamic Aspects of the Rule of Law in the Modern Age: Report on the Proceedings of the South-East Asian and Pacific Conference of Jurists* (Bangkok, Thailand: February 15-19, 1965) para 188 p 62.

8 *Ibid*, para 189, 190 p 63.

power to not only supervise, but to scrutinize and substitute their decisions in place of the Executive's - making the courts a virtual über-administrator[9]. The same can also be said should the power to oversee the administration be vested with the Legislature.

In addition to this, it could be said that the separation of powers also implies the delegation of certain powers to a respective branch. To allow the relatively administratively inexperienced or unknowledgeable Judiciary to pervade the field of the Executive would be to blur the distinction between the domain of the two branches and thus, undermine the function of the doctrine.

Democracy

Democracy in Hong Kong takes the form of a Representative Democracy, being the form of government where the citizens are able to exercise their right to make political decisions through a majority vote in free elections[10]. Administrators are put in office by the citizens, who deserve administration in the best interests of the public.

> "Democracy is based on the conviction that man has the moral and intellectual capacity, as well as the inalienable right, to govern himself with reason and justice"[11]

Where maladministration is injurious to a citizen and such faults can be left unavailed or uncurtailed, the public's fundamental right as set out in their social contract[12] with the government is sequestered and democracy is seen to be shrunken under the growing threat of a tyrannic bureaucracy.

2. Protection of Human Rights

The Steering Committee for Human Rights professed repeatedly in their report *Les Moyens Non Judiciares pour la Protection des Droits de l'homme: l'institution de l'Ombudsmän*[13] that the appointment of an Ombudsmän would help promote and protect human rights. Yet, there has been, as of yet, nothing but indirect evidence in support of this proposition.

Mr. Arne Fliflet of the Parliamentary Ombudsmän of Norway refutes such an argument by putting forward six ways in which the Ombudsmän institute is seen to work for the betterment of human rights.[14]

As the aims of Ombudsmän are to prevent injustice from befalling an individual or body, the primary functions of the Ombudsmän is basically parallel to those of the international agreements for the protection of fundamental freedoms of the person from "injustice and arbitrariness by the authorities[15]. Thus, Fliflet was able to deduce that Ombudsmän were

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9 "über" means "super" or "ultra".

10 *Supra* note 7, para 23 p 17.

11 Harry S. Truman on "Democracy", quoted in Fitzhenry, R I (ed), *The Harper Book of Quotations* (New York: Harper Perennials, Harper Collins Publisher, 1993) p 130.

12 "Rousseau, Jean Jacques: Political Writings" and "Political Theory: The Social Contract", *Microsoft Encarta Encyclopedia 99.*

13 Conseil de l'Europe, *Les Moyens Non Judiciares pour la Protection des Droits de l'homme. l'institution de l'*Ombudsman (Strasbourg: Section de Publications, Conseil de l'Europe, 1987).

14 Office of the Ombudsman Hong Kong, China, *The Ombudsman and the Protection of Human Rights in Hong Kong* (Hong Kong: The Printing Department, 1998) para 31 p 36.

15 *Ibid*, para 31(a) p 36.

pioneers of human rights[16].

The second argument made was that the Ombudsmän are in a better position to protect human rights as opposed to the legal profession and the courts. He maintained that both institutions do play a significant role in the furtherance of human rights, but both function in a passive and retrospective fashion (meaning that the aggrieved must first litigate in order to trigger the law for the protection of his rights. This can only be done through the allocation of blame to a party). To this, the writer would like to add that another defect is that the Law, when mobilized for such an end, serves only in that particular case alone, and does little by way of preventing further recurrence of the wrong. Fliflet points out that as the Ombudsmän is empowered to raise inquiries through his own initiatives, and has the ability to recommend future improvements - even before any actual infringement on the general public's rights.[17]

It was also noted that it was an Ombudsmän's statutory duty to be observant as to discrepancies between legislation or public administration and international human rights covenants by which the nation is bound. This puts the Ombudsmän in the unique position of ensuring that the government keeps within the defined objectives of the promotion and protection of human rights.[18]

A point closely related to the one just mentioned is that the Ombudsmän has no power to make legally binding recommendations and so has a greater degree of flexibility when making comments on public administration and the possible infringement of human rights. Independence and the aggregation of specialist knowledge makes the Ombudsmän the perfect candidate for preventing violations of international agreements, regardless of whether or not these agreements are in fact incorporated into the Law.[19]

Ombudsmän from different jurisdictions have convened a number of times and have made constructive discussions and exchange of ideas. As the Ombudsmän throughout are highly experienced in the field of human rights, these conventions make a singular opportunity for an interflow of differing viewpoints on the subject, increasing the Ombudsmän expertise and its suitability as the upholder of human rights.[20]

Finally, although there may be an abundance of other organizations and commissions working in the interest of human rights, these often linger in specialized fields (such as children's welfare and equality for women). The Ombudsmän, on the other hand, works in a general and broader scope, thus allowing for the advance of human rights on different levels.[21]

The above argument shows that the work of the Ombudsmän does take due consideration for the promotion of human rights and thus, as an institution, is of indispensable value.

B. The Central Problem in Classical Political Theory

At the onset of Hill's account of a model Ombudsmän, the central problem in classical political theory is posed: what ought to be the proper relationships between the governors and

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16 *Ibid*
17 *Ibid*, para 31(b) p 36.
18 *Ibid*, para 31(c) p 37.
19 *Ibid*, para 31(d) p 37.
20 *Ibid*, para 31(e) p 38.
21 *Ibid*, para 31(f) p 38.

the governed.[22] The presence of an Ombudsmän straightens the relation between the two, being one of trust, respect, and cooperation on the part of the governed and good faith, loyalty, and eagerness to serve in the benefit of the public on the part of the governors. By furnishing the aggrieved with impartial information or explanation, and the clarification of misunderstandings, the public will come to regain confidence in the Administration.[23] The symbolic value of having an independent body to prop accountability adds to the average citizen's ease of mind that their government is doing all that can be done to ensure good administration for the public.

In turn, by stifling unrest with the administration, the Executive is left to focus their efforts on the delivery of services for the good of its citizens. The Ombudsmän also reinstates the fact that administrators work for the public and not the faceless, secret bureaucrats who can do as they please being the servants of the queen of the long-gone colonial times. Although it has to be said that this is not too likely to be achieved anytime in the immediate future, the value of the Ombudsmän, when seen from a wider perspective, seems to provide a paramount device in the normalization of the distorted relation between the governors and the governed.

C. *Inadequacy of Existing Machinery*

Where the existing mechanisms for the control of administrative power proves to be a sufficient safeguard against maladministration, the addition of Ombudsmän to the scenario would seem to be superfluous, if not redundant. For this reason, only by proving that the forerunners to the Ombudsmän were inapt or inadequate can the necessity of an Ombudsmän be legitimized.

1. The Judiciary

It was briefly mentioned earlier that the courts were removed from the issue of maladministration unless there was a question of illegality. Even if legal administrative wrongs (this refers to the administrative courts to be discussed in the subsequent section) were tried in courts, there lies a myriad of disadvantages when compared to the Ombudsmän.

Perhaps the most imperative criticism of the ordinary court system is the cost of litigation. For the average citizen, it is lamentable enough to have been dealt a hand of injustice, but to have the route to redress paved with fees and expenses? Even in the rare event that legal aid should be granted to the litigant, there still lies the maddeningly time-consuming aspect of litigation that deters the aggrieved from mobilizing the Law to attain redress.

The average citizen is most likely to be intimidated by the prospect of having to appear before court. In fact, this traditional mentality dates back to ancient Chinese history and is rooted in our philosophy. Thus, if one is able to endure the grievance, it is likely that going to the courts will be avoided at all expenses.[24]

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22 Hill, L B, *The Model Ombudsman* (Princeton, New Jersey: Princeton University Press, 1976) p 3.

23 *Supra* note 3, at 206.

24 Leung, M K, *The Office of the Ombudsman of Hong Kong: an Evaluation from the Perspectives of Street-level Bureaucrats, the Public and Members of the Legislative Council* (Master of Public Administration, The University of Hong Kong, 1998)

A final point to make is the fact that the courts will intervene only where the litigant has sufficient interest, or in legal terms, *locus standi*, in the case.[25]

Having detailed the inadequacies of the Judiciary in relieving injustices caused by maladministration, we turn now to consider the role played by the Legislature.

2. Legislature

The traditional role of the legislature was to represent the citizens who put them in office. Complaining to the legislators is an avenue of redress that citizens can no longer resort to. Not only is this medium of complaint scarcely known to the public[26], the legislature has become too preoccupied with "massive and detailed legislation on the one hand and national or international policy on the other"[27] to be bothered with the time-consuming task of investigating into complaints of maladministration.

Should the duty of maintaining checks and balances of powers be vested with the Legislature, another foreseeable problem arises: the balance of powers seem to have shifted towards the realm of legislative supremacy in that the Legislature has dominating powers over the Executive. This might not be as desirable as the present system whereby each branch is responsible to itself. All in all, it seems rather straightforward that the Legislature is in no position to carry out the work of the Ombudsmän.

D. Concluding Remarks

> "One of the most bizarre features of any advanced industrial society in our times is that the cardinal choices have to be made by a handful of men: in secret ... who cannot have a first hand knowledge of what those choices depend upon or what their consequences may be"[28]

From the above section, it can be concluded that there lies a need for an independent body to monitor the work of the Administration and to work towards the ideal of Liberal Constitutionalism. An independent body such as this would also foster better relationships between the governors of society and the governed. Attempts at achieving the aforesaid have been made in the form of allotting the said duties to the Judiciary and the Legislature but have proven to be far from satisfactory.

Having determined that there is indeed a need for such an independent institute, the question arises: What should this independent body be? The following section reserves the option of an Ombudsmän and seeks to consider the pros and cons of adopting other independent institutes, namely the system of administrative Courts and the system of the Procuracy.

III. Alternatives to Ombudsmänship

A. The Supreme People's Procuratorate

Dating back to the *Yuan* of the Han Dynasty and the Censorial System in the Ming Dynasty, there had always been an independent body of high authority overseeing the whole of the

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25 Birkinshaw, P, *Grievances, Remedies and the State* (London: Sweet & Maxwell, 1994) p 258.
26 *Supra* note 6, p 47.
27 *Supra* note 3, at 205.
28 Snow, C P, *Science and Government* (London: Oxford University Press, 1961) p 1.

state to ensure that all falls within the realms of the Law.

The functions of the Supreme People's Procuratorate, however, differed vastly from that of the Ombudsmän. The Procuratorate was to ensure the "strict observance of the law by all government institutions and public functionaries as well as by nationals of the country"[29]. No mention is made of its specific authority in curbing maladministration, but is generally empowered to investigate matters of illegality, charges of counterrevolutionary activity and criminal elements. Improper judgements and certain civil cases of state interest also fall within the jurisdiction of the Procuratorate.[30]

The Supreme People's Procuratorate is the organ that most resembles the structure of the Ombudsmän. It is independent of all other governmental departments and is responsible only to the National People's Congress and it's Standing Committee[31]. Like the Ombudsmän, the Procuratorate has no power to reverse the alleged illegality but may only refer it to the relevant body in charge.

The wide jurisdiction given to this institution puts it in an advantaged position to conduct investigation into alleged malpractices - for this reason, if an alternative to Ombudsmänship is to be examined, the Procuratorate should fall within this consideration.

Naturally, there are downsides to the Procuratorate: first, although the jurisdiction is all-embracing, its scope excludes cases of maladministration. Instances of bureaucratic isolation or elitism would then be left unavailed.[32] Second, despite the fact that Ombudsmän throughout are responsible to their respective Heads of State, the SCNPC can be said to be too politically partial and the fact that the Procuratorate is accountable to it seems to extinguish the independence of the organ. Third, such a high degree of power bing allocated to the Procuratorate may actually be undesirable since it might lead to the development of the über-administrator. Finally, the all-embracing supervision might divert resources and attention from cases of maladministration to other fields, such as the monitoring of the Judiciary.

The conclusion that can be drawn from the above analysis suggests that the Procuratorate system of the PRC is not entirely suitable to fulfil the role of an Ombudsmän.

B. Administrative Courts of UK

Starting from the late 19th Century, Britain saw a proliferation of tribunals aimed at redressing the citizen for the dissatisfactory execution of public administration.[33]

These courts were meant to be an inexpensive, accessible, specialized, and flexible means of determining cases of maladministration. It was conceived to be made up of persons from the legal profession, the government, and where appropriate, experts from various fields.[34] The

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29 *The Organic Law* art 28.

30 Leng, S C, *Justice in Communist China A Survey of the Judicial System of the Chinese People's Republic* (New York: Oceana Publications, 1967) p 103.

31 *The Constitution of the People's Republic of China* 1982, art 67(6).

32 Brady, J P, *Justice and Politics in People's China Legal Order or Continuing Revolution?* (New York: Academic Press, 1982) p 239.

33 Thompson, B, *Textbook on Constitutional and Administrative Law* (London: Blackstone Press Limited, 1995) pp 352-353.

34 *Ibid*, p 353.

procedures to be followed were basically that of ordinary tribunals but in a more informal fashion, so citizens would not be intimidated and could make out a case for themselves.[35]

All this sounds very ideal and beneficial, but in practice, are these advantages really realized? It has been argued that since most tribunal members are only part-time, their remuneration would not incur a great amount of expenses[36]. When talking in terms of costs, these tribunals might even end up cheaper than having the Ombudsmän. Yet, one must note that the reasons for the high remuneration of the Ombudsmän are chiefly to ensure their independence and that they are free from the pressures of the wealthy. In light of the low wages received by the tribunal members, it seems hard to secure independence from them.

The advantage of expertise of the courts could be said of any institute. So long as the body is willing to hire the services of experts, even the Government Printing Department could specialize in certain fields.

As for the claim of flexibility, although particular attention was made to avoid the cumbersome procedures of ordinary courts, the Franks Committee, nevertheless, recommended a set of formalities akin to the technicalities of the usual courts.[37] Accessibility, too can be refuted on the grounds that although the administrative courts are open to the disposal of the public and that this is well known, the public seems unimpressed by the attempts to give a friendlier air to the courts. People are generally intimidated, and unless something is done about this mentality, it can hardly be said that the courts are accessible.

When one takes into account flexibility, accessibility, expertise and independence of the institute over costs, one is far more persuaded by the concept of an Ombudsmän, who, although represents an authoritative and vital part of good governance, encourages the average citizen to voice his discontent in a personal manner; venting the frustrations of the aggrieved of not knowing who was responsible for his loss through their thorough explanation. The Ombudsmän too have their fair share of experts and are highly independent. In the end, it comes down to the bare fact that the Ombudsmän system still stands superior to the system of administrative courts.

Having determined the need for a system of Ombudsmänship and having come to the finding that the major alternatives open are either inadequate themselves or unsuited to the role of the Ombudsmän, it should be considered what the correct form an Ombudsmän system ought to be. This shall be the topic of discussion for the following section.

IV. The Form of the Ombudsmän

A. Functions

In this section, the functions that the Form of an Ombudsmän should undertake will be explored. Having determined this, it will be imported into the Hong Kong context to assess the role that the Hong Kong Ombudsmän should play in society.

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35 *Ibid*, p 354.

36 *Ibid.*

37 *Ibid*

1. Constitutionalism

Already examined in great detail is the role of the Ombudsmän in the instatement of Liberal Constitutionalism. In countries where the concept of Liberal Constitutionalism is well entrenched, the function of the Ombudsmän is to maintain and to uphold this ideal. In developing countries or former colonies and newly independent nations, the establishment of an Ombudsmän helps to lay down the fundamental concept of Liberal Constitutionalism in their premature state of politics.

As for the implications this has for Hong Kong, in light of the recent change in sovereignty and the trembling confidence of the masses over the influence of our communist motherland, the need to accentuate the idea of Liberalism becomes of paramount importance. The underlying function of establishing an Ombudsmän office in Hong Kong further demonstrates the government's willingness to maintain autonomy and its determination to preserve the prevalence of Liberalism in Hong Kong.

2. Human Rights Committee

Being a forerunner for the promotion and protection of human rights, the Ombudsmän is in a suited position to undertake the role of the Human Rights Committee as provided for in the *International Covenant on Civil and Political Rights (ICCPR)* and the *International Covenant on Economic, Social and Civil Rights (ICESCR)*.[38]

With their resources and their statutory powers of investigation, whereby any department is obliged to furnish requested documents at the pleasure of the Ombudsmän, the Ombudsmän is in a unique and privileged position to unearth any trace of human rights violation. Although this would necessarily mean that the Ombudsmän's jurisdiction would have to be expanded so as to cover all aspects of life (as in the jurisdiction of the Supreme People's Procuratorate), this should not pose too great a problem since the Ombudsmän is only able to give recommendations of a non binding nature, thus, no one is said to be adversely affected by this arrangement. This should be in line with society's desire to promote human rights where possible and to exterminate any trace of violations. Should the workload of the Ombudsmän be of concern, there seems little reason why its office should not be better staffed to meet the demand.

Although the *ICCPR* and the *ICESCR* are binding upon Hong Kong[39], the provisions therein that provided for the establishment of a Human Rights Committee[40] have not been followed by the Hong Kong Government. Instead, this task has been allocated, previously, to Britain, and now to the PRC. It is argued that since the Hong Kong Ombudsmän is stationed in Hong Kong and have the power to obtain whatever information they fancy, the task of assessing human rights conditions would be more suited to this office rather than to the sovereign power. Thus, the task of the Human Rights Committee ought to fall on the Ombudsmän of Hong Kong.

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38 *ICCPR*, Part IV.

39 *ICCPR*, "Application of the Covenant to Hong Kong" and *ICESCR*, "Application of the Covenant to Hong Kong".

40 *Supra* note 42.

3. Relation with the Public

Redress of Grievance

The primary function of the Ombudsmän in relation to the public is their role in redressing citizens aggrieved by faults in administration. The office of the Ombudsmän is seen to fill the lacuna left by the imperfections of Judicial Review. With the implementation of this institute, citizens are able to find remedies even if the wrong committed falls within the ambit of the Law; so long as it satisfies the requirements of "maladministration" and "injustice" as stipulated in the *Ombudsmän Ordinance (Cap 397)*[41] or the action is not barred by any provision in the *Ordinance*.

Provision of Information and Explanation by an Impartial Authority

There are times when an allegation against the Administration boils down to a simple misunderstanding, the Ombudsmän serves the role of providing information to the general public concerning the work and the missions of various government departments.

Sir Cecil Clothier asserts that when a frustrated citizen approaches the Ombudsmän and is given a detailed explanation on the difficulties of administering correctly in an increasingly complicated system of government, the limitations of the Law, and the policy reasons behind certain decisions, this frustration is likely to be easily vented.[42] The Ombudsmän, through the supplementation of information and explanations to the public, not only clears the air but might in fact heighten one's appreciation of the work done by our administrators.

4. Relation with the Executive

Watchdog over the Administration

In certain countries, the Administration regards the Ombudsmän with spite and contempt for seemingly playing the "tell-tale" role; publicizing their wrongs and forcing reform on their part through indirect means. This, however, is not true. Various departments ought to be appreciative that there is an independent body there to monitor and to continue pushing the department towards improvement. Perhaps this is the stance taken by administrators in Hong Kong. Not only has the local Ombudsmän received little resistance when conducting their investigations, but the recommendations made have often been speedily considered and, in 95% of the time, been implemented.

Clarification of Misunderstandings by an Impartial Authority

It has been pointed out that the best mode of running a government is to allow the aggrieved citizen a one on one chance to meet with the official at fault and to hear his explanation out.[43] This, of course, is an impossibility because of the time factor and the great hindrance it would pose to efficient administration. This task has been taken up by the Ombudsmän and for this, the administration ought to show gratitude.

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41 *Ombudsman Ordinance (Cap 397)*, s 2(1), s 7.

42 *Supra* note 3, at 206.

43 *Ibid.* at 209.

Another function of the Ombudsmän in relation with the Executive is that the Ombudsmän is clarifying misunderstandings on their behalf. Should there be no Ombudsmän to perform this function, it could be said that citizen's misconceptions about the administration being a tyrannic bureaucracy would be rampant and the Executive might have to incur a huge cost in order to rectify the misunderstanding.

Symbolic Value and the Resolution of the Classical Political Problem

It can also be said that the existence of an Ombudsmän shows the government's determination to uphold the practice of fair administration and accountability. This in turn leads to a healthier relation between the government and the people they set out to serve.

B. Power to Publicize or Power to Enforce?

1. Binding Recommendations

Although it has been rare in Hong Kong, repeated counts of non-compliance with the recommendations made by the Ombudsmän has lead to heated debates as to whether Ombudsmän should be given the power to enforce their recommendations. The independent position of the Ombudsmän ensures that the recommendations made are not biased in any way and are for the best interest of the general public. However, these powers, if bestowed upon the Ombudsmän might lead to irrevocable consequences. The point brought up before was that to give such an impact to the Ombudsmän could very well lead to the Ombudsmän saddling the whole of the government as an über-administrator - substituting the opinions of the Executive for their own, regardless of the Ombudsmän's lack of experience and compassion for the running of the state's policies.

It is also argued that the impact of the power of recommendation could very well exceed that of coercing administrators to submission.[44]

The fact that recommendations are not binding allows the Ombudsmän to function on an informal basis and also permits them to handle a much greater number of cases since the ultimate decision for reform lies with the affected department itself.[45]

The point has also been raised that since recommendations of the Ombudsmän are based on thorough investigations and the consideration of all issues concerned from every perspective, the outcome is superlatively greater than if the changes were forced upon the concerned department.[46]

2. Referral for Prosecution

A brief point to make here is that, should the Ombudsmän, in the course of his investigation, uncover that there had been criminal activity, he should be entitled, if not obliged, to report this to the relevant authorities for disciplinary action or for prosecution. In the case of uncovering a corruption scandal, the Ombudsmän too ought to report this to the Independent

44 Hatchard, J, "Governmental Accountability, National Development and the Ombudsman: A Commonwealth Perspective", [1991] The Denning Law Journal 53, 71.

45 *Ibid.*

46 *Ibid*

Commission Against Corruption (ICAC).
3. Certificate for Court Order

Although the recommendations of the Ombudsmän are not binding, it has been suggested that where a second follow-up recommendation has been issued to the Administration in light of its failure to make necessary changes or unsatisfactory changes being made, the aggrieved citizen or body should be issued a certificate that establishes a *prima facie* case against the Administration.[47]

There are, however, many downsides to getting the court to issue a binding order or injunction. Other than the usual line of problems, such as the high costs of involving the courts and the heavy time-consumption of such procedures, there is also the concern that this would make the binding recommendations of the Ombudsmän not capable of being appealed. Furthermore, this sours the relation between the Administration and the Ombudsmän. This it because of the impression that the Ombudsmän are, through their mobilization of the Judiciary, imposing their opinions upon the Executive and that the Ombudsmän are teaming up with another independent branch of government to fit administrative practices to their own agenda. For this reason alone, it seems to be going overboard to suggest the application of force to instate changes in the government.

V. Conclusion

> "Stopping up the mouths of the people is more dangerous than stopping up a river. When a river is blocked and then breaks through, many people are bound to be injured. It is the same with the people"[48]

There remains many areas on the topic of Ombudsmänship that have been left unstirred in this paper. In the course of research, although much concerning the inadequacies of the local Ombudsmän was unearthed, it cannot be denied that Hong Kong's Ombudsmän have excelled in their quest for the good governance of Hong Kong. Yet, this trend seems to be decelerating - with the denial of Mr. Garcia the right to serve a second term of office and the appointment of Mr. Andrew So, the work of the Ombudsmän have fallen into an abyss of labyrinthine relations. The Electorial Affairs Committee kept out of the Ombudsmän's jurisdiction, the Chief Ombudsmän and a number of other staff's supposed "clash of conflict" with the IPCC and the ICAC Review Board further goes to illustrate the point. In light of the urgent need to bolster the confidence of the public in the government, the Ombudsmän should pull their act together and work towards their Mission:

> "To serve the community of Hong Kong by redressing grievances and addressing issues arising from maladministration in the public sector, and through independent objective and impartial investigations, to bring about improvements in the quality and standard of and promote fairness in the public administration."[49]

The need for the establishment of an Ombudsmän or an institute designated similar functions has been proven to be very real. Gunter Grass commented that it was "the job of the citizen

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[47] Crawford, C, "Complaints, Codes and Ombudsmen in Local Government" [1988] PL 246, 264-267.

[48] Duke of Shao, quoted in Kristof, N D and Wudunn, S, *China Wakes: The Struggle for the Soul of a Rising Power* (New York: Vintage Books, Random House, 1994) p 276.

[49] Office of the Ombudsman Hong Kong, China, *10th Annual Report* (Hong Kong: The Printing Department, 1998) p 3.

to keep his mouth open"[50], but without someone to be listening, what good could keeping one's mouth wide-open come to?

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50 Gunter Grass on "Democracy", quoted in Fitzhenry, R I (ed) *The Harper Book of Quotations* (New York: Harper Perennial, Harper Collins Publishers, 1993) p 131.

THE PROHIBITION OF TRADE IN ENDANGERED SPECIES
HAS IT ACQUIRED THE STATUS OF CUSTOMARY INTERNATIONAL LAW?

JENNIFER CHEUNG PO-YU

I. Introduction

The worldwide trade in wildlife and wildlife products is a big business valued at between US$5 and $50 billion annually. Effective control of this trade, particularly that involving endangered species, is essential to the conservation of the earth's natural heritage. In recent decades, a general practice of prohibition of trade in endangered species has been adopted as a measure of protection. This paper seeks to assess whether the contended rule "Trade in endangered species is prohibited [**]" has attained the status of Customary International Law.

This test focuses on whether the global practice of this rule satisfies the two major elements - State Practice and *Opino Juris*[1] - both of which are required to establishing Customary International Law.

II. Relationship between the Establishment of Customary International Law (CIL) and Convention on International Trade in Endangered Species of Wild Flora and Fauna (CITES)

CITES[2] is the international treaty that controls trade in endangered species[3]. Considered as "perhaps the most successful of all international treaties concerning the conservation of wildlife"[4], *CITES* at present has 151 parties[5]. The significance of *CITES* lies not only in its post implementation effects on the trade of endangered species, but also on the attention it has drawn to the developments in this area since the beginning of the nineteenth century. Preceding its birth in 1973, there were several unsuccessful, yet significant international and regional treaties of a similar nature[6]. Although none of these treaties has had any significant

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** The word "prohibited" should not be interpreted literally as "forbidden totally", because a total ban in the trade of all endangered species is neither possible nor realistic. The word 'prohibited' should be interpreted more liberally to mean 'control and regulation through strict and restrictive measures'.

1 *Asylum Case Columbia v Peru* [1950] I.C.J Reports, 266, cited in Harris, D J, *Cases and materials on International law* (London: Sweet and Maxwell, 5th edn, 1998) p 27.

2 Signed on 3 March 1973, entry into force on 1 July 1975, amended on 22 June 1979 (article XL), in force since 13 April 1987. Text in Birnie and Boyle, *Basic Documents on International Law and the Environment* (New York: Clarendon Press Oxford, 1995) p 415.

3 *Ibid.* The purpose of CITES is to control one threat to the conservation of wild species in international trade. It does so by listing species on three Appendices, each of which entails consequences for international trade. Species threatened with extinction that are affected or potentially affected by international trade are listed in Appendix I, which effectively precludes commercial international trade in them. Appendix II species are not currently threatened with extinction but may become so if international trade in them is uncontrolled. Appendix III species are those which a party identifies as requiring the cooperation of other parties in the control of trade; trade can only occur when an export permit has been issued by the Party including the species in Appendix III. Art. II CITES.

4 Lyster, S, *International Wildlife Law: An Analysis of International Treaties Concerned with the Conservation of Wildlife* (Cambridge: Grotius Publication Ltd, 1985) p 240, quoted in Sand, H Peter, "Whither CITES? The Evolution of a Treaty Regime in the Borderland of Trade and Environment" (1997) 8(1) European Journal of International Law 29-58 at note 142.

5 "List of Parties" Updated to March 2000. http://www.wcmc.org.uk:80/CITES/eng/index.shtml

6 (I) The 1900 London Convention; (II) the 1933 London Convention Relative to the Preservation of Fauna and Flora in their Natural state. (which include provisions for the control of import and export of listed

effect on the regulation of trade of endangered species, they nevertheless reflect a general consensus in the conservation of endangered species in the international arena.

CITES was the result of a common initiative of the US government[7] and the UN Conference on the Human and Environment[8]. After five years of negotiations and preparatory work, the Convention was concluded in 1973 with 25 articles and four appendices. Considered by conventionalists as the "Magna Carta for Wildlife"[9] and "an instrument in both trade and conservation", it institutionalized the core idea of the 1933 *London Convention* within its principles. In terms of governance, *CITES*, having been educated by experiences of the 1933 Convention, has established a comprehensive and effective set of administrative and monitoring measures.

The sequence of events which led to the conclusion of *CITES* suggests that *CITES* should not be taken simply as a treaty on its own merits. It has crystallized the consensus of most nations on the trade in endangered species since the beginning of the nineteenth century and has laid down the basic principles that are applicable worldwide. Its extensive influence in the international arena is evidenced by its large membership and by the consistency of many national laws with *CITES* provisions. Therefore, the indisputably close relationship between

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species in the convention); (III) The 1940 Washington Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere; and (IV) the 1968 Algiers African Convention on the Conservation of Nature and Natural Resource.

(I) The 1900 London Convention designed to ensure the conservation of Various Species of Wild Animals in Africa which are useful to Man or Inoffensive. Signed on 19 May 1900 on behalf of Great Britain, Germany, Spain, Belgian Congo, France, Italy, and Portugal. It never entered into force for lack of ratification by all signatories as required under article VIII. C. Parry (ed.), 188 Consolidated Treaty Series (1979) 418-425.

(II) The 1933 London Convention Relative to the Preservation of Fauna and Flora in their Natural State. Signed on 8 November 1933 on behalf of South Africa, Belgium, Great Britain, Egypt, Spain, France, Italy, Portugal, and the Anglo-Egyptian Sudan; entry into force on 14 January 1936; Text in 172 League of Nations Treaty Series (1936) 241-272. It became applicable to most of Africa, with its import restrictions subsequently extended by Britain to Aden and India, and by the Netherlands to Indonesia. The treaty however failed to provide for decision-making institutions and secretariat services. Consequently, proposals for implementation and adjustments formulated were unsuccessful and were eventually overtaken by the political events of de-colonization.

(III) Inspired by the 1933 London Convention, The 1940 Washington Convention on Nature Protection adopted the 1993 convention's provision on export/import controls as model for similar provisions. Signed on 12 October 1940, entry into force on 1 May 1941; text in 161 United Nations Treaty Series (1953) 193-216; see article IX. It was never given any practical effect by the Organization of American States (OAS).

(IV) Similarly inspired by the 1933 London Convention. Signed on 15 September 1968, entry into force on 16 June 1969. Text in 1001 United Nations Treaty Series (1976) 3-28; see article IX. It was never given any practical effect by the Organization of African Unity (OAU)

[7] The USA introduced the *Endangered Species Conservation Act* on 5 December 1969 which authorized the US Department of the Interior to promulgate a list of wildlife species threatened with worldwide extinction, imports of which were prohibited unless for scientific or breeding purposes. Public Law No. 91-135, 83 US Statutes 275, entry into force on 3 June 1970; superceded by a comprehensive new Endangered Species Act (ESA, Public Law No. 93-205, 87 US Statutes 884) after the adoption of CITES in 1973. After the enactment, the US government was directed to encourage the enactment of similar laws by other countries and to "seek the convening of an international ministerial meeting" to conclude "a binding international convention on the conservation of endangered species". See Sand, H. Peter, *supra* note 4 at p 33.

[8] *Ibid* p 35 n 29. The UN Conference on the Human and Environment intend to conclude an "international convention on regulation of export, transit and import of rare or threatened wildlife species or their skins and trophies".

[9] Layne, "Eighty Nations Write Magna Charta for Wildlife", 75 Audubon Magazine, 3 (1973) 99, quoted in Sand, H. Peter, *supra* note 35 p 34.

the trade in endangered species and *CITES* leads to the proposition that the implementation and practice of *CITES* is reflective of the general practices of trade in endangered species.

III. Relevant test for determining whether the status of Customary International Law has been acquired

A. State Practice:

1. Generality of practice

With a century-long developmental history in the prohibition of trade in endangered species in addition to 25 years[10] since the implementation of *CITES* among its 151 parties, the contended rule has no doubt satisfied the requirements to classify as General State Practice. *The Lusaka Agreement on Cooperative Enforcement Operations Directed at Illegal Trade in Wild Fauna and Flora 1996*, which aims at reducing and ultimately eliminating illegal international trafficking in African wildlife[11], has provided further evidence of the generality of the practice around the world, especially amongst Eastern and Southern African States which were, in the past, major exporters of endangered species[12].

2. Uniformity and consistency of the practice

With regard to the uniformity and consistency of practice, the national legislation of various *CITES* countries have remained consistent with Articles VIII[13] and XIV[14] of *CITES*. Australia, a *CITES* country since 1976, implemented the *Endangered Species Protection Act* in 1992[15], while Canada, a party since 1975, has successfully enacted and implemented the *WAPPIITA 1996*[16], legislation prohibiting commercial trade in endangered species, both on a

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[10] *North Sea Continental Shelf Cases (1969)* ICJ Reports 1969 p 3 recognized that there is no precise length of time during which a practice must exist, simply that it must be followed long enough to show that the other requirements of a custom are satisfied. Nonetheless, the duration of practice can still be relevant in some considerations. Text in Harris, *supra* note 1 at p 27.

[11] The Lusaka Agreement, entered into force on 10 December 1996, obtained the necessary ratification and accessions of Lesotho (a non-CITES party), Zambia, Uganda, Tanzania and later Kenya. Three Signatories, namely, Ethiopia, South Africa, and Swaziland, have yet to ratify the Agreement. The Republic of Congo is in the final process of accession. http://www.ee/listinfoterra/1997/03/0020.html

[12] *Ibid.* The last 35 years have seen the loss of 97% of Africa's rhinoceros species.

[13] Article VIII refers to measures to be taken by the parties. Section 1 states that "Parties shall take appropriate measures to enforce the provisions of the present Convention and to prohibit trade in specimens in violation thereof". CITES, *supra* note 2.

[14] Article XIV refers to the effect on domestic legislation and international Conventions. Section 1 states that "The provisions of the present Convention shall in no way affect the right of Parties to adopt: (a) Stricter domestic measures regarding the conditions for trade, taking, procession or transport of specimens of species included in Appendices I, II and III, or the complete prohibition thereof or (b) domestic measures restricting or prohibiting trade, taking possession, or transport of species not included in Appendices I, II or III". CITES, *supra* note 2.

[15] *Endangered Species Protection Act* 1992, assent on 21 December 1992, commence on 30 April 1993, No 194/1992. Text in *Acts of the Parliament: Commonwealth of Australia 1992*, p 4301. *Endangered Species Protection (Consequential Amendments) Act* 1992, assent on 21 December 92, commence on 30 April 1993, No. 195/1992. Text in *Acts of the Parliament Commonwealth of Australia 1992*, p 4410.

[16] *Wild Animal and Plant Protection and Regulation of International and Interprovincial Trade Act* 1996. The Act aims to complement existing provincial and territorial legislation and to improve compliance with international agreements, for example, it is no longer possible to break the law in one province and escape prosecution by leaving the jurisdiction. It also gives national support to provincial and territorial wildlife management programmes. "Wild Animal and Plant Protection and Regulation of International and Interprovincial Trade Act 1996" news release - http://www2.ec.gc.ca/cws-scf/es/wappa/presseng.htm.

national (between provinces) and international (between countries) level. A recent case involves the seizure from Chinese herbal stores in Vancouver and Victoria, of 2897 pharmaceutical products containing components of endangered species (as provided under the convention[17]).

Japan, which was actively engaged in the wildlife trade in endangered species throughout the last century, is now increasingly compliant with *CITES*, as evidenced by its establishing a Wildlife Division in 1995[18]. It has also amended its domestic legislation for the first time in order to assert some degree of control over domestic sales, exchanges or transfers of items made with Appendix I species[19]. In 1995, an offender received a two-year term of imprisonment for the illegal importation of three juvenile gibbons[20].

Meanwhile, developing countries have also implemented legislation along similar lines. China, after its accession to the *CITES* in 1981, enacted *the Law of the PRC for the Protection of Wild Animals* in 1988, the *Inventory of Key Wild Animals for State Protection 1988* and the *Regulation for the Protection of Terrestrial Wild Animals 1992*. The *1992 Law* stipulates that rare and endangered species of wildlife introduced or brought into the country can be treated as key animals under state protection, thus establishing a link between *CITES* regulated species and those species under the National Inventory.[21]

Hong Kong also imposes restrictions on trade in endangered species through the *Animals and Plants (Protection of Endangered Species) Ordinance* (Cap 187).[22] In 1995, a $5,000 fine was imposed on a shop selling 2 bottles of medicine with tiger and rhinoceros components[23].

Apart from horizontal uniformity, vertical consistency has also been attained. USA, apart from having a special interest[24] in the area, is the world's largest market for wildlife and wildlife products with a billion-dollar-a-year wildlife trade[25]. Its earliest legislation, the *Lacey Act of 25 May 1900*, prohibited interstate commerce in illegally taken wildlife, and was extended in 1935 to wildlife imported from abroad. Shortly following this, it enacted the *Endangered Species Act (ESA)* of 5 December 1969. Throughout the period, a large number of state laws were enacted and implemented, all enshrining the basic principle under the *Lacey Act*, but at the same time imposing stricter control. In *Palladio Inc v Henry A Diamond, as Commissioner of the Department of Environmental Conservation of the State of*

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wildlife management programmes. "Wild Animal and Plant Protection and Regulation of International and Interprovincial Trade Act 1996" news release - http://www2.ec.gc.ca/cws-scf/es/wappa/presseng.htm.

17 "Endangered animal parts sold in herbal stores" News talk radio story posted 16 October 1998. http://www.cfra.com/1998/10/16/68322.html.

18 Burnes, W C, "Asian Compliance with CITES: Problems and Prospects" (1989) 29 Ind J Int'l 62, 68.

19 Favre, S, "Trade in Endangered Species" (1996) 6 *Yearbook of International Environmental Law* 331.

20 *Ibid.*

21 Wang, Xinxia, "The implementations of CITES in China" [1993] 2 Review of European Community and International Environmental Law 370 at 374.

22 *Animals and Plants (Protection of Endangered Species) Ordinance* (Cap 187) was enacted on 6 August 1976. The long title states the aim to be "to restrict the importation, exportation and possession of certain animals and plants, and parts of such animals and plants, and to provide for matters connected therewith". Text from BLIS. http://www.justice.gov.hk/Home.htm.

23 *Supra* note 19.

24 *The North Sea Continental Shelf Case* (1969) states that "[An] indispensable requirement would be that within the period in question. State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform". *Supra* note 10.

25 Fisher, P, "Fact sheet: Fish and wildlife service on trade in reptiles - smugglers target some of world's rarest species" 15 September 1998, Daily Washington File. http://www.usis.it/wireless/wf980915/98091515.htm

New York[26], the District Court Judge held that despite the fact that the *Harris law* and the *Manson law* (the New York State laws governing the trade in endangered species) were more restrictive and of a higher standard than the ESA, they were not inconsistent with the *ESA*. The plaintiff was therefore required to comply with these State laws. The trend of consistency and uniformity in the application of the general principles involved in prohibiting trade in endangered species has been prevalent since the enforcement of *CITES and continues* following the amendment of the *ESA*, as is illustrated by *Man King Ivory and Imports Inc v Deukmijian*[27].

Meanwhile, *CITES* has also been consistently applied internationally. In 1990, the European Court of Justice declared that the French Republic had failed to fulfil its obligation under EEC No. 3626/82 to implement *CITES*[28] in the EU, by virtue of its issuance of import permits for more than 6000 Bolivian fur skins of an endangered specie (as listed under Annex I of the *Convention*[29]*)*.

While clearly there is evidence of uniformity and consistency in practice, there are at the same time certain problems with the evidence in this area:

Reservations

Under Article XV of *CITES*, parties are allowed to enter into reservations against individual species and with respect to that particular species, the state shall not be treated as a party to the Convention. Although trade between a reserving state and a non-reserving state remains illegal[30], trade between a reserving state and a reserving state is legal. A few countries therefore, taken out massive reservations to preserve their "free rider" status in international trade with regard to economically important species.

This happened in 1979 when France, West Germany and Italy each entered into reservations for the saltwater crocodile despite being jointly accountable for 60% of the world trade in the species[31]. The economic incentive for trade and poaching in the developing South American crocodile-producing state thus continued despite the species being listed as endangered under *CITES*. Japan, despite its withdrawal of all reservations on sea turtles, still maintains six reservations out of nine different species of whales for its whaling industry[32] (Norway, Peru, and St. Vincent and the Grenadines are other whaling countries that maintain *CITES*

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26 *Palladio Inc v Henry A Diamond as Commissioner of the Department of Environmental Conservation of the State of New York* 321 F SUPP 630 (SDNY 1970) 27 A Int'l L Cas 1969-1970 Rnddy p 43-480000.

27 *Man Hing Ivory and Imports Inc v Deukmijian* 702 F 2d 760 (9th Cir.1983) 5 A Int'l L Cas 2d 1979-1986 Reams. The judge held that "The section 6(f) of the Endangered Species Act, (which is in accordance to the principle of CITES) preempts a states' statutory prohibition on trade in African elephant products by a trader who has secured all necessary federal permits". This shows that the principle of CITES in regulating trade in endangered species is applied uniformly and consistently.

28 In 1982, the EC council adopted regulation 3626/82 for the implementation in the community of the CITES. The convention sets out to protect some two thousand species by imposing strict controls on international trade in them, but the Regulation has more stringent restrictions and control measures than the Convention. "Trade in endangered species" Halsbury's Laws of England (London: Butterworth, 4th edn, 1979) 51 para 8.34.

29 *Commission of the European Communities v French Republic* Reports of the European Court of Justice (1991) I, 4337, at 4356. http://www.jura.uni.muencheun.de/tel/cases/Bolivan_Furskins.html

30 Article X, CITES, *supra* note 2.

31 Mattews, P, "Problems relating to the Convention of On the International Trade in Endangered Species" (1996) 45(2) The International and Comparative Law Quarterly 429.

32 "Reservations to amendments to Appendices I and II" CITES website - http://www.wcmc.org.

reservations on whales). This shows that the practice of "multiple reservations" with regard to the same species by parties, which constitute a significant proportion of global demand for a particular species or related product, greatly reduces the effectiveness of any trade restrictions and thus, seriously destroys the uniformity of practice.

Designer Loopholes

Article VII of *CITES*[33] makes available to the parties a series of successive "interpretations" and elaboration. Definitions of indeterminate terms such as "captive breeding" and "artificial propagation" are provided and new exemptions such as "ranching" have been introduced to enable countries to meet the established criteria by establishing a list of legitimate uses of Appendix species. This again turns on the consistency of practice.

Conflict with *GATT/WTO*

The *GATT/WTO* and the *CITES* regime have a basic conflict of methodology. While *GATT/WTO*[34] promote trade by eliminating restrictions and promoting non-discrimination, the principle laid down in the prohibition of trade in endangered species protects the environment through control and regulation.

This conflict cannot be ignored because of the size of the *GATT/WTO* membership and the overlap of its membership with that of *CITES*. As Article XIV of *CITES* provides that it is not intended to affect obligations incurred under other treaties[35], such overlapping parties would appear to remain bound by their original obligations to their other *GATT/WTO* contracting parties.

The most important *GATT/WTO* provision challenged by *CITES* is Article XI[36]. Violations of this Article occur when it places an explicit ban on imports of a particular type or from a particular country, or where a measure has the effect of preventing or limiting imports, whereas *CITES* requires import restrictions under its certification scheme corresponding with the export restrictions described above.

The analysis above shows that conflicts with *GATT/WTO* result in inconsistency and a rift in the uniformity of State practice. However, by creative interpretation, *CITES* provisions might be accepted on the condition that a multilateral approach to construction be adopted, having regard to the aim of ensuring the protection of global environmental interests and the guarantee of the participation of all countries in these concerted efforts.

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33 Article VII section 4 states "Specimens of an animal species included in Appendix I bred in captivity for commercial purpose, or of a plant species included in Appendix I artificially propagated for commercial purposes, shall be deemed to be specimens of species included in Appendix II. Section 5 states "Where a Management Authority of the State of export is satisfied that any specimen of an animal species was bred in captivity or any specimen of a plant species was artificially propagated, or is a part of such an animal or plant or was derived therefrom, a certificate by that Management Authority to that effect shall be accepted in lieu of any of the permits or certificates required under the provisions of Article III, IV or V." Art VII CITES *supra* note 2.

34 GATT, *Analytical Index: Guide to Gatt Law and Practice*, (Geneva, 6th edn, 1995) 1.

35 As a general rule, where two treaties are inconsistent, the later overrides the earlier to the extent of the inconsistency Vienna Convention on the Law of Treaties (1969) Art 30. Text found in Evans D. Malcolm, *Blackstones' International Laws Documents* (UK: Blackstone Press, 3rd edn) p 171.

36 *Supra* note 34. Article XI is to prevent quantitative restrictions on imports and exports.

Interpretation of GATT/WTO *Article XX (g)*

Some of the import and export restrictions of *CITES* may be interpreted as falling within Article XX (g) of *GATT* and therefore, being related to the "conservation of the exhaustible natural resources".

A Waiver for CITES *under* GATT/WTO *Article XXV (5) or* WTO *Agreement Article IX (3)*

As most of the parties to *CITES* are also members of *WTO*, they can collectively seek a waiver (for the trade restrictions) under *WTO A*rticle IX (3), where grant of a waiver requires the agreement of ¾ of the members. As a result, widely supported *CITES* measures may be accepted by *WTO* through the appropriation of a waiver.

The green round negotiation

Recent developments of the *WTO* have called for the development of a program on trade and environment.[37] The critical question to be considered is what constitutes an "international environmental obligation"? The growing trend of using *CITES* as the legal instrument to regulate the trade in endangered species has resulted in the increase in its membership. Moreover, principles which are considered to be "soft" international environmental law have been incorporated into *CITES*. Consequently, it appears logical to conclude that "international environmental obligations of trade in endangered species" will have to be interpreted as those regulated by *CITES*.

3. Statistical evidence showing non-uniformity[38]

It is agreed that there is no single uniform "model law" suitable for *CITES* implementation in all countries, due to the diversity of national legal systems and administrative traditions. A set of guidelines for the enactment of legislation, based on a comparison of state practice, has been issued, with four minimum[39] domestic measures defined in 1992, as an aid to implementation, by the IUCN Environmental law Center in 1981. A survey conducted of 81 *CITES* countries between 1993-94 revealed that only 12 of those countries surveyed had completed the full range of legislative and administrative measures needed to give effect to all aspects. Legislation, in at least 26 countries, was found to fail the four minimum requirements set by the conference, while that in 43 other countries was considered incomplete or deficient in some specific aspects. This reveals that practice within states may not be as consistent as the minimum requirement laid down by *CITES*.

B. Opino Juris

To acquire the status of CIL, the contended rule must be regarded by states as being binding in law - there must hence be a legal obligation to obey it.

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[37] Shih, W C, "Multilaterlism and Case of Taiwan in the Trade Environment Nexus" (1996) 30(3) JWT (1-3) 112.

[38] See Sand, *supra* note 4 p 47.

[39] *Ibid.* The 4 minimum domestic measures comprise the authority to (I) designate at least one Management Authority and one Scientific Authority; (II) prohibit trade in specimens in violation of the Convention. (III) Penalize such trade; and (IV) confiscate specimens illegally traded or processed. CITES resolution 8.4 (1992).

The implantation of national laws consistent with *CITES* by State parties has clearly indicated their intention to consider the "prohibition of trade in endangered species" as a legal obligation. Alternatively, general acceptance by the international community of the restrictions that non-parties must comply with when trading with *CITES* parties[40], and the incorporation of *CITES* into EU Regulations[41] (which resulted in *CITES* becoming binding even on EU member states that are not parties to *CITES* e.g. Ireland), further strengthens the contention that this rule is an obligation at law.

It would however, one should be slow to infer from this that countries consider the prohibition of trade in endangered species a legal rule. Evidence has shown that countries are forced to comply, firstly, to avoid potentially harmful economic sanctions and secondly, to guard against threats by other parties.

Evidence also indicates that collective trade embargoes have been used by the *CITES Standing Committee* against states not party to the *Convention* under the following conditions[42]:

- Persistent non-compliance - e.g., in relation to the United Arab Emirate (UAE) in 1985-90; Thailand in 1991-92, and Italy in 1992-93.

- Persistent refusal to provide "comparable documents" pursuant to Article X – e.g., the case of EL Salvador (1986-87) and Equatorial Guinea (1988-92).

The trade embargoes for most cases were lifted when the countries targeted became parties of *CITES*, thus turning from 'free riders' to 'forced riders'.

However, some countries were reported to have entered into *CITES* as a result of unilateral actions, rather then the collective actions of *CITES* members. USA, under its *Lacey Act*, banned wildlife imports from Singapore on 25 December 1986, with the result that Singapore became a party of *CITES* on 30 November the same year.[43]

Similar tactics were used on China and Taiwan respectively, to achieve a ban on ivory trade in China, and the amendment of Taiwan's *Wildlife Conservation Act*. In addition, Japan was forced to withdraw its *CITES* reservations concerning marine turtles in August 1994 by the threat of American trade sanctions.[44]

The *Opino Juris* therefore remains a grey area that requires further exploration during the course of the rule's development.

IV. Conclusion

Evidence of the vast practice of the contended rule worldwide, accompanied by relevant cases and legislation has satisfied the necessary requirements of extensive and virtually uniform practice. Although a certain degree of inconsistency and non-uniformity is also apparent, it

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[40] Article X, CITES. *Supra* note 2.

[41] ECC/3626/82 as amended Mosedale, Thomas, "EU draft Regulation on CITES" [1996] 4 Review of European Community and International Environmental Law 345-346.

[42] See Sand, *supra* note 4.

[43] *Ibid.*

[44] *Ibid.*

is important to bear in mind that universal uniformity and consistency are not required under International Law[45].

Despite of this however, it is submitted that the rule 'trade in endangered species is prohibited' has not acquired the statues of customary international law at the present stage. It would perhaps be more favorable to submit that this rule has a potential to be crystallized as CIL in the future with its maturation in time. Firstly, more time could be allowed for non-uniform practice such as reservations to be resolved by means of further regulation rules. Conflict with the WTO rules is also likely to be resolved in the near future with the commencement of the negotiation on environmental impact and trade.

Meanwhile, the Opino Juris of states could be better justified given a longer period for observation. The relationship between effects of sanctions and basic intention of states could be further studied when more cases of such emerged in the course of development of the rule.

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[45] Nicaragua Case Nicaragua v US Merits 1986, cited in Dixon, M, Textbook on International law (London: Blackstone Press Limited 3rd edn) where ICE indicated that it was not necessary that all state practice be rigorously consistent in order to establish a rule of custom. It would suffice that conduce in general was consistent with the rule and that instance of practice inconsistent with the with the rule be treated as breaches of that with the rule be treated as breaches of that rule rather than as recognition of a new rule.

DOES THE JUDICIAL INDEPENDENCE[1] OF THE HKSAR CEASE WITH THE EXECUTION OF THE BIG SPENDER?

A CLOSE ANALYSIS OF THE CRIMINAL JURISDICTION OF THE HKSAR COURTS IN RELATION TO CROSS-BORDER CRIMES

JANICE WU LAI-FAN

I. *Introduction*

Is the fundamental policy "One Country, Two Systems" eroding? According to the *Joint Declaration*[2] and the *Basic Law*[3], the Hong Kong Special Administrative Region ("HKSAR") shall be authorized to enjoy an independent judicial power. The extent of independence lies on the relationship between the two legal systems. A yinyang symbol[4] is the best to describe the relationship between the two. The line between the white and black in the circle is not a straight divide, but a curve which the two sides have to accommodate each other. That means, it is difficult to work out a clear demarcation of power between the two completely different legal systems, although a clear one is significant and desirable to the viability of the "One Country, Two Systems".

"Fifty Years Unchanged" is also a slogan embodied to maintain the previous system, including judicial independence. It is only a year after the handover, the inaction of the HKSAR's government towards the trial of the Big Spender in a Mainland[5] court arouse thorny questions about the judicial independence of the HKSAR courts from the Mainland. Legal experts fretted over the precedent of a HKSAR resident being executed in the Mainland for the crimes committed in the HKSAR. It is not only about the life or death of the defendants of the Big Spender case, but far more importantly, the impact of the case on the future development of the judicial independence of the HKSAR courts. Does the "trial of the century"[6] undermine the judicial independence of the HKSAR and contravene the basic policies of "One Country, Two Systems" and "Fifty Years Unchanged"?

This paper first outlines the incidence of the Big Spender case leading to the legal controversy. The author then interprets the relevant articles of the *PRC Criminal Code 1997* and the HKSAR *Basic Law* to define the jurisdiction of the respective courts. The author criticizes the justification given by the HKSAR government of waiving her right to exercise jurisdiction. This paper also explores the possible solutions to conflict of jurisdictions between the Mainland and the HKSAR courts of cross-border crimes. It concludes with an urgency of rendition agreement between the Central Authorities of the PRC and the government of the HKSAR.

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1 "Judicial independence" in this paper refers to the independence of the SAR courts from the Central Authorities of the People's Republic of China ("PRC"), rather than the internal independence of the judiciary from the legislative and executive branches of the SAR government.

1 The author wishes to thank Mr Benny Tai, Professor Albert Chan and Dr Fu Hua-ling for their valuable comments.

2 Section 3(3) of the Preamble and Section I of Annex I.

3 Articles 2 and 19.

4 An idea from Mr Ann Tse-kai, a top adviser to Beijing, in "The Case that Threatens Our Autonomy", *South China Morning Post*, 14 November 1998, p 15.

5 The author uses the word "Mainland" to refer to the rest of the PRC, excluding HKSAR.

6 "The State v. Big Spender", *Time*, 9 November 1998, p 24.

II. Background

Cheung Tse-keung, a Hong Kong permanent resident, has the nickname of "Big Spender" because of his "could not care less" attitude of throwing vast sums of money around. He was the mastermind of a criminal organization which used the Hong Kong-Mainland border to carry out lucrative crimes. He and his associates were charged with the offences of smuggling explosives and firearms committed in the Mainland, and kidnapping and robbery committed in HKSAR. The trial was conducted in the Guangzhou Intermediate People's Court from 20 to 30 October 1998. Guilty verdicts were returned for all defendants on 12 November 1998 and the Big Spender was sentenced to death for the offence of smuggling explosives. His appeal was dismissed on 5 December 1998 and he and his four accomplices were immediately executed after the announcement of the dismissal.

The controversy is whether the Mainland court has jurisdiction over the Big Spender case. If yes, on what basis and how does it change (if any) when it came to the interface with courts of the HKSAR?

III. The Criminal Jurisdiction of the PRC

The criminal jurisdiction of the PRC is mainly built upon the territorial principle[7], with the personality principle[8], protective principle[9], and universal principle[10] as supplementary bases. These principles are codified in the *PRC Criminal Code* 1979, which was amended on 14 March 1997 and took effect on 1 October 1997.

A. Interpretation of Article 6 of the PRC Criminal Code 1997

The principle at issue in the Big Spender case is the territorial jurisdiction. Article 6 of the *PRC Criminal Code 1997* reads as follow:

> This law is applicable to all who commit crimes within the *territory* of the PRC *except as specially stipulated by law*. When either the *conduct or the consequence* of a crime takes place within PRC territory, a crime is deemed to have been committed within the PRC territory. *(emphasis added)*

1. "Territory"

The first question of interpretation is whether the word "territory" includes the HKSAR or not. Although this interpretation is more decisive to the Fung Shui Master case,[11] as legal

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[7] A state has jurisdiction over all matters arising within its territory, see art 6, *PRC Criminal Code 1997*.

[8] A state has jurisdiction over its nationals, even if the offences were committed outside its territory, see *ibid*, art 7.

[9] A state has jurisdiction over cases where national interest is injured, irrespective of the nationality of the offender and the place of conduct, see *ibid*, art 8.

[10] All states have jurisdiction over universal crimes, for example, piracy, hostage taking and destruction of aircraft. What offences amount to universal crimes is a matter of customary international law. See *ibid*, art 9. This and the above bases of jurisdiction are recognised in international law. For more detailed information, see Dixon, Martin, *Textbook on International Law* (London: Blackstone Press Limited, 1996) pp 129-135.

[11] Li Yuhui, a PRC national who confessed to administering cyanide to five persons leading to their deaths in a flat in Telford Garden in Hong Kong, was arrested and is going to stand trial in Mainland. The princple at issue in this case is the personality principle. The relevant article is art 7 of the *PRC Criminal Code 1997*.

jargons usually have only one interpretation but not vary with different provisions,[12] the interpretation of the word "territory" in art 7 is also applicable to art 6. There are divergent opinions on this single word. Dr Fu Hualing[13] is of the opinion that "territory" within the meaning of criminal law refers to the Mainland only, as he suggests that this term relates to criminal jurisdiction rather than to state sovereignty.[14] Dr Fu's view reconciles with the explanation given by the HKSAR government. The Secretary for Security Regina Ip Lau Suk-yee made a public announcement declaring that the word "territory" refers to jurisdiction.[15] Her view was reiterated by the Secretary for Justice Elsie Leung Oi-sie a few days later.[16] The explanation given originally aimed at removing the confusion and worry of the public, however, led to strong criticism. The Chairman of the Democratic Party, Mr Martin Lee Chu-ming, who himself is also a Senior Counsel, severely criticized the explanation as "completely without logic", "turning black into white and white into black" and "scared the PRC into death".[17]

On this point, the author respectfully disagrees with the view of Dr. Fu and the HKSAR government. As consistency is always crucial in judicial interpretation, it is worthy to examine other statutes involving the word "territory" (*lingyu* in Chinese), for instance, *Environmental Protection Law*, *Mineral Resources Law*, *Coal Law*, *Survey Law* and *Safety in Mineral Plant Law*.[18] It is hardly conceivable that "territory" under these laws refer to jurisdiction, rather than territorial boundaries. If the National People's Congress ("NPC") had ever intended to give an extraordinary meaning to the word "territory" in the *Criminal Code*, it would have been expressly done so, which was not in the present case. Moreover, the author agrees with Mr Ling Bing, an Assistant Professor of Law in the City University of Hong Kong, that as arts 6 to 10 of the *PRC Criminal Code 1997* are intimately related, the word "territory" in these articles should bear the same meaning. Article 6 laid down the general scope of the application of the *Criminal Code*, if "territory" means criminal jurisdiction, then the provision will be read in a circular notion, that is "the law is applicable to . . . (territory) within the scope of this law". Therefore, it is logical to draw the conclusion that the word "territory" means territorial boundaries under the state sovereignty.

If one is satisfied that territory means territorial boundaries, then the next question is whether the HKSAR is within the territory of the PRC. The answer is straight forward, yes. Article 1 of the *Basic Law* clearly states that the HKSAR is an "inalienable part of the PRC" upon the resumption of sovereignty. As the first and foremost article of the constitution of the HKSAR, it must be the most fundamental underlying principle.[19] Mr Martin Lee said that it is "politically incorrect to say that the HKSAR is not within the territory of the PRC".[20] His view reconciled with other academics. Professor Albert Chan, the Dean of the Faculty of Law in the University of Hong Kong and also a member of the Committee of the Basic Law, said that during the law adaptation process, the Standing Committee of the NPC ("SCNPC")

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12 Mr Martin Lee's view in note 13 below and also the view of Professor Albert Chan in an interview on 12 February 1999.

13 Assistant Professor, Department of Law, the University of Hong Kong.

14 Fu, H, "The Battle of Criminal Jurisdiction" (1998) 28 HKLJ 273, 276.

15 "The Oral Battle Between Martin Lee and Ip Lau Suk-yee", *Ming Pao*, 8 November 1998.

16 Chris Yeung, "Beijing Quizzed Over Use of Laws", *South China Morning Post*, 19 November 1998, p 8.

17 See note 13 above.

18 Ling Bing, "Application of the PRC Criminal Law in Hong Kong" (1999) 1 *Hong Kong Lawyer* 15, 16.

19 The first article being the most fundamental principle is also true in the PRC Constitution, where socialist system is laid down in art 1.

20 See note 13 above.

and the HKSAR government reiterated that the HKSAR is within the territory of the PRC.[21] Besides, Chinese academics have assumed that the HKSAR has always been part of the territory of the PRC and therefore, the HKSAR is included in the concept of territory under the *Criminal Code* and *Criminal Procedure Law*.[22]

2. "Except as specially stipulated by law"

As the HKSAR is within the territory of the PRC, according to the territorial principle, the offences committed in the HKSAR seem to be within the criminal jurisdiction of the PRC. However, the territorial principle is subjected to a proviso, "except as specially stipulated by law", in art 6. The issue is whether the *Basic Law* falls within the exception. The HKSAR government expressed its view that the Basic Law does not fall within the exception. However, all major books on interpretation and construction of the *PRC Criminal Code 1997* listed the *Basic Law* of the HKSAR under the exception category.[23]

It is acceptable that the HKSAR government has a different opinion with the Chinese jurists, as law is always a matter of interpretation. However, it is completely unacceptable that the HKSAR government made the interpretation without first consulting the view of the Central Authorities or even some Mainland legal experts. Deputy Commissioner of Legal Policy, Mr Wong Kai-yi, frankly admitted that the government gave the interpretation without consulting the Mainland.[24] Although the Secretary for Justice a few days later said she had sought the views of "relevant persons with legal knowledge in the state organs" on the interpretation of the relevant articles in the *Criminal Code*, she was reluctant to disclose any comments given as a matter of confidentiality.[25] The vague notion of "relevant persons", the blanket defence of confidentiality and the inconsistent voices within the government seriously undermine the public confidence towards the HKSAR government in maintaining the judicial independence of the HKSAR courts. All the attempts by the government officials on the interpretation of the *PRC Criminal Law 1997* only gave the impression that they were trying to twist the law to "justify" the jurisdiction of the Mainland court. This kind of "random"[26] interpretation further deteriorates the certainty of law, an important element of the rule of law, which the PRC is developing towards.

The author adopts the Chinese interpretation of the proviso "except as specially stipulated by law", rather than the random interpretation of the HKSAR government. Given the unique status of the *Basic Law* in the PRC constitutional framework, it could be regarded as a special

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21 "Regina Ip: No Rendition Request for Li Yuhi", *Ming Pao*, 10 November 1998.

22 Chang & Chen dong, "The Jurisdiction of Criminal Cases Involving Hong Kong" (1992) 3 *Faxue Yanjiow* (Research on Jurisprudence) 35, 37; Zhao Bingzhi & Suan Li, "Examination of Legal Questions on Cross-Border Crimes" (1993) 2 *Zhonguo Faxue* (Chinese Jurisprudence) 79, 84.

23 Zhao Bingzhi, *Xin Xingfa Jiaocheng* (Lectures on New Criminal Code) (Beijing: Chinese People's University Press, 1997) p 72; Criminal Law Session , Law Committee of the SCNPC, *Zhonghua Renmin Gongheguo Xingfa Shiyi* (Interpretation and Construction of the PRC Criminal Code) (Beijing: Law Press, 1997) p 8; Yan Junxing & Xiao Shengxi, *Xin Xingfa Shiyi* (Interpretation and Construction of the New Criminal Code) (Beijing: Central Party School Press, 1997) p 9; Liu Jiachen, *Xin Xingfa Tiaowen Shiyi* (Interpretation and Construction of the New Criminal Code Provisions) (Beijing: Supreme People's Court Press, 1997) p 20. The other exceptions are diplomatic immunity and autonomous region according to arts 11 and 90 of the *Criminal Code* respectively.

24 See note 21 above.

25 See note 16 above.

26 Idea of Professor Albert Chan, see note 21 above.

law prevailing over the general law.[27] In order to give full effect to the fundamental underlying policy of "One Country, Two Systems" and the maintenance of the previous laws in force in Hong Kong,[28] the Basic Law should be a special exception to the territorial application of the *PRC Criminal Code 1997*. Even the Mainland legal experts, who always give priority to state sovereignty, consider that the *Basic Law* is within the exceptional proviso, it is convincing that this interpretation is the most probable one. Furthermore, the extension of the Chinese criminal jurisdiction over acts committed in the HKSAR violates the proscription of non-intervention[29] and encroaches on the high degree of autonomy guaranteed in the *Joint Declaration*. Chinese government would be "estopped"[30] from extending criminal jurisdiction to the HKSAR.

3. "Conduct or Consequence"

The PRC adopts an expansive territorial approach, both subjective and objective. Subjective in a sense that a state can exercise jurisdiction over the offences commencing in its territory, even though some elements took place in another state. Objective territorial principle is the reverse, a state can exercise jurisdiction over offences completed within its territory. "Conduct" and "consequence" refer to the subjective and objective territorial principle respectively. Article 22 of the *PRC Criminal Code 1997* stipulates that preparation of instrument or creation of conditions constitutes a crime. This article is a further illustration of the subjective territorial principle. Expansive territorial principle is gaining acceptance in the international community, especially the common law states. "Expansive" to the extent that if there is an element of a crime taking place within the territory of a state, that state is entitled to have jurisdiction. This creates a problem as to what extent a state is entitled to have jurisdiction. Imagine if a Hong Kong resident bought a gun in the Mainland and then used the gun to commit murder in the HKSAR. The accused was then arrested in the Mainland. Would the accused stand trial in a Mainland court for murder which was substantially done in the HKSAR? The extent of linkage between the crime and the jurisdiction of the court has been judicially considered in the United Kingdom and Canada.[31] Although there has not been any cased decided on the meaning of "conduct or consequence", it should not be interpreted to the extent that infringes the judicial independence of the HKSAR. The exceptional proviso does not completely deprive the jurisdiction of the Mainland courts over the offences committed in the HKSAR. Either "conduct or consequence" takes place within the territory of the Mainland, the courts in the Mainland is entitled to have jurisdiction.

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27 Leung, Priscilla MF, "Big Spender Cheung Tze Keung: A Brief Analysis" (1999) 1 *Hong Kong Lawyer* 17, 19.

28 Article 8, *Basic Law*.

29 This is one of the principle of the *Five Principles of Peaceful Coexistence* entrenched in the *PRC Constitution*

30 Estoppel is an international principle, resting on the principles of good faith and consistency in state relations. See note 32 below, p 50.

31 *Section 1 of the Criminal Justice Act 1993 (UK) authorizes jurisdict*ion over the "relevant event" in relation to an offence occurs in the UK. The "relevant event" is defined as "any act or omission or other event (including the result of any act or omission). The Supreme Court of Canada in *Libman v R* in 1986 held that it is within Canadian jurisdiction if there is "a significant portion of the activities constituting the offence took place in Canada" and a "real and substantial link" between the crime and Canada. See Fu Hualing, "The Relevance of Chinese Criminal Law To Hong Kong and Its Residents" (1997) HKLJ 229, 231. US courts have jurisdiction over offences of which effects or results took place within the territory.

B. Does the Mainland Courts Have Jurisdiction Over the Big Spender Case?

In the Big Spender case, the offences of smuggling explosives and firearms committed in the Mainland, kidnapping and robbery committed in the HKSAR are within the territory of the PRC, and are *prima facie* subject to the Mainland criminal jurisdiction. Yet, the exceptional proviso of which the *Basic Law* is a part removes the offences committed in the HKSAR from the Mainland jurisdiction. That is, the Mainland only has jurisdiction over offences committed in the Mainland, but not those solely committed in the HKSAR. However, the offences of kidnapping and robbery were commenced in the Mainland and then completed in the HKSAR. According to art 6 of the *PRC Criminal Code 1997*, either the conduct or consequence of a crime takes place within the PRC territory is deemed to be committed in the PRC and thus, subject to the PRC criminal law. The firearms used in the robbery and the planning and gathering of accomplices in the kidnapping amount to preparation of instrument and creation of condition, thus constituting crimes under art 22 of the *Code*. In spite of the fact that the Guangzhou People's Intermediate Court relied on art 24 of the *Criminal Procedure Law*,[32] the Mainland courts *have* jurisdiction over the offences committed by the Big Spender and his accomplices under arts 6 and 22 of the *PRC Criminal Code 1997*. The same conclusion was reached by Professor Chen Guangzhong, the Vice-Chairman of the Committee of the Chinese Jurists, notwithstanding his reliance on both art 6 of the *Criminal Code* and art 24 of the *Criminal Procedure Law*.[33] From the above interpretation analysis, Mainland courts *have* jurisdiction over the Big Spender case. However, whether the jurisdiction can be *exercised* depends on whether its right to exercise is excluded by the *Basic Law*.

IV. The Criminal Jurisdiction of the HKSAR

A. Objective Territorial Principle

Before the handover, Hong Kong courts have jurisdiction based on the objective territorial principle,[34] namely if an offence is completed or intended to be completed with the territory of Hong Kong. Pursuant to art 8 of the *Basic Law*, laws previously in force in Hong Kong shall be maintained. Therefore, the objective territorial principle survives the change of sovereignty. Based on this principle, the kidnapping and the robbery completed within the territory of the HKSAR fall under the jurisdiction of the courts of the HKSAR.

B. Interpretation of the Basic Law

From the above analysis, both the courts of the Mainland and the HKSAR have jurisdiction over the Big Spender case. This is so-called concurrent jurisdiction. The next issue is whether the *Basic Law* excludes the Mainland courts from exercising the jurisdiction. The relevant article on the jurisdiction of the HKSAR courts is art 19 and the one on the application of national laws into the HKSAR is art 18. In order to find out the true meaning of these

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32 *Criminal Procedure Law* was promulgated by the NPC on 1 July 1979 and was amended on 17 March. Article 24 states that the People's Courts assert jurisdiction over offences based on the place of committing the offence.

33 "Jurist: The Trial of the Big Spender in Mainland Complies With the Law", *Wen Wei Po*, 4 December 1998; "The Curing of Doubts by Jurist", *Wen Wei Po*, 5 December 1998.

34 *Attorney General v Yeung Sun-shun* [1987] HKLR 987, 997 and *Somchai Liangsiriprasert v The Government of the United States of America* [1990] 2 HKLR 612 (a Privy Council decision on appeal from Hong Kong). See Mushkat, Roda, *One Country, Two International Legal Personalities: The Case of Hong Kong* (Hong Kong: Hong Kong Univeristy Press, 1997) pp 47-8.

two articles, we should first analyze the proper approach to interpreting the *Basic Law*.

1. Proper Approach to the Interpretation of the *Basic Law*

Due to the hybrid nature of the *Basic Law*, being an ordinary statute[35] in a Chinese civil law system and a constitution[36] in a common law system, there has been legal controversy over the proper approach to the interpretation of the Basic Law, as to whether to use the Chinese law or the common law approach of interpretation. The method and power of interpreting the *Basic Law* depends on the interpretation of art 158 of it. This circular controversy was not cleared until a recent decision of the Court of Final Appeal in the HKSAR, *The Director of Immigration v Cheung Lai-wah and Others.*[37] The Chief Justice Andrew Li held that a purposive approach is to be applied in interpreting the Basic Law.[38] In ascertaining the meaning of an article, the purpose of the article, its relevant articles, the language of the text, and particularly important, the context should be considered. It was also held that the *Joint Declaration* is a relevant extrinsic material in ascertaining the purpose of the *Basic Law*. Chief Justice Li went on to rule that the above consideration is not exhaustive as constitutional interpretation is essentially question specific.[39]

As the underlying legal jurisprudence and system in the HKSAR are based on common law which has well-developed rules of interpretation, it is more appropriate to use the common law approach. Although there is a gradual development in the rules of interpretation in the Mainland, there is still no clear distinction,[40] at least in practice, between interpretation and legislation which are both vested on the non-judicial NPC. This is also against the doctrine of separation of powers practised in the HKSAR. It is undesirable to interpret the mini-constitution of the HKSAR with the relatively undeveloped rules of interpretation. On the other hand, as the *Basic Law* purports to implement the basic policies embodied in the *Joint Declaration*, the *Declaration* should be given maximum effect.[41]

2. Article 18 of the *Basic Law*

> "... National laws shall not be applied in the HKSAR except for those listed in Annex III to this Law. The laws listed therein shall be applied locally by way of promulgation or legislation by the Region.
> ... Law listed in Annex III to this Law shall be confined to those relating to defence and foreign affairs as well as other matters outside the limits of the autonomy of the Region as specified by

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35 There are three levels of law in the Mainland PRC legal framework. The most supreme one is the PRC Constitution, the second level is the laws passed by the NPC and the third level is the administrative rules. From this perspective, as the Basic Law is promulgated by the NPC, it could be seen as an ordinary statute in the Mainland legal framework.

36 Decision of the NPC on the Basic Law of the HKSAR of the PRC on 4 April 1990, declaring that the Basic Law is constitutional as it is enacted in accordance with the Constitution of the PRC.

37 Final Appeal No 14, 15 and 16 of 1998(Civil) (on appeal from CACV No. 216, 217 and 203 of 1997). This decision has been strongly criticized by Chinese jurists as wrong and necessary for correction. Its status depends on whether the NPC will re-interpret the relevant article in the *Basic Law*, namely art 158. The NPC has not given or declared to give any re-interpretation up till the finishing of this paper. In the mean time, the author treats this decision as the highest authority in the HKSAR.

38 The purposive approach to interpreting the *Basic Law* is supported by Chan CJHC, Mortimer VP and Nazareth VP in *HKSAR v Ma Wai-kwan David and others* [1997] 2 HKC 315.

39 pp 40-42 of the judgement.

40 Ghai, Yash, *Hong Kong's New Constitutional Order: The Resumption of Chinese Sovereignty and the Basic Law* (Hong Kong: Hong Kong University Press, 1997) p 209.

41 Chan, Johannes, "Principles of Interpretation of the Basic Law: A Preliminary Enquiry" in *Law Working Paper Series* No 19 (Hong Kong: Faculty of Law in the University of Hong Kong, 1998).

this Law."

What is the purpose of art 18? The essence of the *Joint Declaration* is to preserve the previous legal system, including the laws, in force in Hong Kong.[42] National laws are not included in the *Joint Declaration*,[43] in order to honour PRC's international legal obligation, the provisions in the Basic Law must be strictly adhered.[44] The smaller the scope of the application of national laws in the HKSAR, the higher the degree of the autonomy of the HKSAR.[45] The purpose of art 18 is to list out the laws applicable in the HKSAR and limit the application of national laws in the HKSAR.

As the *PRC Criminal Code 1997* is not listed in Annex III of the Basic Law, it is not applicable in the HKSAR. Virtually, it is incapable of being a national law applicable to the HKSAR, as it is relating neither to defence and foreign affairs nor matters outside the limits of the autonomy of the HKSAR. The first issue is whether criminal jurisdiction is a matter outside the autonomy of the HKSAR. As the language of "matters outside the autonomy" is a little bit vague and indefinite, we should look into the context of art 18 in finding out the true meaning of it. Other relevant articles do shed some light on the context. Articles 2 and 19 state that an independent judicial power shall be vested in the HKSAR. While judicial power is the nature of the authority enjoyed by the HKSAR courts, jurisdiction could be described as the scope of the power. That means, independent judicial power includes, or at least goes hand in hand with, independent jurisdiction. Since independent judicial power is within the autonomy of the HKSAR, so does the jurisdiction of the courts. Since the *PRC Criminal Code 1997* does not fit the criteria of Annex III, it is not applicable in the HKSAR. This view is also supported by Professor Albert Chen, a member of the Committee of the Basic Law.[46] To apply laws enacted by the NPC to the HKSAR would lead to the result of NPC taking over the work of the legislature of the HKSAR, which contravenes the *Joint Declaration* and the *Basic Law*.[47]

The Secretary for Justice admits that the *PRC Criminal Code 1997* does not apply in the HKSAR, but she argues that the extra-territorial effect of the *Code* extends to the HKSAR.[48] This argument is regretfully untenable. If any national law not listed in Annex III but having extra-territorial effect extends to the HKSAR, it is in fact amending the *Basic Law* without going through the proper procedure, as specified in art 18. This kind of extension undermines the "two legal systems" policy to a very great extent.

Miss Gladys Li, SC, argues that if the *PRC Criminal Code 1997* has no force in the HKSAR,

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42 Section II, Annex I, *Joint Declaration*

43 Paragraph III, Section II, Annex I. This paragraph stipulates the laws of the HKSAR means that the Basic Law, laws previously in force in Hong Kong and the laws enacted by the HKSAR legislature. There is no mention of national laws.

44 *Supra* note 40.

45 Chen, A.H.Y., "The Birth and First Year of Life of the Legal System of the HKSAR", a paper presented in the "Hong Kong China: A Year Later" conference held on 29-31 October 1998 in Singapore.

46 "The Abolition of Death Penalty in the HKSAR Increases the Difficulty of Judicial Assistance", *Ming Pao*, 9 November 1998.

47 Lee, Martin & Szeto, Wah, "The Basic Law: Some Basic Flaws" in Chiu Hungdah, *The Draft Basic Law of Hong Kong: Analysis and Document* (Occasional Papers/Reprint Series in Contemporary Asia Studies No.5, 1988) The third basic policy in the Preamble of the *Joint Declaration*, arts 2 and 17 of the *Basic Law* would be contravened.

48 Leung, Elsie O, "Viewing the Jurisdictional Issue from a Proper Perspective" (1999) 1 *Hong Kong Lawyer* 56, 57.

as a matter of law, the Hong Kong residents cannot have broken that law.[49] It is doubtful whether this argument applies to the Big Spender case. It is correct to say that a Hong Kong citizen could not have broken a national law not listed in Annex III in the HKSAR. However, the Big Spender and his co-accused did not break the *Criminal Code* in the HKSAR, but in the Mainland where preparation of instrument (the firearms) and creation of condition (planning and gathering accomplices) were done. Article 18 only has the effect that a HKSAR resident is not abide by the national laws not in Annex III in the HKSAR, but does not immune a Hong Kong resident breaking them in the Mainland.

3. Article 19 of the *Basic Law*

> "... The courts of the HKSAR shall *have* jurisdiction over all cases *in* the Region, except that the *restrictions* on their jurisdiction imposed by the legal system and principles *previously in force* in Hong Kong shall be maintained." (emphasis added)

Scope of jurisdiction – "in"

Article 19 defines the parameter of jurisdiction enjoyed by the HKSAR courts, which depends on the interpretation of the ambiguous word "in". From the English version, it means that the courts can exercise jurisdiction based on territorial principle. On the other hand, the Chinese version could be translated as "in" or "of". If it is translated as "of", the jurisdiction of the courts of the HKSAR might be wider, as it might suggest that any cases relating to the HKSAR fall under the jurisdiction of the courts of the HKSAR. No matter which translation is to be adopted, the outcome will be the same over the Big Spender case. As the kidnapping and robbery were completed in the HKSAR, the courts of the HKSAR can exercise jurisdiction based on the territorial principle. (i.e. "in") On the other side of the coin, as the victims were Hong Kong residents, the ransom in Hong Kong currency was paid in Hong Kong, the courts of the HKSAR can also exercise jurisdiction based on the relation to Hong Kong. (i.e."of")

Exclusive jurisdiction?

The real issue is whether art 19 purports to give the courts of the HKSAR exclusive jurisdiction. In the case of concurrent jurisdiction between the Mainland and the PRC, can the HKSAR excludes the Mainland from exercising jurisdiction by virtue of art 19 of the *Basic Law*? The author encountered difficulty in ascertaining the purpose of art 19, the Joint Declaration, the Reference Paper[50] and the Consultation Report[51] of the Basic Law were all silent on the issue of exclusive jurisdiction. Apart from the extrinsic materials, the text of the article itself may give some clues to its purpose. The jurisdiction of the courts of the HKSAR is subjected to previous restriction in force in Hong Kong. Before the handover, the colonial Hong Kong courts do not have exclusive jurisdiction, hence, the courts of the HKSAR should be subjected to the same restriction and not having exclusive jurisdiction. It might be argued that the Court of Final Appeal held that analogy drawn with the old order was misconceived.[52] However, such ruling is solely decided on the facts of the case.[53] The ruling does not absolutely rule out the analogy with the old order. Otherwise, it is amending

49 "Alarmed by Top Officials Lame Excuse", *South China Morning Post*, 28 October 1998.
50 Secretariat of the Consultative Committee for the Basic Law of the HKSAR of the PRC in February 1989.
51 The Consultative Committee for the Basic Law of the HKSAR of the PRC in November 1989.
52 See note 35 above, p 37.
53 *Ibid*, the analogy with the old order is inappropriate due to the drastic difference between parliamentary supremacy in the UK and the absence of such doctrine in the PRC.

the *Basic Law* without going through the specified procedure. The analogy to previous restriction is appropriate in the present case. The language of the article reconciles with the outcome of the analogy. The word "have" must be distinguished from the word "exercise". The word "have" does not include the meaning of mandatory exercising. There is distinction between the two words in other articles of the *Basic Law*. "Exercise" is used in arts 62, 72 and 73 to mandate the functions and powers of the executive and the legislative branch to be carried out. On the other hand, "have" is used in arts 26, 27, 32-36 upon which fundamental rights of HKSAR residents are guaranteed. The word "have" only underlines the minimum guarantee of rights, but does not mandate their exercising. The deliberate use of "have" in art 19 reveals that the HKSAR courts are not obliged to exercise jurisdiction over all cases in the Region, but are only given (have) a right to exercise. Thus, no exclusive jurisdiction is intended. Professor Albert Chen shared the same view with the author that there is no such implication of exclusive jurisdiction in art 19.[54]

Benny Tai, Assistant Professor of the Department of Law in the University of Hong Kong, argued that as art 19 is in the context of Chapter II which regulates the relationship between the Central Authorities and the HKSAR, a clear line must be intended to be drawn between the jurisdiction of the courts of the Mainland and those of the HKSAR. Once the courts of the HKSAR have jurisdiction over a case, the Mainland courts are then excluded from exercising the jurisdiction.[55] This argument went too far. Even an independent state cannot exclude the jurisdiction of another state, how can a SAR with high degree of autonomy do so to its country? The high degree of autonomy is to prevent interference from the Mainland over cases within the jurisdiction of the courts of the HKSAR, but not to defeat the claim of Mainland in relation to cross-border crimes. If art 19 had exclusive jurisdiction in all instances of concurrent jurisdiction, there might be unjust result in cases where the link between the crime and the HKSAR was not as substantial as that to the Mainland. The rigidity of "always-prevailing art 19" is unsatisfactory, the facts of the case must be taken into account.

Albert Ho Chun-yan, the legal spokesman of the Democratic Party, said the trial of the Big Spender Case in the Mainland contravened art 19 of the *Basic Law*.[56] The author disagrees that there is any contravention to the *Basic Law*. From the above analysis, both the Mainland and the HKSAR courts have concurrent jurisdiction over the case. Concurrent jurisdiction does not amount to contravention. There is no express or implied provision in the *Basic Law* suggesting that once the courts of HKSAR have jurisdiction over a case, its Mainland counterpart is deprived of the right.

C. "Justification" Given by the HKSAR Government

As art 19 does not deprive the jurisdiction of the courts of the Mainland, the Big Spender Case is an illustration of concurrent jurisdiction between the courts of the Mainland and the HKSAR. Concurrent means that both courts can compete their claims in exercising jurisdiction. However, the HKSAR lost the battle shamefully; shameful not due to the result of losing, but the failure of attempting the battle. It is disappointing that the HKSAR government only kept on asserting that the Mainland court has jurisdiction over the case while neglecting its unshakable responsibility to safeguard the interests of Hong Kong residents and

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[54] The author conducted an interview with Professor Chen on the interpretation of the Basic Law on 12 February 1998.

[55] "The Unshakable Responsibility to Uphold the Autonomy of the HKSAR", *Ming Pao*, 2 November 1998.

[56] "Haste Urged On Criminal Transfers", *South China Morning Post*, 6 December 1998.

uphold judicial independence from the Mainland.

There are three reasons given by the government of not attempting to fight the jurisdiction battle. The Secretary of Security said there was insufficient evidence to seek the return of the defendants as there was no formal reporting to the police. Although Benny Tai argued that the request of the Big Spender to face trial in the HKSAR could be seen as a self-confession, it is absurd if a defendant is allowed to choose a jurisdiction with more lenient punishment after the harsher proceedings had started. This reason is acceptable as it is a usual requirement under the common law that a state requesting extradition of an accused needs to produce sufficient evidence to justify the committal of trial. This is known as "*prima facie* case" requirement.[57] Although it is doubtful whether the rendition agreement in negotiation would adopt this requirement, in the mean time, there is no reason of not following the common law tradition.

The second reason was given by the Secretary for Justice that there was no legal basis to interfere with the Mainland jurisdiction, as there is no established principles of mutual judicial assistance.[58] We all know that the rendition agreement takes quite a long time to be concluded, due to the drastic difference between two legal systems. How about if, in the mean time, there were Hong Kong residents being arrested and prosecuted again in the Mainland court for cross-border crimes, will the HKSAR again watched with folded arms towards the Mainland trial due to the absence of rendition agreement? Should the formality of rendition agreement overrule the precious value of human lives? Is the case decided on the notoriety of the Big Spender? Even if he is notorious, he is entitled to enjoy the fundamental right to life. One can contrast the attitudes of the HKSAR government towards the Big Spender Case and the Old Lam Pak-yan case.[59]

The Chief Executive said that "we in Hong Kong under the 'One Country, Two Systems' policy must respect legal procedures inside China. Our legal system is *not at all* under threat."[60] Representing the Bar Association, Ronny Tong, SC, argued the opposite. The fundamental policy of "One Country, Two Systems" will be severely undermined if the HKSAR government failed to compete with the Mainland, and merely submitted to its authority. His argument is supported by the Legislative Council legal profession representative Margaret Ng Ngoi-yee who said "the appearance of crimes committed in Hong Kong being tried in the Mainland is not good concept of 'One Country, Two Systems'".[61] It is worrying whether the HKSAR government understands the true meaning of "One Country, Two Systems".

V. Possible Solutions to Concurrent Jurisdiction in Relation to Cross-Borders Crimes

The passive attitude of the HKSAR government shakes the confidence of the public towards judicial independence. A proper solution to concurrent jurisdiction in cross-border crimes tops the government agenda. There are several possible solutions from different perspectives below.

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57 See note 32, p 75.
58 *South China Morning Post*, 4 November 1998.
59 A Hong Kong resident was prosecuted in Taiwan for bribing government officials. The Chief Executive of the HKSAR, Tung Chee-wah, mitigated for the defendant's old age through non-official organizations.
60 "Pledge to Speed Up Extradition Talks", *South China Morning Post*, 12 November 1998.
61 "Big Spender case fuels jurisdiction debate", *South China Morning Post*, 19 November 1998.

A. Chinese Law Perspective

Before the handover, some Chinese academics foresaw the jurisdictional problem in relation to cross-border crimes and several suggestions were given to solve the conflict:

1. If there is only one offence of which the preparation and commission are split over the Mainland and the HKSAR, then the court where the crime is committed is entitled to exercise jurisdiction. The rationale is that the offence generates greater adverse effect on the place of commission rather than that of preparation. And the place of commission can more accurately reflect the nature and extent of the crime.
2. If there is only one offence continuing across the border, for instance, smuggling and trafficking of dangerous drugs, then the principles of "actual control" and "first reception" apply. The court of the place where the crime is first defeated is entitled to exercise jurisdiction.
3. If there are several cross-border offences, the jurisdiction over the case might go to:
   (a) the court which first obtains the custody of the offenders;
   (b) the court where the crimes are mainly committed; or
   (c) the court where the most serious crime is committed, which is the most serious crime is determined by the laws of the court first receiving the case.[62]

As the Big Spender and his co-accused were involved in several cross-border crimes, we will first start with the third scenario. It is the Guangzhou People's Court who first detained and arrested the Big Spender and his accomplices. Next, it is arguable where crimes are mainly committed. While the smuggling of explosives and firearms were organized in Mainland and then transported to the HKSAR, the kidnapping and robbery were planned in the Mainland but took place in Hong Kong. Both Mainlanders and Hong Kongers were involved in the crimes. There is hardly a clear-cut place as the major commission area. The third solution is again not decisive, as the most severe penalty for smuggling explosives, firearms and kidnapping are all capital punishment in the Mainland. There is no one outweighing the other. All in all, the first solution prevails over the other two. The first solution gains more support from the legal profession[63] and is more compatible with international principle (as we shall we in the next section).

Although the first and second scenarios are of little significance to the Big Spender case, they do help in removing the worry of the people in the HKSAR towards the judicial independence of the Region. Take the charge of kidnapping as an example, under scenario (1), the jurisdiction of the court of the HKSAR where the crime was committed prevails over that of the Mainland where preparation was done. The trial of the Big Spender for kidnapping and robbery in a Mainland court was decided upon the fact there are other offences which took place principally in the Mainland and thus subject to its jurisdiction.

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62 See note 22 above.

63 "Chinese Academics Support the Territorial Principle", *Ming Pao*, 15 November 1998. Both Professor Zhao Bingzhi and Professor Albert Chen supported the principles of "actual control" and "first reception".

B. *International Law Perspective*

As the Mainland and the HKSAR are two separate legal entities, their conflict could be seen as a microcosm of international law conflicts,[64] and thus could be solved by international law.

In the case of concurrent jurisdiction, normally the state which actually has the custody of the suspect has priority to exercise jurisdiction.[65] The exercise of jurisdiction also depends on the availability of evidence. In the Big Spender case, the victims of the kidnapping provided written statements, which were admitted as evidence, to the Mainland court. The actual custody and the availability of evidence allow the Mainland court to exercise jurisdiction in accordance with international principle. Although it is still arguable whether international law applies between the Mainland and the HKSAR due to the notion of sovereignty, there is no reason why we should not use international principles, at least, as guidance and reference.

C. *Hierarchy of Laws*

The author tries to formulate an argument that if the *Basic Law* has a higher status than the *PRC Criminal Code 1997* in the hierarchy of laws, then the *Basic Law* should be given more weight in a case of concurrent jurisdiction. As the *Criminal Code* is not applicable to the HKSAR, its relationship with the *Basic Law* has to be considered in the context of Chinese constitutional framework. However, the author encountered enormous difficulty in placing the *Basic Law* in the Chinese hierarchy of laws.

Generally speaking, there are three levels of laws in the Mainland. The most supreme one is the *PRC Constitution*, the second level is the laws passed by the NPC, and the third one is the administrative rules. According to this classification, as both the national laws and the *Basic Law* are passed by the NPC, they should have the same status.[66] However, given the specific interpretation and amendment procedure[67] and the constitutional nature of the *Basic Law*[68], it seems that the *Basic Law* has a higher status than national laws.[69] The status of the *Basic Law* may even be higher, as it is enacted pursuant to the *Joint Declaration*, an international treaty. In the PRC legal system, international treaty prevails over the domestic law (including the *PRC Constitution*). Following this logic, the *Basic Law* may even enjoy higher status than the *PRC Constitution*. The *Basic Law* is so unique that it does not fit nicely onto any levels of laws in the Chinese constitutional framework.
The argument of comparing the status between the *Basic Law* and the *PRC Criminal Code 1997* does not hold water. The *Basic Law* can hardly fit into the Chinese hierarchy of laws due to its unique status. Professor Ghai commented that as the purpose of the *Basic Law* is to a large extent to separate the HKSAR from the rest of the Mainland, it makes little sense to

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64 Fu Hualing, "The Relevance of Chinese Criminal Law To Hong Kong and Its Residents" (1997) HKLJ 229.

65 See note 10 above, p 128; Shaw, Malcom, *International Law* (London: Cambridge University Press, 1997) p 462.

66 Cheng, Joseph Y.S., "Draft Basic Law: Messages from Hong Kong People"; Ting Wai, "What Will the Basic Law Guarantee? –A Study of the Draft Basic Law from Political and Comparative Approach" in *The Draft Basic Law of Hong Kong: Analysis and Document* (Occasional Papers/Reprint Series in Contemporary Asia Studies No.5, 1988) pp 12-13, 60.

67 Articles 158 and 159 of the *Basic Law*. Article 158 states that the NPC must consult the Committee of the Basic Law before making an interpretation. Article 159 requires not only the consultation from the Committee of the Basic Law, but any amendment must not contravene the basic policies.

68 Decision of the NPC on 4 April 1990.

69 Wang C & Zhang X, *Introduction to Chinese Law* (Hong Kong: Sweet & Maxwell, 1997) p 22.

take about a single hierarchy in a general way.[70]

D. *Rendition Agreement*[71]

All the above possible solutions have its own disadvantages: Chinese law perspective not applicable to the common law Region; international law perspective not applicable in one country, the hierarchy of laws makes little sense. The Big Spender case highlights the urgency of a rendition agreement between the Mainland and the HKSAR pursuant to art 95 of the Basic Law. The negotiation is complicated by the divergent legal systems and practices. The complication is aggravated by the death penalty in the Mainland. However, it is only the conclusion of a rendition agreement that can remove the worry of the public and uphold the judicial independence of the courts of the HKSAR from the Central Authorities. A reminder to the government is that the rendition negotiation must have a bottom line,[72] rather than complete subordination under the Central Authorities.

VI. Conclusion

The Big Spender case highlights the inherent jurisdiction problem in cross-border crimes. Unlike concurrent jurisdiction between independent states, the extraordinary context at issue is the relationship between the Mainland PRC and the HKSAR. In the absence of rendition agreement, the battle of jurisdiction has to be solved by interpreting the relevant articles in the *PRC Criminal Code 1997* and the *Basic Law*. According to the *PRC Criminal Code 1997*, the mainland court is entitled to have jurisdiction over the case. On the other side of the coin, the court of the HKSAR also has jurisdiction over the same case based on the objective territorial principle in common law. In this case of concurrent jurisdiction, the issue is whether art 19 of the *Basic Law* excludes the Mainland court from exercising the jurisdiction. There is no express provision as to exclusive jurisdiction. The author also finds art 19 is incapable of carrying such implication. Therefore, it is open for both courts to compete and assert its jurisdiction. Nevertheless, it is disappointing that the HKSAR government gave up the battle unilaterally. The government, on one hand, made no attempt to seek the return of the Hong Kong residents, on the other hand, asserted repeatedly the legitimacy of the exercise of jurisdiction by the Mainland court. The passive attitude of the government towards the Big Spender case seriously undermines the fundamental policy of "One Country, Two Systems" and thus, the public confidence towards the judicial independence of the HKSAR. The author looks forward to a bilateral rendition negotiation to resolve the conflict of jurisdiction in cross-border crimes and restore the judicial independence of the HKSAR.

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70 See note 38 above, p 369.

71 Rendition is a concept used in the federal system, distinguished from extradition which is about the transfer of fugitives between states. In light of the one country situation, rendition is more appropriate to the Mainland and the HKSAR.

72 Ng, Margaret, "Rendition Negotiations Must Have A Bottom Line" (1999) 1 Hong Kong Lawyer 14.

PRC STOCK MARKETS - THE LAW AND REGULATIONS

LEUNG HOI-GEE

I. Introduction

The People's Republic of China (PRC) has undergone enormous economic change during the last two decades from being a centrally planned economy to the current socialist market economy. Hong Kong has been a capitalist society for at least a hundred years. Both have enjoyed high rates of growth and economic interdependency. Their need for mutual co-operation justifies a closer look at the structure of the PRC economic framework. This paper attempts to examine the legal and regulatory framework of the stock market of the PRC.

This paper is structured so that Part I provides an Introduction. Part II gives a brief overview of the PRC's major stock exchanges and Part III deals with the ideological background of the Chinese economy that has influenced the formulation of the legal and regulatory framework of the stock market. Part IV examines this framework, while Part V looks at some of the problems in the system. Finally, Part VI concludes.

II. PRC Stock Market

Stock trading was not a complete blank in the Chinese modern history. The first stock market was informally set up in Shanghai as early as in 1914, though it was not officially opened until 1920. The market's focus was on trading government bonds. Thereafter, stock markets emerged in Beijing and Tianjin. In 1949, when the Chinese Communist Party came to power, the stock exchanges were forced to close and all securities were abolished.

In 1978, Deng's Open-door policy initiated an entire new era in the economic history of China. In the following years, China gradually transformed itself from a communist state to a socialist market economy. In 1981, the Chinese Government floated national treasury bonds to finance its budget deficit. Soon afterwards, the debt-ridden State-owned enterprises turned to financial and construction bonds to remedy the shortages, as capital was badly needed for the country's economic reconstruction. Originally, China's securities market was made up of a group of independent local exchanges. With the improvement of the regulatory system and operational mechanisms, China's securities markets have developed into an integrated marketplace having nation-wide coverage, with stock exchanges having emerged in Shanghai (1990) and Shenzhen (1991)[1]. By the end of 1998, China's listed companies had issued a total of 74.61 billion shares in the two markets and had raised a total of RMB 355.31 billion[2]. In addition, between 1991 and 1998, foreign capital of $39.1 billion was raised from both home and abroad[3].

The Shanghai Stock Exchange (SHSE) was founded on November 26, 1990, and began trading securities on December 19 of the same year. It was the first securities exchange in the PRC, being also a non-profit membership institution and legal person, and was handling 438 listed companies with a market capitalisation of RMB 1062.6 billion, equivalent to 13.3% of

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1 China Securities Commission, http://www.csrc.gov.cn/CSRCsite/eng/esmintr.htm.

2 *Ibid.*

3 Li, Yiqian, "Tough new blue-sky rules for the securities market", China 2000, March 1999, http://www.china2thou.com/9903p4.htm.

China's GDP by the end of 1998. The Shenzhen Stock Exchange (SZSE) is located about 30 miles north of Hong Kong and was modelled on the SEHK. By the end of 1998, the SZSE was handling 413 listed companies with a market capitalisation of RMB 888 billion, equivalent to 11.13% of China's GDP.

At present, the Chinese stock exchange trading system reaches all large and medium-sized cities with 2,412 retail branches across the nation. By the end of 1998, the total market capitalisation was RMB 1,950.5 billion, equivalent to 24.46% of the GDP; the outstanding capitalisation was RMB 574.5 billion, 7.2% of its GDP; and the annual turnover was RMB 2,354.4 billion.

PRC companies list two kinds of shares. Common stocks issued and traded domestically are separated into 'A' shares for domestic investors and 'B' shares for foreign investors exclusively.[3a] Also, there are 'N', 'H' and 'S' shares, listed and traded by Chinese companies in New York, Hong Kong and Singapore respectively. Major indices are the Shanghai Securities Exchange Index (SSEI), a weighted-average index of all listed shares on the SHSE, and the China Index of all listed shares on both the SHSE and the SZSE.

III. Ideological Impediments

To understand the reasons behind the current legal and regulatory framework, one must have some idea about the ideological tensions and the background of the Chinese economy. Being a socialist economy, the biggest ideological opposition to the adoption of the shareholding system in China is based on the firmly established socialist orthodoxy that joint stock companies are a prominent feature of the capitalist system. Accordingly, it runs contrary to the socialist principle of public ownership.

The supporters of the shareholding system sought to resolve the conflict by re-examining the concept of 'socialist public ownership'. For instance, Li Yining, head of the securities drafting group, argued that ownership reform must be accompanied by a transforming the traditional public ownership into a new form of public ownership, i.e. public ownership under stock enterprises. Under this theory, the working masses are the masters of the production materials. The share system strengthens this new form of "socialist public ownership" as the working masses now control, by virtue of the shares they hold, a larger share of the capital[4].

In spite of these conflicting theories, the Chinese government has repeatedly emphasised the need to promote the joint stock system, and has declared publicly that the corporatisation of State-owned enterprises is the key direction in which the reform should proceed[5]. In the past, 'socialist public ownership' mandated that the State should always hold a majority stake in all sectors of the national economy. In March 1998, the concept of 'socialist public ownership' was redefined to mean that State capital should only control sectors that constitute the nation's economic lifeline such as finance, material reserves, public facilities, infrastructure and

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3a For more information on the different types of shares, please see Zhang, Xianchu, "The First Securities Law of China: An Assessment", Yearbook of International Financial and Economic Law 1998, 595, 600.

4 Tan, Lay Hong, "Legal issues in China's bifurcated securities markets", The Company Lawyer, Vol 19 No 10, 316.

5 At the 15th Party Congress in September 1997, Jiang Zemin, President and General Secretary of the Communist party, presented his ambitious strategy for the future development of the Chinese economy into the twenty-first century and provided guidelines for the further development of capital markets within a "mixed economy".

certain high-tech industries, but that otherwise, the State should play a reduced role[6].

IV. The Legal and Regulatory Framework

Early securities laws emanate from the provinces. Both the Guangdong and Xiamen securities laws were promulgated in late 1986[7]. Each regulation contains similar rules on the payment of dividends and interest, and the procedures for issuing shares and bonds. Although largely similar, regional legislation may sometimes contain special provisions to meet the different needs of each province. The inadequate modes of supervision and lax enforcement of the law however, has resulted in excessive speculation, market manipulation, insider dealings and other irregularities by institutions and investors alike[8] in the Chinese stock market.

The recent financial turmoil in Asia further exposed the weaknesses of China's capital markets. A well-regulated capital market would greatly help China in mobilising its economic domestic savings, particularly at a time when the government is pursuing major reforms of the banking sector and state-owned enterprises. Taken into consideration with China's long-held objective of joining the World Trade Organisation, and the increased integration of the Chinese economy with world markets, there arises a greater need for the PRC to clarify the ambiguities in its laws and to unify provincial and national securities laws. Further, growth inevitably calls for the PRC to bring its legal system into line with internationally accepted rules and regulations and to tighten up law enforcement and compliance.

As a result, China has adopted changes and reforms in the legal and regulatory framework of its securities markets. In July 1999, a new comprehensive Securities Law[9] came into effect that addresses the lack of regulation in this area. This represents a significant effort by the central authorities to codify and unify the regulatory and legal regime governing the stock market[10].

The new Law includes regulations for the issuance and trading of securities[11], and replaces a host of market rules on a variety of abuses, including insider trading[12] and share-listing fraud by increasing penalties on irregular trading and providing more power to market regulators. It also sets out that foreign investors may not buy shares intended for domestic sale, and ensures that brokerages separate their own accounts from those of clients. Such changes are necessary for the development, growth and maturation of capital markets.

A. Regulatory bodies

Much like China's many existing commercial laws, the new Securities Law seeks to regulate

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6 Tan, Lay Hong, "The Legal and Regulatory Framework of Securities Markets in the PRC", Asia Pacific Law Review, Vol 7 No 1, 75.

7 *Supra* note 6, p 77.

8 *Ibid.*

9 The PRC Securities Law adopted by the Sixth Session of the Ninth National People's Congress Standing Committee on 29 December 1998. An unofficial English translation of the PRC Securities Law can be found at http://www.chinaonline.com.

10 "Building a framework: new Regulations are helping to bring stock markets into line with international practice" (January 1998) *China Trade Report* 12.

11 *Supra* note 10, Ch 3.

12 *Supra* note 10, Art 5.

the development of the securities industry. Two levels of administration were established[13a]: the State Council Securities Committee (SCSC) was created for the administration of the market at the macro-level while the China Securities Regulatory Commission (CSRC) was formed with officials and securities experts as the executive branch of the SCSC. Since 1992, the CSRC has supervised and regulated securities markets[13]. The two level system will be re-structured and replaced by having only the CSRC as a highly centralised body with enhanced supervisory and regulatory functions independent of government intervention[14]. No doubt, this is to be an important step towards the full implementation of the Securities Law.

B. Intermediaries

The Securities Law sets stringent registered-capital requirements [15] for the licensing of brokerage houses, limiting the industry to five or six existing or newly merged brokerages with strong ties to the central authorities.

C. Transparency, Public Disclosure and Insider Dealing

Key features of the Securities Law, which distinguishes it from many existing regulations, are the concepts of transparency and public disclosure. The proper observance and enforcement of these safeguards should improve the quality of available information about publicly listed companies and boost the confidence of market participants.

Chinese culture often allows people to conduct their business in a manner of moral judgement rather than by following legal procedures. Relation building instead of legal governance is the usual mode of conduct. In the PRC particularly, laws and regulations are always lacking. To curb this practice, the Securities Law contains a number of provisions[16] prohibiting insider dealing that are even more stringent and comprehensive than the laws currently in force in Hong Kong[17].

D. Separation of Banking industry and Insurance industry

The Law indicates that the securities industry will be operated and supervised separately from the banking industry, the trust industry and the insurance industry.[18] With the global merger trend toward full-service banks, and the relaxation of the restrictions imposed upon US commercial banks from engaging in investment banking by the US Glass Steagall Act, it is

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13a *Supra* note 3a, 598.

13 "Financial Services Liberalization in the WTO: Case Studies: China", *Institute for International Economics*, http://www.iie.com/CATALOG/TRADELIB/DOBSON/dobchina.htm.

14 At the 15th Party Congress in September 1997. Lynch, Katherine, "Stock Market Crises and Insider Dealing in Hong Kong: The Need for Regulatory Reform".

15 *Supra* note 10. Arts 121, 122A. Art 121 requires that the establishment of a comprehensive securities company must conform to the requirements to have a minimum registered capital of 500 million yuan. Art 122 requires a brokerage securities company to have a minimum registered capital of 50 million yuan.

16 *Supra* note 10. For example, arts 68-70. Art 68 defines broadly the class of persons considered to be insiders and dealers such as board directors, supervisors, managers, deputy managers, and other relevant senior administrators of companies that issue stocks or corporate bonds, and stockholders holding 5 percent of more of a company's stocks. Art 70 prohibits holders of inside information from buying or selling the company's securities, leaking the information, or suggesting that other people buy or sell the securities. Art 69 defines in broad terms "inside information".

17 *Supra* note 14. For further reading, please refer to Lynch, pp 283-285.

18 *Supra* note 10, art 6.

not clear at this stage whether Chinese authorities will strictly enforce the separation[19].

For example, China's top brokerage house, CITIC Securities, is part of the China International Trust and Investment Corporation Group (CITIC). Its activities span across banking, securities and commerce (CITIC is not to be confused with the Guangdong International Trust & Investment Corporation, GITIC, which filed for bankruptcy in January)[20].

V. Problems

The PRC stock market is still relatively young and faces a number of challenges if it is to become fully developed in accordance with international standards. The newly promulgated Securities Law supplies a comprehensive legal framework for the stock market. However, there are still problems that have been left un-addressed. Only two of the myriad problems facing the stock market will be discussed here: volatility and difficulty of enforcement of shareholder rights.

A. Volatility

The current structure of the stock market is plagued with speculation and great volatility. There are several possible reasons for this phenomenon.

First, State ownership has always occupied a dominant position due to the ideological perception that shareholding is a tool of capitalism. In the formulation of regulations governing the Stock Market, the law frequently stipulates that a majority of the shares shall continue to be held by the State. State capital accounts for more than 50 (at times even exceeding 70) percent of the shares in listed companies. State shares and legal person shares are not transferable without the approval of the State authority. Hence, only shares that are in the hands of individuals are traded. This accounts for only 25 percent of all shares traded publicly. Therefore, the market remains small and volatile and speculation becomes rife. The restricted transferability of different classes of shares presents barriers to the development of a truly competitive market in many ways.

Second, the Chinese culture of treating stock buying and selling as a form of gambling reflects in the individual players' behaviour accordingly. As a result, technical analysis has become very popular in China, in part, because stock buying and selling is seen as a complicated gambling exercise in which money is made by correctly predicting the waves of optimism and pessimism of other buyers. Of course, these waves are also based on their perception of what the rest of the crowd is about to do.

Third, the absence of long-term investors creates even more volatility in the Chinese stock markets. The Government has placed severe restrictions on institutional trading. Institutions can play an important role in raising capital in financial markets, as well as in raising standards of transparency and accountability of listed firms. At present, the government has sought to isolate domestic individual portfolio investors from competition with both foreign portfolio investors and institutions. This is due to the belief that these institutions have an advantage over individual investors, both in terms of their ability to move markets by trading large blocks of stock and by a superior ability to gather and use information. While this

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19 Ho, Helen K., "New commercial measures will change the business climate" *China 2000*, March 1999, http://www.china2thou.com/9903p5.htm.

20 *Ibid.*

assumption is correct, it is also true that these large institutions can add liquidity to markets and make it easier for individual portfolio investors to buy and sell stock, thus reducing volatility and creating more opportunity for longer-term investment.

The legal framework does not yet address these problems. There is a need for fundamental changes, such as further opening up the market or instituting a change in the investing culture, before the situation can be improved.

B. Rights and Enforcement

Although the PRC Company Law grants significant rights to shareholders, individual shareholders still lack legal support to protect their rights. The Company Law grants shareholders powers that even shareholders in America and other common law countries do not have. Unlike their Western counterparts, Chinese companies' shareholders can participate in the management of the company, and have the right to approve the directors' business plans, budgets and distribution of dividends[21].

In reality, the broad rights guaranteed by the law to the individual shareholders are extremely difficult to exercise due to the fact that the majority shareholder in most cases, is the State. Obviously, there is an innate conflict of interest when the entity solely responsible for creating, changing, and enforcing the rules of corporate governance is the ultimate owner of corporate assets. This creates a serious political risk to portfolio investors in China who are by default minority shareholders. If the Government decides to effect changes on corporate governance in a manner damaging to the minority shareholders, there is no way for the latter to take effective legal action in order to redress their grievances or block the action taken by the government. As a result the shareholders' supposed ability to oversee the company's management decisions is little more than fictitious.

Furthermore, the right of legal action is often illusory due to the vulnerability of the Chinese courts to political pressure and well-connected defendants, the prevalence of official corruption and the reluctance to prosecute another government official too vigorously[22]. Such ambiguities and uncertainties within the legal framework discourage many potential investors.

The problem here does not stem from the legal framework, but the enforcement of rights and the overall attitude of the Government towards shareholding.

VI. Conclusion

In the process of modernising China through the Open Door policy, increasing importance is attached to the role of the Chinese securities markets. The current legal and regulatory framework has come a long way in the past ten years.

The Securities Law has come into effect only recently and is an obvious improvement to the ambiguous and myriad rules and regulations that previously existed. The newly introduced concepts of transparency and public disclosure bring the entire legal framework closer to international standards.

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21 Company Law (China) Arts 38(a)(f)(g), 103(a)(f)(g).

22 AP Vandevelde, "Realizing the Re-emergence of the Chinese Stock Market: Fact or Fiction" (1997) 30 *Vanderbilt Journal of Transnational Law*, 610-611, quoted in *supra* note 6.

However, the road to a smooth development of the securities markets into a truly competitive market determined by market forces depends on the modernisation and the effective enforcement of the legal and regulatory framework, as well as the liberalisation of economic and political ideals.

As illustrated by the problems discussed, the Securities Law cannot be developed in isolation from the entire legal framework and culture. To ensure that the Securities Law does bring Chinese companies into the international arena, development and modernisation of corporate culture and the legal climate is a must.

It is however, a matter of when this will happen, for the current trend in the PRC seems to be further liberalisation and the gradual acceptance of the western model of the market economy.

從一個區別說起

李錫鶴

幾年前，《讀書》曾發表紀坡民先生的文章：《補一下羅馬法的課》（1994 年第 6 期），讀後很受啓發。但其中關於「財產所有者權利」的論述，總覺得還需要作些說明。俗務纏身，近日方得空草成此文。

紀文中有這樣的話：「羅馬法的法權原則的邏輯前提，是財產所有者權利的平等……」「公有財產的所有者與私有財產的所有者，財產權利應當是平等的。」引文中的財產所有者權利和財產權利，意思是相同的，都是指財產所有者支配自己的財產的資格。引文不能理解爲各財產所有者擁有等量的財產，公有財產的所有者和私有財產的所有者擁有等量的財產。這裏涉及到民法學的一個基本觀點：民事關係當事人之間的平等是地位平等，不是權利平等。在這一問題上，容易產生誤解。影響最大的法典之一《法國民法典》中，最重要的規定是第 8 條：「所有法國人都享有民事權利。」著名法學家李浩培先生在《法國民法典．譯者序》中說：「第 8 條規定：『所有法國人都享有民事權利。』民事權利是指非政治性權利，包括關於個人的權利、親屬的權利和財產的權利。這就是說，在原則上，每個法國人，毫無例外，都享有平等的民事權利。」這一解釋是權威性的，然而並不符合第 8 條的文字意思。

討論這一問題，也需要從羅馬法說起。確切地說，羅馬法是指羅馬奴隸制國家時期的全部法律。由於地理、歷史的原因，古代羅馬的簡單商品經濟十分發達，以調整私人之間的財產關係和家庭婚姻關係爲宗旨的私法得到了高度發展，取得了獨立於公法的地位。法律第一次被分爲公法和私法。羅馬法的精華在私法，後人對羅馬法的研究，主要也是研究它的私法。因此，通常所說的羅馬法，僅指羅馬法中的私法。

如果要用最簡單的語言概括羅馬法的法權原則，似可借用《聖經》中的一句話來表述：「凱撒的東西應當歸凱撒。」

商品經濟的基本特徵是交換者雙方在交換過程中地位平等，任何一方都不能把自己的意志強加給對方。顯然，商品經濟蘊含一個前提：交換者雙方都享有支配各自的交換物的資格。法學中稱法律確認的行爲資格爲權利，這裏的資格就是權利。

羅馬法的法權原則被稱爲商品經濟的「幾何公理」。這一比喻充分反映了這一原則對商品經濟的重要意義。但這一原則只能解決「凱撒」的財產歸屬問題，不能解決誰能成爲「凱撒」即「凱撒」的條件問題。而對於商品經濟的建立和發展來說，規定「凱撒」的條件是第一位的問題，具有決定性的意義。「凱撒」的財產歸屬是第二位的問題。「凱撒」的條件就是羅馬法的身份規定。在羅馬法的復興過程中，羅馬法的法權原則及其具體規定起了重要作用，但起根本作用的是羅馬法的身份規定。歷史上我國的民法一直很落後，主要癥結也在身份規定。中國近代有所謂「體」、「用」之辯。「體」就是法律的身份規定。「中體西用」說的主要理論家張之洞說得很明白：「君爲臣綱，父爲子綱，夫爲妻綱。……天不變道亦不變之義本之。……此其不可得與民變革者也……聖人之所以爲聖人，中國之所以爲中國，實在於此。」（《勸學篇》）

商品交換關係的上述前提比較明顯，但這一前提本身還蘊含一個前提：交換者雙方都享

有獲取交換物的資格。後一前提就不易發現了。這裏的資格不再是權利，而是權利資格。法學上稱權利義務的承擔者爲主體，權利資格就是主體資格。要想成爲「凱撤」，必須享有主體資格。古羅馬的法學家以驚人的抽象力，發現了主體資格這一法學範疇，稱其爲人格。19 世紀時，德國法學家把取得權利即成爲主體的資格稱爲權利能力。在現代法學理論中，主體資格、人格、權利能力三個概念經常互相替代。但現代的權利能力是不能繼承的，而羅馬法的人格是可以繼承的；此外，德國法學家的權利能力僅限於民事領域，而羅馬法的人格包括政治人格和民事人格。

如果把羅馬法的法權原則的前提，表述爲財產所有者的財產資格平等，或者，民事人格平等，而不是財產所有者權利平等，也許不容易產生誤解。法律上的權利包括政治權利和民事權利。羅馬法的法權原則作爲私法原則，不涉及政治權利，和財產所有者的政治權利是否平等無關。民事權利包括財產權利和人身權利。在財產可以私有的時候，人們的財富不可能平等，因此，財產所有者的財產權利一般是不平等的。人身權利包括人格權和身份權。人格權是權利人作爲一般主體而享有的權利，是主體的固有權利，如生命權、健康權、名譽權、肖像權等。自然人人格權可以也應該平等。身份權是權利人作爲特定主體而專享的權利，如配偶權、親權、親屬權、榮譽權等。各人的身份不可能相同，身份權自然也不可能平等。概括言之，人們的民事權利是不可能平等的，即使僅僅在原則上平等。

所以，任何一部民法典都不可能規定自然人原則上民事權利平等。《法國民法典》第 8 條在字面上也沒有這樣的含義，它僅僅規定所有法國人都享有民事權利。實際上，自從奴隸制滅亡以來，理論上已不存在完全的人身依附關係，在《法國民法典》制定以前，每個法國人就或多或少享有民事權利。

那麼，《法國民法典》第 8 條是否沒有意義了呢？不是。在 1804 年的《法國民法典》中，夫妻的民事人格不平等，婚生子女和非婚生子女的繼承資格（屬於民事人格）不平等（本世紀 70 年代已廢除不平等規定）。除此以外，自然人的民事人格是平等的。因此，可以說原則上每個法國人的民事人格（不是民事權利）是平等的。這就基本上廢除了民事領域的等級，「爲發展資本主義經濟開闢了廣闊的道路」。(《法國民法典．譯者序》) 這是《法國民法典》的主要貢獻。對民事權利能力的規定是民法典最根本的內容，民法典的靈魂。《法國民法典》應該有一條符合法典具體條文的對民事權利能力的規定。根據法典的具體條文，這一規定的內容應爲所有法國人民事權利能力平等，但有例外情況。《法國民法典》完成於 1804 年，當時還沒有提出權利能力的概念。從《法國民法典》的安排看，第 8 條實際上處在規定民事權利能力的位置，但立法者把這一規定表述爲「所有法國人都享有民事權利」，而且至今未改。人們實際上是這樣理解第 8 條的：所有法國人都享有民事權利——所有法國人都享有取得民事權利的資格——所有法國人都享有民事權利能力——所有法國人的民事權利能力都不受侵犯即不受限制——所有法國人的民事權利能力平等。不難發現，這一推論也蘊含一個前提：民事權利能力是一個不可分割的整體，享有民事權利能力就是享有完全的民事權利能力，自然人享有民事權利能力就是和他人民事人格平等。另一部影響最大的法典，比《法國民法典》晚一個世紀的《德國民法典》，其實也蘊含這一前提。在現在的《德國民法典》中，自然人的民事權利能力是平等的，但法典對民事權利能力的規定是：「人的權利能力，始於出生的完成。」（第一條）人們實際上是這樣理解該條規定的：人自出生即享有完整的民事權利能力，不受限制。

然而，嚴格說來，自然人的民事權利能力是否平等，應由法律明文規定。在古代，在中世紀，自然人的民事權利能力是不平等的，在今天，仍然存在自然人民事權利能力不平等的現象。這表明民事權利能力是可以限制的。從享有民事權利能力推論享有完全的民事權利能力，需要法律根據。從民事權利能力平等推論民事權利平等或財產權利平等，則混淆了概念。

區分權利和權利能力，不是概念遊戲。要說清楚一些多年來一直困擾我們的問題，如人格、人性、人權，法律的本質，人治和法治的關係，甚至現代和傳統的區別，等等，實際上都需要從這一區分說起。

現代漢語中的「人格」一詞，是多義詞，在倫理學中表示尊嚴、價值、道德等；在心理學中表示個性；在人格主義哲學中表示「自我」、「唯一的存在」；在法學中表示主體資格。中國古代似沒有「人格」一詞。近人章炳麟《諸子略語》:「孔子家居教人，多修己治人之言，不求超出人格。」這裏的「人格」，指人事之範圍。現代漢語中的「人格」已無此義。日本學者認爲：日本法學家在翻譯西方法學中的 personality 時，用漢字創造了「人格」一詞，表示法律上的主體資格，現代漢語中的「人格」一詞，是從日文引入的。的確，比較一下，可以看出，現代漢語中的「人格」的其他詞義，實際上都是法律上的「主體資格」這一詞義所衍生的，因此現代漢語中的「人格」的本義是法律上的主體資格。可以認爲，現代漢語中的「人格」一詞來自日文，和章炳麟《諸子略說》中的「人格」無關。

在法學上，主體和「人」同義，主體資格就是人的資格。「格」字在漢語中，有「標準」和「式樣」之義，如「合格」、「聊備一格」。按字面解釋，「人格」就是人的標準和式樣，可引申爲人的資格。但這些只是簡單的推論。要真正瞭解人的資格的含義，還需要進一步探討。

人是從動物進化來的，脫離了動物界。所謂人的資格，應該是人的個體區別於動物的資格，也就是進入社會的資格。人有意識，這是人和動物的根本區別。人的資格應該是人的個體證明自己有意識的資格。人的個體只有將自己的意識表現於外，才能證明自己的意識的存在。人的資格應該是人的個體表現自己的意識的資格。人的個體是通過自己的行爲表現意識的，人的資格應該是人的個體的行爲資格。行爲是有目的的活動，是實踐意志的過程，行爲資格就是意志的實踐資格。人的資格應該是人的個體實踐自己的意志的資格。

人的個體如果僅僅通過語言、文字或行爲，讓他人知曉自己的意志，而不實施實現意志的進一步行爲，固然是一種實踐活動；人的個體在讓他人知曉自己的意志後，實施實現意志的進一步行爲，乃至實現意志，也是一種實踐活動。但兩者有根本的區別：前者僅僅是表示意志，後者則是實現意志。作爲人的資格的實踐意志的資格，是人的個體證明自己有意識的資格，因此是表示意志的資格，而不是實現意志的資格。

意志是意識的內容。各人的意志是各人的大腦對客觀世界的反映，是獨立的、自主的。意志是決定達到某種目的的心理狀態，所謂意志的獨立，指這一決定是各人自己的決定，即各人的意志只能由各人的大腦產生。人的個體可能同意其他個體的意志，但這一同意是該個體的大腦自己作出的。人的個體可能受其他個體的意志的影響，改變自己的原來的意志，但這一改變也是該個體的大腦自己作出的。人的個體可能屈服於他人的意

志，虛僞地表示改變自己原來的意志。但虛僞意味著該個體實際上沒有改變自己的意志，而虛僞改變的決定也是由該個體的大腦自己作出的。總之，任何意志都是獨立形成的，他人無法直接支配其過程。意志的獨立是意志的本質特徵，不獨立不成其爲意志。

從是否以實踐自身爲實現手段的角度，意志可分爲實踐性意志和非實踐性意志。以實踐自身爲實現手段的意志，或者說需要付諸實踐才能實現的意志，爲實踐性意志。絕大多數意志都是實踐性意志。不以實踐自身爲實現手段的意志，或者說不需要付諸實踐就能實現的意志，爲非實踐性意志，如決心思考某個問題。非實踐性意志的實現過程是純粹的心理過程，不受法律規範。法學只討論實踐性意志。

意志是獨立的，他人允許它存在，它固然存在；他人不允許它存在，只要產生它的生理基礎和心理基礎存在，它仍然存在。因此，意志本來無所謂允許存在的問題。然而，實踐性意志是準備付諸實踐的意識。如果不允許一個實踐性意志實踐（不是實現）自身，實際上意味著不允許該意志存在。打個比方：蠶蛾長成後，必須到繭外產卵。這也是它的生命的意義。如果不允許蠶蛾破繭而出，等於不允許它生存。所以，意志的實踐資格就是意志的存在資格，或者說形成資格。非實踐性意志不存在實踐自身的問題，也就無所謂實踐資格。

所以，人的資格是實踐或形成自己的意志的資格，說得通俗些，就是表示自己的意志的資格。在現代社會，法律爲欠缺行爲能力人設定了監護人。從法理上說，欠缺行爲能力人以監護人的意志爲自己的意志，沒有這一意志，欠缺行爲能力人無法實現自己的主體資格。必然的邏輯結論是：主體的本質是享有存在資格的意志，人格的本質是意志的存在資格。

由於不同個體在社會中的具體位置不同，思想方法不同，生理和心理的需求不同，他們的意志之間經常發生矛盾，這樣就可能發生人的資格問題。

一. *人的資格的標誌是什麼？換句話說，怎樣才算享有人的資格？*

既然意志是獨立的、自主的，任何個體的意志都無法直接支配其他個體的意志的形成過程，不同個體的意志間就存在一種固有的平等關係。這一關係必然要求意志互相矛盾的個體在實踐或形成各自的意志的過程中資格平等，即任何個體都不得干涉其他個體實踐或形成自己的意志。這就意味著每個個體都享有實踐或形成自己的意志的資格。可見，不同個體表示意志的平等資格，是個體享有人的資格的標誌。在這一意義上，可以說平等創造了人，或者說，人是平等的產物。眾所周知，勞動創造了人，這是就人的起源而言。而平等創造了人，是就人的資格而言。兩種創造所指不同。平等資格意味著每個個體都享有其他個體所享有的全部資格，因此就是完全資格。

早在兩千多年以前，歷史最悠久的法學流派——自然法學派，已經提出人生而平等。古代的自然法學家提出的根據有：自然、正義、神意、理性、人性等，但都未能證明。歷史上第一個人權宣言——美國《獨立宣言》認爲，人生而平等是不證自明（self-evident）的真理。這樣就回避了根據問題。18 世紀末 19 世紀初的德國著名法哲學家菲希特認爲，人的原始權利是「必要的虛構」。這表明菲希特認識到，有兩千多年歷史的自然法學說是一種假設。直到今天，自然法仍然沒有拿出根據，因此仍然是一種假設。

兩千多年來，儘管人生而平等始終只是一種假設，但這是人類歷史上最偉大的假設，其意義超過了未證明時的「日心說」。前文指出，意志的獨立及其衍生的不同個體意志間的固有的平等關係，要求每個人實踐或形成意志的資格平等，即進入社會的資格平等，因此是人生而平等的真正根據。這一根據不是自然的產物，而是社會的產物。這一根據使以人生而平等爲基本觀點的自然法學說具備了現實性的品格。

瞭解了人的資格的含義後，可以探討人性和人權的含義了。先討論人性。

在中國，自從孔子提出「性相近，習相遠」的命題以來，歷史上幾乎所有的思想家都對人性問題發表了看法，爭論之熱烈，爲其他問題所不及。外國思想家對人性特別是人性的善惡問題也有許多論述。然而，迄今爲止，仍然很難找到一個人性的定義。

所謂人性，顧名思義，應該人皆有之，是人的共性，是全體人的抽象。部分人而非全體人的任何屬性，都只能稱部分人之性，不能稱人性。全體人的共性或者說抽象性是人性的題中應有之義。所謂「只有具體的人性，沒有抽象的人性」的觀點違反邏輯。古代有些思想家把人性分成幾等。人性如有等級，各個等級的「人性」就只是部分人的屬性，不是全體人的屬性。從這種「具體人性」、「等級人性」中抽象出的只是一個沒有具體內容的空洞的「人性」名稱，不是一個人性概念。這種觀點實際上否定了人性。多年來，我們只承認具體的人性，不承認抽象的共同的人性，其根據是馬克思的一段名言：「人的本質並不是單個人所固有的抽象物。在其現實性上，它是一切社會關係的總和。」從中推出了鐵一般的結論：由於各人的社會關係不同，世上只有具體的人性，沒有抽象的人性。在階級社會裏就只有帶階級性的人性，而沒有什麼超階級的人性。然而，馬克思這裏指的是人的本質，不是人性。人的本質和人性是兩個雖有聯繫但完全不同的概念。從馬克思的這段話中，只能推出，由於各人的社會關係不同，世上只有具體的人的本質，沒有抽象的人的本質；而不能推出，世上只有具體的人性，沒有抽象的共同的人性。如果不同的階級有不同的人性，人性就成了階級的屬性，階級性的內容，而不是人的屬性，人的共性。這種觀點其實也是將人性分了等級。

人性應該唯人所有，是人區別於其他事物的屬性，即人之爲人的屬性。因此，人性應該是人的本質屬性，人的一切非本質屬性不是人性。有些思想家把人的生理需求當作人性。此類需求非人類獨有，不是人的本質屬性，因此不是人性。

然而，人的本質屬性並不就等於人性，如，直立、思維、語言等都是人的本質屬性，但它們不是人性。思想家們所爭論的人性指人的本性。人性是表現爲人的本性的本質屬性，人的其他本質屬性不是人性。所謂人的本性，應該是人之爲人的要求，人而無此要求，不成其爲人。因此，人性是人的個體成爲人的要求。生而爲人，似乎不應該再發生要求成爲人的問題。然而，人生在世，始終存在一個是否享有人的資格的問題。所謂成爲人的要求，就是享有人的資格的要求。人的其他要求不是人的本性，因此不是人性。

前文指出，不同個體的意志間存在一種固有的平等關係。這種平等關係是人的本質屬性。人的個體因這一平等關係而必然產生的實踐或形成各自意志的資格的要求，是人之爲人的要求。無此要求，人的個體無法體現自己的意志的獨立，不成其爲人。這一要求是人的本性，也就是人性。

因此，人性可以這樣定義：人的個體因意志的獨立而必然產生的享有實踐或形成自己意

志的資格的要求。說得通俗些，就是：人的個體表示自己的意志的要求。

人的個體享有表示自己的意志的資格，就是享有不因其他個體的意志而不能表示自己的意志的資格，這意味著享有不低於其他個體的表示意志的資格。

所謂「不低於其他個體的資格」，存在兩種情況：1、與其他個體資格平等。2、高於其他個體的資格。人的個體對兩種資格的要求，都是人性的表現。但前者意味著不僅要求自己享有人的資格，也承認他人的人的資格，即承認他人的人性。後者意味著僅要求自己享有人的資格，而不允許他人享有人的資格，即否認他人的人性。人的個體實現人的資格的要求，只有這兩種形式。

人的個體表示意志的要求作爲人性，是抽象的。但人的個體總是在和其他個體的具體關係中表示意志。人的個體究竟要求在和其他個體資格平等的條件下表示意志，還是要求在高於其他個體的資格的條件下表示意志，由人的個體的物質條件所決定，當然主要由經濟條件所決定。

因此，人性存在於人的個體實現人的資格即表示意志的具體要求中。人的個體表示意志的具體要求是人性的載體。在原始社會，人們的經濟地位平等，人性的載體只有一種形式：人的個體的和其他個體平等地表示意志的要求。私有財產產生以後，人們因經濟地位的對立而形成了階級，人性有了兩種載體：1、人的個體的和其他個體平等地表示意志的要求。2、人的個體的高於其他個體資格的表示意志的要求。

可見，人性是存在的，但只存在於其載體中，即人的個體表示意志的具體要求中，而不能單獨存在。認爲人性可以脫離其載體而單獨存在的觀點，否認了人的個體實現人的資格的具體要求是現實物質條件的反映，是一種唯心論的觀點。在原始社會，人性的載體只有一種形式，存在共同的人性比較明顯。在階級社會，人性有了兩種載體，是否存在共同人性發生了疑問。然而，在人的個體表示意志的不同形式的具體要求中，確實存在著共性——要求表示意志。說得具體些，在人的個體的和其他個體平等地表示意志的要求與人的個體的高於其他個體資格的表示意志的要求中，確實存在著共性——人的個體的不低於其他個體資格的表示意志的要求。因人性存在兩種載體而否認存在共同人性的觀點，強調了經濟因素對人的個體實現人的資格的具體要求的制約作用，但忽視了意志的獨立性對人的個體實現人的資格的抽象要求的制約作用，是一種機械唯物論的觀點。

許多思想家混淆了人性和「人心」這兩個概念。「人心」指人的意識，人性則是人之爲人的要求，兩者含義不同。人有意識，這是人的共性。但各人的意識內容千差萬別，因此「人心」不是人的共性。「人心」有善惡之分。人性的載體即人的個體實現人的資格的具體要求，是人的意識，有兩種形式：一種承認他人的人性，爲善；一種否認他人的人性，爲惡；因此也有善惡之分。而人性是人性的載體的某種共性，不是意識。人性蘊含善惡兩種可能，其本身無善惡之分。換句話說，人的個體要求做人，這一要求本身無所謂善惡，因爲這裏的「人」是抽象的人，這一要求是抽象的要求，這樣的「人」，這樣的要求，現實生活中是不存在的。在現實生活中，人的個體總是要求做具體的人——是和他人平等地表示意志即承認他人人性的人，還是把意志強加於人即否認他人人性的人。關係善惡的是做具體的人。由於把「人心」當作人性，許多思想家所熱烈爭論的所謂「人性」的善惡，其實是「人心」的善惡。

法律是國家設定的行爲規範，存在也只存在兩種情況：1、平等地適用於自然人各個體；2、不平等地適用於自然人各個體。前者自然人人格平等，各個體都享有人的資格，這是對人性的確認。後者自然人人格不平等，這是一部分自然人對另一部分自然人的人格限制，是對人性的否認，表現了一種非人性。前者的全部規定，都是爲了實現自然人的平等人格。因此，其全部立法理由，一言以蔽之，就是承認有共同的人性，即承認人性。後者的全部規定，都是爲了實現自然人的不平等人格。因此，其全部立法理由，一言以蔽之，就是否認有共同的人性，即否認人性。立法理由是法律的直接根據。這就證明，古今中外，法律的直接根據無非是人性或非人性。

人類的文明史是階級鬥爭的歷史。所謂階級鬥爭，其實就是壓迫階級把自己的意志強加於被壓迫階級，被壓迫階級拒絕接受。壓迫階級把自己的意志強加於被壓迫階級，就是否認被壓迫階級的人的資格，這是對人性的否認。被壓迫階級拒絕接受壓迫階級的意志，就是要求實現人的資格，這是人性的表現。階級鬥爭其實就是人性和非人性的鬥爭，人類的文明史其實就是人性和非人性的鬥爭史。人性是歷史發展的根本動力，也是法律發展的根本動力。我們的教科書告訴人們：資產階級在法律上的平等要求，反映了商品經濟的要求。這一觀點自然是正確的。但需要指出，從根本上說，不是人反映了經濟的要求，而是經濟反映了人的也就是人性的要求。商品經濟能取代自然經濟以及計劃經濟，說到底是人性使然。所以，完整的說法應該是：資產階級通過反映商品經濟的要求，反映了人的要求。法律的背後是經濟，經濟的背後是人性。人不僅是目的，而且是原因。人類社會各種現象的最終原因，只能是人本身。

甲. 再討論人權。

人權的口號，是近代資產階級思想家提出的。當時，資本主義經濟已取得初步發展，但受到封建制度的重重束縛。代表封建制度的是教會、王室和傳統貴族。他們享有種種特權，正是這些特權，阻礙了資本主義的發展。資產階級要發展資本主義，必須取消這些特權，也就是使資產階級與僧侶、王室成員、傳統貴族法律地位即法律人格平等。資產階級找到的唯一根據是自然法的基本理論：人生而平等。

人格是通過享有權利即行爲資格實現的。平等的人格意味著實現人的資格的平等行爲資格。生而爲人，理應享有人的資格，無須他人同意。因此這種平等行爲資格是天賦的。資產階級思想家稱這種平等行爲資格爲「天賦人權」，通稱人權。

權利的確是一種行爲資格，但這一資格必須由法律確認。世上沒有天賦的權利。把自然人的天賦的行爲資格稱爲人權，有違權利的本義。在這一意義上，人權的概念不能成立。人權這一名稱的確切表述應是：人的個體實現人的資格的行爲資格。人的資格是表示意志的資格，人的個體實現人的資格的行爲資格就是人的個體表示意志的行爲資格，也就是人的個體表示意志的資格。因此，人權就是人格——確切地說是完全人格。人權的標誌是平等行爲資格即表示意志的平等資格，其實就是平等人格。天賦人權其實是天賦人格，或稱原始人格、自然人格，即人的個體因意志的獨立而應該享有的無須法律確認的人的資格。人權的名稱混淆了權利和人格的關係。前文菲希特所謂的「原始權利」，就是指人權，應稱原始人格，說明菲希特也混淆了權利和人格的關係。人權理論中混淆權利和人格是常見現象，《世界人權宣言》第一條：「人人生而自由，在尊嚴和權利上一律平等。」就是一例。反對人權的最方便最常見的手法，就是通過否定人權的名稱，否定人權的內容。應該承認，否定人權的名稱是有理由的，但不能因此否定人權的內容，因

爲人權的本義是某種行爲資格，不是某種權利。沒有天賦的權利，不等於沒有天賦的行爲資格。譬如，原始社會沒有法律，沒有權利，但部落成員享有實現人的資格的平等行爲資格。

通常把人權定義爲人應有的權利，這意味著人權是法律應該確認的權利。從前文可知，人權的本義是人應有的行爲資格，在存在法律的社會，是法律應該確認的行爲資格。在法律確認以前，人權只是人的個體的天賦行爲資格，不是權利；經過法律確認，這一行爲資格才成爲權利。把人權定義爲人應有的權利，不能反映權利和行爲資格的區別。但這一定義比較通俗，與人權的本義也無實質性出入。如果把人權定義爲人應有的權利，這一權利就是實現人的資格的權利，也就是進入社會的權利，做人的權利，人之爲人的權利。因此，人權就是自然人人格權，確切地說，是自然人人格完全權，自然人人格平等權。

現代法律的根本原則是自然人人格平等。現代法律依法限制公民的人身自由，乃至剝奪公民的生命，都是公民人格平等的結果，因此都是公民享有人權的結果，而不是公民不享有人權或者說剝奪人權的結果。從法理上說，所謂剝奪人格，就是使自然人和人格分離，分離的前提是自然人生命之存在；所謂剝奪權利，就是使權利人和權利分離，分離的前提是權利人生命之存在。在自然人人格平等的情況下，公民的人格是不能剝奪的，公民的人格權也是不能剝奪的。現代法律中的死刑剝奪的是生命，不是人格，也不是權利。死者不享有人格和權利是生命終止的結果，不是法律剝奪的結果。換言之，在公民的生命存在的時候，公民的人格和人格權是不能剝奪的；而在公民的生命終止以後，死者已不享有人格和權利，無須再行剝奪。剝奪人權就是剝奪人格，只有一種形式，就是法律規定自然人人格不平等。

根據以上論述，可以知道：

1、人權是人的個體和他人人格平等的權利。人權從來就是純粹的個人權利。因此，所謂「集體人權」、「民族人權」的概念不能成立。

2、人權是人的個體應該享有的權利。作爲社會成員，人的個體應該享有廣泛的權利，現代法律中的各項公民權，都是人的個體應該享有的權利。因此，人權包括多項權利。人權是人的個體享有和他人平等的人格，從而享有人的資格，成爲「人」的權利。人權是人的標誌。人的個體如果僅享有人權的部分權利，意味著不享有和他人平等的人格，因而不享有人的資格，不能成爲「人」。人權的部分權利不是人的標誌。人權和它的部分不僅存在數量的區別，而且存在性質的區別。所以，人權是一個集合概念。所謂集合概念，就是將同類物件作爲一個整體來反映的的概念，它只適用於該整體，不適用於構成該整體的個體。人權實際上是人的個體應該享有的行爲資格的總和，說得通俗些，是人的個體應該享有的權利的總和。人權的任何部分，都只是屬於人權，不等於人權，不是人權。正如聯合國的部分成員國不能稱部分聯合國，人權的部分權利不能稱「部分人權」。正如部分聯合國的概念不能成立，部分人權的概念也不能成立。當初資產階級思想家之所以提出人權的口號，並非由於資產階級不享有人權中的任何權利，而是由於資產階級不享有人權。從人權的本義來說，享有人權，就是享有人的個體應該享有的全部權利，即和他人人格平等，從而成爲「人」。從理論上說，自從奴隸制度滅亡以來，世界上已不存在不享有人權中任何權利的人。今天，所謂享有人權的部分權利，不過是不享有人權的一種表述方式。

3、人權只有一種：自然人人格平等。人權不存在「基本人權」和「非基本人權」的區別。某項權利可能是人的基本權利，或者說人權的基本部分，但不能成爲「基本人權」。

4、同理，所謂「人權首先是某項或某幾項權利」的說法不能成立。人權不是它的任何部分，不管這些部分是否首先取得或者是否應該首先取得。

5、人權應該爲每一個自然人所享有，不問其具體情況。聯合國大會通過的《世界人權宣言》第二條明確宣告：「人人有資格享受本宣言所載的一切權利和自由，不分種族、膚色、性別、語言、宗教、政治或其他見解、國籍或社會出身、財產、出生或其他身份等任何區別。」聯合國大會通過的《經濟、社會、文化權利國際公約》第二條、《公民權利和政治權利國際公約》第二條都重申了這一內容。因此人權沒有階級性。所謂「階級的人權」的概念不能成立。僅爲某個階級享有的「人權」不是人權，而是特權。

6、同理，僅爲部分人享有的「人權」不是人權，而是特權，無論這部分人是多數還是少數。因此，所謂「多數人人權」或「少數人人權」的概念不能成立。有的權威性人權著作公然聲稱要剝奪他人的人權，或即以此爲根據。

7、人權只有一個標準：自然人人格平等。《世界人權宣言》第二條就是對這一標準的規定。因此，人權無國界。任何違背《世界人權宣言》的「人權標準」都侵犯人權。

8、同理，人權所包含的各項具體權利不是人權的標準。爭論人權包括多少項具體權利是爭論不淸的，無意義的。

9、人們常把人權的內容概括爲自由和平等。需要指出兩點：第一，人權概念的實質是自然人人格平等，在存在法律的社會，就是法律人格平等，或稱法律上的平等，法律地位平等，法律平等。如：孫中山先生主持制定的《中華民國臨時約法》第五條：「中華民國人民，一律平等，無種族、階級、宗教之區別。」毛澤東主席主持制定的《中華人民共和國憲法》（1954 年）第 85 條：「中華人民共和國公民在法律上一律平等。」自由只是這一平等的表現。第二，法律平等是立法平等，不是司法平等即法律面前平等。後者僅要求兌現法律，不問法律內容，不是人權。只要法律不是空文，法律面前必然平等。法律平等是取得權利的資格平等，即機會平等；不是權利平等，即結果平等。結果平等是實質意義上的平等。相對于結果平等而言，機會平等只是一種形式意義上的平等。在法律產生以前，由於生產力極其低下，部落社會內部既是形式平等，又是實質平等。這是一種原始平等。在存在法律的社會，人們的財富從來沒有平等過，也不可能平等。這是實質不平等。法律的發展史是從法律不平等到法律平等的過程，因此，法律社會的發展史是從形式和實質都不平等，到形式平等而實質不平等的過程，借用後文將討論的亨利·梅因的公式，就是「從身份到契約」的過程。在法律消亡以後，社會將實行按需分配。這是一種理想的實質平等。由於自然人各個體的生理、心理條件不同，環境不同，愛好不同，他們的需要不可能相同。因此，按需分配是不等量分配，意味著自然人各個體取得生活資料的資格不平等。這是一種新的形式不平等。

所以，人類的史前社會在形式和實質上都是平等的。人類的文明史則是從形式和實質都不平等，經過形式平等而實質不平等，再到新的形式不平等而實質平等的過程。新的形式不平等是在自然人各個體都享有人的資格的前提下的不平等，與人格限制的形式不平

等有本質的區別。人類的理想分配形式是按需分配即理想的實質平等，不是形式平等。然而，從剩餘財產出現起，直至全社會實現按需分配以前，在這整個歷史時期中，只有形式平等使所有的自然人都享有人的資格，因此是這整個歷史時期中自然人之間的最公正的關係，也是社會實現理想的實質平等的必經階段。在形式平等實現以前，任何反對形式平等的主張客觀上都是在維護特權；反對形式平等即法律平等卻主張法律面前平等，則是爲了掩蓋形式不平等，當然也不可能真正實現法律面前平等。可以說，在法律平等和法律面前平等這兩種平等之間，隱藏著法律的真正奧秘。

完成上述分析以後，可以討論法律的本質了。

在法學史上，權利概念的提出，無疑具有重大的意義。嚴格來說，法學之成爲法學，就是從提出權利概念開始的。在提出權利概念以前，法學不能算作一門「學」，只是一種「術」，即專制術。然而，作爲法律確認的行爲資格，權利和行爲一樣，存在於法律的現象中。而主體資格作爲一種資格的資格，存在於法律現象的背後。主體資格概念的提出，觸及了法律的本質，使法學有了真正的理論深度。

任何事物都有現象和本質兩個方面，法律也不例外。從現象看，法律是國家設定的行爲規範和權利規定。

自然人如果不享有人格權或只享有不完全的人格權，或者，雖然具有與享有財產權的其他自然人同樣的取得財產的根據，卻不能享有財產權，就意味著法律沒有賦予他權利能力，或只賦予他不完全的權利能力。可見，關於權利的規定的背後是關於權利能力的規定。這就表明，法律在本質上是人格規定即意志資格規定。

法律對自然人人格的規定有兩種情況。第一種情況：自然人人格平等即意志資格平等。自然人可以形成任何意志，表示任何意志，任何互相矛盾的意志存在資格平等，任何壓制他人表示意志的行爲都違背法律；法律只規範人的外部行爲，不規範人的內心世界，這意味著允許人的個性自由發展；法律的本質表現爲國家確認的意志許可。第二種情況：自然人人格不平等即意志資格不平等。一部分自然人享有完全人格，可以形成和表示任何意志，是「人」；一部分自然人不享有人格，禁止形成和表示任何意志，是「非人」，即奴隸；一部分自然人享有不完全人格，只允許形成和表示與完全人格者的意志不衝突的意志，不允許形成和表示與完全人格者的意志衝突的意志，可稱爲「半人」，當然，嚴格說來還是「非人」；法律不僅規範人的外部行爲，而且規範人的內心世界，這意味著用一部分人的大腦全部或部分地代替另一部分人的大腦，扼殺另一部分人的個性。法律的本質表現爲國家確認的意志規範。這是法律的等級性。中國古代所謂的「腹誹之法」、「意欲之罪」，就是法律規範意志的極端和典型。如果說，階級就是一部分人佔有另一部分人的勞動，那麼，法律上的等級就是一部分人佔有另一部分人的意志。一切社會衝突都是意志的競爭。法律就是國家制定的以暴力保證的意志競爭規則。法律的公正就是同一人格等級的意志競爭資格平等。所謂國家，其實就是規定人格的暴力。國家的本質就是可以暴力實現的規定人格的意志。國家的根本使命，簡單說來，就是以暴力相威懾，讓每一個自然人各就其位，即在法律爲他規定的人格等級上生活——現在稱爲競爭。

多年來，法律的本質一直被認爲是統治階級的意志，即法律的本質必然地直接地表現爲階級性。然而，這一觀點無法解釋規定自然人人格平等的法律。

所謂階級，指人們在生產關係中，因和生產資料的不同關係，而形成的不同地位。所謂法律的階級性，就是不同階級的法律地位不同，一個階級享有其他階級所沒有的權利能力。因此，法律的階級性是法律的一種等級性，反映了法律確認的等級關係。如果法律規定自然人人格不平等，法律就有了等級性，等級性主要表現爲階級性。如果法律規定自然人人格平等（不是在法律中點綴個別規定自然人人格平等的詞句），法律就不存在等級性，當然也無所謂階級性。在社會的生產力發展水平無法消除人們因和生產資料的不同關係而形成的地位差別時，社會的任務不是消滅階級，而是消滅等級，即消滅法律的階級性。

對法律的階級性問題的誤解，經常導致對民主與專政的關係的誤解。所謂民主，其實就是自然人表示意志的資格平等，因此就是自然人人格平等。所謂專政，作爲民主的對立面，只能是自然人的人格限制，即通過法律限制他人表示意志的資格，合法地把自己的意志強加於人，與統治、壓迫是一回事。由自然人的平等人格所衍生的國家制度就是憲政。因此專政也是相對于憲政而言的。專政與特權則是人格限制的不同角度的反映和稱呼。所以，專政只存在於實行人格限制的社會。專政不一定是階級對階級的關係，在同一階級內部也可以實行專政，如封建地主階級內部的等級制。把司法部門依法限制自然人人身自由籠統地稱爲專政是對專政的誤解。在自然人人格平等的情況下，司法部門依法限制自然人人身自由是民主的不可缺少的內容，不是專政。在自然人人格不平等的情況下，只有具有人格限制性質的處罰才是專政。所謂具有人格限制性質的處罰，即行爲人因人格限制而受到處罰或處罰加重。非人格限制性質的處罰不是專政。被統治階級就是被專政階級，與他們是否觸犯法律，是否被司法部門依法限制人身自由無關。自古以來，被統治階級之所以被專政，從來不是由於犯法，而是由於他們是被統治階級。

結論是：法律的本質是國家規定人格的意志，是區分「人」和「非人」的尺度。法律本質上是社會之門。

現在不難瞭解「人治」和「法治」的關係了。

所謂「人治」，其實是以執法者意志治國；所謂「法治」，其實是以立法者意志治國。在古代，法律普遍規定自然人人格不平等，「人治」和「法治」之爭只是統治階級內部的利益之爭，和自然人的人格狀況無關。在今天，法律或者規定自然人人格不平等，或者規定自然人人格平等。如是前者，一部分人既然可通過立法規定自己的人格高於他人，必然壟斷國家權力，不受監督。不受監督的權力是不可能嚴格守法即實行「法治」的。如是後者，任何人都處於社會的監督下，必然實行「法治」而不是「人治」。因此，在今天，「法治」和「人治」的區別的實質就是自然人人格平等還是不平等。離開了自然人人格的平等問題，討論「法治」和「人治」，是無法深入的。

學過法律史的人大概都知道，19 世紀英國著名的法律史學家亨利 ·梅因（Sir Henry Maine, 1822-1888）寫過一本《古代法》，書中有一段名言：「『身份』'這個字可以有效地用來製造一個公式以表示進步的規律，不論其價值如何，但是據我看來，這個規律是可以足夠地確定的。在『人法』中所提到的一切形式的『身份』都起源於古代屬於『家族』所有的權力和特權，並且在某種程度上，到現在仍舊帶有這種色彩。因此，如果我們依照最優秀著者的用法，把『身份』這個名詞用來僅僅表示這一些人格狀態，並避免把這個名詞適用于作爲合意的直接或間接結果的那種狀態，則我們可以說，所有進步社會的

運動，到此處爲止，是一個『從身份到契約』的運動。」

一些學者認爲：「從身份到契約」，只是歷史進步的第一級台級，「從契約到制度」，才是歷史進步的第二級台級。目前到了「從契約到制度」的階段。這意味著在身份時代和契約時代以後，在法律消滅以前，還存在一個「後契約時代」，而我們已進入了這個「後契約時代」。

梅因的這段話中，的確有「到此處爲止」這幾個字，但這段話並非僅僅描述一個已經終結的階段。梅因自己認爲，他在「製造一個公式」，以「表示進步的規律」。

筆者完全贊成梅因的這段話，筆者甚至認爲，對於人類的文明史，沒有比「從身份到契約」更簡要更精闢的概括了。所謂「從身份到契約」，就是從自然人人格不平等到自然人人格平等。梅因的結論，源自對家庭和家族的歷史的研究。然而，在家庭、家族和社會中，人之爲人的根據是相同的，都是意志的獨立以及由此衍生的不同個體的意志間的平等關係。毫無疑問，這一公式曾在已經實現的地方，即已從身份時代進入契約時代的地方，發生作用的內在機制，在尚未實現的地方，即仍是身份時代的地方，同樣存在。而在已經結束身份時代的地方，契約至今是主要的民事關係，沒有也不可能出現什麼「後契約時代」。有理由認爲，在存在法律的整個歷史階段，梅因的這一公式將是始終適用的。它已經被全部文明史所證明，並將被今後的文明史所證明。「從身份到契約」不是歷史的某個一般的總結，而是歷史的公式，歷史的規律。正如達爾文發現了生物的進化規律一樣，梅因發現了文明人類的進步規律。梅因是法學界的達爾文。

眾所周知，真正意義上的革命就是解放生產力。而所謂解放生產力，其本來含義就是解放人格。如果沒有縮小或者消滅人格差距，那麼，無論多麼劇烈的社會變動，無論怎樣轉移財產所有權，都不能稱爲革命。因此，觀察社會首先必須觀察人格。梅因的公式其實指出了社會進步的基本方向——解放人格，因此是真正的革命號角、革命宣言。對於限制他人人格的權力來說，梅因的理論是比任何武器還要可怕的威脅。

梅因的公式告訴我們：從根本上說，歷史的發展階段，應以自然人人格的解放程度爲標誌。因此，傳統社會和現代社會的根本區別不在於時代先後，也不在於人均產值、綜合國力，而在於自然人人格的平等與否。整幢現代大廈的基石，就是平等的人格。

人類是從近代開始覺醒的。覺醒了什麼？就是主體意識。什麼是主體意識？就是人的個體知道自己應該享有完全的主體資格，和他人人格平等，也就是知道人生而平等。自然，反過來也可以說，有人如果不知道人生而平等，是不能算覺醒的。主體意識是在承認人的個體之間權利不平等的基礎上產生的。這意味著區分了權利和人格。因此，如果說，主體意識覺醒的前提是懂得主體資格，而懂得主體資格的前提是區分權利和人格，恐怕不能說是無稽之談。

香港人權法案條例 之 人權真面目

陳詠儀

一. *引言*

很多人認爲《國際人權憲章》[1]能有效地保障簽約國內人民的權利，而參考《公民權利和政治權利國際公約》(下稱公約)而寫成的《香港人權法案條例》亦應該具有同等的效力，保護香港境內的基本人權。

首先，讓我們從《香港人權法案條例》的長題目了解其立法者目的及意圖：「本條例將《公民權利和政治權利國際公約》中適用於香港的規定收納入香港法律，並對附帶及有關連的事項作出規定」，從中可見，立法者無意將整條《公約》收納入香港法律，而只是將「適用於香港的規定」收入本港法律，並對某些事項作出規定，此舉會否影響本港的人權保護及對政府和有關當局的約束，稍後我們會再作研究。

於本文中，我們將從三個不同的角度去探討香港的人權真面目：第一、我們以香港人權法案中個別條款對人權的保証，分析雙語譯本是否均能對基本的人權作出最妥善的保障；第二、從一個多語立法系統的角度分析中文真確本在多個文本的地位，及對使用中文人仕的保障；第三、以《基本法》出發，從《香港人權法案條例》看現今香港雙語立法的情況。

二. *人權的保障*

於本部份，我們會將中英文本作出比較，觀察當中有否歧異之處，會否直接影響中譯本[2]未能按照立法者的意圖去保護人權。

甲. 接受公正公開審訊的權利

於《香港人權法案條例》第十條[3]，保証每一個人「在法庭或法院之前，悉屬平等。任何人受刑事控告或因其權利義務涉訟須予判定時，應有權受獨立無私之法定管轄法庭公正公開審問。」何謂「因其權利義務涉訟」？英文對應詞句是 “of his rights and obligations in a suit at law”，「涉訟」[4]或英文 “in a suit at law” [5]是否只局限於法庭上的訴訟程序？政

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[1] *國際人權憲章，“International Bill Of Human Rights”*：由*《世界人權宣言》(“The Universal Declaration of Human Rights”)*，*《經濟，社會，文化權利國際公約》(“United Nations Covenants on Economic, Social and Cultural Rights”)*及*《公民權利和政治權利國際公約》(“United Nations Covenants on Civil and Political Rights”)* 及其兩個*《任意議定書》(“Optional Protocol”)*所組成。Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary,* (NP Engel, Publisher 1993) p XVII。

[2] *《香港人權法案條例》*由台灣人翻譯，乃聯合國承認的中文真確本，*《1990 香港人權法案條例草案》*由香港人翻譯，雖未被承認，但於此文會作爲比較參考之用。

[3] 原文見附件一。

[4] 「涉訟」可理解爲涉及訴訟，根據三民書局的《大辭典》、商務印書局的《辭源》、上海辭書出版社的《辭海》及漢語大詞典出版社的《漢語大詞典》對「訴訟」一詞的解釋均大同小異，解作於法庭內排解糾紛，分辨是非曲直的程序。又《1990 香港人權法案條例草案》中，用「一件訴訟案中的」一詞代替「涉訟」。

府的行政決定是否屬於「涉訟」？是否受此限制？

因此，我們必須參考《公約》中對應的條文第十四條第一款[6]的立法目的及人權委員會對 "in a suit at law" 的詮釋。

人權委員會認爲《公約》的第十四條目的在於透過一系列的措施，例如：法庭前人人平等及於獨立無私的法院中獲得公平公開的審訊，以維繫一個健全的司法制度[7]。他們亦認爲條文中的 "criminal charge" 及 "rights and obligations in a suit at law" 應該由簽約國因應其司法制度作出相應的解釋[8]。

一些評論[9]亦指出《公約》第十四條是由人權委員會早於一九四八至四九年間，爲了對法律程序作出最低的保證，並以權力分立及相對行政者的司法獨立等基本原則草擬而成，同時亦成爲《歐洲人權公約》第六條及《世界人權宣言》第八條的藍本[10]。
由於《公約》是一個多語立法的系統，因此《維也納公約關於公約法》[11]中第三十三條訂明《公約》的五國語文本，分別爲：中文、英文、法文、俄文及西班牙文均屬地位相等的真確本。各文本應有相同的意思[12]，如文本中某些詞句出現明顯的分歧，則應根據條文的目的及意圖，找出最切合的解釋[13]。

因此，我們參考案例 *Y L v Canada* [14]中人權委員會對 "in a suit at law" 一詞認爲最切合立法者意圖而選擇的解釋。

這是關於一個被勒令退休的軍人要求索償傷殘退休金的案件，人權委員會需要就此決定這項索償是否屬於 "in a suit at law"，是否受到第十四條的保障。委員會參考《公約》第十四條中各個文本的保障條件，發覺當中的意思出現了明顯的分歧：英文本及俄文本偏重訴訟程序的性質；法文本及西班牙文本則偏重於牽涉權利的性質[15]。委員會研究過上述的分歧及立法者意圖後，作出以下的裁判：

> 「"in a suit at law" 應理解爲牽涉權利的性質，而不是訴訟雙方的地位(無論是官方的、半官

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5 "in a suit at law" – "case in a law court";"prosecution of a claim" 即訴訟；控告；法律案件 (*Oxford Dictionary,* Oxford University Press).

6 原文見附件二。

7 根據 General Comment 13/21 of 12 April 1984 (Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary,* (NP Engel, Publisher 1993)) p 857.

8 根據 General Comment 13/21 of 12 April 1984 (Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary,* (NP Engel, Publisher 1993)) p 858.

9 Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary,* (NP Engel, Publisher 1993).

10 Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary,* (NP Engel, Publisher 1993) p 236.

11 Vienna Convention on the Law of Treaties.

12 Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary,* (NP Engel, Publisher 1993) p XXIII.

13 同上。

14 Communication No 112/1981, *Selected Decision of the Human Rights Committee under the Optional Protocol* (New York: United Nations, 1990) Vol 2 pp 28-30.

15 個別委員意見 Individual Opinion, submitted by Messrs Bernhard Graefrath, Faus to Pocar and Christian Tomuschat concerning the admissibility of communication No 112/1981, YL v Canada, *Selected Decision of the Human Rights Committee under the Optional Protocol* (New York: United Nations, 1990) Vol 12 p 30.

方的或法定的組織)，或因應當地司法制度而作出裁決場所的性質，尤其於普通法制度中，對公法及私法沒有明顯的區分，法院能有權審核原訴、上訴或司法覆核的案件。有見及此，每宗案件必須視乎其個別環境及因素審理...... 」[16]

由此可見，只要牽涉的權利是私人的權益，無論當中涉及法院、半司法組織或行政的決定，一概符合《公約》第十四條所要求的條件，受其保護。

由於《歐洲人權公約》(下稱歐約)第六條第一款[17]的法文本跟《公約》的第十四條第一款的法文本相同，我們亦會參考當中對此項條件的解釋[18]。

歐洲人權法庭認爲公平審訊於民主社會中佔有極重要的地位，故此不能對《歐約》第六條作出狹窄的規限，應以能反映法治的原則[19]爲基本方向[20]。

於一九七一年至一九九二年間，歐洲人權法庭在多宗案例[21]的判決中均清楚申明，只要牽涉的權利屬於私人權益，其申請人就受到《歐約》第六條的保護，獲得公平公開審訊的權利。如當中涉及行政機構或監守紀律的組織，其性質未符合《歐約》第六條第一款對裁判處的要求，其決定必須接受由符合要求的司法機關進行的司法覆核，以確保申請人的權益[22]。

由於上述案例的影響，香港法院於 *Ma Wan Farming Ltd v Chief Executive in Council & Anor* [23]一案中對《香港人權法案條例》的第十條作出同樣的解釋。此案例是有關馬灣一位大地主跟政府的賣地事宜談判失敗，但行政長官仍批出發展馬灣的計劃，要強行收回這位大地主部份的土地，他到原訴庭申請司法覆核，但被原訴法官以此行政決定不受第十條所限爲理由而拒絕申請，大地主遂要求上訴。

上訴庭認爲應該採取一個歸納的方法[24]去理解第十條中的 "rights and obligations"，無論當中糾紛牽涉的是官方機構、法院、法庭或行政長官，第十條的適用範圍只會受涉及權利的性質所影響[25]。既然只著重牽涉權利的性質及投訴的類別，行政決定是不能免疫於第十條的管限。上訴法庭的法官 (Nazareth VP) 更認爲近年很多行政及立法決定均嚴重影響公眾的私人權益，如將第十條解釋爲只保障法庭中審核的權利，「實在太過荒謬！」[26]

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16 同 10。

17 見附件三。

18 *Fok Lai Ying v Governor in Council & Ors* (1997) 7 HKPLR 327.

19 法治的原則 "The Rule of Law" 爲在法律面前人人平等，法律凌駕一切。

20 Andrew Grotrian, *Article 6 of the European Convention on Human Rights: the right to a fair trial* [Strasbourg] (Council of European Press, 1994) p 6.

21 *Ringeisen v Austria* A 13 (1971), *Konig v Federal Republic of Germany A 27* (1978), *Benthem v Netherland* (Application 8848/80) (1983), *Boden v Sweden* (1988), *H v France* A 162-A (1989), *X v France* (1992). 根據 Harris, DJ, *Law of the European Convention on Human Rights.* (Butterworths, 1995) Ch 6.

22 Andrew Grotrian, *Article 6 of the European Convention on Human Rights: the right to a fair trial* [Strasbourg] (Council of European Press, 1994), p 13.

23 [1998] 2 HKC 190.

24 Inductive Approach.

25 [1998] 2 HKC at 199-200.

26 [1998] 2 HKC at 205.

從上可見，《香港人權法案條例》英文本中的 "in a suit at law" 及中文本的「涉訟」均未能切合立法者的意圖及目的，相反，如只保留 "of his rights and obligations" 及「因其權利義務」，就更能突顯立法者的意圖[27]：由主審法官因應案件的種種因素決定其權利是否私人權益；再者，第十條英文本的後半部份再次出現 "in a suit at law" 一詞，中文本卻利用「民事」作詮釋，意謂所有刑事及民事案件的判決，應一律公開宣示。由於中、英文本於此語境中均能作出恰當的詮釋，所以為免於同一條文內出現一詞多譯的情況，英文本中首一個 "in a suit at law" 及中文本的「涉訟」應刪去，以免影響於第十條對公正公開審訊權的保護。

乙. 參與公眾生活的權利

《香港人權法案條例》第二十一條：

> 「凡屬永久性居民，無分人權法案第一(一)條所列之任何區別，不受無理限制，均應有權利及機會—
>
> (丙) 以一般平等之條件，服香港公職。」

何謂「一般平等之條件」[28]？英文對應句是 "on general terms of equality"，根據《牛津英語詞典》，"general" 解作 "all or nearly all, not special or particular"，而根據案例 "Association of Expatriate Civil Servants of Hong Kong v Chief Executive of the Hong Kong Special Administrative Region" [29]中審理是否每一位公務員均應享受平等的代遇，司法人員及警務人員於紀律行為的調查中能獲得律師代表，而其他公務員一律被禁止又是否違反第二十一條丙款時，法官引用另一宗案例[30]的判決，認為第二十一條丙款保護所有公務員均應享有同等的入職條件及待遇，如對此上述兩項權利加諸任何不合理的限制，就違反了第二十一條丙款保障的權益。但法官表示懷疑：於第二十一條丙款中所保障的，是否包括每一位公務員均能享有其他公務員的每一項待遇[31]？法官再次引用案例[32]，認為 "general terms of equality" 不應理解為所有公務員需要享有同等及平等的待遇。由此可見，"general" 一詞被香港法庭詮釋為基本上相等，但容許例外情況出現的意思。

中文本的「一般」又如何詮釋呢？根據三民書局的《大辭典》:「一般」可作一樣、一種或通常、普通解，而商務印書局編製的《辭源》中，「一般」只作一樣或一種解。因此，「一般」於第二十一條丙款最少可作兩個解釋：一. 相同的平等條件，服香港公職；二. 通常平等的條件，服香港公職。我們是否可採用第一個文本於 *Association of Expatriate Civil Servants of Hong Kong v Chief Executive of the Hong Kong Special Administrative*

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27 因為人權委員會於 *YL v Canada* 一案認為《公約》的法文本比較切合立法者意圖。而《歐約》的法文本跟《公約》的一樣，其英文本亦只不過是 "civil rights and obligations"，於普通法中，私法與公法並沒有明顯的區分，"civil"一詞沒有意義可以刪去，所以 "rights and obligations" 已符合立法者的意圖及目的。

28 《1990 香港人權法案條例草案》(Hong Kong Bill of Rights Bill 1990) 以「在一般的平等的條件下」代替。

29 [1998] 2 HKC 138.

30 *R v Secretary for the Civil Service & Anor, exp Association of Expatriate Civil Servants of Hong Kong & Ors* (1995) 5 HKPLR 490 (HC), (1996) 6 HKPLR 333 (CA) at 516I-517H.

31 *Association of Expatriate Civil Servants of Hong Kong v Chief Executive of the HKSAR* [1998] 2 HKC at 151E-F.

32 *R v Secretary for the Civil Service & Anor, exp Association of Expatriate Civil Servants of Hong Kong & Ors* (1995) 5 HKPLR 490 (HC), (1996) 6 HKPLR 333 (CA) at 517D-E.

Region [33]一案中控告香港特區政府？香港特區政府是否違反了第二十一條丙款的規定？我們是否又應一如慣例，採用清晰的版本？[34]然而，於保護人權的大原則下，中文本首個解釋似乎更能保障香港市民的權益，爲了解決上述一連串的疑難，我們必須參考《公約》對應的條文第二十五條丙款的詮釋。

《公約》第二十五條丙款的立法目的是希望避免政府職位給一小撮人壟斷，政府亦容許於入職條件上加諸一些合理的要求，如最低年齡及教育程度等[35]。而人權委員會選用 "on general terms of equality" 及 "reasonable" 等含糊的字詞，是要迎合政治權利的特性，因爲每一個簽約國的政治環境及歷史背景不同，對個別政治權利的理解亦大有差異，如對於「自由」這個理念，中、美兩國的詮釋相信也截然不同。故此，人權委員會特地使用這等含糊的字詞，給與當地政府較大的自由度，於合理的情況下，因應其實際環境，解釋此等字詞。

《世界人權宣言》亦有類似的條文[36]，保護平等參與公職的權利，但當中並沒有任何含糊的字眼：於一次會議期間，法國的代表要求要更清楚訂明「平等參與」的準則。可是，經過一番討論後，這位代表最後亦承認「嚴格而言，平等機會參與公職並不是一項基本的權利。」[37]

從種種證據證明，平等機會服公職及於任內享有同等的待遇不是必然的權利，由此可見，英文本 "general" 容許有特殊待遇的解釋是正確的，而中文本的「一般」容易引起混淆，所以應改作「基本上」或「大致上」平等之條件，方能切合立法者意圖及英文本的解釋。

丙. 法律人格

《香港人權法案條例》第十三條保証：

「人人在任何所在有被承認爲法律人格之權利」[38]

何謂「法律人格」？英文對應詞句爲 "recognition everywhere as a person before the law"。

根據《公約》第十六條的法文本採用 "personnalite juridique"，意思是個人存在的權利，一個人除了物理及精神上的存在性以外，更重要的是被政府在法律前承認其存在性。這是每個人不可或缺的權利，在法律前被承認爲一個人，意即爲一個有資格享受權利及承擔義務的人，否則便不能享有《公約》所保証的任何權利[39]。

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33 [1998] 2 HKC 138.

34 *Gravel v City Of St Leonard* [1978] SCR 660, *R v Voisine* (1984) 57 NBR (2d) 38, *Cardinal v The Queen* (1979) 97 DLR (3d) 402.

35 Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary,* (NP Engel, Publisher 1993) p 450.

36 Article 21, s 2. "Everyone has the right to equal access to public service in his country".

37 Allan Rosas, "Article 21" in Asbjorn E, Gudmundur A, *The Universal Declaration of Human Rights: A Commentary* (Scandinavian University Press, 1992) 431.

38 在《一九九零年香港人權法案條例草案》，使用「人人在任何地方有權被承認在法律前的人格。」

39 Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary,* (NP Engel, Publisher 1993), p 282.

人權委員會及草擬委員會最初於英文本使用切合法文本的 "judicial personality" 一詞，但由於此詞於英美的法律中未能有適當的解釋，故此在菲律賓代表的建議下改爲 "recognition as a person before the law"[40]。

究竟「人格」一詞是否用得恰當？是否能包含英文本中那麼偉大的意思？根據三民書局《大辭典》：「人格」是法律上指得爲權利及義務主體的資格；而漢語大詞典出版社的《漢語大詞典》則謂按照法律、道德及其他社會準則應享有的權利或資格。

由此可見，翻譯者於進行翻譯工作期間，曾翻查這條條文的立法歷史及立法者意圖，才能準繩地使用「法律人格」一詞，要不然，譯上了「在法律前被認作爲一個人」，豈不是貽笑大方，叫我們使用中文的一群都丟臉嗎？

從以上三條條文的中譯本可見，翻譯者雖使用類似文言文的中文語句，看似艱深，但跟《一九九零年香港人權法案條例草案》中使用的現代漢語比較，往往更覺其言簡而義深，更能準確地表達立法者的意圖。雖然上述的論證分析中，中譯本偶有出現未盡完善的地方，但這並不只是翻譯上的錯誤：一. 把 "in a suit at law" 譯作「涉訟」[41]。中譯本以英文本爲宗，但英文本本身的解釋就跟條文的原意有偏差，所以才會出現歧異；二. "general" 作「一般」解[42]，這是否因爲台灣對「一般」的解釋跟香港式中文對「一般」的解釋有所不同而出現差別呢？

多語立法

從上述兩點，我們可以察覺下列兩個問題：一. 爲何翻譯者會在未確定英文本是否完全切合立法者的意圖時，以它作爲中文本的根據？二. 爲何《香港人權法案條例》要使用一個由台灣人翻譯的版本？

丁. 英文本永遠是對的？

因爲歷史背景影響，香港的法例大多源自英國，而當我們需要中文本時，往往就根據英文本的字面意思翻譯，因此形成了英文本的超然地位，不論其對與錯，一律照單全收。此做法其實漏弊叢多，因礙於歷史及現實環境等多種因素，暫時未能根治這種情況。但《香港人權法案條例》的情況有別於一般的條例，它參照《公約》而成，《公約》有五個語文真確本，享受同等的地位[43]。雖然於會議上使用哪個語文本作爲最後解釋的決定，會視乎出席會議的代表們多使用那種語文，而現實情況中，英文及法文的譯本較有主導性及說服力。然而，英文本其實就是從法文本翻譯過來，既然如此，我們如何能確保每一個語文本或譯本均是真確？均享有相同的地位？這些所謂「平等地位」的保證豈不是都成了一種政治手段，安撫多個使用不同語文的強國？

我們對這些疑問暫且不作討論，但作爲一個法律條文的翻譯者，是否最少要揭開這些堂

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40 Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary*, (NP Engel, Publisher 1993), p 284 para5.

41 《香港人權法案條例》第十條，詳見第一部份。

42 《香港人權法案條例》第二十一條，詳見第二部份。

43 見 12。

皇的面紗，根查真正的立法意圖及目的[44]，不能在「以訛傳訛」的情況下，再盲目跟從英文本或其他個別文本的解釋。要知道我們希望實踐多語立法的精神，並不是「多語譯法」的陋習！

戊. 本國語化

雖然香港跟台灣，甚至中國，都是使用中文的國家，但由於文化及社會環境差異，對一些詞語的理解或選擇的用詞均有所不同，例如：中國大陸使用的語言是普通話，台灣用的稱爲國語，雖然各有相異之處，但於香港人而言，大致上都是一類的東西；又例如："contracting parties"，在中國會譯作「簽約各方」，在香港的合同法中，訂定合同不一定要「簽」，在台灣可能又有另一番的見解。

在《香港人權法案條例》中，一些用詞於香港社會是陌生，甚至不適當的，如：「人民」[45]、「兵役」[46]等，在港人心目中，只有市民，何來「人民」？「兵役」更是天方夜譚，爲何一條旨在保護香港人權的條例，要選用台灣人譯本？爲何不使用一個切合香港社會環境及文化的譯本？當然，它是聯合國承認的真確本是主要因素，可是，既然當局已於長題目中申明，本港無意收納整條《公約》，只想納入適用於香港的規定，當局明顯有權刪改條例某些部份以迎合香港的實際需要。於第三部份，我們會研究港英政府及特區政府如何理解「適用於香港的規定」。

「適用於香港的規定」？

英國政府當引入《公約》於香港時，加上一些例外及保留條文(即《香港人權法案條例》的第 III 部)，其中最具爭議性是第十三條：香港的行政立法兩局不需由選舉產生；而全國人民代表大會的常務委員會則廢除《香港人權法案條例》第一部第二條第三項、第三條及第四條[47]，全部均針對這條例跟其他條例的關係及地位。

我們因此可見，兩個政府對這條例執行的均是政治性的措施，針對如何能更有效管治香港這個殖民地、這個特別行政區，這些措施對既有人權保護的影響固然值得商榷，關於中英文本的使用及解釋置之不理，亦責無旁貸。既然當局這麼注重《基本法》和《香港人權法案條例》之間的關係及地位問題，而有關方面又處處顯露其「香港重歸祖國懷抱，受其管轄，復歸統一」的主張，就更應該將《基本法》的精神體現於《香港人權法案條例》中。

《基本法》的精神是實現「一國兩制」的大原則，姑勿論此「制」是指經濟上的制度，還是另有他指，始終執著於「在一個國家的情況下，尊重香港現行的制度」，應用在立法語文系統上，《基本法》第九條如此申明：「……立法機關和司法機關，除使用中文外，還可使用英文，英文也是正式語文。」從上可見，我們是中國的一部份，中文是官方語文是理所當然的事，但當局也承認英文是正式語文，因爲中國必須了解及接受這是香港

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44 於 *Young Loan Arbitration* (1980)59 ILR 495 一案，同樣是有關國際公約，英文雖是當時起草的文本，但一樣不會影響他們只著重目的及意圖的原則。

45 《香港人權法案條例》第四條第三款乙項 ii 目。

46 《香港人權法案條例》第四條第三款乙項 ii 目。

47 Yash Ghai, *Hong Kong's New Constitutional Order: The Resumption of Chinese Sovereignty and the Basic Law* (Hong Kong University Press, 2nd Edn, 1999) p 449.

的歷史背景和現實社會環境導致的事實，然而，這兩種正式語文當中的主從關係亦十分明顯：中文爲主，英文爲次，因此法律條文本國語化必須加快步伐，讓我們每個人都能在法庭裏使用自己熟悉的語文，真正尊重我們的語文權[48]。

以《香港人權法案條例》爲例，既然中文爲主要的正式語文，當局就應該更注重其地位及真確性，方能使中文本成爲真正受人確認的語文本。

要真正符合雙語或多語立法的原則，就必須每一個語文均有其代表，熟悉當地的法律及文化，參與條例的起草過程，才能使每個文本皆享有同等的地位，互不隸屬而互相協調[49]。參考加拿大魁北省的經驗，他們亦使用 "joint drafting" [50]來達致英、法雙語立法的原則，面對不同的語文、文化及法律制度，他們雙語立法的工序十分艱鉅，但成績依然有目共睹，反觀香港跟英國使用一般的普通法制度，又曾經有接近百年的主從關係，照理只要港府官員及法律業界摒棄大英帝國情意結，重新肯定中文的價值，要提升中文在香港司法界的地位，實不困難。尤其於過渡後，《基本法》對我們影響至深，擁有解釋權的全國人民代表大會的常務委員會已表明只會採用中文本[51]，我們更要加緊學習如何使用中文爭取自己的權利。

三 總結

從現今香港只有寥寥數個涉及雙語條例解釋的主要判例[52]可見，高等法院的幾位大法官依然堅持中文本只是譯本，經常企圖挑戰中、英文本均享有同等地位的事實。似乎除了加強開導外，更重要的是同時使用雙語草擬制定及頒佈法律，方能使雙語地位真正達致均等。

因此，政府必須加緊培訓人材，加強宣揚法律本國語化的重要性，我們使用中文的一群，能真正受到中文法律保護的日子不遠矣！

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48 《香港人權法案條例》第 1 及 22 條。

49 Law Reform Commission of Canada, *La redartıon francaise des lois,* (Ottawa: Minister of Supply and Services Canada, 1980); English version, *Drafting Laws in French – Study Paper* (1981; reprinted in 1982, by M Lajore, W Schwab and M Sparer, 266 pages) at 1, quoted in Michael Beaupre, *Interpreting Bilingual Legislation* (Carswell, 1986) p 182.

50 Michael Beaupri, *Interpreting Bilingual Legislation* (Carsell, 1986) p 173.

51 全國人民代表大會常務委員會關於香港特別行政區基本法英文本的決定（1990 年 6 月 28 日）引述於 Yash Ghai, *Hong Kong's New Constitutional Order: The Resumption of Chinese Sovereignty and the Basic Law* (Hong Kong University Press, 2nd Edn, 1999) p 349.

52 *R v Tam Yuk Ha* (MA No 933 of 1996), *Chan Fung Lan v Lai Wai Chuen* (MP No 4210 of 1996), *R v Tse Hing San* (MA No 1395 of 1996), *HKSAR v Tam Yuk Ha* [1997] 2 HKC 533.

SAME SEX MARRIAGES

HKSLR EDITORIAL TEAM

I. Introduction

The recent Hawaii Supreme Court decision in *Baehr v Lewin* has spurred a heated debate over the issue of same sex marriages. The Court held that it was unconstitutional to restrict marriage licensing laws to opposite sex couples. The debates began as early as the 1970s and it is widely argued that the *Baehr* case has only given a partial account of the recent blossoming interest. Other concerns include the impact on laws governing employment, family relationships, disputes relating to custodial rights and the adoption of children, the right to recover for same-sex partner injuries and the interpretation of rent laws. While these issues still stand unsettled and uncertain, *Baehr* offers no guidance on the direction which the legislature is likely to take.

Arguments frequently raised by those who seek to stifle calls for added protection for homosexual couples include references to Scriptures, Natural Law, legal precedent and the argument that homosexuality violates the theory of evolution laid down by Darwin.. This article aims at giving a general view on how the issue of same sex marriages is viewed by the Christian religion and by Jurists belonging to the school of Natural law and Positive law. This is followed by a consideration of the state of the law in the protection of same sex marriages abroad. Finally, the present article concludes by examining whether or not same-sex couples have sufficient protection under the present regime of laws locally under the Constitution of the HKSAR.

II. Homosexuality and Religion

A. Introduction

Marriage is a unique practice, in that it is both a religious ritual performed by churches etc, and a legal registration controlled by the state which carries many responsibilities and privileges. The issue here is the legalization of same-sex marriage. As with other gay-rights matters, the debate is a tension much between heterosexuals and homosexuals; it is being fought between conservative religious groups and lesbian/gay groups. The objective of this analysis is thus not to promote either agenda, but rather, to present the arguments for and against this debate in the context of religion, and more precisely, in the context of the Christian faith.[1]

The Christian faith is chosen because of its broad influence in the western society, be it the American model, or the British Commonwealth. If we take the position that the Bible is the manifestation of god given law, and is the embodiment of what is moral and righteous, then the debate on whether the bible allows or condemns homosexuality or same-sex marriage will bear direct relevance to legislation in the natural law context.

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1 The reason for this is because the topic is so broad and has been deliberated so many times that any sensible discussion of the issues and perspectives involving more than one religion would lead to a cursory and superficial treatment at best in an essay of this length. For an example of the proliferation of articles and discussion board on the Internet, any inquiry for the word "homosexuality" will yield a long list on each and every search engines.

One of the main arguments[2] championed by religious groups against same-sex marriage is that it is behavior which is condemned in the Bible. Thus, the questions arises: "is homosexuality a 'sin'?" and "is it really forbidden by the Bible?". From reading the writings of the Bible, also known as the Scriptures, it seems that while the Bible condemns heterosexual and homosexual exploitive, manipulative sex, and prostitution, it is silent on *consensual* homosexual relationships. Therefore, it is up to the readers to try to deduce from more indirect passages whether this sort of relationship is accepted or condemned. For the rest of this section, we will attempt to describe the arguments of both conservative and liberal Christians in relation to biblical references[3] (both the English translations and the Hebrew-Greek original texts[4] will be considered).

B. Conservatives vs Liberalists

Generally speaking, conservative Christians tend to interpret the Bible as inerrant and inspired by God. They often cite passages from English translations of the Bible which, when interpreted literally, condemn gay and lesbian sex. They generally regard all types of homosexual behavior to be inherently sinful; as a chosen and changeable perversion, which is hated by God.

On the other hand, liberal Christian theologians often emphasize that consensual, loving, same-sex relationships were unknown in Biblical times. They tend to search out alternate interpretations of those Biblical passages where English translations refer to "homosexuality". Most regard homosexual orientation and behavior is a natural and normal human sexual expression among a minority of adults. It is not changeable or chosen.

Due to the limited scope of the essay, we will only look into two much contested topics in this debate of homosexuality: the city of Sodom, and the lack of approved homosexual relationships in the Bible.

C. The Arguments

1. The Book of Genesis 19 - The destruction of the city of Sodom

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2 The other arguments include: There have never been same-sex marriages in the past; Our present view of nuclear marriage has always been the dominant one; The nuclear heterosexual family has always been the basic building block of society; Married homosexuals will raise children who will also be homosexuals; Threat to existing marriages; The will of the majority must rule.

3 A word of caution. The words "homosexual" and "homosexuality" are not found in the original Hebrew, Aramaic and Greek texts. The concept of sexual orientation was only developed in the late 19th century and did not exist during the time when the Bible was written. Consequently, the writers had little or no understanding of same-sex committed relationships. Instead, all humans were presupposed to be heterosexual, but that some heterosexuals engaged in sex with persons of the same gender. It is therefore important to keep this in mind when the words "homosexual" or "homosexuality" are found in the English translation of the Bible, as further research into the original Hebrew or Greek text is needed in these circumstances.

4 These two Hebrew words are associated with homosexual passages but are often mis translated in many English versions of the Hebrew Scriptures (see http://www.religioustolerance.org/hom_bibl.htm):

qadesh means a male temple prostitute who engaged in ritual sex; it is often translated simply as "sodomite" or "homosexual." The companion word *quedeshaw* means female temple prostitute and is frequently mistranslated as "whore" or "prostitute."

to'ebah means a condemned, foreign, Pagan, religious, cult practice, but often simply translated as "abomination". For example, eating food which contains both meat and dairy products is "to'ebah".

This chapter[5] is perhaps the most commonly cited anti-homosexual passage in the Bible. It is so frequently used that the term "Sodomite" that once referred to an inhabitant of Sodom, has now become a derogatory synonym for a homosexual.

Conservative Christians interpret "knowing" the angels to mean that the mob intended to engage in homosexual activities the angels. This is why God was displeased with the inhabitants of the city and decided to destroy both the city and its inhabitants. God condemns homosexuality then and now. This interpretation of Genesis 19 appears to have been created in the 11th century by the Italian ascetic St. Peter Damian.[6] This explanation is accepted generally, in fact, the English word sodomy was derived from the name of the city.

According to liberal Christians, however, the Hebrew verb which is commonly translated as "know" is ya,,da′ with an ambiguous meaning. It appears 943 times elsewhere in the Hebrew Scriptures (Old Testament). In only about a dozen of these cases does it refers to sexual activity - all heterosexual. It is not absolutely clear whether the mob wanted to gang rape the angels or to meet with them, and perhaps attack them physically. It is thus unclear from these few verses in Genesis why God demolished the city. In order to shed some light on this matter, other passages in the Bible need to be referred to.

The first chapter of the Book of Isaiah is a condemnation of Judah. There were repeated comparisons to Sodom and Gomorra in their evildoing and depravity. The Prophet listed many sins of the people, including *inter alia*: rebellion against and desertion of God, ignorance, idolatry, oppression of others, insensitivity towards the needs of widows and orphans, murder, accepting bribes, etc. Homosexuality and other sexual activities were not mentioned at all.[7]

Moreover, many Jewish stories in the Ethics of the Fathers and the Talmud mention Sodom using the phrase "middat Sdom".[8] It may be translated as "the way the people of Sodom thought". It meant a lack of charity and hospitality towards others and ignoring the needs of the poor. To help strangers was a solemn religious duty, as mentioned in the Book of Leviticus 19:33-34.

Many liberal Christians would thus conclude that the condemned activities in Sodom had nothing to do with sodomy, instead, they were condemned for, *inter alia*, inhospitality and violence to strangers.

2. Accepted Couples?

The Bible described at least two emotionally close relationships between two people of the same gender. Depending on the interpretation, they appear to be beyond a casual friendship. It should be noted that while there is no direct mention of actual sexual activity between these two same-sex couples, must be pointed out that these couples had made covenants with each other.

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5 Two angels visited the Canaanite city of Sodom and were welcomed into Lot's house. The angels were sent to warn Lot that God was displeased with wickedness of the city's residents, and that God had decided to destroy the city of Sodom and the nearby city of Gomorra. The men of the city gathered around the house and demanded that Lot send the strangers to the mob so that they might "know" the angels. Sensing evil intent by his fellow citizens of Sodom, Lot refused. As an alternative, he offered his two virgin daughters to be heterosexually raped if that would appease the mob. The offer was declined. Later, the angels urged Lot and his family to flee the city.

6 Robinson, B.A. - http://www.religioustolerance.org/hom_bibg.htm

7 *Ibid.* Also see Jeremiah 23:14, Ezekeiel 16:49-50.

8 *Ibid.*

And in ancient times, a covenant was viewed by the Israelites as a holy bond, a powerful uniting of two people.

a. David and Jonathan[9]

The conservative view of the friendship between David and Jonathan is that it is totally non-sexual. It is impossible that God would allow a homosexual to become one of the most famous kings of Israel. On the other hand, liberal Christians would interpret the relationship between David and Jonathan to be of a consensual homosexual nature. There are many passages in the Bible that described their close relationship:

1 Samuel 18:1[10]

> "...Jonathan became one in spirit with David and he loved him as himself." (NIV) or "...the soul of Jonathan was knit with the soul of David, and Jonathan loved him as his own soul" (KJV)

1 Samuel 18:2[11]

> "From that day, Saul kept David with him and did not let him return to his father's house." (NIV)

2 Samuel 1:26

> "I grieve for you, Jonathan my brother; you were very dear to me. Your love for me was wonderful, more wonderful than that of women."

b. Ruth and Naomi

Ruth 1:16-17 and 2:10-11 described the friendship between Ruth and Naomi. While this bond appears to be very close, there seems to be no direct proof to say that it was a sexually active relationship. The famous passage from Ruth 1:16-17, which is often read out during heterosexual marriage ceremonies and Lesbian union services, described their relationship:

"Where you go I will go, and where you stay I will stay. Your people will be my people and your God my God. Where you die I will die, and there I will be buried. May the Lord deal with me, be it ever so severely, if anything but death separates you and me." (NIV)

D. Conclusion

Each Bible translation reflects the experience, beliefs and mind sets as well as specific theological belief systems of its translators. An additional complexity facing translators is that the modern society is very different from that of Biblical times, and it is sometimes difficult to find a current English word that closely matches a Hebrew or Greek term.

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9 Passages in 1 Samuel & 2 Samuel describe an extremely close bond between David and Jonathan. Jonathan was the son of King Saul, and next in line for the throne. But Samuel anointed David to be the next king. This produced a strong conflict in the mind of Saul.

10 Genesis 2:7, as written in the original Hebrew, describes how God blew the spirit into the body of Adam that God had formed from earth, so that Adam became a living soul. It would appearl that "soul" represented a combination of body and spirit in the ancient Israelite times. Thus the two men appear to have loved each other both physically and emotionally.

11 David left his parent's home and moved to Saul's where he would be with Jonathan. This is a strong indication that the relationship was extremely close.

There seems to be no absolute answers. In fact, different meanings can be derived from different interpretations of the same passages of the Bible.

III. Arguments in Legal Theory on Same Sex Marriage

A. Introduction

In the previous section, the "Prohibitionist" view taken by the Church has been discussed. This mainly dealt with resistance to an impending revolutionary change in the institution of marriage posed by the proponents of same-sex marriage. In terms of Jurisprudence, the position is split: There are those who staunchly oppose the notion of homosexuality, let alone a union of such a couple recognized under the ambits of the law and there are those who believe that the law is what is laid down by the Sovereign power or the *Grundnorm*, absent of any morality influences, and hence does not necessarily exclude the provision for legally married couples of the same sex under the law. The following section will deal with the area of Natural law which, like the Prohibitionist view, heatedly oppose the notion of same sex marriages. The position of the Positive school on the issue shall be dealt with in a subsequent section[12].

B. Natural Law

Perhaps the strongest arguments against legalizing same-sex marriages come from Jurists adhering to the school of Natural law, who expound that Law should be what is "moral" and "natural" and these values dictate the way we behave. What is not considered "moral" or "natural" cannot be considered valid Law.

Such a proposition logically begs a definition of what is "moral" and "natural" by Natural Law standards. According to leading Natural lawyer Thomas Aquinas[13], morality can be objectively determined just as scientific truths and that we inherently know what these standards of morality are[14]; the approximation of the standard of truth in ethics for Aquinas are the values specified by human nature and natural inclinations:

> "The order of the precepts of the natural law corresponds to the order of our natural inclinations ... corresponding to this inclination the natural law contains all that makes for the preservation of human life"[15]

According to Professor C E Harris, these can be divided into two groups -- biological values (existence and procreation) and characteristically human values (Knowledge and sociability)[16]. He believes that since homosexuality works against the biological values of maintaining human existence and the elimination of procreation, it is unnatural and hence, should be considered immoral and banished. In addition, homosexuality also disrupts normal, proper human relationships by spreading acceptability of homosexuality (which he ardently believes to be "wrong") as equally accepted by society as heterosexuality. This counters characteristically

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12 See *Infra* section III part C.

13 Quoted in the sympathetic analysis of Harris, C E, "The Ethics of Natural Law" *Applying Moral Theories* www.central.edu/philrel/nlaw.html.

14 However, we are prone to faltering when we make inaccurate interpretations as to the implications of these standards.

15 Aquinas, T, *Summa Theologica,* pt 2, 1st pt, qu 94, art 2. Text in Freeman, M D A, *Lloyd's Introduction to Jurisprudence* (London: Sweet & Maxwell, 1994) p 134.

16 *Supra* note 13.

human values and hence deserves no support of Natural lawyers.

1. Biological Values: Procreation and Existence

Similar arguments have been made in the House debate over the *Defense of Marriage Act*[17] by Professor Hadley Arkes[18], where he asserts the importance of the complementarity of sexes and procreation as the ultimate value. American writer Andrew Sullivan[19], on the other hand, argues that there is no basis to claim that same-sex marriages or homosexual activities are immoral or unnatural just because they do not lend a hand towards procreation or ensuring the continuing existence of the human race. He questions why childless heterosexuals are allowed to marry while the same right should be denied to homosexuals on the basis that they cannot procreate and sustain the existence of mankind[20]. Culhane also makes repeated reference to the case where a sterile couple is allowed to marry without in anyway violating morality or Natural Laws[21]. Several concerns are also raised by the assumption that Natural Law makes -- if procreation and maintaining humankind equates to the morality, and hence the legality, of a certain act, the act of consummation must necessarily lead to procreation. But is this not taking the position of Stalin where couples were strongly urged to give birth to as many children as possible[22]? Would this stance also fail to attach enough significance to the current problem of over-population -- especially in places like India and China?

2. The Conservative Argument: Homosexual Activity[23]

More subtle arguments that fall within this category is Finnis' argument that marriage, as a basic human good, needs no instrumental value; it is a biological union of the reproductive organs of man and wife – a way of allowing them to "experience their real common good – their marriage[24]". Religious arguments on this point also considers the "exploitation" of genital organs for anything other than reproduction as immoral or sinful and hence, should not be legal. To this, Sullivan puts forward an alternative view – the dualist conception asserts that the human body is dictated by emotional desires and the physical body is only instrumental in attaining what our emotions crave. He argues that for heterosexuals, the ultimate "fulfillment of a longing for emotional and physical union[25]" comes in the form of marriage. A homosexual couple, deprived of such recognition of their union can only turn to other means of attaining

17 28 U S C § 1738C (Supp II 1997).

18 See Culhane, J G, "Uprooting the arguments Against Same-sex Marriage", Cardozo L Rev 20(1999) 1119, 1203.

19 Andrew Sullivan puts forward three main arguments over same-sex marriages: the liberal, the conservative and the prohibitionist view. This section of the article shall focus on the conservative view since it mainly surrounds the debate between proponents of same-sex marriage and legal theorists, namely, Natural Lawyers.

20 Sullivan, A, "Let Gays Marry" in Bennett, W and Sullivan, A, *An exchange on Same-sex Marriage*, www.central.edu/philrel/sullivan.html. Sullivan raises examples such as Bob and Elizabeth Dole and Pat and Shelley Bucchanan.

21 *Supra* note 18, 1207.

22 After Stalin's ascension to power and during the three periods of "Five-year Programs", Russian-folk were encouraged to have as many children as possible and families were even paid or given medals for having a lot of children. Stalin believed that they would provide Russia with a great labour force but failed to see the scarcity of resources that the nation had to support such a collosal population.

23 George, R P, "Nature, Morality and Homosexuality" in Forte, D, (ed) *Natural Law and Contemporary Public Policy* (Washington DC: Georgetown University Press, 1998) p 36.

24 Finnis, J, *Law, Morality and Sexual Orientation*, p 1066. The union of the genital organs of a husband and his wife alone may attain this union, therefore, oral sex or homosexual activity cannot be said to be able to lead towards a sharing of the common good.

25 *Supra* note 23.

such a level of intimacy. It is argued that homosexual activity is precisely what draws two together and allows for a better understanding of each other, through the expression of one another's trust by opening to the other one's vulnerability. Viewed in this way, Sullivan argues that homosexual activity, though incapable of procreation, still serves a fundamentally natural function and hence should not be considered immoral[26].

There is a more pragmatic way of looking at the Naturalist perception of sexual activity for personal pleasure. If Finnis' extreme views were adopted[27], it would mean that heterosexual couples engaging in sexual activity not geared towards procreation would also be immoral and therefore, not legal. If this were strictly enforced by the state, all couples would be deprived of the right to conduct their affairs in the privacy of their own homes since there would be a need to ensure that all sexual activity is performed for the purpose of procreation. Practically, this is impossible to implement and even if an application of the double effect principle[28] were raised in an attempt to justify doing so, the value of privacy would likely outweigh the value of ensuring that the sole objective of any sexual activity was procreation.

3. Characteristically Human Values: Disruption of Sociability

As mentioned above, Arkes criticized homosexuality on the basis that it violates the complementarity of the sexes of the parties to a marriage[29]. His views stem from his assumption that only opposite sex relations are "natural". Sullivan counter-argues this point by questioning how it could be explained that homosexuals "[are] bound up in that mysterious and unstable area where sexual desire and emotional longing meet[30]". What Sullivan is saying is that homosexuality is normal – in the sense that we are not given any more choice about being black or white, male or female[31].

However, such an assertion would necessarily mean that there is no social or psychological explanation for homosexuality – that one is inherently born with homosexuality scored in their genes. In a discussion on an internet forum[32], it was raised that homosexuality is something that results from external conditioning and not from one's genetic make-up. Hence the analogy to miscegenation cannot be completely accurate and if sufficient thought and research were put into discovering the underlying factors for homosexual tendencies, there would not exist the "mysterious and unstable area" to which Sullivan refers.

There are also those arguments that claim that admitting same-sex marriage would destabilize the institution of marriage. Arkes is of the opinion that a main function of marriage should be the domestication of men – he further elaborates that "[I]t is not marriage that domesticates men; it is women[33]". This ancient stipulation has not met with favor by the Supreme Courts when weighed against the fundamental right to marry. Furthermore, domestication stems from one's commitment to the relationship. It would be setting a double standard to say that those who

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26 *Ibid.*

27 Finnis was vehemently against anything that deviated from the norm. Finnis did not only argue that legislation allowing same-sex marriages should be prohibited, but that legislation should be used as a guard against homosexuality (ie prohibited by the law) and that education and the media should be manipulated so as to stifle homosexuality completely. See Culhane, *supra* note 6.

28 *Supra* note 13.

29 *Supra* note 18, 1203.

30 *Supra* note 23.

31 *Supra* note 20.

32 "***Y is Homosexuality Bad?", www.cyberpass.net/h2o/wwwboard/messages/158903.html.

33 Arkes, H, "The Closet Straight" Nat'l Rev, July 5, 1993.

vow loyalty and responsibility to a party of the same-sex is not paralleled by a vow to a party of the opposite sex. On the contrary, Culhane[34] and Sullivan[35] argue that allowing same-sex couples into the institution of marriage would serve to reinforce the "unitive significance[36]" of marriage, quite apart from Kenneth Monigue's view that homosexuality would weaken an already strained institution. Unfortunately, there has never been a detailed account as to how this can be achieved by same-sex marriages.

It is evident that the liberal views of the proponents of same-sex marriage are matched by the conservative concerns of many Jurists. This section has briefly explored the arguments that Sullivan classifies as "Conservative". The stance of those belonging to Positive law are substantially different from the views of Natural lawyers. This is explored below.

C. *Positive Law*

Despite the fact that both Natural Law and Positive law fall within the ambit of Analytic Jurisprudence, they appear at times to be in total contradiction to one another. Hinging on this fact, many have sought to use Positive law's position on same sex marriages as a possible shield against Natural Law arguments made against the validity of laws providing for the union of same sex couples at law. Yet, upon close examination, matters may not be as simple and as straightforward as one might have perceived, for although Positivists and Naturalists hold polarized view-points on the issue of legal validity, the application of both schools of thought may (arguably) at times see eye to eye.

Positive law jurists among themselves are often of varied and differed opinions, but three common elements can be drawn from their philosophies on law that point to the validity of laws[37]. First, Positive law advocates a Separability thesis which dictates that law is a concept that can be removed from morality. Secondly, there is the Conventionality thesis which refers to the acceptance by officials of the validity of the law and finally, the Social Fact thesis, which draws up several prerequisites that must be present for laws to be valid. In the context of same sex marriage, each shall be examined in turn.

1. The Separability Thesis

In the simplest of terms, the Separability thesis is a blatant rebuttal of the Natural Lawyer's Overlap thesis[38]. It states that law and morality are conceptually distinct and the latter plays no part in the determination of whether a law is valid or not. According to the Positivists then, the morality or immorality of homosexual behaviour, and hence same sex marriages have no bearing on the validity of any relevant laws and cannot be used as an argument against such

[34] *Supra* note 18, 1189.

[35] Sullivan, A, "A Reply to Bennett" in Bennett, W and Sullivan, A, *An Exchange on Same-sex Marriage*, www.central.edu/philrel/sullivan.html.

[36] A term used by Hadley Arkes.

[37] *The Internet Encyclopaedia of Philosophy*, http://www.utm.edu/research/iep/l/law-phil.htm.

[38] Natural Lawyers believe that law and morals are concepts that are necessarily intertwined – that what is valid law is determined by whether it is moral hence, what is immoral cannot be considered valid law. This is known as the Overlap thesis; a term coined in the *Internet Encyclopaedia of Philosophy*, *ibid.* Dworkin takes the example further by expanding it in his proposition that Hercules, in the adjudication of cases must invariably come to one and only one conclusion -- implying that in all cases, only one right answer will be derived, this in turn points to a veiled assertion that there should be only one moral thing to do. That, in Dworkin's terms would be the constructive interpretation of the statutes. See *supra* note 15, pp 80-83, 89, 90.

promulgation. Conversely, Naturalist argument that only heterosexual unions in the institution of marriage are moral cannot be the pillar that upholds its validity at law.

What then becomes of assertions made by those who advocate for the recognition of same sex marriages at law? Plainly, these assertions point to the immorality of laws that restrict marriage laws to heterosexual unions and, that to so restrict would be an essential breach of a person's privacy rights as well as one's fundamental right to get married – and an inequality of individuals under the law, being discrimination in the form of one's sexual orientation. When these arguments are put in the context of Positive law, it becomes clear then that these arguments, which, in actuality are the only arguments that have ever been put forward by those who have been or are currently fighting for state recognition of same sex marriages at law, are headed in the wrong direction – that in order to prove the invalidity of marriage laws as seen by the Positivists, the proper approach rather was the identification of Sovereign or a higher order who or which was to promulgate and declare what was law. This is what is called the Social fact Thesis in Positive law.

2. The Social Fact Thesis

The Social Fact Thesis asserts that legal validity is a function of certain social facts. Jurists hold different convictions on what these necessary social facts are to be. The beliefs of the most prominent of these Jurists are examined at length below.

a. Bentham & Austin

In Austin's view, in order for a law to be valid, it must have been declared to be law by a Sovereign and there must be a coercive element to the law[39]. It was in Austin's view that punishment had to ensue from the non-obedience of a law in order for it to be valid law. Bentham took the theory further by saying that there needn't be only punishment but also reward backing the compliance with a law declared by the Sovereign to make it valid. He further recognized the divisible and mutable nature of the Sovereign's power to declare law, which his disciple Austin was unable to allow for in his thesis[40].

The validity of law in Bentham and Austin's opinions had several prerequisites: the existence of a sovereign, that law is declared by him and that the non-compliance with that piece of law gives rise to punishment and acting according to the word of the law could result in rewards offered. In the determination of whether or not marriage laws are invalid, as propounded by the advocated of equal rights to homosexuals, one must examine whether or not the social elements that Bentham and Austin have prescribed exist at the time of promulgation.

If Sovereign by definition means merely the government or the legislative organ, then it becomes clear that the present marriage laws so declared to be law must be valid. The punishment for the non-compliance is that there is no recognition of that union of persons of the same sex under the law and compliance with the law, the marriage of a man and woman, bears the advantages or "reward" of having a state-recognized, legally valid marriage that guarantees tax benefits, housing and other marriage-based protections under the law.

On the other hand, those who hope to see same sex marriages accorded the same protection can look to the statutes to see if there are any implications that could be derived therefrom to

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39 *Ibid*, pp 216-226.
40 *Ibid*, pp 210-212.

support or recognize same sex marriages. Should there be such a provision, it could be argued that they too have the force of valid laws since they too are provisions that have been promulgated in the same ways as marriage laws for heterosexual couples. The unfortunate case in many jurisdictions though is that the marriage laws usually expressly provide that a valid legal marriage is to be a union of man and woman – meaning that by the strict application of Bentham and Austin's test for validity would often exclude the notion that the Sovereign could have willed for there to be homosexual unions under the law.

b. Kelsen's *Grundnorm*

Kelsen saw that legal validity was to be determined by a set framework of social behavioural patterns accepted by the community. These collectively were known as the *Grundnorm* and in each society, there is one *Grundnorm* that dictates not only the habitual behaviours of the people, but also dictates the validity of the law. According to Kelsen, no other order should be found higher than the *Grundnorm* and in its supremity over all other orders, gives validity to the layers of regimes that fall under it -- leading finally to the validity of the laws that form the root of the hierarchy[41].

Following the theory laid down by Kelsen, it is essential to first identify the *Grundnorm* within society in order to determine the validity of the laws relating to marriage. Arguably in Hong Kong, the Basic Law would be the *Grundnorm* but then, this presumption begs the question of whether the Basic Law indeed holds such an esteemed position that it is beyond any other regime's power to alter, amend or to interpret it. Articles 158 and 159 of the *Basic Law* in fact provide that the *Basic Law* in fact does not possess the necessary characteristics to make it the *Grundnorm* for post-Handover Hong Kong, namely that the *Basic Law* is not immutable and of the highest order but that the Standing committee of the National People's Congress is vested with the power to determine the meaning of and to amend the *Basic Law*.

Tracing upwards to that which gives the Basic Law its validity then, one would find s 33 of the PRC Constitution and the Joint Declaration empowering the enactment of the *Basic Law* as the mini-constitution for Hong Kong after the Handover. Would that mean that the Constitution of the PRC is what Kelsen would have called the *Grundnorm* of Hong Kong? But does that not sit uneasily with the fact that there could be a socialist *Grundnorm* that presides over a capitalist state as Hong Kong? While these questions appear to fall out of the scope of our present analysis[42], it does led us to the conclusion that there is no logical way of determining the *Grundnorm* of Hong Kong or at least is free from any doubts that might be raised either in the theoretical or social context.

Whatever the conclusion drawn, we may for argument's sake, assume that the *Basic Law* does in fact embody the *Grundnorm* of the territory. In such a case, it would then be logical to ask whether the *Basic Law* as the *Grundnorm* provides for any recognition of heterosexual marriages in Hong Kong as an accepted practice – so much so that a behavioural pattern set in stone emerges and forms the "standard" against which behaviour should be judged[43]. It

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41 Kelsen, H, *the General Theory of Law and State*, text in *ibid*, pp 297-302.

42 The focus of this section is to determine the *Grundnorm* of Hong Kong so that the validity of marriage laws, which only recognise heterosexual marriages, can be determined. The question of whether a decided *Grundnorm* is befitting to the economical climate of Hong Kong is a different matterwhich merits exploration in another essay in itself.

43 The Constitution of Hong Kong and its bearing on the recognition of same sex marriages in Hong Kong will be discussed below in greater detail. For present purposes, it suffices to say that the *Basic Law* dictates that to be valid law as that found in the statutes. This means that, similar to the application of Bentham and

becomes clear upon such an analysis that this is the case -- and that it *is* the norm in Hong Kong that marriages that have taken place are all heterosexual unions[44]. There are, therefore no grounds to argue that the existing laws that recognize only heterosexual marriages are invalid.

c. Hart's Rule of Recognition

According to Hart, the validity of laws is not tested as Bentham and Austin propose but is much more akin to the theory put forward by Kelsen. He believes that in each society, there lies a Rule of Recognition that articulates what is or is not valid as law and which includes provisions for the making, adjudicating and amending of primary laws. Hart's view of the Social fact Thesis is that a proposition is legally valid in a society if and only if it satisfies the criteria of validity contained in the in a Rule of Recognition that is binding on that society. How then does one determine whether or not the Rule of Recognition identified is binding on that society? According to Hart, a Rule of Recognition is binding only if there is a social convention among officials to treat that Rule of Recognition as defining standards of official behaviour. This in another words, would be the Conventionality Thesis of Positive law.

3. The Conventionality Thesis

Within theories of Positivism, there lies a conception about the law that legal validity will ultimately trace its roots to certain forms of social convention. In Hart's view, a Rule of Recognition is binding upon a society only by virtue of the fact that convention has been established among the officials that the criteria laid down in the Rule of Recognition shall be a standard governing their behaviour as officials[45]. This means that officials must deem the secondary rules in society as prescriptive of their behaviour. In such a case, it can be said that the Rule of Recognition is binding upon that society. This then prods the inquiry further by necessitating the question as to what these criteria are, and having so determined, to consider whether these criteria are seen by officials of Hong Kong as indicative of standard behaviours.

Taking the example of the Paris Metre Bar, Hart states that the according the Rule of Recognition, a law is neither subject to the test of right or wrong (hence in conformity to the Separability Thesis) – it is simply what the Queen enacts as law or in the case of Hong Kong, what the Constitution mandates to be law. In essence therefore, the Rule of Recognition is for Hong Kong the Constitution, and whether or not it is binding on Hong Kong depends on whether or not the officials of Hong Kong recognize that the Basic Law effectively prescribes what their behaviour should be.

Again for argument's sake, should the Basic Law indeed be thought of by officials as that which lays down the standard for behaviour, does the Basic Law say that marriage laws that only recognize heterosexual unions are valid laws? The application of Hart's theory would land a similar conclusion as Kelsen's theory: according to the present state of marriage laws in Hong Kong, only heterosexual marriages are valid at law and there is nothing to contradict that

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Austin's theory, same sex marriages are not recognized and hence cannot be the "standard" for behavioural norms in the *Grundnorm*.

44 It is believed that if homosexual marriages would one day become so prevalent a practice that the majority of society practiced it and that it sets the norm as opposed to heterosexual marriages, then a new *Grundnorm* would have emerged and, through some violent overthrow (since at law under the existing *Grundnorm*, one is not validly allowed to have same sex marriages) of the past *Grundnorm* that only recognized opposite sex marriages, a new *Grundnorm* that recognized only the union of couples of the same sex would emerge. See *supra* note 41, p 302.

45 See *supra* note 37.

according to the major Jurists within the Positivist school of thought.

D. *Conclusion*

Having dealt briefly with the various elements of the theories of different Positivists, it appears that the situation is hardly favourable to those who hope to see equal rights of marriage accorded to homosexuals. The only way, in the view of the Positivists, is to have the law changed – either by way of a Sovereign declaring that homosexuals are allowed to get married and their marriages validly recognized under the law, or through a change in *Grundnorm*, where by the common practice of society dictates that the a new set of norms have emerged to replace the old and where same sex marriages would therefrom be recognized.

IV. *Foreign Legislation*

A. *Introduction*

Among the more contentious developments in law, the debate on the legalisation of same sex marriage is probably in its most contested form in the United States. As a result, this section of the essay will deal with an overview of the general developments across the globe, the main focus being on legislative efforts within the US.

All over the world, there has been much legal and cultural activity surrounding the emergence of the legalisation of same sex marriage. With or without the blessing of the law, same sex couples have been proceeding with and celebrating publicly their ceremonies of commitment. Legal moves by same sex couples to be recognised by the law face denunciation from conservative voices who assert that by nature and divine will, only relationships between a man and a woman can be considered natural.

B. *Europe*

From the start of the 19th century until the 1950s, there was a campaign against homosexual activity, first on legal, then on medical grounds, throughout the Western world, and in the "civilised" world, same sex marriage was impossible[46]. Since the late 1960s, homosexuality has become much more accepted throughout Europe. This is evidenced by the acceptance of this in Denmark[47], Norway[48] and Sweden[49], with Finland, Slovenia and the Netherlands, and possibly Iceland and the Czech Republic which was expected to follow suit. In fact, same sex common law marriage has been recognised by the courts of Hungary[50]. Generally speaking, the

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46 http://www.bway.net/~halsall/lgbh/lgbh-marriage.html.

47 http://www.qrd.org. Denmark was the first country to legalise same-sex unions in 1989. By the end of 1991 about 1000 such unions had taken place and 3000 by the end of 1995. Although the legal ceremony creates legal bond enforceable in law, it is not the same as marriage between heterosexual couples. Same sex couples are not granted access to adoption, artificial insemination, in-vitro fertilisation, or church weddings. In addition, one partner must be a citizen of Denmark.

48 *Ibid.* Same sex unions were made legal on 1 April 1993.

49 *Ibid.* The law legalising same sex unions came into effect on 1 January 1995. The law was passed quite narrowly with a parliamentary vote of 171 to 141 with 5 abstentions and 32 absences.

50 *Ibid.* In an odd legal decision the Hungarian Constitutional Court legalized "common-law" gay marriage on March 8 1995. The court said a law limiting common-law marriages to "those formed between adult men and women" was unconstitutional. "It is arbitrary and contrary to human dignity ... that the law (on common-law marriages) withholds recognition from couples living in an economic and emotional union simply because they are same-sex," the court wrote. The justices ordered parliament to make the changes necessary to implement common-law gay marriage by March 1, 1996. The oddity was that the court also

legal relationships created by same sex marriage laws are not exactly the same as heterosexual marriages: in particular, most such couples have to be citizens of the country in question, and do not gain adoption right or the right to marry in Church.

The strict definition of 'legal marriage' to be a permanent union between a man and a woman has created queer circumstances. One such can be found in Britain where, in 1995, there was an official lesbian marriage[51]. The unusual circumstances that gave rise to this unprecedented marriage was the fact that one of the brides was actually born a man but underwent a sex change operation. Although physically female, under British law, she is still a man, and was therefore able to marry her partner.

Many European countries are still very much opposed to the legalisation of same sex marriage. For example, in France, the "Gay Marriage" Bill was described by the BBC Paris correspondent as one of the most bitterly opposed piece of legislation for years[52]. The French parliament, on 13 October 1999, voted in favour of this controversial bill that gives gay couples many of the rights enjoyed by married couples. The measure, known as the Civil Solidarity Pact (PACS), allows unmarried couples of whichever sex to enjoy some of the tax, legal, social security and financial benefits open to married couples. The bill would allow unmarried heterosexual and same-sex couples to register their union "in order to organise their common life".

C. Outside Europe and the US

Australia has an active lesbian and gay movement that is much effected by American and European developments. Indeed, Sydney has been the host of annual gatherings and parades of a homosexual nature, for example, the Annual Gay March. Other countries that see legislative developments within its borders would include South Africa, which became the first state in the world to include gays and lesbians as a class protected from discrimination in its constitution. 1995 surveys in the Brazil show that 73 Brazilian cities and towns – including Sao Paulo, Rio de Janeiro and Brasilia – ban discrimination based on sexual orientation[53]. Legislation to create civil union contracts for same sex couples was introduced nationally.

In Ontario, Canada, same sex partners have the same rights and responsibilities in Ontario as common-law heterosexual couples[54]. The Ontario government passed legislation in October 1999 complying with a Supreme Court of Canada decision that ruled laws that treat heterosexual relationships differently from gay and lesbian relationships are unconstitutional. The Supreme Court ruling in May 1999 in the case *M v H* gave provincial governments six months to amend the Family Law Act.

D. United States

In 1978, the United States Supreme Court in *Zablocki v Redhail* declared marriage to be "of fundamental importance to all individuals". The court described marriage as "one of the 'basic

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ruled that formal, civil marriages are for heterosexual couples only. "Despite growing acceptance of homosexuality (and) changes in the traditional definition of a family, there is no reason to change the law on (civil) marriages".

51 The Plaid website. Also reported on the BBC website.

52 http://www.labyrinth.net.au/~dba/pa991012.html.

53 *Supra* note 46.

54 *Supra* note 52.

civil rights of man'" and "the most important relation in life." The court also noted that "the right to marry is part of the fundamental 'right to privacy'" in the US Constitution.

Although marriage has been declared a fundamental right, no state has yet recognise same sex marriages. However, in December 1999, the Vermont Supreme Court in *Baker v State* ordered that state's legislature to either grant marriage licenses to same-sex couples or provide same-sex couples with the same legal rights and protections given to married heterosexual couples[55]. The plaintiffs in the case, two lesbian couples and one gay couple, stressed the fact that the law overwhelmingly denies equal protection to same-sex couples. These include the areas of health insurance, the right to make medical decisions for an incapacitated spouse, joint tax filings, social security benefits and the principle of survivorship that operates for heterosexual couples in the absence of a will. When ruling in favour of the plaintiffs, the Vermont court concluded that extending equal benefits to same-sex couples "is simply, when all is said and done, a recognition of our common humanity."

Markedly, because the decision was based on the Vermont Constitution and not state law it cannot be appealed to the US Supreme Court. Thus the legislature is obligated to provide Vermont Constitutional benefits to same-sex couples, and this law will likely stand for some time to come. If the Vermont legislature does grant such marriage licenses, same sex couples would be free to travel to Vermont, marry, and then return to their home states and demand that their marriages be recognised. This is based on the provision in the US Constitution that legal agreements made in one state must be given "full faith and credit" in every other state. Nonetheless, the home state of the marrying couple would be able to make an appeal to the US Supreme Court.

Prior to the decision in *Baker v State*, there had been a string of cases involving same sex marriages. The earliest ones date back to 1971, for example, *Baker v Nelson*, a Minnesota case, where a gay couple argued that the absence of sex specific language in the Minnesota statute was evidence of the legislatures intent to authorise same sex marriages. [56] The case was made by direct constitutional argumentation, citing the 9th and 14th amendment (concerning due process and equal protection rights). The court rejected the case by stating that "The institution of marriage as a union of man and woman, uniquely involving the procreation and rearing of children within a family, is as old as the book of Genesis." The court also ruled that "... abstract symmetry' is not demanded by the Fourteenth Amendment," and rejected the parallel with marital restrictions based upon race.[57]

The legal and constitutional debates continued all the way through the 1970s and 80s, culminating in the 1999 Hawaiian case of *Baehr v Miike*[58]. The case was a nine year battle over the issue of same sex marriage, and it ended just eleven days before the Vermont ruling in *Baker v State*. The plaintiff in *Baehr* argued that Hawaii's marriage license rules were discriminatory. The case set off a national debate over same-sex marriage rights and prompted an onslaught of state and federal legislation designed to preempt the possibility that other states would be forced to recognise same-sex marriages from Hawaii. Most notorious was the Defense of Marriage Act (HR 3396/S 1704) that was introduced by Bob Barr in the House and Don Nickles in the Senate and passed the House in late May 1996[59]. The *Baehr* case was finally dismissed

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55 http://www.state.vt.us/courts/98-032.
56 http://www.nolo.com/encyclopedia/articles/mlt/same-sex_marriage.html.
57 *Supra* note 46.
58 *Supra* note 56.
59 *Supra* note 46.

on the grounds that the legislature had passed a prohibition on same-sex marriages before the Hawaii Supreme Court could render a favourable opinion.

With the Vermont decision, the future of the legalisation of same sex marriage seems to become more optimistic. However it is still too early to say for sure, because without a doubt, a state bureaucrat in at least one of the other 49 States will refuse to recognise another state's same sex marriage and the dispute will go to the US Supreme Court. The Supreme Court will have to decide which takes precedent: the full faith and credit clause of the US Constitution, the Defense of Marriage Act, or the state's assertion that same sex marriage violates public policy.

V. Domestic Legislation

In Hong Kong, legislation is the primary source of the law concerning marriage. Numerous ordinances have been enacted to deal with issues arising out of the institution of marriage, including property rights and the rights and statuses of spouses both during the continuance of marriage as well as upon its dissolution. Therefore, one needs to go only so far as the statute books to ascertain Hong Kong's position on the controversial issue of same sex marriage.

If one was unaware of the inconsistencies in this area of the law and of the differing views of nations around the world, one would expect Hong Kong, being a democratic nation with high regard for individual rights, to recognise same sex marriages and to give these individuals the same recognition and status as is provided for the parties to heterosexual marriages. However, as will become more apparent below, the situation is surprisingly different. Rather, marriage is understood narrowly in the traditional sense – involving a man and a woman.

The best starting point would be the *Marriage Reform Ordinance*[60] and the *Marriage Ordinance*[61]. Under the former, marriage is specifically defined as implying "the voluntary union for life of one man with one woman to the exclusion of all others". The same point is made in the latter, in s 21(4), which provides the language to be used by the Registrar in addressing the parties to be married. Here again, reference is made to the 'union of one man and one woman to the exclusion of all others'. By specifically referring to 'one man' and 'one woman' and by reference to the phrase 'exclusion of all others', it would seem that the legislature's intention is clearly represented.

In the *Married Persons Status Ordinance*[62], we find sections entitled 'actions in tort between husband and wife' and 'questions between husband and wife as to property to be decided in a summary way'. Had the lawmakers wished to do so, it would have been easy to substitute the words 'husband and wife' with 'spouse'. Such a change would have eliminated the discrimination against homosexual couples.

More importantly, under the *Matrimonial Causes Ordinance*[63], one of the grounds for a marriage being void is where the parties are not respectively male and female. Hence, it would appear that a marriage of two individuals of the same sex would be considered void under Hong Kong Law. It is perhaps useful to note that there have been no instances of judicial disputes in Hong Kong involving couples of the same sex, nor have there been any challenges to the legislation on the grounds of unconstitutionality, as have been witnessed in some overseas

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[60] *Marriage Reform Ordinance* (Cap 178) s 4.
[61] *Marriage Ordinance* (Cap 181) s 21(4)(a).
[62] *Married Persons Status Ordinance* (Cap 182) ss 5-6.
[63] *Matrimonial Clauses Ordinance* (Cap 179) s 20(1)(d).

jurisdictions. Perhaps, it is only a matter of time before the HKSAR courts get their first experience. This is not unlikely considering the changing views of Hong Kong people, and the diminishing impact of traditional Chinese culture within the region, but until then, persons of the same sex are unable, under the current law, to have a valid and legal marriage. If following the rationale in the cases that have been decided in the United States in the past decade, the denial of marriage to anyone would constitute a breach of one's fundamental right to be married as he/she chooses, and the present state of law in Hong Kong could very well be in violation of a basic human right. To examine whether or not there has been such a breach, it is necessary to turn to the Constitution of Hong Kong to unveil whether any such constitutional requirement to marriage does indeed exist and then, whether such right is violated due to lack of protection under the current legal regime.

VI. Hong Kong's Constitutional Law and Same Sex Marriages

Since the resumption of sovereignty over Hong Kong by the People's Republic of China (PRC) in July, 1997 the main constitutional document governing the affairs of Hong Kong is the *Basic Law* of the Hong Kong Special Administrative Region (*BL*). The first most general provision is art 4 of the *BL* which safeguards all the rights and freedoms of the Hong Kong people in accordance with the law - this means the rights and freedoms of people as established at common law by legislation or a specific delineation of the rights in the *BL* itself.

It is of prime importance to look at the constitutional document of any country first since it is this document which enshrines the most important rights of the people in such a way that there is a safeguard against its removal from the law. This, in its most elementary form, is the doctrine of "Hierarchy of Laws."

Although a detailed scrutiny of the Hong Kong Special Administrative Region's legal system since the transfer of sovereignty in 1997 and its relationship with the Central Authorities of the PRC[64] is out of the scope of this essay, it is essential to flag the main issues of this debate to facilitate an understanding of whether such a change towards the legalisation same-sex marriages is possible or likely in Hong Kong, and if so, to what extent.

The highest state organ in the Hong Kong legal system is the Standing Committee of the National People's Congress (NPCSC) of the PRC. This statement in itself is most contentious and one which has spurred much discussion from academics all over the world[65]. This view, however, is premised on the elementary notion that the organ with the ultimate authority to determine what bills ultimately acquire the status of 'law' and to amend the *BL* is most likely the body which is of supreme authority in Hong Kong. Presently, this power rests with the NPC by virtue of art 159 *BL*. Such power to propose bills for amendments lies with the NPCSC, the State Council and the HKSAR. Any bill originating in the HKSAR, must be approved by two-thirds of the deputies of the Region, two-thirds of the Legislative Council of HKSAR and the Chief Executive, before it is submitted to the NPC[66].

It is essential to consider the *BL* because its effect percolates onto any future legislation being passed in the Region due to the catchall provision in the *BL* that no law shall be passed in

64 For a detailed discussion of the issue, see Ghai, *The New Constitutional Order of the Hong Kong Special Administrative Region*, 2nd Edition (HKU Press: 1999).

65 The extent of academic material published and put onto internet websites championing the cause is but one example of such heated discussion.

66 Article 159 of the *BL*.

contravention to the *BL* and should it be so, such law is void and without effect.[67] Moreover, it would be difficult to pass any laws that are not in 'harmony' with the policies for the Region as propounded by the NPC, as there is a reporting obligation on the Hong Kong legislature for every law passed. Any legislation that is returned is immediately invalidated.[68]

It appears therefore, that unless the law as it stands can be interpreted as accommodating same-sex marriages, it would be a most arduous task to attempt to effect such a change so as to preserve it in the Region's constitution as an inviolable right.

Bearing these limitations in mind, the following analysis purports to highlight the extent to which Hong Kong law can legalise same-sex marriages, if at all, followed by a brief synopsis of the likely sentiment of the NPC at the stage of endorsement.

Chapter III of the *BL* outlines all the rights and duties of Hong Kong residents. Art 37 of *BL* provides, 'the freedom of marriage of Hong Kong residents and their right to raise a family freely shall be protected by law'. Similar to most constitutions, the provisions are not gender-biased. They purport to protect residents generally. Therefore, by virtue of this provision, it is clear that unless the local legislation is more accommodating or specific, this most general provision cannot be used in support of same-sex marriages. Hence, the conclusion is that given the above analysis of Hong Kong marriage law, Hong Kong law suffers from the same bias against homosexual and lesbian marriages as do most states.

Perhaps another useful avenue would be to examine whether at an international level, albeit most indirectly, the provisions of the *International Covenant on Civil and Political Rights* (ICCPR) or the *International Covenant for Economic, Social and Cultural Rights* (ICESCR) are applicable in this context.[69]

The *ICCPR* and *ICESCR* are incorporated into the body of Hong Kong law by virtue of art 39 of the *BL,* which provides that these Covenants shall remain in force in the region and shall be implemented through the laws of the HKSAR. This provides for an interesting and very able mechanism to cater for same-sex marriages, should it become the international norm to allow or accept it under the umbrella of the general freedom to marry and raise a family. If such a freedom were read into the international covenants, HKSAR would have two options. The first would be to enact local legislation so as to give effect to this amendment in the Covenant as is

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67 Article 11 of the *BL*.

68 Article 17 of the *BL*.

69 See particularly, art 19 *ICCPR* which protects one's freedom to hold opinions without interference, art 23(2) which provides for the right of men and women of marriageable age to marry and to found a family, art 23(4) which imposes an obligation on all State Parties to take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and upon dissolution (it remains to be seen whether the term 'spouse' will be interpreted in the same way as it has been in most common law jurisdictions to mean member of the opposite sex) and art 26 which provides that all persons are equal before the law and should be equally protected against discrimination on the basis of their opinion.

The *ICESCR* also contains relevant provisions, however, most striking is art 10 which states that 'the widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment...' because this brings into question whether by virtue of the fact that same-sex couples are unable to reproduce, it would run contrary to the promotion of a 'family unit'.

required by art 39 of *BL*, although such enactment would need to be endorsed by the NPCSC.[70] The second option would be to deposit a reservation to this particular article of the Covenant in order to be exempt from the obligation to give it the force of law.

The issue which arises here is whether the PRC is obliged to follow such procedure as is stipulated under *BL* art 39 as this is purely 'a legislative provision' enacted by it and is subject to amendment at any time. Whether or not such a culture would take favour with the PRC government or be struck down on the grounds of maintenance of the values of the society or the cultural heritage and morality of the region is debatable. It is difficult to say which way the ball will roll. However, it is important to note that it is most unlikely that the PRC would make way for such a drastic change in the social system of any of its Regions and would risk international reprehension if that is what it takes to protect its people.

The final issue for consideration that remains is whether Hong Kong law, through the force of the Covenants, already provides or is bound to provide for such arrangements allowing same-sex marriages. It is contended that the most realistic argument that one can pursue rather than stretching the law is to rely on the right against non-discrimination. One significant reason why homosexual couples are fighting for marriage rights is due to the entitlements and benefits provided for married individuals by the law. However, the force of such argument has been much weakened by the American judicial interpretation in *Singer v Hara (Washington, 1974)* where a gay couple argued that denying them the right to marry violated the state's *Equal Rights Amendment*. It was held that the purpose of the statute was to overcome discriminatory practices as between men and women on account of sex. It is unfortunate that although Hong Kong now has legislation[71] against discriminatory practices, it too applies in respect of situations where discrimination is based on the grounds of sex, marital status or pregnancy[72]. It is unlikely that any of these categories can be legitimately extended to include couples or individuals discriminated on the basis of their sexual orientation.

VII. Conclusion

The debate on homosexual rights is a ripening one and is contentious to the point of causing concern to people of all nations. The above discussion, while focusing on marriage rights, offers only a simple illustration of some of the issues that have arisen and no doubt, continue to arise in this area. As we have seen, the question of whether same sex marriage ought to be legalised is a complex one, and the answer one gets depends on a combination of numerous factors. The debate has become all the more intense over the years with the increasing recognition of the concept of 'individual rights' and the hope by many such couples to attain state recognition and protection of their status in society.

The arguments on either side of the debate are finely balanced. While the most dominant arguments of the opponents are rooted in morality and religion, one could equally frame arguments on these very grounds as supporting the opposite view. How can it be said that God would disapprove of homosexual unions, for that would mean treating some of his 'children' differently from the way we treat the others? Would such treatment not make us sinners? Rather, it would appear that the question really falls to be determined in light of cultural beliefs

70 Whether the PRC is allowed to derogate from such obligation to give the effect of law to the provisions of the *ICCPR* and *ICESCR* as is provided for under Article 39 of the *BL* is discussed in the following paragraphs.

71 *Sex Discrimination Ordinance*, Cap 480 Laws of Hong Kong

72 And more specifically, it caters for discrimination in the employment context.

and social norms. For the question of 'what is moral' is itself a function of accepted social values and bears a different answer depending on where and when it is asked. Even the Bible, as we have seen, offers no determinate answer and at the end of the day, is a matter of pure interpretation.

On the other hand, there are those who rely on the argument that laws failing to recognise same sex marriages are unconstitutional. Their claim is that it is an infringement of a basic human right, particularly in those nations where the constitution makes bold and solemn vows about the principles of 'equality' and 'protection against discrimination'. What is to be made of this argument depends to some extent on the question of whether homosexuality is a consequence of some genetic attribute, in that one is *born* gay or whether it is a function of social conditioning. If it is proved that nobody is *born* a homosexual, then the force of this argument is greatly diminished.

No doubt, each country is free to choose the direction in which its law will develop. There is no shortage of justification for either course. Whilst some countries have chosen to enact legislation to eliminate the 'discrimination in relation to sexual minorities', others have taken a halfway house approach by providing a mechanism to register domestic partnerships or 'civil unions'. However, the laws of the majority of nations remain opposed to same-sex marriage; Hong Kong falls within this group. Perhaps it is not so much that the majority opposes same-sex marriage but rather, it reflects the passive attitudes of most legislatures in changing social norms and values. Given the increasing force of the debate and the vehement arguments championed in support of such marriages both academically and in real life, it is only a matter of time before the courts and the legislature are faced with the task of having to declare the 'correct stance' with certainty and finality.

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