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With a Foreword by The Honourable
Chief Justice Andrew Li

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All correspondence should be addressed to the Editorial Board, Hong Kong Student Law Review, Faculty of Law, University of Hong Kong, Pok Fu Lam, Hong Kong.

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Foreword

Message from the Chief Justice

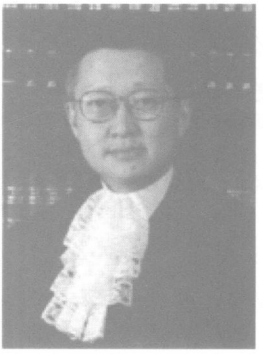
It gives me great pleasure to write this Foreword for the Hong Kong Student Law Review.

It has been nearly four years since I last wrote a Foreword for the commemorative issue of the Hong Kong Student Law Review in 1997. That year marked our reunification with the Motherland with the establishment of the Hong Kong Special Administrative Region of the People's Republic of China.

With Reunification, we have for the first time our own final appellate court, the Court of Final Appeal. The past few years have been a momentous period for the development of constitutional jurisprudence in the new order. A few judgments have understandably attracted worldwide attention. But apart from them, the Court of Final Appeal has delivered a number of judgments in various areas which would be of great interest to judges and academics in the common law world. There is widespread interest among local and overseas jurists in the work of the Court of Final Appeal and the challenges it faces under the concept of "one country, two systems".

During the same period, successive Editorial Boards of the Hong Kong Student Law Review have continued to put in tremendous efforts in maintaining and improving this student law journal. The current issue of the journal is another success. The hard work and the achievements of all the students involved are to be congratulated.

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



THE HONOURABLE MR JUSTICE ANDREW LI
Chief Justice
May 2001

Message from the Dean

In a modern university like HKU, there are many professional disciplines, such as medicine, dentistry, engineering, architecture and law. Is the main purpose of university education to train professionals for different occupations in a modern society? It is true that modern society needs many specialists and experts in various fields. But is university education nothing more than vocational training, that is, equipping students with the specialised technical know-how and skills they need for the purpose of finding a job when they graduate?

There is a great tradition of thought about university education which holds that to confine university education to vocational training would be too narrow a view, and would defeat the higher ideals of university education. In one of the most famous books about university education called *The Idea of the University* first published in 1852, John Henry Newman pointed out that a university must provide a kind of liberal education to its students. Liberal education is about the training of the mind, and the cultivation of a habit of mind that appreciates values such as liberty, justice, and wisdom. Martin Buber, one of the greatest thinkers of the 20th century, wrote that an education that really deserves to be called education must focus on education of character. This in fact converges with the traditional Chinese Confucian view that the essence of education must be cultivation of virtues and goodness in the human being, as expressed in the saying in the *Great Learning (Da xue)*, one of the Confucian classics: "What the Great Learning teaches, is -- to illustrate illustrious virtue; to renovate the people; and to rest in the highest excellence." The Confucian approach to education also stresses the importance of developing the potential for good in each person to the full, so that the journey of life will be a continuous process in which the human character unfolds, develops, grows and matures, constantly enriching itself, ceaselessly improving itself, and ultimately fulfilling itself and transcending itself in the discharge of the sacred responsibilities that are inseparable from the gift and miracle of life.

So training of the mind and cultivation of character should be two of the most important goals of university education. Several other aspects are, I think, encapsulated in the following words of Alfred Whitehead, one of the greatest mathematicians of the 20th century. He said that the university exists for the purpose of bringing together younger and older generations in the enterprise of creative learning, so as to achieve a synthesis of knowledge and the passion of life. Contained in this short statement are several important insights about the nature of the university. First, the university is about creative learning. This concept embraces the two basic activities of the university, which are teaching and research. Research is the discovery or creation of new knowledge and understanding about truth, goodness and beauty, which are the highest values in the world; and teaching is the transmission of knowledge, understanding and wisdom about such truth, goodness and beauty from generation to generation. Secondly, Whitehead's statement reminds us that the university is where younger and older generations are assembled together, for the purpose of learning, or the transmission of valuable knowledge from generation to generation. So learning is a joint enterprise for both teachers and students; each side has something to learn from, and benefits from its company with, the other side. Thirdly, Whitehead points out that knowledge needs to be combined with the passion of life. We are here in the university to learn, to learn the truth about many things in the world. We are involved in a quest for truth. This is what the university is about. But the quest for truth is only meaningful and worthwhile for us if we have a passion for the truth. Without the passion for knowledge, the passion for understanding what the world is and who we are, the civilisation of humankind would not have established the institution which we today call the university.

So let us treasure this wonderful opportunity of being a member of the university, this community in search of truth, this assembly of people gathered together to engage in the training of the mind, the cultivation of character, and the transmission of the most valuable cultural and intellectual creations of human civilisation from generation to generation. In particular, let us remember that university education should not be confined to vocational training, or learning enough to find a good job. There must be something higher, something beyond. We can call it ideals. We can call it dreams. We can call it the mission and purpose of life.

University is the best place for young people to develop their vision and values in life. They do this not only by studying, but by participating in extra-curricular student activities. Editing and organizing the publication of a law journal is one of these activities which students in our law school engage in. The dream of having such a law journal was first realised in 1994, when the first volume of the *Hong Kong Student Law Review* appeared. The noble dream and ideal of the founders of the journal have been faithfully kept alive by subsequent generations of law students. It is my honour and pleasure here to offer my warmest congratulations to all students -- editors, authors, managers and other helpers -- who dedicated their hearts and minds to this labour of love, this project of the publication of the sixth volume of the *Hong Kong Student Law Review*.

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

13 June 2001

Preface

The year 2001 was a year with relative calmness and prosperity. Yet, this does not mean that the law ceases to come into play in the midst of our being. Though many often see the function of the law and our judicial system solely as a last resort for conflicts resolution, the law touches us on more than one level. Law is the primary framework for an orderly society and the basis of our civilized existence of mutual respect. For law students, this should be the source of momentum and incentive in the pursuit of our career.

In this edition, this resounding sentiment is reflected in the articles submitted to us by the students of the faculty: with articles on legal matters commonplace to our everyday life such as direct mail and Hong Kong's housing policies. On a more serious and "legal" note, two articles explore the role of the law in the regulation of prostitution and the presently rampant trade in pirated VCDs.

Theoretical discussions of the more abstract side of the law are also present in this edition with articles on *Public Ordre*, a critique of the ADR boom and the problem of witness coaching in our legal system.

We are most honoured to have our Chief Justice, Mr. Andrew Li, to provide the Foreword to this edition of the Review. We would like to take this opportunity to express our deepest gratitude for his kind words and encouragement, and to wish him continued success in instilling amongst the public the authority and fairness of the law through his influential role in our judicial system.

Our most heart-felt appreciation goes to the Faculty for their guidance and assistance to the Board throughout this year. A special note of thanks goes to the Friends of the Faculty for their unfailing support, without which we would not have come this far.

We hope you will enjoy this latest edition.

Melissa Chim
Janice Leung
Editors-in-Chief

April 2001

PRIVATE VICE, PUBLIC VIRTUES?

THE ROLE OF LAW IN REGULATING PROSTITUTION

LILY MA MING-FONG

I. Introduction

Prostitution is a perplexing and controversial subject. Even the nature of prostitution is difficult to define – is it a sexual relationship or a work contract, private act or public commerce? Prostitution will always lead to controversy in liberal democratic societies: it invades the scope of intimate sexual relations, yet morally beckons for regulation. Ultimately, a society's response to prostitution reveals how it protects minority rights and upholds majority interests.

Much of the current focus of international law and activism has been directed towards protecting those who are perceived to be real "victims", such as victims of trafficking, child "prostitution" and "forced prostitution". Trafficking and forced prostitution are addressed by numerous organizations as well as the United Nations who have been actively pursuing legal and social reforms to eliminate sexual exploitation.[1]

Yet, these human rights instruments have failed to acknowledge an equally important aspect: the population of those who voluntarily enter the profession. In response, this essay focuses on the forgotten and neglected women toiling in the sex industry – women who are not physically or otherwise coerced by someone into selling sexual services.

This article reveals how essentially contested prostitution policy has been over the last century and a half in Hong Kong, especially the failure of the government to regulate the trade in the early era of legalization and the present policy aimed at its suppression. Prostitution policies have come under attack from all the diverse actors – prostitutes, customers, police and lawmakers. All agree that the system does not work: it has little effect on sex commerce, it makes a mockery of the legal process, and it is a drain on public resources. But perhaps, by tracing the long history of this contested domain and looking at the factors behind the problem, the debate can be revived to evaluate this tide of cynicism to allow room for decriminalization with regulation. This entails the recognition of prostitution as a legitimate business, with minimal government intervention.

This article is divided into seven parts. Part I is the "Introduction". Part II, "The Prostitute", discusses who a prostitute is for the purposes of this paper and outlines different forms of prostitution in Hong Kong. Part III, "Policing the City", traces the evolution of prostitution policy and reform agendas of Hong Kong from the last century and a half to the present. The enforcement (or the lack of it) of these laws is also discussed. Part IV of the article, "Alternatives to Prohibition", investigates theoretical alternatives to the present system, and argues for general decriminalization with regulation only when special social circumstances require. Part V, "The Social Aspects and the Social Aspects Questioned", lists out factors that concern society as a whole and challenges whether each of them sufficiently justifies regulation. Part VI, "Paths That Others Have Taken", examines how other countries have responded to the

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1 Trafficking issues are being addressed most notably by The Global Alliance Against Trafficking in Women, The Coalition Against Trafficking in Women and UNESCO. The problem of children in the sex industry is being attacked by End Child Prostitution in Asia Tourism ("ECPAT") (Thailand), the Human Rights Commission and UNICEF.

prostitution problem and discusses how parts of them can be concretely adopted in Hong Kong. Last of all, Part VII is the "Conclusion".

II. The Prostitute

A. The Prostitute

There has been some controversy as to what sort of activities are properly described within the term "prostitution".[2] Traditional definition describes "prostitutes" as "persons whose livelihood is dependent, in whole or in part, on the sale of sexual services, most of which are indiscriminate and generally involve no emotional involvement."[3] The above definition needs clarification.

First of all, the "sale" of sexual services connotes a voluntary, non-coercive transaction between two willing adults.[4] Therefore, a distinction must be made between voluntary sex workers with commercialized rape victims, namely children, trafficking victims and women forced to sexually "service" invading armies. "Child prostitute" is an especially misleading term as it wrongly implies social acceptance of a child's "consent" to being a prostitute and does not reveal the violence and adult coercion underlying the child's consent. "Military prostitutes" suffers from the same inaccuracy as the women and girls forced to "service" soldiers are, in fact, rape victims; they did not consent and they are not paid for. The modifier "commercialized" merely identifies the existence of a network of third parties who profit from the rape of the victims.

To include these commercialized rape victims within the term "prostitution" is misleading. Such a broad definition would only collapse all women in the sex industry into one monolithic category without regard for the diversity of their circumstances. Indeed, the focus of domestic and international law and activism has been on protecting "prostitutes" when they are in fact commercialized rape victims. This has resulted in a blind spot in current laws regarding other non-coerced sex workers, hence, this article will address these concerns.

Having defined who a prostitute is for the purposes of this article, it is now worth discussing some of the characteristics of a prostitute. One salient feature of prostitution is the stark absence of emotional involvement between the parties. The parties clearly initially only intend to engage in a temporary relationship, although it may not be unusual for a prostitute or a client to mutually form an emotional bonding subsequently.[5] The second characteristic of prostitution is that the relationship between the prostitute and the client is premised exclusively on sex; prostitutes are identified by their patrons primarily for their willingness to provide sexual favours.[6] Third, sex workers can have frequent sexual contacts with a substantial number of clients. One Hong Kong study reported numbers vaguely from more than a dozen a day to only about six or seven per week.[7] Finally, although other items of value are occasionally exchanged,

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2 See Benjamin, H and Masters, R E L, *Prostitution and Morality* (New York: The Julian Press, Inc, 1964), pp 21-23 for an excellent discussion of this difficulty.

3 Decker, J F, *Prostitution: Regulation and Control* (Colorado: Fred B, Rothman & Co, 1979), p 5.

4 McCary, J, *Human Sexuality* (Princeton, New Jersey: D Van Nostrand Co Inc, 1967), p 306.

5 *Ibid.*

6 *Supra* note 3, p 7.

7 Tang, A and Lam, M P, "Teenage Prostitution in Hong Kong: A survey and Review of Fifty Cases", Unpublished paper (1986) (Centre for Hong Kong Studies, Chinese University of Hong Kong, 1986).

cash is usually given as consideration for the services rendered.[8]

Certainly there are many who fall within borderline cases, but they will not be referred to as prostitutes for the purposes of this article. For example, a mistress who gains her entire financial support from her lover would not be classified as a prostitute since she does not indiscriminately accept everyone who comes.

B. Forms of Prostitution

Prostitution is practiced in many different forms in Hong Kong. These include "one woman brothels", massage parlours, private apartments, recreational centers, music centers, nightclubs, hotels, dance halls, escort services and other legitimate fronts used to disguise prostitution-related activities.[9]

As a rough estimate, there are around 16,000 women working as prostitutes (as defined by this article) in the region.[10] Yet, further estimates regarding the trend of prostitution are difficult to make because the prostitute population fluctuates drastically, due to periodic increases and decreases of amateur prostitutes as opposed to professional prostitutes who stay for longer periods of time.[11]

Professional prostitutes derive the majority of their income by providing sexual gratification for consideration, [12] while amateur prostitutes occasionally periodically "turn a trick" to supplement their incomes.[13] Amateur prostitutes include students, secretaries, and others who resort to prostitution from time to time.

Next to prostitutes, pimps and managers of vice-establishments and other supporting personnel to the prostitute are probably the most visible in the industry. Many entrepreneurs of the vice establishments are triad members who employ pimps and madams to manage and administer the business, but they themselves are seldom involved in the business' daily running.[14]

III. Policing the City

In order to adequately understand and evaluate any type of prostitution control, it is useful to trace its historical evolution. By investigating the development of traditional prostitution in the last century and a half, one can more effectively understand and evaluate current methods of control.

Broadly speaking, there have been two very different types of regulation depending on the time period the policies were implemented. During the "Legalization Era" between 1857 and 1945,

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8 Garb, S, "Sex for Money Is Sex for Money" (1995) *Law & Ineq J*, 281, 291.

9 Zi Teng (A Sex Workers Concern Organization), "Research Report on Mainland Chinese Sex Workers" Unpublished paper (2000) describes in detail the practical differences between each of these establishments.

10 Cook, B, "2,000 Housewives in Sex Industry", *South China Morning Post*, 3 May 1993, at 2. For the sake of completeness, there are around 4,000 children working as commercialized rape victims in the sex industry.

11 *Ibid.*

12 *Supra* note 3, at 6.

13 *Ibid.*

14 Vagg, J, "Vice" in Trevor, Harold and Jon Vagg (eds), *Crime and Justice in Hong Kong* (London: Oxford University Press, 1991), p 60.

governmental policies were preoccupied with the legalization of the sex industry. Prostitution *per se* was allowed to exist subject to various regulatory schemes such as licensing of brothels and mandatory medical checks of sex workers. However, since the 1950s, prostitution policy has changed and laws regulating the trade have gradually become re-orientated to eliminate sex work altogether. Unfortunately, the history of regulation bears witness to the failures of these two types of control over the sex industry.

This part is further divided into two components. The first deals with prostitution controls from 1857 to around 1945 while the second part focuses on the modern attempts, in tackling this issue.

A. The Legalization Era (1857-1945)

Prostitution in Hong Kong has had a long history,[15] but it was with the establishment of the colony in 1842 that prostitution began to develop into different forms in Hong Kong. Shortly following the two periods of the Opium Wars[16] and the Taiping Rebellion,[17] there was a large surge of Chinese men in the population who fled to the colony to find work leaving their families behind in Canton. European men also made up a significant part of the colonial population, and they were supplemented by the army garrison, the Royal Navy and the crewmembers of merchant ships that frequented the colony regularly.[18] This resulted in the male population largely outnumbering the female. In 1872 when the first census was carried out, there were 3,264 European men compared to 669 European women, a ratio of practically 5 to 1, and Chinese men outnumbered Chinese women by 78,484 to 22,837, a Ratio of 7 to 2.[19] This imbalance continued, although it diminished to a certain degree over the next 70 years.[20] There was always a demand for prostitutes because of Hong Kong's peculiar situation, and numerous brothels were established. By the 1850s, however, the colony was notorious for the prevalence of venereal disease.[21]

Thus, as early as 1857 the colonial government saw fit to take its own action to regulate the trade through the *Contagious Diseases Ordinance*. A system of registration and inspection of brothels was enacted,[22] largely based upon the *Contagious Diseases Act* in Britain. Minor changes or replacements were made subsequent to this 1857 ordinance, but regulation of this

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15 The first historical reference to prostitution dates back before Hong Kong was ceded to Britain; however, no literature describing them in detail was recorded. There are however some accounts of the controls of prostitution in China which dates back to 650 BC which resembles with modern practices in other societies. For example, the then Emperor of China, Kwan Chung, set apart certain districts of each big city and town where brothels might be legally established and where the prostitutes were free to practice their profession. Another example is that during the reign of the Emperor Han Wu, under the T'ang Dynasty (AD 618-907), brothels in China were licensed and rates were standardized. See Whitehead, K, *After Suzie: Sex in South China* (Hong Kong: Chameleon in association with Corporate Communications Ltd, 1997), p 12.

16 The Opium Wars occurred during 1839-1842.

17 Taiping Rebellion in Southern China occurred in the 1850s.

18 O'Callaghan, S, *The Yellow Slave Trade: a survey of the traffic in women and children in the East* (London: Anthony Blond Ltd, 1968), pp 21-23.

19 Hong Kong Government Gazette, 15 February 1873, p 55.

20 For example in 1931, Chinese men outnumbered Chinese women by 4 to 3 while the European ratio remained at a high of 7 to 2. Source Hong Kong Legislative Council, Sessional Papers 1931, 102, 111. See also Whitehead, K, *supra* note 15, p 23.

21 Miners, N, *Hong Kong under Imperial Rule, 1912-1941* (Hong Kong: Oxford University Press, 1987), p 194.

22 Hoe, S, "Queen's Women: Western Prostitutes in Hong Kong 1841-1931", paper presented to the 12th IAHA Conference, Hong Kong 1991, p 5.

type largely continued until 1889. Prostitution was a legally recognized profession, with licensing and regulations under the direct control of the Registrar General in Hong Kong and the Secretary of State in London's Colonial Office.[23]

The government's justification for this scheme was the belief that regulation would protect the rights of the prostitute and prevent abuses by providing women with a safe, regulated space in which to work.[24] These regulations confined brothels to certain designated localities with separate districts for European and Chinese patrons, and penalties were imposed for unlicensed brothels and those that operated outside designated areas.[25] Brothel keepers were constantly required to supply the Registrar General with an up-to-date list of their prostitutes and to display such a list outside their brothels.[26] Brothels were subject to inspection by the police and medical authorities at any time and any suspected prostitute on the streets were arrested.[27]

This system of licensing and regular inspection of brothels was greatly endorsed by the Secretary of State for another reason: it meant better protection of prostitutes against their possible enslavement.[28] All the new prostitutes were brought by their brothel keepers before the Registrar General and were questioned to ensure that they were entering the profession of their own free will, and were not kidnapped or forced into servitude.[29]

Regulation also provided for a system of compulsory medical examination and punishment for communicating venereal disease.[30] All prostitutes were required to attend weekly examinations at the Lock Hospital, and were then issued with a certificate of good health. Those who failed the test were detained in the hospital until cured.[31] A tax collected from the brothels was used to run and provide the expenses of the hospital.[32]

Although the whole system applied equally under the law, in practice, the law requiring mandatory medical examination was only applied rigidly to a minority of prostitutes serving the European soldiers and sailors.[33] The law was applied with a considerable degree of laxity *vis-à-vis* the majority of prostitutes who served the local population.

The authorities therefore simply concentrated on ensuring that customers remained in their own designated areas, thereby minimizing the chances of Europeans having contact with prostitutes who had not been medically checked.[34] Some suggested that the control system largely achieved its main goal, which was not the protection of women from exploitation but the protection of the military, or, as it was commonly expressed in Hong Kong, "the provision of

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23 The Secretary of State in London's Colonial Office played an important role in indirectly controlling the situation by means of guidelines, or directives to the Registrar General.

24 *Supra* note 7, p 8.

25 *Supra* note 21, p 193.

26 *Supra* note 22, p 7.

27 *Supra* note 21, p 194.

28 Yim, Y Y, "Enlightenment of Prostitutes' Rights Movement in Hong Kong", presented to the World Action Forum for Sex Work Rights Forum, Taipei, 1998, p 234.

29 *Ibid.*

30 *Correspondence Relating to the Working of the Contagious Diseases Ordinance of the Colony of Hong Kong*, C, 3093, 21.

31 *Ibid*, p 22.

32 *Supra* note 22, p 8.

33 *Ibid*, p 4.

34 *Supra* note 28, p 236.

clean Chinese women for the use of the British soldiers and the sailors of the Royal Navy".[35]

However, during the 1870s and 1880s, the British system came under attack by various moral reformers such as Josephine Butler who considered the licensing system discriminatory towards women, since they were compelled to take the degrading medical examinations, analogous in the prostitutes' view, to "symbolic rape".[36] Although the campaign was initiated in England, this was certainly accurate of what prostitutes in Hong Kong felt. Indeed, a main reason why mandatory inspections failed in Hong Kong was because a majority of prostitutes saw such requirements as intrusive and was unwilling to submit to such measures.

As a result of a long campaign the British system was brought to an end, and the act was repealed by Parliament in 1886.[37] Although it had no direct effect in Hong Kong, the Secretary of State pressured the local government to follow the British example. The Governor of Hong Kong opposed vigorously, since it was believed that legislation was the only means to control the spread of venereal disease, to prevent the proliferation of brothels in respectable areas of the city, and of preventing the exploitation of women.[38]

In 1890, the *Contagious Diseases Ordinance* was forcibly repealed by the Secretary of State due to the pressures in England.[39] Instead, a new *Women and Girl's Protection Bill*[40] was reluctantly passed by the Legislative Council in Hong Kong. The Secretary of State in England was convinced that laws imposing the compulsory inspection of women should be repealed, but he was however prepared to allow the licensing scheme to continue for the sole purpose of preventing the possible enslavement of women.

Yet in practice, although it was no longer legally obligatory, official pressure ensured that prostitutes continued to report weekly for medical examinations, and that they continued to keep to their respective localities as before.[41] Furthermore, although mandatory inspections were legally repealed, heavy penalties remained on brothel keepers who allowed members of other communities to patronize their establishments.[42]

This state of affairs came to the attention of England's reform moralists. They had successfully abolished the system altogether there and were determined that Hong Kong did the same. Parliament soon ceded to this pressure and in 1893, the Secretary of State, Lord Ripon, sent instructions to Hong Kong that the whole system was to be abolished forthwith.[43]

The effects of abolition were soon clear. Brothels migrated in new areas originally not open to them and the incidence of venereal disease soared as a result of the cessation of medical examinations. In 1897 half of the European soldiers in Hong Kong were under treatment for

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35 Quoted by Governor Sir J Pope Hennessy in a dispatch to the Earl of Kinberley, dated 13th November 1880. See *supra* note 30, p 46.

36 Bullough, V & Bullough, B, *Women and Prostitution: A Social History* (New York: Crown Publishers, 1987), p 375.

37 Williamson, J & Josephine B, *The Forgotten Saint* (Leighton Buzzard: Faith Press, 1977), p 372.

38 *Supra* note 22, p 193.

39 *Ibid.*

40 *Ibid.*

41 Further Correspondence relating to measures adopted for checking the spread of venereal disease: presented to both houses of Parliament by command of His Majesty, April 1906, 122.

42 *Supra* note 21, p 194.

43 Bristow, E J, *Vice and Vigilance: Purity Movements in Britian since 1700* (Dublin: Gill and Macmillan 1977), p 239.

venereal diseases compared to 15 percent ten years before.[44] In retrospect, there were many possible reasons for the outbreak of disease among European soldiers, such as the sudden arrival of soldiers originally stationed in India, although the local government uncritically blamed deregulation as the sole cause.[45]

Faced with the pressing circumstances, the local Governor resorted to drastic measures and requested the Colonial Office that it gave the government complete autonomy to deal with the question. This request was unofficially approved, and the subject unofficially became a matter solely for the colonial government. For the next 20 years, the issues of brothels and prostitutes ceased to be subject of communication between Hong Kong and London, and the Colonial Office made no detailed attempts to inquire about the local agenda on the issue.[46] Meanwhile, the local government seized its chance and reintroduced an extra-legal system of licensing and examination that was identical to the one abolished in 1893.

However, although the crisis among European soldiers had subsided by then, the system continued to be much less effective in controlling the spread of venereal disease in the Chinese population. On the basis of examinations of patients admitted to hospitals for other complaints, it was estimated that at least 27 per cent of the Chinese male population were infected with syphilis, and it was possible that the numbers were as high as 40 per cent.[47] The Hong Kong authorities however took no active steps to improve that situation, and the system generally continued without interference from Britain until the end of the First World War.

Control of prostitution was put into the spotlight once again after an inquiry visit into traffic in women and children in Hong Kong by a commission from the National Council for Combating Venereal Disease which had been sent to report on conditions in the Far Eastern colonies. The commissioners, Mrs Neville-Rolfe and Dr Hallam explored the region of the League of Nations in 1931.[48] Although the commission officially condoned prostitution, the commission's report generated significant commotion in England and the Hong Kong government was once again prodded to phase out brothels altogether.[49] The British Government was forced to abolish the unofficial autonomy on the subject of prostitution and re-announced its aim to bring about the suppression of all brothels in Hong Kong. In 1931, shortly after a similar report from the League of Nations[50] was delivered, European brothels for European clients were closed in December 1931, and Chinese brothels for Chinese clients in June 1934.[51] The brothel keepers and prostitutes either moved to adjacent cities like Guangzhou and Macau to continue their business or, if they remained in Hong Kong, went underground often disguising themselves in ways so as to look like various legitimate businesses. The government regretted the ending of the system but, at the same time, recognized that the restoration of the old system was not possible.

A brief period of reinstatement of the old laws occurred with the Japanese invasion during the Second World War. However, these laws were in turn abolished with the defeat of the Japanese

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44 *Supra* note 18, pp 30-33.

45 Luo, L M, *Tang xi hua yue hen*, (Hong Kong: Ming Pao Publishing:1994), p 64.

46 *Supra* note 21, p 195.

47 Macfarlane, H & Aubrey, G E W "Venereal Diseases Among the Natives of Hong Kong", *The Cadauceus, Journal of the Hong Kong University Medical Society,* Vol 1, April 1922, pp 22-27.

48 *Supra* note 7, p 13.

49 *Supra* note 43, p 258.

50 *Ibid.*

51 *Supra* note 7, p 19.

in 1945.[52]

With the benefit of hindsight, what is responsible for the deplorable failure of prostitution policy in this era of legalization? Although the local government treated the sex industry as a business, there were stringent regulations *vis-à-vis* the trade; a licensing system existed, brothels were taxed and red-light zones were created. Yet, these regulations failed to realize the two main objectives of prostitution policy, namely, the prevention of the enslavement of women and the control of the spread of venereal disease.

Regarding the first goal, few, if any at all, tried to seek help from officials to "escape" from their profession.[53] Prostitution was the only occupation in which women could earn, on average, more than men could. Furthermore, prostitution provided the economic stability that few other jobs could. This was particularly attractive for sex workers who had entered the industry with little educational background and who did not possess other useful skills.[54]

Yet, despite their willingness to remain in the trade, prostitutes still suffered because the laws that were intended to protect them from exploitation in reality failed to protect their rights. Since prostitutes could not work independently outside licensed brothels, the primary beneficiaries of the policy were brothel owners.[55] Legislation conferred a safe place of operation for brothel owners. By making the licensed brothel a *sine qua non* of prostitutes, brothel owners were guaranteed a steady flow of women. Since places in licensed brothels were few, two classes of prostitutes emerged: those working legally within the regulatory system and those working outside the system.[56] Those inside legitimate brothels were vulnerable to threats of being thrown onto the streets due to the disparity of their bargaining position; those on the streets were vulnerable to exploitation from pimps and the police due to the disparity in their strength and resources.[57] In reality, the zones became a place outside the law. While outside the zones, women continued to be abused and exploited against their will.

With regard to the second aim, prostitution policy tried to control venereal disease through a variety of measures such as mandatory examinations of the prostitutes and partitioning the prostitutes based on the race of their patrons.[58] As stated earlier, these measures were only enforced rigidly with the minority of prostitutes used by the Europeans, and applied with deplorable laxity with the majority used by the local population.

Yet, even the regulation of prostitutes serving Europeans was constrained by medical limitations. There was no guarantee, even if the prostitute had subjected herself to the rigorous weekly physical examinations, that she would be free from diseases.[59] Weekly examinations were severely constrained because there was a real possibility that a prostitute could still spread, to subsequent patrons during the week, the disease she had contracted with earlier infected clients. Furthermore, as medical science was not that developed, examination techniques were

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52 *Supra* note 22, pp 24, 32.

53 *Supra* note 28, p 239.

54 Cheney, B M, "Prostitution – A Feminist Jurisprudential Perspective" (1988) 18 *VUWLR* 241.

55 *Supra* note 28, at pp 255-257.

56 Jirdane, A, "Sex Workers in Asia and Abuses in Human Rights Law" Unpublished paper (1996).

57 Interview with Elaine Lam, social worker, Zi Teng - A concerned group for sex workers (21 March 2000).

58 Lau, chi-ping, *Prostitution and Venereal Disease*, (Hong Kong: Ming Pao Publishing, 1990), pp 84-103.

59 During a telephone interview conducted with Dr Michal Sai-Wing Leung, on 6 April 2000, a point was made that it remains true today that there is no means to ensure that a prostitute is free of venereal disease because a sex worker could very well contract STDs with her next partner.

largely cursory and largely constrained by the cost and availability of medical facilities.[60] In a sense, mandatory examination requirements contributed to a false sense of security amongst frequenters of brothels believing that they would be safe from infection. Thus, the system as a whole in reality failed to protect any of the parties the law sought to protect.

B. The Era of Suppression (1950-2000)

After the Second World War, prostitution started to appear in different forms, and has largely remained under the guise of legal fronts such as dancing academies or massage parlours. Such practices still continue today to a significant extent. In the realm of legal agenda, although Hong Kong's relationship with Britain made it politically unfeasible to adopt any regulatory system similar to the old, other types of regulation have since been implemented instead to control the prostitution industry.

The general approach taken in the present laws is largely influenced by *The Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others* (hereinafter referred to as the "*Trafficking Convention*"). Although Hong Kong is not a signatory to this convention, the convention operates as a standard to which local legislation has striven to conform, due to Hong Kong's unique history and its close relationship to England.

The *Trafficking Convention* is the product of the campaign that was started in 1888 by Josephine Butler mentioned above, who was determined to close down all brothels and to stop trafficking in women and girls.[61] It calls for the repeal of laws regulating prostitutes and for prosecution of everyone, except sellers and buyers working in the sex industry.[62] By deregulating the industry and decriminalizing prostitutes, the campaigners originally hoped to remove the power the laws had given to the police and brothel owners to exploit and abuse women who were forced to submit due to their disparity of power. Care was taken to make prostitution *per se* legitimate because the campaigners refused to criminalize women in the sex industry whom they considered to be victims of exploitation, even prostitutes.[63] Consequently, the *Trafficking Convention* does not distinguish between sex workers and commercialized rape victims.

Faithfully following the *Trafficking Convention*, local drafters in Hong Kong created the current laws. The resulting legislation is a *de facto* prohibition of prostitution: all associative acts other than the act of prostitution are not allowed. The drafters clearly intended to deprive sex workers of the ability to work because, if the law were implemented perfectly, it would be impossible for prostitution to exist. In other words, by criminalizing supporting industries such as the pimp or manager of the vice or by regulating the manner in which prostitutes can work, the law unduly imposes unfair burdens on the trade. Yet, this is exactly the result intended by the campaigners of the *Trafficking Convention* who saw it as the tool in furtherance of the total elimination of sex work altogether.[64] The underlying premise of the *Trafficking Convention* is that, if every participation involved in the operation of the sex industry is criminalized, the

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60 Balos, B & Fellows, M, "A Matter of Prostitution: Becoming Respectable" (1999) 74 *NYUL Rev* 1220, p 1281.

61 *Supra* note 37, pp 5,72.

62 *Convention for the Suppression of the Traffic of Persons and of the Exploitation of the Prostitution of Others* ("*Trafficking Convention*") art 1, 2 and 6, GA Res, 317 (IV) of 2 December 1949, UN Doc A/1251, at 33-35 (1949). For details, see Reanda, L "Prostitution as a Human Rights Question: Problems and Prospects of United Nations Action", 13 *Human Rights Quarterly* 202 (1991).

63 *Supra* note 43, p 356.

64 Sion, A, *Prostitution and the Law* (London: Faber, 1977), p 51.

industry will collapse and women will voluntarily give up sex work altogether as a result of the all-encompassing vice of the law. [65]

The paragraphs below are devoted to reflect some inconsistencies in the current legislation and how the interests of different parties in the commercial sex industry have been adversely affected as a result.

1. Soliciting for an Immoral Purpose

Section 147(1) of the *Crimes Ordinance* clearly states that any person who in a public place solicits for any immoral purpose, or loiters for the purpose of soliciting for any immoral purpose shall be guilty of an offence liable on conviction to a fine of $10,000 and 6 months of imprisonment.[66] In 1995 alone, 240 sex workers were found guilty of this offence, most of them being self-employed sex workers who offered prostitute services to undercover police agents.[67]

The rationale for this law is by no means clear. First, prostitution *per se* is not an offence yet, it is an offence to offer one's body for the purpose of prostitution. In theory, the two provisions are contradicting, since without a requisite offer and acceptance, there can be no act of prostitution. In order to avoid the offence, the prostitute must solicit in a private place. However, it is questionable whether sex workers are able to find their customers by passively staying indoors all the time.[68]

Furthermore, such a law is objectionable because it clearly amounts to a violation of human rights. Since prostitution is not illegal, it is ironic that the incitement of another to a lawful act should be punished. Soliciting should itself be considered a criminal act where the act is only considered a crime itself. In this light, a distinction premised on sex is prejudicial because it is *prima facie* no different from other types of advertising such as handing out pamphlets and other active promotional tactics.[69] This will be further discussed later in "The Social Aspects and the Social Aspects Questioned".

The enforcement of this provision is also problematic. Although, in theory, a customer who solicits a prostitute is just as culpable as the prostitute for soliciting, in practice, the prostitute is the sole party caught by the offence.[70] There is not a single case where the customer has been prosecuted for offering, hence suggesting that the official attitude to prostitution has tended to blame women who supply the service rather than the men who create the demand. The clients, on the other hand, are seen as normal men with a healthy sex drive.[71] Sometimes, the police encourage patrons picked up in brothel raids to testify that women solicited them. This tactic usually fails, however, as the men have no interest in sending sex workers to prison. Some critics and feminists object to the discriminatory enforcement of solicitation law, arguing that

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65 *Ibid.*

66 *Crimes Ordinance* (Cap 200), s 147(1).

67 Zi Teng- A Sex Workers Concern Organization, *supra* note 9, at 14 showed a table of statistics on two kinds of "Prostitution" under "Number of Prosecutions for Miscellaneous Offences and Minor Narcotics Offences" from 1986 to 1995. Source supplied by the Hong Kong Police Force.

68 *Supra* note 57.

69 *Supra* note 3, pp 422-429.

70 *Supra* note 57.

71 Ellis, A, *Sex and Single Man* (New York: Lyle Stuart, Inc, 1961), pp 5-36.

customers should also be arrested.[72] However, the problem is not unequal application of the laws but the presence of the laws themselves. In fact, prostitutes do not want men arrested for solicitation because it would drive away their only source of income.

2. Living on the Earnings of Prostitution of Others

Not only are prostitutes the targets of unfair legislation, supporting personnel to the industry are similarly affected. Section 137 of the *Crimes Ordinance* stipulates that any person who knowingly lives, wholly or in part, on the earnings of the prostitution of another commits an indictable offence and is liable on conviction to five years' imprisonment.[73] Unless he or she can prove to the contrary, the requisite knowledge is presumed if a person lives with, or is habitually in the company of a prostitute, or exercises control, direction, or influence over the prostitute's actions.[74] The words "control, direction or influence" do not imply compulsion, persuasion or sanction.[75] Therefore, it is unnecessary to establish any element of force or coercion in the relationship in order to secure a conviction. "Influence" is merely given its ordinary meaning and all that is necessary is that the influence had an effect on the person influenced.[76]

An illustration of the implementation of the above provision is provided in *R v Fong Yuk-choi*.[77] Although it was accepted by Silke J that the two sex workers were well looked after by their boyfriend (pimp) and were willing participants in the trade, criminal liability was nonetheless imposed on the boyfriend under s 137. The judge justified his decision on the basis that such heavy handed measures were necessary, since prostitution was morally condemned in society and there was a danger that undesirable repercussions would arise if not dealt with sternly.

It is unfortunate that the law unrealistically views all supporting personnel in such a pejorative light, reducing them to nothing more than evil people who make money through exploitation. The perspective of the criminal law on prostitution in this respect is condemned because it unreasonably imposes a liability on persons merely because of their occupation as "pimps" or "madams" without making a distinction between those who exploit prostitutes and those who do not. Streetwalkers with the higher-than-average arrest experiences often associate with pimps or madams for all kind of reasons, and such relationships often turn out to be valuable to them both financially and emotionally.[78] Often, pimps and madams provide the prostitute with necessary protection, marketing and emotional companionship that they cannot obtain from the shallow encounters with patrons.[79] However, by prohibiting prostitutes from sharing their earnings with these supporting personnel, the law legally isolates the prostitute, effectively making such relationships impossible.

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72 In this respect the Sixteenth Report of the English Criminal Law Revision Committee and the Wolfenden Report of the Committee on Homosexual Offences and Prostitution 247 (1957) have contributed to some recommendations. Both reports recommended that a new offence should be created of "soliciting another person for the purpose of prostitution or loitering for the purpose or with the intention of so loitering or being so solicited." In this sense, the law can cover solicitation by a prostitute, a "tout" or a client.

73 *Crimes Ordinance*, s 137(1).

74 *Crimes Ordinance*, s 137(2).

75 *A-G's Reference (No 2 of 1995)* [1997] 1 Cr App Rep 72. See also *R v Ip Ping Kan* [1987] 3 HKC 569 at 571-572.

76 *Ibid.*

77 *R v Fong Yuk-choi* [1983] 1 HKC 208.

78 Ah Chang (a streetwalker), "Ah Chang's Story" issue no 9, Zi Teng's Monthly Publication, September 1999, 1.

79 *Supra* note 2.

Without the supporting personnel, prostitutes become much more vulnerable to elements such as potential violence from clients and harassment from the police. Although the laws were formulated initially to protect the prostitute from potential exploitation, from the perspective of many sex workers, the real exploiters are ironically the police who infringe on their legal rights.[80]

3. Offences in Relation to Vice Establishments

Section 139 stipulates first, that any person who on any occasion keeps any premises, vessel or place as a vice establishment; or second, manages or assists in the management of a place kept as a vice establishment, shall be guilty of an offence liable on summary conviction to imprisonment for three years or on conviction on indictment to imprisonment for ten years.[81]

Again, supporting personnel in the industry such as "pimps" are the targets of these provisions. The mistaken assumption inherent in the law about supporting personnel and their practical worth is already mentioned above and will not be reiterated, but it is now worth examining police tactics that aim to eliminate vice-establishments.

There are two main ways of policing against vice establishments. One is to conduct covert operations to secure evidence in relation to the various offences mentioned earlier.[82] The other is the use of police powers to carry out what is perhaps more candidly called police harassment. Harassment is unacceptable in many countries, but the police in Hong Kong use it openly without any reprisals from the community.[83] An example of such harassment is the raids conducted in the Yuen Long District. Since May 1997, at the request of the District Commander, officers in charge of District Special Duties Squads have been delegated the authority by the Secretary for Home Affairs under the *Hotel and Guesthouse Accommodation Ordinance* (Cap 349) to take enforcement action against suspected unlicensed guesthouses in Yuen Long Town.[84] Using their newly acquired powers, the police excessively raided establishments in that district, sometimes up to three to four times each night. As a result of police decoy operations conducted by the squad team, a lot of convictions and fines resulted, ranging from $10,000 to $20,000.

Ironically, despite the number of extensive raids conducted, arrests and prosecutions are comparatively rare. In 1998, the police conducted 45,638 raids in Hong Kong. Yet, only 501 arrests were made. Furthermore, of the 501 arrests, only 298 persons were prosecuted.[85] However, puzzling as it may be, the objective of such raids is not to secure convictions. Through the process of checking business registration certificates (of what vice establishments claim to be their legitimate business), employee records, and identity cards of clients, the police can ensure that the establishment is "out of action" for about 20 to 30 minutes. Clients are told that the premises are suspected of being a vice establishment, and advised to leave. Persons arriving at the door will quickly see the situation and leave. When this is repeated again and again, the police succeed in inflicting irreparable damage to the business operation of the

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80 Informal interviews with 40 prostitutes conducted by social workers of Zi Teng recorded that almost all the prostitutes have had unhappy encounters with the police, supra note 80.

81 *Crimes Ordinance*, s 139(1).

82 *Supra* note 14, at pp 64-66.

83 Telephone interview with Raymond, Chi-hung Chau, Senior Inspector, Hong Kong Police Force (20 January 1999).

84 http://www.info.gov/gia.general/199811/30/1130208.htm.

85 Statistics on raids conducted on vice establishment, number of arrests and number of prosecutions as a result of the raids 1988-1998. *Supra* note 83.

establishment. At the end, some clients may decide that the experience of the raid is unpleasant enough, and will cease future visits.[86]

These raids would run a clear risk of being declared unlawful if the owners of establishments were to apply for judicial review. However, the police rely on the fact that owners are not often prepared to risk exposure and expense in fighting court actions.[87]

If the police have sufficient evidence, then they should openly prosecute those involved. To adopt such underhanded methods is an abuse of the powers granted to the police and this arrangement is not something that a liberal democracy would endorse.

4. Letting Premises for Use s a Vice Establishment

Under s 143 (1) of the *Crimes Ordinance*, it is an offence for the owner or a tenant of any premise to knowingly let or permit premises to be used for the purposes of keeping it as a vice establishment.[88] Upon conviction, such a person is liable to imprisonment of seven years. To establish the *mens rea*, warning letters are sent to the owner or tenant warning him of a possible offence.[89] However, this has become a standard tactic applied indiscriminately even to "one-woman brothels",[90] even though it is not an offence to operate one.

When landlords obtain such letters, it is more likely than not that they will evict their prostitute tenants to avoid further trouble, regardless of whether or not prostitution really is carried on there.[91] Thereby, prostitutes are effectively discriminated against through this extra-legal mechanism without direct government intervention. As a result, prostitutes are swept from one place to another. Ultimately, many are forced to go underground and seek help from the organized brothels. In this sense, the law is self-defeating: it perpetuates the problem that it seeks to suppress.

5. An Analysis of the Era of Suppression

Despite the Hong Kong government's claim that the Region has a democratic and liberal system, it can be inferred from the present legal policies that the government's attitude towards prostitution is, to say the least, relatively conservative and authoritarian. From the above analysis, it is apparent that an inherent contradiction of prostitution law exists: while prostitution is technically legal, ancillary laws have made it virtually impossible to identify when, where and how prostitutes can legally conduct their trade on a regular basis.

Not only is suppression flawed because it leads to an abuse of rights, it is objectionable because it is based upon a simplistic and fanciful understanding of a complex problem which naively assumes that the sex industry will somehow disappear under police pressure.[92] Yet, experience has told us that the suppression of the trade necessarily forces women to go underground, beyond the gaze of the law and the community, facilitating their exploitation by the police and other elements.

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86 *Supra* note 83, *supra* note 14, at pp 64-66.
87 *Ibid.*
88 *Crimes Ordinance*, s 143(1).
89 http://info.gov.hk/police/offbeat/archives/651/frontpage/html.
90 Despite the fact that one-woman brothels are not considered vice-establishments under the legislation.
91 *Supra* note 57.
92 *Supra* note 56, p 2.

By rejecting the possibility of consent and *de facto* criminalization of prostitution, the law has effectively secured their marginalization and ruled out any possibility of guaranteeing prostitutes the right to work in safe and humane conditions. As a result, law enforcement has simply evolved into a revolving door through which many women are thrown into detention only to re-enter the sex industry upon release.

6. Why the Eradication of Prostitution has Failed

It is submitted that supplying prostitutes through brothels can never be eradicated so long as there is a substantial demand for them. Prostitution has always been the "oldest profession" and has similarly existed in traditional Chinese culture for a very long time. Its history can in fact be traced back to the Tang Dynasty (A.D. 618-907).[93]

According to a survey by the Chinese University, one in every seven male adults in Hong Kong has patronized a prostitute.[94] A telephone poll in July and August last year of 1,142 men aged between 18 and 60 showed that 14.1 percent of them had sex with prostitutes over the previous six months. Translated back into the real figures, it is estimated that there are about 276,000 men visiting prostitutes overall.[95] Men may visit prostitutes for many reasons. Some may be attracted to a cheap thrill; some seek sexual gratification without wanting to bear social responsibilities.[96] Regardless of their motives, it has been relatively easy for them to locate a willing prostitute.

The supply of prostitutes continues due to several interesting factors. One reason for the rise in the numbers of prostitutes is because prostitution is no longer perceived to be as morally repugnant and many women today no longer share the Victorian belief that the sale of sexual gratification is immoral.[97] Moreover, embarking on prostitution retains an attractive allure because it allows a greater autonomy on the part of the individual to run an unfettered lifestyle, while at the same time assuring her a reasonable standard of living.[98] Lastly, entry and exit has remained relatively fluid, making it easier for part-time prostitutes attracted to the possibility of earning extra money, to participate in the profession occasionally.[99]

With these factors in mind, it is important to realize that brothels and houses will always be resilient towards all anti-prostitution laws that attempt to suppress them. The popular demand for prostitutes will not be successfully suppressed by legal initiatives aimed at eliminating prostitutes and prostitution. Prostitution repression is wasteful, time consuming and inefficient. History stands witness to the resilience of the trade to official intervention. The world's oldest profession has successfully withstood repeated attacks and has always successfully re-emerged, albeit in different forms.

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93 *Supra* note 15, p 13. It was introduced because of the fear of syphilis that existed in prostitutes before that date.

94 Dr Lau Tak-fai, *Findings on AIDS-related Sexual Behaviour of Men*, presented to the Health Medical Conference of Chinese University, (Hong Kong: Centre for Clinical Trials and Epidemiological Research, 1999). Dr Lau, said the findings carried a 2 percent margin of error.

95 *Ibid.*

96 Joardar, B, *Prostitution in Historical and Modern Perspectives* (New Delhi: Inter-India publications, 1984), pp 146-150.

97 Walkowitz, J, *Prostitution and Victorian Society: Women, Class, and the State* (Cambridge: Cambridge University Press, 1980), pp 45-49.

98 *Supra* note 54, p 242.

99 *Supra* note 3, pp 4-7.

If prostitution cannot be eradicated by prohibition, what are the other possibilities that can be adopted?

IV. Alternatives to Prohibition

A. The Feminist Arguments

Before looking at any concrete possibilities, it is important to establish the theoretical basis by which possibilities may be evaluated. At this moment, it is worth exploring some of the arguments put forward by different feminists on this issue.

To start off with, we shall look at the most vocal feminist group, the radical feminists. Radical feminists oppose recognition that the sale of sexual services is a legitimate form of work. Their position is best illustrated by the Penn State Report, which emanates from a meeting organized by The United Nations Educational, Scientific, and Cultural Organization (UNESCO) and the Coalition Against Trafficking in Women (CATW), a coalition of non-governmental and exploitation by men in a patriarchal society. In the report, they voice their opposition based on human rights arguments of freedom of choice and action, comparing the sale of sexual services to slavery, the sale of body parts and surrogate motherhood.[100] They argue that the pro-prostitution position reflects the paternalistic, western perspective intended to protect the rights of sex workers in the west, while ignoring the double harm of poverty and the exploitation of the industry in the developing world.[101] Although radical feminists support the protection of the human rights of sex workers, they do so because they support women's rights. Therefore, they object to the notion of a human right to be a sex worker on the ground that such a right "usurps and negates already established human rights of the prostitute woman to human dignity, bodily integrity, physical and mental well-being".[102] Fundamentally, sex work is seen as inherently violent and abusive to the physical person and the psychological self.[103]

The radical feminists have been criticized by other feminists, who refuse to deprive sex workers of their right to work even if it means such work as a legitimate form of occupation. For example, liberal feminists reject morality as a legitimate basis for depriving women who are not harming anyone of the right to work in the commercial sex industry.[104] Post-modern feminists take a slightly different approach, focusing their attack on the critique essentialism of the radical feminist position.[105] In other words, post-modern feminists criticize radical feminists for failing to see the underprivileged point of view, reproaching them for their self-righteousness, telling what "other" women should do.[106] Both liberal and post-modern feminists call for all feminists, even those who are uncomfortable with the idea of sex work, to

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100 UNESCO and Coalition Against Trafficking in Women, The Penn State Report International Meeting Of Experts On Sexual Exploitation, Violence, And Prostitution i, ii (1991). Kathleen Barry, the author of Female Sexual Slavery (1981) and the Prostitution of Sexuality (1995), is the Executive Director of CATW.

101 *Supra* note 4.

102 *Supra* note 5.

103 *Supra* note 5, note 6.

104 Sandford, J, *Prostitutes: Portraits of People in the Exploitation Business* (London: Secker & Warburg, 1975), p 34.

105 Barlett, K, "Perspectives in Feminist Jurisprudence" in Taylor, B and Rush, S (eds), *Feminist Jurisprudence, Women and the Law: Critical Essays, Research Agenda, and Bibliography* (New York: William S Hein & Co, 1999) p 3.

106 Jackson, E, "Contradictions and Coherence in Feminist Responses to Law" (1993) 20 *Journal of Law and Society* 398.

acknowledge differences and to listen to the voices of the workers themselves.[107]

Being in neither camp, women in the sex industry point out that while prostitutes may be exploited by men, it is also true that prostitutes often make more money selling sex than they could ever earn in a "straight" job, such as working in factories. Therefore, there is hardly any kind of real exploitation. Women in all occupations are "victims" in the sense that they live in a patriarchal, sexist society that channels women to the lower end of the socio-economic ladder and into exploitative working conditions. Yet, despite their similarity in reality, society refuses to treat the two jobs differently. Society is willing to fight for the rights of the factory workers, but it refuses to accept the rights of the prostitute. As a result, prostitutes feel that they are being discriminated against because they have made the "immoral" choice.[108]

Pro-prostitution advocates argue that prostitution should be recognized.[109] Contrary to the objections of the radical feminists, the sale of sexual services cannot realistically be equated with slavery, which involves the involuntary sale of a person and corresponding loss of that person's rights and freedom, since sex work does not necessarily deprive the seller of any rights or freedom.[110] Similarly, it cannot be said that women who sell sexual services somehow lack human dignity, bodily integrity and physical and mental well-being simply on the basis of their occupation. Such arguments are too simplistic and degrading to voluntary prostitutes. Furthermore, such arguments ignore the sufferings of people who are "forced" by economic hardship to engage in prostitution.

In any event, further discussion of whether the law should or should not legislate morality is perhaps too complex and beyond the scope of this discussion. However, what is certain is that the law does, in this area of prostitution, concern itself with morals in a most unsatisfactory way.

Having examined present prostitution controls, it is suggested that today's laws may not be justified in a place that purports to guarantee maximum individual autonomy and minimal government intrusion into other personal affairs.

B. The Alternative

Looking at the history of Hong Kong, it is unequivocal that the approach adopted by the government has enjoyed mediocre success. Both strategies of legalization and prohibition have failed substantially to meet their objectives.

It is suggested that the best way forward is "decriminalization with regulation" (decriminalization): to accept prostitution as a legitimate form of business subject to government limitations only where a demonstrable and substantial societal interest can be advanced thereby.[111]

Decriminalization is desirable first, because it recognizes the existence of voluntary sex workers and second, because it views prostitution accurately, namely, that the purchase of sexual services from a sex worker selling her (or his) sexual services is not a human rights

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107 *Supra* notes 38-45.

108 *Supra* note 56, p 25.

109 Feminists such as Kathleen Barry.

110 Phoenix, J, *Making Sense of Prostitution* (New York: St Martin's Press, 1999), pp 58-72.

111 This approach is the best way forward, and the interview and discussion with Elaine Lam also reflected this, *supra* note 80.

violation.

By recognizing prostitution as a legitimate occupation, the goal of this alternative is threefold: first, to empower women through the elimination of abusive laws; second, to rightly punish those who abuse and truly exploit women; third, to protect the population at large.[112] Many people have difficulty envisioning a world in which sex work is considered legitimate.[113] However, once discussion and analysis progress beyond questions of morality towards the examination of the rights of women, it immediately becomes apparent that decriminalization with regulation must be given serious consideration as a viable and legitimate business.[114]

If one starts from the fundamental principle that human rights are universal, then it follows that sex workers have the same human rights as everyone else. Human rights instruments recognize the "right to work, which includes giving everyone the opportunity to attain his living by work which he [or she] freely chooses or accepts" and which is "an inalienable right of all human beings".[115] However, sex workers are denied full realizations of this right. Furthermore, if one accepts the premise that not all women in the sex industry are victims of violence, force or non-economic coercion, then it follows that not all women in the industry need to be or want to be rescued.[116]

Decriminalization respects the right of adult women to choose a living. Criminal liability will no longer be apportioned on the basis of occupation. The criminal law does not intervene into the everyday lives of prostitutes, brothel owners, pimps or anyone else "living off the earnings of" sex workers unless they use violence (eg assault), force (eg false imprisonment) or non-economic coercion (eg blackmail).

Decriminalization empowers women by permitting sex workers to control the conditions of their labour. Under this alternative, sex workers, like other workers, would be able to hire agents and work for others or themselves in the same manner as any other worker.[117] They would be able to form trade unions and organize their own brothels. The commercial sex industry would simply be treated as a business. Under decriminalization, the human rights of sex workers would be protected since the opportunities for abuse of power would be removed under the official protection of the law.

Unlike "Legalization", Decrimalization calls for a *laissez-faire* attitude by the state. The state does not intervene officiously since only justifiable aspects will be regulated upon. Although the state would not condone prostitution, it tolerates the phenomenon in recognition that it can only be eliminated through long term social and economic and legal reforms.[118] Such an approach is desirable because it views the phenomenon beyond the legal perspective, taking into account wider socio-economic considerations outside the legal realm. Although there can be no "perfect solution" to answer everyone's needs and requirements, this attitude provides a reasonable and workable compromise between prostitutes, clients and the community as a

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112 Shrage, L, "Prostitution and the Case for Decriminalization", Vol 43 Dissent, number 2, http://www.igc.org/dissent/archive/spring96/shrage.html.

113 Shaver, F, "The Feminist Defence of the Decriminalization of Prostitution" [1985] *Resources for Feminist Research* 38, pp 38-42.

114 *Ibid.*

115 *ICCPR*, art 6; Women's Convention, *supra* note 100, at art 11(1)(a).

116 *Supra* note 113, pp 39-42.

117 *Supra* note 112.

118 Smith, A and Berlin, L, *Some Sins are Not Crimes: A Plea for Reform of the Criminal Law* (New York: New Viewpoints, 1974), pp 35-42.

whole.

V. *The Social Aspects and the Social Aspects Questioned*

Assuming that Decriminalization is the best way forward, which factors in society are worth state interference? There are ample problems perceived by others about prostitution that may justify state regulation. However, whether these assumptions are valid or constitute a sufficient reason for control is another matter. Each of the problems listed below will be discussed. The purpose of embarking upon this debate is not to provide a "perfect solution" for such problems, but perhaps to probe into areas of confusion and perhaps obtain a better comprehension of the role of the law in regulating prostitution.

A. *Protection of Customers*

Some voices have argued that intervention is necessary for the benefit and protection of the patrons. Such voices trace their origins from the belief that patrons are somehow degraded in their prostitution transactions.[119] It was thought by many that patrons were often defrauded by cunning sex workers who promise sexual favours after receipt of monetary consideration but provide nothing of the sort. Furthermore, people thought that patrons faced a variety of dangers, such as blackmail, violent assault and venereal disease, as well as thefts of personal property and outright robbery. It was also believed that customers were exploited by being coaxed into spending absurd sums of money on prostitutes which could perhaps more wisely have been spent on personal or family needs.[120]

There is perhaps some truth in these assertions, but it is essential to inquire whether such problems should be the basis for invoking governmental intervention. First, even if persons are really belittled and humiliated by those with whom they choose to associate, it appears that a democracy based on the tenets of liberty and freedom ought to allow willing, adult participants to assume the risks of such relationships.[121] Second, the money "wasted" on the prostitute is the patron's own business and not a matter for the government to intercede. In modern society, where leisure expenditure is rampant, it is puzzling why a distinction is made between seemingly worthless expenditure such as alcohol consumption or betting at the race track with that involving sex?[122] Third, if the patron unfortunately becomes an actual victim of crime, then the prostitute ought to be subjected to law enforcement measures for those specific offences, rather than being punished on the basis of her profession.

B. *The Control of Incidental Crime and Criminal Culture Surrounding Prostitutes*

One reason for legal intervention is the assumption made that prostitution is often related to the incidence of crime and the criminal culture surrounding it.[123] The gist of this supposition is premised on the Wilson and Kelling's "broken window theory" that crime has a snowballing effect if not eradicated early on. In other words, it argues for the strict enforcement of "trivial" crimes such as prostitution before it leads to other more serious crimes.

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119 Andelman, "Prostitutes: Some New Tricks for the Oldest Profession" *South China Morning Post, 28* March 1986.

120 *Ibid.*

121 *Ibid.*

122 *Supra* note 118, pp 53-55.

123 See generally Kennedy, R, *The Enemy Within* (New York: Harper & Brothers, 1996).

There might be some truth in the above assertion. Prostitutes often rely on "pimps" to protect them or turn to organized syndicates for refuge because of the high-risk nature of their profession. This is a further reason why prostitution should be legalized. By recognizing prostitution as a profession and providing legal protection to prostitutes, there will be no need for prostitutes to go underground.[124] It is completely possible, as some countries have done, to cultivate a fruitful co-operative attitude among prostitutes and law enforcement officials to stamp out crimes associated with the trade.

C. Prevention of Under-aged Members From Entering into Prostitution

Another reason for controlling prostitution involves an interest in protecting minors. It is submitted that this social aspect may be the most important consideration since juveniles, unlike adults, have neither the mental capacity nor the maturity to assume total responsibility over their person.[125]

If there is any aspect of prostitution that appears to be experiencing a definite increase in numbers, it is juvenile prostitution.[126] This includes not only teens, but also pre-teens.[127] In some cases, parents have advised the adolescents to commence selling sexual favours. In a few others, the youngsters were compelled forcefully. While it should nevertheless be understood that only a small percentage of prostitutes are below the age of eighteen, their existence should be the basis of some concern.[128]

The exploitation of juveniles is of special concern for several reasons. First, these individuals are most likely to engage in prostitution at the behest of an adult profiting from it. Second, these youngsters are often not in a bargaining position to deal with some of the shrewd promoters and profiteers one can encounter in "life". Third, they do not possess the physical stamina to cope with a promoter or patron that may have violent tendencies.[129] But finally and most important of all, they are not of sufficient age to effectively consent to the prostitution transactions they experience.

While economic considerations seem to be the paramount reason why adults turn to prostitution, somewhat different considerations seem to play the primary role in the movement of an adolescent into the sex industry. It has been noted that the primary motivation for adolescent prostitution may be the absence of acceptance and love in their lives, complemented by a related, perceived need to rebel.[130] Inasmuch as the responsibility for youth prostitution cannot be fully shouldered by respective juveniles because of the incapacity relating to their age and maturity, the ultimate accountability for it has to be placed in the hands of society. In other words, these juveniles are victimized by society's failings.[131]

It should be all too clear by now that legal repression of prostitutes does little more than drive them underground and cause their dispersal. In doing so, this approach, which is aimed at

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124 *Supra* note 113, pp 45-49.

125 *Supra* note 3, p 345.

126 Moy, P, "Alarms Bells sound over sex survey findings" Hong Kong Standard 26 May 1999 reported that juvenile 'prostitution' is on the increase. In 1993, there were only 45 cases of juvenile participation in the trade, but in 1998, the numbers have doubled to 97 cases.

127 *Ibid.*

128 *Ibid.*

129 *Supra* note 3, p 345.

130 See generally Little, P, *The Juvenile Delinquent* (New York: MacFadden Bartell, Corp, 1989).

131 *Ibid.*

control, has effectively eliminated the aims to control. If adult sex workers were free to operate in a more clandestine fashion, then the general visibility of prostitution would be increased and correspondingly, the authorities could determine whether certain practicing prostitutes were minors and, simultaneously, would deter the patrons from contemplating meretricious arrangements.

D. The Prevention of Venereal Disease

It is uncontroversial that venereal disease is a significant threat to today's society. The spread of many different forms of venereal disease: syphilis, gonorrhea, genital herpes and AIDS is complicated by the fact that there remains no simple formula of cure.[132] Even those who have recovered do not develop immunity from the disease in the future.

Notwithstanding the fact that it may be true that prostitution may be a prime suspect for venereal disease during the early years of Hong Kong under the British rule, whether this remains true is questionable. The medical establishment and drugs industry have provided convincing figures to show that everyone is equally at risk from venereal disease. Indeed, according to statistics, men who had contracted AIDS from having sex with "women at risk" only account for 0.04% to 0.27% of the total number of men with AIDS. [133]

Prostitutes in Hong Kong were at one time systematically held and examined for venereal disease under a system of licensing. However, the suppression of prostitution under this system was not ideal due to the unwillingness of prostitutes to submit to these intrusive and discriminatory measures. Furthermore, these laws were criticized on the various grounds mentioned above, such as the fact that inspections would mislead customers into believing that the prostitutes are free of disease etc.

Logically, if venereal disease were considered a real threat to society, the government should also take into account the possibility of imposing some sort of duties on patrons as well, since persons detected with disease come from both sexes. There is no reason why prostitutes should bear the brunt of state intrusion.

It should be pointed out that prostitutes nowadays are just as, if not more, concerned than the general public about the spread of venereal disease. A recent study showed that sex workers voluntarily seek medical care of some sort every two to three months.[134] Furthermore, over 95% of sex workers choose to wear condoms. However, if their clients insisted that they didn't wear one, over 73% of them responded that they would refuse to have sex altogether.[135] Most are cognizant that venereal disease has a high opportunity cost for business, especially when it leads to the drop in the business altogether, either because clients will be lost as a result or because they may be reported to the authorities.

Furthermore, from a health perspective, most prostitutes are well aware of the harm a venereal disease may have towards her foetus while she is pregnant which may cause permanent disabilities to her child. Indeed, most know the destroying potential of such diseases: AIDS, the most prevalent, can destroy her life; gonorrhea, can similarly cause damage to a woman's

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132 *Supra* note 58.

133 *Supra* note 94, 12.

134 Supra note 80, 9.

135 *Supra* note 9. Over 200 sex workers participated in Zi Teng's questionnaire asking questions about their general health.

reproductive system; syphilis, can bring about diseased, or broken skin whenever touched, and can lead to permanent blindness.[136] In reality, more prostitutes insist on taking precautionary measures than other non-commercial sex partners. Indeed, almost all prostitutes wash their customer's and their own genital areas before and after contact to drastically lower the risk of infection.[137]

It would seem, with the rise in sexual activity amongst youngsters, that there is no conclusive link between venereal disease and prostitution in Hong Kong. Therefore, if a duty is to be imposed, a comprehensive obligation must be extended to all promiscuous persons, but this is realistically impossible. In light of this, rather than repeating the failures of the legalization era, a comprehensive campaign involving health care and education should be adopted.[138] Rather than making war with the prostitutes, the state should adopt a more embracing attitude towards them, providing support rather than punishing them for the crimes of others.

E. The Regulation of Public Nuisance

Despite the inherent contradiction in the law on solicitation mentioned above, one of the concerns relating to prostitution is that it causes public nuisance on the streets. It is beyond doubt that some prostitutes do disrupt the peace and quiet of a residential area, physically harass residents and disinterested persons, etc. To the extent that a prostitute operates in such a way as to constitute a real nuisance, the law should deal with her as it would with any other person who disturbs the peace.[139]

From a human rights perspective, legal intervention is not justified merely because their sheer presence offends the sensitivities of some. However, if the state were to intervene, the government could enact legislation that prohibits the active solicitations in all public areas of the community, but allow for non-obscene solicitations to be published in periodicals willing to advertise them.[140] It is completely possible to address all of these concerns without the indiscriminate criminalization of prostitution.

VI. Paths that Others Have Taken

Hong Kong is not peculiar in facing problems with prostitution. Therefore, in constructing viable alternatives, it is important to review prostitution controls adopted in other countries. For this purpose, special attention will be paid to the experiences of Holland and Sweden because they have successfully adopted decriminalization with regulation as the main approach in regulating prostitution.

In Amsterdam, although the authorities do not consider prostitution legal, prostitution is tolerated and government involvement is kept to a minimum. There are no provisions in the municipal code requiring positive action on the part of sex workers, such as compulsory physical examinations. Existing legislation in relation to the public is aimed only at eliminating

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136 *Supra* note 57.

137 It is known that washing genitals after sexual intercourse can reduce the chances of getting an STD by more than 90 percent.

138 Corbin, *Women for Hire* (London: Harvard University Press, 1990), pp 266-271.

139 It was held in *R v Hutt* [1978] 2 SCR 476 that "soliciting" involved "pressing and persistent" behaviour. Although the ruling caused some controversies in the area, it is believed that a similar interpretation will be beneficial to Hong Kong. See Lowman, J, Prostitution Law Reform in Canada, thesis, Simon Fraser University, 1999, http://users.universe.com/-lowman/ProLaw/prolawcan.htm.

140 Balos, B & Fellows M, "A Matter of Prostitution: Becoming Respectable" (1999) 74 *NYULR* 1236.

the public nuisance aspect of prostitution by prohibiting excessive solicitation.[141] Laws still exist to protect the prostitute from possible exploitation by pimps, and madams, but they are different in nature from the ones adopted in Hong Kong.

The experience in Amsterdam has sufficiently demonstrated that the sex industry can competently regulate itself. The trade has established red-light districts in which prostitutes may choose to work, but it is not a mandatory obligation. In this way, prostitutes may gather in the same area with other sex workers and assist each other in case of an emergency, but prostitutes will not face any sanctions if they do not conform.

In the well known red-light district known as Zeedijk, located in one of the oldest centres of the city, there are numerous well-dressed "ladies of the night" passively sitting like mannequins behind large apartment windows, or standing in doorways to the apartments they rent on the streets.[142] Cautiously, they extend only smiles to men passing up and down the narrow passageways. The patron, simply gestures to the prostitute and if received, disappears into her apartment. Since the premises are solely used by the prostitutes, they are not considered "brothels" and hence are not prohibited.[143]

Neither the prostitutes nor the apartments in which they operate are licensed. However, the police in charge of the area indicated that they know virtually all the prostitutes, for supervisory purposes, to ensure that they are safe. In Amsterdam, raids are never performed because there is no real need for them due to the transparency of the industry. Juveniles engaged in prostitution are easily identified by the police.[144] Traditional associations with organized crime disappear. Violent sex offences have significantly decreased over the years. Through decriminalization, prostitution objectives have become easier to realize through the communication and co-operation between the two parties.

The situation is similar in Sweden where the Swedes have decided that sexual relations, including prostitution, are not an appropriate matter for legislation. This belief is reflected in the penal code which contain no provision against the act of prostitution or of patronizing a prostitute.[145] The most proactive provision is that on disturbing the peace that allows for aggressive solicitation to be stopped, just like any other disorderly behaviour.

The legislation also recognizes that living off the earnings of a prostitute by itself is not illegal. However, it should be noted that "procurement" remains an offence. This was done to secure the autonomy of the prostitute to control her conditions of work and to freely employ others to provide her with protection.[146]

There is no doubt that both these models could be adopted in Hong Kong.

VII. Conclusion

What is the future for prostitution in Hong Kong? Since prostitution per se is not a crime, there are now plans by some in Hong Kong for a union for prostitutes. Yet, improvements are

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141 *Supra* note 3, pp 142-144.
142 See generally Mankoff, A, *Mankoff's Lusty Europe* (New York: Pocket Books, 1984).
143 *Supra* note 3, p 142.
144 *Supra* note 142.
145 Jenkins, D, *Sweden and the Price of Progress* (New York: Penguin Books, 1975), pp 203-205.
146 *Ibid.*

incremental, and despite the alternatives taken by the other countries, the possibility of prostitution being recognized as a legitimate profession still remains distant. It is the author's personal hope that such advocates continue undaunted.

WITNESS COACHING

AN EXAMINATION OF WHAT WITNESS PREPARATION IS, THE ARGUMENTS FOR AND AGAINST THIS PRACTICE AND THE VARIOUS WAYS TO AVOID COACHING DURING WITNESS PREPARATION

CHIM E-LING*

I. Introduction

The growth of incivility in legal practices and the sudden explosion of "Rambo" lawyers,[1] who see the courts as their battlefields, and hardball litigation as their weapons, are going unnoticed by those with the authority and duty to check malpractice. This has not, however, stopped the media from placing objectionable legal practices centre stage. Films like *Anatomy of a Murder*[2], *The Verdict*[3], courtroom dramas like *LA Law*[4] and *The Practice*[5] and even sitcoms like *Ally McBeal*[6] have portrayed lawyers as the "purveyors of falsehood".[7] One could take this to mean either that the profession approves of ruthless Rambo-esque lawyering since winning at all costs means fulfilling an advocate's duty to litigate zealously in the interest of his client *or* that the Bar and the Law Society are just not prepared to deal with the problem yet. Either way, the problem is certainly there and the profession has to become aware of the implications that it has.

When one talks about witness coaching, one often envisions a scenario where a witness is seated at a corner of a long barren table in a dimly-lit room, sparsely furnished, with a lawyer looming over the back of the witness, treacherously forcing words into his or her mouth. The latter then regurgitates the lines verbatim - like a child memorizing the lines in a play that he or she reluctantly participates in. Perhaps it is accurate to say that going to trial is all but a play[8] which no one hopes to be part of, but it would no doubt be highly biased to say that witness preparation is restricted to role-playing or falsifying of witness testimony by coaching the witness to say what the lawyer knows the case needs. Witness preparation encapsulates far more than the stereotyped unethical influencing of the witness and can actually be appropriate and desirable in many cases. The focus of the next section, hence, is to determine the precise scope of our subject-matter - to define what we mean when we talk about witness preparation.[9]

II. Witness Preparation Defined: Applegate's Seven Methods

Generally, any meeting or communication between a lawyer and a prospective witness (be it a

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* The author would like to thank Ms Katherine Lynch and Ms Jill Cottrell for their guidance, supervision and extreme patience. The author would also like to acknowledge the suggestions made by Mr Michael Sandor in the formulation of the dissertation topic.

1 Term taken from Taylor, D H, "Rambo as a Potted-Plant: Local Rule, Making's Preemptive Strike Against Witness Coaching During Depositions", 40 (1995) *Vill L Rev* 1057.

2 *Anatomy of a Murder* (Columbia Pictures, 1959).

3 *The Verdict* (Twentieth Century Fox Film Corporation, 1982).

4 *L A Law* (NBC Television Broadcast).

5 *The Practice* (Twentieth Century Fox Television, 1997).

6 *Ally McBeal* (Twentieth Century Fox Television, 1998).

7 Luban, D, *Lawyers and Justice: An Ethical Study*, (New Jersey: Princeton University Press, 1988), p 96.

8 See analogy of a trial to a play in Van Kessel, G, "Adversarial Excesses in the American Criminal Trial", 67 (1992) *Notre Dame L Rev* 403 at 431-432.

9 Witnesses referred to in the present paper will be restricted to adults of normal infirmity.

client, a witness in support of the client's case or a hostile witness) which is "intended to improve the substance or the presentation of testimony to be offered at trial or ... hearing"[10] is to be considered as part of witness preparation.[11]

Professor John Applegate has identified seven forms of witness preparation.[12] He describes each of these methods as a desirable process in adequately preparing the witness for trial but also acknowledges the possibility of unethical lawyers or unwary lawyers distorting the perception or testimony of their witnesses.

A. Introductions and Demeanor Preparation

When a lawyer first meets with a prospective witness, there are certain elementary matters that each lawyer normally advises upon. Such matters include an explanation of the role of the witness and those who will be questioning him in court. The lawyer might also tell the witness about the procedures of the trial, warn him not to lie under oath and inform him of the consequences in the event that he does lie. The witness will also be urged to speak clearly, address the jury, to avoid ambiguity in his answers and to control his emotions. He will also be warned that the opponent might seek to discredit the witness during cross-examination and might say things that are directed at angering the witness or bringing up certain gory details in the witness' past history to destroy his credibility.[13]

The preparer of the witness will also be obliged to tell a prospective witness what proper court attire would be and how best to present himself. This might include how one presents an answer - changing the tone and even phraseology to make it convincing and persuasive.[14]

B. Providing Legal Background: The Lecture

"The Lecture" means explaining the law applicable to a case and telling the witness what are the elements that have to be established in order for there to be a case at all, what further elements have to be proven in order for the defendant in the case to be convicted, what defenses are available, the burdens of proof and the standards of proof required.

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10 Applegate, J S, "Witness Preparation", 68 (1989) *Tex L Rev* 227 at 278.

11 Note must be had to the difference in the words "preparation" and "coaching" – the former being inclusive of all forms of communication, ethical and unethical, while the latter refers solely to that which is objectionable. This distinction is the drawn up by the author for the clarity of the paper. Other authors have taken the approach of uniformly referring to "preparation" and "coaching" to mean all forms of communications with witnesses consistently throughout their article, see for example Applegate, *ibid*, and Salmi, R, "Don't Walk the Line: Ethical Considerations in Preparing Witnesses for Deposition and Trial", (1999) 18 *Rev Litig* 135.
The term "prepping" however, has been used interchangeably – both as a colloquial abbreviation for the word "preparation" but also as referring to the distortion of witness testimony through unethical practices. In the present dissertation, "prepping" will be taken to mean solely as "preparation".

12 *Supra* note 10, pp 298-323.

13 Though it is now clear that previous criminal records are generally not allowed to be raised for the sole purpose of discrediting a witness, there are other records that might diminish the credibility of the witness, for example a cross-examiner might question a witness as to his past relations with one of the immediate parties that may be embarrassing or he may suggest to the jury that the witness has an interest in the outcome of the trial and hence directly affect the credibility of the witness when although he does not in fact intend to influence the trial.

14 This, it is argued, could lead to deception of the jury and even distort the meaning of the witness' original words. For an elaboration, see *infra* Part III A.

In former Justice John D Voelker's critically acclaimed novel, *Anatomy of a Murder*,[15] defense lawyer Biegler gives a good description of what exactly "the Lecture" is and achieves:

> "The Lecture is an ancient device that lawyers use to coach their clients so that the client won't know he's been coached and his lawyer can still preserve that face-saving illusion that he hasn't done any coaching. For coaching clients, like robbing them, is not only frowned upon but downright unethical . . . Hence the Lecture, an artful device as old as the law itself, [is] one used constantly by some of the nicest and most ethical lawyers in the land. 'Who me? I didn't tell him what to say,' the lawyer can later comfort himself. 'I merely explained the law, see.' It is a good practice to scowl and shrug here and add virtuously: 'That's my duty, isn't it?'"[16]

Strictly speaking, there is nothing wrong with explaining the law to a witness – in fact, it is quite expected that a lawyer should. What makes it a borderline case for unethical legal practice is the timing of when the Lecture is given. When given *after* the witness gives his version of the facts, there is nothing unethical or wrong with the Lecture but if the lawyer does not give a chance for the witness to first tell him what he remembers and his initial perception, telling the witness about what the case needs might alter his testimony and hence lead to perjury.[17]

C. Factual Context: The Substance

When preparing a witness for trial, a lawyer might sometimes wish to discuss the testimony of other witnesses[18] if he finds that the different versions of facts appear contradictory. He may wish to discuss with the witness the reasons for this apparent disparity and attempt to uncover certain details that the witness might initially have forgotten or misinterpreted so as to make the two testimonies contradictory.

Where there are no contradictions in the witness statements, a lawyer may still want to discuss the statements of other witnesses in order to construct a time-line with the witness using the information that he has collected from preparing other witnesses for the sake of clarity and to make sure that the stories all match or at least make sense.

D. Factual Details: The Method

The main difference between factual context and factual details is that in the former, the resulting testimony is likely to be substantially the words of the witness. When we talk about factual details, we focus mainly on the method in which the witness has been prepared – whether the lawyer has used leading or suggestive questions in order to extract the intricate details from the witness[19] or whether the witness was allowed to give a full account of the facts before neutral questions were posed to him. What is of paramount concern here is not that the lawyer has tampered with the knowledge of the witness, but rather, he has tampered with the *perceptions* of the witness.[20]

Note must be had to the differences between the various types of methods employed in eliciting details from the witness since it will be important to know how to regulate this practice.

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15 Traver, R , *Anatomy of a Murder*, (Michigan: St Martin's Press, 1958).

16 *Ibid*, p 35.

17 The downsides to giving of a Lecture before hearing the witness' version of the story is discussed in Part III B *infra*.

18 *Supra* note 10, p 304.

19 *Ibid*, p 308.

20 *Ibid*.

First, there is the ethical and unobjectionable method that many prominent psychologists and cognitive scientists have suggested: this method asserts that a lawyer should ask open-ended questions and first hear the full story that the witness has to offer before interrupting and asking for more detailed information about the case.[21] Neutral questions should be used as much as possible and lawyers should generally bear in mind Grice's theory of Conversational Implicature[22] and the effects the phraseology of his questions might have on the witness. Where these guidelines are complied with, the lawyer would have conducted the elicitation of factual details in an acceptable manner.

Second, there are those lawyers who inadvertently affect the testimony of their witnesses by using terms and questions that might be suggestive of the answer they want or expect to get. This is not done intentionally – but the testimonies of other witnesses already interviewed have left too deep an impression of what the facts ought to be such that, when preparing a new witness, the lawyer sub-consciously suggests the "right" answers to the witness. In such a situation, the lawyer has subjectively done nothing wrong, but objectively, the witness' testimony *has* in fact been altered or moulded by the lawyer, and the hearsay rules have in fact been breached.

Finally, there is the type of witness coaching that one is likely to see on *The Practice* and *LA Law*. This is the intentional use of suggestive and leading questions to elicit details that the lawyer hopes the witness will provide.[23] It is argued that this constitutes malpractice and that it is unethical and should be regulated.

E. Privileged Documents

A lawyer may choose to prepare a witness by allowing him to review a letter or memorandum detailing the crucial points, the major problem areas and the contemplated approach and arguments. Other work-product documents that may be used in witness preparation include deposition digests, edited transcripts of other witnesses or compilations of data and chronological lists of the events. If somebody who reviews the privileged documents subsequently becomes a witness and testifies, there will not be a waiver – meaning that the court, jury and the opposing attorney have no right to demand the examination of those documents. If however, someone reviews the document, subsequently becomes a witness and seeks to testify upon the contents of that document, it will have the effect of putting that piece of document in issue. In such a case, the court will hold that there has been an implied waiver since the document is placed in direct use and the contents will have to be disclosed.[24]

F. Discoverable Documents for Refreshing Witness Memory

Refreshing the witness' memory before he testifies is also part of witness preparation since it is communication with the witness intended to improve the substance and presentation of the testimony. In contrast to privileged documents that are generally not discoverable, documents

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21 Wydick, R C, "The Ethics of Witness Coaching" 17 (1995) *Cardozo L Rev* 1 at 28-32, 43-52. See also Salmi, *supra* note 11, pp 170-178. See *infra*, Part V C.

22 Grice, H P, *Studies in the Way of Words*, (Cambridge, Massachusetts: Harvard University Press, 1989), p 284, referred to in Wydick, *ibid.*

23 See *infra* Part IV for an elaboration on the categorization of the various forms of witness coaching.

24 *Supra* note 10, p 312.

which a witness uses before he gives his testimony are discoverable. This is a very common form of preparation that many in the legal field strongly recommend – especially for complex commercial cases.

These documents are usually drawn from the materials that a lawyer is able to collect during the discovery period. Usually, there is a good deal of paper work and the lawyer is required to select and compile the information diligently. One judge has remarked that the selection and compilation process is often even more important than the legal research itself[25] since a lawyer has to plan strategically how to organize the documents for the witness which would best serve the case. Hence, the final collection very often reflects the lawyer's thought processes: his evaluation of which are the weak and strong points in the case, the irrelevant and the relevant and his approach on how to argue the case.

Documents used for the purpose of refreshing a witness' memory are discoverable individually but the *collection* of these documents are protected as core work-product if they "emerge from a selection and arrangement process requiring significant effort on the part of an attorney and resulting in a product of a value greater than that of the document itself".[26] As Justice Murphy of the Supreme Court of the United States stated:

> "Historically, a lawyer is an officer of the court and is bound to work for the advancement of justice while faithfully protecting the rightful interests of his clients. In performing his various duties, however, it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference."[27]

Allowing the witness to review documents compiled by his attorney prior to testifying ought to be protected under the work-product doctrine since to allow otherwise would be to implicate the privilege rule.

G. Recapitulation: Role-plays and Rehearsals

> "Role-playing means just that – playing or practicing behaviours . . ."[28]

The final method of witness preparation – and perhaps the most controversial[29] - is that of the rehearsal. During the final stages of the preparation process, after the lawyer has extracted all the information he thinks he will need, he can either summarize to the witness the questions that he will be asking during direct-examination and the questions that might be asked of him in cross-examination and ask him to think about the answers that he might be giving *or* he may chose to take on a more active role in moulding the presentation of the testimony. He may detail the questions that he and the opponent might ask and require the witness to tell him generally how he will answer those questions. The lawyer may also take the liberty of rephrasing the answers in a manner that can be better understood by the jury or sound more persuasive.

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25 *Shelton v American Motor Corp,* 805 *F2d* 1323, p 1329 (8th Cir 1986), text in Applegate, *ibid,* p 315.

26 S S C, (Note) "Work Product Protection for Compilation of Nonparty Documents: A Proposed Analysis", 66 (1980) *VA L Rev* 1323 at 1340.

27 *Hickman, Administrator v Taylor et al, Trading as Taylor & Anderson Towing & Lighterage Co, et al,* 329 US 495 (1937) at 510-511.

28 *Supra* note 10 at 323.

29 *Ibid,* p 322. See also Zacharias, C F and Martin, S, "Coaching Witnesses", 87 (1998) *Ky L J* 1001.

At a more extreme level, the lawyer may even formulate the answers and ask the witness to answer in those words as much as possible. Perhaps the most extreme case would be where the witness becomes the "mouthpiece" of the lawyer – where the answers are all pre-composed and the witness is only expected to memorize the script and to act out the lines convincingly. This often happens when an unethical or unwary lawyer receives a very weak case and although he knows what would help the case, those are not the findings that he is getting from the discovery process. In a desperate attempt to save the case, he may resort to this sort of scripting, which might well amount to perjury.

Other than going through the questions and answers, the lawyer may also want to role-play the direct- and cross-examinations. This means that he may want to incorporate all the formalities observed at court and follow the sequence that he will be using in direct examination to question the witness.[30] The witness will also be told what gestures or manners to avoid or observe and he will be told how best to articulate the answers that he has in mind. At the same time, the lawyer must take care not to over-rehearse the witness so that he appears "rehearsed" during the actual trial. He must be calm and contained, but not fake and overly confident.

Although role-playing is time-consuming when compared to the other forms of witness coaching, its benefits are manifold and most lawyers engage in rehearsals and role-playing at the final stages of witness preparation.

III. The Pros and Cons of Witness Preparation

Having gone through what each of the seven methods of witness preparation are, it is important to understand the controversy that each also instigates – for although most of these methods can be executed ethically and fairly, there are times when the lawyer crosses the line, knowingly or inadvertently.

A. Introductions and Demeanour Preparation

General introductions are necessary not only since they ensure a calm, relaxed witness who will not easily be side-tracked or flustered during cross-examinations[31] but they also help the lawyer to serve the court – by helping witnesses tell the court only that which is relevant and staying focussed on the subject of the trial, lawyers are actually saving the court's time and resources. This goes a long way taking into consideration the numerous and lengthy trials judges have to adjudicate all the time. Making sure that a witness is not discredited unfairly by giving him adequate warning and preparation also serves the ends of justice since the strength of a client's case will not be reduced on the basis of prejudices the jury forms of the witness but can be fairly judged with reference to its substantial credibility.

However, demeanour preparation could be perjurious since advising a witness to speak with confidence or even calming or relaxing a witness might induce an "unwarranted degree of certainty" – take for example a timid witness may testify that he *might* have seen the defendant leaving the crime scene. Initially unsure, continuous coaxing of the witness to speak up, speak clearly and with confidence will make him bolder and bolder of his answers.[32]

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30 *Supra* note 21, p 16.
31 *Supra* note 10, p 298.
32 *Supra* note 10, pp 298-299.

An extreme example can be taken from a scene in *LA Law*. In one episode, a witness who answered "not really" to an answer was immediately corrected by his attorney Michael Kuzak: the answer was "no".[33] The witness ultimately adopts the words of Kuzak at trial – despite the fact that it was in complete contradiction to his former phraseology and tone. This illustrates how dangerous simple demeanour preparation could be - if the tone of the witness changed (ie he is more confident in saying what the jury would otherwise have detected as a questionable view of the facts), it could arguably still be accepted. If however, the witness adopts the perception held by his lawyer during the preparation stage as his own, it becomes permanently incorporated into his memory as part of the truth.[34]

Other than affecting the witness and, in an extreme case, lead the witness to the making of a perjurious claim, demeanour preparation also affects the jury. "The confidence of the witness, rather than accuracy, [is] the major determinant of juror belief",[35] also, "jurors believe that there is a strong linear relation between a witness' confidence in the accuracy of his testimony and the true accuracy of that testimony: more confidence, more accuracy".[36] This would mean that so long as the lawyer is able to persuade the witness that a certain set of facts are true, he will most likely be able to persuade the jury that it is in fact true.

Where an attorney is defending a sociopathic triple-murderer, so long as he can persuade the client-witness that he is a regular guy and support that with testimony of other witnesses who are also coaxed into so believing, the jurors may in fact come to see the defendant's confidence in his own normality as an indicator that he in fact is quite average.[37] It is for this reason that Professor Applegate is particularly worried by demeanour preparation that is directed at producing a false representation of the witness since no rules of perjury provide for this form of

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33 *Supra* note 5.

34 Recollection is broken down into three stages: (1) perception, (2) codification and storage and finally (3) retrieval. Wells, G L and Loftus, E F, *Eyewitness Testimony: Psychological Perspectives*, (Cambridge: Cambridge University Press, 1984), p 278.
It is argued that the first step of recollection could very well be imprecise. Witness coaching further affects the second and third stages when suggestive questions are asked or if a certain fact is expressly or impliedly hammered into the witness. One example of this is given by Michael Sherrard QC of Middle Temple, London:

The Interview

Q: When Bloggs came into the pub, did he have a knife in his hand?
A: I don't remember.
Q: Did you see him clearly?
A: Yes.
Q: Do people in the neighbourhood often walk into pubs carrying knives in their hands?
A: No, certainly not.
Q: If you had seen Bloggs with a knife in his hand, would you remember that?
A: Yes, of course.
Q: And you don't remember any knife?
A: No, I don't remember any knife.

{time lapse}

At Trial

Q: When Bloggs came into the pub, did he have a knife in his hands?
A: No, he did not.

Example found in Wydick, *supra* note 21 at 11-12. See also Salmi, *supra* note 11, p 143.

35 Wellborn, O G, "Demeanour", 76 (1991) *Cornell L Rev* 1075, p 1089.

36 Miller, M O, "Working with Memory", *Litig.*, Summer (1993) 10 at 15.

37 Example found in Applegate, *supra* note 10, p 299.

testimony falsification.[38]

B. The Lecture

Where the witness being "prepped" is a defendant, it is only natural that he expects his lawyer to tell him precisely where he stands. He would want to be told what law would apply to his case and what are the implications of the facts he is caught in. Where the client is the plaintiff, it is only natural that the client would be anxious to know what legal basis he or she has for bringing a lawsuit. Even a third party witness would desire to know the implications of the information that he has.

A Lecture that is given after hearing the witness out would be advantageous since it helps the witness stay focused on the relevant details rather than straying and lingering on matters that are immaterial to the arguments of the case. This also ensures that the time and resources of the courts are not wasted and that the case can be adjudicated with as little delay as possible. It also helps to calm the witness since it clears the air about the case and he is perhaps more reassured as to his position. The Lecture enables the witness to expect what arguments will be raised by both sides and he can better respond to the questions posed since he will know the purposes of those questions and will be able to reassert what his version of the facts establish, in a manner that reflects what he believes to be true. Telling the witness what is the applicable law might also direct the witness as to what are the more important facts and in certain cases, might even be able to prompt the witness into remembering certain facts that are crucial.

But if a Lecture is given prior to obtaining the statement of facts from a witness, it could affect the testimony in a variety of ways. From a psychological point of view, people generally have a tendency to say what they know will be easily accepted or believed by their audience.[39] When a lawyer tells a witness that a certain set of facts is what his case desperately needs, the witness might be inclined to mould his testimony so as to conform to the version of the facts that he believes the lawyer is looking for. On a higher level, the witness, having adopted an inaccurate version of the facts, might become so affected that his perception changes – his codification/storage and retrieval stages are altered and the witness becomes increasingly convinced of the accuracy of the altered version of the facts.[40] The witness adopts the testimony that the lawyer wants, making detection even harder during cross-examination.

From a technical point of view, by giving a Lecture on the law before the lawyer hears the witness' account of the facts, he might not be able to obtain a full set of information from the witness. Being overly focused (intentionally or otherwise) on tailoring his story to fit what he believes his lawyer wants to hear, the witness might omit certain details that could prove highly crucial to the development of the case or the defences that the lawyer seeks to raise. Hence, it is often suggested that giving the lecture *after* hearing what the witness has said could very well help the preparer obtain a complete story.[41]

C. Factual Context: The Substance

The practice of informing the witness being prepared of the testimonies of other witnesses serves a number of purposes. First, it raises the witness' awareness as to certain issues that he

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38 *Ibid.* See *infra* Part IV on the existing state regulations and codes.

39 Applegate, *supra* note 10, pp 301-302. See also *supra* note 11, pp 154-155.

40 *Supra* note 36, p 278.

41 *Supra* note 11, p 155.

was not initially concerned about. This adds to the completeness of the overall statement obtained.[42] Secondly, it allows the witness to reflect on the certainty of his own testimony – seeing contradictions between his own statement and that of other witnesses, may lead him to check the amount of ungrounded confidence he might have of the accuracy of his recollection of the facts.[43]

Furthermore, discussing the testimony of other witnesses will prevent the possibility of the witness becoming over agitated or surprised by the testimonies and documents that are revealed in court[44] - this would mean that the lawyer had not sufficiently prepared his witness so that he is not even aware of the underlying facts of a case. This, would be irresponsible and bad lawyering.

A lawyer who sees that his witness is very unsure about the accuracy of his recollection might want to disclose to him what other witnesses have said that fall in line with what he is saying. This allows the discovery process to run much smoother since the witness will not have to struggle through the interview, stuttering and stammering. It will also give a more complete set of facts ,since a person who is less confident about what he is saying will usually not add too many details. If the testimonies of other witnesses that back up the witness' are disclosed, it will reinforce the witness' confidence and allow him to speak with more ease.

On the other hand, telling the witness about what other people have said poses serious dangers – the witness' perception might be changed upon hearing what others have said. He may begin to doubt the accuracy of his own statement even though he was initially rather certain of it. He might begin to think that the version of facts that other people have provided seems to make more sense and fits into the general picture better than his version and might waver and become reluctant to add anything more, for fear that his testimony will seem too out of place when placed side by side with other witnesses' testimonies.

A witness may also be persuaded by the facts given by others that a certain train of events must have been the likely conclusion, since that is the only way he can reconcile the contradicting or sequentially logical facts. Hence a witness may begin to incorporate the facts that other people have provided into the facts that he seeks to prove as well. This would rob the jury of their job of determining what they believe to be the facts since the witness adopts the statements of others as though they were true and as though he had witnessed them himself.

This concern is particularly strong in the case of "group prepping" – where a group of witnesses gather together and talk about the events and contradictions are ironed out of their testimonies. From the point of view of the lawyer, group presentations are good since it saves the time involved in having to prepare each witness individually and, it also derives a collection of witness statements that is free from contradictions. However, this form of preparation has been vehemently criticized since the chances of concoction, fabrication and breach of the hearsay rules are far too great. It is for this reason that most courts in the States discourage this practice and even if it is done, the court requires that a lawyer who performs group preparation inform the court duly of it.[45]

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42 *Ibid.*
43 *Ibid.*
44 *Supra* note 10, p 305.
45 *Ibid,* p 306.

D. Factual Detail: The Method

A lawyer has an ethical duty to his client to thoroughly prepare his witness so that he is able to formulate arguments with sufficient basis. He also bears a duty towards the court since the adversarial trial is supposed to be the ultimate truth-seeking procedure for the resolution of disputes. If a lawyer only has a very general picture of his client's case, it is hard to see how he can properly fulfil his two duties owed to his client and to the court. Hence, in order for a lawyer to fully know his case and to be able to present the position of his client persuasively before the court, he will have to find out as much as he can about the facts from what his witnesses have to say.

Bearing in mind that there are different levels of eliciting factual details from a witness, it is obvious that not all interviews for detailed accounts of the facts are unethical. However, without proper training or self-discipline, it is hard to prevent some suggestive questions or comments during the course of each interview.

A study was conducted on the adversarial nature of behaviour among law students and the results revealed twenty-five different coercive, deceptive and manipulative interrogation techniques.[46] This further goes to prove that without the necessary training in legal ethics and witness psychology or in

In terms of the effects, there is no difference be it inadvertent or intentional tainting of the witness' perception. The conclusion is the same, that the witness might likely be affected, his perception about the events changed and hence his testimony altered. In terms of penalty, in most adversarial jurisdictions, there are provisions forbidding the known falsification of witness testimony and to do so would amount to perjury. However, no such express codes guard against the unknowing altering of a witness' perceptions.

E. Privileged Documents

The most obvious advantages of using this sort of preparation technique are that it is highly time-conserving and cheap. It has also proved to be effective and efficient as a means of witness preparation. Where a number of witnesses have the same version of the facts, it would be redundant having to hear them go through it and having to probe them to remember the details as though the lawyer did not really know what the sequence of events were. If a witness were shown an edited copy of another witness' testimony, he can swiftly say whether he agrees with that version. In the event that he disagrees with a variety of details, the preparer can focus solely on the areas in dispute which would help save an immense amount of time. When time is saved, it also means that costs are spared.

Applegate identifies three areas of concern for witness preparation through the use of privileged material. He picks up on Professor Marcus' concerns that a lawyer could educate a witness with documents that the opponent is unaware of or unable to use during cross-examination.[47] This would mean that the lawyer would be able to employ abusive methods of witness preparation and still immunize that from the scrutiny of the court or the opposing counsel.

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46 Stark, Tegeler, Channels, "The Effect of Student Values on Lawyering Performance: An Empirical Response to Professor Condlin", 37 (1987) *J Legal Educ* 409, pp 411-413. Findings quoted in Applegate, *supra* note 10, p 308.

47 Marcus, R L, "The Perils of Privilege: Waiver and the Litigator", 84 (1986) *Mich L Rev* 1605 at 1647 cited in Applegate, *supra* note 10, p 313.

Through the use of documented privileged material, the preparer might also be reconstructing rather than helping the witness to recollect. Related to this concern would be the fear that allowing a witness to be prepared through the use of a work-product document might instil unjustified certainty in the facts which he might initially not be too sure upon.[48] Finally, there are also arguments against this method of witness preparation that asseverate that owing to the lax requirements of the present codes and regulations, a lawyer could make only partial disclosure of a document and strategically omit those that are unfavourable to his client's case. This arguably would be as bad as telling an outright misrepresentation since according to a truth that is selectively reduced and reported as a half-truth is considered to be as bad as an outright misrepresentation.[49]

F. Discoverable Documents for Refreshing Witness Memory

In long complex commercial cases or any case with a myriad of intricately detailed evidence, it is always wise to first allow a witness to review a summary of the facts or any other document that may prove useful since with the great abundance of facts that the witness has to take with him in his mind when he takes the stand, it is highly probable that he will forget or confuse certain facts.

An advantage of greater importance and bearing of refreshing a witness' memory (protected as work-product) is that it helps to prevent "sharp practices" among lawyers:

> "Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served."[50]

However, allowing a witness' recollection to be refreshed while safeguarding work-product privileges poses a serious problem that the opponent is not given the chance to test the accuracy of the witness' refreshed memory and the written document's capacity to so refresh the witness' memory.[51]

In *Berkey Photo v Eastman Kodak*[52], Judge Frankel expressed his concern about the potential for a lawyer to "prepare – and thus, very possibly, . . . influence and shape – testimony"[53] in the absence of any opportunity for the opponent to examine those preparatory documents. It is for this reason that the court in *Berkey* laid down an all-encompassing rule, which states that any collection of writing having an impact on the testimony of a witness triggers r 612[54] (which

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48 Applegate, *ibid,* p 313.

49 *Nottingham Patent Brick and Tile Co v Butler* (1886) 16 QBD 778.

50 *Supra* note 27 at 511.

51 *Supra* note 10, p 316.

52 *Berkey Photo v Eastman Kodak* 74 FRD (SDNY 1977) 613.

53 *Ibid,* at 616.

54 *Federal Rules of Evidence*, r 612 reads:

> "[If] a witness uses writing to refresh memory for the purpose of testifying, either:
>
> (1) while testifying, or
>
> (2) before testifying
>
> if the court at its discretion determines it necessary in the interest of justice an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions that relate to the testimony of the witness."

requires the disclosure of material used either before or during testimony to refresh a witness' recollection) and that r 612 requires disclosure, even though the material is recognized to be core work-product.[55]

G. Rehearsals and Role-playing

Despite their time-consuming nature, rehearsals and role-playing have a number of benefits. First, role-playing familiarizes the witness, especially a lay-witness,[56] as to what his role is to be and in the actual trial, he will feel more relaxed and less browbeaten by the unfamiliarity of the procedures and the intimidating presence of a judge and jury. Rehearsals also serve the function of building up the witness' confidence in his presentation and in the accuracy of his facts. Hence he is better prepared for a rigorous cross-examination.[57] The preparer can educate the witness as to specific gestures or techniques of presentation (such as pausing before answering certain questions and refusing to answer only "yes" or "no" for sweeping questions or for whose answer cannot be reduced to such a state of simplicity) that will prevent the witness from feeling too flustered or frustrated at the stand, which is often the aim of many aggressive cross-examiners.

Perhaps the strongest reason for rehearsals is that they improve the narration of the witness[58] by making sure that he is clear as to the interrogation procedures and the topics that will be covered, the way in which the questions will likely be worded and how best to manage these questions.

The lawyer also benefits directly from rehearsals and role-playing as it educates him as to the likely response that he will get from the witness during direct-examination and how best to help the witness plan for the cross-examination. In preparing hostile witnesses, the lawyer also learns how to strategically organize his questions for the cross-examination of a hostile witness by avoiding areas that are likely to be of great disadvantage to his client's case.

Nevertheless, rehearsals and role-playing are very time-consuming and tedious – so much so that they might strain the relationship between the lawyer and the witness. This however, often pays off during trial when the witness is able to breeze through the direct-examination and does not falter too much at cross. Yet, too much rehearsal creates the possibility of the witness looking over-rehearsed, leaving a bad impression on the jury.

Professor Wydick notes that if the form of rehearsal that a lawyer adopts is to "devise a plausible story and then practice it until they can run through it like actors through a script",[59] his sort of witness coaching is ethically objectionable and the witness runs the risk of being impeached for concocting a story at the aid of his attorney. Wydick also points out that this practice would be tactically foolish since a suspiciously smooth direct-examination will look out of place when contrasted with a rocky cross-examination.[60]

Professor Freedman and Professor Applegate further remarked that of all the methods of witness preparation that are used by lawyers, "rehearsal[s] [have] a greater potential for

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55 For a discussion of the present safeguards from witness coaching for each form of witness preparation technique, see *infra* Part V B.

56 *Supra* note 11, p 165.

57 *Supra* note 10, p 322.

58 *Ibid.*

59 *Supra* note 21 at 15.

60 *Ibid.*

suggestiveness than other preparation techniques . . . because the repetition of a story is extremely suggestive".[61] Not only in terms of the details that the witness might add as he goes along with the role-playing, but also in terms of the groundless confidence[62] that he may begin to culture about his version of the facts. This might mislead the jury as to the degree of accuracy of the witness' account of the facts.[63] Conversely, a witness who is telling the whole truth, but who has been rehearsed so many times that his testimony is delivered immaculately, might even be wrongfully doubted by the jury believing that such a smooth direct-examination could only be the result of concoction.

IV. The Gradation of Witness Coaching

In all of the aforementioned methods of witness preparation, there lies a chance for the lawyer to induce the witness to give false testimony. The point for this categorizing of witness coaching in different magnitudes is so that it may be penalized accordingly. It will be proposed later on that the different degrees of witness coaching will entail different punishments and disciplinary measures. But first, let us consider the gradation that Professor Wydick has suggested.

A. Wydick's Three Grades of Witness Coaching

The method by which Wydick divides up the different grades of witness coaching is by considering how the witness will be affected. He interprets the *Model Rule of Professional Conduct* (the "*Model Rules*") as pointing away from the state of mind of the attorney to the state of mind of the witness: what he realizes is the intent of his lawyer. This then determines the magnitude of the lawyer's wrong.

1. Grade One Witness Coaching

Grade One witness coaching refers to the situation where a lawyer knowingly and intentionally induces a witness to commit perjury by asking him to testify to something that he knows is false. Wydick suggests that the appropriate test for determining whether a lawyer has committed grade one witness coaching is asking whether the lawyer realized that it was practically certain that his conduct would be interpreted by the witness as an inducement to testify falsely.[64]

According to Wydick's classification, even if there was no actual knowledge, so long as the lawyer's conduct was "'openly' or 'on its face"[65] an inducement to testify, that qualifies it as grade one witness coaching. To put it in legal terms, knowledge, actual or constructive, will be a sufficient mental element to find a lawyer guilty of grade one witness coaching.

Knowledge can also be inferred from the circumstance. This takes the requirement to another level – instead of only penalizing lawyers with actual or constructive knowledge with regards to the circumstances the lawyer is in (more akin to the subjective standard), a new category where the lawyer could be held liable for an objective standard of mental requirement emerges.

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61 *Supra* note 10 at 322-323. See also Freedman, M H, "Counselling the Client: Refreshing Recollection or Prompting Perjury?", *Litig*, Spring (1976) 35, p 36 and Salmi, *supra* note 11, pp 165-166.

62 *Supra* note 11, p 166.

63 *Supra* notes 14-20 and accompanying text.

64 *Supra* note 21, p 19.

65 *Ibid.*

Professor Hazard and Hodes explain that:

> "In such a case, the lawyer will be legally chargeable as if actual knowledge had been proved In terms of what can be 'proved', the 'knows' standard thus begins to emerge with the 'should have known' standard, for often it will be impossible to believe that a lawyer lacked knowledge unless he deliberately tried to avoid it. *But one who knows enough to try to evade legally significant knowledge already knows too much.*"[66] (emphasis added)

2. Grade Two Witness Coaching

Grade two witness coaching refers to the case where a lawyer knowingly induces the witness to give false testimony, but this instruction is conveyed to the witness covertly rather than overtly (*à la* grade one witness coaching)[67]. The inducement is masked and transmitted by implication and if the witness understands the message, he may choose to go along with the veiled instructions that he has been given.

Wydick cites as an example the case of the Lecture:[68] an attorney tells the witness prior to the hearing what the witness has to say so that the witness is clear as to what the lawyer is seeking to argue, and what facts are needed to support this line of argument. In the case of a client-witness, naturally the client would be inclined to understand that the lawyer is implying to him, as to what he will need to testify in order to win the case and in such a case the temptations to follow the instructions of the lawyer are great.

Most lawyers choose to covertly imply to their witnesses rather than tell them flat-out what to say because implication is safer for both parties – the chance of inducement is harder to detect and prove. There is also the desire on the part of the lawyer not be seen as unethical and dishonest. If he told the witness overtly what to say and the witness declined on ethical grounds, the lawyer would look very bad. Similarly, the witness is more inclined to accept the lawyers offer to lie since there has been no express offer to lie and the witness need not expressly assent; he merely has to comply. Hence both are able to maintain the false impression that they have done nothing wrong.

3. Grade Three Witness Coaching

When a lawyer unknowingly induces the witness to give false testimony, this will constitute grade three witness coaching.[69] Since memory is something that is highly malleable, anything that the lawyer says or asks may have the effect of altering the witness' perception, and therefore, unknowingly falsifying the witness' testimony. Unlike the former two grades of witness coaching, there lacks in this case, the element of corruption.[70] There are also no safeguards against grade three witness coaching and no efficient way to police it. But the effects are the same as that of grade one and grade two witness coaching since it interferes with the court's truth-seeking function.[71]

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66 Hazard, G C, Jr and Hodes, W W, *The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct*, (2nd edn., Supp 1994) 402 at *lxxii*.

67 *Supra* note 21, p 25.

68 *Ibid*, pp 25-26. See also *supra* Part II B on "The Lecture".

69 *Ibid*, p 38.

70 *Ibid*.

71 *Ibid*.

B. The Proposed Gradation Scheme

Rather than considering what the witness perceives to be the message that his lawyer is sending to him in determining the magnitude of the lawyer's misdeed, an alternative method would be to consider the state of mind of the lawyer himself. There is nothing in the *Model Rules* that prevent such an interpretation and it is submitted that such an analysis would be worthy of consideration.

The reason to choose to find fault on the basis of what the witness perceives is perhaps because it would be easier to prove fault – considering that every lawyer in an attempt to save his skin, would lie and say that he did not foresee that the witness would so interpret his words and so argue that he did not have the requisite mental element. This is based on the assumption that since what is in issue is the state of mind of the lawyer, the only person who can attest to that state of mind would be the lawyer himself. This however, is an assumption that seems to forget that proving of *mens rea* is a longstanding requirement in criminal law. There is nothing that says that one's *mens rea* can only be attested to by the defendant. In fact, what is normally done is that the *mens rea* element is often inferred from the surrounding circumstances.

Likewise, in the case of witness coaching, the determinant of whether or not the lawyer did coach and if so, how serious that coaching was, ought to be judged according to the lawyer's state of mind. He should not be able to escape guilt merely because his witness was slow to understand that he was implying that the witness lie or that the witness was of such a fortified ethical nature that the thought of lying itself could not possibly have crossed his mind. Where a lawyer forms a guilty thought, develops an intention to carry out that wrong, and in fact acts on that intent, he ought to be found guilty of coaching.

1. Intentional Inducement

The first degree of witness coaching that warrants the highest amount of punishment refers to the case where a lawyer knowingly and intentionally induces a witness to offer false testimony. This can be proved with evidence that there was an express giving of instructions to lie or a blatant attempt on the part of the lawyer to alter or falsify the testimony of the witness in the execution of any of the seven methods of witness preparation suggested by Professor Applegate.[72] Whether or not the witness does end up giving false evidence or misleading the jury, so long as it can be proved that the lawyer had instructed him to deviate from the ethical course of conduct, he has committed coaching in the first degree.

2. Inadvertent Inducement

Bearing in mind the unique position that lawyers hold – with their duty split between serving their clients and serving the courts – lawyers ought to be on guard at all times to check if there has been a breach of their duty. It is because such a duty is attached to them that in the event that they inadvertently breach their duty not to perjure or to coach a witness, they ought to be found answerable.

The lawyer must have acted *so inadvertently* that any prudent and competent lawyer in his position would have realized that his witness would interpret those words as an indication to lie. The lawyer might not have known, but he *ought* to have known, it being his express duty to

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72 *Supra* Part II.

avoid committing such unethical acts.

3. Innocent Inducement

Where the lawyer does everything in the seven steps of witness preparation normally without any intention to perjure, but the witness' final statement is still tainted by the lawyer's influences, the lawyer should still be held liable considering that the court's truth-seeking function has nevertheless been interfered with. However, his penalty should be reduced considering that there is an absence of corrupt intent, but a small penalty should nevertheless be imposed so that the lawyer will be much more aware of the effects his words might have on future witnesses.

This may seem to be very hard on the lawyer, who might very well have been acting under the notion that all he did was to litigate zealously for his client. Yet, lawyers should be held to a very high standard – not only because they hold a very unique fiduciary position in relation to the clients but also because they are, after all, officers of the court. To tighten the belts of the profession as a whole so as to prevent two or three cases of coaching is extremely justified since even without this categorization and the express recommended penalties for each category, a lawyer should observe ethical practices nevertheless.

V. To Coach or Not To Coach?

A. Two Countries Divided by a Common Language[73]

Having examined the various ways in which a lawyer may prepare his witness and having discussed the different degrees in severity of witness coaching a lawyer may be found liable of, it is apparent that although coaching is highly probable when the seven methods of preparation are being carried out, the advantages of witness preparation, along with the ethical duty of the lawyer to litigate zealously for his client outweigh the dangers posed. But is there really a need for such a trade-off? Can lawyers not thoroughly prepare their witnesses without succumbing to the temptation to coach? Or do lawyers really need to be told precisely where the boundaries lie – to be told what they can do and what they are not allowed to and if the former, how it should be done? More intriguingly, why is it so commonly done in the States when it is hardly heard of in England?

Some attribute this to the difference in moral standards and a generally more liberal approach to the regulations in the States. It is hard to understand or to support a claim that our American counterparts are in anyway less moral than we are or that they adopt a generally more liberal interpretation of their codes and guides. One could infer so, from the fact that the Americans have always been pioneers and adventurers in a variety of fields (eg socially, technologically) but to link that to legal practices would sound too much a long-shot.

There are those who believe that there is no hope for lawyers – regardless of the jurisdiction they serve in since all lawyers are tempted to think in a way which makes breaking the rules hard but crossing the boarders too easy. Zacharias and Martin believe that "the problems in ethical lawyering often develop because lawyer think about issues in precisely [these] terms;

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73 Said by George Bernard Shaw. Quote found in *The Macmillan Dictionary of Quotations*, (New York: Macmillan Publishing Co, 1989), p 586.

namely, how their intended conduct falls within the confines of rules, codes and statutes"[74]. And indeed Michael Owen Miller once remarked that if a lawyer had to think if he was crossing the ethical boundary, he was probably standing too close to it already.[75] When a lawyer seeks to carry out certain acts that he knows might very well breach the existing codes, he is trying the patience of the rules laid down, so to speak. Zacharias and Martin consider that the only way around the problem is for lawyers to become aware of the unethical nature of the acts they seek to do and refrain from doing so on their own intuition – without added regulations and penalties to regulate them.

Others believe that the problem of witness coaching only exists in the States but not in England. This indicates that whatever differs the legal system of America from the United Kingdom will likely be the reason behind the divergence in legal practice.[76] The argument hinges on the fact that there remains a split profession in the UK[77] where witness preparation is generally carried out by the solicitor rather than the barrister. Hence, the chances of distorting the witness' testimony are greatly reduced. And although the code of conduct for the English Bar is generally unwritten and unarticulated, it is an accepted fact among persons within the profession that barristers are prohibited from interviewing the witnesses prior to their taking the stand.[78] It is for this reason that oral testimony given by witnesses in the UK are markedly more spontaneous and unrehearsed as compared with direct-examinations in an American trial.[79]

In Hong Kong, witness coaching is rare for the same reasons – here, we have a split profession and each stage of the witness preparation process is handled by the solicitor. All the information collected will then be passed on to the barrister assigned the brief who does not have the benefit of his American counterpart in ascertaining the precise way in which his witness will respond in the stand. The solicitor, in the course of his preparation will also not have the chance to mould the testimony of the witness, since he being a legal "generalist", will not have the sufficient expertise in the field of advocacy to determine what the client's case requires and the best combination of phraseology that will be particularly persuasive to a jury (this is the task for the legal "specialist" – the barrister to acquire).[80] This "division of labour", though at times tedious,[81] proves to be the best safeguard against the problem of witness coaching since it isolates the person who can best coach from interviewing a witness until the direct-examination.

Apart from the structural safeguards that we have here in Hong Kong, there are also a number of relevant provisions in the *Code of Conduct* and the *Guide to Professional Conduct.*

B. Present Safeguards in Hong Kong

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74 *Supra* note 29 at 1001.

75 *Supra* note 36, p 14.

76 See Miller, K L K, "Zip to Nil?: A Comparison of American and English Lawyers' Standards of Professional Conduct", *CA* 32 *ALI-ABA* 199 for an excellent account on the differences in legal practices and the likely underlying causes. See also Zacharias and Martin, *supra* note 31, p 1010 and footnote 36; Wydick, *supra* note 21, pp 5-8; Van Kessel, *supra* note 8, pp 431-435.

77 Despite the fact that there were serious talks on reforming the system in the UK so that there would be a fused profession, there remains up to this day a clear distinction between solicitors and barristers.

78 Miller, *supra* note 76, pp 217-218.

79 Harvey, C P, *The Advocate's Devil*, (London: Stevens, 1958), p 66.

80 *Supra* note 21, p 5.

81 *Ibid,* p 7.

1. The Code of Conduct

Within the *Code of Conduct*[82] (the "*Code*"), there is no express provision for the practice of witness coaching. There are however, several articles that tie into the topic:

In art 110 and art 135 of the *Code*, a barrister's duty to litigate diligently for his client is provided for. Though worded somewhat differently from the States' *Model Rules,*[83] both are understood by those within the profession in the same way. Article 130 states a barrister's duty not to deceive or to mislead the court. There are times when the two duties mentioned might conflict, like in the case of over-zealous witness preparation.

The articles that bear the most relevance fall under the heading of "Conferences and Consultations". In this area, art 141 requires the barrister to be on call for a pre-trial conference where it is necessary and practicable even if the instructing solicitor makes no move to arrange such a conference.

Article 142(a) prohibits a barrister from having anything to do with the client in the absence of the instructing solicitor or an authorized representative. Exceptionally, a barrister may be allowed to interview a witness for the purpose of clarifying matters – but this must also be done under the supervision of an instructing solicitor.[84]

Article 143(2)(b) provides that if the instructing solicitor or his representative are both absent, then a barrister may, again, exceptionally, interview any supporting witnesses. A lay-client who has been detained may also be interviewed in the absence of the solicitor so long as the permission to do so has been given by the latter.[85]

According to art 145, a barrister may not interview a witness or have any form of communication with him, save with the permission of the opponent.

Aside from the various articles, one must also pay attention to Annex 12 of the *Code* which states that counsel for the prosecution is likewise barred from interviewing a witness unless the person who instructs the prosecution witness is present.

2. The Guide to Professional Conduct

The governing principle for solicitors is akin to a barrister's duty to act diligently for the interest of the client.

The first relevant principle would be principle 6.01 of the *Guide to Professional Conduct* (the "*Guide*"), which states that a solicitor has the duty to act competently. He is also forbidden from attempting to exclude any liability for his professional misconduct. Similarly, a solicitor is required under principle 11.01 to act in good faith with his overriding duty to the client. Hence if a court finds that the solicitor has in fact coached a witness and has thus tampered with the witness' testimony, he cannot defend himself by saving that he has an arranged disclaimer

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82 http:// www.hkba.org/code-of-conduct/home.htm

83 The American Bar Association's *Model Rules of Professional Conduct* where it states that an attorney is to litigate zealously in the interest of his client. Note that the Model Rules are generally the more accepted standard of ethical behaviour among the states. See *supra* note 65, p xvii.

84 *Code of Conduct,* art 142(b).

85 *Code of Conduct,* art 144.

with the client. Just as a barrister owes a dual-duty to both client and court, so a solicitor is also bound not to deceive the court or to participate in such deception. This would be the strongest reason against a solicitor teaming up with the barrister he instructs for the purpose of altering a witness' testimony.[86]

Principle 10.12 stipulates that a solicitor may choose to interview a witness at any stage of the proceedings, but to do so after a witness has been called by an opposing side would be to open himself to the suggestion that he has tampered with evidence – particularly if the witness subsequently changes his statement.[87] When interviewing the opposite party, the solicitor must also obtain the consent of the opposite side's solicitor.[88] Should a solicitor realize that there is professional misconduct on the part of another solicitor, this must be reported to the offending solicitor's firm and to the Disciplinary Council pursuant to principle 11.03.

Principle 12.01 calls for the solicitor to ensure that the barrister instructed in the case is adequately instructed and all the relevant documents are passed on to him in good time. He is also required to arrange for conferences to clarify instructions through discussions with both the solicitor and the client or to discuss the facts and applicable law.

It can be seen that both the *Code* and the *Guide* not easily applied to the case of witness coaching, since there is no express provision for it. They mainly spell out the structural differences between the States' approach and the traditional English approach whereby a solicitor prepares the witness and the barrister does not. This overconfidence in our traditional system's ability to prevent witness coaching renders our *Code* and *Guide* lacking in any express safeguard against this form of malpractice.

This is apparently insufficient. It is suggested therefore, that lawyers should look for guidance elsewhere. Several suggestions have been made by persons from a variety of fields. These will be examined in the following section.

C. A Word with the Shrink

> "Magistrate: But the . . . situation at present is in a hopeless muddle. How do you propose to unravel it?
> Lysistrata: Oh, it's dead easy"[89]

Other than relying on the written codes that we have at present, the lawyers of Hong Kong, like their British doppelgangers, rely heavily on agreed and unarticulated standards of conduct. Self-regulation plays a major role in shaping the image of lawyers in the UK as well as in Hong Kong and for that precise reason, our Law Society and Bar Association have their own disciplinary tribunals to handle cases of misconduct and malpractice.

Yet, this is by no means a fool-proof system. Although there is a split profession, there are still ways in which a solicitor and a barrister could "team up" to attempt to alter the testimony of the witness. What is urgently called for is better professional responsibility and ethics courses to be taught at law schools with constant updating and reforms in the curriculum to keep up with the new and varied problems faced by lawyers in practice.[90] Some scholars, though, are sceptical

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86 *Guide to Professional Conduct,* principle 10.03, http://www.hklawsoc.org.hk/members/conduct.shtml.
87 See commentary to principle 10.12.
88 *Guide to Professional Conduct,* principles 10.21, 11.02.
89 Aristophanes, *Lysistrata,* Act One, (London: Penguin 60s Classics, 1995), p 41.
90 *Supra* note 10, p 279 and *supra* note 29, pp 1006, 1015.

about the likelihood of this happening in the manner contemplated:

> "Actual integration into assigned readings and classroom discussions has been slow to follow, however, for a variety of reasons. Even the most casual review of the table of contents of commonly adopted casebooks shows the transubstantive character of the course . . . In light of the range and complexity of these subject matter areas, most professional responsibility teachers will not respond enthusiastically to a proposal to add still another topic to the classic curriculum . . . The basis for their resistance is neither difficult to articulate nor entirely without merit. The course is already bursting at the seams. The law of lawyering has become so complex that issues relating to the routine practice of domestic law are regularly shortchanged."[91]

With no written guidelines for lawyers in Hong Kong to follow and poor prospects of witness preparation techniques being taught in law schools, the driving force keeping us from tipping over to the field of unethics is our internal introspection.[92] This, it has been suggested, can be cultured in the profession through ethics and professional responsibility courses and by an overall increase in the amount of exposure of the problem of witness coaching in legal scholarship. However, at present there is barely any literature written by legal scholars, practitioners or even by sociologists. Applegate attributes this as being one of the reasons for many lawyers unknowingly falling into the pitfall of witness coaching.[93]

Apart from asserting that better ethics courses should be taught at law schools and that more legal literature should be devoted to this area, one should also be aware of the advice that many psychologists and philosophers have given on this topic. This will be discussed below.

1. Philosophical Advice on Witness Preparation: Grice's Theory of Conversational Implicature

Within the study of linguistics, there is a branch which lawyers and legal scholars may draw wisdom from. This branch is called pragmatics and is the study of how language is used as a tool in communicating with another. Grice formed a theory that there was a supposed difference between the symbols of formal logic and their natural language counterparts (the Theory of Conversational Implicature). Thus a speaker could mean a different thing from what he is superficially saying or he could be conveying a lot more than what he says.[94]

Grice begins by explaining that when someone "says" something, he means what he says verbally and superficially. For the deeper or "real" meaning behind those words that the speaker seeks to convey to his hearer, Grice coins the term "implicature".[95] This he incorporates into the cooperative principle of conversation, which states that people do not usually utter a series of disjointed and unrelated sentences. Rather, these sentences tend to be linked and aimed at a common direction. These links can be found in the four conversational maxims that dominate a conversation: Quantity, Quality, Relation and Manner.[96]

When a speaker violates one of the maxims, he might be doing so in order to send an unstated

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91 Daly, M C, "The Ethical Implications of the Globalization of the Legal Profession: A Challenge to the Teaching of Professional Responsibility in the Twenty-First Century", 21 (1998) *Fordham Int'l L J* 1239 at 1239, 1248, 1249.

92 *Supra* note 29, p 1015.

93 *Supra* note 10, p 279.

94 Grice, P, *Studies in the Way of Words,* (Cambridge, Mass: Harvard University Press, 1989), back cover.

95 *Ibid,* pp 24-25.

96 *Ibid,* pp 26-27.

message to his hearer. The hearer could attempt to interpret those words (knowing that they are flouting the maxims of conversation) as though no maxim has been violated[97] or he may understand it as hiding another meaning.[98]

It is submitted that Grice's theory of Conversational Implicature ought to be taught in professional responsibility courses. In this way, lawyers who in the future prepare witnesses will be aware of the hidden messages that they may be unknowingly sending to the witness and hence indirectly altering his testimony. If it were argued that professional responsibility courses are already saturated with materials that have to be covered, then perhaps a wise step would be to offer so-called "broadening" courses in linguistics to students who are interested in becoming barristers and solicitors specializing in the field of litigation. This should also be made a prerequisite for the eligibility for admission to the bar or for positions that require a solicitor to prepare witnesses.

2. Wydick's Proposed Method of Analysis

Professor Wydick offers an easy four-step test that a lawyer should ask of himself before he poses a question to a witness:

- Will the next question/statement *overtly* tell the witness to testify to something that is known to be false? *If not,*
- Will the next question/statement *covertly* tell the witness to testify to something that is known to be false? *If not,*
- Is there a legitimate reason for asking/making the next question/statement? *If yes,*
- Is the question being asked/statement being made in a manner least likely to harm the quality of the witness' testimony? *If not,*

then the question should not be asked/statement should not be made.[99]

How then is one to understand if the manner in which a question is asked or a statement is made is the least likely to harm the witness' testimony? Here, Wydick borrows from psychological and cognitive techniques.

3. Psychological Advice on Witness Preparation: The Non-suggestive Interview

The amount of details that a witness is able to tell the lawyer is definitely not a complete account of the events, but the accuracy of those that a witness is able to narrate is very high. This is called "recalling".[100] By contrast, a lawyer would be able to derive far more information from the witness if he asked the witness a series of specific questions, but the amount of

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97 An example provided in Wydick, *supra* note 21 at 30 illustrates the point succinctly:
> "When I bid my wife farewell before departing for the day, I anticipate a response that pertains fondness, or departure, or both. Instead, I get a weather report, 'It is raining'. That is irrelevant to the matter at hand. My wife has flouted the maxim of relevance. That warns me that I must interpret her statement as though it were relevant. I thus discover her fond, departure message, 'Take an umbrella, dear, so you won't catch a cold'. That is a conversational implicature."

98 Take for example, a friend notices that you are saying something that perhaps you should keep to yourself, and he makes an abrupt change of the topic, he flouts the maxim of relevance and the hearer ought to receive that as a hint to watch what he is saying.

99 *Supra* note 21 at 38-39.

100 *Ibid.* at 41-42.

information will be compromised by the lower level of accuracy. In order for the lawyer to be able to achieve both accuracy and detail, most psychologists recommend that the lawyer should allow the witness to first recall by asking him broad and general questions and then go on to the more specific questions in order to extract the details from the witness.

Moreover, Wydick notes that there have been studies that show that the use of different words in the formulation of a question could alter the witness' answer.[101] Hence a lawyer ought to take extra care not to lead a witness into saying what he wants the witness to say.[102]

Lawyers are often tempted to ask questions concerning the main focus of the event or matter relating to the central characters in the scenario since they believe that this is the main purpose of the interview or because they are eager to extract the information most relevant to their case. However, this sequence (radiating from the central characters and the main event) may not be the way in which the recollection was first stored in the memory of the witness' mind – this means that this will not be the way to get as many details as possible from that witness[103] but only those that the lawyer views to be most important. What the Morris study suggests is that if the lawyer asks open-ended questions at the beginning and observe how the witness answers the questions – that particular way of retrieving the information will probably be the way in which the memory was first stored. The lawyer can then pick up from there and proceed to interview the witness following that train of storage pattern.[104] One criticism of this approach is that lawyers are not trained for this sort of psychological analysis of the various forms of storage patterns and even if they were able to identify a pattern, they might not know how to formulate a question according to that pattern so that the witness testimony is harmed the least.

It is for this reason that one must look elsewhere for guidance and Wydick next suggests the use of the Cognitive Interview.

4. The Cognitive Interview

Over a period of more than twelve years, Edward Geiselman, Ronald Fisher and their team have developed a method of investigative interviewing that is comprehensive and helps the lawyer to "coach less and learn more from witnesses".[105] This they have termed the "Cognitive Interview" and it has been proven that this system of interviewing technique generally raises the accuracy and output of the witness by 25 – 30 percent.[106]

The cognitive theory comprises four stages – two of which are derived from the well-known cognitive postulate that the effectiveness of a retrieval cue depends on the likeness to the situation in which the witness acquired the perception.[107] This is particularly important to bear in mind when one is conducting the first stage of the interview. This does not mean that the lawyer is obliged to take the witness back to the scene where the event took place, but it would

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101 Wydick notes a study conducted by Elizabeth Loftus and Guino Zanni on the different results that were attained when two questions were formulated differently - "did you see the thin man in a blue suit?" was received more affirmative answers than "did you see a thin man in a blue suit?". Similarly, "do you get headaches frequently and if so how often?" saw more frequent headaches than "do you get headaches occasionally and if so how often?" did. *Ibid*, at 43.

102 *Ibid.*

103 *Ibid*, at 44.

104 *Ibid.*

105 *Ibid*, at 45.

106 *Ibid*, at 47.

107 *Ibid*, at 45.

be preferable if the lawyer could start off the interview by asking the witness to place himself where he first acquired the memory mentally.

The second stage is to get the witness to tell the preparer everything that he remembers. The common mistake that most lawyers make is to tell the witness in advance that only certain areas are of relevance to the case – this interrupts the retrieval process of the witness and the likely outcome is that the lawyer will not get as much *relevant* information if he did away with the irrelevant. Hence, in the second stage, the witness should be urged to lower the standard of relevance and to tell the lawyer even pieces of memory that appear incomplete and irrelevant.

The third stage is akin to the conclusions of the Morris study[108] and it asserts that different people store memory in different patterns and that the lawyer ought to be alive to that fact when beginning the interview. Instead of directing the witness to tell him what he remembers in a particular format, he should ask the witness to just tell him what he remembers and allow the witness to demonstrate to the lawyer which way best helps him retrieve the information.

The final stage helps the problem witness (who are unsure of what they remember or are highly inarticulate) to explore a variety of paths through which it would be most comfortable for him to tell the lawyer what he remembers. Having gone through as much as possible the story from the witness' perspective, he should be led to think of the events from the perspectives of other witnesses that might have been present when the event occurred. Note must be had, though, that many witnesses interpret reviewing the event from another's point of view as an invitation to guess or fabricate – the lawyer should caution the witness otherwise before beginning this stage and inform him of the motive for using this approach.[109]

In 1987, having modified the Cognitive Interview, Geiselman and Fisher now propose the New Formula for investigative interviewing witnesses.

5. The New Formula

At the introductory stage, the lawyer should seek to put the witness at ease. This could be done by interviewing witnesses at venues that are less intimidating (many people, for example are very intimidated by large conference rooms or brightly lit areas and would much prefer to be interviewed in the comfort of their homes rather than at a solicitor's firm). Next, the witness should be taken through the first preparation technique suggested by Applegate by explaining to the witness his role in the case and familiarizing the witness with the importance of his truthful testimony.[110] Having gone through the preliminaries, the witness should begin to dominate this stage of the interview while the lawyer ought to be listening, guiding and probing only when necessary. Wydick suggests that the four stages of the cognitive interview ought to be explained to the witness and adhered to as much as possible in the subsequent stages of the interview.[111] However, that serves no apparent function and might very well confuse the witness, who is suddenly thrown a handful of cognitive terms. It is submitted therefore that the lawyer ought to keep the Cognitive Interview to himself and follow it as much as he can without the need of educating the witness on his anticipated scheme of interviewing techniques.

In the second stage, the lawyer should strategically ask an open-ended general question

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108 *Supra* Part V C 1.
109 *Supra* note 21, p 51.
110 *Supra* Part II A.
111 *Supra* note 21, p 48.

designed to elicit the entire story from the witness. Wydick notes that this is not an information gathering stage, but rather a planning stage, whereby the lawyer "should be designing the best way to probe the witness' memory".[112] In another words, this is the stage where the lawyer is to discover the storage pattern of the witness and to plan how he can best attempt to execute the fourth method of witness preparation.[113]

In the third stage, the probing stage, which is the main information gathering stage of the interview, the witness should be asked to focus on one topic at a time and his memory exhausted before moving on to another topic. The lawyer must be cautioned at this stage not to interrupt the witness when he is giving an answer and that he must not move on to a different topic if the witness' memory is not yet exhausted. This is because interrupting the witness poses a high risk of what the lawyer said being incorporated into the perception of the witness. Allowing the witness to say all that he has to say, free from interruption is also a sign of encouragement, and should the witness seem hesitant, the lawyer should not hurry the witness along but rather, gesture for him to continue. If the lawyer moves on to a new topic before the witness has said all that he has to say on that topic, the chances are that he will not remember the details that he left out previously, should the lawyer return to that "unfinished" topic subsequently.

Wydick suggests that the lawyer can attempt to guide the witness with closed-ended, leading questions[114] but there lies a serious danger that the witness, whose memory has already been exhaustively tried, might give inaccurate answers if leading questions were used. The probing stage, it is submitted, should be comprehensive enough without the need to use leading questions, which is precisely what Grice's theory of Conversational Implicature seeks to avoid.

Having probed and derived a collection of information from the witness, the fourth stage of the New Formula requires that the lawyer repeat to the witness everything that is relevant. This stage is immensely important since it makes sure that the witness has been correctly understood and gives the witness a final chance to add any forgotten details that might have been left out earlier.[115]

In the final stage, the lawyer should end the interview on as positive a note as possible and try to leave a favourable impression on the witness.

VI. Conclusion: Likely Advantages and Problems with Witness Preparation

The various suggested techniques help to reduce the likelihood of witness coaching when conducting witness preparation, since the chances of covert or overt witness coaching remain significant even in our system where there are barristers and solicitors and a tradition of fair-play, the Bar Association and the Law Society ought to take a closer look at the suggestions made by philosophers, psychologists and cognitive scientists on how best to prepare a witness. The need to eradicate the problem might not be as pressing as in the States, but nonetheless, the need is still present. As the old saying goes, "prevention is better than cure" – since we are well aware that there is the existence of such a danger, why should we not guard against it before it strikes? We could very well pride ourselves on our split profession and how that takes care of everything, but in actuality, it might not. Who is to say that a solicitor may not act unethically

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112 *Ibid,* at 49.
113 *Supra* Part II D.
114 *Supra* note 21 at 49.
115 *Ibid.*

when he is preparing the witness? Surely the solicitor knows as much as (if not far more than) the barrister assigned the brief and although it could be argued that the solicitor could not falsify the testimony of the witness due to his ignorance in the skill of advocacy, one has to bear in mind that solicitors too have a right of audience in lower courts. This will surely give them enough knowledge about litigation to coach a witness. As for the barrister who is not allowed to interview the witness, coaching is still possible since the *Code of Conduct* allows for interviews with the witness so long as it is done in the presence of the solicitor, or exceptionally, in the absence of one.[116] This leaves the possibility of coaching open to an unethical barrister or a barrister who overtly does so without even realizing it.

It is for these reasons that although witness coaching is at present not an epidemic, it has potential to seep into Hong Kong's legal practices. However, it might be unwise to expressly sanction it in the *Codes* and the suggested train of action should be to teach and warn against it in professional responsibility courses at law schools and an increase in exposure of the problem through journal articles and formal opinions of the Law Society or the Bar Association.

In the long run, if the bodies involved are willing to take the time to examine the suggestions that scholars from various professions have given, Hong Kong's legal practices could be guarded against the problem even before it sets in the system. The profession will not be caught unexpected and will know precisely how to deal with the problem when it does surface.[117]

There are foreseeable problems with an express introduction of the practice of witness preparation and the dangers of witness coaching in Hong Kong. As Zacharias and Martin have noted,[118] lawyers tend to act unethically owing to their habit of looking at the regulations and making sure they are at the very limit but not falling across the line. If the *Code of Conduct* and the *Guide to Professional Conduct* expressly define coaching, forbid it and impose penalties on it, this might lead to more unethics than if there were no provision for it.

Especially troubling is the Darwinistic character of witness coaching – it is hard to detect, hard to monitor and hence impossible to implement any safeguards against it. The only way of rooting it out is to start where it breeds – the internal introspection of the lawyers. This can only be done in law schools or training seminars that the larger firms might hold concerning witness coaching.[119] However, there is a strong resistance from those in the legal education departments to make any changes or to cater to new and relatively unknown topic.[120] The profession's internal introspection, the root of all evils, hence do not see the likelihood of change anytime in the near future and lawyers will remain the "purveyors of falsehoods"[121] until somebody is willing to do something about it.

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116 *Supra* Part V B.

117 Which, it is predicted, will be bound to happen sooner or later, This stems from the fact that even in England, there are already signs that witness coaching is being carried out. See, for example, Diana Beaver's NLP "School of Witness Coaching" in *Creating Credible Witnesses in Court*, http://www.dianabeaver.co.uk/witness.htm.

118 *Supra* note 29, p 1001. *Supra* Part V A. See also Gaetke, E R, "Litigating Zealously Within the Bounds of the Law: Forward (renewed)", 87 (1998/1999) 87 *Ky L J* 903 and Rubin, M H, and Judge Brady, "Simply Complying With the Rules Doesn't Make You an Ethical Lawyer" in Stetter, R A, (ed) *In Our Own Words: Reflections on Professionalism in the Law*, (Louisiana: Louisiana Bar Foundation, 1998), p 93.

119 *Supra* Part V A.

120 *Supra* note 91.

121 *Supra* note 7.

THE APPLICATION OF "PUBLIC ORDER" (*ORDRE PUBLIC*) AS RESTRICTION ON FREEDOM OF EXPRESSION

YIP TUNG-SANG

This paper focuses on the application of "public order" (*ordre public*) as a ground of restriction on freedom of expression in the context of Hong Kong. Emphasis will be placed on its definition by the Court of Final Appeal in the recent controversial national flag case.[1] Suggestions on how this restriction should function in Hong Kong to strike a balance between the individual freedom and the interests of the community through the reference from international practice and standard will be discussed. However, before turning to that, it is crucial to determine the justifications of freedom of expression and the laws which guarantee as well as restrict the freedom since they form the basis of other parts of the paper.

I. Introduction – Justifications for the Freedom of Expression: its Values and Functions[2]

Freedom of expression has been humanity's yearning. Cato's anguished *Cri de coeur* "[w]here a man cannot call his tongue his own, he can scarce call anything his own", articulates an almost "universal lament".[3] The concept of freedom of expression has been recognised as an essential foundation of all other human rights in democratic society.[4] It was proclaimed in a resolution of the first session of the United Nations General Assembly that:

> "[Freedom of expression] is a fundamental human right and . . . the *touchstone of all of the freedoms* to which the United Nations is consecrated."[5] (*emphasis added*)

Freedom of expression, in terms of democracy, is essential to assure one's self-fulfillment since the essence of democracy is to allow different voices to be heard by the public at large.[6] It

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1 *HKSAR v Ng Kung-siu and another* [2000] 1 HKC 117.

2 There are many justifications for freedom of expression. This paper focuses on the argument for democracy and the argument for harmony and stability. They are more relevant for the discussion in the following parts of the paper as emphasis will be placed on the conflict between the restriction "public order" and the democratic development and harmony of a community. For detailed discussion on other justifications like the consequentialist and non-consequentialist justifications, please refer to Kent Greenawalt, "Free Speech Justifications" in Singh, M P (ed), *Comparative Constitutional Law* (Lucknow: Eastern Book Co, 1989).

3 Sorabjee, S J, "The Importance and Use of International on Comparative Law: the Indian Experience", *The article 19 Freedom of Expression Handbook* (Britain: The Bath Press, 1993), p 3.

4 It was agreed by Kevin Boyle that freedom of expression is the essential underpinning for the enjoyment of all other rights, including civil and political rights, freedom of thought and religion, privacy, freedom of association and assembly, and freedom of information and publicity. See Kevin Boyle, "Freedom of Opinion and Freedom of Expression" in Chan, J and Ghai, Y (eds), *The Hong Kong Bill of Rights: A Comparative Approach* (Butterworths Asia, 1993), pp 304-5. It was also argued by K J Partsch that freedom of expression is "one of the cornerstones of human rights and has great importance for all other rights and freedoms." See Partsch, K J, "Freedom of Conscience and Expression, and Political Freedoms" in Henkin, L (ed), *The International Bill of Rights: the Covenant on Civil and Political Rights* (New York: Columbia University Press, 1981), p 216.

5 General Assembly Resolution 59(1) of 14 December 1946.

6 Boyle, K, *supra* note 4, p 307; Emerson, T I, *The System of Freedom of Expression* (USA: Ransom House Inc, 1970), pp 6-7.

enables the circulation of ideas and maximises the diversity of opinions.[7] It was accepted in *Abrams v United States* that "the best test of truth is the power of thought to get itself accepted in the competition of the market".[8] The search for the truth would be handicapped and democracy cannot be achieved if such freedom is suppressed. The European Commission on Human Rights in *Handyside v UK*[9] recognised that freedom of expression is "to promote the individual self-fulfillment . . . the attainment of truth"[10] and these elements are the "demands of that pluralism, tolerance and broadmindedness without which there is no democratic society".[11]

A greater degree of harmony and stability can also be ensured if freedom of expression is protected because the public is then more ready to compromise and accept different views through open discussion. The possibility of making rational judgment is then higher as different ideas allow people to think more critically by analysing a particular issue from different perspectives. "Conflicts", which is essential for the progress of a community, can then be preserved and tolerated without destroying society.[12]

However, despite the justifications and importance of freedom of expression mentioned above, it is unusual to find the grant of such a right in absolute terms and a balance between the degree of the right to freedom of expression and the interests of the community as a whole must be struck.[13]

II. Sources of Law relating to the Freedom of Expression in Hong Kong

After the transfer of sovereignty, the principle instruments in the new constitutional order are the *Basic Law of the Hong Kong Special Administrative Region* (*Basic Law*) and the *Hong Kong Bill of Rights Ordinance*, Cap 383 (*Bill of Rights*).[14] Therefore, to find out the sources of law relating to freedom of expression under this new constitutional order, it is best to refer to the relevant provisions of the *Basic Law* and the *Bill of Rights*.

Freedom of expression is guaranteed by art 27 of the *Basic Law* which reads:

> "Hong Kong residents shall have *freedom of speech*, of the press and of publication; freedom of association, of assembly, of procession and of demonstration; and the right and freedom to form and join trade unions, and to strike." (*emphasis added*)

Although the word "*speech*" is used, it was accepted by Justice Bokhary PJ in *Ng Kung Siu*[15] that "given the breadth to be ascribed to the word 'speech' in the constitutional context, the freedom of speech and the freedom of expression amount to the same thing".[16]

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7 For detailed arguments on this issue, please refer to Keane, J, *The Media and Democracy* (Oxford: Blackwell, 1991).

8 *Abrams v United States*, 250 US 616, 628 (1919).

9 *Handyside v UK*, Report of the Commission, 30 September 1975, Series B.

10 *Ibid*, paras 146-7.

11 *Ibid*, para 64.

12 Yuen, Y, "The Freedom of Expression and article 23 of the Basic Law", (1997) 3 *HKSLR* 188.

13 Ghai, Y, "Derogations and Limitations in the Hong Kong Bill of Rights" in Chan, J and Ghai, Y (eds), *The Hong Kong Bill of Rights: A Comparative Approach* (Butterworths Asia, 1993), p 161.

14 Ghai, Y, "Freedom of Expression" in Wacks, R (ed), *Human Rights in Hong Kong* (Hong Kong: Oxford University Press, 1992), p 369.

15 *Supra* note 1.

16 *Ibid* at 143 E-F.

Freedom of expression is also guaranteed by art 16(2) of the *Bill of Rights*. The equivalent article in the *ICCPR* is art 19(2). Paragraph 2 of each provides:

> "Everyone shall have the right to *freedom of expression*; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice". (*emphasis added*)

Article 19 of the *ICCPR* is incorporated into the *Basic Law* by the virtue of art 39 of the *Basic Law*. Article 39 provides that "the provisions of the International Covenant on Civil and Political Rights . . . shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region." Article 16 of the *Bill of Rights* is the "law of the Hong Kong Special Administrative Region" which provides for the incorporation and implementation of art 19 of the *ICCPR*.

The source of art 19 of the *ICCPR* is art 19 of the *Universal Declaration of Human Rights*.[17] *Universal Declaration of Human Rights* is also the principle inspiration of the articles guaranteeing freedom of expression in the *European Convention on Human Rights* and the *American Convention on Human Rights*. One may note that art 16 of the *Bill of Rights* has its international origins giving the universal content to the right to freedom of expression in Hong Kong.

III. Restrictions on the Freedom of Expression

Despite the importance of the freedom of expression, no society has such freedom absolutely. It may be subject to restrictions to ensure that social interests are not damaged or may be subject to limitations if it conflicts with others rights.[18] The followings are only some examples:

1. The right to freedom of expression protected must be read *in the context*.[19] For example, the *Basic Law* itself reflects that freedom of expression may be limited by other provisions therein.[20]

2. There are also many restrictions under common law. For instance, no one can defame another; sedition is strictly forbidden; and interference of the administration of justice is prohibited.[21]

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17 Article 19 of the Universal Declaration reads: "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information through any media and regardless of frontiers."

18 Kiss, A, "Permissible Limitations on Rights" in Henkin, L (ed), *The International Bill of Rights: the Covenant on Civil and Political Rights* (New York: Columbia University Press, 1981), p 290; *Supra* note 13.

19 *The Article 19 Freedom of Expression Handbook* (Britain: The Bath Press, 1993), p 18.

20 It was argued by Professor Yash Ghai that the Basic Law itself actually reflects the contradictory views on the freedom of expression as on one hand the liberal position espoused in the Bill of Rights, but on the other hand the more administrative view concerned with the politics of control. An example on the restrictions provided by the Basic Law itself include art 23 which requires the HKSAR to enact laws to prohibit, *inter alia*, any act of sedition or subversion against the Central People's Government of the PRC. *Supra* note 14, p 369. *Supra* note 1.

21 For a more detailed discussion on this topic, please refer to Curry, J L and Dassin, J R (eds), *Press Control Around the World* (USA: Praeger Publishers, 1982) Chapter 11. It was also argued by Stanley Fish that there is no such thing as free speech. See Fish, S, *There's No Such Thing as Free Speech: And it's a Good Thing, Too* (New York, Oxford: Oxford University Press, 1994).

3. Freedom of expression may be limited when the restriction falls within the *general limitation clause* contained in art 5 of the *ICCPR* or art 2(4) of the *Bill of Rights*, preventing the destruction of the rights of others.

4. Freedom of expression may also be restricted by the limitation clause provided within the provision which itself guarantees the freedom. Article 16 of the *Bill of Rights* (art 19 of the *ICCPR*) itself, through para 3, provides for certain restrictions. It was argued that the Basic Law itself accords, through art 39, a special constitutional status to the *Bill of Rights* and the *ICCPR*. The article obliges the HKSAR to implement the applicable provisions of the *ICCPR* through its laws, presumably a general incorporation (ie the *Bill of Rights*). The *Bill of Rights* is a substantial implementation of the *ICCPR* and states authoritatively how the *ICCPR* is applied to Hong Kong. Therefore, they are within '*one document*' that the *ICCPR* and the *Bill of Rights* are parts of the *Basic Law*.[22]

In this sense, although art 27 of the *Basic Law* itself does not provide express restrictions on freedom of expression, the limitation clause provided under art 16(3) of the *Bill of Rights* (art 19(3) of the *ICCPR*) should be read together with art 27. The limitation clause under art 16(3) of the *Bill of Rights* (art 19(3) of the *ICCPR*) should be treated as providing possible restrictions for art 27 of the *Basic Law* as they should be treated as "*one constitutional document*".[23] Article 16(3) of the *Bill of Rights* provides:

> "The exercise of the rights provided for in para (2) [freedom of expression] of this article carries with it special duties and responsibilities. It may be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
> 1. for respect of the rights or reputations of others; or
> 2. for the protection of national security or of public order (*ordre public*), or of public health or morals."

In a general comment concerning art 19 of the *ICCPR* (art 16 of the *Bill of Rights*), the Human Rights Committee emphasized the three requirements imposed by para 3 with which any restriction must comply:

> "Paragraph 3 lays down conditions and it is only subject to these conditions that restrictions may be imposed: the restrictions must be 'provided by law'; they may only be imposed for one of the purposes set out in sub-paragraphs (a) and (b) of paragraph 3; and they must be justified as 'necessary' for that State party for one of those purposes."[24]

The *ICCPR* requires that restrictions be "necessary" to protect the listed interests within the provisions.[25] Only when all three parts of the test are satisfied can the restrictions be legitimate and applied.

However, owing to the limit of words, this paper focuses only on one of the requirements under

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22 Ghai, Y, *Hong Kong's New Constitutional Order: the Resumption of Chinese Sovereignty and the Basic Law*, (Hong Kong: Hong Kong University Press, 1998), pp 450-1.

23 However, it was agreed by both Professor Yash Ghai and Mr. Justice Bokhary PJ that although the ICCPR and the Bill of Rights should be read with the Basic Law as a whole, the Basic Law should always prevail where there is an inconsistency between them since, as a general rule, the ICCPR which is "*incorporated*" by the Basic Law should be subject to the latter. See Mr. Justice Bokhary PJ in *HKSAR v Ng Kung Siu and another*, *supra* note 1, at 144 A-C and *supra* note 22, p 451.

24 *Report of the Human Rights Committee to the General Assembly*, 38th Session, Supp No 40, 1983 (A/38/40), Annexe VI, General Comment 10.

25 *Supra* note 19, p 109.

the second part of the test: the use of "public order" (*ordre public*) as a ground of restriction provided by the sub-para (b) of art 16 of *Bill of Rights*.[26]

IV. *The Application of "public order" (ordre public) as a Ground of Restriction on Freedom of Expression in the HKSAR*

A. *Definition*

Under international law, governments are entitled to restrict expression when necessary to protect "public order" if the means of restriction are proportionate to the threat.[27] However, the words "public order" under art 16(3) of the *Bill of Rights* and art 19(3) of the *ICCPR* are followed in parenthesis by the French words *"ordre public"*. It is generally accepted that the insertion indicates that the term has a broader and wider meaning than the English law concept of public order. This term has origins in public and private French jurisprudence and in the civil law systems.[28] However, it was argued that even in such systems, it may still be very difficult to pinpoint its exact meaning owing to different meanings in public, private internal and private international law. It is "a term of art" borrowed from the legal systems of various nations.[29] For instance, in French private internal law, *"ordre public"* may be invoked to negate freedom of contract; in French private international law, the court may not give effect to foreign law if such law is treated as contrary to *"ordre public"*.[30]

In French public law, it may refer to the "police power" of the state broadly conceived. *"Ordre public"* under public law may be invoked "to restrict or suppress a freedom in the interest of higher imperatives".[31] In this sense, *"ordre public"* may be explained as a sum of principles on which a given society is founded. According to Lockwood, it may be identical to "a broad police power to maintain the accepted level of public welfare, social organisation, and security".[32] It was also argued that the concept "originally included the authority to maintain good order, health, safety, and peace and was expanded to include moral, esthetic, economic, and political elements".[33]

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26 For a detailed and thorough discussion on the other restrictions such as "provided by law", "national security", "public health and morals" and "necessary", please refer to *supra* note 18, pp 290-310; Lockwood, "Working Paper for the Committee of Experts on Limitation Provisions" (1985) 7 *Human Rights Quarterly* 35; Byrnes, A, "Permissible Limitations on Rights Under the ICCPR and the Bill of Rights", *Seminar on the Hong Kong Bill of Rights Ordinance: selected materials/ prepared by Johannes Chan and Andrew Byrnes* (Hong Kong: Faculty of Law, HKU, 1991), p 31; *supra* note 13, pp 161-198; *supra* note 14, pp 392-401; Boyle, K, *supra* note 4, pp 321-322.

27 *Supra* note 19, p 121.

28 For more discussion on the concept of "ordre public", please refer to *Regina v Bouchereau* [1977] 2 Common Mkt L Report 800, pp 815-6.

29 Kiss, A, "Commentary by the Rapporteur on the Limitation Provisions" (1985) 7 *Human Rights Quarterly* 15, 19; Lockwood, "Working Paper on Limitation Provisions" (1985) 7 *Human Rights Quarterly* 15, 58-9.

30 *Supra* note 18, p 300.

31 *Regina v Bouchereau, supra* note 28 at 816.

32 Lockwood, *supra* note 29, 59.

33 *Ibid.* See also Daes, Special Rapporteur, Sub-Commission on Prevention of Discrimination and Protection of Minorities "The Individual's Duties to the Community and the Limitations on Human Rights and Freedoms under article 29 of Universal Declaration of Human Rights" *United Nations Document* E/CN. 4/Sub.2/432/Rev.2 (1983).

However, despite the above arguments, this concept is still very *vague* and Prof Andrew Byrnes argued that it is a "highly dangerous" concept from the perspective of ensuring the enjoyment of human rights because of its broad definition.[34]

The consequences of the insertion of "*ordre public*" in art 16 of the *Bill of Rights* (art 19 of *ICCPR*) are far-reaching since it expands the scope of the use of "public order" as a ground of restriction on expression because of its broad and vague meaning. The following parts will focus on how this vague term was applied and will attempt to discuss where the limit of its scope should be in the context of Hong Kong.

B. Application of the Restriction "Public Order" (ordre public) by the Court of Final Appeal in the National Flag Case[35]

1. The Facts

This case arose in Hong Kong on 1 January 1998. A lawful and orderly public demonstration was organized by the Hong Kong Alliance in Support of the Patriotic Democratic Movement in China. It consisted of a public procession from Victoria Park to the Central Government Offices of Hong Kong. During the procession, the two respondents carried and waived in their hands a defaced national flag and a defaced regional flag. At the end of the procession, they tied them to the railings of the Central Government Offices. The flags were substantially defaced by the defendants.

In the first instance, both defendants were convicted under s 7 of the *National Flag and National Emblem Ordinance* and s 7 of the *Regional Flag and Regional Emblem Ordinance*. The former prohibits desecration of the national flag and emblem by publicly and willfully burning, mutilating, scrawling on, defiling or trampling on the same while the latter lays down a similar prohibition in respect of the regional flag and emblem. The particulars were that they desecrated the national flag by publicly and willfully defiling it.

Both defendants challenged the constitutionality of the statutory provisions under which they were charged, basing their challenge on the right to freedom of expression. However, their challenge failed in both the Magistrate's Court as well as the Court of Final Appeal and the Court of Final Appeal upheld that the statutory provisions in question are constitutional.

Li CJ of the Court of Final Appeal agreed that the relevant provisions are restrictions on freedom of expression guaranteed by art 27 of the *Basic Law* as well as art 16 and art 19 of the *Bill of Rights* and the *ICCPR* respectively. He went on, by following the arguments of the government, that in order to justify the restriction, two requirements must be satisfied: (1) whether the protection of the flags in question is within the concept of "public order" (*ordre public*) provided under the para 3 of art 16 of the *Bill of Rights* (art 19 of the *ICCPR*); (2) If the answer is in the affirmative, whether such restriction is "necessary" for the protection. The following parts focus only on (1).

2. Definition of "public order" (*ordre public*) by the Court of Final Appeal

First, Li CJ ruled that the prohibition of the desecration of flags by the statutory provisions in

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34 Byrnes, A, *supra* note 26, p 31.

35 *Supra* note 1.

question is a limited restriction only since it bans "only one mode of expressing whatever the message a person concerned may wish to express" and it "does not interfere with the person's freedom to express the same message by other modes".[36]

In examining whether the restriction was within "public order" (*ordre public*), Li CJ, by referring to the *Tam Hing-yee v Wu Tai-wai*[37], the *Secretary for Justice v The Oriental Press Ltd and others*[38] and the *Wong Yeung Ng v Secretary for Justice*[39], accepted that its concept is not limited to public order in terms of common law notions of "law and order". He quoted the first instance judgment in the *Oriental Press Group Ltd* case[40] to support this argument: "public order" (*ordre public*) should be given "wider meaning" than the words normally have in common law jurisdictions; to define "public order" (*ordre public*) has been elusive especially as the phrase has different meanings in private and public law; its meaning should differ depending on the context in which it is being used.[41]

He then attempted to define the scope of *ordre public* by referring to the following materials:

- According to Kiss's article, *ordre public* includes the existence and the functioning of the state organisation, which not only allows it to maintain peace and order but also ensures the common welfare by satisfying collective needs as well as protecting human rights. *Ordre public* may be as a basis for restricting some specified rights and freedoms "in the interest of the adequate functioning of the public institutions necessary to the collectivity when other conditions . . . [including] prescription for peace and good order; safety; public health; esthetic and moral considerations; and economic order (consumer protection, etc)".[42] In addition, the concept must remain a "function of time, place and circumstances".[43]

- The Siracusa Principles contained the following statement on "public order" (*ordre public*):

  > "22. . . . ensure the *functioning of society* or the set of *fundamental principles on which society is founded* . . .
  > 23. . . . shall be interpreted *in the context* of the purpose of the particular human right which is limited on this ground."[44] (*Emphasis added*)

- Furthermore, the Advisory Opinion No. OC – 6/86 in 1986, on the word 'laws' in art 30 of the *American Convention on Human Rights*, the *Inter-American Court of Human Rights* expressed the view that "the requirement that the laws be enacted for reasons of *general interest* means they must have been adopted for the '*general welfare*', a concept that must be interpreted as an integral element of "public order" (*ordre public*) . . ."[45] (*emphasis added*). Article 30 of that Convention provides that the restriction on rights or freedoms does not be applied "except in accordance with laws enacted for reasons of

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36 *Ibid*, at 136 B-C.
37 *Tam Hing-yee v Wu Tai-wai* [1992] 1 HKLR 185 at 190.
38 *Secretary for Justice v The Oriental Press Group Ltd & others* [1998] 2 HKLRD 123 at 161.
39 *Wong Yeung Ng v Secretary for Justice* [1999] 2 HKLRD 293 at 307I.
40 *Supra* note 38.
41 *Ibid*, at 669C-H.
42 *Supra* note 18, p 302.
43 *Ibid.*
44 (1985) 7 *Human Rights Quarterly* 3 at 14.
45 (1986) 7 *Human Rights Law Journal* 231 at 235.

> *general interest* and for the purpose of which the restrictions have been established" (*emphasis added*). Article 32(2) provides that "the rights . . . are limited by . . . the just demands of the *general welfare*, in a democratic society"(*emphasis added*).

Li CJ concluded that the following three points could be drawn from the materials referred to above:

1. The concept of "public order" (*ordre public*) is imprecise and elusive and its boundaries could not be precisely defined;
2. Public order (*ordre public*) includes the protection of general welfare or the interests of the collective as a whole. Examples include prescription for peace and good order; safety; public health; esthetic and moral considerations as well as economic order;
3. The concept of "public order" (*ordre public*) must remain a function of time, place and circumstances.

Much emphasis was placed on (3) through the explanation of the importance of the *very special* characteristics in terms of "time, place and circumstances" in Hong Kong with regard to the new constitutional order. On 1 July 1997 the People's Republic of China (PRC) resumed the exercise of sovereignty over Hong Kong and Hong Kong became an inalienable part of the PRC under the principle of "one country two systems". He quoted the preamble of the *Basic Law* which provides that the resumption of the exercise of sovereignty fulfils the "long-cherished common aspiration of the Chinese people for the recovery of Hong Kong". The national flag is the unique symbol of the "one country" and the regional flag is the unique symbol of the HKSAR as an inalienable part of the PRC under the principle of "one country two systems". Under these "special circumstances", Li CJ explained that the "legitimate societal interests in protecting the national flag and the legitimate community interests in the protection of the regional flag are interests that within the concept of "public order" (*ordre public*) as these interests form part of the "*general welfare*" and the "*interests of the collectivity as a whole*", which are two important elements of public order (*ordre public*).[46]

3. Balancing Act by the Broad and Wide Scope?

One may note that Li CJ's reasoning seems to provide an extraordinary wide definition on the scope of public order (*ordre order*) as a ground of restriction on expression. Many other kinds of expression may fall into the scope of public order (*ordre order*) in terms of the vague concepts of "general welfare" and the "interests of the collectivity as a whole" easily. Moreover, it seems that Li CJ justified the flag laws as necessary to preserve public order by reference only to the circumstances of the time, which include such matters as political issues like the resumption of the exercise of sovereignty over Hong Kong by the PRC.[47] This gives the public a strong impression that the court, while balancing the degree of the right to freedom of expression allowed in society and the interests of the community as a whole, apparently puts much more emphasis on public interests rather than on individual freedom.[48] It is because Li CJ, while drawing the conclusion of the case and upholding the constitutionality of the national and regional flag ordinances, seemed to focus much more on the "special characteristics" in terms of "time, place and circumstances" of the post-handover situation of Hong Kong than on the

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46 *Supra* note 1 at 143 H-I, 144 A.

47 Editoral, *South China Morning Post*, 16 December 1999, at 24.

48 Editoral, *HK Standard*, 16 December 1999.

importance of the protection of freedom of expression as a fundamental human right.

The following parts focus on how the scope of public order (*ordre public*) should be defined in order to strike the balance between the protection of these important human rights and the functioning and the interests of the community by reference to famous scholars as well as international cases. However, before turning to that, it is crucial to clarify some fundamental principles for the interpretation of freedom of expression and that of the limitation clauses. It is because these principles are important to provide legitimate grounds for the application of international jurisdictions as reference to examine the scope of "public order" (*ordre public*) in the context of Hong Kong.

C. *A Matter of Interpretation – an Approach to International Jurisprudence*[49]

Two imperative principles have emerged in international human rights practice which appear to represent the position under the *ICCPR* and the *Bill of Rights*[50]:

1. "Protection of the freedom is the general rule while limitation is the exception".[51] Limitation to the enjoyment of protected rights must be *narrowly* construed.[52] This approach was also applied in the local case *Ming Pao Newspapers Ltd v A-G of Hong Kong*[53] and was accepted by the Court of Final Appeal in *Ng Kung Siu*[54];

2. It is for the *Government* to justify any restriction on the enjoyment of rights.[55] It was also laid down in art 12 of the *Siracusa Principle* that "the burden of justifying a limitation upon a right guaranteed under the Covenant lies with the state".[56]

The preamble and the repealed art 2(3) of the *Bill of Rights* state clearly that the purpose of the *Bill of Rights* is to provide for the incorporation into the laws of Hong Kong of provisions of the *ICCPR* as implemented to Hong Kong. The Court of Appeal in *R v Sin Yau-ming*[57] stated that the *Bill of Rights* is a constitutional document that should be regarded as being *sui generis*, affirming the well-established principle of constitutional interpretation in relation to the Bill of Rights by referring to the above provisions and concluded:

> "We are no longer guided by the ordinary cannons of constructions of statutes nor with the dicta of the common law inherent in our training. We must look . . . at the aims of the Covenant and give 'full recognition and effect' to the statement which commences that Covenant. From this stems the entirely new jurisprudential approach . ."58

The important effect of this holding was that it allowed an increased reference to international

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49 For an excellent discussion of international jurisprudence, please refer to Lester, A, "Freedom of Expression: Relevant International Principles", *Developing Human Rights Jurisprudence: the Domestic Application of International Human Rights Norms: Judicial Colloquium in Bangalore, 24-26 February 1988* (London: Human Rights Unit, Commonwealth Secretariat, 1988), pp 23-56.

50 Byrnes, A, *supra* note 26.

51 This is the position mainly of the European Court of Human Rights.

52 *Klass v FRG*, Eur Court H R Series A No 28 *ILR* 423, para 42.

53 *Ming Pao Newspapers Ltd v A-G of Hong Kong* [1996] AC 907 at 917B-C.

54 *Supra* note 1, at 136 G-H.

55 *Pietraroia v Uruguay*, Communication No 44/1979, *Selected Decisions*, vol 1, 95. This was applied locally in *HKSAR v Ng Kung-siu and another*, *supra* note 1.

56 *Supra* note 44.

57 *R v Sin Yau-ming* [1992] 1 HKCLR 127.

58 *Ibid* at 141.

law and comparative law materials as persuasive sources for the interpretation of the *Bill of Rights*.[59] This is a generous and purposive approach. Although art 2(3) of the *Bill of Rights* has been repealed by the Standing Committee of the National People's Congress, it was argued by Professor Peter Wesley-Smith that the repeal would not "in any way" affect judges' interpretive approach to the Bill of Rights since "they may still refer to the long title, which uses the word 'incorporation', and they are obliged in any event to follow a purposive interpretation of an ordinance".[60]

As a result, despite the few authoritative precedents under the *ICCPR* owing to its youthful history (having come into force only in 1976)[61], reference can still be drawn from various international jurisprudence. This approach was claimed by Kevin Boyle as precedent in the "*global village*".[62] Case law from European Commission of Human Rights, European Court of Human Rights and the Inter-American Commission and Inter-American Court of Human Rights as well as many national jurisdictions may be as persuasive sources for the interpretation of the *Bill of Rights*.

In the same token, while interpreting the scope of public order (*ordre public*) as a ground of restriction, international jurisprudence should also be referred to. This approach was adopted by Bokhary PJ in the instant case.[63] He referred to two American flag desecration cases and some other overseas cases in the interpretation of the constitutionality of the restriction.

The next part follows this generous and purposive approach by using international case law as well as various legal scholars' articles as reference to discuss how the scope of public order (*ordre public*) should be to strike a balance between the right to freedom of expression and the interest in the community as a whole.

D. Comments on the Definition of "Public Order" (Ordre Public) in the National Flag Case

Secretary for Justice Elsie Leung Oi-sie, after the delivery of the judgment, welcomed the court's decision and said the restrictions conform with the *Basic Law* and the *ICCPR*. She commented:

> "the judgment is fully and consistently in compliance with well-supported by authorities here and abroad . . . the ruling has no impact on the freedom of expression because the two flag ordinances only prohibit one type of expression and there are still other ways of criticising the government and the mainland."[64]

She also commented that in exercising freedom of expression, one "must have regard to public order, which includes the collective need of the community".[65] Here, the "collective need of the community" was the symbolism of the national and the regional flag. This was in line with the opinions of Professor Albert Chen Hung-yee that the Chinese flag plays a more sensitive role here than national flags in other countries because it is "one of the few manifestations of

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59 Chan, J and Ghai, Y, "Experience of the Hong Kong Bill of Rights" in Chan, J and Ghai, Y (eds), *The Hong Kong Bill of Rights: A Comparative Approach* (Butterworths Asia, 1993), p 17.

60 Wesley-Smith, P, "Maintenance of the Bill of Rights" (1997) 27(1) *HKLJ* 15.

61 Boyle, K, *supra* note 4, p 300.

62 *Ibid*, p 302.

63 *Supra* note 1, at 145-6.

64 "Leung Welcomes Court's 'well-supported' decision", *HK Standard*, 16 December 1999.

65 "Public Still Free to Criticise, Says Justice Chief", *South China Morning Post*, 16 December 1999.

Chinese sovereignty in Hong Kong".[66]

However, questions may arise as to why a high degree of freedom to express dissent is being compromised for the sake of the dignity associated with the national and regional flag in terms of the vague and broad scope of "public order" (*ordre public*) given by the court. Moreover, implications could be far-reaching since the permissible room for the expression of dissent may be further limited in favour of the symbols of sovereignty by the application of such vague and poorly defined scope of "public order" (*ordre public*).[67]

1. "Public Order" (*Ordre Public*) Includes the Respect for Human Rights

As discussed above, this is a vague concept that is difficult to define in terms of its scope. However, it is without doubt that the application of any restriction on any human right must be balanced and a line must be drawn between the degree of the right and the interests of the community: neither should have overwhelming influence over another in a civilised society. This is in line with Professor Higgins's argument that "*ordre public*" seeks an accommodation "between the individual rights and freedoms and the rights and freedoms of the community at large".[68]

Li CJ, in quoting Kiss's article, held that while the definition of the words "*ordre public*" is wide and elusive, the focus of it should be on the ways to protect the "existence and the functioning of the state organization". One way to do so is to ensure the common welfare by satisfying "collective needs". He said that restriction on expression is legitimate if it is in the interest of the adequate functioning of the public institutions to the collectivity. Moreover, he also quoted art 30 and 32(2) of the *American Convention on Human Rights* and ruled that restriction was allowed if it was for "reasons of general interest" or "demands of the general welfare". The protection of national and regional flags should be within these aspects and hence within the scope of "*ordre public*".

Without doubt, collective needs as well as the general welfare are important elements to the existence and functioning of the state. However, Kiss also put much emphasis on the need of the protection of human rights that is also one of the most important ways to state organisation's existence and functioning. Although the concept must remain a "function of time, place and circumstances", the protection of individual human rights also plays an imperative role in any time, place and circumstances. As argued by Kiss:

> "[T]he concept [of *ordre public*] itself reflects the principle that there are limitations on the state's powers, especially as far as human rights are concerned ... *ordre public* may *itself demand respect for human rights* as an element in the exercise of the public authority ... in the conflict between state authority and individual rights and freedoms, *ordre public* can be on either side."[69] (*emphasis added*)

In times of "conflicts", it was held in a local case *R v Sin Yau-ming* that:

> "The interests of the individual must be balanced against the interests of society generally but, in the light of the contents of the Covenant and its aim and objectives, with *a bias towards the interests of*

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66 Yeung, C, "Flag Ruling casts Shadow over Liberty", *South China Morning Post*, 18 December 1999, at 23.

67 *Ibid.*

68 Higgins, "Derogations Under Human Rights Treaties" 48 *British Y B International Law* 281, 282.

69 *Supra* note 18, p 301.

> *the individual*."[70] (*emphasis added*)

Indeed, art 3 of the *Siracusa Principle*, which was referred to by Li CJ, also states expressly that:

> "All limitation clauses shall be interpreted strictly and in favour of the rights at issue."[71]

It seems that when such conflicts arise under the concept of "*ordre public*", priority should be given to the protection of the human rights. It seems that the judgment delivered by Li CJ focused too much on the importance of "community interests" to the functioning of the state organisation rather than that of the individual human rights. Indeed, protection of human rights and community interests are equally important to the "existence and the functioning of the state organisation" since Kiss argued that "*ordre public*" "implies that human rights are respected within a democratic society".[72]

Kiss added that the concept is designed to "assure a minimum level of public interest and social organisation, consistent not only with the values of the society but *with universal principles of civilisation and justice*"(*emphasis added*). Here, the "principles of civilisation and justice" should be understood as the protection of human rights. It is because Kiss strongly suggested that:

> "Human rights of individuals are part of . . . minimum civilised order and *cannot be lightly sacrificed even for the good of the majority* or the common good of all."[73] (*emphasis added*)

In the same token, when art 23 of the *Siracusa Principles* states that the words should be "interpreted in the context of the purpose of the particular human right", the word "context" should also comprise the "respect for human rights" since it was stated in art 22 of the *Principles* itself that:

> "Respect for human rights is part of public order (*ordre public*)."[74]

As argued by Lockwood, "*ordre public*" is a broad police power that must be exercised in a legal framework "respecting fundamental human rights. The police should be subject to controls."[75] One should note that the protection of individual human rights is as equally important as, and even prior to, the "collective interests" to the existence and functioning of state organisation in terms of "general welfare" or the "interests of the collectivity as a whole" under the concept of "*ordre public*". In this sense, if more focus is placed on the importance of human rights to the "existence and the functioning of the state organization", the results *may* be different.

2. Substantial Threat to the 'General Welfare' of Society?

As mentioned above, "*ordre public*" is a concept that implies that human rights should also be respected within society. Owing to this, Kiss, while commenting the *Siracusa Principles*,

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70 *R v Sin Yau-ming* [1992] 1 HKCLR 127, at 145.
71 *Supra* note 44.
72 Kiss, A, *supra* note 29, p 19.
73 *Supra* note 18, p 302.
74 *Supra* note 44, 5.
75 Daes, *supra* note 33.

argued the restriction "*ordre public*" can be justified:

> "Only if the situation or the conduct of the persons concerned constitutes a sufficiently *serious threat to public order*."[76] (*emphasis added*)

The desecration of the flags in this case does not itself threaten public order or, to use the Li CJ's extraordinary broad exception, "general welfare". Indeed, it was argued by Professor Yash Ghai that:

> "There was 'no turmoil or uprising during the pro-democracy march. If, as the Chief Justice Li said, the freedom of expression 'lies at the heart of civil society and of Hong Kong's system and way of life', he should have been less prepared to subordinate it to the dangerously vague concept of 'general welfare' [within the scope of *ordre public*]."[77]

"General welfare" was regarded in the judgment as an integral element of "*ordre public*" in democratic societies. *Advisory Opinion No.OC – 6/86* in 1986, Inter-American Court of Human Rights, on the word "laws" in art 30 of the *American Convention on Human Rights*, expressed clearly that:

> "[General welfare] may under no circumstances be invoked as a means of denying a right guaranteed by the Convention . . . [restrictions] must be subjected to an interpretation that is strictly limited to the *'just demands' of a 'democratic society'*".[78] (*emphasis added*)

Here, the "just demands of a democratic society" should be understood in line with the arguments of Yash Ghai and Kiss that, to legitimise ordre public as a restriction on expression, there must be serious threat to the public order of society.

However, from the facts given, one may note that even Li CJ agreed that the demonstration organised by the Hong Kong Alliance in Support of the Patriotic Democratic Movement in China was a "lawful and orderly" one. The desecration of the flags, during such lawful and order demonstration, neither posed any threat to the society at large nor committed any other serious offences, that was, as held by Li CJ, the threat to the principle of "One Country Two Systems".[79] Although Kiss agreed that "control by an independent organ . . . a judicial body (court) . . . is important", the court in the instant case failed to explain how the desecration of the flags posed what kind of threat to either the community at large or the principle of "One Country Two Systems".

For instance, the US Supreme Court in *Brandenburg v Ohio* held that free expression may only be prescribed where two conditions are satisfied: (1) the advocacy must be "directed to inciting or producing imminent lawless action" and (2) the advocacy must be "likely to incite or produce such action".[80] And the Court developed the "fighting words" doctrine to address the issue of offensive expression. "Fighting words", which are excluded from constitutional protection, include those which "tend to incite an immediate breach of the peace" or which "by their very utterance inflict injury".[81] Since 1952, the second prong of the test was declined by the Court

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76 Kiss, A, *supra* note 29, 19-20.

77 Ghai, Y, "What if Flag is the Message?", *HK Standard*, 22 December 1999.

78 *Restrictions of the rights and freedoms of the American Convention/the word "laws" in Art 30*, Advisory Opinion No OC-6/86 (Reported in (1986) 7 *Human Rights Law Journal* 231 at 236).

79 杜耀明, "欲加之罪卻欠事實根據", *Ming Pao*, 21 December 1999, at E9.

80 *Brandenburg v Ohio*, 395 US 444 (1969).

81 *Chaplinsky v New Hampshire*, 315 US 568 (1942).

impliedly and the first prong of the test was interpreted to incite "an immediate breach of the peace" to be co-extensive with the "clear and present danger" test.[82]

Following the test in these US cases, the desecration of the flags in the instant case, in all circumstances, neither fell into the "fighting words" nor tended to "incite an immediate breach of the peace" in the community or the public at large.

Even if, although not quite possible, the defendants' act might really disturb the peace, the government still should not prohibit it since the court in *United States v O'Brien* held that expression may not be prohibited on the basis that an audience who takes serious offense to the expression may disturb the peace since the Government cannot assume that every expression of a provocative idea will incite a riot, but must look to the actual circumstances surrounding the expression.[83] In fact, when one "looks to the actual circumstances" of the instant case, it is still very difficult to see how the desecration of flags might "incite a riot" that should be suppressed.

3. A Clear Separation of 'Substance' and 'Mode'?

Bokhary PJ held that any restriction on any right or freedom, including "*ordre public*", must be "reconcilable with" that right or freedom and he said that to be reconcilable, the restriction must be narrow and specific. However, the reasons for him to hold such restriction as "narrow and specific" and reconcilable with freedom of expression is, *inter alia*, that freedom of expression can be divided into "substance" (*what* to be expressed) and "mode" (*how* to be expressed) and the two flag ordinances restrict *only the latter.*

It seems that Bokhary PJ assumed that there can always be a "clear cut" of freedom of expression between substance and mode. However, Professor Yash Ghai argued that the flag itself can represent the "message" ("substance" in the words of Bokhary PJ).[84] He argued, from historical point of view, that the current Chinese flag, unlike many other national flags, is "suffused with the symbolism of the Communist Party" without deep historical roots or which are "based on commonly accepted insignia of nationhood".[85] He added that the Chinese national flag is only the symbol of a political party which "has never been popularly elected in free and fair elections" and a potential instrument of "party propaganda" only. Under such historical background, the action of the desecration of the flag itself, in his words, is:

> "A very *vivid and powerful mode of expressing dissent* [over a political party since] ... not every one has access to the media to express dissenting opinions."[86] (*emphasis added*)

It is not pragmatic or even possible to have an absolute "clear cut" of the substance and the mode. The act of desecration may itself represent both the mode as well as the substance of expression, especially when facing the historical reality of the case of China. Several overseas case law support this argument:

In Germany, although it retains several criminal laws intended to safeguard the honour of national institutions and symbols, they are of scant importance in practice. For example, in

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82 For instance, this interpretation was applied by the Supreme Court in *Terminiello v Chicago*, 337 US 1, p 4 (1949) (per Douglas J); *Cox v Louisiana* (Cox 1), 379 US 536, p 550 (1965).

83 *United States v O'Brien*, 391 US 367 (1968).

84 *Supra* note 77.

85 *Ibid.*

86 *Ibid.*

Dundesflagge, the Constitutional Court held that attacks against national symbols, including the national flag, even if harsh and satirical, must be tolerated as to protect freedom of expression since the act of attack itself can be regarded as the substance of expression[87].

In the United States, the Supreme Court held that that the federal and state governments may make it a crime to desecrate the US flag, they may not pass laws which prohibit certain flag-related conduct based on the message delivered by the act of desecration sought to be conveyed. For instance, in *Texas v Johnson*, the Supreme Court invalidated a Texas statute that made it a crime to "intentionally or knowingly desecrate . . . national flag" because, *inter alia*, such acts could be countered by acts respectful of the flag, such as giving the remains of the flag a burial.[88] In *United States v Eichman*, the Supreme Court, by invalidating another act which criminalises the conduct of any one who "knowingly mutilates, defaces, physically defiles, burns, maintains on the floor or ground, or tramples upon" a US flag, held that:

> "Although the . . . Act contains no explicit content-based limitation on the scope of prohibited conduct, it is nevertheless clear that the government's asserted interest is 'related to the suppression of free expression' and *concerned with the content of such expression.*"[89] (*emphasis added*)

From the above discussion, one may note that the desecration of flag is a kind of "artistic" or "symbolic" expression that the act itself should be viewed as the *unique* way to express dissent that cannot be substituted by any other mode. It was also argued that the desecration of flags during the demonstration represented the anger towards the suppression of the Chinese Government in the "June Forth Crackdown". The desecration under such occasion was an expression that could not be separated into "substance" and "mode" since such "mode" represented the "substance": the message the defendants wanted to deliver included not only political dissent but also sensitive and emotional feelings and anger towards the suppression of the democratic movement by the Chinese Government in the "June Forth Crackdown". Restriction of the mode equals to the restriction of the message delivered in that special occasion.[90]

4. A Function of 'Time, Space and Circumstances'

Li CJ emphasized that the concept of "*ordre public*" must remain a function of "time, place and circumstances". Under this function, he said that Hong Kong has a new constitutional order after the transfer of sovereignty and has become an inalienable part of the PRC under the fundamental principle of "one country two systems". He added that the national flag is the unique symbol of the "one country" and the regional flag is the unique symbol of the HKSAR as an inalienable part of the PRC. He held that because of the special circumstances of Hong Kong, the "legitimate societal interests in protecting the national flag and the legitimate community interests in the protection of the regional flag are interests that within the concept of 'public order' (*ordre public*)". These interests form part of the "*general welfare*" and the "*interests of the collectivity as a whole*", which are two important elements of public order (*ordre public*).

However, one democratic legislator argues that, owing to the wider scope of "*ordre public*" to protect the "community interests" at large, the scope of such "community interests" under "*ordre public*" should be wide enough to include also the "tolerance of different opinions and

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87 81 FCC 278, 294 (1990); See also 81 FCC 298, 306 (1990) (*Bundeshymne* case).

88 *Texas v Johnson*, 491 US 397, 414 (1989).

89 *United States v Eichman*, 496 US 310, 315 (1990), quoting *Texas v Johnson* at 410.

90 *Supra* note 79.

voices expressed in different ways and forms in order to preserve a diversified and democratic community".[91] As mentioned in the part titled "*Justifications for the Freedom of Expression: its Values and Functions*" above, "conflict" is an essential ingredient for the progress of a community and hence expression of different opinions must be allowed provided that they do not pose threat to the functioning of a society.[92] The tolerance of these opinions is one of the most important aspects required in a democratic society.[93]

The European Court of Human Rights, for instance, in *Castells*, made it very clear that in most of the time and under most of the circumstances governments are required to tolerate an even greater degree of scrutiny and criticism than politicians.[94] The six to one majority judgment held that:

> "The *limits of permissible criticism are wider with regard to the Government* than in relation to a private citizen, or even a politician. In a democratic system the actions or omissions of the Government must be *subject to the close scrutiny.*"[95] (*emphasis added*)

The court suggested that government prohibit criticisms of itself only in "extraordinary circumstances" when the public order is in "serious threat" or the accusations are "devoid of foundation or formulated in bad faith".[96] However, as discussed in the previous sections, these accusations were absent in the instant case.[97]

Furthermore, the judgment of the instant case was delivered immediately after the recent right of abode ruling in favour of the Government as well as the re-interpretation of the NPCSC "clarifying" the Court of Final Appeal's judgment on *Ng Ka Ling v Director of Immigration*.[98] Under these circumstances, there was an implication that that the Court of Final Appeal held in favour of the Government was under strong political connotations.[99] It is in fact, in the words of Bokhary PJ, sensitive "time and circumstances" that it may give the public an impression that courts may not rule against the Government whenever a case is brought against the Government in the future. However, this is a political issue that is outside the scope of this paper.

5. Bokhary PJ – the "Lone Fighter"?

Bokhary PJ, in his concluding remarks, said:

> "[the limits of the restriction on freedom of expression] stops where these restrictions are located. For they lie just within the outer limits of constitutionality. Beneath the national and regional flags and emblems, all persons in Hong Kong are . . . equally free under our law to express their views on all matters whether political or non-political: saying what they like, how they like."[100]

This comment reflects that he accepted that flag desecration was only just within the bounds of

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91 何俊仁, "限制自由 請到此爲止", *Ming Pao*, 12 December 1999, at A26.

92 As discussed in the above part titled "*Substantial Threat to the 'General Welfare' of Society?*", it is clear that the desecration of flags in a peaceful demonstration did not itself pose any threat to society and the court also failed to explain how the public order of the community was threatened by the desecration.

93 *Supra* note 91.

94 *Castells v Spain* 14 EHRR 445, 447

95 *Ibid* para 46.

96 *Ibid.*

97 Please refer to "Substantial Threat to the 'General Welfare' of Society?" and "A Clear Separation of 'Substance' and 'Mode'?".

98 *Ng Ka Ling (an infant) & Anor v Director of Immigration* [1999] 1 HKC 291.

99 Editoral, "Balancing Act", *South China Morning Post*, 16 December 1999, at 24.

100 *Supra* note 1 at 148 E-G.

what could be banned and virtually all other forms of freedom of expression would always be permissible. However, such comforting comments were not supported by other four judges, including the Chief Justice. This casts doubt as to whether this approach will be followed in the future.

To this, Chris Yeung, the Political Editor of the SCMP, commented that he was the "lone fighter for two systems and that the upper limit for the restrictions is merely wishful thinking"[101]. And it was also argued by Martin Lee Chu-ming, a democratic legislator, that:

> "[I]t won't be long before Hong Kong goes down the same route as Singapore or mainland China, where the courts never rule against the government on sensitive cases."[102]

E. Ultimate Purpose of the Court?

One may argue that the ultimate purpose of the Court to rule in favour of the Government was to preserve the authority of the jurisdiction of the courts of the HKSAR. It is because had the Court ruled againt the Government, the Government may "invite" the NPCSC to "re-interpret" the relevant provisions of the Basic Law again. The application of the *ICCPR* in Hong Kong, provided under art 39 of *Basic Law*, would also be interpreted. The possibility for the NPCSC, while interpreting art 39 concerning the legal effect of the *ICCPR* in Hong Kong, to rule that the *ICCPR* does not have direct legal effect in Hong Kong would be very high.[103] If this is the case, the courts of Hong Kong may lose the authority to continue applying the *ICCPR* directly in judicial review cases in future.

In this sense, to preserve both the authority of Hong Kong's courts as well as the continuity of the direct application of the *ICCPR*, the Court of Final Appeal tried to deliver this judgment, by ruling that the flag ordinances are within the broadly defined concept of "public order" (*ordre public*), to prevent the intervention of the NPCSC.

F. Drafting Work on Article 23 – Influenced by the Wide Concept of "Public Order" (Ordre Public)?

One constitutional expert argues that the Government may use the flag-desecration ruling to support the introduction of tough laws on sedition and treason when she starts the drafting work for the legislation of art 23 of the *Basic Law*.[104] Professor Michael Davies of the Chinese University of Hong Kong says that reference may be drawn from the national flag case since the case stated that freedom of expression could be restricted on the *broad and wide basis of "public order" (ordre public)* in terms of "general welfare" and "community interests".[105] It is also uncertain whether the Government would refer to the "clear cut" of freedom of expression into substance and mode suggested by Bokhary PJ while drafting the bill concerning art 23. If so, the effect may be far-reaching since many forms of expression may be prohibited under this

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101 *Supra* note 66.

102 *Ibid.*

103 It is argued that the NPCSC, while interpreting the second paragraph of article 39, may rule that the *ICCPR* has no direct legal effect in the HKSAR. (From the historical point of view, the repeal of some provisions of the Bill of Rights concerning the "incorporation" and "implementation" of the *ICCPR* into the *Bill of Rights* by NPCSC in 1997 reflected that the Chinese authority had reservations on the continuity of the application of the *ICCPR* in Hong Kong.).

104 "Flag Ruling could Bring Tough Treason Laws, says experts", *South China Morning Post*, 18 December 1999, at 6.

105 *Ibid.*

suggestion and the Government can still argue that it bans only the "mode" but not "substance" of expression.[106]

V. Conclusion

Without doubt, the national flag case is one of the most controversial constitutional cases after the handover. Some may claim that the case provides an opportunity to define what the scope of the "new constitutional order" should be.[107] However, it casts much doubt that when the court defined the scope of "public order" (*ordre public*) in such a broad way, the balance between individual freedom of expression and the community interests at large may become more difficult to strike. It is because once the scope is so broadened, other forms of expression may easily fall into its scope and be restricted: once the court starts off by saying the state has the power to protect its symbols by applying the extraordinary vague and poorly-defined concept of "public order" (*ordre public*), it may not stop at the flag.

106 *Supra* note 79.

107 梁美芬, "判決確立自治空間", *Ming Pao*, 17 December 1999.

PRIVACY RECONCEIVED

PERSONAL INFORMATION AND DIRECT MAIL

JESSICA LAW WING-SHUN

I. Introduction

Privacy and data protection have become issues of incoming importance since the emergence of direct mail activities. Being honoured as a lucrative vehicle for direct marketers, direct mail, which depends on the personal information of consumers to operate, may not attain the same appraisal from consumers.

The right to personal information privacy is sometimes regarded by consumers as being under the threat of misuse and abuse in direct mail activities. This commonly occurs when their names, addresses and other personal information are collected, processed, stored, used, transferred or released, for instance, without their consent and knowledge.

In Hong Kong, direct mail has been practised for decades. Surprisingly, it was not until five years ago that an ordinance[1] was enacted to regulate the use of personal data in direct marketing. Hongkong Post's recent proposal to initiate a mailing list service has made the need for a re-evaluation even more essential.

This paper aims at reviewing and looking into the further development of direct mail in Hong Kong. It starts off by addressing the mechanism of direct mail under the direct marketing regime. It then evaluates the current direct mail practices in Hong Kong from the personal data privacy perspective. It also touches on the like experience of postal administrations in other jurisdictions with the aim of appraising the major legal and economic impediments that may potentially affect the implementation of the mailing list service by the Hongkong Post. Finally it ends with a discussion on the feasibility of this innovative proposal in the context of personal data privacy.

II. The Mechanism of Direct Mail

There is a world of difference between direct mail and direct marketing. Put simply, direct mail is an advertising "instrument" whereas direct marketing is a "mode" of selling and distribution.[2]

Direct mail is only one of the several modes of direct marketing in goods or services. It enables direct marketers to send mail shots to individual households or businesses by post. Direct marketing does not involve any personal or face-to-face communication, but connotes selling directly to customers. Direct mail is only one of the most popularly used techniques. Mail order and telephone shopping, are other frequently used promotional mediums.[3]

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1 *Personal Data (Privacy) Ordinance* (Cap 486 LHK) enacted on 3 August 1995 and came into force on 20 December 1996. Berthold, M and Wacks, R, *Data Privacy Law in Hong Kong*, (FT Law & Tax Asia Pacific, 1997), 1.

2 Jain, C L and Migliaro, A, *An Introduction to Direct Marketing* (New York: AMA COM, 1978), 6-7; and Davies, M, *Understanding Marketing* (London: Prentice Hall, 1998), 281.

3 "Direct Marketing" is also defined in s34 of the *Personal Data (Privacy) Ordinance* as the "offering or advertising of goods, facilities or services, or solicitation of donations by means of: (i) sending information or goods to any person by mail, facsimile, e-mail etc; or (ii) make telephone calls to specific persons". Obviously, the concept of "direct mail" is covered by subsection (i).

Owing to the rapid development of e-commerce, the computing network and communication technology, a favourable environment has been created for direct marketers to advertise their commodities through facsimile or the Internet. Arguably, direct mail may cover the concepts of e-mail and fax. Nonetheless, due to space limitation, specific references to, and detailed analysis of e-mail "spam" and junk faxes shall be excluded from the discussion.[4] Henceforward, we define "direct mail" narrowly as any advertising mail sent by direct marketers by post to the residences or offices of targeted customers.

A. The Mechanism

Theoretically, like other mediums, direct mail enables sellers to solicit orders from consumers. Direct marketers can either formulate consumer lists or databases on their own, or rent them from list brokers. After analysing the lists and identifying the targeted consumers, mail shots can be sent out according to the names and addresses listed therein. The recipients, if satisfied with the goods or services, will respond by placing orders directly either by phone or, most commonly, by mail, by completing "the attached business reply card". Subsequently, goods or services will be delivered directly to customers.[5] In the part following, we shall explore how this mechanism is specifically put into practice in the Hong Kong context.

B. Direct Mail and Privacy [6]

For at least two decades, the right to personal information privacy has been recognized in the international arena. In 1980, the Council of Europe formulated the *Convention for the Protection of Individuals with regard to Auto Processing of Personal Data*[7]. Furthermore, five years later, the *Recommendation on the Protection of Personal Data used for the Purposes of direct Marketing*[8] was introduced.

Another influential code is the OECD Guidelines of 1981, which was prepared by the Organization for Economic Cooperation and Development (the "OECD"). After the guidelines for the Recognition of computerized personal data files were adopted by the United Nations in 1990, the European Union, in 1995, formulated the *EU Directive on the Protection of Individuals with regard to the Processing of Personal Data and on the Free Movement of such data.*[9]

In the Hong Kong context, it was not until the enactment of the *Privacy Ordinance* in 1995 that the right to personal information privacy was acknowledged. Before 1995, consumers in Hong Kong only had a "fairly broadly couched" right to privacy guaranteed by art 14 of the *Bill of Rights Ordinance* (the "*BORO*")[10], which incorporates art 17 of the *International Covenant on Civil and Political Rights.* Upon recommendations by the Law Reform Commission, the

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4 For a general discussion of e-mail "spam" and junk faxes, see the Office of the Telecommunication Authority of the HKSAR. "E-mail spam and junk faxes", <http://www.ofta.gov.hk>, 6 April 2000.

5 *Supra* note 2, p 7.

6 *Supra* note 1, pp 18-23.

7 Council of Europe Convention 108/81, <http://www.europa.eu.int/comm/internal_market/en/media/dataprot/inter/con10881.htm>, 8 June 2000.

8 Council of Europe, Recommendation N R (85) 20, <http://www.coe.fr/DataProtection/edocs.htm>,17 October 1999.

9 *Infra* note 85.

10 It provides, "no one shall be subjected to arbitrary or unlawful interference with his privacy... and has the 0right to the protection of law against such interference or attacks".

Privacy Ordinance was enacted in August 1995, containing in its first schedule Six data protection principles. These are a replica of the OECD Guidelines and the EU Directive.

Since the handover, the right to personal information privacy has been safeguarded by the mini-constitution of the HKSAR — the *Basic Law*. By virtue of art 38 [11] and art 39 [12], the *Privacy Ordinance* and the *BORO* continue in force and the ICCPR has been wholly incorporated as part of our constitution.

III. The Current Practice of Direct Mail in Hong Kong

There are no standardized forms or styles of direct mail. These unwanted mail solicitations can take the form of a postcard, offering a sale of apartments, or a letter, promoting a life insurance plan.

I have extracted some examples from the direct mail received in my very own mailbox:

> "A golden opportunity to make yourself more competitive. Our Association has offered you a wide range of Professional Diploma programs."[13]
>
> "URGENT NOTICE : Free gifts worth $600 and discounts will be granted for your subscription to our magazine." [14]
>
> "New luxurious apartments and penthouses located at the heart of the unique Butlers Wharf conservation area that no other residential development in London can offer you such a rental yields up to 10%." [15]
>
> "This is your admission ticket to our Shopping Day on April 29 at the Conrad Hotel."[16]
>
> "Enjoy your exclusive privileges of free access to Internet services for three months is now available."[17]

Most people would think that they are merely direct marketers' promotion catalogues. Truly, they only portray a small portion of direct mail.[18] One might be attracted by the offers and browse through them enthusiastically, or, one may not even bother to glance over them.

If the latter occurs, is it possible to argue direct mail is "junk mail"? If an individual wants to avoid further disturbance of "junk mail", how can objections be raised? No matter which perception one takes, if he has no idea as to how his name and address was obtained by the direct marketer, he really can't do very much. In the following parts, we shall review the effectiveness of the current direct mail practice under the regulatory regime of Hong Kong.

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11 It stipulates, "Hong Kong residents shall enjoy the other rights and freedoms safeguarded by the laws of the HKSAR".

12 It provides, "the provisions of the ICCPR shall remain in force and shall be implemented through the laws of the HKSAR".

13 This example is based on the direct mail sent by the Hong Kong Management Association in May 2000.

14 This example is based on the direct mail sent by the Yazhou Zhoukan of the Ming Pao in November 1999.

15 This example is based on the direct mail sent by the Colliers Jardine Agency Limited in September 1999.

16 SOGO Japanese Department Store mailshot, April 2000.

17 This is based on the direct mail sent by the Hong Kong Broadband Network in April 2000.

18 Special offer of bags and accessories, promotion of fund investment by financial advisory companies are other common examples of direct mail.

A. Existing Law and Codes

In Hong Kong, direct mail activities are regulated by three schemes. Firstly, by statute: the *Personal Data (Privacy) Ordinance.* Secondly, non-legal rules: the Code of Practice formulated by the Hong Kong Direct Marketing Association (HKDMA) and thirdly, the self-consciousness of direct marketers.

1. Personal Data (Privacy) Ordinance

The *Privacy Ordinance* is designed to protect the personal data privacy of living individuals, in which s 34 is specifically drafted to regulate direct marketing. Section 34 expressly requires direct marketers (as "data users") to provide for an "opt-out" clause[19] in the direct marketing materials. Should the individual (the "data subject"), who is contacted for the first time[20], choose to opt-out, then further contacts must be ceased.[21] Apart from s 34, the six Data Protection Principles[22] (DPP) of fair information practice[23], which are formulated on the basis of the OECD guidelines and the EU Directive 1995, also bind direct marketers.

Pursuant to s 5 of the *Ordinance*, an independent supervisory body, the Privacy Commissioner's Office (PCO), has been established and is vested with statutory power to investigate any complaints related to the application of s 34. If investigations are necessary, then the PCO is entitled to the "power of inspection and to summon witnesses for examination". If the data user is found to be acting in violation of s 34, criminal prosecution will follow.[24]

2. The Hong Kong Direct Marketing Association (HKDMA) [25]

Apart from the *Privacy Ordinance*, another recognized organization that regulates direct marketers' ethical conduct is the Hong Kong Direct Marketing Association (HKDMA). The HKDMA, since its establishment in 1982, has developed a code of ethics for its members to follow. Besides individual members, it consists of member companies from sectors including retailing, data information[26], advertising, banking[27], publishing[28], airlines[29], credit cards[30], direct marketers[31] and insurance.[32]

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19 "Opt-out" clause is a clause that notifies consumers of their right to opt-out further contacts from mailers by sending them written request. It "allows consumers to control the destiny of their personal information by notifying list creators as to whether the list creators can release personal data to other business". Klein, DJ, "Comment : Keeping Business out of bedroom: protecting personal privacy interests from the retail world" (1997), 15 J *Marshall J. Computer & Information L* 391, fn 39.

20 *Supra* note 1, p 143.

21 Lau, S, Privacy Commissioner for Personal Data, "Direct Marketing and Privacy Related to Personal Data", paper presented to the Direct Marketing Asia' 98 Conference, Singapore. 13-15 July 1998, <http://www.pco.org.hk/news/issues071398a.html>, 13 February 2000.

22 Personal Data (Privacy) Ordinance (Cap 486 LHK) Schedule One.

23 *Supra* note 1, pp 1, 20-22.

24 PCO, "Case # 200002141-enquiry". 23 Feb 2000. E-mail <pco@pco.org.hk> 15 March 2000.

25 Miss Laura Au Yeung, the HKDMA Administrator, "Introduction of HKDMA", "Code of Ethics" and "Code of Practice for the Use of Personal Data in Direct Marketing", 26 February 2000. E-mail attached files, <hkdma@netvigator.com> 28 February 2000, <http://www.hkdma.com/mainin.htm>.

26 eg Datatrade, Mailing Lists Asia.

27 eg The Hongkong Bank.

28 eg Reader's Digest Fast East, Asian Sources Media Group.

29 eg Cathy Pacific.

30 eg American Express.

31 eg Times Direct Marketing.

32 eg American International Underwriters.

Since the implementation of the *Privacy Ordinance* in 1996, the HKDMA, upon consultation with and approval by the PCO, further drafted a "Code of Practice for the Use of Personal Data in Direct Marketing" to help its members to comply with the provisions of the *Ordinance*.

It should be noted that none of these codes have legal status. They are merely sectoral codes of ethical constraints. However, these Codes are only binding on members of the HKDMA – non-members are under no obligations with respect to their observance.[33] Nonetheless, since the *Privacy Ordinance* came into force in 1996, these Codes have becoming of declining significance.

3. Self-consciousness of Direct Mailers

Although it appears that our personal data privacy is sufficiently safeguarded by the *Privacy Ordinance* and the Codes of the HKDMA, this may not be the case unless consumers take the initiative to launch complaints against the inconsistent practices of direct mailers.

As will be seen below, due to the lack of awareness of recipients as to their rights to complain, it is important to encourage direct mailers' self-consciousness. This will no doubt be difficult and will take time, but it is the most important, useful and effective means of regulating direct mail activities in the long run.

B. Evaluation

Public opinion and the number of complaints against unsolicited mail are always the best meter bar for measuring the achievements and effectiveness of the *Privacy Ordinance* and the Codes. Before analyzing the extent to which the rules meet with actual public needs (ie the coverage issues, namely the problems of public registers and junk mail), an analysis on whether the rules have been implemented effectively, particularly the mandatory "opt-out" option is required.

1. General Compliance with the Privacy Ordinance

As mentioned earlier, s 34 requires the inclusion of an "opt-out" clause in direct marketing materials if consumers are contacted for the first time. This requirement not only enables the consumers to reduce unwanted mail, but also helps the senders to lower costs. The question is "has this scheme been effective"?

The 1999 Opinion Survey [34] illustrates greater compliance with the *Ordinance* and less misuse of personal data when compared to 1998.[35] This results from the increased use, by direct marketers, of the "opt-out" clause in direct mail and the provisions of greater information to consumers about the purposes behind the collection of personal data.

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33 Whether or not to be a member of the HKDMA is absolutely voluntary for there is no law in Hong Kong that mandates direct marketers to join the HKDMA as members.

34 The PCO & the University of Hong Kong Social Sciences Research Centre "The 1999 Opinion Survey, *Personal Data (Privacy) Ordinance*, Attitudes and Implementation – Key Findings". This survey was conducted in March 1999, by the University of Hong Kong Social Sciences Research Centre under the commission of the Office of the Privacy Commissioner for Personal Data. In the survey, 1580 local residents and 463 organizations storing a relatively large amount of non-employee data from the private and public sectors were interviewed.

35 *Ibid*, fig 19. Similar findings are discovered from organizations' responses. More organizations have adopted policies and practices to comply with the *Ordinance*.

However, it may be too quick to be gratified by these "encouraging" results and conclude that the compliance rate of the *Privacy Ordinance* is high. The terms "greater" and "less" only depict the relative phenomenon. Instead, actual figures of the current year should be looked into.

Three aspects of observation warrant comment. First, although a "greater" number of resident respondents were informed about the data collection purposes and were provided with the opt-out option in 1999, the reality is, this "greater" merely accounts for 40% of the total number of resident respondents.[36] In fact, more than half of these respondents replied that less than 50% of direct mail they received had provided the "opt-out" clause.[37] This suggests that non-compliance with s 34 is still serious.

Second, the public awareness of the right to data privacy was still low in 1999. More than 50% of resident respondents have no idea how to complain about the infringement of personal data privacy.[38] Moreover, 30% of the resident respondents have explicitly expressed that they would not exercise their statutory right to access and correct personal data.[39]

Third, the self-consciousness of the direct marketing industry is still inadequate. After four years of implementation of the *Privacy Ordinance*, nearly one-third of organization respondents still replied that they did not provide "opt-out" clauses in direct marketing materials.[40]

Another meter bar measuring the compliance with the *Privacy Ordinance* is the number of complaints against unwanted solicitations. By the end of May 1998, 374 complaints related to direct marketing had been received by the PCO.[41] Out of 253 complaints against the private sectors, 49 (ie 19%) relate to the infringement of s 34, either by the absence of the "opt-out" option or that further contacts continue after they have opted out.

Although only one such complaint is made every 10 days, and hence, the rate may seem relatively low, it should be noted that this figure may not represent the truth. Relying solely on the number of complaints as a measure of the effectiveness of the *Privacy Ordinance* would prove unreliable since it would underestimate the actual degree of public grievances. As indicated by the 1999 Survey, only 35% of the resident respondents are aware of the PCO's complaint handling function.[42] Furthermore, it is not realistic to assume that all consumers who suffer will necessary launch complaints.

Is there a need for reform? Given that the *Privacy Ordinance* has been in force for nearly 40 months, the time is ripe for a reassessment of its effectiveness. The 1999 Survey illustrates that there are still areas pending improvement. For instance, s 34 stipulates "the first time the marketers use that data, he shall inform the data subject of his opt-out rights". Section 34 only applies when consumers are "first contacted". Thus, if direct mailers have contacted consumers

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36 *Ibid*, fig 6, "Experiences of compliance and preparedness to use data subject rights".

37 *Ibid*, fig 8, "Experience of provision of opt-out clauses".

38 *Ibid*, fig 10, "Where to complain?" It indicates only 39% of all the resident respondents know they can launch complaints to the PCO.

39 *Ibid*, fig 6, "Experiences of compliance and preparedness to use data subject rights".

40 *Ibid*, fig 30, "Provide opt-out clauses in direct marketing materials"?

41 *Supra* note 21. The PCO has received complaints since its establishment in 1996. PCO, "Complaints Related to Direct Marketing".

42 *Supra* note 25, Fig 10 "Where to complain"?

on more than one occasion, they bear no legal obligation to include the "opt-out" option, except only if they use new data in the process.[43]

In reality, however, even if the "opt-out" clause is provided, it is generally not made readily apparent to consumers. No provision requires the "opt-out" clause to be clearly or legibly seen. In practice, most direct marketers would place this clause in the "fine print with other boilerplate terms"[44] in the mail shots. In that way, how can the consumers be "informed" of their entrenched right to "opt-out"? Conversely, are direct marketers entitled to say that they have fulfilled their obligation under s 34 to "inform" the recipients of their "opt-out" right regardless of whether the clause is legibly printed, or can they argue that they have "implicitly" informed the consumers anyway?

If the direct marketers' argument is to be upheld, then the inherent purpose of s 34 will be fundamentally frustrated. Although the word "inform" is not defined in the *Ordinance*, it is interpreted to mean "give knowledge to".[45] "Inform" has been used in DPP3 (a) and (b),[46] but the words "*or implicitly informed*" are deliberately omitted in s 3 (b). Although s 3 (b) makes no mention of the requirement to inform explicitly about the "opt-out" option,[47] the "right to request opt-out" should enjoy the same level of importance as those "rights" stipulated in s 3 (b). Hence, the same "degree" of information should be provided.

The *Ordinance* is designed to protect the privacy of individuals in relation to personal data,[48] and since s 34 is specifically designed to provide consumers with the opportunity to "opt-out", it must mean that this right has to be communicated to and must actually reach the mind of mail recipients. If "*implicit* information" is sufficient under s 34, then it merely provides marketers with a legitimate excuse to depart from the provision by using "illegible print".

In the USA, the public continuously urges for the endorsement of the "opt-in" [49] scheme to replace the existing "opt-out". Ram Avrahami, an Internet entrepreneur, also the plaintiff of the *Avrahami* Case, takes the view that consumers should be allowed to "participate in the market as real critical players via the "opt-in" system, rather than be dismissed and be given a minor

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43 *Supra* note 1, p 143. A data user must offer the recipient the "opt-out" option when he first uses the recipient's name and address data. If the data user later gets the data subject's telephone data, no matter whether this telephone data would be used to contact with the data subject, a further "opt-out" option must be provided. This is because the "telephone data" is "new data", and the words "those data" in s34 do not extend to include "supplemental data".

44 *Supra* note 19.

45 Oxford Advanced Learner's English-Chinese Dictionary (Oxford University Press Hong Kong, 1986)

46 "Inform" has two degrees: explicit and implicit. DPP1 3(a) requires data subjects to be "*explicitly or implicitly*" (emphasis added) informed of whether it is obligatory or voluntary for him to supply the data, and the consequences of failure to supply. Whereas DPP1 3(b) stipulates the purpose for which the data to be used, and the data subjects' right to request access and correction of data have to be "*explicitly*" (emphasis added) informed.

47 I suggest that since the Six DPP apply universally to all data users and direct marketers are only one group of data users, it may be inappropriate to stipulate the "opt-out" option there.

48 The Long Title of the *Privacy Ordinance*.

49 It means that at first contact, only after the consumers have given consent can the mailers contact them again. Avrahami, R, "Letter to Direct Marketing Association", Electronic Privacy Information Centre database, 24 June 1996, <http://www.epic.org/privacy/junk_mail/DMAletter.html>, 15 April 2000. The "opt-in" campaign is initiated by a Virginia resident, Avrahami, who filed a lawsuit against US News & World Report for selling and renting his name to another publication without his express written consent. He later made a letter request to USDMA for the initiation of "opt-in" mechanism. Electronic Privacy Information Center, "List sale case move to the Virginia Supreme Court" (The Avrahami Case, 1997), 25 September 1996, <http://www.epic.org/privacy/junk_mail/press_release996.html>, 15 April 2000.

input, which may or may not be acted upon and with no enforceability via the current "opt-out" system.[50] However, this argument was rejected by the DMA, which feels it is "absolutely unworkable" and would destroy the integrity of database.[51] J Gitlitz, the president of the New York Direct Marketing Association, argues that it is not likely to get any "positive responses" from consumers if the "opt-in" program is adopted.

The pace of the endorsement of the "opt-in" system may be hindered by the recent ruling of the US court. In September 1999, the 10th Circuit Court of the United States accepted the argument of a phone company, US West Inc, that the "opt-in" approach was an infringement to its rights to free commercial speech.[52]

With respect, the "opt-out" system does not adequately provide for the concerns of consumers. "Opting-out" requires action on the consumers' parts to prevent their records being used. However, out of the nine items of direct mail I received since September 1999, only two of them provide an "opt-out" clause. Viewed in this light, it is worth considering the replacement of the existing "opt-out" approach. Anne Wells Branscomb, a communications and computer lawyer, also suggests that the "opt-in" system is "actually what many customers want — information directed toward their special needs and requirements. Given a choice, they would like the right to determine to whom their name and address are distributed and for what purpose".[53]

Stiffer laws mean a higher level of data protection can be enjoyed by consumers. If direct marketers do not comply with the *Ordinance* at the outset, is it still fair to let them enjoy the benefits of "opt-out" or the generosity of our existing law at the expense of the public at large? Absolutely not. Educating both the public and the direct marketing industry seems to be the only effective way to raise their recognition as to the importance of protecting personal data privacy. The general awareness of personal data privacy is growing.[54] Yet, it has not attained a satisfactory standard.

2. The Declining Role of HKDMA

The HKDMA only plays an advisory role to assist the local direct marketing industry. Assistance is given through regular luncheons, seminars and newsletters.[55] Its "Code of Practice For the Use of Personal Data in Direct Marketing", merely rewords or elaborates the Six DPPs of the *Privacy Ordinance*. Since the Code has no legal force, the *Ordinance* always

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50 Avrahami, R, "Data Base Study: Request to Participate, P974806", 15 April 1997, <http://www.ftc.gov/bcp/privacy/wkshp97/comments/Dbase_Request.htm>, 11 June 2000.

51 Jonah Gitlitz, the President of the New York DMA, "Opt-in Absolutely Unworkable". Electronic Privacy Information Centre database, 15 July 1996, <http://www.epic.org/privacy/junk_mail/DMAresponse.html>, 15 April 2000.

52 In *Competition Policy Institute v US West, INC*, the 10th Circuit Court wrote: "Although we may feel uncomfortable knowing that our personal information is circulating in the world, we live in an open society where information may usually pass freely". In that case, the US court overturned the Federal Communications Commission rules issued under the 1996 Telecommunications Act to protect the privacy of out telephone calling records. Capitol Connection, "Phone companies win and you lose your privacy", 10 June 2000, <http://moneycentral.msn.com...cles/news/capitol/4774.asp?special_msnnip>, 11 June 2000.

53 Anne Wells Branscomb, *Who Owns Information? From Privacy to Public Access*, (BasicBooks, 1994), 15.

54 *Supra* note 34, fig 19 and fig 3 respectively. In the 1999 Survey, almost 80% of the organizations from both public and private sector that responded have officially adopted policies and practices to conform with the Ordinance. The residents that responded also gave privacy a rating of 7.6 out of 10 in terms of importance as a social policy issues.

55 *Supra* note 25.

prevails. The 1999 Survey has shown that more organizations would seek assistance from the PCO instead of their representative body – the HKDMA.[56]

The "Mail Preference Service" (MPS), provided by the HKDMA, enables consumers to opt-out of receiving unsolicited mail if they wish to do so. An MPS form available at the HKDMA or Central Post Office, filled in by the consumer, will be circulated by the HKDMA to its members to notify them to cease further contacts with the person. This can be distinguished from s34 in that the MPS would apply regardless of whether the consumer is "first contacted". Notwithstanding that the MPS has a wider coverage than s34, its usefulness is limited in reality and it will not end all unwanted mail advertising because people will still receive mail from companies who are not HKDMA members.

In reality, it is the leaflets from tuition centers, companies making window drills or offering renovation services that annoy consumers most. The problem is that most of them are not members of the HKDMA.[57]

From 1996 onwards, due to the overriding effects of s 34 and the Six DPPs, the prominence of the Code and the MPS have diminished remarkably. The whole direct marketing industry, whether members of the HKDMA or not, has to adhere to and abide by the *Ordinance*.

The Hongkong Post has recently re-launched the MPS scheme with the HKDMA by displaying the MPS forms at the Central Post Office. Nonetheless, due to their limited significance, it may be better to incorporate this MPS scheme, by legislation, to supplement s 34, so that the potential deficiency of s 34 can be ameliorated.

3. Public Registers as a Data Source

One issue left out by the *Privacy Ordinance* is the Public Register privacy issue. In general, direct marketers target customers according to mailing lists.[58] Mailing lists are formed by the combination of lists and databases.[59] Apart from formulating own lists or databases from existing customers (the "*house/internal lists*"[60]), direct marketers can gather information from other sources to make their "*prospect lists*".[61] There are two ways. Firstly, by making a "*response list*" [62] which includes people who have responded to other offers. Secondly, by

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56 *Supra* note 34, fig 23 "Seek help from whom?". Almost 70% of the organizations that responded said they would seek help from the PCO while only 27% would seek help from representative bodies.

57 *Supra* note 26-32.

58 *Supra* note 2, pp 42-48.

59 List and database are not synonyms. According to the United States Postal Union, "lists" merely contains names and addresses of customers, generate either from a complied list (eg people who have subscribed for a particular book) or a response list (eg people who have responded to other offers). Whereas "database" is referred to include not only the names and addresses of customers, but also the purchasing history, hobbies, favourite shopping place, education level and marital status etc. The USPS, "Using Direct Mail: List vs Database", <http://www.uspsdirectmail.com/startnow/beg_lists.html>, 3 April 2000.

60 *Internal* or *house* list is built from the company's customers files to generate profits from repeating sales from customers, eg bank may send information about their new insurance plans, new credit cards, or other new services to their clients; or, a mobile phone service provider may send to their customers catalogues of latest mobile phones. *Supra* note 2, pp 288-291.

61 *Ibid*, *Prospect* list is classified into *mail order (response)* list and *complied* list.

62 *Response* list contains people who have inquired or purchased a particular goods or services. *Ibid.*

building a *"complied list"* from personal data gathered from public registers.[63] If direct marketers want to save themselves the troubles, they can rent those lists and databases from list brokers.

Of all the sorts of lists, the most contentious one is the complied list. It intensifies the vigorous community debate as to whether it is legitimate to use and gather personal data held in public registers for the purposes of direct marketing. The term "public registers" is not defined in any Hong Kong ordinance. Notwithstanding this, it is generally understood to mean "the records kept by government departments containing various public activities data that can be made available to the public with a charge".[64] Records such as the Register of Vehicles, the Land Register, the Register of Marriages and the Companies Register are examples of public registers.

Given that public registers would have detailed and specific personal profiles of individuals or households, their activities, marital status, or personal characteristics – these can be very useful to direct marketers in acquiring new customers.[65] Since the proliferation of personal details is specific, up-to-date and accurate, they are of significant commercial value. Most direct marketers believe that as members of the public, they are entitled to this conferred right to data access, so long as they comply with the relevant provisions of the register ordinance.[66] They argue that since the personal data disclosed is already publicly available, there is no point in arguing over privacy protection in respect of such information (the "already public" argument).[67]

This argument immediately invites strong objection from consumers at large, who regard collecting their personal data from public registers for direct mail purposes as an intrusion into their data privacy. They feel that such actions would fundamentally tamper the original purpose of collecting data because direct marketers are using the information for "direct marketing" purposes, which are totally unrelated to the previous register data purpose. In fact, according to the 1999 Survey, a total of 1580 responded residents opined that the use of personal data by real estate agents, car dealers and marriage service companies gathered from the Lands Registry, Transport Department and Marriage Registry would cause considerable privacy problems. On average, they rated 7.6 out of 10 in terms of seriousness.[68]

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63 *Complied* list usually contains names and addresses of consumer household, commercial and industrial group, organizations, professionals, educational group and government officials, which are generated from some published listings and registrations, eg yellow pages and public registers. *Ibid*, p 43.

64 *Supra* note 21. The definition is provided by the Privacy Commissioner for Personal Data Hong Kong, "Public Registers as a Data Source for Direct Marketing". Moreover, the term is defined as "a register, list, roll... under the control... of public body, maintained pursuant to statute, regulation... which is open to inspection, copying, distribution or search". See Gellman, R, the Privacy and Information Policy Consultant of the US, *"Public Registers and Privacy: Conflicts with other Values and Interests"*, paper presented to 21st International Conference on Privacy and Personal Data Protection, in a Parallel Session of "Public Registers-Privacy Problems and Solutions", 13 September 1999, <http://www.pco.org.hk/conproceed.html public >, 4 February 2000.

65 *Supra* note 21.

66 *Supra* note 1, p 128. For instance, information would be disclosed to any person upon payment of a fee prescribed in the relevant ordinance.

67 Also, the DMA of US do not regard "public records" as "personal data" because they are readily observable. Personal data only means "information that is linked to an individual...and that is not publicly available". Schwartz, P M and Reidenberg, J R, *Data Privacy Law: A Study of United States Data Protection*, (Michie, 1996), 313 fn 18.

68 The corresponding rates in relation to the Lands Registry, Transport Department and Marriage Registry are 7.9, 7.8 and 7.1 respectively. *Supra* note 34, fig.5.

At present, the use (including "transfer"), maintenance, disclosure and gathering of data from public registers for the use of direct marketing are not covered by the *Privacy Ordinance*. As to ordinances governing those registers, little regard is given to whether personal privacy will be infringed. They merely specify that certain documents or information shall appear on the relevant registers and be disclosed to the public.[69] If the legislature had more foresight, they would have contemplated this scenario.[70]

The *Privacy Ordinance* and the establishment of the PCO are milestones showing the government's initiatives towards the protection of personal data privacy. Nonetheless, it was not until 4 years ago that the PCO had been set up. To a large extent, the late awareness of our government is the underlying cause for the public register problem being unresolved for decades.

On the face of the *Ordinance* governing these registers, it appears that direct marketers are legally entitled to use personal data for any purposes because there are no particular limitations as to the purposes they may be used for. Notwithstanding the fact that their "already public" argument has some strengths, if we "take privacy seriously", especially those DPPs entrenched in the *Privacy Ordinance*, it may be argued that the collection of data from public registers infringes the *Ordinance*, in particular DPP3 – "Use of personal data without consent".[71]

For instance, the purpose of collecting personal data by the Marriage Registry is to notify the public about the impending marriages to allow them to raise legitimate objections. Hence, using the information[72] from marriage services companies for direct marketing purpose, arguably, contravenes DPP 3, which prescribes that without the data subjects' consent, personal data may be used ("use" includes "transfer") only for the purposes for which they were collected or for a directly related purpose.[73]

This can be fatal to direct marketers who rely on public registers as their data source. Apparently, they cannot argue but direct marketing "directly" relates to the register purpose. On the other hand, though register data is of significant commercial value, it might have drawbacks on direct marketers, for instance, negative consumer reactions. Assuming a bank uses transacted property addresses and the names of registered owners issued by the Land Registry for direct marketing purposes, say, for credit card promotion, mail receivers may feel that direct mail from companies that have no prior relationship with them is rather invasive.[74] It is highly foreseeable that they would feel surprised and may query how their contact details were obtained.[75]

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69 PCO, "Public Registers as a Data Source for Direct Marketing", *supra* note 21.

70 However, this issue was also not conceived by the Legislature at the time of drafting the *Privacy Ordinance*. This may be due to the fact that the Legislative Council had to be dissolved so the Bill was introduced within a short time span. *Supra* note 1, p 25.

71 DPP3 stipulates, "Personal data shall not, without the prescribed consent of the data subject, be used for any purpose other than (a) the purpose for which the data were to be used at the time of the collection of the data; or, (b) a purpose directly related to the purpose referred to in para (a)".

72 The "occupation, age and dwelling place" are specified there. *Supra* note 1, p 128.

73 It means the Data Protection Principles 3 of the *Privacy Ordinance*. *Supra* note 21.

74 Above, note 34, Fig 2 "Invasion of Privacy". Respondents rated 6.2 on a scale 0-10 (0 = not an invasion, 10 = very severe invasion).

75 This example is taken from the PCO, Advice & Decisions--Notes on enquiry cases related to section 34 of the Ordinance on direct marketing, Case no: 199805027, <http://www.pco.hk/advice/ordinance/sect34_menu.html>, 13 February 2000.

In the eyes of consumers, the disturbance brought about by the uncontrolled use of register data can be awful. Just imagine this scenario. If one marriage service company copied a couple's personal data and sent them their service catalogues, they would have to be bothered with having to write an "opt-out" request to cease any further contacts. How about if 100 such companies have copied their information and target them subsequently? It is foreseeable that the couple's chain of nightmare would not end until and unless they have written the "opt-out" request 100 times. This example clearly reinforces the arguments I have advanced in the previous section concerning the replacing of the "opt-out" system.[76]

The essence is, an individual would not have the right to "opt-out" until and unless a particular company has contacted him or her. That means that only after a direct marketer has sent mail shots to a person according to the register data would he have the opportunity to exercise the opt-out right. As a consequence, data subjects have to tolerate the uncontrolled access and use of their data demonstrated in the public registers before they can exercise their "right to opt-out". It appears that the control of our personal data is solely dominated by others.[77] In this context, is our "opt-out" right merely a qualified right?

Likewise, the transfer of register data is unrestricted. Suppose the data collector is a list broker. In that case, we do not even have the choice to "opt-out" of his selling or renting out of our particulars because no service catalogue would be sent to us at all. It is extremely unacceptable that without the data owners' permission, direct marketers can build up consumer profiles from such data for their own benefits or trade purposes. Is our constitutionally guaranteed right to privacy merely precarious?[78]

Who owns personal information? Losing trust in direct mailers gradually, one begins to hear an argument for the introduction of property rights to personal information. The leading advocates are Professor Arthur Miller, Alan Westin[79] and Anne Wells Branscomb.[80] Believing in the "what-I-own-you-can't-have" notion, they suggest consumers should exercise strict control over the use of their data. Another supporter, Ram Avrahami, loser of the *Avrahami* case, also considers personal information as being a marketable good having regard to the manner in which it is collected, sold and bought, and then used by direct marketers.[81]

What follow from the judgment of the *Avrahami* case are the widespread comments and sentiments from consumers at large. Leonard Rubin, a Chicago lawyer and expert on privacy

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76 See the analysis of "General Compliance with the *Privacy Ordinance*" in Part III B 1.

77 It is argued that the access to register data is not unconstrained by the purposes of the register. It is because public disclosure is not a "purpose of data on the register", but only a "means by which data purposes are fulfilled". It is suggested that to state the above identification in wall notice by register administers would solve the public register controversy. But its effectiveness may be undermined because not all accessing to these data would adhere to these non-mandatory notices. *Supra* note 1, p 128.

78 See the discussion of "Direct Mail and Privacy" in Part II B.

79 Miller regards, "Perhaps the most facile approach to safeguarding privacy is the suggestion that control over personal information be considered a property right vested in the subject of the data and eligible for the full range of constitutional and legal protection that attach to property". Westin also describes "personal information, thought of as the right of decisions over one's private personality, should be defined as a property right with all the restraints on interference by public or private authorities and due process guarantees that our law of property has been so skilful in devising". *Supra* note 53, p 180.

80 *Ibid*, p 29. As a communications and computer lawyer, Branscomb wrote "our names and addresses and personal transactions are valuable information assets worthy of recognition that we have property rights in them. Unless we assert these rights, we will lose them. If such information has economic value, we should receive something of value in return for its use by others".

81 *Supra* note 50.

issues, has opined that once personal data is made public, such as in the public register, a person would have effectively forfeited his rights to it.[82] A "Take Back Your Data" campaign had also been launched by the American Civil Liberties Union in 1997.[83]

Nonetheless, a more appreciable view is advanced by Professor Raymond Wacks, who suggests, without any support from compelling case law, that it is not desirable to apply the concept of "property" to personal information. He regards that such a recognition as being problematic because it would "extend the jurisdiction of breach of confidence to circumstances in which a third party has merely acquired confidential information without actually committing breach of confidence".[84] Viewed in this light, the application of proprietary interests to personal information would only create confusion and illusion.

There are four plausible ways to minimize or even eliminate the unauthorized use and transfer of register data. Firstly, incorporating the EU Directive "Purpose Specification" clause in the *Ordinance*,[85] so that no process of personal data is allowed (either for direct targeting or renting to others) before the data subject's consent is obtained. The second way is to require mailers to print the data source on the front of the envelope, so that recipients can trace or query any unknown sources of their data.[86]

Thirdly, amending the *Privacy Ordinance* to forbid the use of register data as a direct mail source. Followed by the PCO's recent proposal[87] to fill the public register loophole, we can anticipate that the ultimate winner of this "tug-of-war" will be the public. An evaluation of the practicability of these PCO proposals is outside my defined topic. Nevertheless, the Office of the Privacy Commissioner of New Zealand, has suggested "Five Strategies" to solve the public registers dilemma, which largely resemble our PCO's proposals.[88]

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82 Mccready, G, "Consumer privacy debate heats up", 26 August 1997, <http://www.hardrock.org/muse/0421.html>, 10 June 2000.

83 *Ibid.* The urge for property rights in personal information is probably intensified by the unfair treatment on the appropriation of one's name for other's commercial benefit. Most of the states in the US have laws prohibiting the appropriation of celebrities' names for commercial benefit; however, no such law applies to the ordinary citizens.

84 Wacks, R, *Personal Information,* (Clarendon Press, Oxford, 1989), pp 42-49.

85 DPP 1 of the *Privacy Ordinance* was based on the "Purpose Specification" clause of the OECD Guidelines. However, the "Purpose Specification" clause (art 7) of the EU Directive is more specific and narrow than the OECD Guidelines for it stipulates "personal data may only be processed if the data subject gives consent, or processing is necessary for contract performance, or for legal compliance, or to protect the vital interests of the data subject, or for public interest, or for legitimate interests". With reference to this "purpose specification provision, it seems that marketers can only rely on data subjects" consent to process personal data. Lau, S, the Privacy Commissioner for Personal Data, "The Asian Status with respect to the observance of the OECD Guidelines and the EU Directive", paper presented to the 19th International Conference of Personal Data Protection Commissioners, Brussels, Belgium, 17-19 September 1997, <http://www.pco.org.hk/issues0917.html>, 15 March 2000.

86 Recently, such a new data protection law is drafted in Germany, but the DMA objects greatly. Weyr, T, Editor of the DM News International, "German DM Sees Solid Growth", 15 November 1999, <http://www.dmnew.com>, 30 November 1999.

87 The proposals are (i) amending all Ordinances which allows public access to information held by public registers to comply with requirements of the *Privacy Ordinance*; (ii) amending the *Privacy Ordinance* to cope with the public registers controversies; (iii) introducing a "generic public registers ordinance" to govern the establishment, maintenance and use of public registers; (iv) creating a legally enforceable "territorial -wide opt-out list". *Supra* note 21.

88 *Supra* note 64. Mr Blair Stewart, Assistant Commissioner, Office of the Privacy Commissioner, New Zealand, "*Five Strategies for Addressing Public Register Privacy Problems*" 13 September 1999, <http://www.pco.org.hk/conproceed.html>, 4 February 2000.

The fourth viable alternative may be the introduction of mailing list services proposed by the Hongkong Post. As will be further explored in the last section, relying on the mailing list service is likely to be far more attractive and efficient from the perspectives of direct marketers than the recourse to the gathering of information from public registers.

Similar concerns are made to another publicly available data source, namely, The Yellow Pages and telephone directories of other organizations.[89] Yet, they generate less public concern than public registers data because they are generally less detailed and specific and thus fewer marketers would use them as data source.

4. The Hongkong Post Circular Service

Direct mail is widely perceived as the sole cause of "junk mail".[90] However, are "junk mail" and "direct mail" synonymous? They may not be. If consumers are wrongly targeted, eg hair products catalogues sent to a bald man, the recipient will probably consider the direct mail to be "junk". However, if cosmetics were being promoted to a lady, presumably, she will not regard the mail as "junk". In reality, what compounds the junk mail nuisance is that advertising mail sent through the Hongkong Post Circular Service.[91]

Distinguished from direct mail, which is "unsolicited personally addressed" mail, the circular service sends mail shots to consumers without names and addresses.[92] That means the mails do not contain any personal data.

This service operates on a geographical or regional basis. Any businessmen who want to send advertising materials to a particular area can send their promotional materials, "unstamped and unaddressed, enveloped or unenveloped to all local addresses with letter boxes on the ground floor, households in housing estates where there are suitable letter boxes or door slots for receiving mail readily provided at the door of each individual unit".[93]

Suppose place X is a large housing estate. Restaurants, beauty centers, newspaper publishers and Internet service providers, to name a few businesses, may find massive potential consumers concentrated in the place. Thereby, it seems that consumers can be targeted without the trouble of analyzing prospect profiles.

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89 For example, I have observed that some marketers made use of the "Government of the HKSAR Telephone Directory 1998", which contains the name, rank, department, group and office address of civil servants to send mail shots to the staff of the Environmental Protection Department.

90 There are conflicting views on whether "direct mail" equals "junk mail". "Junk mail" is defined as "any advertising material for products or services that is sent to large numbers of people who have not asked for it". Oxford Advanced Learner's Dictionary of Current English (Oxford University Press 1995). So, we may argue if we "do not ask" for the direct mails, they are "junk mail". The United States Postal Services held a contrary view that "junk mail" and "direct mail" are two different entities in the sense that direct mail only becomes "junk mail" if consumers are wrongly targeted due to outdated and inaccurate lists or databases, <http://www.uspsdirectmail.com/>, 3 April 2000.

91 In fact, out of 18 advertising materials I collected since March 1999, 9 of them are sent through the Hongkong Post Circular Service.

92 If only the word occupants' or consumers' addresses appears on the envelope, ie without any names, this does not amount to "personal data", and thus is not direct mail. *Supra* note 75, Advice & Decisions, Case no: 199805027.

93 Telephone interview with one of the staff of the Direct Marketing Section of the Hong Kong Post (28 February 2000). Reference is also made to the Hongkong Post Services "Hongkong Post Circular Service", <http://www.info.gov.hk/hkpo/rate/f_general.htm>, 9 April 2000.

This service is meritorious to businessmen, especially those running a small business, because its cost is likely to be remarkably lower than making or renting a list. But as far as consumers are concerned, more objections may be raised against this Circular Service than the direct mail because they are targeted without any profile analysis.

Given that the contribution of the Hongkong Post Circular Service to junk mail is not negligible, it may be reasonable to ask whether the right to privacy has been extended to our mailboxes. At present, no law regulates the Hongkong Post Circular Service. Nor does the *Privacy Ordinance* have any jurisdiction to monitor it, because this service involves no personal data.

The *Privacy Ordinance* only governs the "collection, holding, processing and use" of personal data. "Personal data" means "any recorded information relating to a living individual from which it is reasonably practicable to identify the individual concerned and that are reasonably practicable to access or process".[94] The scope of the *Ordinance* was redefined clearly in a recent Court of Appeal case, *Eastweek v Privacy Commissioner for Personal Data.*[95] The Court of Appeal held that personal data protection is not a general right to privacy. The *Privacy Ordinance*, only protects "information privacy", but not "personal place privacy", "personal privacy" and "communications and surveillance privacy".[96]

The Circular Services are sent without personal data, without specifying the recipient's name or address. Thus, neither the Hongkong Post nor the mailers are legally obliged to provide any "opt-out" option for mail receivers. Although legally speaking, there is no right to privacy enjoyed by our mailboxes, in practice, there is a way to protect mailboxes from the intrusion of junk mail.

The Hongkong Post claimed that agitated consumers can submit a signed request to the post office and demand further such mails be ceased.[97] But, even if our mailboxes have been given the right of privacy, the right is undermined since the public is not adequately informed of its existence. It would be more desirable to state this right clearly and obviously on the front of the envelope containing the advertising mails.

C. The New Proposal

Developing mailing lists for direct marketers is one of the Hongkong Post's Millennium postal marketing plans.[98] If it does come into force, undoubtedly, direct mail will receive the tremendous evolution that we have never before seen in Hong Kong. In the following paragraphs, the experience of postal authorities in other jurisdictions is examined to see if they can merit close consideration for the Hongkong Post. The proposal has been analyzed from three dimensions, the legal, economic and privacy perspectives.

IV. Postal Administration in foreign jurisdictions

It may be useful to mention at the outset that direct mail services and mailing list rental service

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94 Section 2 of the *Privacy Ordinance*.

95 *Eastweek v Privacy Commissioner for Personal Data* [2000] 1 HKC 692

96 *Ibid*, pp 704-705.

97 *Supra* note 93.

98 The Hong Kong Post Annual Report 1999-2000: Meeting changing needs by programme, p 42 and the Hong Kong Post, "100 Projects for Better Service for 99/2000 — New and Enhanced Products or Services", number 57, <http://www.hongkongpost.com/f_p100.htm>, 9 April 2000.

are not synonymous. Mailing list rental is only one of the various types of direct mail services provided by postal authorities.

A. Some Observations

For most jurisdictions, there is a long history of postal administrations involved in the provision of direct mail services. The United States Postal Services (USPS), Royal Mail UK, Sing Post, New Zealand Post (NZ Post), Australia Post, Dutch Post (PTT Post BV) and the Deutsche Post (Germany) are the world's zealous postal supporters for direct mail services. Surprisingly, the Royal Mail UK and the USPS do not engage in any mailing list rental service but they do offer other corresponding services for direct mail.

The differences between mailing list services and other ancillary direct mail services can be seen in the examples of the NZ Post and the USPS. Data processing and mail production make up the core business of the NZ Post. The two available mailing list rental services are the "Address List Rental Service" and the "Address Correction Service". The former enables direct marketers to target new customers who have some interest in their products and services. Both personalized and non-personalized mailing lists are ready for rental. These lists are made from three list databases and the Prospecta targeting tool. They are the "NZ Movers" (find people who have moved flats), the "Hot Leads List" (find people who have expressed interest in particular types of products and services), the "Household Street Address" (find people by location) and the "Prospecta" (find people by location, lifestyle and behaviour).[99]

On the contrary, the USPS does not provide any mailing list service but does engage in supplying other ancillary direct mail services. As a one-stop direct marketing resource center, the USPS gives direct marketers a guide to the use of direct mail eg listing contact details of list brokers and trade bodies, suggesting useful books and magazines, advising on how to compile, rent and select consumer lists and databases, summing up relevant rules and regulations. The "Customer Relations Representatives" in the "USPS Postal Business Centre" will assist mailers with any difficulties faced in mailing. Other services include offering postal discounts, suggesting direct mail formats and template demos, and inviting professionals to give direct mail seminars. Services are also developed to ensure their mailing list is accurate and updated. The "National Change of Address" File lists changing address records of households for the previous 36 months. The "Delivery Sequence" File contains households and business addresses that can be delivered to.[100]

B. A Comparative Approach

It will be observed that all those postal administrations that provide mailing list services, namely the Sing Post, NZ Post, Australia Post, PTT Post BV and the Deutsche Post, are commercially-oriented. Those governmental postal authorities, represented by the USPS and Royal Mail UK, are more likely to decline the initiation of mailing list services.

Their distinct status, obligations and financial management are the major legal factors that

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99 New Zealand Post, "Addressing Service", <http://www.nzpost.co.nz/nzpost/business/dydm.html>, 6 March 2000.

100 The USPS, "Direct Mail", <http://www.uspsdirectmail.com>, 6 March 2000.

account for their varying participation in providing mailing list service.[101]

1. Legal Status & Obligation

Sing Post is a private limited company operating under its holding company, the Singapore Telecommunications Limited.[102] Processing data is explicitly allowed by para 25 of Second Schedule of the *Telecommunication Authority of Singapore Act 1992*.[103] Likewise, the PTT Post BV, a wholly owned subsidiary of KPN,[104] is forced with the major responsibilities of protecting the State's share interest in the postal service.[105] On the other hand, the NZ Post and the Australia Post being, state-owned enterprises,[106] have the common objective of running a "successful business" according to "sound commercial practice".[107] The Deutsche Post also, is a "joint-stocked" company in which the State holds all shares.[108]

In contrast, the USPS is "an independent executive branch of the US government".[109] Its designated mission is to provide "prompt, reliable and efficient" postal services,[110] but neither "business goal" nor "reasonable commercial return" are prescribed in the act.[111]

On a balance of probabilities, what is the status of the Hongkong Post? Is it governmental or commercialized? The answer may not be so straight forward. While it may still be a government department, it is not purely governmental. The trouble is caused by its mode of financing.

2. Financial Management

A Trading Fund has specifically been established to account for the operation of the Hongkong Post.[112] The Hongkong Post funds itself in the sense that any income received has to be paid in

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101 Any comparisons drawn here are fundamentally based on the information provided by the UPU in *UPU and its Members: Status and Structures of postal administrations* of the UK, US, Singapore, New Zealand, Australia, Netherlands and Germany, <http://www.upu.int>, 19 April 2000.

102 It is the first "Public Postal Licensee" of Singapore. The license was granted by the Telecommunication Authority of Singapore pursuant to s42 of the Telecommunication Authority of Singapore (TAS) Act 1992, <http://www.singpost.com.sg/pf01intr.htm> and <http://www.tdb.gov.sg/costort/singpost.html>, 4 February 2000.

103 It stipulates that "TAS was empowered to provide all forms of communications systems and services, whether interactive or otherwise, including data processing". Sing Post is delegated of this power by s43, which provides that Sing Post is entitled to "perform all or any functions of postal services of the TAS".

104 Royal PTT Netherlands NV.

105 *Supra* note 101. 45% of KPN shares were held by the State.

106 *Ibid.* For New Zealand, the State-Owned Enterprise Act 1986, No 124, Second Schedule. Section 4 provides the "principal objective to be successful business and as a profitable and efficient as comparable business that are not owned by the Crown". For Australia, s26 of the Australian Postal Corporation Act 1989 stipulates "Australian Post shall, as far a practicable, perform its function in a manner consistent with sound commercial practice".

107 *Supra* note 101.

108 *Ibid.*

109 Section 201 of Title 39 of the US Code, <http://www.usps.gov/history/his3.html#SERVICE>, 4 February 2000.

110 The mission is stated in Title 39 of the US Code.

111 Section 412 of Title 39 may be another constraint. It provides "Non-disclosure of lists of names and addresses: Except as specifically provided by law, no officer or employee of the Postal Service shall make available to the public by any means or for any purpose any mailing or other list of names or addresses (past or present) of postal patrons or other persons".

112 *Post Office Trading Fund*, subsidiary legislation E. (Cap 430E),

to its trading fund and any expenses are similarly paid out of the fund.[113] Obviously, it is self-financing. It assumes full responsibility for its own budget. Accordingly, it seems that the Hongkong Post has no difference in status from those commercialized postal administrations. However, this *prima facie* conclusion cannot be sustained for three reasons.

Firstly, the Hongkong Post is neither a state owned enterprise, nor is it a limited company. Despite urges for privatization, this proposal has not yet been adopted officially. Inferences can also be drawn from the *Trading Funds Ordinance* that the Government still retains a considerable degree of control and supervision over the Hongkong Post. The General Manager who controls and manages the Fund is designated by the Financial Secretary.[114] Furthermore, he must comply with any directions issued by the Financial Secretary.[115] Any surplus Fund money can only be invested "in the manner approved by the Financial Secretary".[116] Therefore in substance, the Government controls every movement of the Hongkong Post. It seems to be bound hand and foot, and must do as the Government says. In reality, without any economic autonomy, the final regulator of the Hongkong Post Trading Fund, is the HKSAR Government, rather than the Hongkong Post.

Secondly, no shares are issued and held by the Government.

Thirdly, no commercial obligations are expressed or implied in the *Post Office Ordinances* or the *Trading Funds Ordinance*.[117] The objective of the Hongkong Post Trading Fund is only to "achieve a reasonable return".[118] Certainly, these words cannot be interpreted to mean "a reasonable commercial return" nor can it be extended to mean "sustaining profitability". The most reasonable interpretation would seem to be to run postal services at "break-even" point, just akin to the financial management of the USPS.[119] My contention is supported by the Hongkong Post's mission "to be a viable business with sufficient resources to invest in out future".[120] "Viable" means "capable of developing and surviving without outside help".[121] Obviously, it cannot mean "*profit maximization*". Accordingly, on a balance of probabilities, the Hongkong Post is still governmental.

3. Statutory Interpretation on the Hongkong Post's power

As discussed above, the legal status or obligations of the Hongkong Post may become the hindrance of the implementation of mailing list services. Notwithstanding, it has been argued that the Hongkong Post is statutorily empowered to pursue the mailing list service. Adopting the liberal approach,[122] it is argued that, by virtue of para 7 Schedule 1 of the Post Office

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113 Section 5 of the *Trading Funds Ordinance*, Cap 430 LHK.

114 Under the *Trading Funds Ordinance*, s6(2) stipulates "a General Manager shall be designated by the Financial Secretary to control and manage the Fund and he is accountable to the Financial Secretary for the Fund's operation".

115 *Ibid*, s6(5).

116 *Ibid*, s9(1).

117 All the business-oriented postal administrations either have express or implied legal obligations to practice commercially.

118 Section 6(6)(c) of the *Trading Funds Ordinance*.

119 *Supra* note 101. The USPS has a legal duty to produce revenues equal to costs over time, any surplus revenues are used to offset past or future liabilities. But it bears no obligation to make a profit.

120 The Hongkong Post, "Mission and Vision", < http://www.hongkongpost.com>, 9 April 2000.

121 *Supra* note 45, Oxford Advanced Learner's Dictionary.

122 Although there are a number of approaches to interpret ordinances, we adopt the liberal approach. Section 19 of the Interpretation and General Clauses Ordinance stipulates a "fair, large and liberal interpretation as will best ensure the attainment of the object of the ordinance".

Trading Fund,[123] the Hongkong Post is entitled to provide a mailing list service[124] because such a service can be interpreted as "any service ancillary incidental or conducive" to those services listed therein, in particular the "business reply service".[125]

With respect, if "business reply card template" is proposed, then no one will hesitate in agreeing that it is "ancillary" to the "business reply" service. However, what is proposed now is the "mailing list service", which has no "linkage" in substance with the "business reply service". The "artwork template reply card" can be said to be "ancillary" for it facilitates the ease of consumers to respond to marketers. However, "mailing list" is another thing. It helps marketers to acquire new customers. Accordingly, their underlying objectives are entirely different. Although both of them are categorized as direct mail services, they are independent and no justifications for the "ancillary" relationship can be made.

4. Community's Perception

"Serving the community at large" is the mission of the Hongkong Post. It can be foreseen that the public would feel strongly if government departments got into the business of maximizing profits. Without doubt, the mailing list rental service does have something to do with making profits. Before any privatization reform is concluded, it would be highly unacceptable and inappropriate for the Hongkong Post to act as a list broker and run postal services as a commercial business.

Yet, it may be far easier for the Hongkong Post to supply other direct mail services which are ancillary to mailing list services, but are of a "less commercialized" nature, for instance, the provision of advisory and assisting services as offered by USPS. Nonetheless, if no developed, accurate and up-to-date mailing list is generally available and accessible in Hong Kong, even if other direct mail services are provided, they will be of little use.[126]

V. Direct Mail as an Economic Miracle

Economically, direct mail is always regarded by postal administrators and direct marketers as a flourishing business that can yield billions of dollars. In particular, the Direct Mail Advisory Board (DMAB),[127] USPS and Royal Mail greatly promote direct mail and boast it as an important growth engine for the world economy.

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123 *Supra* note 112.

124 Para 7 reads as "Any ancillary service incidental or conductive to providing any of the services in terms 1, 2, 3, 4, 5 and 6, including the services of business reply, express, insurance, post restante, private post office boxes, redirection and registration".

125 I believe, apart from "business reply" service, other services listed therein only have remote relevance with the purpose of direct marketing or direct mail. Business reply is used by businessmen who want to obtain consumer's response without requiring customers to pay the postage, <http//:www.hongkongpost.com>, 9 April 2000.

126 This is the situation we now experience in Hong Kong. If such a developed mailing list is available in Hong Kong, then, there would not be so many direct marketers relying on "public registers" as data source, or they would not abridge "direct mail" but resort to Hong Kong Post Circular Service as an alternative.

127 The DMAB is created within the Universal Postal Union (UPU), a specialized agency of the United Nations, to activate worldwide development of direct mail. It consists of members from direct mail industry leaders, direct mail associations and 26 postal administrations all over the world. The Direct Mail Advisory Board, *Growing Business: Direct Mail can create Important New Revenue*, 1999, <http://www.dmworldconference.com/text.ht>, 3 April 2000.

A. *The Economic Advantage of Direct Mail*

Hundreds of success stories are boasted by the USPS [128] and the Royal Mail. They claim the response rates of customers have proven direct mail to be workable.[129] Since the 20th century, traditional media such as TV, radio and magazines have become increasingly fragmented, their expansive diversity render targeting consumers more costly and difficult. To direct marketers, direct mail has distinctive advantages[130]over other types of media.[131]

Firstly, "targetability". Only wanted buyers will be targeted and, irrespective of where they are, mail can be reached. Second, "measurability". Consumers responses can be measured accurately and quickly. Third, "cost effectiveness". Unproductive names and addresses can be deleted from mailing lists so that wastage can be reduced. Fourth, "flexibility". Any kinds of businesses can use direct mail for promotion, any one can be targeted, at any time and by any format. Moreover, adjustments can be made according to marketer's budget and specific needs. Fifth, "the existence of more business chances". Targeting is more precise and accurate and thus means more business opportunity. Sixth, "privacy". Direct marketers can target consumers without their competitors' knowledge. Seventh, "maintaining customer loyalty". Solid customer relationships can be built as customers are targeted personally. Eighth, "adjustablity to budget". It can operate even if the budget is small. Lastly, "an advertising complement". It can accommodate other forms of advertising such as radio and magazines to build brands.

B. *The Economic Considerations*

The proven economic advantage of direct mail provides direct marketers with the necessary ambition and incentives to use direct mail. The more developed the mailing list, the more effective the direct mail. Consequently, it results in the increasing importance of mailing lists.[132] To postal administrations, more mail shots mean more revenue. Whenever direct marketers send mail shots or when consumers respond to direct mail, it will gain.[133] Unlike direct marketers, its revenue is independent of consumer response. If it goes further to pursue the mailing list rental service, its revenue may be doubled or even tripled.[134]

Foreseeing mailing lists as an enormous source of revenue, the Hongkong Post will surely do its best to help direct marketers. Nonetheless, is it conclusive to say that the mailing list service ought to be pursued by the Hongkong Post? Despite the economic advantages of direct mail, in order to determine whether it is economical and practical for the Hongkong Post to provide the

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128 *Ibid.* The USPS claimed in 1997, direct mail generates over $145 billion in business to business sales. Eg Bank of Hawaii exceeds sales objectives for loan business by 322%.

129 *Ibid.* USPS claimed over 50% of recipients of direct mail would read it immediately and over 40% of them regard the mail as useful. For instance, the Black Dog Tavern responded target catalogue mailings result in response as high as 40%.

130 The ten advantages are summarized from the DMAB, *Supra* note 127, the USPS, *supra* note 100 and Davies, M, *supra* note 2, pp 281-282.

131 The USPS claimed every dollar spent on direct mail advertising brings in $10 in sales, which double the return by direct TV advertisement. *Supra* note 100.

132 Mailing list is the essence of direct mail. The more the accuracy of mailing list, the higher the opportunity of targeting the right consumers. The USPS has even stipulated the credo in direct mail as "the list, the list, the list". *Ibid.*

133 In 1996, American consumers had spent more than $ 240 billion in response to direct mail. *Ibid.*

134 In 1999, the number of letter mail of the Hong Kong Post is nearly 1300million. Certainly, the number of letter mail will increase extensively upon the implementation of mailing list service. The HKSAR Census and Statistics Department, Hong Kong In Figures 1999, <http://www.gov.hk/censtatd>, 19 April 2000.

mailing list service one has to take account of some local factors, namely, the number of households, size of region and the maturity of DMA.[135] Nevertheless, neither of these is solely decisive.

1. Number of Households and Size of the Region

Any mailing list would contain basic database elements of customers, such as name, address, length of residence, age, gender, marital status, family data (kids, pets), education level, household income, occupation, shopping habits, interests, favourite restaurants, banking preference, travelling patterns.[136] A possible means of collecting this detailed consumer information is by conducting a lifestyle survey on households. Hence, whether it is practical or possible to make mailing lists depends substantially on the number of households. The greater the number of households, the more costly and time-consuming it will be to gather information.

Compared with the UK and the US, the number of households in Singapore, New Zealand, Australia, Netherlands and Germany are significantly smaller.[137] Hence, relatively speaking, it might be much easier (in terms of time, cost, resources etc) and practical to formulate mailing lists in the latter batch. Similarly, Hong Kong has a relatively small number of households with the range of 2.1 million[138] in a small geographical area. These create, *prima facie*, a favourable economic atmosphere for the development of mailing list services.

2. Postal Field Competitions & the Maturity of DMA

When postal administrations face domestic postal competition, they are more likely to provide mailing list services. To maintain competitiveness in the postal market, they must develop new services to acquire and keep customers. Facing competition from other private companies, the German Deutsche Post engages in the provision of mailing rental services.[139]

Besides, with the DMA or other trade bodies are well developed, it is less likely that the postal administrations will engage in making mailing lists. In the US, for instance, apart from the

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135 There are two kinds of databases, the consumer database and business-to-business database. It is unclear that which type of database the Hong Kong Post proposes to make for mailing list. During the telephone conversation, the Direct Marketing Group of the Hong Kong Post said it is not convenient at this stage to disclose the progress to public. *Supra* note 93. Here, the writer submits it is more probable that the Hong Kong Post intends to make a consumer database, because it is the usual practice of foreign postal authorities.

136 These elements summarized from Basic elements of Customers and B-to-B databases by USPS. *Supra* note 100, and the lists offered by the Sing Post, <http://www.singpost.com.sg/ot09data.htm>, 19 April 2000.

137 The number of households of New Zealand, Australia and Dutch are 1.3, 6.9 and 5.9 million respectively while UK has 23.6 household. See Royal Mail US, "A Guide to Direct Marketing", <http://www.royalmailus.com>, 19 April 2000. However, the data of households are not available from the US and Singapore, for example, only the total number of population is recorded. See Singapore Census and Statistics Department, Singapore in Figures 1999, <http://www.singstat.gov.sg/FACT/SIF/sif.html>, 19 April 2000. Besides, Germany has 32.7 million of households, thus, it seems that it cannot be reconciled with the above proposition. However, I consider that the significance of this factor is outweighed by the factors I am going to mention in part (ii) below. Yet, I do not think the significance of the number of households is undermined heavily by the Germany exception.

138 The Census and Statistics Department of HKSAR, Hong Kong in Figures 1999, <http://www.info.gov.hk/censtatd/eng/hkstat/hkinf/population/pop5.htm>, 19 April 2000.

139 *Supra* note 101. Since 1998, a new postal law was passed in Germany to enable the Regulatory Authority for Telecommunication and Post to grant unlimited postal operator license to other companies. The aim of the government is to "uphold the principle of competition without abandoning the government's responsibility to provide basic postal services".

DMA, numerous trade bodies act as list and database brokers (eg the Advertising Mail Marketing Association and the Alliance of Independent Store Owners & Professionals).[140] These bodies have already developed a perfect network and collection system of diversified and resourceful mailing lists. Consequentially, from the economic viewpoint, there is no need for the USPS to produce any on its own.

In Hong Kong, the only supporter of the direct marketing industry is the HKDMA. Although it has been established for nearly two decades, its membership only represents a small portion of the whole direct marketing industry.[141] Well-developed consumer mailing lists do not seem to be readily available in Hong Kong. Neither are any provided by the HKDMA or other organizations. Though a list can be complied from existing customers, it is unworkable for newly started business. List brokers are not common in Hong Kong. Thus, getting data source for direct mail is amazingly difficult. Undoubtedly, it would be good news to both local and foreign direct marketers if they can get their mailing list from a particular place, so that the trouble of acquiring consumers lists can be minimized. Most importantly, the mailing list is comprehensive as it represents the lifestyles of the two million households in Hong Kong.

In short, both direct marketers and the Hongkong Post will benefit from this new proposal. Economically speaking, the mailing list service if pursued by the Hongkong Post will be worth its while.

VI. The Dilemma of Direct Mail and Privacy

The lack of a well developed mailing list in Hongkong may well be one of the reasons exaggerating the public register privacy problem. Without such a list, direct marketers will resort to other means to collect data for direct mail, including public registers, yellow pages and the Hongkong Post Circular Service.

Since customers are not targeted according to any profiles, direct marketers generally opine that this kind of practice is "bad targeting". Consumers would suffer because they receive "junk" mail shots. As mentioned earlier, register data is collected and used without consumers' prior knowledge and approval. Hence, consumers will probably disbelieve marketers and will be reluctant to place their trust in them. In addition, the generally low level of conformity with the *Privacy Ordinance*, such as with the "opt-out" clauses does not really mean ceasing contact and the usual absence of an "opt-out" clause, does cause continuously bombarded consumers to resist or oppose to the practice of direct mail.

Certainly, the proposal initiated by the Hongkong Post would be welcomed by mail receivers, but perhaps, even our mailboxes would welcome it. Once this list is produced, the attractiveness of the Hongkong Post Circular Service, Public Registers data and yellow pages would significantly diminish. Therefore, it is highly conceivable that the junk mail problem would be solved automatically once the Hongkong Post proposal is put into action.

As a government department, as well as a "data user" under the *Privacy Ordinance*, the Hongkong Post would devote the greatest effort to ensure all the provisions and principles of the

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140 *Ibid.*

141 There is no record as to how many companies act as list broker in Hong Kong. According to the 1999 Survey, more than 460 companies of such nature are interviewed, and the HKDMA only has members not more than 20. *Supra* note 34. As such, the membership of HKDMA only represents an insignificant portion of the total industry.

Privacy Ordinance be upheld and complied with. The Hongkong Post, whose image is one of its most important assets, will not be able to afford loosing customer trust.

VII. Conclusion

A detailed overview of the *Privacy Ordinance* in respect of its control over direct marketing has been undertaken. The problem today is that direct marketers have unrestricted access to public records, such as the personal data displayed at public registers and telephone directories.

It seems that there is a cogent need for statutory intervention. Our constitutionally guaranteed right to personal information privacy, would be washed away if no action is taken to remedy this lacuna. The simplest and most effective solution would be amending the *Privacy Ordinance* and those relevant public registers ordinances. Before the direct marketing industry shows general recognition and respect to consumers' rights of personal data privacy, it is absolutely unrealistic to assume they can regulate their own behaviour by their consciousness.

From the economic viewpoint, mailing list services are worth developing. Advancing our postal services development to meet international recognized standards and public demands is also appreciable. If economic considerations are in conflict with privacy considerations, then, consumers' right to personal data privacy should always prevail. As a fundamental human right being recognized globally[142], the right to privacy should always be given priority over any other economic goals – "Privacy as Trumps".[143]

The Hongkong Post proposal can unquestionably resolve, to a certain extent, the controversies on the data source for direct marketing, namely the public registers issues. Nonetheless, efforts from, and the self-consciousness of, direct marketers' are still important for rebuilding consumers trust in them. This can be done by adhering strictly to the *Privacy Ordinance*.[144]

Hong Kong does have the potential to be Asia's "Regional hub of Direct Marketing". Yet, being the Regional hub of Personal Data Privacy Upholder is far more important, appreciable and honourable. For direct marketers, the credo in direct mail is "the list, the list, the list." With respect, as a consumer and mail receiver myself, I sincerely believe the credo in direct mail should be "privacy, privacy and privacy".

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142 For instance, it is acknowledged by Article 12 of the United Nations Declaration of Human Rights, Article 17 of the ICCPR and Article 8 of the European Convention on Human Rights (ECHR). *Supra* note 1, 8.

143 A famous quotation by Samuel D Warren and Louis D Brandeis is, "That the individual shall have full protection in person and in property is a principle as old as the common law; but it has been necessary from time to time to define anew the exact nature and extent of such protection". See Warren, S D and Brandeis, L D, "The Right to Privacy", 4 *Harvard Law Review* 193 (1890).

144 Section 34 of the *Privacy Ordinance*, for example, would not apply to the Hongkong Post because although it is satisfied as a "data user obtains personal data from the data subject" under s 34(1)(a), it does not "use the data for direct marketing purpose" under s34(1)(b). The rental service of mailing list does not qualified to mean "direct marketing". It may only be one of the Hongkong Post's businesses. By nature, it has no difference from its selling of commemorative stamps or covers to philatelists. However, it is bound by the Six DPP and other provisions of the *Privacy Ordinance*.

DISCRIMINATION IN THE PUBLIC RENTAL HOUSING POLICY: RESIDENCE QUALIFICATION

ANTHONY FUNG CHUN-PONG*

"A Beautiful World: A World Without Discrimination."
Slogan of the Equal Opportunity Commission, Hong Kong.

I. Introduction

Previously, one of the eligibility criteria for public rental housing[1] ("PRH") in Hong Kong was:

> "On allocation, the applicant and a *majority* of the family members (including the applicant) must have lived in Hong Kong for *seven years* and are still living in Hong Kong. For two-person families, both members must have fulfilled the seven-year rule and are still living in Hong Kong. (Children *born in Hong Kong* will be deemed to have fulfilled the seven-year residence requirement if either parent has resided in Hong Kong for seven years.)"[2]

Owing to the threat of litigation[3] and the Chief Executive's instructions,[4] two aspects of the above qualification have been changed since 5 November 1999:

1) the minimum threshold for family members to satisfy the seven-year rule has been lowered from 51% to 50%; and
2) all children under the age of 18, regardless of their places of birth, are deemed to have satisfied the seven-year rule if either parent has lived in Hong Kong for seven years.[5]

Despite these changes, the residence durational requirement, ie the seven-year rule, which is the essence of the qualification, remains intact. Apparently, the qualification, even after amendment, creates a situation in which new immigrants (except those children below the age of 18 either of whose parent has lived in Hong Kong for seven years) and more established residents are treated differently on the basis of their duration of residency within the territory: new immigrants who find themselves in the majority of a family are barred from the PRH benefit (until at least half of the family members have satisfied the seven-year rule), while

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1 "Public rental housing" in the present article refers only to that which is managed by the Hong Kong Housing Authority (the "Housing Authority").

2 Housing Authority, *PRH Eligibility Criteria: Application by Ordinary Families* (1 November 1999) – Internet [URL]: http://www.info.gov.hk/hd/eng/hd/public/ordinary.htm. See also (i) Housing Authority, *Press Release 4 November 1999* (16 November 1999) – Internet [URL]: http://www.info.gov.hk/hd/eng/news/p1041199.htm, (ii) Hong Kong Chief Executive, *The 1999 Policy Address*, para 161 (16 November 1999) – Internet [URL]: http://www.info.gov.hk/pa99/english/part6.htm, (iii) Hong Kong Government, *Report of the Hong Kong Special Administrative Region of the People's Republic of China in the light of the International Covenant on Economic, Social and Cultural Rights* ("*ICESCR Report*") (Hong Kong: Printing Department, 1998), Part II, para.355, 382; and (iv) Hong Kong Home Affairs Department, *Service Handbook for New Arrivals* (Hong Kong: Printing Department, 1999), p 67.

3 Chan, Q, "Fresh Challenge to Housing Policy 'bias'" *South China Morning Post*, 14 September 1999.

4 Hong Kong Chief Executive, *The 1999 Policy Address*, *supra* note 2, para 161.

5 Housing Authority, *Press Release 4 November 1999*, *supra* note 2.

long-term residents under the same circumstances are not. This article examines whether the residence qualification is consistent with the equality guarantees in the *Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China* (the "*Basic Law*"), which has been the constitution of Hong Kong since the transfer of sovereignty on 1 July 1997.

This paper attempts to examine the constitutionality of the residence qualification in the public rental housing policy. The constitutionality is analysed in Part IV, preceded by a brief discussion of the PRH programme in Part II and of the situation of new immigrants in Hong Kong in Part III.

II. Public Rental Housing Programme

PRH is provided by the Housing Authority to families who cannot afford adequate private accommodation. The Housing Authority is a statutory body established under the *Housing Ordinance*,[6] responsible for implementing public housing programmes, with the primary objective of providing affordable housing to the needy in accordance with the Government's Long Term Housing Strategy.[7] Through its executive arm, the Housing Department, it plans and builds public housing, either for rent or for sale.

There are currently about 670,000 public rental flats under the management of the Housing Authority, housing about 2.3 million people (35% of the population).[8] At present new (or refurbished) public rental flats are mainly allocated to nine groups: three groups are exclusively for existing tenants of PRH who need to be re-housed, two groups are for civil servants and Estate Assistants respectively, two for compassionate and emergency re-housing respectively, one for clearance operations and the last one is for the Waiting List applicants.[9] The last group is for people who want to apply for PRH but do not fall into the first eight special groups. In the year 2000/2001, for example, more than 40% of the PRH units to be allocated will be set aside for this group.[10] At present, there are nearly 120,000 applicants on the WL.[11] The Government has set a target to reduce the average waiting time from the current six and a half to three years by 2005.[12] This will be achieved by increasing housing production and encouraging upward mobility among existing tenants.

Applicants who do not fall into the eight special groups have to satisfy a set of eligibility criteria before they are put on the waiting list. The residence qualification mentioned above is one of them. There are some points which are noteworthy.

First, the residence qualification has a number of *interrelated* components, and it would be meaningless, if at all possible, to consider one component in isolation from the others. For

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6 *Housing Ordinance* (Cap 283).

7 Hong Kong Government, *ICESCR Report* (1998), *supra* note 2, Part II, para 350-351. See also Housing Authority, *A Brief Introduction* (16 November 1999) – Internet [URL]: http://www.info.gov.hk/hd/eng/ha/introd.htm.

8 Housing Authority, *Public Rental Housing* (16 November 1999) – Internet [URL]: http://www.info.gov.hk/hd/eng/hd/public/public.htm.

9 Housing Authority, *Press Release 18 May 2000* (25 May 2000) – Internet [URL]: http://www.info.gov.hk/hd/eng/news/p20000518.htm.

10 *Ibid.*

11 Housing Authority, *Press Release 4 November 1999*, *supra* note 2.

12 Housing Authority, *Public Rental Housing*, *supra* note 8. See also (i) Hong Kong Chief Executive, *The 1999 Policy Address*, *supra* note 2, para 20 and (ii) Housing Authority, *Press Release 4 November 1999*, *supra* note 2.

example, it should be borne in mind that the residence qualification only requires 50% of the family members of an applicant family to fulfil the durational residence requirement. (In case where the application involves one person only, ie the applicant himself, the applicant, like his counterpart under the scheme for ordinary families, has to satisfy the seven-year rule.[13]) In other words, for applications made by families, it is the *combined* effect of the seven-year rule and the "fifty percent rule", rather than the effect of either of them alone, that delays the allocation of PRH units to certain immigrant families and creates a difference of treatment between new immigrants and long-term residents, and it is the effect of this qualification which makes the qualification susceptible to the present challenge. It may be suggested that the residence qualification, rather than treating new immigrants and long-terms residents differently, differentiates families with different proportions of new immigrants. This is just another aspect of the same problem, and it seems that it does not matter much from which angle one views the problem. What matters is the understanding of the real nature of the problem: new immigrants are less favourably treated under the existing PRH policy.

Second, the status of "permanent resident" or the right of abode is not an ingredient of the present residence qualification. For instance, although adult children (aged 18 or above) born in the Mainland of a Chinese citizen who have resided in Hong Kong for seven years is a permanent resident of Hong Kong under art 24(2)(3) of the *Basic Law*, they, unlike those below the age of 18 with similar background, are not deemed to have satisfied the seven-year rule.[14]

Third, it should be noted that the residence qualification, whether before or after the amendment, comes into play only after an applicant is put on the waiting list, ie a family, whether having satisfied the residence qualification or not, can apply for PRH and register on the waiting list, provided that it has satisfied other eligibility criteria.[15] Between the registration on the waiting list and the allocation of a PRH unit, an applicant has to attend an interview but this interview will not be held until the applicant and his family have satisfied the residence qualification. If the time for interview comes and the applicant and his family have not yet satisfied the residence qualification, their chance of interview will be given to a subsequent applicant and, while still remaining on the waiting list, they will not be able to proceed further.[16]

Lastly, under the *Housing Ordinance*, the Housing Authority has to exercise its powers and discharge its duties so as to secure the provision of housing for such kinds or classes of persons as it may, subject to the approval of the Chief Executive, determine,[17] and has to comply with any directions given by the Chief Executive.[18] It may let to any person for any period any land

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13 Housing Authority, *PRH Eligibility Criteria: Application by Single Persons* (5 June 2000) – Internet [URL]: http://www.info.gov.hk/hd/eng/hd/public/single.htm.

14 With respect to this group of people, there may be potential age discrimination and discrimination based on "place of birth" when they are compared with minor children with similar background and adult children born in Hong Kong respectively. Although these issues will not be discussed in the present article, it is noteworthy that the latter ground, "place of birth", was a criterion which was used to distinguish underage children before the recent relaxation of the residence qualification.

15 See (i) Hong Kong Home Affairs Department, *Service Handbook for New Arrivals* (1999), *supra* note 2, p 67; (ii) Hong Kong Home Affairs Branch, *Equal Opportunities: A Study of Discrimination on the ground of Race* (1997), para 6.8 (21 February 2000) – Internet [URL]: http://www.info.gov.hk/hab/top_issue/index_e.htm, and (iii) Law, C K et al, *新移民政策綠皮書* (*Green Paper on the Policy towards New Immigrants*) (Hong Kong, 1996), para 7.3 (in Chinese).

16 Telephone interview with an officer from the Hong Kong Housing Department, (9 June 2000).

17 Section 4(1), Cap 283.

18 *Ibid*, s 9.

in an estate.[19] Although the Authority may make by-laws to provide for the selection of persons to whom leases may be granted,[20] there have not been any by-laws in this respect. Accordingly, it seems clear that the Housing Ordinance confers on the Authority, under the control of the Chief Executive, a discretionary power to select tenants of public rental flats, and that the residence qualification in the eligibility criteria for PRH is merely the result of the exercise of discretion on the part of the Authority under such circumstances. In other words, the qualification itself is not provided for in any statute; it is, as the Chief Executive said in his *1999 Policy Address*, the "policy"[21] of the Authority. It may also be regarded as the policy of the Chief Executive or the Government.

III. New Immigrants

Mainland China is Hong Kong's principal source of immigrants. Because of the large number, such immigrants are subject to a daily quota of 150 in order to "ensure a rate of settlement that [local] resources [can] reasonably absorb".[22] In the three years immediately preceding July 1998, some 159,500 people from the Mainland settled in Hong Kong.[23] Over 90% of the Mainland immigrants come for family reunions;[24] those classified as "children" or "wives" of local residents constituted nearly 90% of the migrant population.[25] As far as the descendants are concerned, family reunions are provided for in the *Basic Law*. Article 24 states, *inter alia*:

> "The permanent residents of the Hong Kong Special Administrative Region shall be:
>
> (1) Chinese citizens born in Hong Kong before or after the establishment of the Hong Kong Special Administrative Region;
> (2) Chinese citizens who have ordinarily resided in Hong Kong for a continuous period of not less than seven years before or after the establishment of the Hong Kong Special Administrative Region;
> (3) *Persons of Chinese nationality born outside Hong Kong of those residents listed in categories (1) and (2);*
> (4) ...
> (5) ...
> (6) ...
>
> The above mentioned residents shall have the right of abode in the Hong Kong Special Administrative Region and shall be qualified to obtain, in accordance with the laws of the Region, permanent identity cards which state their right of abode."

According to a recent survey carried out by the Government with respect to new immigrants from the Mainland, nearly 70% of the adult immigrants have attained secondary education in the Mainland.[26] Among those who held employment before arriving in Hong Kong (about 40% of the migrant population), nearly three quarters worked as either service workers, shop sales

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19 *Ibid*, *s* 16(1)(a).

20 *Ibid*, s 30(1)(d). By-laws made by the Authority shall be subject to the approval of the Legislative Council: s 30(2).

21 Hong Kong Chief Executive, *The 1999 Policy Address*, *supra* note 2, para 161.

22 Hong Kong Government, *ICESCR Report*, *supra* note 2, Part II, para 205.

23 *Ibid*, para 209.

24 *Ibid*, para 205.

25 The Hong Kong Federation of Youth Groups, *A Study on New Arrivals from the Mainland* (Hong Kong: Youth Research Centre of the Hong Kong Federation of Youth Groups, 1999), para 3.3.1.

26 Hong Kong Home Affairs Department, *Survey on New Arrivals from the Mainland (Third Quarter of 1999)*, Table 5 (21 February 2000) – Internet [URL]: http://www.info.gov.hk/had/major/arrivals/report.html.

workers, elementary workers or clerks.[27] It is interesting to note that, according to a survey conducted by a non-governmental organisation (an "NGO"), there are three main reasons why the immigrants choose Hong Kong, instead of the Mainland, as the place for family re-unification:

- There are more opportunities in Hong Kong for them to climb up the social ladder;
- As the family breadwinner resides and works in Hong Kong, all other family members who are economically dependent should come to join them; and
- Owing to the traditional patriarchal advice that "children and wives should follow their fathers/husbands wherever they go" and to the fact that the fathers/husbands happen to live in Hong Kong, Hong Kong should be the place for family reunion.[28]

The new immigrants in Hong Kong have access to various social services, ranging from counselling to financial assistance, provided by the Government and NGOs.[29] In order to help new immigrants adapt to the life in Hong Kong, the Government also subvented the Hong Kong Branch of the International Social Service to provide post-migration services, such as enquiry services, orientation sessions, counselling, and referral services.[30] This partly explains why, in some immigrants' view, the social services available in Hong Kong are better than those found in the Mainland.[31] Consequently, as the Government has seen the need for a co-ordination mechanism to ensure that the various programmes for new immigrants are coherent, three levels of Committees have been set up.[32] At the top, the Steering Committee on New Arrival Services oversees the work of the Co-ordinating Committee on New Arrival Services and to determine the strategy for the provision of services. Immediately below the Steering Committee is the Co-ordinating Committee on New Arrival Services which monitors and evaluates the services for the Mainland immigrants. Relying on the surveys conducted by the Home Affairs Department, the Co-ordinating Committee examines the problems encountered by new immigrants and recommends measures for both the Government and NGOs to pursue. At the local level, District Co-ordinating Committees in each of the 18 districts complement the Co-ordinating Committee's work.

A Government survey reveals that the median monthly family income of the Mainland immigrants is $7,800,[33] which is well below the maximum income limits for PRH.[34] It should be noted, however, that about 20% of the families have a monthly income lower than $5,000.[35] While "wages" are the major source of family income for most immigrants from the Mainland

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27 *Ibid*, Tables 6A and 6B.

28 *Supra* note 25, pp 49-50.

29 Hong Kong Government, *ICESCR Report*, *supra* note 2, Part II, para 212 and 215. See also Hong Kong Home Affairs Department, *Service Handbook for New Arrivals*, *supra* note 2, pp 19-33.

30 Hong Kong Government, *ICESCR Report*, *supra* note 2, Part II, para 212. See also Hong Kong Home Affairs Branch, *Equal Opportunities: A Study of Discrimination on the ground of Race*, *supra* note 15, para 4.6.

31 Zhang, Y et al, "You Like Hong Kong? Mainland Women Immigrants' Experience and Social Service Implications" in *Proceedings of Joint World Congress of the International Federation of Social Workers and the International Association of Schools of Social Work: Participating in Change* (Hong Kong, 1996), p 140.

32 Hong Kong Government, *ICESCR Report*, *supra* note 2, Part II, para 213-214.

33 *Supra* note 26, Table 15A.

34 Housing Authority, *PRH Eligibility Criteria: Application by Ordinary Families*, *supra* note 2. Indeed, according to the survey conducted by the Government (*supra* note 22, Table 15A), only less than 20% of the immigrant families have monthly income higher than the maximum limit for PRH set for a 2-person family.

35 *Supra* note 26, Table 15A.

(about 75%), nearly 18% of them rely on either public assistance or assistance from relatives.[36] For those who face difficulties in adapting to life in Hong Kong (about two thirds of the migrant population), the most common difficulty is "living environment".[37] Because of high rent, new immigrants from the Mainland often find themselves in crowded living areas. (An NGO once found that the mean personal space occupied by each family member of an immigrant family was only 82 square feet.[38]) As the Government explains,

> "The (Hong Kong based) husbands are less well-off than their Mainland based families had expected. Their living conditions may have been adequate when they were single. But, often, they are less than adequate for families with children."[39]

Consequently, it is not surprising that the supporting service most needed by the immigrants is PRH,[40] which is also the most common type of housing occupied by the immigrant families,[41] despite the residence qualification.[42] Owing to the fact that, as will be indicated in Part III below, nearly 38,000 applicants on the waiting list were disqualified under the old residence qualification, the PRH would certainly be more common among new immigrants than it now is but for the qualification. A gross imbalance appears: on the one hand there are strong demands for PRH on the part of new immigrants, but on the other hand their eligibility for PRH is severely restricted by the residence qualification, whether before or after amendment.

IV. Constitutionality of the Residence Qualification

A. The Guaranteed Right to Equality

1. Article 25 of the *Basic Law*

Chapter III of the *Basic Law*, which runs from art 24 to art 42, lays down guarantees of various fundamental rights.[43] Immediately following the first article in the Chapter, which defines "residents" of Hong Kong, and which has been one of the most controversial articles in the entire *Basic Law*, art 25 sets out a fundamental right in only ten words:

> "All Hong Kong residents shall be equal before the law."

It is noteworthy that "law" here probably covers both legislation and administrative rules. This short article differs, in at least two aspects, from similar provisions in the international human rights treaties, including the *International Covenant on Civil and Political Rights* (the

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36 *Ibid*, Table 15B.

37 *Ibid*, Tables 9A and 9B. See also (i) International Social Service, Hong Kong Branch, *A Study on the Chinese New Immigrants in Hong Kong* (Hong Kong: International Social Service, Hong Kong Branch, 1997), para 6.3.5; (ii) The general household survey conducted by the Census and Statistics Department in January 1997, as cited in *supra* note 25, pp 47-48; and (iii) Law, C K et al, *Green Paper on the Policy towards New Immigrants*, *supra* note 15, para 7.1-7.2.

38 International Social Service, Hong Kong Branch, *A Study on the Chinese New Immigrants in Hong Kong*, *supra* note 37, para 6.3.4.

39 Hong Kong Government, *ICESCR Report*, *supra* note 2, Part II, para 210.

40 *Supra* note 26, Tables 10A and 10B. See also International Social Service, Hong Kong Branch, *A Study on the Chinese New Immigrants in Hong Kong*, *supra* note 37, para 8.2.

41 *Supra* note 26, Table 14A.

42 Sometimes the immigrants do not make fresh applications for PRH; they simply join their relatives (usually husbands/fathers), who are existing tenants of public rental flats. (This may, however, lead to overcrowding.) In this case, the residence qualification is irrelevant. (See Law, C K et al, *Green Paper on the Policy towards New Immigrants*, *supra* note 15, para 7.2)

43 The Chapter in the *Basic Law* also sets out the obligation to abide by the laws in force: art 42.

"*ICCPR*"),[44] the *International Covenant on Economic, Social and Cultural Rights* (the "*ICESCR*"),[45] and the *European Convention on Human Rights* (the "*ECHR*"),[46] and also from the corresponding provision in the *Sino-Portuguese Joint Declaration* (the "*SPJD*").[47] First, it does not include a list of grounds on which discrimination is prohibited,[48] whereas the other provisions mentioned above all provide such a list, which includes[49] a number of grounds, such as race and sex.

Secondly, and more importantly, art 25 does not expressly guarantee the "equal protection of the law", *viz* the right to equality in the substance of the law. Here, two aspects of the term "equality" have to be distinguished: equality in the administration of the law (the *procedural* aspect of equality) and equality in the substance of the law itself (the *substantive* aspect of equality). It has been widely accepted that the concept of "equality before the law" covers procedural equality only.[50] In this sense, the mere guarantee of "equality before the law" (as in the *Basic Law*) seems to be inadequate because discrimination provided for by the law itself is not addressed. On the other hand, "equality before the law" has been interpreted as meaning both procedural equality and substantive equality.[51] Indeed, it appears that this wider interpretation was supported by the Hong Kong Court of Final Appeal (the "CFA") in *Ng Ka-ling v Director of Immigration*,[52] which struck down, *inter alia*, a statutory provision which distinguished illegitimate children from legitimate children and also the father in relation to his illegitimate children from the mother in relation to her illegitimate children, on the principle of "equality" under, *inter alia*, art 25. The argument for the wider interpretation becomes even more powerful when the following dictum by the Court in that case is taken into account:

> "What is set out in Chapter III ... are the constitutional guarantees for the freedoms that lie at the heart of Hong Kong's separate system. The courts should give a *generous* interpretation to the provisions in Chapter III that contain these constitutional guarantees in order to give to Hong Kong resident the *full* measure of fundamental rights and freedoms so constitutionally guaranteed."[53]

2. Article 39 of the *Basic Law*

Article 39 of the *Basic Law*, another provision in Chapter III, provides:

> "The provisions of the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights ... as applied to Hong Kong shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region.
>
> The rights and freedoms enjoyed by the Hong Kong residents shall not be restricted unless as prescribed by law. Such restrictions shall not contravene the provisions of the preceding paragraph of this Article."

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44 Articles 2, 26, *Basic Law*.

45 Article 2, *Basic Law*.

46 Article 14, *Basic Law*.

47 Article 5, *Basic Law*. The SPJD relates to the transfer of sovereignty over Macau.

48 There was such a list in art 25 in its draft form, ie art 24 of the 1988 draft, as quoted in Chan, J, "Protection of Civil Liberties" in Wesley-Smith, P and Chen, A H Y (eds), *The Basic Law and Hong Kong's Future* (Hong Kong: Butterworths, 1988), p 196, at p 201.

49 Such a list is usually open-ended: see below.

50 See (i) Byrnes, A, "Equality and Non-Discrimination" in Wacks, R (ed), *Human Rights in Hong Kong* (Hong Kong: Oxford University Press, 1992), p 225, at p 253, fn 45; and (ii) *supra* note 48, at pp 201-202. (For "equality before the law" regarding art 26 of the ICCPR, see below.)

51 *JW v JW* [1993] 2 IR 476 (Supreme Court of Ireland). See also Byrnes, A, *supra* note 50, at p 253, fn 45.

52 *Ng Ka-ling v Director of Immigration*, [1999] 1 HKLRD 315

53 *Ibid.*

As is usual in common law systems, the two *Covenants*, as international treaties, are not themselves enforceable in the domestic courts,[54] although the courts will have regard to them in interpreting domestic legislation so as to avoid inconsistency with them.[55] In order to have effect in local law, they have to be implemented by the local legislature. To this end, the *Hong Kong Bill of Rights Ordinance* (the "*BORO*")[56] was enacted in 1991.[57] In Part II of the *Ordinance*, there is a Bill of Rights, which has terms almost identical to those of the *ICCPR*. Owing to the non-adoption of certain provisions in Part I relating to interpretation and application,[58] the *BORO* has, as it is believed, lost its limited overriding effect since the transfer of sovereignty.[59] However, this does not mean that the *ICCPR* itself is no longer superior (in relation to other local legislation), because, as was held by the CFA, the effect of art 39 is to incorporate the *ICCPR* into the *Basic Law*[60] and the *ICCPR* is, therefore, given "constitutional force".[61] Under this basic proposition, the Court has applied the provisions in the *ICCPR*[62] in determining the constitutionality of certain statutory provisions on a number of occasions since its birth on 1 July 1997.

3. Article 2 of the *ICCPR*

Article 2 of the *ICCPR* guarantees the enjoyment of the rights contained in the Covenant without distinction of any kind.[63] It has an accessory character and is not an independent guarantee of equality;[64] it can be violated only in conjunction with the exercise of one of the substantive rights recognised in the *Covenant*. However, this does not mean that art 2 can be violated only when the right ensured by some other provision of the Covenant has been violated.[65] For example, if the law provides that the death penalty shall be imposed on black murderers only, but not as whites, art 2 is violated in conjunction with art 6 (which guarantees the right to life), even though art 6 alone has not been violated since art 6(2) expressly tolerates the imposition of the death penalty for the most serious crimes. In the present context, since no right, other than the right to equality protected by art 2 itself and art 26,[66] guaranteed by the

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54 Chan, J, *supra* note 48, at p 218. See also Hong Kong Government, *Report of the Hong Kong Special Administrative Region of the People's Republic of China in the light of the International Covenant on Civil and Political Rights* ("*ICCPR Report*") (Hong Kong: Printing Department, 1998), Part I, para 33.

55 *Minister of Home Affairs v Fisher* [1980] AC 319 (PC), as cited in *Chan Kam-nga v Director of Immigration* [1999] 1 HKLRD 304.

56 Cap 383

57 Further, in relation to the right to equality, three specific ordinances were enacted respectively: see below.

58 Sectopms 2(3), 3, 4, *BORO*.

59 For the explanation of the non-adoption, see Hong Kong Government, *ICCPR Report*, *supra* note 50, Part I, para 54.

60 *HKSAR v Ng Kung-siu* [2000] 1 HKC 117 (*per* Li CJ).

61 *Chan Kam-nga v Director of Immigration*, *supra* note 55.

62 These include (i) art 19 (freedom of expression) in *HKSAR v Ng Kung-siu*, *supra* note 60; (ii) art 23 (protection of family) in *Chan Kam-nga v Director of Immigration*, *supra* note 55; and (iii) art 3 (equality between men and women), art 15 (the principle against retrospectivity), art 23 (protection of family) and art 26 (equality) in *supra* note 52.

63 Article 2(1), which is materially the same as art 1(1) of *BORO*.

64 Nowak, M, *UN Covenant on Civil and Political Rights: CCPR Commentary* (Kehl: N P Engel, 1993), pp 28, 34. See also Byrnes, A, *supra* note 50, at p 242. Article 2(2) of the ICESCR and art 14 of the ECHR, which both guarantee the right to non-discrimination, also have an accessory character.

65 Nowak, M, *supra* note 64, p 35; Byrnes, A, *supra* note 50, p 242.

66 It has been suggested that art 26, which itself guarantees the independent right to equality (see below), forms a sort of *lex specialis* to art 2(1), so that a violation of art 2(1) in conjunction with art 26 is ruled out: see Nowak, M (1993), *supra* note 64, at p 35.

Covenant seems to be relevant, art 2 is inapplicable.[67] However, most of the jurisprudence generated on it regarding the concept of discrimination is highly relevant to art 26, which is another provision in the *Covenant* guaranteeing the right to equality.

4. Article 26 of the *ICCPR*

Article 26 of the *ICCPR*[68] provides:

> "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

Unlike art 2 of the same *Covenant*, art 26 guarantees an independent right to equality.[69] In its *General Comment 18*,[70] the United Nations Human Rights Committee (the "Human Rights Committee")[71] noted:

> "[A]rticle 26 does not merely duplicate the guarantee already provided for in Article 2 but provides in itself an *autonomous* right. ... It prohibits discrimination in law or in fact in *any* field regulated and protected by public authorities. ... In other words, the application of the principle of non-discrimination contained in Article 26 is *not* limited to those rights which are provided for in the Covenant."[72]

Moreover, it should be noted that the list of grounds, like that in art 2(1) and that in art 14 of the *ECHR*, contains only some "especially reprehended personal" criteria and is only demonstrative and not exhaustive, as the terms "any ground", "such as" and "or other status" indicate.[73] In other words, discrimination is not confined to the matters set out in the Article.[74] It has been suggested that *any* criterion which distinguishes one person from another is susceptible to review on the ground that it is discriminatory,[75] although distinctions made on enumerated grounds may be subject to particular scrutiny and therefore may require, if they are to be permissible, more convincing justifications.[76] As a result, in the present context, although

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67 The right to adequate housing is guaranteed in art 11 of the *ICESCR* (but not in the *ICCPR*) and art 2(2) of the *ICESCR* guarantees equality in the enjoyment of the rights ensured by the Covenant. However, the effect of the *ICESCR* in Hong Kong is less than clear because, unlike the *ICCPR*, it has never been comprehensively implemented by local legislation (For the effect of international instruments which are not implemented by local legislation, see above.) and there appears to be no case which directly and solely relies on the provisions in the *ICESCR*, whether before or after the transfer of sovereignty. (For the effect of the *ICESCR* in Hong Kong before the transfer of sovereignty, see Byrnes, A, "Hong Kong and the Implementation of the International Covenant on Economic, Social and Cultural Rights" in Edwards, George, E and Byrnes, A (comp), *Proceedings of a Seminar organised by the Faculty of Law, University of Hong Kong on 15 October 1994* (in relation to the United Kingdom's Second Periodic Reports in respect of Hong Kong regarding Articles 10-15 of the *ICESCR*), p 13.

68 Identical to art 22 of the *BORO*.

69 Nowak, M, *supra* note 64, p 465; Byrnes, A, *supra* note 50, p 243. See also Sieghart, P, *The International Law of Human Rights* (Oxford: Clarendon Press, 1983), p 77.

70 37th session, 1989.

71 The treaty-monitoring body of the *ICCPR*.

72 Paragraph 12.

73 Nowak, M, *supra* note 64, pp 45, 474; Byrnes, A, *supra* note 50, pp.237-238. See also Sieghart, P, *supra* note 69, p 75.

74 See, on art 22 of the *BORO* (which is identical to art 26 of the *ICCPR*), *R v Man Wai-keung* (No 2) (1992) 2 HKPLR 164 (CA), at 176 (*per* Silke VP, with whom Nazareth JA (as he then was) agreed).

75 Byrnes, A, *supra* note 50, pp 237-238.

76 *Ibid.* See also Nowak, M, *supra* note 64, p 474.

it may be argued, as the Government has done,[77] that discrimination against new immigrants is a form of racial discrimination,[78] it seems that "duration of residency in a particular place" by itself is already a criterion which is covered by the equality guarantees. This is especially true when proper regard is paid to the ruling (quoted above) that a generous interpretation should be given to the provisions in Chapter III of the *Basic Law* which contains the constitutional guarantees for freedoms.[79]

Equality before the law and equal protection of the law guaranteed in art 26 address two different aspects of "equality": procedural and substantive.[80] "Equality before the law" in this context is merely a formal claim directed at the enforcement of the law;[81] it requires that existing laws be applied in the same manner to all those subject to it. In other words, those who administer laws, such as judges and administrative officials, must not act arbitrarily in enforcing them. On the other hand, "equal protection of the law" is directed at the legislature. The legislature is required to protect the right to equality without discrimination in both negative and positive ways: it must refrain from any discrimination when making laws, while at the same time it is obliged to enact laws to prohibit any discrimination and to guarantee to everyone equal and effective protection against discrimination. In other words, the second sentence of art 26 relates only to "equal protection of the law" and, as such, imposes obligations on the legislature only. It is submitted that the negative aspect of the guarantee of substantive equality is also binding on the *de facto* legislature, i.e. the duty to refrain from enacting discriminatory laws is also imposed on the administrative bodies which are empowered by the *de jure* legislature to make subsidiary legislation or other rules. Accordingly, the administrative bodies which are entrusted with the discretionary power to make subsidiary legislation or other rules must refrain from any discrimination in exercising such power. It appears that this conclusion was affirmed by the Court of Appeal in *Association of Expatriate Civil Servants of Hong Kong v Secretary for the Civil Service*,[82] which concerned the question whether certain administrative schemes imposed by the Government on officers of the Civil Service violated the right to equal access to public service guaranteed in art 21(c) of the *BORO* (which is the equivalent of art 25(c) of the *ICCPR*), and is supported by the Human Rights Committee, which

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77 Hong Kong Home Affairs Branch, *Equal Opportunities: A Study of Discrimination on the ground of Race* (1997), *supra* note 15, para 1.7. See also Hong Kong Home Affairs Bureau [Note: *"Home Affairs Branch" has been renamed as "Home Affairs Bureau" since the transfer of sovereignty in 1997*], *Code of Practice against Discrimination in Employment on the Ground of Race*, para 2.1(a) (21 February 2000) – Internet [URL]: http://www.info.gov.hk/hab/top_issue/race_e.htm.

78 This is notwithstanding the fact that most of the immigrants are Chinese and are ethnically the same as the majority of Hong Kong's population. According to the Government, racial discrimination includes discrimination against identifiable minorities with a particular culture, and new immigrants from the Mainland, like the Irish Travellers in the United Kingdom, form such a minority in Hong Kong (Hong Kong Home Affairs Branch, *Equal Opportunities: A Study of Discrimination on the ground of Race*, *supra* note15, para 1.7.). This conclusion is questionable as it is arguable whether the Chinese new immigrants, though many of them, as the Government has pointed out, are unfamiliar with local language and customs, have a particular culture or lifestyle that is so significantly different from that of the majority of the local population that they can be regarded as a distinct "racial group". (For a statutory definition of "racial group", see s 3(1) of the UK Race Relations Act 1976. See also *Halsbury's Laws of England*, BRITISH NATIONALITY, IMMIGRATION and RACE RELATIONS "Race Relations", para 153.)

79 Article 26 (or any other article) of the *ICCPR*, although not physically set out in Chapter III, is incorporated into the *Basic Law* by virtue of art 39 (which is found in Chapter III).

80 N, Manfred, *supra* note 64, pp 466-469. See also Byrnes, A, *supra* note 50, at p 243.

81 It is submitted that a logical meaning of "law" in art 26, as in art 25 of the *Basic Law*, must cover both legislation and administrative rules.

82 (1996) 4:2 *Bill of Rights Bulletin* 42.

noted in a communication:[83]

> "[T]he principle of equal protection of the law without discrimination ... prohibits discrimination *in law or in practice in any field regulated and protected by public authorities.*"[84]

B. Test of Discrimination

It follows from the above discussions that under two entrenched provisions, namely art 26 of the *ICCPR* (which is incorporated into the *Basic Law* by virtue of its art 39), and art 25 of the *Basic Law*, provided that "equal" is taken to cover substantive equality), the Housing Authority, under the control of the Chief Executive (which is entrusted by the legislature with the discretionary power to select tenants of the public rental flats), must refrain from any discrimination when making rules on the eligibility criteria for PRH.

The critical question is: What is the meaning of "discrimination" in the context of the equality guarantees? In Hong Kong, the courts have adopted an interpretation which may be said to be consistent with that of the Human Rights Committee as well as that of the European Court of Human Rights (the "European Court").[85]

1. Human Rights Committee

Having considered the definitions of "racial discrimination" and "discrimination against women" in two other international human rights conventions,[86] the Human Rights Committee noted in its *General Comment 18*:[87]

> "[T]he term "discrimination" as used in the Covenant should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms."[88]

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83 The competence of the Human Rights Committee to receive and consider communications from individuals is provided for in the Optional Protocol to the *ICCPR*.

84 *Broeks v The Netherlands*, Human Rights Committee, Communication No 172/1984, decision of 9 April 1987, para 12.3, <http://www1.umn.edu/humanrts/undocs/undocs.htm>, 15 April 2000. The Human Rights Committee expressed a similar view in its *General Comment 18* (*supra* note 70):

> "[A]rticle 26 ... prohibits discrimination in law or in fact in any field regulated and protected by public authorities." (para 12)

85 Three specific ordinances dealing with sex discrimination, disability discrimination and family status discrimination in certain fields, such as employment and education, have been enacted since 1995, and the definitions of "discrimination" found in them are almost identical: see s 5(1) of the *Sex Discrimination Ordinance* (SDO) (Cap 480), s 6 of the *Disability Discrimination Ordinance* (DDO) (Cap 487) and s 5 of the *Family Status Discrimination Ordinance* (FSDO) (Cap 527).

However, none of the ordinances are directly relevant to the present case and, therefore, they will not be discussed in the present article. For reference, see (i) Petersen, C J, "The Failure of the Hong Kong Court of Appeal to Recognise and Remedy Disability Discrimination" (2000) 30 *HKLJ* 6; (ii) Petersen, C J, "Implementing Equality: An Analysis of Two Recent Decisions Under Hong Kong's Anti-Discrimination Laws" (1999) 29 *HKLJ* 178; and (iii) *Halsbury's Laws of England*, BRITISH NATIONALITY, IMMIGRATION and RACE RELATIONS "Race Relations".

86 The *International Convention on the Elimination of All Forms of Racial Discrimination* and the *Convention on the Elimination of All Forms of Discrimination Against Women*, both of which apply to Hong Kong: see Hong Kong Home Affairs Bureau, *Universal Declaration of Human Rights and Human Rights Treaties* (21 February 2000) – Internet [URL]: http://www.info.gov.hk/hab/udhr/index_e.htm.

87 *Supra* note 70.

88 *Ibid*, para 7.

However, non-discrimination does not mean identical treatment in every single respect. In other words, not every differentiation of treatment will constitute discrimination.[89] Some differences of treatment are in fact encouraged by the *ICCPR* itself. For example, art 10(3) requires the segregation of juvenile offenders from adults. Moreover, certain differential treatment which is known as "affirmative action" is a means to eliminate or diminish existing discrimination and is required by the guarantee of the equal protection of the law in art 26.[90] This requires *inter alia* the State parties, especially their legislature, to afford effective protection against discrimination. In the view of the Human Rights Committee, differential treatment is permissible so long as "the criteria for such differentiation are reasonable and objective" and if "the aim is to achieve a purpose which is legitimate under the *Covenant*".[91]

It has been suggested that the Human Rights Committee probably based its test of discrimination on the jurisprudence of the European Court as the Committee's test is quite close to the Court's.[92]

2. European Court of Human Rights

The *ECHR* has no provision which, like art 26 of the *ICCPR*, contains an independent guarantee of equality. Article 14 of the *ECHR*, like art 2(1) of the *ICCPR*, guarantees the enjoyment of the rights set forth in the *Convention* without discrimination and, as such, has an accessory character. On the test of discrimination, the European Court has held that differentiation of treatment will constitute discrimination if the distinction has no "objective and reasonable justification". The existence of such a justification must be assessed in relation to the aim and effects of the measure in question; differential treatment, to be permissible, must pursue a legitimate aim, which must be reasonably proportional to the difference of treatment under consideration.[93]

3. Hong Kong

The test of discrimination was first laid down in *R v Man Wai-keung* (No 2).[94] In relation to art 10 of the *BORO*[95] (equality before the courts), Bokhary J (as he then was), after recognising that the requirement of fairness is the reason for the insistence on equality, held that although literal equality is not required, the starting point is identical treatment and any departure therefrom must be justified. To justify differential treatment, it must be shown that first, that a sensible and fair-minded person would recognise a genuine need for some difference of treatment; secondly, that the difference of treatment is itself rational; and thirdly, that the

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89 Human Rights Committee, *General Comment 18*, *supra* note 70, para 8, 13. See also *Broeks v The Netherlands*, *supra* note 84, para 13.

90 See (i) Human Rights Committee, *General Comment 18*, *supra* note 70, para 10; and (ii) Human Rights Committee, *General Comment 4* (13th session, 1981), para 2. See also Nowak, M, *supra* note 64, pp 475-479. However, the residence qualification in the present case plainly has no ameliorative effect.

91 Human Rights Committee, *General Comment 18*, *supra* note 70, para 13. See also (i) *Franz Nahlik v Austria*, Human Rights Committee, Communication No 608/1995, decision of 22 July 1996, para 8.4 <http://www1.umn.edu/humanrts/undocs/undocs.htm>, 15 April 2000; and (ii) *Broeks v The Netherlands*, *supra* note 84, para 13. It has been pointed out that proportionality between the difference of treatment and its aim is implicitly required to justify differential treatment: see Nowak, M, *supra* note 64, p 474.

92 Nowak, M, *supra* note 64, p 473, fn 77. See also Byrnes, A, *supra* note 50, at p 236.

93 *Belgian Linguistic Case* (No 2) (1968) 1 EHRR 252, para 10.

94 *Supra* note 74.

95 The equivalent of art 14(1) of the *ICCPR*.

difference of treatment is proportionate to the need.[96] This three-stage test was subsequently applied in cases concerning art 22 of the *BORO*, which is the equivalent of art 26 of the *ICCPR*.[97]

It appears that this three-stage test is quite similar to the test of discrimination adopted by the European Court. First, under both tests, a difference of treatment is not automatically regarded as discrimination and is permissible unless it cannot be justified. Secondly, while the European test requires a legitimate aim, the local test talks of a genuine need for differentiation, which, it is submitted, may be justified by a legitimate aim. Finally, both tests require the difference of treatment under consideration to be proportionate to the aim/need.

A Court of Appeal case, *Lee Miu-ling v Attorney General of Hong Kong* (No 2),[98] related, *inter alia*, to whether a large variation in the number of voters between various functional constituencies, each of which sent one member to the Legislative Council, violated the right of equal suffrage guaranteed in art 21(b) of the *BORO*.[99] After re-affirming the three-stage test in *Man Wai-keung* and concluding that the first criterion of the test was satisfied, Bokhary JA (as he then was) with the concurrence of Litton VP, held that since sensible and fair-minded people would have differing views on how the functional constituencies should be drawn up, the question in relation to the second and third criteria should be put negatively. It should be asked whether sensible and fair-minded people would condemn the arrangement as irrational or disproportionate.[100] As such, it was not necessary for sensible and fair-minded people to positively endorse the difference of treatment and it appears that the level of scrutiny over differential treatment was thereby reduced.[101]

It is not very clear when the court would apply the less demanding negative test. It is not uncommon for sensible and fair-minded persons to differ in their views on whether a certain difference of treatment is rational and proportionate to the need and therefore, according to Bohkary JA in *Lee Miu-ling*, the negative test would often, if not always, be applied. However, this has not been the case thus far: the negative test was not ever mentioned in subsequent cases which applied the three-stage test in *Man Wai-keung*.[102] For instance, in *Association of Expatriate Civil Servants of Hong Kong v Secretary for the Civil Service*,[103] it was arguable that sensible and fair-minded persons would have differing views on whether the decision, to take into account the ability of an officer seeking a transfer to local agreement terms to communicate in Cantonese if there was any post in his rank which might become available and in which communication in Chinese would be required, violated the right to have equal access to public

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96 *R v Man Wai-keung* (No 2), *supra* note 74, at p 179.

97 See *R v Crawaiting listey* (1994) 4 HKPLR 62 (HC) (*per* Keith J (as he then was)).

98 *Lee Miu-ling v Attorney General of Hong Kong* (No 2) (1995) 5 HKPLR 585.

99 The equivalent of art 25(b) of the *ICCPR*.

100 *Lee Miu-ling v Attorney General of Hong Kong* (No 2), *supra* note 98, at p 592.

101 See Editorial comment on *Association of Expatriate Civil Servants of Hong Kong v Secretary for the Civil Service* (1997) 4:2 *Bill of Rights Bulletin* 48.

102 See eg on the right to have equal access to public service guaranteed in art 21(c) of the *BORO* (the equivalent of art 25(c) of the *ICCPR*), (i) *R v Secretary for the Civil Service, ex parte Association of Expatriate Civil Servants of Hong Kong* (1995) 5 HKPLR 490 (HC) (*per* Keith J (as he then was)); on appeal: *Association of Expatriate Civil Servants of Hong Kong v Secretary for the Civil Service*, *supra* note 82; (ii) *Association of Expatriate Civil Servants of Hong Kong v Chief Executive of the HKSAR* [1998] 2 HKC 138 (CFI) (*per* Keith J (as he then was)); and (iii) *Association of Expatriate Civil Servants of Hong Kong v Secretary for the Civil Service* (No 2) (1998) 5:1 *Basic Law & Human Rights Bulletin* 82 (CFI) (*per* Barnett J).

103 *Supra* note 82.

service. (In fact both the Court of Appeal and Keith J (as he then was) in the High Court[104] came to the opposite conclusions on this particular issue by applying the same three-stage test.) Bokhary JA, delivering the judgment of the Court of Appeal, reversed Keith J and repeated the three-stage test, not applying the less demanding negative test. Perhaps the negative test would be considered only if a considerable number of sensible and fair-minded people have differing views on the issue,[105] and it might be that Bokhary JA's view that the language requirement in the *AECS's case* was not as controversial (in that fewer sensible and fair-minded people would hold differing opinions) as the arrangement of functional constituencies in *Lee Miu-ling*, so that the negative test was applied in the latter, but not the former. For the present purpose, since difficult considerations of political nature, like those appearing in *Lee Miu-ling*, do not seem to appear, the negative test will not be considered.

Further relevant guidelines may be drawn from cases on various equality guarantees in the *BORO*. Firstly, at no time does common sense go out the window when things like "genuine need", "rationality" and "proportionality" are judged.[106] Secondly, the cornerstone of the three-stage test is fairness.[107] Thirdly, the application of the three-stage test in any given case requires a careful assessment of the circumstances of that case.[108] Fourthly, the contention that a distinction is needed because problems would otherwise arise, must be scrutinised and will not be accepted unless it is clear that there really would be serious problems which would be very difficult, even if not impossible, to overcome.[109] The Court explained this in the following terms:

> "Human rights are involved here. And courts and tribunals must guard such rights by guarding themselves against being persuaded to make too much of problems put forward with a view to justifying distinctions in the way people are treated."

Fifthly, the difference of treatment must not merely be rational, but must be rationally connected to the need which justifies it.[110] Sixthly, the difference of treatment must be no more extensive than is necessary to achieve the objective which made some difference in treatment necessary.[111] Lastly, the concept of "discrimination" also covers "indirect discrimination",[112] which occurs when a rule, practice or policy which on its face neutral in effect has a

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104 *R v Secretary for the Civil Service, ex p Association of Expatriate Civil Servants of Hong Kong*, *supra* note 102.

105 Should this be the case, a crucial question is bound to arise: How "considerable" the number of people having differing opinions should be will the negative test be triggered? This interesting question will not be discussed here.

106 *R v Man Wai-keung* (No 2), *supra* note 74, at p 179 (*per* Bokhary J (as he then was)).

107 See, on the right to have equal access to public service guaranteed in art 21(c) of the BORO (the equivalent of art 25(c) of the ICCPR), *Association of Expatriate Civil Servants of Hong Kong v Secretary for the Civil Service*, *supra* note 82.

108 *Ibid.* See also Nowak, M, *supra* note 64, p 473.

109 See, on the right to have equal access to public service guaranteed in art 21(c) of the *BORO* (the equivalent of art 25(c) of the *ICCPR*), *Association of Expatriate Civil Servants of Hong Kong v Secretary for the Civil Service*, *supra* note 82.

110 See on the right to have equal access to public service guaranteed in art 21(c) of the *BORO*, *R v Secretary for the Civil Service, ex parte Association of Expatriate Civil Servants of Hong Kong*, *supra* note 102, at p 518. This ruling was repeated by the same judge in a subsequent first instance case, *Association of Expatriate Civil Servants of Hong Kong v Chief Executive of the HKSAR*, *supra* note 102, at p 153.

111 *Ibid.*

112 See, on the right to have equal access to public service guaranteed in art 21(c) of the *BORO*, *R v Secretary for the Civil Service, ex parte Association of Expatriate Civil Servants of Hong Kong*, *supra* note 102, at pp 535-536 (This issue was not considered on appeal). See also, in relation to the *ICCPR* and the ECHR, Byrnes, A, *supra* note 50, at p 239.

disproportionate impact on a particular group but not the other.[113]

The three-stage test in *Man Wai-keung* will be used to determine whether the PRH residence qualification constitutes discrimination under art 26 of the *ICCPR* and art 25 of the *Basic Law*. Before examining the three criteria in relation to the circumstances of the present case, the argument that the courts should accord due deference to the executive branch of the government in the area of social welfare (including PRH),[114] as well as the use of residence requirements in other government programmes, inside and outside Hong Kong, will be briefly discussed.

C. Due Deference to the Government

It has been pointed out by the courts in different jurisdictions[115] that the legislature must have discretion in choosing the means by which legitimate ends may be achieved having regard to the benefits of the people, and other organs of the State. In particular the courts should accord due deference to the legislature and should avoid from second-guessing its decision. This is probably because the legislature, as an elected body with representatives from different classes of the community, is the most appropriate forum in which policy decisions which may involve competing claims of, and affect the interests of, different classes of the community, such as those decisions as to how to allocate some scarce resources, are made. Under the constitutional doctrine of "separation of powers", the legislature, and not the court, is entrusted with the power to make reasonable assessments as to where the dividing line should be drawn. By the same token, although the government, particularly that in Hong Kong, is not comparable to the legislature in terms of the representative function, it is arguable that it should have a broad discretion, especially in the areas of economics and social welfare, to formulate its policy under the entrenched doctrine of "separation of power" since it possesses the necessary experience, expertise, information and power. Indeed, for the Government, the legal basis for formulating the PRH residence qualification is art 62 of the *Basic Law*, which provides *inter alia* that the Government shall have the power and function to formulate and implement policies and to conduct administrative affairs.[116] The Government appears to maintain that it has every right to determine the scope of the "privileges" created by it, including the PRH benefit. This means that the courts, again, should refrain from lightly interfering with its decision.

The argument for the broad discretion of the government plainly has its virtue. However, *broad* discretion is one thing; *unlimited* discretion is another. The cases mentioned in the above paragraph are clearly referring to the former, but not the latter. Even the elected legislature is, and ought to be, limited by the constitutional guarantees of fundamental rights including, of course, the right to equality. Due deference to the legislature does not mean that the legislature can enact whatever laws it likes, particularly in jurisdictions where there is an entrenched constitution, as is made clear by the fact that the ordinary legislation passed by the legislature is

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113 *Australian & New Zealand Equal Opportunity Law and Practice* (CCH Australian Limited), para 4-500. See also Byrnes, A, *supra* note 50, at p 230.

114 Although the Government maintains that it has always treated housing policies and social welfare policies separately (see *Hong Kong Proceedings of the Legislative Council*, 13 October 1999, p 129), PRH is regarded as a form of social welfare in the present article because it is in many aspects similar to those typical forms of social welfare.

115 See (i) Australia: *Wertheim v The Commonwealth* (1945) 69 CLR 601 (HC) (*per* Latham CJ); (ii) Canada: *Irwin Toy Ltd v Quebec (Attorney General)* (1989) 58 DLR (4th) 577 (SCC); and *Libman v Quebec (Attorney General)* (1997) 151 DLR (4th) 385 (SCC); (iii) United States: *Bowen v Gilliard* 483 US 587, 97 L Ed 2d 485 (USSC); and (iv) Hong Kong: *Ming Pao Newspaper Ltd v Attorney General of Hong Kong* (1996) 6 HKPLR 103 (PC); and *HKSAR v Ng Kung-siu, supra* note 60 (CFA) (*per* Bokhary PJ).

116 *Hong Kong Proceedings of the Legislative Council*, 13 October 1999, p 129.

subject to constitutional scrutiny by the courts. This naturally applies to the government, perhaps with greater force as the government, especially that in Hong Kong, has not got any mandate from the people. Article 26 of the *ICCPR*, and perhaps art 25 of the *Basic Law*, as mentioned above, give the courts the power to check on the decisions of the legislature as well as those of the administrative bodies. As the Human Rights Committee held in a communication in relation to social security (a form of social welfare) and discrimination:

> "[Article 26] does not ... require any State to enact legislation to provide for social security. However, when such legislation is adopted in the exercise of a State's sovereign power, then such legislation *must* comply with Article 26 of the Covenant."[117]

This passage is equally applicable to the present case if the words "social security" are replaced with "PRH" (another form of social welfare) and "legislation" is taken to embrace the administrative rules, which in turn include the residence qualification, under the parent legislation, *viz* the Housing Ordinance. As a result, the Hong Kong courts are empowered to examine whether the PRH residence qualification violates the constitutional guarantee of the right to non-discrimination.

D. Residence Requirements in Other Areas

It is noteworthy that the durational residence requirement is not peculiar to PRH. For example, in order to be eligible for the Comprehensive Social Security Assistance ("the CSSA"), which provides financial assistance to those in need, an applicant must have resided in Hong Kong for one year[118] (although the Director of Social Welfare has a discretion to waive the residence requirement, having regard to the daily needs of the applicants[119]). Nor is the term peculiar to Hong Kong. For example, such a requirement can be found in England in relation to council housing[120] and education,[121] and in the United States in relation to a number of sectors, such as social security, registration to vote, non-emergency medical care, education, tax exemptions, etc.[122] Of course, the mere existence of a durational residence requirement in various programmes in Hong Kong and elsewhere does not mean that the difference in treatment between new immigrants and long-term residents can be justified in any circumstances.[123]

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117 *Broeks v The Netherlands*, *supra* note 84, para 12.4. For a decision with similar sentiment, see *Geduldig v Aiello* 417 US 484, 41 L Ed 2d 256 (USSC).

118 Hong Kong Home Affairs Department, *Service Handbook for New Arrivals*, *supra* note 2, p 19.

119 *Hong Kong Proceedings of the Legislative Council*, 13 October 1999, p 135.

120 Burney, E, *Housing on Trial* (London: Oxford University Press, 1967), p 61, 94, 233. See also Cheung, W C, *The Chinese Way: A Social Study of the Hong Kong Community in a Yorkshire City* (York: University of York, 1975), p 135

121 See *Orphanos v Queen Marchy College* [1985] 2 All ER 233 (HL). In this case, the condition that a student had to show that he had been ordinarily resident in the area of the EEC for three years in order to qualify as a "home student" (who could pay a lower tuition fee), was held to be unlawfully discriminatory under s 1(1)(b) of the *Race Relations Act* 1976. The House of Lords held that sub-para.(ii) in para.(b) was satisfied on the ground that ordinary residence was "so closely related to ... nationality that the discrimination [could not] be justified *irrespective of* nationality". Under art 26 of the *ICCPR*, however, it is not clear whether a difference of treatment must strictly be justified without reference to the relevant criterion on which differentiation is made.

122 See generally Donahue, D A, "Penalising the Door: Durational Residence Requirements for Welfare Benefits" (1998) 72 *St John's L Rev* 45.

123 Indeed the validity of some residence qualifications set by local housing authorities in England is questionable (see UK Commission for Racial Equality, *Code of Practice in Rented Housing* (10 April 2000) – Internet [URL]: http://www.cre.gov.uk/cre/publs/dl_rhcp.html, whereas a residence requirement regarding education in England and some of the residence qualifications in the United States were struck down by the court (*supra* note 121 and *infra* note 132).

E. *First: Would sensible and fair-minded people recognise a genuine need for the residence qualification?*

1. Scarce Resources

The Government once explained that the PRH residence qualification which provides for the seven-year rule is the "result of practical considerations and the need for impartiality in balancing claims to scarce housing resources".[124] It repeatedly maintains that the main objective of the seven-year rule is to ensure that long-term residents have priority in the allocation of PRH, having regard to the fact that housing resources are scarce and limited in Hong Kong.[125] On the PRH residence qualification, the Secretary for Housing recently said in the Legislative Council:

> "As resources for ... public housing are limited in relation to demand, there is a need to set priorities."[126]

It is doubtful whether the argument of limited resources can justify a need to set *some* priorities other than those given on a first-come-first-served basis, let alone whether a particular group should be less favourably treated. It is undeniable that land and housing resources, whether in the public or private sector, have always been very tight in Hong Kong, whereas the demand for PRH (as reflected by the number of applicants on the waiting list) is very high. The fact that the demand exceeds the supply naturally means that there must be a queue for the PRH, and hence the setting up of the waiting list. According to the Housing Authority, apart from the district chosen, allocation of public housing units is strictly in accordance with the order of priority of applications on the waiting list,[127] which in turn, "primarily" (ie without considering other factors which may delay allocation, like the residence qualification) depends on the time of application. In other words, allocation is primarily made on a first-come-first-served basis. It is submitted that this simple mode of allocation alone is adequate enough to deal with the problem of insufficient supply and therefore, having regard to the problem alone, there is no need to set any further priorities, let alone determine whether a certain group (eg new immigrants) should be less favourably treated under such priorities. As such, the argument of scarce housing resources cannot justify the need for the residence qualification. It follows that the "practical considerations and the need for impartiality in balancing claims to scarce housing resources" which, for the Government, justify the PRH residence qualification and hence the difference of treatment between new immigrants and long-term residents, must mean something more than the mere problem of insufficient supply.

2. Shortening the average waiting time

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124 Hong Kong Home Affairs Branch, *Equal Opportunities: A Study of Discrimination on the ground of Race*, *supra* note 15, para 6.8. The residence qualification at that time (the "1997 version") is different from those two recent versions (pre- and post-amendment) mentioned in Part I of this article. However, like its successors, the 1997 version also disqualifies new immigrants.

125 See (i) Housing Authority, *Press Release*, 4 November 1999, *supra* note 2; (ii) *Hong Kong Proceedings of the Legislative Council*, 13 October 1999, p 129; (iii) Hong Kong Government, *ICESCR Report*, *supra* note 2, Part II, para 382; (iv) Hong Kong Home Affairs Branch, *Equal Opportunities: A Study of Discrimination on the ground of Race*, *supra* note 15, para 6.8; and (v) *Hong Kong Proceedings of the Legislative Council*, 10 February 1993, pp 1809-1810.

126 *Hong Kong Proceedings of the Legislative Council*, 13 October 1999, p 129.

127 Housing Authority, *PRH Eligibility Criteria: Application by Ordinary Families*, *supra* note 2.

The problem of scarce housing resources results in a long queue for PRH: there are about 120,000 applicants on the waiting list waiting for the allocation of a public rental flat, and the current average waiting time is six and a half years.[128] It may be suggested that the residence qualification, by delaying allocation of public rental flats to certain applicants, can shorten the waiting time of the other applicants. If the residence qualification was lifted, the average waiting time would become much longer (perhaps even up to seven years!) and applicants would then have to wait for a long period of time as if they were all subject to a seven-year rule. As such, the abolition of the residence qualification would not benefit immigrant families, but would only downgrade everyone. Therefore, as the argument goes, the objective of shortening the average waiting time justifies the need for the residence qualification.

As mentioned above, the Court of Appeal held in the *AECS's case*[129] that the contention that a distinction is needed because problems would otherwise arise, must be scrutinised and will not be accepted unless it is clear that there really would be serious problems which would be very difficult, even if not impossible, to overcome. Since it is now argued that problems would otherwise arise if the residence qualification were removed, it is necessary to determine whether there would really be serious problems which would be very difficult, if not impossible, to overcome.

Because of the recent relaxation of the residence qualification mentioned at the beginning of this article, about 32,000 out of the 38,000 households on the waiting list (which constitutes nearly 85%) who did not satisfy the old qualification can now satisfy the new qualification, and the Government, which still intends to achieve the target of reducing the average waiting time to three years by 2005,[130] has to spend two billion dollars and to provide five hectares of land, more each year to cope with the extra demands.[131] In other words, the Government is prepared to cope with the demands of almost 85% of the immigrant families who were caught by the old qualification, while still aiming at reducing the waiting time to three years. So it appears that it will not be "very difficult" for the Government, while pursuing the waiting time target, to cope with the demands of the remaining 15% (who are still caught by the residence qualification as amended). As such, the argument based on the reduction of the average waiting time cannot be used to justify the need for the residence qualification.

Even if it is wrong to conclude that it will not be very difficult for the Government to cope with the demands of the remaining 15%, it seems arbitrary to single out immigrants among the needy and deprive them of the PRH benefit just for the purpose of reducing the average waiting time. It is submitted that the average waiting time cannot be reduced at the expense of the interest of any person in need of the PRH benefit. Accordingly, the introduction of the residence qualification, again, cannot be justified by the need to reduce the average waiting time.

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128 *Supra* Part II.

129 *Association of Expatriate Civil Servants of Hong Kong v Secretary for the Civil Service*, *supra* note 82 (on the right to have equal access to public service guaranteed in art 21(c) of the *BORO* (the equivalent of art 25(c) of the *ICCPR*)).

130 *Supra* Part II.

131 Housing Authority, *Press Release*, 4 November 1999, *supra* note 2.

3. Saving Public Money[132]

It may be argued that the residence qualification, by excluding some immigrant families from the PRH benefit and therefore reducing the demands for PRH, helps the Government to save public money as it can spend less to achieve the target of reducing the average waiting time to three years by 2005.[133] Similar to the reduction of the average waiting time, it seems arbitrary to single out immigrants among the needy and deprive them of the PRH benefit just for the purpose of reducing expenditure. It is submitted that public expenditure cannot be reduced at the expense of the interest of any person in need of the PRH benefit. As such, the objective of saving public money cannot justify the need for the residence qualification.

4. "Jumping the Queue"

One main consideration for the Government retaining the PRH residence qualification may be that, but for such a qualification, the new immigrant whose spouse or parent in Hong Kong has submitted the application for PRH before they come to Hong Kong would be able to "jump the queue". This is because the Housing Authority allows applicants to add to their original applications, which have already been registered, the names of their spouse and/or children below the age of 18. It will then make allocations according to these applications as amended which, subject to one exception,[134] have the same priority as they had prior to amendment.[135] For the Government, if the immigrant families were allowed to retain their original priority, then these immigrants would be allowed to "jump the queue" and the PRH allocation system would become unfair to those families who have been on the waiting list for years. Therefore, as the argument goes, it is necessary to use the residence qualification to avoid this situation.

However, it should be made clear that new immigrants are not the only group which would benefit from the permission for amendment of PRH applications, as the names that can be added are not restricted to those of new immigrants: an applicant may also add to his application the names of his *non-immigrant* spouse and/or underage children. In other words, the residence qualification, which by its very nature has an effect on immigrant families only, cannot adequately remedy the problem of "jumping the queue". For example, if an applicant, after applying for PRH, gets married in Hong Kong to another long-term Hong Kong resident, he may request for the addition of his spouse's name to his original application and his priority on the waiting list will not be affected, provided that his original application does not involve himself only. Similarly, if an applicant gives birth to a child in Hong Kong after having made an application for PRH, he may add his child's name to his application and retain the priority he

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132 See, on similar durational residence requirements, *Shapiro v Thompson* (1969) 394 US 618, 22 L Ed 2d 600 (USSC); and *Memorial Hospital v Marchicopa County* (1974) 415 US 250, 39 L Ed 2d. 306 (USSC). In these two cases, the one-year durational residence requirements relating to social security and to free non-emergency medical care were respectively rendered unconstitutional on the grounds (a) that they violated the Fourteenth Amendment of the *United States Constitution*, which guarantees the equal protection of the laws *and* (b) that they penalised the fundamental right to interstate travel: see (i) Tribe, L H., *American Constitutional Law* (New York: The Foundation Press, 1988), pp 16-50; and (ii) Donahue, D A, *supra* note 122. It is ground (b) that distinguishes the two cases from the present case. See also Law, C K et al, *Green Paper on the Policy towards New Immigrants*, *supra* note 15, para 7.5.

133 *Supra* Part II.

134 In case the original PRH application involves a single person only (ie the applicant himself), while the applicant may request addition of family members in order to be qualified as an ordinary family on the waiting list, only *half* of his previous waiting time as a single person will be credited to his amended application, up to a maximum of three years: see Housing Authority, *PRH Eligibility Criteria: Application by Single Persons*, *supra* note 13.

135 Telephone interview with an officer from the Hong Kong Housing Department (9 June 2000).

had before amendment, given that his original application is not a single-person application. Accordingly, if the immigrants whose names are added to their spouse's or parent's PRH application which were made before they arrived in Hong Kong, are (but for the residence qualification) regarded as "jumping the queue" because the priorities of those applications remain unchanged, then *any* non-immigrant whose name is added to an existing PRH application, whether he is a long-term resident or a child born in Hong Kong, should also be regarded as "jumping the queue" as the addition of his name to that application does not change the priority of that application and will, therefore, also be unfair to those families who have not amended their applications and who have been on the queue for a long period of time. However, the residence qualification covers only the former unfair situation, but not the latter. As such, it cannot be said that the need to avoid the problem of "jumping the queue" justifies the residence qualification.

5. Test of Residency

It may be pointed out that since the housing assistance is targeted at local residents, it is necessary to set up some test of residency, and that a durational residence requirement provides an appropriate objective test.[136] However, the period of seven years is probably too long to be a rule of thumb to determine bona fide residence. Accordingly, even though it may be argued that the need for a test of residency justifies the need for some duration residence requirement, it appears that the PRH residence qualification here cannot be justified by the need for a test of residency.

6. Budget planning

It may be argued that the residence qualification, by excluding immigrants from the PRH benefit, facilitates the PRH budget planning.[137] However, the abolition of the residence qualification would probably not make the task difficult since the Mainland immigrants are, as mentioned above, subject to a fixed daily quota of 150, and the surveys regularly conducted by the Government (as well as NGOs) provide a reliable basis for estimation of the new immigrants' demands. Therefore, the residence qualification cannot be justified by the need to facilitate budget planning.

7. Influx of Immigrants

At first sight, it may be suggested that the residence qualification can prevent an influx of immigrants to Hong Kong who are attracted by the desire to occupy a public rental flat.[138] However, having regard to the reasons explaining why immigrants choose to settle in Hong Kong set out in Part III above, it seems that, even in the absence of the residence qualification, PRH by itself would not be a very strong pulling factor for Mainland immigrants, who are, in any event, subject to a rigid daily quota. In other words, the need to prevent an influx of immigrants cannot justify the need for the residence qualification.

8. Decommodifying Effects

It has been pointed out that PRH may constitute a challenge to the commodity relations in the

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136 See, on similar durational residence requirements, *Shapiro v Thompson, supra* note 132; and *Memorial Hospital v Marchicopa County, supra* note 132.

137 *Ibid.*

138 *Ibid.*

private market because it inevitably reduces demands for housing in the private sector. On the other hand, it may be supposed that the Government, as a believer of capitalism and *laissez-faire* values, does not want that challenge to go too far. As such, it may be said that the residence qualification, by excluding certain people from the PRH benefit, helps to reduce the "decommodifying effects" of PRH.[139] However, it seems arbitrary, and there seems to be no proper reason, to single out a particular group of people, eg immigrants, among the needy and deprive them of the PRH benefit just for the purpose of maintaining the market demands. Therefore, the introduction of the residence qualification cannot be justified by the need to reduce the "decommodifying effects" of PRH.

9. Reward Theory

It appears that the most fundamental justification for the PRH residence qualification is to restrict welfare benefits to those regarded as having significantly contributed to the community through, for example, payment of taxes and labour.[140] People who have significantly contributed to the community are usually those who have resided therein for some time, so the residence qualification can serve as an appropriate test. According to this view, PRH should benefit only those who have made significant contributions to the community because it is a kind of assistance paid out of the public purse. As new immigrants, by definition, have made few (if any) contributions to the community, they do not deserve the assistance. This reward theory appears to be based on the notion of "fairness", which was said to be the cornerstone of the three-stage test,[141] and may help to explain why the Government considers "fair and reasonable" to give priority to long-term residents.[142] In any event, it seems likely that, having regard to this reward theory, sensible and fair-minded people would recognise a genuine need for the residence qualification.

F. Second: Is the residence qualification rational and rationally connected to the need?

1. Preparations before emigration

In an attempt to justify the one-year residence requirement of the CSSA, the Government explained that it was of the view that new immigrants should be well prepared to deal with problems pertaining to their livelihood before coming to Hong Kong.[143] This argument may also apply to the PRH residence qualification. However, as a member of the Legislative Council recently pointed out, sometimes immigrants simply are not given any opportunity to make preparations in the Mainland because of their poor standard of living.[144] Moreover, as another member of the Legislative Council pointed out, under the system of the One-way Permits in the Mainland, applicants must leave their place of residence and come to Hong Kong within two weeks after being informed of their successful application, or they will lose their

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139 Ng, K S K and Yu, S W K, "Housing Rights in Hong Kong: A Critical Perspective on Government's Provision of Housing" in *Proceedings of the 27th International Council on Social Welfare International Conference*, vol 2b (Hong Kong: 1996), p 69.

140 See, on similar durational residence requirements, *Shapiro v Thompson, supra* note 132; and *Memorial Hospital v Marchicopa County, supra* note 132.

141 See, on the right to have equal access to public service guaranteed in art 21(c) of the *BORO* (the equivalent of art 25(c) of the *ICCPR*), *Association of Expatriate Civil Servants of Hong Kong v Secretary for the Civil Service, supra* note 82.

142 Hong Kong Government, *ICESCR Report, supra* note 2, Part II, para 382.

143 *Hong Kong Proceedings of the Legislative Council*, 13 October 1999, pp 130, 133 and 135.

144 *Ibid*, p 134.

chance forever.[145] As such, many people do not have much chance to make further preparations after being notified that they can emigrate to Hong Kong. In relation to the PRH residence qualification, there may be one more counter-argument: although it may be reasonably argued that it is not impossible for immigrants to make preparations for their livelihood in the first year of their coming to Hong Kong, the argument will be very difficult, if not impossible, to sustain if the period extends to seven years. As a result, it appears that the argument that immigrants should make preparations before emigration cannot rationalise the PRH residence qualification.

Be that as it may, regarding to the reward theory which justifies the need for the residence qualification in the first place, the residence qualification appears to be rational and rationally connected to the need.

G. Third: Is the residence qualification proportionate to the need?

This question will be determined by considering respectively the objective of the residence qualification, which justifies the need for, and rationalises, the qualification, and its discriminatory effect.

1. Objective of the Residence Qualification

Undeniably, the reward theory has its virtue: people who have just joined the community and hence have not had the opportunity to contribute to it yet are barred from enjoying the fruits of the others' labours until they themselves have made some contributions, so that they will not receive a windfall which they do not deserve. However, it should be borne in mind that this reward theory does not *directly* relate to the residence qualification: in order to use the reward theory to justify the residence qualification, one must make an assumption that any person who has resided in the community for a certain period of time (eg seven years) must have made such contribution to the community, so that they should not be barred from the assistance paid out of the public purse. However, residence by itself does not necessarily mean contribution: the fact that those who have contributed to the development of the community are usually residents in it does not mean that *all* residents must have made contributions. In other words, the assumption made in an attempt to use the reward theory to justify the residence qualification is not always satisfactory. At the most it can only be said that the residence qualification serves as a convenient test which can give a close, but by no means precise, measurement of how much one has contributed to the community.

Moreover, it appears that the reward theory is not as constructive as the forward-looking view that *any* resident in the community, no matter how long he has resided in it, should be entitled to, say, the housing benefit, so long as he has a genuine need. According to the latter view, every resident in need should be given assistance so that he will be more likely to flourish and the interest of the community will accordingly be advanced. One who accepts this view may begin to doubt the importance of the need for the residence qualification, which will be taken into account when the question whether the residence qualification is proportionate to the need, is to be determined.

2. Discriminatory Effect of the Residence Qualification

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[145] *Hong Kong Proceedings of the Legislative Council* (28 April 1999) – Internet [URL]: http://www.legco.gov.hk/yr98-99/english/counmtg/hansard/990428fe.htm.

The most obvious effect of the residence qualification is that many immigrant families who genuinely need PRH are denied access to such benefit until at least half of the family members have resided in Hong Kong for a period of seven years. Some households at the head of the public housing queue "have been returned to the back"[146] because of this qualification. As a result, many immigrant families are found in poor living areas facing difficulties in their "living environment",[147] which is, of course, a vital aspect of human life. Some immigrant families have even been driven to having more children in Hong Kong to enable them to meet the fifty-percent rule, and this strange phenomenon has created a lot of family problems.[148]

A more profound implication of the residence qualification is that the qualification perpetuates the disadvantaged position of new immigrants and acts as an obstacle to their integration into society. Notwithstanding the fact that most of the immigrants come from the Mainland and are of the same ethnic group as the majority of the population in Hong Kong, many of them are unfamiliar with local customs and language and often encounter difficulties in adapting to the life in Hong Kong.[149] Moreover, although Hong Kong is said to be an "international metropolis", some of the existing members of the local community are rather unwelcoming: they take the view that since most new immigrants come from the Mainland (which is in many aspects less developed than Hong Kong) and are likely to become a "burden" on the community, they deserve less respect. As a result, new immigrants are sometimes treated unfairly. The PRH residence qualification simply reinforces the irrational view that new immigrants are not "full members" of society or are "second-class citizens", and, therefore, adds to their difficulties. The qualification will probably make it more difficult for new immigrants to get rid of the disadvantaged position and to adapt to the life in Hong Kong. From the policy point of view, such differentiation is unwise because those unfortunate immigrants who are unable to integrate into society may really become the "burden" of the community in two senses: on the one hand, they are not given any opportunity to make positive contributions to the community, and on the other, they may have to rely heavily on social welfare services and, as such, the public expenditure in those areas will inevitably increase. Also, they will be likely to cause far-reaching undesired social problems.

To sum up, it appears that the discriminatory effect of the residence qualification is too serious to be ignored, whereas the importance of the need for the residence qualification is, at least, questionable. It follows that the PRH residence qualification is likely to be disproportionate to the need, which justifies it. According to the three-stage test in *Man Wai-keung*, the residence qualification cannot be justified and, therefore, constitutes discrimination under art 26 of the *ICCPR* as well as art 25 of the *Basic Law*. As such, it is unconstitutional and should be struck down.

V. Conclusion

At first sight, the Hong Kong Government appears to be a governing body which deeply respects the right to equality. In his *1999 Policy Address*, the Chief Executive, the head of the

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146 Hong Kong Home Affairs Branch, *Equal Opportunities: A Study of Discrimination on the ground of Race*, *supra* note 15, para 6.7. Despite the residence qualification, a family, whether having satisfied the seven-year rule or not, can apply for PRH and register on the Waiting List, provided that it has satisfied other eligibility criteria: *supra* Part II.

147 *Supra* Part III.

148 Chan, Q, *supra* note 3. See also International Social Service, Hong Kong Branch, *A Study on the Chinese New Immigrants in Hong Kong*, *supra* note 37, para 9.2.

149 Hong Kong Home Affairs Branch, *Equal Opportunities: A Study of Discrimination on the ground of Race*, *supra* note 15, para 1.7.

Government, said:

> "I firmly believe that all are equal before the law, and I will do my best to uphold the rule of law in Hong Kong."[150]

The Financial Secretary echoed:

> "Three and a half centuries ago, the philosopher Francis Bacon declared there were four pillars of government: religion, justice, counsel and treasure. Hong Kong treasures four pillars, too: the rule of law, *level playing field*, corruption free government and the free flow of information."[151]

The Government in a consultation paper on racial discrimination elaborated on the concept of "level playing field":

> "The focus of [the studies on discrimination] has been equal opportunities: that is, the right of *all* members of society to a level playing field in the competition for the *necessities* and pleasures of life. Government is firmly committed to this ideal and to the principle that all kinds of discrimination are wrong."[152]

However, it seems that the Government is merely paying lip-service to the concept, at least in relation to PRH. Although the Chief Executive said, when proposing the two "halfway"[153] amendments to the residence qualification (which is certainly a step, though not big enough, towards equality), that he believed that the amendments would "ensure a fairer and more rational approach to the allocation of public housing"[154], it is not clear whether he supported the amendments wholeheartedly or made the proposal just to avoid litigation.[155] This doubt is further strengthened by the fact that after the amendments have already come into effect for more than seven months,[156] the PRH eligibility criteria listed in the Government's website still contain the old residence qualification.[157] In any event, because of the residence qualification (whether before or after amendment) in the eligibility criteria, PRH, by excluding new immigrants, has ironically become the source of inequality, instead of balancing the inequality created by the private market.

Discrimination against new immigrants from the Mainland is rather pervasive in Hong Kong, whether in the public or private sector.[158] Such acts are detrimental to both the discriminated and the community as a whole. Take an extreme example: in the past six months, at least two schoolchildren who were Mainland immigrants attempted to commit suicide because they could not tolerate being discriminated against by their peers and only one was saved.[159] It may be said that they themselves were to blame since committing suicide is wrong by itself and they should find other ways to resolve the problem, but these two instances may reflect how severe

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150 Hong Kong Chief Executive, *The 1999 Policy Address*, *supra* note 2, para 145.

151 Home Affairs Bureau, *Equal Opportunities: Race* (21 February 2000) – Internet [URL]: http://www.info.gov.hk/hab/top_issue/race1_e.htm.

152 Hong Kong Home Affairs Branch, *Equal Opportunities: A Study of Discrimination on the ground of Race*, *supra* note 15, para 1.1.

153 Because the fundamental source of discrimination, the seven-year rule, remains intact.

154 Hong Kong Chief Executive, *The 1999 Policy Address*, *supra* note 2, para 161.

155 For the threat of litigation, see Chan, Q, *supra* note 3.

156 The amendments took effect from 5 November 1999: *supra* Part I.

157 Housing Authority, *PRH Eligibility Criteria: Application by Ordinary Families* (6 June 2000) – Internet [URL]: http://www.info.gov.hk/hd/eng/hd/public/ordinary.htm.

158 See, eg Huang, W F, "歧視內地人" ("Discrimination against People from the Mainland"), *Hong Kong Economic Times*, 17 February 2000 (in Chinese).

159 *Apple Daily*, 18 December 1999 and 20 April 2000.

the impact of discrimination on the discriminated can be. These two children are equally capable of contributing to Hong Kong's future development and their early death is surely a great loss to the community. What is worrying in these two instances is that the discriminators were also children, who are to determine the community's future. As the Chief Executive admitted in the Legislative Council regarding the first instance, the Government has a duty to correct the problem.[160] It is submitted that the first step the Government should take is to eliminate, wholeheartedly, existing discriminatory practices in the public sector, including the PRH residence qualification.

In fact, the phenomenon of discrimination against new immigrants should not have existed in Hong Kong in the first place because most of the new immigrants are ethnically the same as the majority of the local population, and many existing residents in Hong Kong either themselves came from the Mainland or were born of parents who came from there. The current Chief Executive, for example, is a Mainland immigrant.[161] However, discrimination against new immigrants does exist. It is to be hoped that all such practices will disappear in the near future. To this end, the Government should, and must, act as the locomotive.

160 *Apple Daily*, 14 January 1999.
161 *Ibid.*

HOLISTIC APPROACH TO HK'S VCD SITUATION

ANTHONY FUNG CHUN-BONG

I. Introduction

Last night, I bought "The Gladiator" and "Mi-2" for twenty dollars each. I am not complaining, but I am puzzled. The government has been responsible for no less than 1000 raids on illegal VCD manufacturers and vendors each year for the last 5 years.[1] Laws have been amended again and again, and heavier and heavier penalties are imposed. Yet, despite these efforts, there is no lack of opportunity to purchase illegal titles. Is there something wrong with our laws? Is it a question of education? Or is it part of 'Asian Values,' something inherent in our blood that makes us particularly attracted to infringing goods? This paper will try to provide an answer. We will attempt to understand the phenomenon of piracy and why current efforts have failed to eradicate the issue at all.

On 25 June 1997, Sir Donald Tsang at the AGM of the Federation of Hong Kong Industries said, 'Without being too boastful, I can assure you that Hong Kong's copyright laws are among the best in the world.'[2] Yet, the reality is that the blatant selling of illegitimate VCDs continues to occur on street corners. The creative industry condemns the government as not doing enough, advocating a very simple solution of the situation: increased enforcement and heavier penalties on the manufacturers and vendors.

Rather than uncritically imposing penalties on the suppliers under the current patchwork policy, this essay will try to show that the VCD situation is a complex one and should be approached in a balanced and principled manner. Policy should be formulated with equanimity under Dworkin's approach of 'law as integrity'. Applied to the VCD situation, it means reinstating due process and lessening penalties for manufacturers, re-orienting enforcement policy to ensure equal enforcement on vendors, and drafting legislation to impose criminal liability on buyers.

This essay will be divided into eight sections. The first section, 'The Theory,' will attempt to show two things: first, what copyright is and its value to society; and second, the appeal of Dworkin's 'law as integrity' approach and its relevance to policy and legislation. The second section, 'The Official Story,' will list out the legislation relevant to the main players in the VCD industry. The third section, 'Manufacturers of Optical Disks,' will contrast the earlier section and show the situation faced by manufacturers in practice; in particular, it will show how current efforts fail to target illegitimate manufacturers and how they levy unfair burdens on legitimate manufacturers. The forth section, 'Vendors of VCDs' will, like the earlier section, illustrate the situation in practice vis-à-vis the legitimate and illegitimate vendors, focusing particularly on problems of tackling street level piracy. The fifth section, 'Law Enforcement Officials,' will explain current enforcement initiatives from the perspective of law enforcement officials and try to point out the limitations of official actions against the problem of piracy. The seventh section, 'Buyers,' will try to paint a profile of the buyer population, looking at their

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1 Provisional Legislative Council Panel on Trade and Industry: Enforcement against copyright piracy activities – Panel on Trade and Industry (Papers) (8 September 1997) – Internet [URL]: http://www.legco.gov.hk/yr97-98/english/panels/ti/papers/ti0809-5.htm.

2 Sir Donald Tsang, "Address at the AGM of the Federation of Hong Kong Industries" (Wednesday 25 June 1997) - Internet [URL]: http://www.info.gov.hk/ipd/fs_spch.html.

mentality and reasons why they buy pirated goods. The eighth section, 'The Right Approach,' will present alternatives to the present arrangement through Dworkin's 'Law as Integrity' analysis, arguing for a general reappraisal of the current situation through a holistic perspective to the situation. The last section, 'Conclusion,' will give a short ending to a very difficult situation.

II. The Theory

In this section, we shall look at the theoretical foundations for the existence of copyright and Dworkin's 'law as integrity,' the theory by which copyright policy will be evaluated.

A. The Economics of Copyright

In recent years, critical voices have emerged questioning the value of copyright. In a recent paper, Moglen challenged the value of copyright, arguing that it is undesirable because it has outlived its usefulness. In his view, copyright, by allowing individuals to place de facto barriers on ideas, has indirectly allowed organised industries to reap exorbitant profits and stunt social growth by excluding competitors from participation.[3] This is a powerful argument that carries a certain degree of truth. However, the abuse of copyright does not automatically mean that copyright should be abolished; misuse can be remedied through legal measures such as anti-trust laws and the removal of competition-inhibiting rules such as regulations against parallel importing. There is still value in the protection of copyright.

Copyright is the bundle of rights given to the owner of an original work.[4] It is a manifestation of the social recognition given to the importance of intellectual property by conferring property rights on the efforts of artists, writers, and other creative members of society.[5] Through affording legal protection to the intangible, copyright rewards creativity by defining an exclusive future market for the use of the intellectual property.[6] Copyright law does this by 'preventing unauthorised copying and, in terms of economics, giving the copyright owner a temporary monopoly on the original work'.[7] The temporary monopoly allows the copyright owner to recover his expenses from the production and to reap any profits that exist. Without the institution of copyright, 'the price of creative work would fall to marginal cost of production'.[8]

Turning to the concrete example of VCDs. Due to the discrepancy between the cost of making a VCD and the cost of making the movie, the pirate obtains an unfair advantage because he effectively circumvents the production costs of the movie, paying only the marginal amount needed for making the VCD. The legitimate copyright owner cannot compete with the pirate because the price of the legitimate copy factors in the movie's production costs. In other words, because the pirate does not have to shoulder the production costs, he can simply cash in on the producer's efforts by engaging in rent seeking activity i.e. 'the devotion of resources to gathering pure surpluses,'[9] effectively defeating the market mechanism. Such activities are

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3 Moglen E, "Anarchism Triumphant: Free Software and the Death of Copyright" (1999), (paper prepared for the Buchmann International Conference on Law, Technology and Information, at Tel Aviv University).

4 Bainbridge D, *Intellectual Property* (London: Pitman, 1994) p 29.

5 Phillips J, *Introduction to Intellectual Property Law* (London: Butterworths, 1990) p 105.

6 Dnes A, *The Economics of Law* (Oxford: International Thomson Business Press, 1996) p 33.

7 *Ibid.*

8 *Ibid.*

9 *Ibid* at 14.

wrong because the pirate is effectively stealing revenue from the pockets of the producer, legitimate copyright owners and licensees.[10] Furthermore, rent-seeking behaviour tends to lead to inefficient use of resources; in this case, it depreciates the profitability of the copyright, resulting in a diminution in incentive for filmmakers to make future movies. The role of the law is thus to uphold the market mechanism by correcting such behaviour and to affirm the central tenets of society.[11] Yet, this was not satisfactorily achieved due to the incongruent approach taken in drafting copyright legislation and devising policy.

B. Law as Integrity

Hong Kong has a curious copyright protection strategy: manufacturers and vendors are penalised heavily for infringing acts, while no liability is imposed on the buyer at all.[12] This policy has its roots in the UK *Copyright Act of 1956*. Two voices have been instrumental to its development: first, the government's refusal to impose liability on the buyer (largely voiced by the Customs and Excise (C&E) Department and the Department of Justice); and second, extensive lobbying from interest groups (such as the IFPI) calling for greater deterrence by imposing heavier punishments.[13] The current policy is what Dworkin would term 'a pragmatic compromise', the optimum state of affairs under the utilitarian calculus securing the maximum happiness of interest groups concerned, reflecting the concerns of practical enforcement and the particular interests of certain interest groups.[14]

Yet, there is good reason that such pragmatism is undesirable from a theoretical perspective. First of all, we know enough from sociology that society is a 'system of interrelated parts in which no part can be understood in isolation from the whole.'[15] In other words, there is a real danger that incongruent decision making will result in unexpected repercussions in other aspects of society. Furthermore, although pragmatism has the advantage of pleasing all parties, it inevitably compromises principle for other considerations. Patchwork situations occur, where, to take Dworkin's example, racial discrimination is disallowed on buses but permitted in restaurants[16]; or in our case, buying illegitimate VCDs is allowed but selling and making them is illegal. Such circumstances that treat similar incidents differently on arbitrary grounds are offensive to morality because it fails to settle on some coherent principle and results in a 'compromised scheme of justice.'[17] By acting in an unprincipled manner, the state becomes a hypocritical agent. In other words, while endorsing principles to justify its action, it must also renounce the same principles to justify its inaction.[18] In our example, although the state promotes the protection of intellectual property, it indirectly rejects the same principles by imposing no liability on buyers. 'Law as integrity' is therefore a superior philosophy because it

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10 Hettinger E, "Justifying Intellectual Property" in Peter Drahos (ed), *Intellectual Property* (Ashgate: Dartmouth, 1999) p 117, Falls M., "Retribution, Reciprocity and Respect for Persons" in Antony Duff (ed), *Punishment* (Sydney: Dartmouth, 1994) p 27.

11 *Supra* note 9 at 14.

12 Intellectual Property Department, "Copyright in Hong Kong," IPD Homepage – Internet [URL]: http://www.info.gov/hk/ipd/new_law/cpr_e.htm

13 Cheung, Kwok-Fu, "A Study of Copyright Protection Policy and the Enforcement of Anti-Piracy Law Enforcement in Hong Kong" (1989) Masters of Social Sciences Thesis, University of Hong Kong, Hong Kong, p 42.

14 Dworkin R, *Law's Empire* at p 179, extracted in Davies and Holdcroft, *Jurisprudence: Texts and Commentary*, (London: Butterworths, 1991) p 387.

15 Wallace R. and Wolf A., *Contemporary Sociological Theory: Continuing the Classical Tradition* (London: Prentice Hall Inc, 1995) p 18.

16 *Ibid* at 14.

17 *Ibid* at 14.

18 *Supra* note 14 at p 388.

offers a holistic alternative to legislation and policy.

Being a holistic philosophy, 'law as integrity' rejects hypocrisy. 'Law as integrity,' or to be more exact, 'the virtue of political integrity'[19] demands that like cases be treated alike. To be more specific, it requires 'the government to speak with one voice, to act in a principled and coherent manner towards all its citizens, to extend to everyone the substantive standards of justice and fairness it uses for some.'[20]

'Law as integrity' has its origins from liberal political philosophy which encompasses three ideals – fairness, justice, and procedural due process. First, according to Dworkin in 'Law's Empire,'[21] 'fairness' is concerned with the correct distribution of political power, which is ensured by making legislation and policy fair and unbiased towards or against any particular interest group. This has been generally interpreted to mean procedures and practices that secure equal influence to all citizens vis-à-vis the decisions that govern them.

Second, 'justice' is concerned with the correct decisions that political institutions ought to make; in recent years, this has been taken to mean the demand on legislators and officials to 'distribute material resources and protect civil liberties so as to secure a morally defensible outcome.'[22] Obviously justice has many aspects, but any interpretation of justice essentially requires some conception of proportionality and of just deserts. For this reason, retributivist theories are particularly suited for this purpose. Although retributivists differ on the details, retributivism is at heart a deontological theory that offers a non-utilitarian alternative by advocating punishments based on the inherent qualities of the act.[23] On the contrary, utilitarian theories of punishment, that view punishments solely in terms of economics and crime reduction, are undesirable because there is nothing inherent in their consequentialist perspective that rejects disproportionate punishments.[24] Retributivist theories have their origins from the *jus talionis*, which embraces three principles:

(i) Punishment is justified only if deserved;
(ii) Punishment is deserved only if the person punished has voluntarily committed the wrong;
(iii) The severity of the punishment must be proportionate to the severity of the wrongdoing.[25]

Rather than crime prevention, punishment is viewed as the state's way of expressing censure or blameworthiness on deviant behaviour, where offenders are held responsible for their actions, no more and no less.[26] Blame is assigned to offenders because they have done wrong; therefore, it is only natural that the extent of blameworthiness be commensurate with the severity of the

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19 *Supra* note 14 at p 386.
20 *Ibid.*
21 *Supra* note 14 at p 385.
22 *Ibid.*
23 Murphy J, "Retributivism, Moral Education, and the Liberal State" in Antony Duff, *Punishment* (Sydney: Dartmouth, 1994) p 124.
24 Hudson B, *Understanding Justice: An Introduction to Ideas, Perspectives and Controversies in Modern Penal Theory* (Buckingham: Oxford University Press, 1995) p 57.
25 Falls M, "Retribution, Reciprocity and Respect for Persons" in Antony Duff, *Punishment* (Sydney: Dartmouth, 1994) p 27.
26 Von Hirsch "Proportionality in the Philosophy of Punishment: From 'Why Punish?' to 'How Much?'" in Antony Duff, *Punishment* (Sydney: Dartmouth, 1994) p 347.

resulting punishment.[27] 'Hard treatment' (onerous burdens e.g. imprisonment and fines) is justified, but at the end of the day, they should only seek to supplement the moral reasons for obeying the law rather than supplanting the role of censure itself.[28]

Lastly, 'procedural due process' is concerned with adopted procedures and how they can faithfully reflect rights and other basic political values of liberalism. Procedural due process exists not because they ensure accurate finding of facts, but because they seek to equalise the imbalance of power and resources between the individual and the state.[29] They define a personal arena for individuals to resist unfair decisions by the majority and instil a 'margin of safety' against the conviction of the innocent.[30] Absolute efficiency and accuracy is compromised because such a conception champions a more important principle – the principle of 'equal concern and respect' which sees persons as an end and not as means - and respects them as having dignity and respect worthy of protection.[31] This view that humans are significant and valuable lies at the heart of liberalism and constitutes the main reason against treating people as expendable to unprincipled considerations.

Therefore, 'law as integrity' is a desirable philosophy not only because it embraces these three ideals, but because it affords certainty and predictability in everyday affairs of people's lives and more importantly, promotes the concept of society as a moral agent relying on principles to legitimise its monopoly of force.[32] In this model, the state does not enjoy legitimacy because of its ability to wield coercion and punishments, but because it promotes the common principles which everyone shares. A conception of society based on principle promotes fairness and ultimately enjoys greater legitimacy than other philosophies. A society based on principle fosters an egalitarian society – one which affords equal concern for all its members; where 'no one be left out, that we are all in politics together for better or worse, that no one may be sacrificed, like wounded left on the battlefield, to the crusade for justice overall'.[33]

III. The Official Story

In this section, we shall look at the legislation vis-à-vis actors in the VCD industry. Unlike other intellectual property rights such as trademarks or patents, no formalities are required for copyright to arise. Legally speaking, copyright is an automatic right that arises when a work is available to the public,[34] and it can be assigned, licensed and sub-licensed easily without need of registration or formal notification.[35] Works all over the world qualify for copyright protection in Hong Kong.[36] However, the work must fall within the established categories (e.g. artistic works, sound recordings, etc.), although the categories are diverse and have been

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27 Ashworth A, "Criminal Justice and Deserved Sentences" in Antony Duff, *Punishment* (Sydney: Dartmouth, 1994) p 375.

28 *Supra* note 25 at p 357.

29 Dworkin R, 'Liberalism', *Public and Private Morality* 127-136, extracted in Davies and Holdcroft, *Jurisprudence: Texts and Commentary*, (London: Butterworths, 1991) p 319.

30 *Ibid.*

31 *Supra* note 23 at p 51.

32 Dworkin R, *Law's Empire*, pp 189-190, extracted in Davies and Holdcroft, *Jurisprudence: Texts and Commentary*, (London: Butterworths, 1991) p 388.

33 *Ibid* at p 390.

34 Sections 177, 178, *Copyright Ordinance* (Cap 528).

35 Wan, Tak-Hung, "A Study of Copyright Protection Policy in Hong Kong" (1999) Masters of Public Administration Thesis, University of Hong Kong, Hong Kong 36.

36 Pendleton, Garland P and Margolis J, *The Law of Intellectual and Industrial Property in Hong Kong*, (Singapore: Butterworths, 1994) Division IV p 44.

interpreted liberally to include virtually all creations.[37]

Before proceeding further, it would be appropriate to identify the interested parties. There are 6 parties in the VCD industry: the copyright holder, the client, the manufacturer, the vendor, the buyer and the law enforcement officials. The client is where everything starts; he is the party who takes the initiative to obtain the license from the copyright holder (e.g. Disney) and who places the order with the VCD manufacturer to produce the relevant titles. The VCD manufacturer, in contrast, is the party with all the machinery and technical expertise necessary to create the VCDs. Created VCDs subsequently pass to the vendor, the party who sells VCDs to the buyer. Lastly, the law enforcement officials are the party exclusively charged with enforcing the relevant laws protecting the right of copyright owners.

A. Legislation vis-à-vis Clients, Manufacturers and Vendors

Legislative protection of copyright is governed by the *Copyright Ordinance* (Cap. 528). This is the principal Ordinance that sets out the main copyright offences, the relevant procedures and the limits on the powers of investigative officers. Section 118(1) makes it an offence for a person, without the license of the copyright owner, to make for sale or hire, import or export otherwise than for domestic use, possess for trade or business with a view to breach the copyright, or distribute to such an extent as to affect prejudicially the copyright owner, an infringing copy of a copyright work. Offenders face a maximum penalty of $50,000 per infringing copy and imprisonment for up to four years.[38] Section 118(4) makes it an offence for a person, without the license of the copyright owner, to make, import, export, or possess for trade and business purposes, machinery adapted for making infringing copies. Offenders face a maximum penalty of $500,000 and imprisonment for up to eight years.[39]

Section 120 embodies the objective territorial principle under international law, extending Hong Kong's jurisdiction over offenders who import articles which they know to be infringing copies and other articles (machinery) designed for making infringing copies into Hong Kong. Offenders face a maximum penalty of $500,000 and imprisonment for up to eight years.[40]

Lastly, ss 35(4) and 118(1) penalise parallel importing. It is an offence for commercial importers to import legitimate copies licensed abroad into Hong Kong in breach of a Hong Kong exclusive licensee agreement, before the expiration of 18 months beginning on the first day of publication of the work. Offenders face a maximum penalty of $50,000 per infringing copy and imprisonment for up to four years.[41]

It should be noted that there is a defence for those who can prove that they did not know or had no reason to suspect that the copy in question was an infringing copy,[42] although as we will later see, subsequent judicial decisions have cast new light on defences as well as the offences themselves.

B. Legislation vis-à-vis Buyers

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37 *Ibid.*
38 Section 119(1), *Copyright Ordinance* (Cap 528).
39 Section 119(2), *Copyright Ordinance* (Cap 528).
40 Section 120(6), *Copyright Ordinance* (Cap 528).
41 Section 119(1), *Copyright Ordinance* (Cap 528).
42 Sections 118(3), 120 (1), 120(2), *Copyright Ordinance* (Cap 528).

Although the above Ordinance clearly apportions liability to illegitimate manufacturers and vendors of VCDs, buyers of such goods are not penalised at all. It is not an offence to possess, import or export[43] infringing articles for private and domestic use. However, although there is no provision that criminalises buying, there is also no provision that specifically exempts the possible accessorial liability of buyers. Yet, buyers are never prosecuted in practice.

C. Legislation vis-à-vis Law Enforcement Officials

After looking at the main offences, it is important to review the legislation vis-à-vis the law enforcement officials. It should be noted that, in order to exercise the powers under the ordinances, the public officer must be authorised by the Commissioner or Assistant Commissioner of the Customs and Excise[44]; this effectively means that only Customs and Excise (C & E) officers are able to exercise the powers under the relevant ordinances.

Generally speaking, all C&E officers enjoy a power to stop, search, and arrest any person reasonably suspected of committing an offence under the three ordinances without need of warrant.[45] Once arrested, the officer will be able to search and take possession of any evidence on or about the person and in or about the place of arrest. Furthermore, C&E officers can request entry into a site where they believe a suspect has entered (e.g. by chase), and have the power to break in if entry is refused.[46] Normally, however, C&E officers need a warrant to enter into any place (other than for a vessel, vehicle, or customs checkpoints) and search for evidence.[47] Although, no warrant is required for the exercise of general inspection powers in licensed premises under the *Prevention of Copyright Piracy Ordinance,*[48] a warrant will be necessary to enter and search premises where it is suspected that an offence under the *Prevention of Copyright Piracy Ordinance* has been committed.[49]

Additional powers are conferred on law enforcement officials through the *Organised and Serious Crimes Ordinance*, since ss 118(1), (4), (8), and ss 120(1), (2), (3) of the *Copyright Ordinance*, and ss 6(c), (d) of the *Import and Export Ordinance* (Cap 60) are listed in Schedule 1 of the OSCO. In other words, officers investigating the aforementioned crimes will be able to, inter alia, ask the court for an order to compel a person to furnish information or make material available.[50]

Section 131 of the *Copyright Ordinance* further simplifies law enforcement by reversing the onus of proof. Now, regardless of whether or not a person is charged with an offence under s 118 or s 120, the C&E will be empowered to forfeit any seized articles (including suspect VCDs and suspect machinery) without need of absolute proof of breach of copyright. All the C&E need to do is to serve a notice to the owner, and if the owner does not respond within 30 days, the goods will be forfeited without further process.

IV. Civil Penalties

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43 Section 118(1), *Copyright Ordinance* (Cap 528).

44 Section 198, *Copyright Ordinance* (Cap 528) and s 2, *Prevention of Copyright Piracy Ordinance* (Cap 544).

45 Section 17A, *Customs and Excise Service Ordinance* (Cap 342).

46 Section 17B(4), *Customs and Excise Service Ordinance* (Cap 342).

47 Section 123(2), *Copyright Ordinance* (Cap 528).

48 Section 17(1), *Prevention of Copyright Piracy Ordinance* (Cap 544).

49 Section 18(1), *Prevention of Copyright Piracy Ordinance* (Cap 544).

50 Sections 3, 4, *Organized and Serious Crimes Ordinance* (Cap 455).

Obviously, the traditional civil remedies of damages, injunctions, and accounting are available to infringed parties.[51] Delivery up orders[52] and additional damages may be awarded in flagrant cases[53] to copyright owners. Subject to the usual requirements of proof and causation, what the plaintiff obtains is a matter of fact.

Two remedies deserve special mention, however; namely, the Anton Piller Order and the interlocutory injunction – two significant interlocutory remedies in the civil law.[54] In essence, the Anton Piller Order allows the party whose right has been infringed to apply to court for an order requiring the defendant to answer certain questions or to allow the it to enter the defendant's premises and take away material evidence before he has the opportunity to dispose of it in order to frustrate the plaintiff's claim.[55] The Anton Piller Order is a means of obtaining discovery at an early stage or in some urgent situations, even before a writ is issued.

The interlocutory injunction, on the other hand, is an order that prohibits the defendant from doing or continuing with a certain act. The claimant need not prove infringement; all he needs to prove is that there is a strong likelihood and that on the balance of convenience, an interlocutory injunction should be granted.[56] An interlocutory injunction is not a casual remedy; the court, in its discretion, will look at a variety of factors in deciding whether to grant the injunction, which include, inter alia, whether or not damages will be an adequate remedy for the plaintiff.[57] Furthermore, the plaintiff must compensate the defendant for any damage suffered if the claimant fails in his action.[58]

V. Manufacturers of optical disks

After looking at the official section, we shall now turn to look at the unofficial side of how these laws apply to both legitimate and illegitimate manufacturers of VCDs.

A. Legitimate manufacturers

Clients who deliberately fail to obtain the relevant licenses from the copyright owner are obviously criminally liable under s 118(1) of the *Copyright Ordinance*. It is only fair that manufacturers who connive with them are also criminally liable. What is troubling, however, is that legitimate manufacturers possibly share criminal responsibility of clients who deliberately want to make pirated copies even if the manufacturers did not know of the client's dishonesty and had no intention of committing piracy.

The authority for that proposition is *R v Ng Kwan Pui*[59], where the court convicted the defendant for publishing a copyrighted photograph for cassette inlaid cards under s 5 of the *Copyright Ordinance* (which was subsequently amended as s 118(1d) of the *Copyright Ordinance* – possession for trade purposes). The photograph was supplied by a commercial designing company with whom the defendant had a long-standing and business relationship without any problems to date. The production had continued for two years without any

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51 Sections 107, 220, *Copyright Ordinance* (Cap 528), elaborated in *supra* note 36 at Division IV 130.
52 Sections 109 -111, 228, *Copyright Ordinance* (Cap 528), elaborated in *supra* note 36 at Division IV 130.
53 Section 108, *Copyright Ordinance* (Cap 528), elaborated in *supra* note 36 at Division IV 130.
54 *Supra* note 36 at Division VII 1.
55 *Supra* note 36 at Division VII 7.
56 *Supra* note 12 at 66.
57 *Supra* note 36 at Division VII 10.
58 Supra note 36 at Division VII 12.
59 [1988] HKC 724.

complaints, but the judge held that these facts were irrelevant and imposed criminal liability, holding that the defendant had a duty to make necessary inquires. The judge rejected counsel's argument that it was unreasonable to demand that the appellant check the copyright position in every commission, and based his decision on policy i.e. that if allowed, it would 'be all too easy for a publisher to pass the buck.' This construction was judicial legislation based solely on policy considerations. Section 5 clearly provided a defence for persons who had no reason to know of the infringing status of the work and there was no ambiguity on the face of the wording of the section that could allow for the possibility of an alternative interpretation,[60] especially one that warranted a departure from the strict liability character of s 5 to allow the imposition of a positive duty to make inquiries.

Unfortunately, *Ng Kwan Pui* was uncritically adopted into the VCD context in *HKSAR v Mega Laser Products*[61], where criminal liability was imposed on the manufacturer for producing VCDs for an overseas client. This case is disturbing for two reasons. First, the case reveals that the legislation fails to account for the international aspect of the VCD manufacturing industry. The VCDs in question were intended for export to Taiwan, where licensing was not needed for the film because the copyright protection afforded to films in Taiwan was significantly shorter in time. However, since Hong Kong had a much longer copyright protection period than Taiwan (50 years), the VCDs had technically become 'infringing copies' because licensing was still required in Hong Kong. According to s 118(1) of the *Copyright Ordinance*, not only was Mega Laser Products criminally liable for creating the VCDs (which would be completely legitimate to create in Taiwan), s 118(1) also imposed criminal liability on the Taiwanese client similarly for his part in 'making' the VCDs. However, it served nobody's interest to penalize the manufacturer. Local licensees would not benefit since the VCDs were intended for export, true pirates would not be deterred since the VCDs were intended for legitimate vendors overseas, and the copyright owner (who made the complaint) would not benefit since the VCDs would be created elsewhere anyway.

Second, the case establishes a very high standard of conduct vis-à-vis the duty to make inquiries imposed by *Ng Kwan Pui*. The judge found that the inquires the defendants made with their friend employed at a solicitor's firm and their preliminary inquiries with the Movie Association of Hong Kong and Kowloon were 'minimal', failing to discharging their duty to make sufficient inquiries. The court held that Mega Laser Products should have spent more time verifying and seeking proper legal advice regarding the foreign transaction. Although this may seem fair ex post facto, this decision deals a severe blow to legitimate manufacturers since they will likely refuse foreign orders in the future due to the legal costs and fear of such complications.

Without looking at the 'blind spot' that has occurred, the two decisions are disturbing because they disregard the words of the statute, imposing a positive duty that goes beyond the requirement of proving an innocent mental state in any strict liability offence. Normally, the VCD manufacturer receives a letter of authorization from his client,[62] however, this is now plainly insufficient. And it appears that manufacturers have a positive duty to seek legal advice and exhaustively verify the copyright status of every order with the local associations. Furthermore, just as the duty was originally imposed on the publisher of cassette inlaid cards and applied to VCD manufacturers, there is nothing on the face of the statute precluding the

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60 See *Pepper v Hart* [1993] 1 All ER 42.

61 [1999] 3 HKC 161.

62 Submission of the Optical Disc Manufacturing and Technologies Association Ltd. to the Sub-committee on *the Organized and Serious Crimes Ordinance* (Cap 455) - CB(1) 477/99-00(01)

duty from being similarly adopted in respect of other actors such as vendors, packers, delivery men, warehouse owners, etc. The current interpretation thus goes against good business sense, imposing time-consuming verification requirements on the relevant actors.

The verification requirement is also controversial because there is currently no efficient and unfailing method of verifying copyright. Indeed, the government has indicated to the Sub-Committee on the *Organised and Serious Crimes Ordinance* that it has given up on the possibility on keeping an official copyright registry, because of the sheer number of titles that exist around the world. Furthermore, "given that there are no legal obligations for the copyright owners and licensees to register their rights, it is not possible for any government to maintain an up-to-date register of all copyright works given the vast number of titles involved and the complete freedom on transfer of ownership.[63]" In other words, even if it were possible to maintain an up-to-date directory of all the original copyright owners, it would still be insufficient since it would not take into account the sub-licensees and sub-sub-licensees who are probably unknown by the original copyright owners.[64]

Yet, despite the impossibility of maintaining a central database, the government has shifted the burden to the "retail" side, leaving them with the onus of verification. Obviously, this has led to great discontent among VCD manufacturers. According to Mr Lee Yuk-Sang, the president of the Optical Disc Manufacturing and Technologies Association, over 98% of CD manufacturers oppose the current arrangement.[65] CD manufacturers are particularly unhappy because they now have to bear an additional delay in their operations in order to satisfy the verification requirement, making them less competitive than mainland manufacturers.[66] Currently, copyright verification with the Motion Pictures Association or the Movie Association of Hong Kong and Kowloon (bodies which the government recommends for copyright verification) generally takes between two to seven days.[67] This waiting period is unacceptable to manufacturers who constantly receive urgent orders from around the world; to wait as long as seven days before starting work is simply unsuited to many clients, and many would prefer to take their business elsewhere.[68] Furthermore, copyright verification is virtually impossible with foreign orders, such as those from India, Vietnam or the Philippines, all affording different periods for copyright protection. To quote Mr Lee, "we get orders for making all sorts of products. All claim to be reputable clients. It is not that we don't want to check on copyright – sometimes, we don't even know the names of the movies or songs on the compact discs.[69]"

If one were to 'play it safe' i.e. not to receive any orders from clients that do not correspond with the database of the aforementioned associations, one would have to refuse a lot of business. The mere fact that clients do not appear on the search does not automatically mean that they are illegitimate; there can be a multitude of explanations e.g. the clients might be sub-sub-licensees, or they might have not registered with the associations, or a license was not needed in that country because the copyright protection period had expired, etc. To refuse business based on the government's recommendations might protect oneself from criminal liability, but it would also mean refusing profitable orders purely on speculation.[70] This factor has largely

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63 Sub-committee on the Organized and Serious Crimes Ordinance, (Amendment of Schedule 1) Order 1999 – CB(1) 477/99-00(04)

64 Personal interview with Mary Man, practitioner at Wilkonson and Grist (Jan 19th, 2000).

65 Lee, Stella, "Genuine video disc makers fear closure," *South China Morning Post,* 23 September 1999.

66 *Supra* note 62.

67 Telephone communication with the Motion Pictures Association (6 June 1999).

68 "Law Change 'Would Hit Legal Disc Makers,'" *South China Morning Post,* 2 December 1999.

69 *Ibid.*

70 "Hard Laws Hit Manufacturers," *Ming Pao,* 5 May 1999.

contributed to many legitimate licensed VCD manufacturers continuing to run the risk and largely explains why innocent manufacturers are occasionally arrested for producing illegitimate VCDs.[71]

Due to the lack of official capability for copyright verification, it is virtually impossible for C&E officials to adopt a holistic enforcement policy due to their inability to identify infringing copies on their own.[72] As a result, Customs operations are often in response to specific complaints by individual copyright holders,[73] whom Customs is entirely dependent on for the verification of infringing copies. Yet, due to the absence of any foolproof way of copyright verification due to sub-licensing, there is no way of being sure that an operation is illegal until one takes official action. Unfortunately, many manufacturers suffer irreparable damage as a result because correcting any misunderstandings inevitably involves complications and delays, since most copyright complainants are overseas. In the meantime, while one's goods are seized and production is halted, a manufacturer suffers financially and takes an irreparable blow to its reputation and goodwill.[74]

Theoretically, official action is kept in check by a party's right to sue the government for negligence. However, this right has been severely limited by the *Prevention of Copyright Piracy Ordinance* (Cap 544) and the *Organised and Serious Crimes Ordinance* (Cap 455). Section 33 of the *Prevention and Copyright Piracy Ordinance* precludes liability for damage caused by C&E officials acting in good faith. The situation is worsened by the introduction of ss 118 and 120 of the *Copyright Ordinance* and s 6 of the *Import and Export Ordinance* into Schedule 1 the *Organised and Serious Crimes Ordinance.*[75] The *Organised and Serious Crimes Ordinance* limits the government's liability to 'serious defaults' caused by their agents, and since most searches will have been based on obtained warrants, it is unlikely that the manufacturer will be able to succeed against the government.[76] Although such protection is relatively standard with that conferred on other law enforcement officials, the objection in this situation is that the margin of error of copyright enforcement and subsequent punishments are considerably higher than in other law enforcement situations, leaving little protection for legitimate manufacturers from overzealous enforcement.

Yet, overzealous enforcement is what legitimate manufacturers have to face every day. According to a study conducted by the Optical Disc Manufacturing and Technologies Association, over 82% of CD manufacturers find current C&E actions 'intrusive.'[77] Although the C&E originally had strict internal criteria regarding when action is to be taken, they had to settle for a very loose policy in recent years due to increasing pressure.[78] Indeed, according to C&E statistics, about three manufacturers have their goods seized monthly through official actions, despite the fact that there are only around 100 manufacturers in the industry.[79] Yet ironically, none of the suspected manufacturers identified during 1998-1999 have been prosecuted yet due to insufficient evidence.[80]

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71 *Ibid.*
72 *Supra* note 63.
73 *Supra* note 12 at 20.
74 *Supra* note 63.
75 Schedule 1, *Organized and Serious Crimes Ordinance* (Cap 455)
76 *Supra* note 64.
77 *Supra* note 62.
78 *Supra* note 12 at 72.
79 Customs & Excise Department, "Optical Discs Seizure Analyzed by Location of Seizure," C&E Homepage – Internet [URL]: http://www.info.gov/customs/statis/table7.htm.
80 "C&E Successfully Apprehends Digital Manufacturers," *Ming Pao,* 7 May 2000.

The case of the '*Golden Star International Company*' serves as an example of how legitimate manufacturers are affected by careless enforcement. On 28 July 1999, Customs raided the 'Golden Star International Company' in response to a complaint from its copyright owner in Taiwan. In reality, Golden Star had not been guilty of producing illegal copies of the series and was actually legitimately producing the VCDs for an authorised distributor in Guangzhou, a sub-sub licensee – unknown to the copyright owner. Unfortunately, in accordance with normal customs practice, all of Golden Star's VCDs were temporarily seized and their workers subjected to questioning. Although the company was ultimately not charged, Golden Star suffered tremendous injury to their goodwill, and was forced to close a few months later due to a sudden drop of business, losing more than several million dollars in the process.[81] This is by no means an isolated incident. It is well documented that Customs officials have raided legitimate CD manufacturers many times before.[82]

As a result of overzealous enforcement, it is no wonder that the CD manufacturing industry in Hong Kong has been adversely affected. Many potential clients have withdrawn their business from Hong Kong, preferring rather to place orders with CD manufacturers in other countries.[83] Banks have shortened their lending periods on loans and are less willing to lend capital to manufacturers.[84] Investors, believing Hong Kong to be a "piracy haven" have lost confidence in the industry and have given it the lowest credit rating, making it almost impossible to borrow money to finance manufacturing activities.[85] When the government adopts such measures against manufacturers without considering its consequences, not only does it foster a perception that the government does not care about the manufacturing industry, it also projects a very negative image of Hong Kong's business environment to potential high-tech developers, making investors think twice before investing here.[86]

B. Illegitimate Manufacturers

Having examined the law as it applies to legitimate manufacturers, we will now look at how the laws are applied as against illegitimate manufacturers.

Currently, the government regulates the industry in two ways: licensing requirements and mandatory identification codes. As stated above, all manufacturers of optical disks must register with the Customs in order to obtain a license, without which the enterprise would be illegal.[87] Through this system of licensing, Customs impose conditions and requirements on CD manufacturers, which the manufacturers must follow in order to keep their licenses.[88] The licensing system has the additional benefit of facilitating law enforcement officials in keeping track of manufacturers and their products, making it easier to identify illegal plants and infringing copies.

In addition to the licensing requirements, C&E officials rely heavily on source identification codes (manufacturers' SID codes). As stated in s 15 of the *Prevention of Copyright Piracy Ordinance*, the manufacturer's code is essentially a code assigned to each optical disk

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81 *Supra* note 65.
82 "Police Take Piracy Seriously," *Shing Pao*, 30 August 1999.
83 "Hong Kong Lacks Verification Mechanism," *Dai Kung Pao*, 23 September 1999.
84 *Ibid.*
85 "Manufacturers in Real Jam," *Apple Daily*, 23 September 1999.
86 "Copyright Legislation Break High Tech Image," *Hong Kong Commercial Daily*, 23 August 1999.
87 Section 3, *Prevention of Copyright Piracy Ordinance* (Cap 544).
88 Sections 5(2), 5(3), *Prevention of Copyright Piracy Ordinance* (Cap 544).

manufacturer that he must stamp on all the optical disks that he produces. This code was developed originally by Phillips and the International Federation of the Phonographic Industry (IFPI) as a security-enhancing program to facilitate the C&E in locating the source of suspect optical disks.[89] Since all Hong Kong licensed optical disk manufacturers will have their own unique code, law enforcement officials can easily trace any VCD made from a validly licensed factory back to its manufacturer.

Obviously, these two methods (licensing and the use of SID codes) are invaluable in the regulation of legitimate CD manufacturers - however, they are less valuable in targeting illegal manufacturers. The problem with licensing is that there is nothing inherent in licensing that prevents piracy. Even if the pirates are licensed and have obtained the codes, C&E officials are still unable to ensure that the factories only produce legitimate products without relying on copyright owners. Although C&E officials are now empowered to enter at any time and conduct inspections, the degree of control on a factory largely depends on the co-operation of the manufacturers.[90] Because of the information asymmetry between the Customs and the manufacturer, it is not difficult to forge records or withhold vital information to conceal illegal manufacturing.[91] Yet, this information asymmetry is structural; C&E officials have so many duties that it is unrealistic to demand that they know the daily operations of every registered factory. Lastly, licensing still fails to deal with illegal manufacturers who escape regulation altogether by relying on unlicensed clandestine operations to produce infringing copies.[92]

Source code identification is also of limited help, given the ability and possibility of pirates to forge legitimate manufacturers' codes, or alternatively to remove these codes altogether using 'polishers' and other machines.[93] In other words, source code identification only succeeds in apprehending manufacturers who are careless in copyright verification such as Mega Laser Products, or manufacturers who receive orders from sub-sub licensees like Golden Star. Deliberate pirates are rarely caught exclusively by source code identification.[94]

Perhaps in recognition of the difficulty in apprehending illegitimate vendors, additional investigative powers were conferred on law enforcement officials by listing *the Copyright Ordinance* into the Schedule 1 of the *Organised and Serious Crimes Ordinance* (OSCO).[95] In addition to providing better protection for law enforcement officials in the exercise of duty mentioned above, OSCO also removes the right to silence of related participants (whose testimonies cannot be used against them, but can be adduced to show credibility – which is a de facto annulment of the right).[96] It should be noted that OSCO also extends to other actors, such as vendors and other parties who possess infringing copies for trade purposes.

Yet, due to the long-winded procedure of copyright verification, a 'rotating door' situation still emerges. Because copyright verification is so onerous, C&E officials often have to wait for a year before cases get to trial. In the meantime, suspects out on bail resume pirating activities,

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89 Bills Committee on the Prevention of Copyright Piracy Bill, minutes of the meeting on 25 August 1997 – Internet [URL]: http://www.legco.gov.hk/yr97-98/english/bc/bc58/minutes/bc582502.htm.

90 *Supra* note 35 at 72.

91 *Ibid.*

92 "Secret Operations Confuse Enforcement Efforts," *Hong Kong Standard*, 3 December 1999.

93 "Crushing the Enterprise of Removing SID Codes," *Ming Pao*, 7 May 2000.

94 *Supra* note 62.

95 Panel on Trade and Industry, minutes of the meeting on 1 March 1999 – Internet [URL]: http://wwwlegco.gov.hk/yr-98-99/english/panels/ti/minutes/ti010399.htm.

96 Legislative Council, Official Record of Recordings of the Meeting on 16 December 1998 – Internet [URL]: http://www.legco.gov.hk/yr98-99/english/counmtg/hansard/981216fe.htm.

creating a 'rotating door' situation where they return to the streets soon after they are apprehended.[97] Unfortunately, those apprehended often don't get to trial, because illegitimate manufacturers often settle with copyright owners by obtaining the license retrospectively. Indeed, it has now become a standard behaviour of copyright owners to drop their complaints when such offers are tendered, probably influenced by the high opportunity cost they would face if the case went to trial.[98] Unfortunately, this practice has indirectly encouraged indiscriminate complaint making, and it is indeed used many companies as a common tactic to increase revenue without any of the risks associated with civil proceedings.[99]

C. Analysis

The current arrangement violates the three principles of fairness, justice, and due process enshrined in Dworkin's liberal political philosophy. Fairness, which is ensured by making legislation and policy fair and impartial, is violated because the decision to impose a duty to make reasonable inquiries was not reached by due consultation of the affected parties – it being only 'judicial legislation' based on efficiency and enforcement considerations (*Ng Kwan Pui* is the result of just such a decision). Furthermore, such a decision opens up the possibility of similar duties being imposed on other actors such as vendors, delivery men, packers, and warehouse owners, as they all fall within the ambit of s 118(1d), for possession of infringing copies for the purpose of trade and business.

The imposition of such a duty is prejudicial to the manufacturers because manufacturers are given the difficult task of copyright verification – a burden which manufacturers can never be certain of unloading due to the uncertain nature of copyright. Furthermore, such an arrangement is economically prejudicial because of the deleterious impact such a decision has on the business environment of manufacturers due to its failure to account for the operational aspects of manufacturing.

Second, justice, which is ensured by demands on legislators and officials to promote moral and social justice, is violated because current punishments violate the principle of proportionality. Currently, if one was convicted of possession for business purposes, one faces a $50,000 fine and 4 years imprisonment in respect of *each* infringing copy. It should be noted that the penalty used to be only a fine of $1,000 and 12 months imprisonment when *Ng Kwan Pui* was decided. Although it is difficult to objectively assess the severity of a punishment, it is hard to accept that the inherent blameworthiness of piracy has soared exponentially merely over a decade. This heavy reliance on criminal sanctions deviates from the experience of all Commonwealth countries,[100] and appears to be one not supported by the judiciary. This is evidenced by the minimal conviction rate[101] as well as the fines imposed; indeed, the record fine imposed by the judiciary was only $700,000 for producing 16,054 VCDs – about $43 per VCD.[102] Punishment should be imposed for wrongdoing, but should not be levied to the extent that manufacturers go bankrupt.

Third, due process, which ensures the protection of the individual against majority interests, is

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97 "Customs: Verification Takes Time," *Sing Tao*, 27 April 2000.

98 "Copyright Owners Benefit Under Current System," *Ming Pao*, 3 Jan 2000.

99 *Ibid.*

100 Pendleton B, *The Law of Intellectual and Industrial Property in Hong Kong*, (Singapore, Butterworths, 1984) p 5.

101 "C&E Successfully Apprehends Digital Manufacturers," *Ming Pao*, 7 May 2000.

102 "Record Fine Imposed on Illegal Manufacturer," *Apple Daily*, 20 April 1999.

violated by allowing copyright owners to indirectly use the state mechanism to further their own personal commercial interests. Traditionally, the costs associated with losing a civil case acted as a deterrent against frivolous claims. However, this can now be frustrated by the C&E's loose criteria of investigation.[103] Such an arrangement is an abuse of the protection conferred on law enforcement officials, especially when interlocutory remedies such as temporary injunctions and Anton Piller Orders are available in the civil process. In other words, since there are doctrines in the civil law that confer powers similar to C&E officials, copyright owners should not be able to use the complaint process to authenticate frivolous claims and to get around the associated compensation should those claims fail.[104]

Due process is also violated because the right to silence is removed by its undesirable annexation to Schedule 1 of OSCO. Looking at the other offences that are classified as 'Organised Crime' and 'Specified Offence' in the OSCO, the problems should be immediately apparent. To list some of the crimes classified: import or export of strategic commodities; trafficking in dangerous drugs; operating, managing or controlling gambling establishments; being an office bearer of an unlawful society; causing explosion likely to endanger life or property; causing prostitution of a person; trafficking to or from Hong Kong in persons; counterfeiting coins and notes; blackmail; dealing in arms or ammunition without a license; providing services that assist the development, production, acquisition or stockpiling of weapons of mass destruction, etc. It is ironic that the offence of making or dealing with infringing copies of creative material is afforded the same treatment as the crimes which unequivocally cause great harm to important individual 'Rechtsguter' such as life, liberty, property and health.[105] Undeniably, VCD piracy causes great economic loss and greatly affects Hong Kong's international reputation. However, one must question whether the crime of VCD piracy is of such a 'magnitude of evil' so as to warrant the overwhelming restriction on a victim's right to bring actions against officials as well as an abrogation of the fundamental right to silence.

Lastly, due process is violated because the removal of the right to silence violates the personal arena of individuals that resists the unfair demands of the majority – in this case, the government's overzealous enforcement policy formulated to pacify the pressure of certain interest groups. To put it another way, the principle of 'equal concern and respect' is undermined because society has made it easier to prosecute a certain group of people to advance the narrow commercial objectives of movie producers and certain distributors. Due process is violated because persons (the manufacturers) are treated as an end and not as a means, denied the dignity, respect and protection given to every other member of society.

VI. VCD Vendors

In this section, we shall look at the application of the law on both legitimate and illegitimate vendors of VCDs. It should be noted that the analysis in this section will be subsumed in the subsequent section on law enforcement officials for better analysis of the C&E enforcement policy.

A. Legitimate Vendors

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103 *Supra* note 12 at 72.

104 *Supra* note 12 at 73.

105 Marshall S E and Duff R A, "Criminalization and Sharing Wrongs," (1998) 11 *Canadian Journal of Law and Jurisprudence* 7.

Legitimate vendors potentially suffer from similar consequences to those of CD manufacturers since *Ng Kwan Pui* and *Mega Laser Products* has made it open to interpretation that a similar duty to make necessary inquiries exists with other actors also. This problem is exacerbated by the fact that it is difficult for vendors to differentiate between legitimate and infringing copies purely on appearance.[106] A duty to investigate every title is clearly inefficient and, therefore, places an undue burden on businesses.

B. Illegitimate Vendors

Like illegitimate manufacturers, illegal vendors lose their right to silence under OSCO upon application by C&E officials.[107] Yet, despite these extended powers conferred on law enforcement officials, it remains difficult to apprehend illegitimate vendors due to the complicated procedure of copyright verification. Like illegitimate manufacturers, a similar 'rotating door' situation has developed, with offenders committing further crimes while out on bail.[108]

Yet complicated procedure is only one reason why vendor piracy is so prevalent; another reason is that vendors adopt special tactics to escape detection, such as selling after business hours and short term leases.[109] However, the main reason why illegitimate vendors exist has to do with official customs policy; indeed, it was already decided in 1973 that, as a matter of policy:

a) action would be aimed at overt trade in infringed copyright materials;
b) the main enforcement would be against manufacturers and major dealers and distributors rather than street level operators;
c) legitimate interests in subsequent civil proceedings would be assisted.[110]

Although, the C&E made subsequent amendments,[111] later changes merely supplemented the 1973 policy, which survives virtually intact till today.

Naturally, this selective enforcement has attracted displeasure from interested parties who criticised the government for focusing their efforts solely at pirates operating in shopping arcades, while ignoring pirates who openly sell their wares at street corners. According to Stephen Wong, spokesperson for Edko Distributors, 'officers only take action when large numbers of VCD pirates are gathered in one place. In this way, they can draw public attention to impressive seizures.'[112] C&E officials defend this imbalance in enforcement from a standpoint of a lack of resources.[113]

VII. Law enforcement officials

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106 *Supra* note 96.
107 Section 3(11), *Organized and Serious Crimes Ordinance* (Cap 455)
108 *Supra* note 96.
109 "Mafia Involvement only Occasional," *Hong Kong Seung Pao*, 7 June 1999.
110 *Supra* note 12 at 8.
111 A five-pronged strategy was adopted in 1986 to combat copyright piracy, however it merely supplemented the original 1973 strategy. It argued for 1) strong legislation; 2) a special task force; 3) vigorous enforcement; 4) close co-operation with other departments and copyright owners; and 5) education, publicity and warnings.
112 "VCD Pirates Keep Low Profile in Hong Kong," *Hong Kong Standard*, 26 June 1999.
113 *Ibid.*

In this section, we will look at the current enforcement policy of C&E officials and recommendations for amendment.

A. C&E

As mentioned above, C&E is the sole law enforcement agency empowered to enforce the powers under the *Copyright Ordinance* and the *Prevention of Copyright Piracy Ordinance*.[114] Ironically, it is also the main player in the formulation of copyright legislation and policy. In theory, it is the Trade and Industry Branch (TIB), advised and co-ordinated by the Intellectual Property Department (IPD), who formulates the relevant legislation and policy. However in practice, the TIB maintains a 'hands-off' attitude, especially regarding the principles of copyright enforcement, giving the C&E a lot of leeway in deciding policy and legislation.[115]

In theory, this 'law-in-action' arrangement is ideal because policy-making can take into account the situational realities that an enforcement agency has to face, resulting in an optimum level of effectiveness vis-à-vis the implementation of the policy.[116] This allows the C&E to efficiently allocate resources, securing the greatest level of effectiveness minimal input.[117] Unfortunately, what is efficient from a utilitarian enforcement perspective may not necessarily be the same as what is socially desirable. In other words, efficiency in practice means that areas of concentrated piracy activity such as manufacturers and pirates in shopping arcades are attacked, leaving other areas of piracy such as hawkers and street-corner pirates virtually untouched.[118] Furthermore, because the C&E have the ability to shape its own policy, it can efficiently tailor its enforcement actions to meet the demands of its clientele, namely, the demands of interest groups and other international pressure groups. This results in the C&E's current selective enforcement policy, which entails acting only on specific complaints by copyright owners.[119]

Yet, the C&E should not be blamed. Indeed, it is an inevitable result in light of their numerous duties and limited resources. Furthermore, the policy of responding to complaints is quite effective in diffusing the pressure of interest groups and international organisations.[120] Unfortunately, this policy means that enforcement actions are neither consistent nor sustained and only exist as an eclectic amalgamation of sporadic enforcement actions responding to individual concerns.[121] Yet, it is questionable why the enforcement policy cannot be diversified to include involvement of other law enforcement agencies in the enforcement against the remaining pirates who operate in shops on street corners or congregate as illegal hawkers and in particular, why police involvement is excluded in the fight against piracy.

B. Analysis

Currently, there is a division of labour between C&E and the Police. According to Police Commissioner Eddie Hui, "It is C&E who is in charge of law enforcement against piracy. Our role is only limited to providing assistance."[122] Although the Police will meet with C&E to

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114 Section 198, *Copyright Ordinance* (Cap 528) and s 2, *Prevention of Copyright Piracy Ordinance* (Cap 544).

115 *Supra* note 12 at 43.

116 *Supra* note 12 at 43.

117 *Supra* note 12 at 47.

118 "Piracy Still Prevalent," *Apple Daily,* 2 July 1999.

119 *Supra* note 12 at 97.

120 "Hong Kong Off 301 List," *South China Morning Post,* 21 February 1999.

121 *Supra* note 12 at 113.

122 "Police Defends Division," *Hong Kong Standard,* 19 March 1999.

exchange intelligence, it remains the general responsibility of C&E to enforce the *Copyright Ordinance*, while the Police is charged with the responsibility to tackling VCDs which contain pornography that infringes the *Indecency and Obscenities Ordinance.*[123] Indeed, there is a general perception by the Police that piracy is a matter unsuitable for police involvement, since they are charged with the more important duty of protecting the public at large rather than the enforcement of such 'trivial' crimes.[124]

Yet, there is good reason for police involvement with regards to a crime of this nature – especially in light of the sheer number, distribution, and mobility of pirate vendors. The police are best suited, by virtue of the nature of beat duty which requires detailed knowledge of the area they manage to tackle pirate vendors, just like any other type of street crime.[125] Customs officials will always be understaffed, by nature of their composition, to tackle street piracy. Customs officials may be able to clamp down on manufacturers and other immobile pirates, but it is certain that their effectiveness will be limited vis-à-vis hawker pirates and storefront vendor pirates without police participation. Indeed, it was only by extensive police involvement during the 1970s that helped wipe out pirated cassettes from Taiwan.[126]

Furthermore, while piracy is perceived as a 'trivial' crime, failure to enforce such offences may have a negative 'spill-over effect.' We know enough from sociology that society is inter-connected, and that unprincipled decision-making has the danger of creating further difficulties down the road.[127] In the criminal context, this position is no better put than the 'broken window theory' which holds that disorderly behaviour in public, if not firmly suppressed, will frighten citizens and attract predatory criminals, thus leading to more serious crime problems.[128] To quote an ardent supporter, Bill Bratton (New York Police Commissioner), "Just as unrepaired broken windows can signal to people that nobody cares about a building and lead to more serious vandalism, untended disorderly behaviour can also signal that nobody cares about the community and lead to more serious disorder and crime."[129] In other words, just as in an organism, a failure to address disorder in one system effectively risks the possibility of such disorder spreading to other sub-systems, in our case, when police officers walk pass blatantly visible piracy on the streets without doing anything, a perception is fostered among the public that the Police are apathetic about such crime. Indeed, there is nothing that can be more damaging to public confidence than to see a law enforcement official walk past a continuing crime (e.g. pirate vendors), without stopping to make inquiries. Not only does this perception inflict great damage to public confidence, it also sends a strong message to criminals that 'everything goes,' encouraging them to commit greater crimes.[130] On the other hand, if the police were involved, then not only would it effectively reduce piracy, it would also send a strong message to citizens that such activities are illegal.

Lastly, only by a holistic enforcement policy will the principle of 'law as integrity' be affirmed. Since 'law as integrity' demands that like cases be treated alike, it is only by adopting a consistent and holistic enforcement policy through a combined effort will the government be able to express the same condemnatory message to all participants of the piracy trade.

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123 "Police Come Out in a Rare Occasion to Defend Themselves," *Ming Pao*, 25 July, 1999.

124 *Supra* note 12 at 102.

125 *Supra* note 96.

126 *Supra* note 35 at 101.

127 Bailey J, *Social Theory for Planning* (London: Routledge & Kegan Paul, 1995) p 57.

128 Wilson J and Kelling G, "Broken Windows" (1982) *The Atlantic Monthly* 29.

129 Greene J, "Zero Tolerance: A Case Study of Police Polices and Practices in New York City" (1999) 45 *Crime & Delinquency* 171.

130 Hayes B, "Bratton in Britain?" (1997) *Policing Today* 12.

Currently, selective enforcement falls short of this goal because its inability to speak with one voice to its citizens; even worse, it treats like offenders differently, offending the principle of justice. The current policy should be re-oriented to communicate the same message to offenders and citizens, and this can only be achieved by eliminating the 'checkerboard' situation that has developed.

VIII. Buyers

In this section, we will paint a profile of buyers of VCDs, and look at their motives and reasons for imposing liability on them.

A. Survey

According to a survey conducted by the Chinese University of Hong Kong,[131] a sizeable proportion of people buy pirated goods. Of those questioned, over 58% admitted to having bought pirated goods, over 55% of their family members buy pirated goods, and over 67% of their friends and colleagues buy pirated goods. When asked whether they considered selling of pirated VCDs an infringement of IP rights, 92.7% answered in the affirmative. Yet, when asked whether they considered buying to be an infringement, only 61.4% answered in the affirmative. Furthermore, when asked whether they consider buying pirated goods to be immoral, only 50% of the respondents considered buying to be immoral. Yet, ironically, over 80% of those questioned consider the infringement on IP rights as having a negative impact on Hong Kong.

B. Analysis

People in Hong Kong have a double standard towards piracy. They see selling pirated goods as being unequivocally wrong, having negative consequences to society. Yet, 58% continue to buy anyway, even though 61.4% consider buying to be an infringement. Contemporary opinions[132] attribute 'Asian values' as the main cause of such behaviour, arguing that piracy is difficult to eradicate because the people find the concept of intellectual property foreign since it offends the Confucian ideal of sharing and communitarianism in Chinese culture. Indeed, some go as far as arguing that "the copying of works has for centuries been regarded as honourable and necessary, and to reproduce flawlessly the work of another is the highest compliment one can bestow on another."[133]

However, without looking to metaphysics, there are other concrete reasons why piracy is so prevalent. Indeed, according to the survey by Chinese University, over 64.9% of the respondents cite cheaper prices as the main reason for buying pirated goods, followed by 22.1% who cited availability as the second reason. Interestingly enough, such views are not unjustified.

According to a spokesperson for Edko Video, making a legitimate VCD costs around 80 cents, and Edko[134] distributes them for about $8 each after obtaining the license from copyright owners. Although the prices vary considerably, vendors sell them at $45 to $100 each,

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131 Chinese University, "Survey on Public Awareness of Protecting Intellectual Property Rights (June 22-24, 1999)" – Internet [URL]: http://www.info.gov.hk/ipd/extract.htm.

132 Ho K (1995), A Study into the Problem of Software Piracy in Hong Kong and China, Unpublished Masters Thesis, The London School of Economics and Political Science, Houghton, London 7.

133 Wingrove N, "China traditions oppose war on IP piracy," (1995) 38(3) Research-Technology 6-7.

134 Equivalent to the client for the purposes of this essay.

depending on the agreement with the copyright owner. For example, some US copyright owners such as Warner Brothers make it a licensee condition that their movies be sold at a particular price for marketing reasons, whereas some smaller filmmakers will be contented with their movies being sold at a lower price.[135] In any event, regardless of the movie, the consumer pays a total mark-up of around 5,625 - 12,500% per VCD.[136] Taking the unrealistic assumption that Edko makes nothing and that all of the $8 is paid for the purchase of the copyright to finance the production of the movie, consumers still have to pay a mark-up of 563-1,250% in general for each VCD.[137] Indeed, the mark-up is so extreme that even pirates sometimes find it more cost-efficient to obtain the real license from smaller filmmakers willing to deal with them.[138] It is no wonder that consumers turn to pirates for cheaper alternatives. Indeed, one may even argue that piracy is an inevitable social response to the price fixing of copyright owners.

Yet, these cartels enjoy such great power mainly because of ss 35(4) and 118(1) of the *Copyright Ordinance* make it a criminal offence for businessmen to import legitimate copies licensed abroad into Hong Kong in breach of a Hong Kong licensee agreement.[139] Although it is possible to obtain another distribution license from the copyright owner, 'better' copyright owners such as Warner Brothers will not license movies to distributors without the guarantee that their movies will be sold at a certain price in line with their marketing strategy.[140] Therefore, once a client obtains the license from the copyright owner, he effectively enjoys a monopoly vis-à-vis the distribution of the work, allowing him to control the price and the supply of the titles he distributes.[141] In effect, the criminal law prevents competition from those who want to import cheaper legitimate copies from abroad. Unfortunately, the criminal law also prevents businessmen from importing to satisfy demand when legitimate supplies run out. By restricting availability of legitimate copies, consumers are sometimes left with little choice but to purchase pirated copies instead.

Nonetheless, it remains morally reprehensible for those who continue to buy pirated VCDs. Indeed, if piracy can be interpreted as a form of theft, then buying pirated goods is analogous to handling stolen goods. Buyers who knowingly purchase illegal VCDs are just as responsible because they effectively cooperate with the vendors to exclude licensees and bypass the normal operations of the market. Furthermore, problems of price and availability that relate to competition can be remedied by introducing legislation to foster competition; they remain independent of the inherent value of copyright and the issue of criminalisation in copyright.

Indeed, although the Department of Justice's has expressed concerns regarding to difficulty in legally proving the mens rea for the offence, there is strong anecdotal evidence that buyers indeed know that they are buying pirated goods because of the circumstances in which such transactions take place.[142] Indeed, to quote Selina Chow, the Chairman of the Bills Committee on the Copyright Bill, "Those who have the experience of strolling around the streets know it is impossible for one not to know how to identify a pirated CD. Everyone can tell what a pirated product looks like; how can one say that it is impossible to distinguish between pirated and

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135 "Copyright Owners Bring it onto Themselves," *Apple Daily,* 29 September 1999.

136 *Supra* note 112.

137 "Golden Situation Shows no Signs of Diminishing," *Apple Daily, 5* February 2000.

138 "Customs Raid Piracy Syndicate," *Sing Tao,* 17 April 1999.

139 *Supra* note 112.

140 "14 Caught in Yesterday's Raid," *Hong Kong Commercial Daily*, 8 August 1999.

141 Bills Committee on Copyright Bill, minutes of 14 January 1997 meeting – CB1/14/97.

142 Panel of Trade and Industry, minutes of the 9 July 1998 meeting - Internet [URL]: http://www.legco.gov.hk/yr98-99/english/panels/ti/minutes/ti070998.htm.

genuine products? There is simply no excuse at all."[143]

Lastly, only by penalizing knowing buyers will the notion of 'law as integrity' be upheld. Since buyers knowingly purchasing pirated copies are as morally culpable as the vendors they frequent, it is only just that they be similarly punished. Currently, the state acts hypocritically because while endorsing the protection of copyright, it also indirectly condones piracy by tolerating buyers who knowingly purchase pirated goods. By acting incoherently, the current approach fails because it only seeks to restrain the supply side through heavy penalties, leaving the demand side unchecked. Ultimately, this means that any efforts by the C&E can only be ephemeral. The more the C&E decrease supply, the greater the demand will be, the more profitable it will be for those in the trade to continue with their activities and to expand the operations to replace those who are caught. Rather than attacking supply, one should seek ways to decrease demand, because supply will automatically dwindle without demand, but not vice versa.

IX. The Way Forward

In the real world, there are no perfect solutions. All paths are weighed with advantages and disadvantages. Even if it can be satisfactorily demonstrated that 'law as integrity' is the proper approach to take, the application of the theory remains an area of subjective interpretation. The following section, however, puts forward a possible submission to the problem. It is not meant to be *the* answer, but is an illustration that there are other possibilities.

Although the current policy reflects the right aims, it is submitted that the current policy is wrong for three reasons. First, the law over-criminalises illegitimate manufacturing activities and causes great business difficulties for legitimate manufacturers. Second, the current enforcement policy selectively targets manufacturers and vendors in shopping plazas, failing to address other illegitimate piracy activity such as vendors on street corners and hawker pirates. Third, the current policy sends out conflicting messages to the society at large because it allows buyers of illegitimate VCDs to walk with impunity without any moral censure.

'Law as integrity' rejects this incongruous arrangement; it demands that the government speak with one voice and act with equanimity, with regard to principle rather than compromised decisions intent on pleasing everyone. Indeed, there are good practical reasons for adopting 'law as integrity' as the guiding principle rather than the heavy-handedness espoused by the current approach. First, although most agree that some kind of punishment is necessary to deter crime, there is no conclusive evidence that the severity of punishments influences crime rates. Rather than escalating the severity of punishments, findings indicate that increasing the objective likelihood and the subjective perception of the likelihood of being apprehended have a better probability of reducing crime.[144] Therefore, any practical recommendation that reflects these findings must invariably argue for a reduction in punishments with escalation in enforcement.

Implemented against manufacturers, 'law as integrity' would demand that the duty to make reasonable inquiries in *Ng Kwan-pui* be removed, so as to uphold the legislative intent and the virtue of fairness. Second, the legislation should be amended to reflect the international aspect of the manufacturing business so as to ensure that the *Mega Laser Products* scenario does not

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143 *Supra* note 96.

144 Susan S, *Postclassical Criminology* (Cambridge: Cambridge University Press, 1986) p 117.

recur. Third, existing penalties should be reduced significantly, to a level where the appropriate moral censure is expressed without the offender being overburdened to the point of bankruptcy, so as to affirm the virtue of justice and just deserts. Forth, copyright offences should be taken off Schedule 2 of OSCO and the right to silence reinstated, so as to affirm due process. Lastly, rather than raiding suspected manufacturers immediately upon complaint, the C&E should consider issuing warnings to manufacturers to afford them an opportunity to explain any misunderstanding before action is taken. This would affirm the principle of equal concern and respect, and mitigate the harshness of the compensation provisions for mistaken action.

With regard to vendors, it is first submitted that penalties should be similarly reduced so as to affirm the virtue of justice and just deserts. Instead of heavy penalties, the current enforcement policy should be revised so as to ensure equal enforcement against all types of vendors, so as to uphold the virtue of justice and equal treatment. Second, C&E could consider imposing licenses on vendors, making it easier to prosecute illegitimate vendors, without relying on the time-consuming process of copyright verification. Since licensing would introduce a level of transparency into business operations, illegitimate vendors would probably choose to remain unlicensed, making them easier to shut down. Lastly, police should be actively involved in the enforcement against visible street-level piracy, so as to alleviate the manpower shortages of the C&E and effectively stigmatise piracy as illegal, so as to achieve equanimity in enforcement and affirm 'law as integrity.'

With regard to buyers, it is submitted that criminal liability should be imposed. From a theoretical perspective, criminalising the buyer's behaviour would affirm the principle of 'law as integrity' and achieve consistency in principle. From a practical perspective, criminalisation should be adopted because it is the only practical alternative since altering behaviour through education appears to be an unworkable solution for the near future. Indeed, evidence shows that the ethical perception of piracy has no significant effect on the rate of piracy[145]; one study for example found that there was no significant difference in the perception of piracy among subjects who took an ethics course and those who did not take the course.[146] There seems to be little alternative but to criminalise the purchase of illegitimate VCDs.

Although the Department of Justice finds it problematic to construct the elements of a possible offence, criminalising buyers is not as foreign as it appears. Indeed, it is already possible to prosecute buyers under existing common law for incitement to sell pirated VCDs. Furthermore, such a suggestion is by no means original – the *Dutiable Commodities Ordinance* criminalises the use and purchase of illicit fuel by introducing presumptions, placing the onus on the buyer to prove his innocence.[147] Yet, even if we do not adopt such an extreme approach, one could still construct an offence circumventing the need for copyright verification, criminalising the associative elements that inevitably accompany the knowing purchase of illegitimate VCDs. For example, one could construct an offence criminalising buyers who purchase VCDs from unlicensed vendors (assuming that the earlier suggestion as to licensing vendors is adopted). By legally requiring legitimate vendors to display their license in a prominent place, purchasers could be effectively penalised for frequenting pirates, who would probably be unlicensed. Obviously, not every buyer will be caught, but the value of the offence lies in its ability to express a formal condemnation of the act itself, making it impossible for buyers to openly flout

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145 Simpson P M, Banerjee D and Simpson C L Jr, Softlifting: A Model of Motivating Factors (1994) *Journal of Business Ethics*.

146 Richard G and Wallace W, "Situational Determinants of Software Piracy: An Equity Theory Perspective" (1996) *Journal of Business Ethics*.

147 Sections 17(8), 17(11), *Dutiable Commodities Ordinance* (Cap 109).

morality by flagrantly purchasing pirated goods.

Lastly, we should reappraise our general policy regarding copyright and reformulate our policy to better promote the interest of consumers. Although it is impractical to enact a law forcing vendors to lower their prices and increase the supply of their titles, one could nevertheless revise the policy to foster competition. Competition would break up existing cartels and allow more distributors to enter into the market, bringing greater variety and lower prices.[148] Indeed, if the vendors would offer cheaper goods in abundance, there would be little reason for consumers to buy pirated goods. The most immediate way is to decriminalise parallel importing to foster competition among distributors. However, to successfully protect the free market condition, larger initiatives will have to be introduced, such as antitrust legislation, legislation against price fixing, etc.[149] but a thorough analysis of these options is beyond the scope of this essay.

X. Conclusion

The question of piracy is a complex one. With the information age and an increasing ability of technology to deliver cheap modes of production, it is virtually certain that piracy will get worse. Yet, one must remember that there are limits to the reach of the law because piracy is at heart a social problem. Yet, precisely because piracy is a social problem, there is an even greater need to act in a principled manner to balance competing interests. One should always remember that bad policies inevitably lead to dangerous repercussions. Therefore, although problems need to be solved, it is important to ensure that the solution does not become a source of problems in itself.

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148 Hirsch W, *Law and Economics: An Introductory Analysis* (Boston: Academic Press, 1988) p 277.

149 Posner R, *Economic Analysis of Law* (Boston: Little, Brown, 1992) p 285.

ALTERNATIVE DISPUTE RESOLUTION

AN ATTEMPT TO EXTRACT INSTRUCTIVE DIRECTIONS FROM THE CRITICISMS MADE BY RICHARD ABEL AND ITS APPLICATION TO THE HONG KONG SITUATION

CHIM E-LING MELISSA

I. Introduction

A. The ADR Movement

> "Willingly I impart my things, not not willingly I accept better ones".[1]

The quest for a stable society has made it essential to find a perfect mechanism for resolving conflicts. The majority of the wealthy and developed nations believe that they had found this "form"[2] of dispute resolution in a rigid, formal judicial system wholly run and sponsored by the State. Most English scholars heralded this concept and saw it as the only method of dispute resolution[3] and brought this system to the vast outreaches of their colony. Owing to the "veil of ignorance" perhaps,[4] there were faults in the present legal system from its inception that had prevented it from being fool-proof.[5] While many chose to sit on their hands or to turn a blind eye to the obvious, the Americans have swiftly identified the problem and were devising alternatives to avoiding the cumbersome system.

1. The First Wave: Criticisms of Formal Dispute Institutions

The first signs of discontent with the existing dispute resolution institutions arose in the 1960's, reflected in the amplitude of literature on the matter. These writings generally fall under two headings – exploring the availability of "judgment" and the merits of "settlement".[6] The first wave of criticism identified the pervasiveness of "legal poverty" and the problems with adjudication, such as its time-consuming, expensive, cumbersome and overall intimidating and inaccessible nature.

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1 Sir Thomas More, *Utopia* (London: Penguin Classics, 1965) p 25.

2 The term "Form" is taken from Plato's concept of the model of perfection. For more details on the topic of "Eternal Forms" see "Greek Philosophy: Plato and Aristotle", *Microsoft Encarta Encyclopedia 1999.*

3 Take for example Blackstone's commentary on the English Common Law system.

4 Other attributes that could have catalyzed the realization of the faults of the present legal system include the shift in jurisprudence from a traditional formalistic conceptualization of what the law is to a radical denunciation of all formal legal institutions and an innovative exploration of the "Law in Action" by the Realists and their "descendants", the adherents of Critical Legal Studies. It could even be argued that Equity was the first sign that common law and the judicial system was ill-served to certain disputants.

5 Concept of "veil of ignorance" taken from John Rawls, *John Rawls: A theory of Justice (1971)* http://www.lcl.cmu.edu/CAAE/Home/ Forum/meta/background/Rawls.html and "Rawls, John" in *Encarta R Deluxe Online* http://encarta.msn.com/encarta/Contents.asp?pg=2&ti=0D463000.

6 Palmer, M, and Roberts, S, *Dispute Processes: ADR and the Primary Forms of Decision Making* (London, Edinburgh, Dublin: Butterworths, 1998) p 25.

2. The Second Wave: The Rhetoric of Informalism

The "settlement" criticisms, which bloomed in the 1970s, were more focused on finding an alternate way detached from the trouble-laden litigation process. Bok's opinions are perhaps representative of the sentiments of the writers of the "settlement" genre. He noted that the "legal combat" element ran through most legal education and questions whether lawyers are hence responsible for the aggravating of controversy rather than attempting to stifle it.[7] He saw that the "gentler arts of reconciliation and accommodation" were to lead the way for dispute resolution in the future:

> "Over the next generation, I predict, society's greatest opportunities will lie in tapping human inclinations toward collaboration and compromise rather than stirring our proclivities for competition and rivalry. If lawyers are not leaders in marshalling cooperation and designing mechanisms that allow it to flourish, they will not be at the centre of the most creative social experiments of our time."[8]

Bok's predictions were reified with the implementation of quasi-judicial and non-judicial, chaosmic dispute institutions and procedures such as Neighbourhood Justice Centres, Metropolitan Mediation Centres and a general proliferation in the use of negotiation, mediation, arbitration, rent-a-judge schemes and innovative resolution mechanisms designed to suit particular trades (eg shipping) – specifically in the commercial context so as to attain efficiency and effectiveness in dispute resolution.

3. The Third Wave – Deflating the Rhetoric of Informalism

But was this "solve-all" solution really efficient and effective? The Second Wave of the ADR movement had asseverated the ability of informal dispute resolution processes to alleviate the straining burden on the courts by resolving disputes swiftly. It also guaranteed effectiveness since disputants come to a conclusion on a voluntary basis, meaning that if the terms of compromise were unsatisfactory to either, the parties would not have agreed in the first place. Other conceptually appealing arguments in favour of ADR were that it dissolved the monopoly in the business of dispute resolution originally vested in the State and was seen as not only allowing popular participation in the resolution process but also a decentralization of State power.

Yet, many have argued against these claims and perhaps the most notable feature of the third wave arguments were that they were never challenged or replied to.[9] Of the many whose writings fell under the debates of the 1980s,[10] three were particularly influential: Richard Abel, Owen Fiss and Jerome Auerbach. Of these three critics, Abel is the focus of the present paper. Abel's criticisms alone are comprehensive and representative of the crucial evaluations made to counter the inflated claims of ADR proponents.

Each of the major criticisms made by Abel in his two-part volume on *The Politics of Informal Justice* will be examined in turn in the next part of the paper. Part III will attempt to extract

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7 Bok, D, "A Flawed System of Law and Practice Training" (1983) 33 *Journal of Continuing Legal Education* 570-585.

8 *Ibid* at 582.

9 *Supra* note 6, p 148.

10 *Ibid*, p 29.

constructive directions on the appropriate mechanisms of implementing informal dispute institutions in light of the criticisms made by Abel. In Part IV, the paper explores the likely costs of implementing an ADR scheme incorporating these directives, weighing these against the benefits of informalism proposed during the second wave, determine whether or not the HKSAR Government ought to pursue a policy of actively facilitating the implementation of ADR mechanisms in Hong Kong.

In order to read the arguments made by Abel in light of the local situation more cohesively, a brief narration as to the spread of informalism in Hong Kong is called for.

B. The ADR Movement in Hong Kong

Hong Kong is currently caught between the first and second wave of the ADR movement. There have been those who are beginning to see that there is a need to remove the current strains on the adversarial system[11] and many others who are awaking to the trend of ridiculously high fees being charged by legal professionals; thereby rendering the legal system virtually inaccessible to those who are not financially prepared.[12] Similar concerns exist regarding the length of the trial process and the monopolization of litigation by lawyers and persons familiar with the technicalities of the system and the jargon of the law.

Although these concerns have been recognized and have motivated Chief Justice Andrew Li Kwok-nang to initiate a review of court procedures and potential reforms in the civil process, the focus seems to be on changes other than plans for a full-scale adoption of ADR schemes. Margaret Ng has voiced her belief that a higher standard of advocacy holds the solution[13] while Chairman of the Bar Association, Ronny Tong, sees increased competition through relaxed restrictions on advertising as cutting the costs of barristers in Hong Kong.[14] Former Court of Appeal Judge Barry Mortimer, on the other hand, proposes extending rights of audience for solicitors to the High Court in order to cap litigation costs.[15] Despite their failure to attach sufficient weight to the dawning of informalism in Hong Kong, it has not stopped ADR from penetrating, slowly, but surely, into the system.

Already, signs of "invasion" have been blossoming in areas such as court-annexed ADR schemes and mandatory mediation for labour relations, family matters, landlord and tenant disputes and construction disputes.[16] There have also been experiments with case-management and mini-trials which points to a shift from cosmic concentration of power to chaosmic power centers in the handling of disputes. An innovative Gradual Dispute Resolution Scheme embodied in Clause 92

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11 Concerns voiced by Michael Wilkinson, in his introductory paper "Reform of the Civil Justice System" (March 1999) in ADR Materials under *Topic 1: Historical and Legal Background to ADR.*

12 Figures compiled by the Judiciary have revealed that over 47% of all litigants are unrepresented. This is due to the crushing costs of litigation that not everyone is able to afford. Statistics also show that lawyers in Hong Kong rank among the highest paid as opposed to their counterparts in other jurisdictions – meaning that access to legal services for middle-class people in Hong Kong is the lowest in the world.

13 Ng, Margaret, "Cut Costs, But Not Quality", *SCMP*, 2 January 2000.

14 Buddle, C, "Cheaper Legal Fees Backed by Bar Chairman", *SCMP*, 14 January 2000.

15 May Sin-mi Hon, "Money Wasted in Elaborate Services: Judge Calls For Cap on Surging Litigation Costs", *SCMP*, 16 September 1999.
Boaventura de Sousa Santos, "Law and Community: The Changing Nature of State Power in Late Capitalism" in Abel, R, *The Politics of Informal Justice, Volume 1* (New York: Academic Press, 1982) p 261.

of the Airport Core Project (ACP) contract has also proved to be a success in facilitating the speedy completion of the Hong Kong Chek Lap Kok Airport. Like clauses are also increasingly being used in government construction and engineering projects. When the above examples are viewed diagrammatically, it becomes obvious that dispute institutions are moving into narrower power spheres and away from the formal judicial system.

As Hong Kong gradually moves into the age of ADR, one must also be wary of the downfalls of informalism. Though it is doubtless that our existing system is ridden with faults, it does not mean than an alternative system is a problem-free solution. We have the benefit of learning from the US experience and hence, attention should be focused on the criticisms made of ADR rather than blindly following what other jurisdictions have done, thinking of it as novel and fashionable and therefore correct. It is for this reason that the following section considers the criticisms made of informalism by Richard Abel at length.

II. Richard Abel on ADR

Abel, one of the most prominent skeptics of the move towards informalism during the 1980s, has written extensively on the major fallacies of informalism. In his celebrated compilation of the commentaries put together by himself and his colleagues, Abel raises twelve main criticisms of informalism.[17] For the purposes of the present paper, these criticisms will be divided into four categories: "The State", "State Sustenance of Dispute Institutions", "The Disputants" and "The Mechanics of Informalism". Each of these will be examined in turn.

A. The State

1. Expansion of State Control

Perhaps the strongest and most shocking argument made by Abel is that informalizing dispute institutions could actually lead to an enlargement of State control. What seems to be paranoia at first sight seems to lend itself a greater degree of logic upon careful consideration.

In his article "The Contradictions of Informal Justice" (henceforth referred to as *Contradictions*), Abel argues that informal dispute institutions funded and run by state-appointed personnel do not remove the element of coercion that ADR proponents claim informalism will avoid.[18] Rather, it disguises coercion in the cloak of free choice – that disputants freely opted to resolve their differences through informal channels. Indeed, Abel points out that informal institutions go to great lengths to achieve the image of non-coerciveness – by referring disputants to ADR methods rather than arresting or summoning them; by appointing mediators or negotiators, often female, to "discuss" or "caucus" rather than give an oral presentation in a court in a language comprehensible to the parties. But at the end of the day, the very same coercion that exists in adjudication processes still prevails. If the parties do not accept ADR or abide by the results of the informal process, what awaits them will still be litigation. In fact, it would be a greater opportunity cost than if the disputants had directly gone to court, since time, effort and money has

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17 Abel, R, "The Contradictions of Informal Justice", in Abel, R, *The Politics of Informal Justice, Volume 1* (New York: Academic Press, 1982) p 269.

18 *Ibid*, p 270.

already been expended in the informal process, and the parties would feel bound to go on with the ADR process. As Abel points out:

> "State action cannot avoid using force; social control cannot function without it. Coercion serves to 'persuade' parties to submit to informal justice, to 'agree' to the outcome, and to comply with it."[19]

This argument assumes that informalism is additive to the formal dispute institutions rather than complementary.[20] Where coercion is concealed, the state gains the ability to regulate and review behaviour that currently falls out of the ambit of the law. Whilst disputes that arise as a result of activities expressly forbidden by the law may or may not go to the courts, informal processes help the state to monitor disputes falling short of the law. As a result, state control is expanded since actions will be conditioned by the law and the formal court system, while a person's character will be conditioned by informal institutions that say that certain actions, although legal, are undesirable and irrational.[21]

If it is accepted that informal dispute institutions are *complementary* rather than additive to the formal court system, it would mean that the workload would be shared out among cosmic and chaosmic institutions, meaning also that the former will be able to process more cases than it used to. This necessarily indicates that more activities will be sanctioned by the state – in a sense, veiled coercion gives rise to extended *vertical* state control (more types of actions sanctioned) while relieving the courts would allow for greater *horizontal* state control (larger quantity of prohibited activities sanctioned).

From another point of view, methods of dispute resolution that were formally part of social control (eg businesses, neighbourhoods, ethnic, religious means) would fall under the control of the state.[22] By funding and staffing 'ADR institutions, the state has claimed these elements of social control as its own, justifying its onslaught through the concept that only the state possesses a legitimate source of authority.

This appears to be particularly ironic for two reasons: society has seen a massive decline in the use of chaosmic modes of dispute resolution because of the growth of the state and because all along, the state has urged its citizens to discontinue reliance on non-scientific reasoning. At the dawn of the state, people were urged to seek redress from the logical and scientific judiciary. When that became overloaded, the state turned its citizens back to the non-scientific mode of resolution.

Another reason for irony in the subordination of social control would be that the establishment of informal dispute institutions brings with it the state's promise of decentralizing power and distributing it to forces of social control so that disputants have more of a command over their own cases. But what the state is in fact doing is to engulf that part of social practice which it had guaranteed to its citizens.

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19 *Ibid*, p 271.

20 This argument will be considered in greater detail in later sections.

21 *Supra* note 17, p 272.

22 *Ibid*, p 275.

2. Preservation of the Status Quo

A very obvious criticism of informalism would be that it inhibits social change. By privatizing disputes that bear public interest (such as pollution cases, nuisance cases, sex discrimination, racism, consumer grievances) and removing them from public scrutiny, less people will be aware of their rights against these groups and less likely to join in a class suit to fight for change. Ensuring that the capitalists always settle these disputes secretly also ensures that capitalists may continue businesses at the expense of the rights of the few, which perhaps does not bother the government too much should economic policies rank high on the political agenda.

Abel notes:

> "Our formal political institutions, both legislative and executive, often shun politically explosive forms of conflict in the fear that intervention can only make enemies."[23]

To this end, informal institutions were devised. ADR mainly individualizes grievances so that disputes likely to stir mass outcry will be handled on an individual basis – in isolation and each in turn will be convinced that it was their fault. Believing that they were at fault, grievants would not consider themselves as having a right against capitalists. This would then drive victims seeking redress though informal dispute institutions to exit the relationship, thinking that they have no claim. This powerful conditioning will help capitalists to continue businesses with minimal interference and aid the state in maintaining the status quo.

3. Legitimacy of the State

It is admitted, even among proponents of ADR that informalism is of little avail in the fact of a dispute with powerful entities,[24] knowing that ADR settlements will likely go unobserved. Thus, according to Abel, the state can safely implement ADR mechanisms which provide the instrumental function of legitimating the social system by "publicly declaring rights and remedies while simultaneously ensuring that they are systematically unenforced or under-enforced."[25]

For Abel, informalism held symbolic significance in legitimating the state firstly, by showing that it was heeding the complaints of its citizens and the conviction of their claims and secondly, through informalism's propagation of mythical claims that the claimants would be able to achieve the impossible, despite the lack of resources to so attain.[26]

4. Division of Reality from Liberalism

The direct opposite of liberalism would be authoritarianism.[27] Hence, the condition laid down by liberalism for the exercise of coercion is that it must be accompanied by due process so as to ensure there is minimal abuse of forces of authority against a selected person or group of persons.

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23 *Ibid* at 288.
24 *Ibid*, p *299*.
25 *Ibid*.
26 *Ibid*, pp 304-306.
27 "Liberalism 2(politics)" found in *Encarta World English Dictionary*, http://dictionary.msn.com/find/entry.asp?search=liberalism.

However, in informal dispute institutions, although they do carry with them the element of coercion, the element of protection in such a process remains absent. The only solution to this catch-22 is reformalization, which would in turn be going against the promise that informalism makes of turning away from formalities.[28]

Liberalism calls for due process but there have been arguments that changes in process that are favoured by disputants will not alter the outcome of a dispute if the structure or position of the adversaries do not also change.[29] The only (meager) defence that informalism can put up in light of this is that process weighs heavier than outcome – even if a win-lose position becomes a lose-lose possibility.[30]

B. State Sustenance of Dispute Resolution

1. Withdrawal of State Support from Grievants

Agents of informal institutions see themselves more as brokers or agents to refer out disputes to other even less coercive bodies, and hence, there is no incentive to champion the interests of the victims or to act diligently as an intermediary.[31]

Informalism deprives disputants of full redress since all settlements that come out of ADR are necessarily compromises. Where either party comes to the table anticipating to "win", his expectations will be negotiated or mediated down by the neutral third party or the opponent, and hence, any compromised outcome is necessarily a lose-lose situation for both parties.[32] Whereas if an aggrieved party took the dispute to the courts, and assuming he *did* win the case, the total amount of compensation he might get would far exceed what he gets at the negotiating table.[33]

ADR creates a two-tier legal system whereby the rich and well-connected are rewarded with the protections of due process and a definite judgement. Those who cannot afford to mobilize the luxuries of the judicial system then will have to make-do with the second-class justice obtained from informal institutions. Even if this is not the truth, there is no denying that this is the general impression that the public gets and it appears to deny justice to those who are financially incapable of initiating a court action.[34]

In the extreme scenario, Abel argues that the under-privileged classes will realize that even in the informal institutions, their interest will not be able to match those of their stronger adversaries, since the inherent status and position of the parties have not changed despite a change in the process.[35] The result would then be a shunning of the processes of dispute resolution – both formal and informal – and a taking of the law in their own hands.[36]

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28 To be further discussed *infra.*

29 *Supra* note 17, p 294.

30 A point that the author will revisit in the concluding section of the paper.

31 *Supra* note 17, p 292.

32 *Ibid,* p 293.

33 Abel also that 60% of those who appeal the decisions of mandatory arbitration succeed. *Ibid.*

34 *Ibid,* p 300.

35 See *supra.*

36 *Supra* note 17, p 309.

2. Deceleration of Dispute Processes

Abel asserts that the success rates of plaintiffs in informal institutions are less than 50% while plaintiffs often fair better in the adjudication – the lower the success rates, the more likely the decision will be appealed or unobserved and this tends to prolong the dispute process acutely.[37]

The effects of second-class justice as demonstrated by Abel will further lengthen the dispute since such a breakdown in communication might mean transmuting a civil action into a criminal brawl.

3. Enlarging State Budget

From the assertions that Abel makes, it becomes evident that if those who resort to ADR were aware that there would be a 60% chance of success upon appeal or that with the benefit of greater financial backing to afford a good lawyer that chances of winning would proportionately increase, most people disappointed by ADR would appeal, hence total state expenditure in the dispute resolution department would grow enormously.

When the state opts to establish ADR mechanisms, money will not be transferred from the judiciary since there is a need to preserve judicial independence of the judges. The state will have to spend more than it originally was spending on dispute resolution in order to implement ADR schemes.

C. The Disputants

Aside from the comments made by Abel concerning the state, the role and position of the disputant also becomes a major area from which Abel drew his criticisms.

1. De-emphasis of Power Inequality

As discussed above, informalism neutralizes conflict through the individualizing of grievances – a party will not be allowed to appear in the company of his friends, colleagues or family. Not only is this a brutal attempt on the part of the state to undermine collective action on the part of the oppressed against the state, this is also a way of ensuring that individuals' discontent is stifled by his relatively powerful adversary.

Abel argues further that informalism seeks to deepen the rift between the rich and the disadvantaged since the target group envisioned by the proponents of ADR was those who were politically oppressed. Neighbourhood Justice Centres located where there is a high population density and the oppressed are often those who mobilize informal institutions (as opposed to the wealthy, who turn to formal litigation) – thus, it appears that ADR is serving precisely the needs of the repressed.[38]

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37 *Ibid*, p 298.
38 *Ibid*, p 274.

In situations where it would be totally legal, and in fact, economically desirable that the institutions (formal or informal) protect the interests of the capitalists, it would appear that informalism gives the best solution to the dispute while minimizing the harm that might be done to the (wrongful) individual. Yet, it would be naïve to assume that by minimizing the injury to the defendant, the relationship between the disputants would continue as if without event. Where it is a landlord-tenant dispute, the landlord will drive the tenant out by raising the rent or an employer-employee relationship would result in the employer firing the employee on other grounds.[39] As any Marxist would say, the advantaged will only get more advantage while the disadvantaged will remain disadvantaged throughout.

Other than failing to check the existing power imbalances between disputants, ADR also deprives the disadvantaged party the protection of formalism and due process. This means, to use Abel's analogy, ADR equips the privileged party with a sword of the informal procedure while taking away the shield of formal protection from the inferior party.[40]

The two-tier legal system that results will explicitly enable the powerful to mobilize formal institutions of dispute resolution while the weaker parties will have to turn to subordinate authorities. This highlights the uneven distribution of power and resources among disputants that the proponents of ADR have so conveniently overlooked.

2. Stimulation of Conflict

As mentioned earlier, Bok was of the opinion that the adversarial mode of legal training seems to have instilled in lawyers a need to stimulate and aggravate disputes. It could be argued that the dominant form of dispute resolution might have an indirect bearing on the way that a lay mediator or negotiator will conduct a dispute resolution.

Since there are no safeguards to ensure compliance with the settlement reached through informalism, there is no guarantee and hence no incentive to comply, unless the disputants see value in the continuance of the relationship.[41] Where the disputants are relative strangers, there is a lesser incentive to abide by the terms of the settlement agreement and in light of non-compliance, the defaulting party will have to be sued in order for a judgement for breach of the settlement agreement to be obtained. To have to litigate or to go to court to obtain an order is in itself a form of conflict stimulation. This paves the way for relationships to fall foul as a result of disputants not complying with settlements.

Again this argument brings us back to the extreme scenario that Abel suggests whereby disputants finally ignore all forms of dispute institutions as a result of preferential treatment. This would lead to direct confrontation and violence if not properly curtailed.

3. Introduction to New Substantial Standards

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39 *Ibid*, p 295.
40 *Ibid*, p 297.
41 *Ibid*, p 298.

Abel asserts that as informalism gives rise to more activities falling under the regulation of the state, people will become to become used to the notion that they are not allowed to do certain things that fall squarely within the law. This is an argument that Abel does not adequately explore but takes as the truth. In actuality, it is hard to determine whether most people will be influenced by informal procedures.

Yet, even if we assume that Abel's proposition is accurate – that people are likely to become subordinate to more implied or informal rules – one must necessarily consider whether this is desirable. One could claim that the state has been able to trade the implementation of ADR in the system with added obedience to the state even without express legislation. But it could be argued that if the state wanted to prohibit a certain act, it could legislate it rather than form an unwritten practice with undefined boundaries. One could also argue that often the acts in question before informal dispute institutions are peculiar to a particular case or trade, hence to generalize that everyone is also refrained from doing those acts would be rather absurd.

Informalism, championing the sprit of compromise, often seeks to moderate the claims and demands of the aggrieved. In this respect, because disputants are often discouraged from resorting to self-reliance, a sense of personal incompetence is cultured within the parties. The voluntary submission of the parties goes to ensure compliance with the final outcome of the settlement since the participation of both parties means that the likelihood of default is minimized, although there are no safeguards as to the fairness of a compromised outcome. Accordingly, there emerges a new standard that people are expected not to act in accordance with, with reference to those acts that are prohibited – not by law – by decisions of informal institutions. Disputants also develop a new standard for themselves, abiding by compromised solutions due to the notion of incompetence nurtured by ADR.

D. The Mechanics of Informalism

1. How formal is Informalism?

As mentioned earlier, a truly liberal government would ensure that where there is coercion – veiled or expressed – it should be accompanied by the safeguards of due process.[42] This indicates that ADR must either be coercive, formal on non-liberal. As has been noted above, Abel believes that even with informal dispute institutions there remains a coercive element comparable to that in adjudication, but it could alternatively be argued that there is a substantial reduction in coercion coupled with a system that retains certain formal elements – namely a rigid structure. This is evident in the fact that mediators are obliged to adopt a common technique of shuttle-caucusing while the arbitration is procedurally closely akin to the formal court system.

In truth, ADR is a step towards the reduction of formality – towards quasi-chaosmicism (with a certain element of coercion remaining). However, it cannot be said that it has reached the stage of true chaosmicism (where the state has no control over the means of dispute resolution or the exercise of coercion).

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42 *Ibid*, p 298.

It can hence be deduced that since coercion has been reduced to a certain extent, it must be compensated for by securing an element of due process.

2. Popular Participation in Dispute Resolution Process

Full participation of the primary parties to a dispute occurs in truly chaosmic dispute institutions (duels, quarrels). But, as discussed earlier, since the state attempts to usurp social control over disputes through the implementation of ADR mechanisms, control over disputes is actually being shifted from the parties to the state. This means that the state reduces the participation of parties in dispute resolution processes and replaces it with the "facilitation" and "guidance" of state personnel such as negotiators and mediators. Nonetheless, it must still be acknowledged that this is a step towards the demonopolization of dispute handling by lawyers and a split of participation among state personnel and the parties. Yet, to say that there is full participation and control over the dispute by the parties themselves would in no way be an accurate description of informalism.

Perhaps it would be appropriate here to quote from Abel:

> "State informalism not only expropriates conflict from the parties but also reduces participation by other citizens in the handling of disputes. State informal institutions substitute paraprofessional state employees for citizen jurors."[43]

This denotes that state implementation of ADR would lead to added control over disputes on part of the state whilst the parties' and other non-state persons' participation will be reduced.

3. Reprofessionalization of the Dispute Process

In *Contradictions*, Abel notes the differing views and interests of professionals currently involved in dispute processes on the implementation of ADR schemes.[44] He also points out succinctly the reasons why he believes the implementation of ADR would lead to an added layer of professionals which disputants will become dependent upon. To quote Abel's insightful and educational comments verbatim on this point:

> "[Specialists of informed justice] ensure that informal institutions foster dependence on paraprofessional mediators, counselors, and advocates, notwithstanding the rhetoric of disputant participation and self-reliance . . . mediators, like all other categories of service providers, will seek to professionalize, ie, to control entry into the occupation and to enhance its status and perquisites . . . The emerging occupational category will differ significantly from existing legal professions . . . [and] it will more easily be subordinated to those legal professionals who already dominate formal institutions. The result will be yet another layer of professionals . . . who increase the dependence of citizens on occupational specialists."[45]

There is much truth in what Abel has to say about public dependency on the new professionals and even on existing professionals, such as lawyers and judges who are most eager to back in on ADR as a means of securing yet more business for themselves (there is already a growing body of lawyers claiming to be experts in negotiation, mediation and arbitration, professing that with their

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43 *Ibid* at 277.
44 *Ibid*, p 301-304.
45 *Ibid* at 303-304.

knowledge and experience in litigation, they are best suited to represent disputants in ADR programmes. Retired judges, too, cash in on ADR methods such as Rent-a-Judge schemes to make a fat profit off wealthy disputants.)

III. How Should Informalism be Implemented?

The third wave of the ADR movement was part and parcel of the same "revolution" sparked off initially by the Realists during the jazz age. The third wave critics of ADR followed the footsteps of Realists and Critical Legal Studies (CLS) jurists by failing to go any further than making criticisms. No directions as to what might be a rational programme of change were provided, nor was any actual recommendation tabled by any of the critics, Abel included.

What that leaves those interested in the implementation of ADR with, is a long list of reasons why adjudication is inadequate matched by a list of reasons on why ADR is no better. But that does not take one very far, hence, the crux of this essay is to extract some guidelines from the criticism made by Abel on how a state could best establish a network of ADR schemes open to the public, free from the faults Abel finds in informalism.

A. The State

In Part II, it was noted that Abel found coercion to be still present in ADR but that coercion is an inevitable consequence of the desire for disputes to be resolved. It is desirable for the stability of society that disputes be resolved swiftly in an organized manner, and therefore the state makes it its concern that dispute resolution be an essential part of society's governing framework since it would ensure social control.

The conclusion so derived is that there must be a way of eliminating coercion in light of the diminished formality of ADR. This could be achieved by the state relinquishing its insistence on maintaining social control. This would perhaps be asking the state to put faith in its citizens that even without coercion and rigid formalities, they would remain on a positive plain – meaning that they will not fall into anarchy without the supervision of the state in dispute processes. Indeed this is analogous to a teenager asking his parents to allow him more freedom and the parents, in giving this freedom, trust that his behaviour will not become too outrageous.

As for the argument that the state, in implementing ADR schemes, is in fact fulfilling its ulterior motive to maintain the status quo, the state may prevent such criticisms by getting the Ombudsman involved in all of the negotiated and mediated cases to ensure that necessary steps will be taken in respect of those issues that directly affect the public interest. The Ombudsman's monitoring of the cases will be kept in the strictest confidence and a report with recommended changes would be submitted to the government so as to preserve the confidentiality of the ADR process.

B. State Sustenance of Dispute Institutions

It has been argued that state agents have no incentive for change. If indeed the Ombudsman is involved in the post-settlement review and drafting of recommendations, this worry could be put to rest. This is because, although the Ombudsman is state-sponsored or state-funded, it is a body

that lies outside of the administration and therefore will not be under the pressure of the government to maintain the status quo. In fact, the Ombudsman is very often more than eager to recommend changes to the government since it reflects that it is doing its job – and to the Ombudsman, image matters.

Withdrawal of state support for disputants is said to occur since ADR naturally leads to a lose-lose outcome. This is a very pessimistic view which relies on the presupposition that the disputants come to the negotiating table with an expectation to win – which would lead to disappointed expectations since settlement requires bargaining of positions. But if disputants believe that they are in a deadlock or that they have a weak case (which are often the reasons why people opt to use ADR rather than to litigate in the first place), they cannot possibly expect to come out victorious. Hence to say that ADR disappoints expectations would be incorrect considering the nature of most ADR cases and the positions of most users of ADR.

Arguments that ADR gives rise to second-class justice may be argued away by the hypothetical situation where there is only an inflated adjudication system with no alternative means of resolution. Those disadvantaged will have no redress at all. Although legal aid and duty lawyer schemes are attempts to alleviate the problem of "legal poverty", it appears that ADR provides solutions on a larger scale.

The justice that ADR gives is arguably the same as that given in the courts – maybe even better, since litigation, which essentially bears a win-lose structure, might leave the loser with nothing. ADR on the other hand, allows for the possibility that both sides get something in the end. If compliance matters raise concern, the state could give negotiated or mediated decisions the force of legal decisions, enforceable by authorities such as the police. By doing so, the state would also cut down on the deceleration problem mentioned and cut the costs of resolving disputes as well.

C. The Disputants

If the Ombudsman was involved in the post-ADR process, the absence of class actions and the seeming stifling of discontent (could this bee seen as allaying the discontent rather than a stifling of it?) could be shelved. With the Ombudsman fighting for changes on behalf of claimants, the aggrieved are even spared the trouble of having to go through litigation and campaigning to get the government's attention.

According to Abel, ADR appeared to champion the interests of politically oppressed groups merely because the mechanisms were often located where there was a high concentration of the oppressed. Yet, this is a biased comment – ADR mechanisms are placed there strategically since these are the people who appear to most need ADR – not because the government was scheming that this act should make it look like Robin Hood.

Abel also argues that power imbalances are left unchecked and even amplified by ADR. It is understandable that power imbalances are unchecked since ADR is just a means of resolving disputes, not a means of resource reallocation. ADR cannot be expected to be able to adequately address the issue unless the state chose to adopt an inquisitorial system – which would be the direct opposite of the rhetoric of ADR altogether. As for the argument that (a) stronger parties in the "right" might be doubly advantaged by ADR and that (b) ADR deprives the weaker parties

the protection of due process, first the stronger party in (a) would likely prefer to litigate since it has a strong case which means that (b) would cease to be an issue. It would be wishful thinking to say that (a) might occur if the two might want to retain good relations, since Abel himself points out that the likelihood that happening is minimal.[46]

Abel then argues that conflict might be stimulating owing to the fact that parties are not bound to comply with the settlement agreements but, as suggested earlier, this could be resolved by giving settlement agreements the force of law.

D. The Mechanics of Informalism

As discussed above, informalism and a reduction of the reliance of due process is one of the distinctive characteristics of ADR. This should not be traded for a heightened coercive element in dispute processes.

Participation of the parties, in Abel's view, ought to be increased as is guaranteed by ADR proponents. In a purely cosmic institution, there is minimal participation while on the other end of the spectrum, chaosmic institutions fully vest dispute control with the parties. It is therefore best if the implementation of ADR would be effected in such a way so as to indicate a drop in the level of formality in the process and a drop in the degree of coercion and a corresponding increase in party participation.

As for the participation in dispute processes by other citizens, Abel argues that this is not possible since places that were formerly reserved for those knowledgeable in the particular chaosmic social control variant will be replaced by state officials – hence leading to reprofessionalization to a certain extent. However, if the state was willing to allow dispute resolution institutions to be run by those same persons who formerly took charge of these respective areas, it appears that the problem is not that insurmountable. Increasing the use of law persons as negotiators or mediators might help prevent the problem of reprofessionalism.

At first sight, the implementation of ADR into the local dispute resolution structure does not seem to pose too much of a problem. Despite the many criticisms that Abel makes of ADR, this section has addressed some of the superficially feasible ways of overcoming them. Whether or not these safeguards are likely to be of use will be the subject of the next part.

IV. Application to Hong Kong

A. Costs of Implementation

> "'I'll be the judge, I'll be the jury' said cunning old Fury, 'I'll try the whole cause, and condemn you to death.'"[47]

The conclusion that has been reached in the preceding part is that, along with a reduction in formality, coercion should also be reduced. In order to attain this, it would require the

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46 *Ibid,* p 295.

47 Description of the Royal Court by the Mouse in *Alice in Wonderland* quoted in Kristoff, N D; Wudunn, S, *China Wakes: The Struggle for the Soul of a Rising Power* (New York: Vintage House, 1994) p 114.

government to allow an increased level of self-discipline on part of citizens enacting more laws.[48] This is arguably good from a liberalist's point of view, but to the HKSAR Government, this might not be an appealing idea. Already, the Tung regime has shown signs of conservatism and distrust for the outspokenness of the public or their ability to maintain a "grip" on themselves.

If the suggestions above (Part III) were adopted, it would require, with the implementation of ADR, that the Ombudsman take on a greater level of responsibility to monitor cases and make recommendations. This would be good for the image of the agency and would put to rest any worries of status quo preservation. It would cost little too since we already have a longstanding Ombudsman agency in Hong Kong with a guaranteed degree of independence from the administration.

Settlements should also be given the force of law, which increases the flexibility of the law while remaining within its boundaries. Moreover, enforcement of those agreements will be effected by the police or existing correctional service officials or relevant disciplinary authorities within a trade.

In the process of mediator/negotiator/arbitrator selection, the state should not incorporate more lay persons (this might even reduce the amount of unemployment by those not skilled in a profession). These ADR agencies could also be placed under privacy management rather than being a branch of the judiciary so that the likelihood of state expansion of power be curbed.

The costs of implementation, as can be seen, are not extravagant and neither are they difficult – except perhaps for the first requirement. Otherwise, it appears that the most flagrant problems with informalism can be dealt with preliminarily by the safeguards mentioned.

B. Benefits of a System of ADR Free from the Defects Pointed Out by Abel

Very often, when people are asked to explain the benefits of ADR, they give a lengthy account of why adjudication is inadequate. When one thinks about ADR in isolation, one finds primarily confidentiality, cheapness, voluntariness, efficiency, and participation as the reasons for states wanting – and (in sophisticated countries whose judiciaries are seriously strained) even needing ADR. In Hong Kong, it is undoubted that these elements are not found within the formal dispute institutions as reflected by the problem of preposterously high lawyers' fees. Hence, ADR is much needed and called for.

Yet, even having come to the conclusion that the costs are low and the benefits are great, it does not necessarily mean that ADR can be imported into our system unconditionally. One must also consider whether it is a feasible task and one which the HKSAR Government would be willing to undertake.

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[48] A debate was once held concerning this topic. During the debate, a floor speaker raised an interesting question – legislators are always enacting new laws, would there be a day when there would be a saturation of legislation, whereby all conduct would be regulated in a certain way. Also, concerning coercion and sanctions, when the effects of imprisonment and capital punishment start to wear off and people are no longer deterred from refraining to do certain prohibited acts, will the state have to resort to other means such as torture?

V. Conclusion

> "Discourage litigation, persuade your neighbours to compromise whenever you can. Point out to them how the nominal winner is often a loser in fees, expenses and cost of time." – Abraham Lincoln.[49]

It is apparent that Hong Kong suffers from the defects of litigation that first wave critics have diagnosed. Michael Wilkinson points out that a litigant might have to wait years before his case gets heard.[50] Costs of litigation often breaks people's finances and greatly discourages the aggrieved from litigating and litigants from hiring lawyers to represent them. It is for these reasons that ADR will likely take Hong Kong by storm - even if the Government does not like it. Since the Government is helpless in the face of the ADR wave, it would be wise for it to consider taking appropriate measures to prepare Hong Kong for the dawning of ADR.

The main obstacle to the implementation of the above safeguards in conjunction with ADR would be the Government's reluctance to reduce formality and coercion, which have all along been seen by the authorities as the best way of stifling the public. To introduce ADR would be to diminish control over the masses and, despite the many benefits of informalism, the Government would be likely to be very conservative in the implementation of ADR. It is likely that the Government would choose to follow the American experience with little deviation due to this conservatism.

Informalism, otherwise, would probably attract much support – especially from the commercial sector – since many major businesses in Hong Kong are family-type businesses, or even if they are not, businessmen in Hong Kong generally rank business relationships very high. Connections are a very important element and so ADR would best serve capitalists seeking to resolve disputes in a friendly manner.

Furthermore, it is most desirable and suitable for Hong Kong to incorporate a system of ADR mechanisms since competition in the commercial sector is particularly stiff. Disputants do not want details of their conflict to be aired out like laundry. With the growth of information technology and an increasing amount of disputes in the field of intellectual property, the need for a private dispute resolution mechanism becomes more and more important.

For these reasons, the Government ought to take the necessary precautions before any wholesale importation of ADR into Hong Kong. We are now witnessing the fall of the *ragna rek* and its replacement by the *ragnarokk*. Hence, the Government should consider the costs of instilling safeguards and carefully rethink the role of its judiciary as well as what the masses will think of the state. The drawing near of ADR is a very real fact, and it would be lamentable indeed if our government did not heed the words of wisdom of our American counterparts.

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49 Bevan, A, *ADR: A Lawyer's guided to Mediation and Other Forms of ADR* (London: Sweet & Maxwell, 1992) p 6.

50 *Supra* note 11.

謀殺罪與誤殺罪（殺人罪行條例第 2(1) 條與第 5(1) 條）[1]

施玉琪

一. *引言*

殺人罪行條例第 2(1)條及第 5(1)條分別將 "murder" 和 "manslaughter" 譯作「謀殺罪」和「誤殺罪」。乍看之下，謀殺與誤殺兩詞不但深入民心，而且簡單易明，確實比一般普通法用語的中譯更爲大眾化。可是，衡量翻譯優劣的首要標準應爲該譯本能否準確地傳達原文的意念。本文嘗試以此爲大前題去探討一下「謀殺罪」與 「誤殺罪」是不是 "murder" 與 "manslaughter" 的準確翻譯。筆者首先會分別比較上述詞語的字 面意思，然後會透過兩個邏輯推論去突顯問題的核心所在。最後，我們可參考中、台、澳的有關用語，研究一下是否有值得借鏡之處。

二. *比較字面意思*

甲. "Murder" 與「謀殺」

"Murder" 指神智正常的人以預懷惡意傷害受英皇保護的人， 而受害人即時死亡或在受襲後一年零一日內死亡。[2] 「預懷惡意」則不只包括圖謀已久的惡意，亦包括因一時衝動而萌生的殺人或嚴重傷人的意圖。[3] 換言之， "murder" 的定義並不局限於有預謀的殺人。

根據《*大辭典*》[4],「謀」這個字有四個解釋，較爲貼題的爲「計議」、「策略」和「計畫」。[5]「謀殺」一詞則指事先設下殺人的計劃，然後實行殺人的事。[6] 又根據《*漢語大辭典*》[7],「謀殺」意爲「謀劃殺害」。

綜合來說，中文所說的「謀殺」，有一個必要的條件，就是該殺人行爲是要預先籌劃的，即是說，若甲在殺死乙之前的一刻有意圖去殺死乙，但又沒有預先謀劃殺人，那麼嚴格來說，這行爲也不應叫「謀殺」。其實自漢代以來，歷代刑律都設有此例。[8] 由此可見，「謀殺」一詞的意義實爲根深柢固。若將之與 "murder" 比較，我們不難發覺 「謀殺」一詞比 "murder" 一詞的意思爲窄。

乙. "Manslaughter" 與 「誤殺」

"Manslaughter" 指不屬兇殺的非法殺人。[9] 至於「誤」字， 根據《漢語大詞典》[10]，可

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1 第 339 章。
2 此普通法定義由愛德華・柯克勛爵 (Coke) 提出，詳見 3 Inst 47。
3 J.W. 塞西爾・特納著，*肯尼刑法原理 (Kenny Outline)* 第十五版 153。
4 三民書局，1985。
5 「謀」亦可解作「營求」，或作爲一姓氏。
6 見註釋 4。
7 主編羅竹風，三聯書店 (香港)有限公司，漢語大詞典出版社，1993。
8 同上。
9 李宗鍔、潘慧儀主編，商務印書館 (香港) 有限公司第二版。

解作「不是故意地、不慎」。[11] 「誤殺」則指「因誤而傷人至死」[12]。這樣看來，誤殺亦有一個必要的條件，就是該殺人行爲不可以是故意的，相反要是一個不小心的結果。那麼與 "manslaughter" 相比，「誤殺」的意思，亦是較爲狹窄的。

丙. 邏輯推理

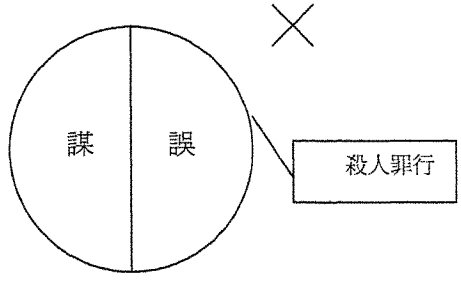
筆者希望能透過下列兩個結論錯誤的邏輯推論去突出上述翻譯不合理之處。

1. 推論一

大前題(1)：簡單來說，香港的法例將殺人罪分爲謀殺罪及誤殺罪。[13]
大前題(2)：「謀」，如前所述，應包括預先籌劃的成份。「誤」則必須要不慎的成份。

小前題：甲被激怒[14]，突然失去理智而去殺害乙，此並非有預謀的殺人行爲，因此不能稱之爲謀殺。此亦非屬於不小心的殺人，因此不能稱爲 「誤殺」。

結論：小前題所述的殺人行爲，既非謀殺，亦非誤殺。



明顯地，這個結論是錯誤的。在作進一步探討之前，讓我們再看一個相關，但卻更令人難以接受的推論。

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10 見註釋 7。

11 其餘三個解釋爲謬誤、錯誤；耽誤、迷惑；見註釋 7。

12 詞典中亦提到古代誤殺罪的一例。《*元史・答里麻傳*》：「濟陽縣有牧童，持鐵連結擊野雀，誤殺同牧者，繫獄數年。」答里麻曰：「小兒誤殺同牧者，實無殺人意，難以定罪，罰銅遣之。」

13 爲了簡化推論，本部將不會考慮《*侵害人生罪條例*》第 47C 條的殺嬰罪及《*交通條例*》第 36 條有關危險駕駛引致他人死亡罪行。

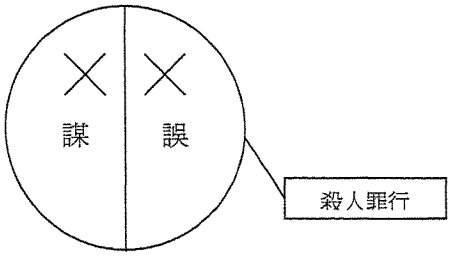
14 即 provocation，此翻譯本身亦有不當之處，因憤怒並非 provocation 的必要條件。

2. 推論二

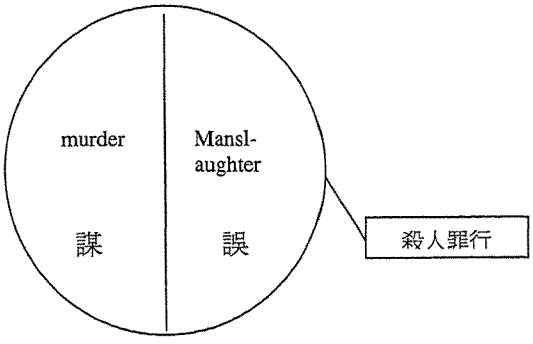
大前題：殺人罪行只可分爲謀殺罪及誤殺罪。非謀即誤，非誤即謀。

小前題：根據推論一所假設的情況，甲在沒有預謀下殺死乙，此非謀殺.。根據大前題，非謀即誤，因此該殺人行爲屬於誤殺。
同樣道理，甲並非因一時不慎而殺死乙，非誤即謀，因此這殺人行爲是謀殺。

結論：既是謀殺，又是誤殺。



這個結論更形荒謬。究竟問題的核心在哪裡呢？筆者認爲問題出於大前題身上。香港法例將殺人分爲 "murder" 及 "manslaughter"，但 "murder" 及 "manslaughter" 的含義分別比「謀殺」與「誤殺」爲廣，因此實際的情況應爲這樣：



由上圖可見，殺人罪行分爲「謀殺罪」與「誤殺罪」這一說法是錯誤的。若將沒有預謀的人說成是謀殺，就會產生語意上的矛盾；若將並非因失誤而將他人殺害的行爲說成是誤殺，亦只會是一個誤導。

三. 參考中、台、澳的有關法例

甲. 中國

中國將殺人罪行二分爲「故意殺人罪」[15]及「過失致人死亡罪」[16]。「故意」一詞，根據

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15 *大陸刑法*第 232 條。

《*辭海*》[17]，應解作「有意、存心」，亦是過失的對稱，指明知自己的行爲會發生危害社會的結果，並且希望或放任這種結果的發生。那麼究竟「故意殺人」能否準確地表達出"murder" 的意思呢？筆者認爲答案是否定的。有些時候，殺人者確是有意致他人於死地，但法庭可能會因爲一些抗辯的理由如激怒等而去裁定某殺人行爲不是 "murder"，而只是 "manslaughter"，因此，「故意」一詞亦非一個恰當的翻譯。
至於「過失」一詞，根據《*漢語大詞典*》[18]，是指因疏忽大意而犯罪。這樣看來，「過失致人死亡」與「誤殺」的字面意思根本沒有兩樣，因此這用語亦不能準確地譯出"manslaughter" 的意思。

乙. 台灣

在台灣，有關殺人罪的罪名分得比較仔細，與討論有關的包括「普通殺人罪」[19]、「過失致人死亡罪」[20]及「義憤殺人罪」[21]。明顯地，台灣所採用的並非二分法，沒有類似 "murder" 和 "manslaughter"的對應概念，因此亦不適用於香港。

丙. 澳門

澳門以刑罰的輕重去分不同的殺人罪行，它們分別是 — 「殺人罪」[22]、「減輕殺人罪」[23]、及「加重殺人罪」[24]。雖然澳門所採用的並非二分法，但這並不表示香港不能參照澳門的例子，用刑罰的輕重去區分殺人罪行。例如，我們可否稱 "murder" 爲「殺人罪」，稱 "manslaughter" 爲「減輕殺人罪」呢？這樣命名就不會過份限制了 "murder" 及 "manslaughter" 的意思。

可是，「殺人罪」一詞比較中性，不能在字義上表達出 "murder" 一罪的嚴程度，因此不算是一個全神的譯法。另一方面， "homicide" 在香港被譯作「殺人罪行」[25]，這是一個廣義的詞語，其含義包括了 "murder" 及 "manslaughter"。如 "murder" 也譯作「殺人罪」，就可能會令公眾產生混淆。

那麼「減輕殺人罪」又是否一個準確的翻譯？筆者認爲此譯法不但能免卻了「誤殺」的誤導成份，而且能表達出此殺人罪可責性較低的特點，本應是一個不錯的選擇。唯一美中不足的是「減輕」帶有比較的意思，若如前所述， "murder" 不被譯作「殺人罪」的話，那麼「減輕殺人罪」就會失去了其比較的對象。但獨立來看，「減輕殺人罪」未嘗不是一個較「誤殺」準確的用語。

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16 *大陸刑法*第 233 條。
17 上海辭書出版社，1999。
18 見註釋 7。
19 *台灣刑法*第 217 條。
20 *台灣刑法*第 276 條。
21 *台灣刑法*第 273 條。其餘的殺人罪行爲第 272 條的*殺直系血親親屬罪*，第 274 條的*母殺嬰兒罪*及第 275 條的*加功自殺罪*。
22 *澳門刑法*典第 128 條.。
23 *澳門刑法*典第 130 條。
24 *澳門刑法*典第 129 條。
25 見註釋 1。

至於 "murder" 筆者認爲可參考《*英漢法律大詞典*》所採用的「兇」[26]。根據《*漢語大詞典*》，「兇」即「惡狠、惡劣」，「兇殺」即「行凶殺人」，而「凶」則指「殺害或傷害人[27]」。這樣看來，「兇殺」一方面不局限了"murder" 的意思，一方面又能突出 "murder" 的嚴重性，實比「謀殺」一詞來得更準確。

四. 結語

綜合以上討論，「謀殺」與「誤殺」兩詞雖爲人所熟悉，但它們根本不能完完全全地表達出 "murder" 及 "manslaughter"的真正含義。相比之下，「兇殺罪」與「減輕殺人罪」雖不致無懈可擊，可是若以準確度爲首要標準的話，此組詞語當然是較爲可取。

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26 見註釋 9。

27 見註釋 7。

從《侵害人身罪條例》到法律普及化—探討香港雙語立法的驅動理念及中英文本產生歧異的根源

葉冬生*

一. *雙語立法的重要性及歷史背景*

「身爲律師，我們致力於維持法治；而作爲法律草擬人員，我們相信法律知識普及有助鞏固法治。」

---- 法律草擬專員嚴元浩
（錄自《香港律師》一九九九年十二月號）

正如法律草擬專員嚴元浩先生於《*香港律師*》期刊撰文展望二十一世紀的法律草擬工作時表示，相對於古時的平民市井而言，知悉法律對現代人來說幾乎是與生俱來的基本權利之一[1]。就刑事案件爲例，《*香港人權法案*》清楚訂明，刑事案件的疑犯必須在最短時間內清楚明白其所涉及的罪行和案由，及有權得到法律代表協助了解有關罪行的內容，以便進行辯護。[2]

由此可見，既然法律對每一個市民均有如斯重要的影響，知悉法律確是人權之一。如市民都能清楚明白影響著他們日常行爲模式的法律，當權者便不能輕易借助一些不合理的法律強加於人民身上，或胡亂假借「法律」的名義隨便剝削人民應有的權利。從這個角度而言，法律愈能「普及」，「法治」的概念愈能植根社會。這一理念正是驅動香港政府推行「雙語立法」的其中一個主要原因。香港自一九八五年開始正式引入雙語立法規定；《*香港特別行政區基本法*》明確規定立法機關須採用雙語立法、禁止任何人士基於包括語文等理由而歧視社會上的任何人；而經修訂後的《*釋義及通則條例*》[3]第 10B 條亦清楚規定中英文本的條例均必須被推定爲同等真確、沒有輕重的分野。

以上所說及的有關雙言立法的規定，爲香港推行雙語立法的工作奠定了穩固的基礎，彷彿汪洋中的燈塔，爲雙語立法這巨大的油輪導航，使其得以朝著正確的目標航行，務求順利地到達「目的地」：法律的普及化。

然而，相對於其他行使雙語立法的國家如加拿大而言，香港雙語立法的歷史尚是「起步」的階段，故此因雙語立法而產生的問題，自然猶如雨後春筍般湧現。筆者現針對第 212 章《*侵害人身罪條例*》第 27 條作句譯研究，希望能窺探當中問題及建議有關解決方法。

本文第一部份研究中英文語法形式之比較；第二部份集中討論如何解決中英文本出現意思上分歧時的問題。此部份以較宏觀的角度，嘗試從雙語立法最根本的理念入手，探討問題癥結所在；最後部份將建議如何藉著參考外國的例子，以改善現行雙語立法的工作。

二. *中英文語法形式的比較*

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* 本文作者特此鳴謝律政司法律草擬專員嚴元浩先生接受訪問及爲本文初稿提供寶貴意見。

1 嚴元浩, "二十一世紀的法律草擬工作", 《*香港律師*》一九九九年十二月號, 40。

2 香港人權法案第 5, 11 條，在《*香港人權法案條例*》第 383 章第 8 條。

3 第 1 章。

甲. 簡介

中英文各自有一套約定俗成的詞序及句式結構。如翻譯者盲目跟從原有文本的既有結構，一字不漏地翻譯，譯文可能會與原文本身一套既定的詞序，及結構產生不協調甚至衝突，令人誤解當中意思；然而，若翻譯者將譯文意配合譯文本身的詞序及結構，又往往可能因此而失卻了原文希望著重的部份或強調的重點。

因此，爲避免上述兩種極端情況出現，翻譯者必須從中找到平衡，在保存譯文文案的特色之餘，亦能注意原文所持的重點，未有因翻譯而受到忽略。

乙. 翻譯時必須注意有關主語的使用

第 27 條是關於「對所看管兒童或少年人虐待或忽略」。其中第 3 款有以下一句：

> 「…即使與本條所訂罪行有關的兒童或少年人已經死亡，*犯該罪的人，仍可循公訴程序予以定罪*…」（斜體爲作者所加）

驟眼一看，很多人可能會以爲犯了罪的人，即使在有關兒童或少年人已死的情況下，仍然可以循公訴程序去爲該已死的兒童定罪。這樣的解釋自然與第 27 條的意旨完全違背。

此條的問題在於未有定明*誰人*有權循公訴程序去爲*誰人*定罪，而當中的「*予以*」一詞亦未能清楚界定所指爲何人。

明顯地，英文原案比中文譯本來得清晰：英文原案用被動句式，清楚指定是犯罪者須被定罪，而非其他人士：

> "... a person may be convicted of an offence... notwithstanding the death of the child or young person in respect of whom the offence is committed"

雖然中文文本並非不能明白，而且有人亦可爭論從條例的宗旨我們憑常識推斷便可估計這裏必然是針對犯者而非其他人士。但是，這種推論有以下的潛在危機：

1. 法律文字並非一般文字，尤其是帶有刑事責任的條文，更加不可倚靠所謂「常識」去推斷、估計。這是一個觀念的問題。假如法律條文往往可以以常識推論，那「法治」所著重的「一致及準確性」便站不住腳了；

2. 假若法官在審理一宗有關於本條的案件時，辯方律師提出這樣的中英版本的問題，法官會否根據 *陳玉霞* [4] 一案初審時的判詞，同意所有疑點利益歸於被告而就單單因爲這看似「微細」的中英版本問題而判被告無罪?

因此，筆者建議其實要避免以上問題方法非常簡單，即只需條文中文版作以下更改便成：

> 「即使有關兒童或少年人已經死亡，*法庭*仍可循公訴程序……*將被告定罪*…」（斜體爲作者

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4 *Queen v Tam Yuk Ha*, Mag. Crim. App. No. 933 of 1996

所加）

筆者希望提出的是，雖然這裏的誤差可能只是很小的問題，但我們仍絕不可以疏忽，因爲這是一種對法律追求嚴格、謹慎的「觀念」。

丙. 翻譯時必須注意有關「語境」與「結構」----- 以 "cause" 字爲例

"Cause" 一字在第 27 條中出現了數次，中文文本均之譯作「導致」。然而，「導致」一詞是否都適合表達 "cause" 一字在不同的句子形式及不同的語境的意思？下文比較三種 "cause" 在不同句子結構及語境中的用法，並將之與中文文本對照，看看到底哪時應採用「導致」表達：

1）第 27 條第 1 款近末端有以下一句：

"... likely to *cause injury to* his health..."（斜體爲作者所加）

中文文本將之譯爲：

「…相當可能*導致*…受到…健康*損害*…」（斜體爲作者所加）

這裏採用「導致」一詞明顯直譯英文原案 "cause" 一字。英文而言，用 "to cause injury to somebody" 乃常用句式。但中文而言，將 "cause" 純粹譯爲「導致」可能產生以下問題：

「導致」與「損害」都是動詞。就中文而言，我們通常會說：「…相當可能*損害*某某人的健康」 — 一個動詞便能表達句子意思。但當「損害」被放在句末，而在句前端加上「導致」的話，句子便明顯受英文原案中 "cause" 及 "injury" 二字影響而令中文文本出現了*兩個動詞*，使讀者感到句子繁複及累贅。

然而，根據法律草擬專員嚴元浩先生在《*香港律師*》期刊撰文時表示，有時爲求能徹底（「徹底」指不加多也不減少）傳達一個法律意念，有必要採用稍爲特殊的句法，因此可能在某些時令中文文本比英文文本來得生硬[5]。或許正因希望「不加多也不減少」的原則所致，這裏便刻意採用了兩個動詞以求「徹底」表達英文文本中 "cause" 與 "injury" 的意思了。

然而，如從務求「簡潔」的角度出發，其實句子可以被譯爲「…相當可能損害…健康…」這樣既能符合中文句式一貫用法，亦能將條文變得簡潔易明。

2）然而，上述所涉及的問題卻未必必然出現在每次連用 "cause" 的句子上。第 27 條第一款有以下一句：

"... *cause* such child or young person *to be assaulted*..."（斜體爲作者所加）

中文文將之譯爲：

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5 見註釋 1。

「*導致*…該兒童或少年人*受襲擊*（等行爲）…」（斜體爲作者所加）

筆者以爲這裏的「導致」卻有保留的需要。

此句 "cause" 一字所處的語境與 1）的不同。這裡所指的 "cause" 有兩個可能：

（i）有關監護人本身對兒童／少年人造出襲擊等行爲；
（ii）有關監護人本身沒有對兒童／少年人造出襲擊等行爲，而是「製造」了一個環境／機會而令第三者對兒童／少年人造出襲擊等行爲。

就（ii）而言，有關監護人本身沒有直接造出有關行爲，而是間接地製造／提供（provide）一個環境（circumstances）（可能是基於監護人的行爲或不行爲而有意或無意地）給予第三者對兒童／少年人造出襲擊等行爲。故此，假如根據 1）之理論而刪去 "導致" 一詞，那便可能只可以表達（i）之意思：如中文文本寫成：「……監護人…襲擊…兒童／少年人…」這樣會給讀者錯覺以爲句子只是指出有關監護人本身造出有關行爲，並未能包含（ii）的意思。採用「導致」一詞則可以包含較廣闊的定義：

- 監護人*本身襲擊*兒童／少年人；或
- 監護人*製造／提供*一個環境導致第三者襲擊兒童／少年人

那末，保留「導致」一詞不單沒有如 1）所述的問題，而且有助條文更清晰地表述 "cause" 在這個語境的意思。

3）第 27 條又有以下一句：

"likely to *cause* such child or young person *unnecessary suffering*..."（斜體爲作者所加）

中文文本將之譯爲：

「…相當可能*導致*該兒童或少年人*受到不必要的苦楚*…」

1）所述的理論亦不能套用於此：不是基於 2）所述的語境問題，而是基於英文文本本身的句式結構。英文 "cause somebody suffering" 不像 1）中的 "cause somebody to suffer" 可以直接用「損害」一個動詞取代。就因應英文這樣的特有句式，爲求「徹底」表述條文內容，筆者建議在此保留「導致」一詞。

從上述所討論的三種情況可見，即使如 "cause" 一般簡單的詞彙放在不同的語境及句式結構時亦會產生不同的意思和含意。因此，準備中文文本時亦須注意條文欲表述之意思，絕不能「搬字過紙」般逐字逐字地翻譯，以免導致中英文版本出現不必要的混淆。

三. *意思上的分歧 – "wilful...neglect" = 「故意…忽略」？*

第 27 條有以下一句：

"*wilfully* assaults, ill-treats, *neglects*, abandons or exposes children..."（斜體爲作者所加）

中文文本採用「故意」一詞來表述 "wilfully" 之意思。當筆者首次讀此部份時，真覺對 "wilful" 一詞警覺：到底這裏所採用的「故意」是否合適? 因爲 "wilful" 與「故意」在程上似乎有所不同。

根據《漢英大詞典》[6]所載，「故意」乃指 "intentional" 。那末，假如 "intentional" 相等於 "wilful" 的話，爲何英文文本要採用 "wilful" 而不索性採用 "intentional" 代之? 其實，大部份成文法及案中， "wilful" 都被解作爲 "intentional" ，即「故意」的意思。而筆者翻查不少法律字典後亦發現 "wilful" 一詞在絕大部份情況下相等於 "intentional"，例如：由李宗鍔大法官所編撰的《英漢法律大詞典》[7]所載， "intentional" 指「意圖、目的、意旨；期望採取某行動或不行動以達致某效果」；而 "wilful" 指「故意、有意：全心全意而爲」，而當中更明確表明 "wilful" 乃相等於 "intentional" 。

由此可見， "wilful" 與 "intentional" 在絕大多數的情況下相等，而且二者均可被解爲「故意」。當筆者深入地探究時，發現兩者卻有微妙的分別。*The Dictionary of Canadian Law*[8]指出，雖然 "wilful" 在大部份情況下與 "intentional" 無異，但 "wilful" 的真正意思，在個別不同情況或語境下有所不同。該字典舉出一加拿大案件 *R v Buzzanga*[9] 爲例，當中法院指出在某些「特殊」情況下， "wilful" 除了可以解作 "intentional" 之外，更可擴闊其含意，包含 "subjective recklessness" 的意思。(這裏暫且用「罔顧後果」來形容) 而「特殊」情況的其中一個例子正是第 27 條所載的 "wilful ... neglect" 。

根據 *R v Sheppard*[10] 一案，英國上議院非常明確地訂下了對 "wilful" 一字的解釋原則：

1) "wilful" 一字可以根據不同的案情及背景而作出不同的解釋；
2) 但根據 *R v Sheppard* 案本身所涉及的案情所示，當中 1933 年 *Children and Young Person Act* 第一條所指的 "wilful" ，如果連同條文當中的 "neglect" 一併解釋的話， "wilful" 將不局限於 "intentional" 之意，而是可以更廣泛地包含了 "subjective recklessness" 的意思。

上議院作出上述的判決，是基於對該法案的「立法原意及目的」而擴闊 "wilful" 一字的含意 (必須指出的是，當年的法案條文與第 27 條的內容相同，因此有極大的參考價值)。上議院認爲法案的立法原意乃爲針對及加強對兒童及少年人的保護、並防止父母或有關監護人可以輕易逃避法律責任。如果條文中的 "wilful" 只解作 "intentional neglect" ，那末即使監護人「罔顧後果」地疏忽，亦可以免除法律責任。這正有違法案的立法原意。因此，假如 "wilful" 可以像上議院判定般在「疏忽」這個大前提下包含 "intentional" 與 "subjective recklessness" 的話，監護人便只可以以其「真心」(bona fide) 地未能預見兒童或少年人的有關需要而「疏忽」才可以免卻法律責任。如此一來，監護人的辯護理據便相對收窄，而這亦正好符合法案的立法原意與目的。

因此，假如中文文本單單用「故意」一詞來表達 "wilful" 一字便不能夠包含 *R v Sheppard* 案中對 "wilful neglect" 所包含的 "subjective recklessness" 元素。

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6 張方杰主編，《*漢英大詞典*》，新華出版社，1995。
7 李宗鍔、潘慧儀主編，*英漢法律大詞典*，商務印書館，1998。
8 Dukelow, Daphne A. and Nuse, Betsy, *The Dictionary of Canadian Law* (2nd Ed.) 1995
9 *R v Buzzanga* (1979) 101 DLR (3rd) 488
10 *R v Sheppard and Another* (1980) All ER 3 899

然而，當筆者與法律草擬專員嚴元浩先生作錄像訪問而論及以上的問題時，嚴先生似乎認爲情況未必太過嚴重。嚴先生認爲無論條文上採用哪一個詞彙表達，其實法院都會將有關字眼在參考過案例後而加上一個「普通法」的定義（common law meaning）。而法律工作者如律師等都必定清楚明白「普通法」的含義，因此條文上的字眼有所出入其實並非一個大問題。

誠然，嚴先生所言的確與《*釋義及通則條例*》第 10C 條所建議的一樣：每當對條文上的字眼有爭議時，我們必須參考普通法的案例作爲最終的解釋。然而，如此一來可能會衍生出以下的問題：

《*釋義及通則條例*》第 10B 條指明中英文版本的條例必須被推定爲同等真確。但是，每當條文上的字眼有爭拗時卻參考擁有悠久歷史，以英文爲「獨有」語文而載的「普通法案例」，其實已暗示了中文的地位實則不如英文，條文都以英文「獨家」的案例爲「最終歸宿」，第 10B 條 所言的「同等真確」豈非紙上談兵的一番美侖美奐，但其實是虛有其表的空談?

正如黃克明大律師在《*香港律師*》期刊撰文時表示，任何形式的中文版本案例在香港根本沒有悠久歷史，而大部份香港案例都是「衍生性」，所以即使如何大聲疾呼中英版本條文的「同等」真確性，現實是中文的地位都只是較英文版本的低。[11]

誠然，即使中文判決是原文版本，我們也著實找不到法律基礎去支持所謂「真確性」，因爲中文版的詞句及規例，都可能沒有足夠地辨別、闡述或支持有關普通法的詞句及規例。筆者欲引述一前英國國會議員 *Enoch Powell* 的說話來表述英語的那份既有的、一貫的「優越地位」:「*其他人或多或少可說英語及閱讀英文，但英語是屬於我們的…英語由英國人在英國創製，不管如何被廣泛使用，始終是特別屬於我們的財產。*[12]」如將此言論與法律文字掛勾，我們不難發現，所謂的中英雙語版本條文「同等真確」不過是學其「形」而非其「意」，因爲，始終普通法都是源自英文專有的歷史。

以上內容彷彿與本部份有所偏離，但卻正正帶出了本部份所提出的問題的主要根源。無論如何，就論及本條文而言，既然我們已有一個對香港法院有著極大說服力的上議院案例，我們理應跟隨上議院對 "wilful ... neglect" 一詞的定義去解釋條文。因此，筆者建議就針對 "neglect" 而言， "wilful" 一字應被譯爲「故意或罔顧後果地」 。

然而，這樣的翻譯又有可能引申以下問題：

（1）「罔顧後果」只能表達 "recklessness" 而非 "subjective recklessness" 。"Subjective" 者，乃相對 "objective" 而言。根據普通法， "subjective" 指當事人本身的思想狀態去分析當事人本身是否有不該思想。因此，純粹用「罔顧後果」未能表述所指爲何種 "recklessness" 。

（2）*R v Sheppard* 案指出除了 "neglect" 之外，其餘四種要求 "wilful" 這個思想狀態

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11 黃克明， "在香港推行法律雙語化的神話"，《*香港律師*》一九九九年十一月號, 32。

12 Greenbaum，"誰人的英語?"，引自 Ricks 及 Michaels 編，《*語言的狀況*》，加利福尼亞州伯克利大學出版社, 1990。

的行爲（assault, ill-treatment, abandon 及 exposure）均必須將 "wilful" 解作 "intentional"。換句話說，"wilful ... neglect" 其實本身是一個例外。因此，如我們純粹將條文 "wilful" 譯作「故意或罔故後果地」的話似乎會令其餘四種行爲所要求的 "wilful" 程度由 "intentional" 降低至 "recklessness" 亦可入罪。

筆者建議的解決方法是在中文版本中分開 "neglect" 與其餘四種行爲，然後各自解釋 "wilful" 在當中所持的意思及程度。這樣當然清晰，但卻造成中英文版本起了「結構上」的重大分歧：必然會有人質疑：「爲何只更改中文版本？如果更改中文版本的話，我們應否連英文版本亦一併更改？」要解答這個複雜的問題，我們必須從中英文版本最根本的「理念」去找尋答案：

正如本文開首引述嚴元浩先生的言論，雙語立法的驅動理念，是令不諳英語的大部份香港人，能夠享受到明白法律條文內容的基本權利，因而有所謂「用者稱便」的大原則[13]。故此，爲達至「用者稱便」此一「境界」，中文版的條文都力求採用淺白的文字表述深奧的法律問題。而爲以上這個理據「辯護」最佳例子莫過於一個不諳英語的罪犯自辯時，會不能了解所謂 "common law meaning" 等「暗藏」於條文背後的另一層意思，因此必須將所有可能的解釋放於中文版本內，以方便這類人士參考。

然而，英文版本又如何呢？在筆者有限的知識領域範圍內，並未曾聽聞過英文版本亦有要求「用者稱便」這個原則。即使是一個深諳英語的英文系博士，相信亦未必等於能夠清楚理解條文當中的法學意思吧！由此可見，中英本版本背後持的理念可謂南轅北轍，不能同日而語。[14]

故此，假如兩者各自朝著不同的方向發展，英文版本著重純粹表達一個法律理念而不著重一般人明白條文真正內容與否，但中文版本卻集中希望達到「用者稱便」的境界而務求人人皆曉法律的話，中文文本必然會較英文版本更加詳盡地、巨細無遺地將所有可能性的普通法歸納入中文文本之中。那末，中英文版本的內容便因此而產生極大分歧，二者的法理地位自然將成爲爭論焦點：到底中英版本孰重孰輕？如法庭採用英文版本解釋而一位自辯人士以較詳盡的中文版本上庭自辯時，哪一個版本才是「真確」？

當然，以上的論點都是「假設性」的提問。但不要忘記的是，《*基本法*》與《*人權法*》均清楚指出法律面前人人平等，而且亦准許罪犯進行自辯。即使上述討論可能被視爲「極端化」了的假設討論，但既然有憲法保障人人平等、公平申訴時，現實中可能有這樣的情況：一位沒有金錢聘請律師辯護，而又不諳英語的疑犯自辯時，提出「平等」乃包括中文版本必須訂明所有定義，使自己得以完全明白條文而得以自辯。那末，循此方向走，上述所論的中英文版本因分歧而生的法理地位問題，始終會有無可避免的一朝！

因此，筆者希望找出的反而是雙語立法背後理念上的問題：既然英文版本的條例亦不等於要求明白英文的人可以完理解、領悟，那末中文版本的目的又是不是必須達致律政司所一向倡議的「用者稱便」，而令以中文爲母語的香港人能完全明瞭中文文本背後所持的法律含意？這樣的追求是否恰當及值得？筆者認爲，我們必須慎重考慮這一個最關鍵的問題後，才能爲雙語立法訂立一個真正的方向。

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13 見註釋 1。

14 Wallace, Jude, "The Victorian Experience in Plain English – Complications of Making Things Simple", *9th Commonwealth Law Conference Paper* (Auckland: 1990)

四. 結語及展望

誠然，第三部份末端的討論並不可能一朝一夕得出結論。然而，就現實環境而言，務求盡量減少中英文本所產生的分歧，以下的方式亦不失爲一個“折衷”的解決方法：採用較簡單的英文立法（plainer English），減少兩者的分歧：

我們不難看到一些極著名的法例草擬者，如英國的“*Thring and Chalmer*”等均以能夠草擬最簡潔清晰的條文而爲後世稱頌。不要忘記中文其實說到底仍是「衍生性」的法例，因此英文版本既能見簡潔精煉，中文版本自然可相應地以簡潔的詞彙表達。那末，二者同樣簡潔精煉，可預期的衝突自然相對地減少。

就以外國爲例，澳洲自 1950 年代以後所撰寫的條文明顯地減少了法律術語（legal jargon）的運用[15]；加拿大甚至培育法律草擬人才（就以加拿大的 University of Ottawa 爲例，該大學特設法律草擬爲學位課程，務求培養一批人才，能以最簡潔精煉的詞彙表達深奧的法律理念於條例中）。[16]

其實，香港亦曾於 1994 年委派法律草擬人員進行一系列的研究，探討法律草擬工作的方向及發展。其研究報告亦明確指引法律草擬人員，應當以簡潔精煉的方式草擬法律方爲上上之策。有關指引被俗稱爲“the template”，包含一系列規定及方式建議法律草擬的發展。[17]

筆者尤其希望在檢討雙語法例的理念及大方向的同時，有關方面能多加進行上述的研究。雙管齊下方爲推動雙語主法制的最佳方法。

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15 Berry, Duncan, “A Content Analysis of Legal Jargon in Australian Statutes” (1994) 33 *Clarity*, 26

16 Johnson, Peter, “Legislative Drafting Practices and Other Factors Affecting the Clarity of Canada’s Law” (1991) *Statute Law Review*, 1

17 Fung, Spring YC and Watson-Brown, Anthony, *The Template – A Guide for the Analysis of Complex Legislation* (London: Institute of Advanced Legal Studies, University of London, 1994)

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