HONG KONG STUDENT LAW REVIEW
VOLUME 7 2001

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Works in this publication should be cited as (2001) 7 HKSLR page number

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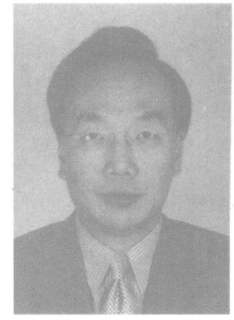
Message from the Chairman, Hong Kong Bar Association

I am more than privileged to be asked to write a Foreword for Volume 7 of the *Hong Kong Student Law Review*.

Not too long ago when I was studying in the then School of Law, there used to be a publication called *Justitia*. It collected the best dissertations submitted by law students as part of our second year curriculum. Whereas we were mandated by course requirements to do a dissertation each, there is no obligation on law students to produce articles for the *Hong Kong Student Law Review*. It has been up to you to take the initiative to find a current legal issue, research, analyse and articulate on your findings. Your being prepared to take such an initiative is salutary.

The articles appearing in the *Hong Kong Student Law Review* have invariably been well researched and are showpieces of scholarship. Each of them is an exhibition of thorough research, critical thinking, persuasive arguments and eloquent presentation.

I congratulate the editors and contributors for a job very well done and look forward to the Journal's continued contribution to local jurisprudential development for many more years to come.



Mr Alan Leong SC
Chairman
Hong Kong Bar Association
March 2002

Foreword

Message from the President, the Law Society of Hong Kong

I am honoured to have been invited to write this Foreword for the *Hong Kong Student Law Review* and it gives me great pleasure to do so.

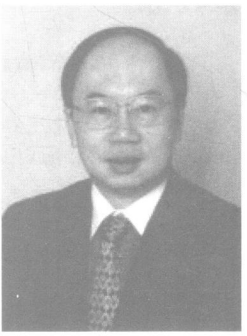
I am an ardent admirer of the *Hong Kong Student Law Review*, which is unique in Hong Kong. For nearly eight years it has provided a forum for law students to publish their research, a means of encouraging original thought and a way in which law students may be encouraged to articulate their views on current events.

We live and practise in a world, which is changing with a degree of rapidity never before experienced. Institutions and practices that have been in place unchallenged for decades are now questioned and justification sought. This is generally a healthy sign of development in society but the ability to adapt to these changes is an essential ingredient of the successful lawyer.

It is for these reasons that the Law Society has been so concerned that entrants to the profession do receive training that will serve them well in their future careers and provide them with the necessary skills to ensure not only their survival but their success in the hard, modern world of legal practice in Hong Kong. Familiarity with "Black letter" law is essential but not the only attribute with which students should graduate. They must leave university with a wider knowledge of human endeavour, the culture and activity that surrounds them and an awareness of life beyond their immediate surroundings. The *Student Law Review* plays an important role in seeking to achieve these ends.

No one suggests that those who graduate from University are going to remain fully cognisant of all aspects of the law. Knowledge and practice of a subject which is as constantly changing as the law can only be achieved as a result of life-long learning and that is why the Law Society has in place a sophisticated continuing professional development scheme. For busy practitioners the need to keep up to date with the law is readily acknowledged but the real task is finding the time to do so. As a reflection of the thinking of future generations of lawyers and what concerns them I commend the *Student Law Review* to legal practitioners in Hong Kong. It provides a succinct resume of what concerns those in the Law Faculty and those who will form the future legal professionals in Hong Kong. As such it is an invaluable tool to a practitioner's knowledge of what is happening within the community in which we practise.

I congratulate all who have been involved in the production of the *Student law Review*. It is a publication of which you can be proud.



MR HERBERT TSOI
President
Law Society of Hong Kong
March 2002

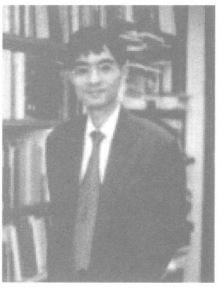
Message from the Dean

As law teachers we find great satisfaction in seeing students taking the initiative to work on research projects chosen and designed by themselves, and even greater satisfaction in seeing that the projects result in publishable articles. The articles in this volume provide excellent examples of how students' work can address contemporary legal issues of social relevance in Hong Kong, and contribute to the developing legal literature in Hong Kong.

Among these articles, there are five on aspects of the constitutional system and human rights in Hong Kong. Carmen Chan investigates into the fate of private members' bills in the post-1997 legal order. Paul Chan examines the debate on the *Public Order Ordinance*. Alan Yip discusses the issue of freedom of expression in the context of *Ng Kung Siu* (the Flag case) and the *Paul Tse* defamation case. Belinda Lloyd researches into the privacy issues arising from workplace surveillance of employees by employers in Hong Kong. Hester Leung analyzes the doctrine of legitimate expectation in her commentary on *Ng Siu Tung*.

Other articles in this volume address issues of criminal and tortious liability, translation problems in bilingual legislation and legal philosophy: Andy Ho examines the legal aspects of sado-masochism in Hong Kong. Helen Au discusses the proposed legislation on the prevention of child pornography. Janie Wong explores the liability of Internet service providers for defamation in cyberspace. Chan Chi-yuen considers the Chinese text of the *Occupiers Liability Ordinance*. Harry Liu discusses cyber defamation from a conflict of laws perspective. Sarah Cheng investigates into the philosophical problems of civil disobedience.

Collectively these articles testify, not only to the high standard of law students' scholarship in Hong Kong, but also to the dynamism of Hong Kong legal developments in recent years. I am sure that students, particularly those who are embarking upon the path of legal research, will have much to learn from the articles. I also hope that members of the legal community in Hong Kong, members of the general public in Hong Kong as well as overseas readers will find this volume a useful addition to Hong Kong's legal literature. Finally, I take this opportunity to express our Faculty's heartiest gratitude to donors under the Friends of the Faculty donation scheme, whose annual donations to the Faculty have made possible, *inter alia*, the annual publication of this *Hong Kong Student Law Review* over the years.



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

12 April 2002

Preface

"It is no mean task to establish and maintain a law journal. There are potential contributors to persuade or cajole, disappointed authors to assuage, unenergetic subeditors to harass, tardy printers to threaten, uninterested distributors to plead with, potential subscribers to woo, and above all, worthy readers to inform and entertain. Deadlines must be set and met, blue pencils wielded, citations checked, style-sheet injunctions enforced, copy marked up, proofs read, proofs re-read, sleep meanly rationed, family obligations neglected, proofs re-read again, and budgets somehow observed. Then, when all is done, and the first copies arrive from the printers, the infelicities and gaucheries and mistakes leap at you from the page."

The above quotation appears in Volume 1 of the *Hong Kong Student Law Review*, written by Professor Peter Wesley-Smith, former Dean of our Faculty of Law. It is particularly illuminating to us at this stage, when editorial works in Volume 7 is nearly finished. Maintaining this law journal is never easy – there seems to be never-ending tasks to accomplish and ever-changing problems to cope with. Without the zeal and persistence of the whole Editorial Team, this edition would never be published. It is exactly determination and courage which enable the mission of the *Hong Kong Student Law Review* to be carried forward to the seventh year.

The reader may find the coverage in this volume very comprehensive. In this edition, we have articles touching on daily life issues such as surveillance in the workplace and sado-masochistic behaviours in Hong Kong. Directed to local legislations, we have submissions commenting on the *Public Order Ordinance*, the proposed *Prevention of Child Pornography Bill* as well as the *Basic Law* provisions governing private members' bill. More theoretical discussions on freedom of expression and civil disobedience can also be found. Moreover, we continue our bilingual custom with one Chinese short essay commenting on the Chinese version of the *Occupiers' Liability Ordinance*. Finally, we feel privileged to receive one submission on the possible liability of ISPs for defamation through the Internet. It was specially dedicated to the *Student Law Review*, and the author's enthusiasm and devotion are greatly appreciated.

This year we introduce a new practice of inviting students to submit commentaries on current legal issues and important cases. It is intended to be a channel for students to express their sophisticated opinions and criticisms, at the same time making the *Student Law Review* more responsive to current issues. Our vision is to entrench a custom amongst students to advocate and defend their views on areas of law that they find controversial. It is particularly encouraging to have two case commentaries in Volume 7, and we truly hope that our vision will become true in the future.

Works in this volume are divided into three categories: "Articles" are lengthy and serious writings which are original, mostly coming from dissertations of Guided Research. "Analyses" are shorter pieces of legal research, aimed at arousing debates on controversial legal issues that await to be settled. Finally, "Commentaries", as mentioned above, are comments and critiques on recent cases or legal issues.

One of our traditions is to invite the Chief Justice and the Secretary for Justice to write us a Foreword in consecutive years. Starting from this year, we decide to invite the Hong Kong Bar Association and the Law Society of Hong Kong as well. We are highly honoured to receive the encouraging Forewords from Mr Alan Leong SC, the Chairman of the Hong Kong

Bar Association and Mr Herbert Tsoi, the President of the Law Society of Hong Kong, which provide great momentum to us, as they stand as an important indication that besides the judiciary and the government, our efforts are further recognized by the legal profession. We take this opportunity to wish them every success within their term of offices.

Last but not least, our most heartfelt appreciation goes to the Faculty for their unfailing guidance and assistance to the Editorial Board throughout this year. We would like to thank Professor Albert Chen, Dean of the Faculty for his reflecting and inspiring Foreword. Our gratitude also extends to Ms Robyn Emerton, Professor Graham Greenleaf, Mr Michael Jackson, Miss Alice Lee, Mr Andrew Li, Professor Roda Mushkat, Dr Kevin Pun, Mr Philip Smart, Mr Benny Tai, and Mr Simon Young for their invaluable comments on the submissions. A final note of thanks must go to the Friends of the Faculty for their generous support, without which the publication of this edition would still be impossible.

We hope you will enjoy this latest edition.

PAUL CHAN
HESTER LEUNG
Editors-in-Chief

April 2002

THE DOCTRINE OF SUBSTANTIVE LEGITIMATE EXPECTATION
A COMMENTARY ON THE *NG SIU TUNG* CASE

HESTER WAI-SAN LEUNG*

I. Introduction

The Court of Final Appeal holding in *Ng Siu Tung v Director of Immigration*[1] (the "*Ng Siu Tung* case") is important in many aspects. It spelt out the amen for the episodes of right of abode saga, dating back to the controversial *Ng Ka Ling v Director of Immigration*[2] case, which instigated the Chief Executive to seek a re-interpretation of the *Basic Law* from the Standing Committee of the National People's Congress ("NPCSC")[3] and brought Hong Kong to a constitutional crisis. It is also a constitutional law case on the proper interpretation of art 158 of the *Basic Law*, adding another valuable precedent to Hong Kong's short constitutional history. However, it is in the field of administrative law that the case had demonstrated the greatest prominence and breakthrough – not only in the jurisprudence of Hong Kong but that of the Commonwealth – and it is also this aspect of the case that this article focuses on.

II. The Development of the Doctrine of Substantive Legitimate Expectation

What progress had our Court of Final Appeal ("CFA") brought about in the development of administrative law? As the law stands, the *Ng Siu Tung* case is the first authority approving *and* applying the doctrine of substantive legitimate expectation at the highest court level. But before going into the actual decision itself, it is revealing to examine the meaning of the doctrine and its evolution from pure procedural to the present substantive form.

A. The Meaning of Substantive Legitimate Expectation

Li CJ in the *Ng Siu Tung* case had succinctly summarized the doctrine in the following quote:

> "The doctrine recognizes that, in the absence of an overriding reason of law or policy excluding its operation, situations may arise in which persons may have a legitimate expectation of a substantive outcome or benefit, in which event failing to honour the expectation may, in particular circumstances, result in such unfairness to individuals as to amount to an abuse of power justifying intervention by the court."[4]

Hence, for the doctrine to operate so as to accord substantive benefits to claimants, the precondition is the existence of a "legitimate expectation".[5] Generally speaking, it may arise "as a result of a promise, representation, practice or policy made, adopted or announced by or

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* The author would like to thank Mr Andrew Li, barrister-at-law for his invaluable comments on the draft of this article.

1 *Ng Siu Tung v Director of Immigration* (2001) CFA, FACV Nos 1-3 of 2001.

2 *Ng Ka Ling and others v Director of Immigration* [1999] 1 HKLRD 315, CFA.

3 *The Interpretation by the Standing Committee of the National People's Congress of Articles 22(4) and 24(2)(3) of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China*, adopted by the Standing Committee of the Ninth National People's Congress at its Tenth Session on 26 June 1999.

4 *Supra* note 1, para 92.

5 Legitimate expectations are widely recognized in the domestic law of some European nations, notably Germany. See Cripps, Y, "Some Effects of European Law on English Administrative Law", (1994) 2 *Indiana Journal of Global Legal Studies* 213, p 222.

on behalf of government or a public authority"[6]. So where a public authority made a promise and subsequently reneged upon the promise, which results in such unfairness to individuals as to amount to an abuse of power, principles of good administration and fairness require the public authority to be held to its promise unless there are overriding public interests to the contrary.

B. Procedural Legitimate Expectation

Despite the embryonic stage that the doctrine of substantive legitimate expectation remains in, the principle of legitimate expectation giving rise to procedural benefits has a relatively longer history[7] and was firmly established.[8] It was developed to supplement the classic situation which gives rise to the application of the principles of natural justice – where some legal right, liberty or interest is affected. For even in the absence of such established legal right, liberty or interest, there are *other circumstances* where good administration requires public authorities to observe the principles of natural justice, of which *a legitimate expectation to be treated fairly* is one.[9] As Lord Bridge observed in *Re Westminister CC*:

> "The courts have developed a relatively novel doctrine in public law that a *duty of consultation* may arise from a legitimate expectation aroused either by a promise or by an established practice of consultation." [10]

It is worth noting that when an applicant claims for procedural benefits, ie an opportunity to be heard or consulted, on the basis of a legitimate expectation, the expectation can be divided into two types depending on the content of the promise, representation or practice that has been relied upon. The first situation is where the public authority made a promise that certain procedures would be complied with before arriving at a decision; in such a case, fairness requires the procedures promised to be followed. The second situation is where the public authority promised certain substantive benefits; in such a case, the *substantive* expectations are protected *procedurally* by providing the claimant an opportunity to be heard or consulted before his expectation is dashed.

C. Evolution to Substantive Legitimate Expectation

It is clear from the second situation mentioned in the preceding paragraph that there are occasions where *procedural* safeguards are not sufficient in protecting *substantive* expectations. As Bokhary PJ in the *Ng Siu Tung* case recognized, "after all, the legitimate expectation itself will always be substantive except where the representation itself is no more than that the person will be given an opportunity to be heard. And even then the ultimate objective would still be substantive. An opportunity to be heard is only a means of attaining that objective."[11] Hence, "it was only *natural* that the question would eventually arise as to whether the courts would order or allow protection of a substantive legitimate expectation."[12]

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6 *Supra* note 1, para 92.

7 The principle first emerged in Lord Denning MR's decision in *Schmidt v Secretary of State for Home Affairs* [1969] 2 Ch 149.

8 It was approved by the Privy Council in *AG v Ng Yuen Shiu* [1983] 2 AC 629. See also the discussion in Wade, H W R and Forsyth, C F, *Administrative Law* (Oxford: Oxford University Press, 2000), pp 494-500.

9 *Ibid,* Wade and Forsyth, p 494.

10 *Re Westminster CC* [1986] AC 668 at 692.

11 *Supra* note 1, para 337, *per* Bokhary PJ.

12 *Supra* note 1, para 89, *per* Li CJ.

At first, the issue was controversial;[13] but since *R v North and East Devon Health Authority, Ex parte Coughlan*[14] ("*Coughlan*"), there existed a consistent line of authorities by the Court of Appeal which approved and further developed the doctrine, and was approved by the CFA in the *Ng Siu Tung* case.[15]

Before *Coughlan*, support of the existence of the doctrine can clearly be found in a line of tax authorities.[16] The House of Lords' decision in *R v IRC, ex parte Preston*[17] was the authority that frustrating a legitimate expectation can amount to an abuse of power. There, the Revenue made a promise to the applicant that it would not further inquire on certain tax affairs if it agreed to forgo interest relief and to pay a certain sum in capital gains tax. The House of Lords held that the Revenue could not renege upon its promise because to do so would be unfair to the applicant as to amount to an abuse of power:

> " [T]he taxpayer is entitled to relief by way of judicial review for *'unfairness' amounting to abuse of power* if the commissioners have been guilty of conduct equivalent to a breach of contract or breach of representation on their part (emphasis added)."[18]

However, whether the doctrine existed in branches of administrative law other than revenue cases had been doubted. The problem, as recognized in *Coughlan*, is that "while *Preston* has been followed in tax cases, using the vocabulary of abuse of power, in other fields of public law analogous challenges, couched in the language of legitimate expectation, have not all been approached in the same way."[19] The most notable example of authorities that went the other way is *R v Home Secretary, ex parte Hargreaves*[20], where the Home Secretary changed the policy of allowing prisoners home leave due to concerns over crimes committed by them during leave. The Court of Appeal condemned the doctrine as "heresy" and "wrong in principle"[21], and limited the standard of review to *Wednesbury* unreasonableness. Central to the reasons for those cases that refused a wider ground of substantive review was the principle that the government or public authority should have freedom to change its policy and the court should not trammel executive policy-making.

Coughlan is the watershed in the development of the doctrine. It concerned the decision of the Health Authority to close down Mardon House, a National Health Service ("NHS") facility designed to house long-term, severely disabled person in which the applicant resided. Before the applicant and a few other patients moved into Mardon House, they resided in the Newcourt Hospital. It was on the strength of the express assurance by the Health Authority – they could live there for "as long as they chose" – that the applicant and the others agreed to move into Mardon House. Subsequently, the Authority decided to close the House down after a process of consultation. The applicant challenged the decision by way of judicial review. The Court of Appeal held that the Authority had created in the applicant a legitimate expectation of having a home for life in Mardon House and to frustrate it would be unfair. The

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13 For a detailed account of the conflicting decisions, see Craig, P and Schonberg, S, "Substantive Legitimate Expectations after *Coughlan*" [2000] *Public Law* 684.

14 *R v North and East Devon Health Authority, Ex parte Coughlan* [1999] LGR 703, CA.

15 *Supra* note 1, para 90.

16 For example, *R v Inland Revenue Commissioners, Ex parte Preston* [1985] AC 835, HL; *R v Inland Revenue Commissioners, Ex p MFK Underwriting Agencies Ltd* [1990] 1 WLR 1545; *R v Inland Revenue Commissioners, Ex parte Unilever Plc* [1996] STC 681. See article, *supra* note 13, p 685.

17 *R v IRC, ex parte Preston* [1985] AC 835, [1985] 2 All ER 327, HL.

18 *Ibid* at pp 866-867.

19 *Supra* note 14, para 61.

20 *R v Home Secretary, ex parte Hargreaves* [1997] 1 WLR 906, CA.

21 *Ibid* at 921.

burden of proving overriding public interests to justify the breach lay on the Authority, which had failed to weigh the interests correctly. In drawing the balance of conflicting interests, "the court will not only accept the policy change without demur but will pay the closest attention to the assessment made by the public body itself."[22]

Coughlan was considered by *R v Secretary State for Education and Employment, Ex parte Begbie*[23]. The case concerned a change in education policy after the Labour Party came to power in May 1997. The applicant, then aged nine, was offered a place at an independent school which educated people up to the age of 18 under a state-funded assisted places scheme. In its election platform, the opposition party announced its plan to dismantle the scheme but gave undertakings that existing assisted students would not be affected. Following its return to office, the new government passed the *Education (Schools) Act 1997* which provided that existing assisted students receiving primary education were to continue to be funded only until the primary stage was completed, save where the Secretary of State could exercise discretion to extend the period in individual cases. The applicant sought an order of certiorari to quash the Secretary of State's decision on the grounds that the undertakings had created a legitimate expectation that she would enjoy the benefits of the scheme until the completion of her education at that school (ie until the age of 18), and breach of those undertakings was unfair and unreasonable. The Court of Appeal affirmed the decision in *Coughlan* but refused to apply the doctrine to the facts of that case because to give effect to the legitimate expectation would require the public authority to exercise its discretion in a way which undermined the statutory purpose, and was in effect providing assisted places to all those pupils whose assisted places were not saved by the statute itself. This indeed is always the limit that the court will be prepared to go in enforcing a substantive legitimate expectation. Moreover, the Court of Appeal pointed out that the Labour Party was not yet in power when the statements were made, it followed that the undertakings did not arise from a public authority so as to fall within the ambit of judicial review, and "when a party elected into office fails to keep its elected promises, the consequences should be political and not legal"[24].

The next case that came before the Court of Appeal was *R (on the application of Zeqiri) v Secretary of State for the Home Department*[25]. It is a case that worth indepth discussion, not only because of the striking similarity between its facts and that of *Ng Siu Tung*'s, but the interesting result that the House of Lords had reached a contrary conclusion (which would be discussed later in Part V). The background of the case was the outbreak of violence between the Serbs and Albanians leading to Yugoslavia's invasion of Kosovo in 1998-99. During that period, many Albanian Kosovars fled the territory to claim asylum as a refugee in other European countries. Both the United Kingdom and Germany were parties to the *Dublin Convention 1990* which determines the state responsible for examining applications for asylum lodged in one of the member states, the basic principle being that the first member state that receives the alien has responsibility for examining the alien's application for asylum. The applicant, who had first claimed asylum in Germany before arriving in the U.K., was directed to be returned to Germany for substantive determination by the Secretary of State. He applied for judicial review to challenge the decision. His application, like 114 similar cases, were stayed pending the progress of a test case, *R v Secretary of State for the Home*

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22 *Supra* note 14, para 89.

23 *R v Secretary State for Education and Employment, Ex parte Begbie* [2000] 1 WLR 1115, CA.

24 *Ibid* at 1126D.

25 *R (on the application of Zeqiri) v Secretary of State for the Home Department* [2001] EWCA Civ 342, CA.

Department, Ex parte Besnik Gashi[26], which was decided in favour of the asylum seeker by the Court of Appeal. The Secretary of State obtained leave to appeal to the House of Lords, but due to changing circumstances, he withdrew the appeal a year later and reissued a certificate to remove the applicant from the U.K.. The applicant applied for judicial review challenging the new decision on a few grounds, *inter alia*, that *by treating Besnik Gashi as a test case*, the Secretary of State led him legitimately to expect that he would not be removed to Germany if *Besnik Gashi's* application succeeded. This was also *reinforced by the conduct of the Secretary of State in pursuing, up until October 2000, an appeal to the House of Lords.* The Court of Appeal upheld the legitimate expectation of the applicant and ordered that the substantive entitlement to be determined in the U.K.. The decision was remarkable in two aspects. Firstly, it agreed with *Coughlan* that the distinction between procedural and substantive legitimate expectation is blurred. In the case, the applicant was arguing for an opportunity to have his asylum application determined in the U.K. which was in the immediate sense a procedural question, "but it may well be that applicants considered that there were benefits of substance in remaining to have it determined in England rather than being removed to Germany"[27]. The impracticality to distinguish between the two reinforces the view mentioned earlier that the movement from procedural to substantive legitimate expectation is an inevitable and irreversible trend. Secondly, the court considered that there were two approaches to the standard of review: the approach of considering whether there were any public interests outweighing the unfairness of frustrating the legitimate expectation as recognized in *Coughlan*, and the conventional *Wednesbury* unreasonableness approach. It did not, however, come to a conclusion as to which test should be adopted, and held that the result would be the same no matter which approach was taken. It also pointed out that in the instant case, where human rights were in play, a rigorous examination of the decision was required.

The latest decision as it stood immediately before the *Ng Siu Tung* case was *R (Bibi) v Newham London Borough Council; R (Al-Nashed) v Newham London Borough Council*[28] ("*Bibi*") . The applicants and their families were refugees accepted by the local council as unintentionally homeless and in priority need. The council provided temporary accommodation to the applicants, erroneously believing that it had the duty to do so, and promised to provide them legally secure accommodation within 18 months. Later, the council did not honour its promise after the House of Lords' ruling that it did not had the duty to prioritise the applicants, and the applicants challenged the inaction of the council by way of judicial review. The trial judge held that the applicants had a legitimate expectation and granted a declaration that the council was bound to provide the applicants with such legally secured accommodation as promised. On appeal to the Court of Appeal, it affirmed the trial judge's decision with respect to the existence of a legitimate expectation. However, the Court disagreed with the remedy that the trial judge granted. It did not take the substantive decision itself but remit the matter to the council to decide afresh, coupled with a declaration that the council had a *duty* to take the legitimate expectation into account. This decision created a new remedy in enforcing a substantive legitimate expectation, which was later adopted in *Ng Siu Tung.*

Despite the emergence of a consistent line of Court of Appeal decisions upholding the doctrine of substantive legitimate expectation, the doctrine had not yet been examined by the

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26 *R v Secretary of State for the Home Department, Ex parte Besnik Gashi* [1999] INLR 276, CA.

27 *Supra* note 25, para 60.

28 *R (Bibi) v Newham London Borough Council; R (Al-Nashed) v Newham London Borough Council* [2001] EWCA Civ 607, [2002] 1 WLR 237, CA.

House of Lords as of the date of *Ng Siu Tung* case. References to the doctrine, however, were made in *R v Secretary of State for the Home Department, Ex parte Hindley*[29] where Lord Hobhouse described Lord Woolf's judgment in *Coughlan* as "valuable"[30]. These recent authorities paved way for the *Ng Siu Tung* decision.

III. The Ng Siu Tung *Case – Outline of the Facts and Decision*

The facts of the *Ng Siu Tung* case was rather complicated. It all began with the CFA judgment in the *Ng Ka Ling* case and *Chan Kam Nga v Director of Immigration*[31], which involved the interpretation of art 22(4) and art 24(2)(3) of the *Basic Law*. To put the long story short, the *Ng Ka Ling* case decided that children born outside Hong Kong by Chinese nationals who were residents of the HKSAR enjoyed rights of abode without the need to hold a one way permit as required by *Immigration (Amendment) (No 3) Ordinance 1997*. The *Chan Kam Nga* case decided that Chinese nationals born on the Mainland even before one parent had become permanent residents could enjoy rights of abode. The decisions were later overturned by the NPCSC which issued a freestanding reinterpretation on the relevant provisions, with the effect that those who would have been entitled to enjoy rights of abode and stay in Hong Kong under the *Ng Ka Ling* and *Chan Kam Nga* judgments had to return to China. Article 158 of the *Basic Law* states that an interpretation by the NPCSC shall not affect "judgment previously rendered". Over 5000 people, who shared similar positions to the parties in the *Ng Ka Ling* or *Chan Kam Nga* cases, applied for judicial review on various grounds. It was held by the majority, Bokhary PJ dissenting, that "judgment previously rendered" only refers to actual parties to the litigation and would not avail the applicants who were not. Then the doctrine of substantive legitimate expectation was also relied on. It was contended that as a result of the public statements and representations made by various government officials to the applicants and the manner in which the *Ng Ka Ling* and *Chan Kam Nga* litigations were conducted, the applicants had a legitimate expectation, to which effect should be given, such that they would receive the same treatment as the parties in those two cases.

The panel of judges[32], led by Li CJ, agreed unanimously that the doctrine of substantive legitimate expectation "forms part of the administrative law of Hong Kong"[33] and "occupies an important place in the armamentarium of a public law system like ours"[34]. Affirming the recent line of English Court of Appeal authorities mentioned earlier, the CFA summarized the law in the following points:

1. The law requires that a legitimate expectation arising from a promise or representation be properly taken into account in the decision-making process so long as to do so falls within the power, statutory or otherwise, of the decision-maker.[35]
2. Unless there are reasons recognized by law for not giving effect to legitimate expectations, effect should be given to them. If effect is not given to the expectation, fairness requires reasons to be given expressly by the decision-maker

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29 *R v Secretary of State for the Home Department, Ex parte Hindley* [2001] 1 AC 410, HL.
30 *Ibid* at 419 and 421.
31 *Chan Kam Nga v Director of Immigration* (1999) 2 HKCFAR 82, CFA.
32 The panel of judges included Li CJ, Bokhary PJ, Chan PJ, Ribeiro PJ, Sir Anthony Mason NPJ.
33 *Supra* note 1, para 91.
34 *Supra* note 1, para 337, *per* Bokhary PJ.
35 *Supra* note 1, para 94.

so that the court can test them in the event that the decision is challenged.[36]

3. Even if the decision involves the making of a political choice by reference to policy considerations, the decision-maker *must* make the choice in the light of the legitimate expectation of the parties.[37]
4. Failure of the decision-maker to take into account a legitimate expectation constitutes an abuse of power such that the court can properly call upon the decision-maker to exercise his discretion by taking the legitimate expectation into account, unless the court is satisfied that the failure has not affected the decision.[38]

The majority (with Bokhary PJ came to a separate view) then applied these principles to the general and specific representations that were relied on, which were held to be capable of generating legitimate expectations, being the following three categories:[39]

1. Three general statements made by the Chief Executive together with another one made by the Director of Immigration to the public that the government recognized the consequences flowing from the test case character of the two cases.
2. Specific representations in the Legal Aid *pro forma* replies sent to individual applicants for legal aid which reassured them of the government stance and stated that it was unnecessary to commence further proceedings or join in proceedings.
3. A reply from the Secretary for Security to an applicant containing a clear representation that the Department of Immigration "will follow the final judgment of the Courts in dealing with applications for certificate of entitlement".

The majority concluded that all three categories of representation were capable of producing legitimate expectations, being expectations that are reasonable[40], clear and unambiguous[41]. The legitimate expectation was that the applicants would be treated as if they were litigants in the *Ng Ka Ling* and *Chan Kam Nga* cases. Although their expectations were unlawful in light of the reinterpretation by the NPCSC, the majority held that the Director of Immigration (Director) could satisfy them to some extent by exercising his discretions to allow the applicants to enter and reside in Hong Kong, which is not contrary to law. In exercising his discretions, the Director had a *duty* to take the legitimate expectation into account. However, he would not be bound to exercise his discretions in such a way as to undermine the statutory scheme as a whole, and hence it must follow that he could not exercise his discretions, being exceptional powers, in favour of all the representees in category one - an innominate class which may consist of more than 600,000 members. But the situation is different for representees in categories two and three, which constituted a discrete and ascertainable class. The Director's contention that the decision would not have been materially affected even if the expectation were taken into account was rejected, as the burden of proving such an inevitable outcome lay on him, who had failed to do so. The Court therefore quashed the removal orders with respect to applicants in categories two and three and declared that the

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36 *Supra* note 1, para 95.

37 *Supra* note 1, para 96.

38 *Supra* note 1, para 97.

39 The Court ruled out some general statements made by the Chief Executive and the Director of Immigration before, during and after the delivery of the *Ng Ka Ling* and *Chan Kam Nga* judgments which "said nothing more than any responsible government would say, namely, it respects the rule of law" (para 92) and specific representations made in the standard reply sent by the Immigration Department to applicants for the right of abode which "did no more than state that, as the litigation was ongoing, decisions on applications for right of abode could not be made for the time being." (para 85).

40 *Supra* note 1, para 101.

41 *Supra* note 1, para 103.

Director ought to exercise his discretionary powers in their favour so as to allow them to reside in Hong Kong, giving *substantial weight* to the legitimate expectations.

IV. A Closer Examination of the Decision

The decision itself is significant in many aspects and raises interesting issues which warrant further deliberations. I have chosen four issues to discuss below, namely, the rationale behind the doctrine, the remedy, the standard of review and the question of whether general representations will ever succeed in legitimate expectation challenges.

A. The Rationale behind the Doctrine of Substantive Legitimate Expectation

In order to understand the scope of the doctrine, it is necessary to look into its rationale and justifications. Taking cognisance of the doctrine in Hong Kong, the CFA found its roots in the notion of abuse of power:

> "the doctrine is an important element in the exercise of the court's inherent supervisory jurisdiction to ensure, first, that statutory powers are exercised *lawfully* and are *not abused* and, secondly, that they are exercised so as to result in *administrative fairness in relation to both procedural and substantive benefits* (emphasis added)."[42]

> "The essential function of the doctrine commonly called 'the doctrine of legitimate expectation' is to give judicial relief against abuse of executive power. If one were to name this doctrine after its raison d'être, it could be called 'the doctrine against abuse of power'."[43]

Yet, abuse of power itself is a vague concept. As Lord Woolf, MR commented in *Coughlan*, "abuse of power can be said to be but another name for acting contrary to law"[44]. In the ordinary case, it may well be difficult to see why a decision of the executive to strive for a policy goal should be impeded as an abuse of power provided that it is legal, rational and reached by a lawful process. Hence the conventional approach demands a decision to be impeached substantively only when it is *Wednesbury* unreasonable. But in the case of legitimate expectation, the situation becomes apparently different. As pointed out in *Coughlan*, it involves not *one* but *two* lawful exercises of power by the same public authority, with consequences for individuals trapped between the two.[45] The abuse of power arises only when one considers the impact of the latter decision in light of the earlier one. It is this fundamental aspect that generates space for the development of the doctrine and justifies the court to step into the substantive province of an administrative decision.

Fairness is another principle that is commonly used by judges in justifying the doctrine. Being yet another broad and indistinct concept, it is actually the other side of the same coin.[46] Fairness often depends on the circumstances of the case; and where the breach of the promise by the public authority causes substantial unfairness to an individual without sufficient justification, it becomes an abuse of power.

A counter-concern that springs from our constitutional and statutory framework and the separation of power is that the government or public authority must remain free to change its

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42 *Supra* note 1, para 91.
43 *Supra* note 1, para 330.
44 *Supra* note 15, para 76.
45 *Supra* note 15, para 66.
46 *Supra* note 15, para 71, Lord Woolf referred to fairness as "a second approach to the same problem".

policy in the light of public interests. This concern is indeed the underlying reason why substantive legitimate expectation was refused in the past. But the CFA is now willing to accept, quite rightly, that "the adoption of a new policy does not relieve a decision-maker from his duty to take account of a legitimate expectation"[47]. The court's task is to balance the executive's continuing need to initiate and respond to change with the legitimate expectations of citizens who have relied, and have been justified in relying, on a current policy or promise.

B. Remedies Available to Satisfy a Legitimate Expectation

Where the executive has breached a substantive promise or changed its policy, the ultimate question is what role the court should take. In *Coughlan*, the Court of Appeal identified three possible outcomes:[48]

1. The court may decide that the public authority is only required to *bear in mind* its previous policy or other representation, giving it the weight *it thinks right*, but no more, before deciding whether to change course. This means the court is confined to review the decision on *Wednesbury* grounds.
2. The court may decide that the applicant shall be given an opportunity to be heard or consulted before the decision is made. This means the legitimate expectation is protected *procedurally*.
3. The court may decide that to *directly enforce the substantive benefits* legitimately expected.

However, in *Ng Siu Tung*, a fourth outcome, which emerged from the case of *Bibi*, was adopted. The court, in quashing the removal orders against categories two and three applicants, remitted the cases back to the Immigration Department for fresh decision, declaring that the Director was *obliged* to consider whether, in light of the legitimate expectations, he ought to exercise his discretionary powers in favour of the applicants so as to allow them to reside in Hong Kong.

It is not surprising that *Ng Siu Tung* took a course different to that in *Coughlan*,[49] because in *Coughlan*, the Housing Authority had already taken into account the legitimate expectation in reaching its decision while in *Ng Siu Tung*, the Director had not. This new course is significant because the court could avoid taking the decisions in its own hands and left them to the decision-maker, which is in conformity with the doctrine of the separation of powers and the legislative intent. At first glance, it seems no greater difference than the *Wednesbury* grounds, requiring the decision-maker to bear in mind the relevant legitimate expectations before making the decision. However, a closer examination will reveal a *critical difference*: in the *Wednesbury* case, the decision-maker remains free to accord the legitimate expectation *the weight it thinks right*; but in *Ng Siu Tung*, the decision-maker is *obliged* to give *substantial weight* to the legitimate expectation. The decision of the Director might well pass the *Wednesbury* test because when exercising his discretions in the ordinary course of duty, he necessarily has a range of factors to bear in mind. As counsel on behalf of the Director had argued, "all such factors, like humanitarian grounds, are matters to which he can have regard,

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47 *Supra* note 1, para 93.

48 *Supra* note 15, para 57.

49 Of course the Court could not directly grant the applicants a right of abode as it was already held to be unlawful, but the Court still had the alternative of exercising the relevant discretion itself, as had been done by the trial judge in *Bibi*.

if he so chooses, but he is not bound to take them into account"[50], and the *Wednesbury* test will be passed insofar the decision is not one which is so unreasonable that no reasonable public authority would have come to. The court rejected the argument and commented:

> "if the circumstances are such as to raise a legitimate expectation, *the common law itself imposes a duty* on the decision-maker, grounds in the principle of good administration and the duty to act fairly, to take that legitimate expectation into account ... (emphasis given)."[51]

In effect, the fourth remedy may achieve an outcome very close to direct enforcement because the burden now lies on the Director to justify his failure to honour the legitimate expectation. The court was also unwilling to accept the Director's contention that even if the expectations were taken into account, it would not have materially affected the decision, which shows how high a standard the court had set to allow a frustration of legitimate expectations generated by public authorities.

C. Standard of Review

The standard of review is the test by which the court judges whether the substance of an executive decision calls for judicial intervention. In other words, taking into account the legitimate expectation, *when* will the court hold that an executive decision is an abuse of power and hence unlawful? As the Director in the *Ng Siu Tung* case had *never taken into account* the legitimate expectations, such failure is clearly an abuse of power. What remains unclear is when the decision-maker *has taken into account* the legitimate expectations but takes a course that frustrates them - can the court nevertheless uphold them? If so, under what circumstances? The majority, quite understandably, was silent on this. Bokhary PJ, on the other hand, mentioned five options:[52]

1. reviewing abuse of power in and of itself;
2. reviewing traditional *Wendesbury* unreasonableness suggested by Lord Greene MR in *Associated Provincial Picture Houses Ltd v Wednesbury Corp.*[53] that whether a decision is "so unreasonable that no reasonable authority could ever have come to it"[54];
3. reviewing *Wednesbury* unreasonableness as reformulated by Lord Cooke of Thorndon in *R v Chief Constable of Sussex, ex parte International Trader's Ferry Ltd*[55] that "whether the decision in question was one which a reasonable authority could reach"[56];
4. reviewing disproportionality; or
5. reviewing imbalance between fairness to the person having a legitimate expectation and the overriding interests relied upon by the executive to justify disappointing that expectation.

Bokhary PJ noted that because of the important role the doctrine of legitimate expectation plays in the preservation of the rule of law, the standard of review in these cases must be *intense*; which is particularly so where an entrenched constitutional right like the right of

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50 *Supra* note 1 at para 129.
51 *Supra* note 1 at para 129.
52 These options were initially raised in the article by Craig and Schonberg, *supra* note 13.
53 *Associated Provincial Picture Houses Ltd v Wednesbury Corp.* [1948] 1 KB 223.
54 *Ibid* at 230.
55 *R v Chief Constable of Sussex, ex parte International Trader's Ferry Ltd* [1999] 2 AC 418.
56 *Ibid* at 452.

abode is involved. Referring to *R (Daly) v Secretary of State for the Home Department*[57] where the proportionality test (option four) was adopted, he indicated his inclination to adopt this test in the *Ng Siu Tung* case.

I would argue that the *Wednesbury* unreasonableness test (option two) or its modified version (option three) should not be adopted as the standard of review because as explained above, legitimate expectation cases involves two lawful exercises of power which the *Wednesbury* test did not cater for. The proportionality test[58] might not be desirable as a *universal* standard of review for legitimate expectation cases because not every administrative case involves an endangered constitutional right. The strict proportionality test tilts its balance too much in favour of the applicant that may excessively impede executive freedom to change policies. The standard of review shall be flexible and indeed a sliding scale depending on a variety of factors, including the nature of the legitimate interests, the circumstances under which the representations are made, the unfairness of the outcome to the individual, the overriding public interests which justify the frustration of a legitimate expectation. Thus, it is submitted that the test applied in *Coughlan*, ie reviewing the imbalance between *fairness* to the person having a legitimate expectation and the *overriding interests* relied upon by the executive to justify the disappointment of that expectation, should be adopted. The court will look at the circumstances of each case when engaging in the balancing exercise. Of course, when human rights or entrenched constitutional rights are involved or promised, the deprivation of these rights will be intrinsically and substantially unfair. The court will require overwhelming public interests to justify their deprivation.

In this connexion, it should be stressed that detrimental reliance or a change of position shall not be viewed as a necessary requirement[59] – the mere breach of a promise or departure from established policy without *any or adequate* justifications is of itself unfair. It is because the rule of law requires laws and those acts deriving their authority from law to be predictable and certain.[60] Moreover, the emotional disappointment that one suffers from the frustration of a legitimate expectation is itself a detriment. Having said that, although the lack of detrimental reliance does not theoretically pose a problem, it will, in practice, play a significant role in the balancing exercise. Nowadays, executive authorities seldom renege upon a promise or change its policy without rational considerations; the court has to be convinced that the unfairness to an individual must be such as to amount to an abuse of power. The *Begbie* case illustrates this point.[61]

It is observed that the majority in *Ng Siu Tung* had in effect endorsed this standard of review although not mentioned expressly. They couched the doctrine in terms of "abuse of power",

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57 *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532.

58 Jowell, J, "Beyond the Rule of Law: Towards Constitutional Judicial Review" [2000] *Public Law* 671: the author discussed about the proportionality test as a sophisticated four-stage process which involves the following four questions:
(1) Did the action pursue a legitimate aim?
(2) Were the means employed suitable to achieve that aim?
(3) Could the aim have been achieved by a less restrictive alternative?
(4) Is the derogation justified overall in the interests of a democratic society?

59 In *Ng Siu Tung*, the CFA found it unnecessary to decide the issue, *supra* note 1, para 109; in *Bibi*, the English Court of Appeal ruled that reliance needs not be present, *supra* note 28, para 31.

60 *Supra* note 13, pp 696-697.

61 Peter Gibson LJ held that he could not accept the mere fact that a clear and unequivocal statement was made giving rise to a legitimate expectation would prevent the statement to be reneged upon. However, he was prepared to hold the public authority to its statement where the applicant had acted in reliance upon the statement to his detriment.

"unfairness" and "overriding reason of law or policy excluding its operation".[62] In articulating its reasons not to fulfil the legitimate expectation of category one applicants, it commented that "their expectation, arising as it does only from general statements made by or on behalf of the government, is overridden by the overwhelming force of the immigration policy which underlies the legislation validated by the Interpretation"[63]. In rejecting the argument on behalf of the Director that even if the expectation of categories two and three applicants were taken into account, it would not have materially affected the decision, it held on the one hand that the Director failed to establish an overwhelming public interests; and on the other hand, "the departure from the applicants' expectation based on the specific representations involved a very substantial degree of unfairness"[64]. The balancing exercise pervaded through the whole judgment.

D. Will General Representations ever Succeed in Legitimate Expectation Challenges?

The CFA ruling with respect to category one applicants raised a very interesting question: will general representations ever succeed in legitimate expectation challenges? In *Coughlan*, the fact that the promise was limited to a few individuals was relied on by the Court of Appeal as a reason in upholding it. In *Begbie*, a test case where there were between 1200 and 1500 sharing similar circumstances to those of the applicant, the Court of Appeal refused to hold the Labour Party to its platform promise. In *Ng Siu Tung*, where the potential claimants based on category one representation was estimated to be more than 600,000, the CFA again refused to enforce the legitimate expectations of that class. General representations have three characteristics: (1) it is directed to an *innominate* class of persons; (2) it is often addressed to and received by *a large number* of representees; (3) some of the representees might not even have knowledge about the representation before their claims. In such situations, the court often comes to a dilemma: on the one hand, principles of fairness and good administration require the public authority to be held to its promise, on the other hand, the large class of representees and their indistinguishable situations from one and other mean that giving effect to the legitimate expectation of one is equivalent to giving effect to all, with the consequence that the public authority is crippled from changing its policy or the carrying out of its statutory duties is substantially undermined. This is what I believe the reason why the court developed another exception to the principle of legitimate expectation – the court will not enforce a legitimate expectation substantively where it requires the public authority to exercise its statutory powers in such a way as to undermine the statutory scheme as a whole. Hence, it may well be the case that the chance of succeeding in a legitimate expectation challenge based on general representations is very rare if there consists a large class of similar representees *and* the applicant fails to distinguish itself from the others.

V. The Zeqiri *Case – a Comparison*

Approximately two weeks after the delivery of the *Ng Siu Tung* judgment, the House of Lords handed down the judgment of the *Zeqiri*[65] case. As have been highlighted above, the facts of the two cases were very similar. Both involved ultimately the right of the applicants to stay in the country. Both involved legitimate expectations arising from a previous "test case". In both cases, there were intervening circumstances that barred the applicants from enjoying original

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62 See for example para 92 of the judgment, *supra* note 1.

63 *Supra* note 1, para 136.

64 *Supra* note 1, para 141.

65 *R v Secretary of State for the Home Department, Ex parte Zeqiri (FC)* [2002] UKHL 3, HL

benefits of the judgments, although the actual litigants to the test cases were saved. The English Court of Appeal decision in *Zeqiri* enforced the legitimate expectation and the principle enunciated in that case was approved by the CFA in Hong Kong. However, the House of Lords reversed the Court of Appeal decision. So, are the decisions conflicting? Can they reconcile with each other?

My view is that the two decisions are reconcilable. The first point to note is that the House of Lords approved the doctrine of substantive legitimate expectation based upon the notion of abuse of power. Referring to its earlier decision in the *Preston* case, it said:

> "It is *well established* that conduct by an officer of state equivalent to a breach of contract or breach of representation may be an abuse of power for which judicial review is the appropriate remedy: see Lord Templeman in *R v IRC, Ex p Preston* ... This particular form of the more general concept of abuse of power has been characterized as the denial of a legitimate expectation ... The question is not whether it would have founded an estoppel in private law but the broader question of whether ... a public authority acting contrary to the representation would be acting 'with conspicuous unfairness' and in that sense abusing its power."

Hence, the House of Lords differed from the Court of Appeal not in terms of the legal principle, but their conclusion as to the facts.

The second point to note is that although the facts of *Zeqiri* and *Ng Siu Tung* were similar, they were not indistinguishable from each other. Unlike the *Ng Siu Tung* case, there were never any express representations directed to the applicants. What was relied upon was an implied representation that was alleged to have arisen out of the *conduct of adversarial litigation* and the *nature of test case* made to the applicants' legal representatives. Moreover, the test case was only up to the stage of the Court of Appeal and leave for appeal to the House of Lords had been obtained. The Secretary of State, in replying to the inquiries concerning the effect of the test case, indicated not merely that he was contemplating an appeal but also he wished to obtain legal advice on the effect of the judgment. Therefore, the House of Lords is well justified to conclude that there was no conduct which amounted to a sufficiently clear representation that the public authority would abide by whatever the test case decided. Indeed, Bokhary PJ in his judgment had identified how the *Ng Siu Tung* case was much stronger: the *Ng Ka Ling* and *Chan Kam Nga* litigation was more than public law test case litigation but constitutional litigation about entrenched right.[66]

VI. Conclusion

The doctrine of legitimate expectation is a powerful concept and may open up challenges in different aspects of public law. It is now sufficiently clear that the CFA of Hong Kong and subsequently the House of Lords of the U.K. had endorsed this doctrine, although the limit to its role is yet to be determined. The landmark decision of *Ng Siu Tung* shall be celebrated in this aspect, as it will certainly play a significant role in enhancing our rule of law and the quality of public administration in Hong Kong.

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66 *Supra* note 1, para 381.

INTERNET PUBLISHERS LEFT TO THE MERCIES OF COURTS

A CASE COMMENTARY ON *GUTNICK V DOW JONES & CO INC*

HARRY HAK-WING LIU

I. Introduction

Cyber-defamation has its idiosyncratic features which present idiosyncratic difficulties. Firstly, the Internet is "extraspacial" but the law as it stands requires us to locate where specific acts have been done. Secondly, the "borderless" feature of the Internet substantially increases interactions, and potentially conflicts, of various jurisdictions within the reach of the Internet. Thirdly, policy considerations underlying the defamation laws cannot be ignored: the distinction between utilization and abuse of the freedom of expression is a delicate one. A recent example illustrating the court's approach to these problems is *Gutnick v Dow Jones & Co Inc*[1] (the "*Gutnick* case") which was decided by the Supreme Court of Victoria.

The *Gutnick* case involves important issues in the law of defamation, but this article will focus on those issues in private international law only. In order to have a profound understanding of the significance of this case and to come to a sensible conclusion, its facts as well as the issues of jurisdiction and *forum non conveniens* will be looked at before a review and evaluation of the court's rulings is engaged.

II. What Happened?

The defendant was the publisher of an international financial magazine. The plaintiff (Mr Gutnick) was a prominent Victorian businessman with connections to various countries. The plaintiff sued for libel in respect of part of an article published (in "Forbes" Magazine) by the defendant (Dow Jones & Co Inc). Only a relatively small number of printed copies of that article were circulated in Australia, but there was a subscriber Website of which at least 1700 of the subscribers paid by way of credit cards from Australia. The plaintiff brought the proceeding in the State of Victoria and two issues arose: (i) whether the Victorian Court had jurisdiction to hear the trial; (ii) whether Victoria was the most convenient forum.

III. Jurisdiction and Forum Non Conveniens *– a Brief Introduction*

Private international law (or "conflict of laws") comes into operation whenever the court is faced with a claim that contains a foreign element.[2] In international disputes, the very first question bound to come up is usually "which court can try it?". Here, "jurisdiction" is used in the widest sense to refer to the question of whether a court has power to try a case.

Even a court has that power, it can nonetheless refuse to exercise it and stay the proceedings.[3] This is where the doctrine of "*forum non conveniens*" comes into play, which simply means that the court should decline to exercise jurisdiction when it is not the most appropriate forum

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1 *Gutnick v Dow Jones & Co Inc* [2001] VSC 305.

2 Sir North, P and Fawcett, J J, *Cheshire and North's Private International Law* (London: Butterworths, 1999), p 3.

3 *Ibid*, p 333.

in the interests of the parties and the ends of justice.[4] The following parts will focus on these two issues.

IV. Jurisdiction

To provide the readers with a general picture, some cardinal principles on defamation are set out below: (1) to constitute defamation the defamatory materials must have been "published" to a third party; (2) publication takes place where and when the words are heard or read;[5] (3) each communication (words being heard or read) is a separate libel;[6] (4) in order to establish jurisdiction a tort committed in the jurisdiction must be a real and substantial one.[7]

Turning to the issue of jurisdiction, order 7 of the *Supreme Court Rules* reads:

> "Part I – When Service Out is Allowed
> 7.01 *For what claims* (1) Originating process may be served out of Australia *without order of the court* where –
> . . .
> (i) the proceeding is founded on a tort committed within Victoria;
> (j) the proceeding is brought in respect of damage suffered wholly or partly in Victoria caused by a tortious act or omission *wherever occurring*;"
> (*emphasis added*)

Order 7 differs in two aspects from Order 11 of the *Rules of High Court* in Hong Kong: (1) service out of jurisdiction usually requires leave of the court under the latter but not the former;[8] (2) the damage must be sustained, or resulted from an act *committed within the jurisdiction* under the Hong Kong rules[9] but not the Victorian rules.

Regarding (2), however, the place of tort is still highly relevant, for firstly, the plaintiff in that case relied on both 7.01(i) and 7.01(j); secondly, the place of tort is also a weighty factor in considering the issue of *forum non conveniens*.

In respect of the jurisdiction issue, Hedigan J upheld the court's jurisdiction to try the case. The chief ground was that the defendants' acts constituted an actionable tort in the State of Victoria. It was said that *for the purposes of the law of defamation, the place of tort is the place of publication. Publication takes place where and when the contents of the publication are made manifest to and comprehended by the audience.*[10] His Honour concluded that the article was published in the State of Victoria when it was downloaded by the subscribers.[11] As to the place of damage, His Honour held that since the downloading of that article did occur in Victoria, the presumption of some damage to reputation in Victoria was a reasonable one.[12]

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4 *Supra* note 2, pp 333-359. There are other situations where the court would stay proceedings, eg there is a foreign choice of jurisdiction clause; there is an agreement on arbitration.

5 *Bata v Bata* [1948] WN 366.

6 *Duke of Brunswick and Luneberg v Harmer* (1849) 14 QB 185.

7 *Kroch v Rossell & Cie SPRL* [1937] 1 All ER 725; *Investasia Ltd & Anor v Kodansha Co Ltd & Anor* [1999] 3 HKC 515.

8 Order 11(1), *Rules of the High Court* (Cap 4A).

9 *Ibid*, Order 11(1)(f).

10 *Supra* note 1, para 60.

11 *Ibid* para 59.

12 *Ibid* para 81.

It is interesting to note the argument of Mr Geoffrey Robertson QC[13] who appeared for the defendant. As the overwhelming majority of the established authorities were against him, Mr Robertson was forced to apply a very technical analysis.

The argument started with an account of the technical details of the transmission of electronic data through the World Wide Web. The transmission started with the defendant's uploading of the article from its computers in New Jersey to the servers, which were also located in New Jersey. Upon the request of the subscriber, the servers then transmitted the article to Victoria. There the subscriber downloaded it.

In short, the defendant's case was that the transmission of the allegedly defamatory materials should be divided into two stages: (1) the *delivery* of the materials by the publisher and (2) the *comprehension* of the materials by the readers. Publication occurs at the first stage but not at the second stage.

The situation, in Mr Robertson's submission, was analogous to a Victorian borrower knocking on the library door in New Jersey. *When the librarian gave the book to the borrower in New Jersey, he published it.* The borrower took the book home unread and when he read it in Victoria, it had already been published. An analogy was then drawn: in the context of the "library analogy", the publisher accomplished the "delivery" (and thus the publication) of the book when he gave the book to the borrower in New Jersey; *in the circumstances of the case, the publisher accomplished the "delivery" (and thus the publication) of the article when it uploaded the materials in New Jersey. Where and when the contents of the article were eventually communicated to the subscribers were irrelevant for determining the place of publication.*

The "library analogy" did not quite fit the purpose, for (1) the borrower did not go to New Jersey to knock on the library door (the subscriber issued the request for the article in Victoria but not in New Jersey); (2) the librarian did not give the book to the borrower in New Jersey and let him take it home (the article did not reach the hands of the subscriber in New Jersey but in Victoria).

"Delivery", in the ordinary meaning of that word, is not accomplished until the object (which one intends to "deliver") reaches the hands of the recipient. A has not finished "delivering" B's birthday present to B until B actually receives the present. In this case, the article reaches the hands of the subscribers not in New Jersey, but in Victoria, and therefore, the article should have been "delivered" to the subscribers in Victoria. On the other hand, Mr Robertson seemed to suggest another meaning of the word "delivery", that "delivery" is accomplished once the article left the publisher's hands. Thus A has "delivered" the birthday present to B once A has left it to the post office, whether B eventually receives the present is another matter.

It appears that His Honour adopted the meaning of the word "delivery", not in Mr Robertson's sense, but in the ordinary sense. On that basis, he made another analogy, that the Victorian borrower has entered into an arrangement with the New Jersey library. The New Jersey library agreed to "transport" the book to the borrower's home upon his request.[14] Therefore, both

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13 Mr Geoffrey Robertson QC is an internationally renowned advocate who has appeared in numerous human rights and media cases. He was also counsel for the defendant in *Berezovsky v Michaels* [2000] 2 All ER 986, another landmark case on multinational defamation decided recently.

14 *Supra* note 1, para 43.

the "delivery" (as the delivery started in New Jersey and ended in Victoria) and the "comprehension" of the allegedly defamatory materials occurred in Victoria. As a result, even if a third party's comprehension of the defamatory matter was not a feature of publication (His Honour had already held it was), the better view should be that the information was published in both places.[15]

One can immediately see from the complexities of these analogies that to place too much emphasis on the technical operation of the Web is not a wise course. Nor is this necessary, for even if we accept the "library analogy", the basis of Mr Robertson's analogy, that publication occurs once the defamatory materials left the publisher's hands (whether this amounts to "delivery" or not) but not until the content is heard or read by the subscribers, is still ungrounded in law. The communication of the defamatory matter to a third party is always the very essence of defamation.[16] The requirement of communication to third party shows that the aim of defamation laws is to protect reputation. It would be absurd if liability were attached to a publisher once the allegedly defamatory materials are uploaded when it is still kept unknown from the whole world and the reputation of the alleged defamed person has not been injured to the smallest extent.[17] Moreover, the "delivery theory" appears even more injurious to the interest of the Internet publishers whom Mr Robertson was anxious to protect, as they may be sued for statements unheard and unread. For the plaintiff, he would be disabled from seeking in appropriate cases an injunction in all but the one country where he would be allowed to sue.[18] Once these fundamental principles are considered, Mr Robertson's argument becomes hard to sustain.

In fact, the failure of this line of argument is not unprecedented. An example is *Bata v Bata*, where the alleged libel was contained in a circular letter written by the defendant in Zurich, Switzerland. It was alleged that the defendant caused his private secretary to post in Zurich copies of the circular letter addressed respectively to three persons in London. Each of these three persons received at his London address a copy of the circular letter. Counsel for the defendant contended that the libel must be regarded as having been committed in the place where the writer wrote the libel (Zurich) and not where he made it available to third parties (London). That proposition was unanimously rejected by the English Court of Appeal and Scott LJ observed:

> "It was the publication of the contents of a defamatory document to a third party which constituted the tort of libel and which alone justified the libelled party in issuing his writ. In this case the circular letter had been published to persons living in London."

In *R v Burdett*[19], a case of seditious libel, the libel was to be found in a document containing an address to the Electors of Westminster. The document was delivered in an unsealed letter by a person other than the accused in Leicester. The accused at about this time was in Leicester and one of the issues was whether the libel was published in Leicester. It was held that the seditious libel had been committed at the place where the letter containing the libel had been posted. However, the application of the decision was since then limited to the

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15 *Ibid,* para 67.

16 Milmo, P and Rogers, W V H (ed), *Gatley on Libel and Slander* (London: Sweet & Maxwell, 1998), para 6.4; for a recent pronouncement of that principle by the House of Lords, see *Berezovsky v Michaels* [2000] 2 All ER 986, p 993, per Lord Steyn.

17 See Walker, S, "Choice of Law in Defamation Actions", (1994) 16 *Torts Law Journal* 4.

18 *Berezovsky and another v Forbes Inc and others* [1999] EMLR 278.

19 *R v Burdett* (1820) B & Ald 95.

criminal offence of seditious libel.[20] Besides, the *Burdett* case is not a firm authority for the proposition since seditious libel is capable of being established without proof of publication at all.[21]

And assuming we leave the precedents aside and accept the "delivery theory", then what would be the natural consequence? A cunning publisher, with a view of defaming an international celebrity, will of course move some of his publishing terminals to the most primitive jurisdiction possible. Then he can safely publish whatever he want to people all over the world, without worrying about libel suits in any jurisdiction other than the desert or the tropical forest where his computers are located – he uploads it in the desert; he "delivers" it in the desert; he "publishes" it in the desert!

As illustrated by this example, the publisher can actually pick his favor forum even before any publication takes place if he contemplates a libel suit. Does this "delivery theory" in substance merely legitimize the "forum shopping", not by the plaintiff, but by the defendant now?

The *Gutnick* case accurately reflects the law as it stands, but should the law be tailored to cater the needs of Internet publishers? Mr Robertson advanced a number of policy reasons, the thrusts of which are: (1) internet publishers would have to pay regard to the different defamation laws in numerous countries; (2) as a result, the amount of information available on the Internet would be diminished.

These are genuine concerns, but His Honour's comments on them, with respect, are no more than a nationalistic and emotional response. He considered Mr Robertson's submissions were based on the "superiority" of the US forum where the libel laws were tilted in favour of the defendants (Mr Robertson contended that New Jersey/New York should be the appropriate forum). This was due to the fact that the US was the primary home of much of Internet publishing and it followed that most libel suits would be brought in the US, resulting in the "world-wide" inconvenience caused to litigants, from Outer Mongolia to Outer Barcoo.[22]

However, in the light of the multiple causes of the action rule,[23] should the balance be tilted towards the defendant when the inconvenience of a defendant travelling to possibly one hundred countries defending in hundreds of proceedings originating from one single paragraph (because each communication is a separate libel and part of an article can be severed from the whole) is to be compared with that of a plaintiff paying for a flight from Outer Mongolia to the US?

His Honour's conclusion that Mr Robertson's argument would lead to the US becoming the dominating forum may be based on an overestimation: in 1996, the District Court of the Eastern District of Pennsylvania found at least forty percent of Internet content originated from outside the US.[24]

Moreover, the impact of the *Gutnick* case cannot be lightly brushed off: it established a very easy hurdle for jurisdiction concerning defamation cases. Theoretically, even if only one man

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20 *Bata v Bata*, *supra* note 5.

21 *R v Williams* (1810) 2 Camp 506.

22 *Supra* note 1, para 73.

23 *Supra* note 6. The feature of the rule is that each communication is a separate libel.

24 *ACLU v Reno*, 929 F Supp 824, p 848 (E D Pa 1996).

in this state happens to download an article for his bedtime reading, this state will be one of the places of publication and thus entitled to exercise jurisdiction since the defamatory message has been communicated to a subscriber within its jurisdiction, albeit that the number of readers is extraordinarily small.[25] Does every Internet publisher need to contemplate this kind of situation and check all applicable libel laws before their articles go to the press each day? Would they take this course after a sleepless night of editorial works and when the articles are to be put online within hours?

On the other hand, Mr Robertson's worries were no exaggeration: given the global scale of potential recipients, the defendant may be harassed by actions in incredibly large number of countries; with the statutes of limitations, long continued circulation may extend liability more or less indefinitely; litigious plaintiffs may use it as a trick to gain bargaining power in the course of negotiation; and as the causes of action are distinct, a judgment in one is not *res judicata* in any other even in the same jurisdiction.[26]

Some solutions are suggested below. Firstly, the plaintiff may undertake to sue in one jurisdiction only, but this has never been obligatory. Secondly, an international regulatory regime may be set up, at least in the context of international mass publications, which adopts the single publication rule (all separate communications treated as one single publication) and allows recovery of global damages.[27] A defendant would no longer be exposed to the risk of being sued in numerous jurisdictions, whilst an honest plaintiff need not initiate multiple lawsuits to redress all injuries done to his reputation. However, in order to be an effective solution it requires a global consent, and this can hardly be achieved without the introduction of a new treaty in the international arena. Unfortunately, given the reluctance of most common law jurisdictions[28], this solution has no prospect in the near future. Thirdly, the doctrine of "*forum non conveniens*" may be applied to screen out cases which have little connection with the forum. This would be more elaborately discussed in the next section.

V. Forum Non Conveniens

By virtue of Rule 8.09, the Court may exercise its jurisdiction to set aside a writ or its service or stay a proceeding. Rule 7.05(2) provides that the Court may make the order under the ground that Victoria is not a convenient forum for the trial.

The importance of the doctrine of *forum non conveniens* as a safeguard against forum shopping becomes even more eminent when the hurdle of jurisdiction seems surmountable in most, if not all, cases involving Internet publishing.

The Victorian rules of stay on inappropriate forum grounds differ from the English rules. Mr

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25 A striking instance is the English case *Martin v Yiannis* (cited in Douzina, C, McVeigh, S and Warrington, R, "It's all Greek to Me; Libel Law and the Freedom of Press", *New Law Journal* Vol 137 No 6312, p 609) which involved articles written by a Greek journalist in a Greek daily newspaper. Jurisdiction was accepted by the English Courts on the basis of the 50 copies of the paper which were sold in England to the Greek community there.

26 Prosser, W L, "Interstate Publication", (1953) 51 *Michigan Law Review* 959, pp 962, 968-969.

27 For a more detailed discussion, see Wood, L A, "Cyber-defamation and the single publication rule", 81 *Boston University Law Review* 895; Prosser, W L, "Interstate Publication" (1953) 51 *Michigan Law Review*, pp 962-970; Koets, R F, Waldman, M J, and Conley, J E, *American Jurisprudence* (2nd Ed), p 264.

28 As shown by *Berezovsky v Michaels* and the *Gutnick* case itself.

Robertson relied upon the statements of Lord Goff in *Spiliada*[29] and submitted that once a *prima facie* case in an alternative forum was made out, proceeding ought to be stayed unless the plaintiff could prove he would not obtain substantial justice.[30] His Honour, however, based on two Australian authorities,[31] held that all stages were subsumed under the fundamental question where the case might be tried for the interests of all the parties and for the ends of justice.[32] Lord Goff's discussion in *Spiliada*, which was the Bible in English courts, was only a precedent providing valuable assistance to this question.[33]

The defendant contended that the issue turned on the "*prima facie* appearance of New York/New Jersey as the forum with which the proceeding was more substantially connected than with Victoria". The defendant neatly summarized its reasons into "12 bullet points", which were: (1) the print publication in Victoria was minimal compared with the United States; (2) in relation to the Internet publication, there were only 300 or so in Victoria; trial in Victoria was inconvenient for the defendant as (a) they were based in New York; (b) they had no operation in Victoria and all of their witnesses in relation to qualified privilege were in the US; (3) the plaintiff had substantial connection with the US; (4) it was more convenient to have one single action and to get all the materials there under subpoena; (5) any judgment obtained in Victoria would be unenforceable in the US; (6) the New Jersey Court could manage it as a worldwide publication; (7) The costs and inconvenience of bringing witnesses and evidence to Victoria would be substantial; and (8) the cost of litigating in New Jersey would not be much greater and there would not be greater delay to get the case to trial.

His Honour disputed that the defendant would be disadvantaged by a trial in Victoria in respect of a defence of qualified privilege. He further found that the tort was committed in Victoria. He stressed that the plaintiff was a resident of Victoria, had his business headquarters there, his family there, his social and business life there, and sought to have his Victorian reputation vindicated by the courts of the state in which he lived. He found that the plaintiff was indifferent to other parts of the article and desired only to repel the attack of his reputation in Victoria; the plaintiff had undertaken not to sue in other places; a *Polly Peck* defence might still succeed in Victoria; Victorian law should be applied wherever the case was tried since the tort was committed there (a take-it-for-granted point as numerous courts can make that claim since that article was "published" globally). On a balance of all of these factors, he reached the conclusion that Victoria was both the appropriate forum and the convenient forum.

His Honour had made a thorough examination of all relevant factors in reaching that conclusion. The decision was not surprising when the facts of the case had been boiled down to a Victorian suit on an exclusively Victorian aspect of the article (as His Honour held that part could be severed from the other parts of the article) who sought to re-establish his reputation in his home state. As the chief objective of the law of defamation is to protect reputation, this outcome is justifiable as the plaintiff was most eager to protect his reputation in Australia where his headquarters were based. Even though the circulation of the allegedly defamatory article in Australia was not substantial, but when that circulation was confined to investment bankers and professional business personnels, the result could be most detrimental

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29 *Spiliada* [1987] AC 460.

30 *Supra* note 1, at para 101. This is also the interpretation in the leading text by Sir North, P and Fawcett, J J, *Cheshire and North's Private International Law* (London: Butterworths, 1999), pp 336-350.

31 *Voth v Manidra Flour Mills Pty Ltd* (1990) 171 C.L.R. 538 and *Henry v Henry* (1996) 185 C.L.R. 571.

32 *Supra* note 1, at para 103.

33 *Supra* note 30. This is cited in the *Gutnick* case, *supra* note 1, at para 102.

to the Australian businessman for whom business reputation probably meant everything.[34]

An interesting point is His Honour's reference to *Berezovsky v Michaels*[35] decided by the House of Lords. In that case, Mr Robertson advanced the global theory not for the purpose of denying the jurisdiction of England, but to contend that England was not the natural forum. This version of "global theory" differed from the "delivery theory" put forward in the *Gutnick* case in that it did not only stress the weight of the place of "delivery". The theory was formulated in the following terms:

> "the correct approach is to treat the entire publication – whether by international newspaper circulation, transborder or satellite broadcast or Internet posting – *as if* it gives rise to one cause of action and to ask whether it has been clearly proved that this action is best tried in England."

This is plainly an implied application of the single publication rule which had no place in English law.[36] The defendants' appeal was dismissed by a bare majority (with Lord Hoffman and Lord Hope dissenting). In rejecting Mr Robertson's global theory, the majority went much further than necessary. Lord Steyn approved *The Albaforth*[37] line of authority and held that *the jurisdiction in which a tort had been committed was prima facie the natural forum.*[38] His Lordship did not hesitate to make it explicit that "the distinction between a *prima facie* position and treating the same factor as a weighty circumstance pointing in the same direction was a rather fine one".[39] The logical result would be that the court would always be the natural forum in cases involving publication in its jurisdiction. It would totally deprive the "*forum non conveniens*" rule of its effectiveness as a safeguard against forum shopping[40] especially when the publication requirement would scarcely be a problem for the plaintiffs now.[41] Lord Hoffman rightly pointed out that "the plaintiffs are forum shoppers in the most literal sense".[42] It is submitted that the proper approach should be that propounded by Lord Hope:

> "*The Albaforth* provides the starting point, but no more than the starting point . . . In a defamation case the judge is not required to disregard evidence that publication has taken place elsewhere as well as in England. On the contrary, this feature of the case, if present, will always be a relevant factor. The weight to be given to it will vary from case to case, having regard to the plaintiff's connection with this country in which he wishes to raise his action."[43]

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34 In a recent Hong Kong case, Findlay J reaffirmed that the fundamental consideration is the extent to which the plaintiffs have a reputation in Hong Kong to protect. See *Investasia Ltd & Anor v Kodansha Co Ltd & Anor* [1999] 3 HKC 515.

35 *Berezovsky v Michaels* [2000] 2 All ER 986.

36 *Ibid* at 993 b-c *per* Lord Steyn.

37 *The Albaforth* [1984] 2 Lloyd's Rep 91.

38 *Supra* note 36, pp 994-995, *per* Lord Steyn.

39 *Ibid* at 995e-f, *per* Lord Steyn.

40 See "Shopping for Justice", *The Lawyer*, March 8, 1999 and "Focus: Media/Entertainment Law", *The Lawyer*, January 13, 1998.

41 The Hong Kong position is in line with Lord Steyn's approach. In *Investasia Ltd & Anor v Kodansha Co Ltd & Anor* [1999] 3 HKC 515, Findlay J decided in favour of the plaintiff in both the issue of jurisdiction and the issue of natural forum where there were 500,000 published copies of the allegedly defamatory material and only 157 out of which were distributed to Hong Kong. Findlay J held that (1) it is not the right approach to compare the number of copies circulated within the jurisdiction with the total number of published copies; (2) the nature of the publication must be taken into account, "where . . . the alleged defamatory material is what one may describe as sensational and juicy, a much smaller size of publication would be sufficient".

42 *Supra* note 35, at 1005e, *per* Lord Hoffman.

43 *Ibid* at 1013 *per* Lord Hope.

The distinction between a "*prima facie* position" and a "weighty factor" is not a fine one. The better view should be that the place of tort (ie publication for the purposes for defamation) may or may not be a "weighty factor", depending on the circumstances of the case. If the forum incidentally becomes one of the places of the publication (it always would be if the concerned materials have been put online), it should decline to exercise its jurisdiction if both the plaintiff and the defendant have minimal connection with the forum, taking account of the degree of circulation and the plaintiff's reputation in the forum when compared with that in other jurisdictions. It is most fortunate that the Supreme Court of Victoria took a much more comprehensive approach weighing up all the factors instead of adopting the robust and straightforward test developed in the *Berezovsky* case.

VI. A Decision in the Wrong Direction?

On the face, the decision can easily fit into a line of rigid cases, of which the *Berezovsky* case decided by the English House of Lords is the leading authority. His Honour should be applauded for his sympathy to defamed individuals, but he failed to give sufficient regard to the many insuperable difficulties that Internet publishers would encounter in the daily operation of their bread-and-butter businesses.[44] However, it must be noted that much constraints were imposed by the ancient defamation laws laid down more than one century ago[45] without foresight of the possibility that information can be transmitted through wires and digits to billions. Given these constraints, the room for creativity is limited.

The problem centres on the fact that an Internet publisher can be sued in almost all jurisdictions within the reach of the Internet. It has been worsened by the courts' determination for upholding their jurisdictions irrespective of the degree of circulation within their jurisdictions. This may be partly due to the courts' ambition of playing the role of international policemen, but as Lord Hoffman succinctly observed in the *Berezovsky* case:

> "we should [not] always put ourselves forward as the most appropriate forum in which any foreign publisher who has distributed copies in this country, or whose publications have been downloaded here from the Internet, can be required to answer the complaint of any public figure with an international reputation, however little the dispute has to do with England. In *Airbus Industrie GIE v Patel* . . . your Lordships' House declined the role of international policeman in adjudicating upon jurisdictional disputes between foreign countries."

No doubt Internet publishing should be treated as a *sui generis* category. This can only be done by the legislature who is not bound by fossilized precedents.[46] At the moment, in the

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44 *Supra* note 25. The Greek author in *Martin v Yiannis* repeatedly claimed that a usual award in England would put the Greek newspaper into liquidation. This is so particularly when the damages are to be assessed by the English jury who do not necessarily know what a reasonable man feels in the Athens omnibus.

45 For example, the multiple causes of action rule began in 1849 with the *Duke of Brunswick and Luneberg v Harmer* case.

46 The English legislature provides a three-pronged defence in the *Defamation Act* 1996. Section 1(1) allows an ISP to avoid liability if the ISP: (1) is not the "author, editor or publisher" of the defamatory statement; (2) took reasonable care in relation to its publication and (3) can demonstrate it did "not know, and had no reason in relation to that what it did caused or contributed to the publication of a defamatory statement." For the interpretation of s 1(1), see *Godfrey v Demon Internet Ltd* [1999] 4 All ER 342. However, this legislation only protects printers, distributors and other secondary publishers but not editors and authors. Moreover, it only addresses the need for a defence in course of trial but does not deal with the issue of jurisdiction and the proper forum which appears in a more preliminary stage. The common law defence of "innocent dissemination" would also alleviate the consequences of the harsh rule to a small extent. For the legislative responses of various jurisdictions, see Sterling, S, "International Law of Mystery: Holding

absence of a single and uniform international regulatory scheme, the only remedy seems to be a more flexible application of the "*forum non conveniens*" rule. No one can be certain of the outcome, as it very much depends on the subtle balancing exercise of all the factors in the case (if we do not adopt Lord Steyn's approach); and after the *Berezovsky* case, Internet publishers are now put in an even more vulnerable position. Internet publishers, at the end of the day, remain clouded by endless uncertainties.

Internet Service Providers Liable for Defamation and the Need for a Comprehensive International Solution", 21 *Loyola Entertainment Law Journal* 327.

THE CHANGING ROLE AND INFLUENCE OF THE PRIVATE MEMBERS' BILL IN THE LEGISLATIVE COUNCIL AFTER THE HANDOVER

CARMEN KA-MAN CHAN *

Private members' bills are bills proposed by members of the Legislative Council, in contrast with those proposed by the executive authorities of the Hong Kong Special Administrative Region ("HKSAR"). Although their number is relatively small, they play an important role in HKSAR's present constitutional settings by being the only permissible channel to put forward proposals on government policies under the executive-led system. In the article, the author argued that this importance has diminished since the handover in 1997. As a result, there is a declining significance of private members' bills in shaping public policies. Although there are constantly hot debates over the possibility of amending art 74 and Annex II of the Basic Law in the Legislative Council, the Administration seems to have no intention to respond to the members' action. It is believed that the removal of obstacles in the introduction and passage of private members' bills in the near future is very unlikely.

I. Introduction

Private members' bills are bills proposed by members of the Legislative Council (the "LegCo"), instead of the executive authorities of the Hong Kong Special Administrative Region ("HKSAR"). Most of the bills are indeed drafted and introduced by the executive authorities. Though private members' bills are much fewer than bills proposed by the government, their role performed in the HKSAR's new constitutional settings must not be neglected. To the LegCo members, under the present executive-led system, introducing private members' bills is the only permissible channel to put forward their proposals on government policies. Such bill introduction is important as this can urge the government to consider policies which the executive officials are reluctant to consider.[1] On the other hand, private members' bills are always perceived cautiously by the executive authorities as an upset to their dominance, thus causing threats to the executive-led system. The Chief Secretary, on behalf of the Administration, has once warned the proliferation of private members' bills will "undermine the present division of responsibilities between the executive and the legislature" and "upset the Administration's own legislative programme".[2] Hence, we can see how significant and controversial private members' bills are in our constitutional settings.

This essay tries to take a closer look on the role of private members' bills in the HKSAR. It firstly examines the restrictions imposed on the LegCo members in the introduction of private members' bills, as well as their voting procedures, by comparing the pre-handover and post-handover situations. It also investigates the changing role and significance of private members' bills in influencing public policies, starting from the nineties till now. The last part explores the possibilities of amending art 74 and Annex II of the *Basic Law*, in which the restrictions and voting procedures for private members' bills are laid down.

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* BSS (G&L) III

1 Wong, M, "The Meaning of 'Charge': Private Member's Bills in the Legislative Council", (1998) 28 *Hong Kong Law Journal* 230, pp 230-231.

2 *Official Record of Proceedings of the Sitting of the Legislative Council*, 13 March 1996 at 16-17.

II. Restrictions on Private Members' Bills

Before the handover, restrictions imposed on the LegCo members when introducing private members' bills were mainly found in the *Hong Kong Royal Instructions*. According to Clause XXIV, bills which "dispose of or charge" any part of the Hong Kong government's revenue could not be proposed by the LegCo members. Instead, such bills could only be proposed by the Governor, public officers designated by the Governor, or the LegCo members expressly authorized or permitted by the Governor.[3] Such limitations were based on the long established principle that public expenditure should only be initiated by the Crown, rather than by anyone else. Thus, LegCo members had no right to introduce bills which have charging effect on the revenue of the Hong Kong government.[4]

The right to determine whether a bill has such charging effects is laid primarily in the hands of the President of the LegCo. Several tests have been derived from the Presidents' rulings by the colonial legislature. For example, those charges should be "likely to be substantial and not just nominal", "new and distinct" or "real, foreseeable and calculable". Expenses arising out of the imposition of new duties on existing authorities, or proposals which caused the Administration to incur a liability or a contingent liability payable out of money to be voted by the LegCo, will also be considered as having a charging effect.[5] Hence, it is observed that a set of rather systematic and clear-cut principles have been established by the Presidents to interpret whether bills introduced by the LegCo members carry charging effects before the handover.

However, it seems that the post-handover situation is a little bit different. Private members' bills are now governed by the *Basic Law*, the new constitution of the HKSAR after the resumption of sovereignty to Mainland China. According to art 74, LegCo members are not allowed to introduce bills which "relate to public expenditure or political structure or the operation of the government". For "bills relating to government policies", the written consent of the Chief Executive is required.[6] Such restrictions are also laid down in the Rules of Procedures of the LegCo, which clearly state that it is the opinion of the President of the LegCo which should be relied on.[7] By comparing with the pre-1997 restrictions, it is discovered that stricter and wider restrictions are now imposed on the LegCo members if they want to introduce bills. It is also doubtful whether "public expenditure" in the *Basic Law* is viewed as the same as "disposal of or charge of the revenue of the Hong Kong government" in the *Royal Instructions*.

Besides a different scope of restrictions, the purposes of holding those restrictions are different also. The Administration holds that art 74 of the *Basic Law* is interpreted and implemented so as to maintain an "executive-led" government. It empowers LegCo members to introduce bills, but at the same time imposes conditions and restrictions on them,[8] a view which is also agreed by the LegCo President.[9] Furthermore, similar government views were revealed in a recent LegCo meeting, in which LegCo member Mr James To asked the

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3 *Hong Kong Royal Instructions 1917 to 1993*, Clause XXIV.

4 *Supra* note 1, p 232.

5 *Ibid* at pp 239-245.

6 Article 74, *The Basic Law of the HKSAR of the People's Republic of China*.

7 Order 51, *Rules of Procedure of the Legislative Council of the HKSAR*.

8 *Ruling by the President of the Legislative Council on the Labour Relations (Right to Representation, Consultation and Collective Bargaining) Bill*, 19 July 1999, paras 5-6, at http://www.legco.gov.hk/yr98-99/english/pre_rul/990719a.pdf.

9 *Ibid* at para 12.

Administration questions on art 74. According to the Administration, art 74 imposes clear requirements regarding the division of functions between the executive and legislative branch under the present constitutional framework, in which the maintenance of the executive-led system is implied.[10]

When the LegCo President needs to determine whether a private members' bill can be introduced, specific terms in art 74 of the *Basic Law* are thus of particular importance. There are always controversies regarding the meaning of those terms among the Administration, the LegCo members and the President. But as mentioned above, the president's opinions should be relied on.

Careful examination on the phrases in art 74 provides us with a better understanding on the restriction on private members' bills. Yet, reference to the President's rulings is essential to estimate the scope of restraint. The words "relate to" mean having "substantive effect" on one or more areas stated.[11] A bill which "relate[s] to public expenditure" refers to one which will increase or reduce public expenditure and the amount affected is substantial. The President also made a remark that this term is wider in scope than the restrictions imposed before the handover.[12] A bill related to the "operation of the government" refers to one having obvious effect on the structure or procedure of the executive authorities.[13] The term "government policies" refers to policies that have been decided by the Chief Executive, the Chief Executive-in-Council, former Governors or Governors-in-Council. Policies reflected in legislation, or policies decided by the public officers with delegated authority from the Chief Executive, or policies promulgated in the LegCo by public officers designated should also be included.[14] For the meaning of the term "political structure", Chapter IV of the *Basic Law* can be referred to. It is entitled "Political Structure" and six sections are included, namely the Chief Executive, the Executive Authorities, the Legislature, the Judiciary, District Organizations and Public Servants. Thus, it can be implied that any bill having substantive effect on any of these six institutions are considered as related to "political structure".[15]

Despite the President's rulings on those specific terms in art 74 of the *Basic Law* help to clarify their meanings to a certain extent, art 74 remains controversial since it imposes much wider restrictions on the introduction of private members' bills. As a result of these limitations, the introduction of private members' bills in the post-handover LegCo was much more difficult than that in the pre-handover one. Several private members' bills were ruled by the President as relating to one of the four areas mentioned in art 74 and thus were not allowed to be introduced.

For example, in the 1998/99 session, the *Labour Relations (Right to Representation, Consultation and Collective Bargaining) Bill* proposed by Mr Lee Cheuk-yan was considered as relating to public expenditure and government policies.[16] However, a similar private members' bill was successfully passed under the pre-handover mechanisms (which will be

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10 Quoting from the Secretary for Constitutional Affairs, *Official Record of Proceedings of the Sitting of the Legislative Council*, 3 May 2000, pp 5978-5980, at http://www.legco.gov.hk/yr99-00/english/counmtg/hansard/000503fe.pdf.

11 *Supra* note 8, at para 17.

12 *Ibid* at para 21.

13 *Ibid* at para 24.

14 *Ibid* at paras 28-30.

15 *Ruling by the President of the Provisional Legislative Council on the Legislative Council (Amendment) Bill 1997*, 14 November 1997 at 2.

16 *Supra* note 8, at para 51.

discussed in details later). In the 1999/2000 session, the *Holiday (1999) Bill* proposed by Mr Leung Yiu-chung was ruled by the president as relating to the government policies on statutory holidays for employees and thus the written consent of the Chief Executive was needed.[17] Yet, according to the pre-handover restrictions on private members' bills, this bill should be able to be introduced since it clearly involves no charging effects on the government.

III. Voting Procedures for Private Members' Bills

Before the handover, the voting procedure for private members' bills was the same as that of other bills or motions. Questions were decided by the majority of votes.[18] Nonetheless, after the handover, a new voting system – the divisional voting system is introduced. Thus, the passage of any bill introduced by LegCo members now requires a simple majority vote of each of the two groups of members present. The first group is members returned by functional constituencies and the second group is members returned by geographical constituencies and the Election Committee.[19] This voting procedure is at the same time specified in the Rules of Procedures of the LegCo, which also makes it clear that a majority vote is attained only when the number of members voting for the question exceeds half of the number of members present at the time of voting in both groups.[20]

There are controversies over the interpretations of the terms in Annex II, such as the terms "simple majority vote" and "present". It was reported that the government once suggested that the abstentions should be excluded from the counting of votes, so as to ensure a smooth passage of its bills. On the other hand, some LegCo members believed that those abstain from voting should still be counted as "present".[21] Yet, as no agreement is reached till now, there is no change on the rules and those who abstain are still counted as present.

While art 74 of the *Basic Law* makes the LegCo members difficult to introduce bills into the LegCo, the divisional voting system poses another obstacle in the passage of private members' bills, and further limits their chance of success. Though no private members' bills have been defeated under this voting system till now, as there are in fact very few private members' bills being introduced into the LegCo since the handover, there were 30 members' motions and amendments in the 1999/2000 session which should have been passed under the original voting system, as the number of "for" votes has exceeded that of the "against" votes.[22] Hence, we can still see how influential the new divisional voting system is in curtailing the power of the LegCo members in initiating bills and amendments.

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17 *Ruling by the President of the Legislative Council on the Holiday (1999) Bill*, 15 September 1999, paras 8-10.

18 *Supra* note 3, at clause XXII.

19 *Supra* note 6, at Annex II, Item II. Members returned by functional constituencies are elected based on social sectors, while members returned by geographical constituencies are elected based on residential areas. Members returned by the Election Committee are those of the 800 people from various social sectors, responsible for the election of the Chief Executive.

20 *Supra* note 7, at Order 46(2). According to Order 46(2) of the Rules of Procedures of LegCo, the passage of a motion, a bill introduced or an amendment introduced by a member shall require a majority vote of both groups of members present (ie Group 1: functional constituencies, and Group 2: geographical constituencies and Election Committee).

21 "Basic Law Wording", *Hong Kong Standard*, 27 June 1998, at http://www.wisenews.net/wisenews-cgi/enterprise/doc.pip.

22 "LegCo Motions 'Crippled by Voting Rules'", *South China Morning Post*, 28 August 2000, at http://dialog.carl.org:3012/cgi-bin/.

In fact, the divisional voting system is always under severe criticisms. It makes the passage of private members' bills difficult so that the dominance of the executive can be free from threats. It has also distorted the voting results, as there is always no secure passage of motions even in case the total number of members voting for the motion is larger than those voting against it.[23]

IV. Role of Private Members' Bills in Shaping Public Policies

Generally speaking, the number of private members' bills and their influence in shaping public policies have been increased since the early 1990's and have reached the peak in the 1996/97 LegCo session. However, their influence has been greatly diminished after the handover due to the new restrictions imposed and the role of such bill has changed drastically.

Private members' bills before the early 1990's were mostly uncontroversial private bills which were only introduced to incorporate or regulate affairs of private bodies or institutions. The first private members' bill relating to public affairs was introduced by Mr Martin Lee in 1991. He introduced a short bill to amend the *Electoral Provisions Ordinance* so as to ensure that all the geographical constituencies were approximately equal in population.[24] In 1993, Mr Tam Yiu-chung went one step further to introduce *the Public Officers (Variation of Conditions of Service) (Temporary Provisions) Bill*,[25] aiming at prohibiting the government re-employing expatriate civil servants on local terms when their contracts were renewed. This was the first private members' bill introduced to challenge a government policy successfully.[26]

Since then, more and more public bills were introduced by the LegCo unofficial members. One of the most controversial and significant bills was the *Equal Opportunities Bill* (the "*EOB*") proposed by Ms Anna Wu in 1994. It was introduced to promote equality of opportunities in Hong Kong and to provide remedies for discrimination on a wide range of areas including sex, age and disability.[27] Such a bill was considered as the unprecedented and comprehensive move to combat with the discrimination problems in Hong Kong. Most importantly, it has stimulated and pressed the government to introduce the *Sex Discrimination Bill* and the *Disability Discrimination Bill*, which were passed with amendments in June and July 1995 respectively. In fact, many amendments to the two bills were originated from the provisions of the *EOB*.[28] Thus, though the *EOB* was not passed to form part of the ordinances at the end, its impact was significant and far-reaching as it has laid the basis of anti-discrimination laws in Hong Kong.

The 1996/97 session of the LegCo experienced an influx of private members' bills. A total of 22 private members' bills were passed, including both private and public bills.[29] Many of them played a significant role in influencing public policies. For example, the *Employee's Rights to Representation, Consultation and Collective Bargaining Bill* was introduced by Mr Lee Cheuk-yan to give the workers more rights and greater protection. With the successful

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23 *Catholic Monitors on Legislative Council 1999-2000 Report*, 27 August 2000, pp 12-13.

24 Miners, N, *The Government and Politics of Hong Kong* (Hong Kong: Oxford University Press, 1995), p 121.

25 *Official Record of Proceedings of the Sitting of the Legislative Council*, 3 November 1993, p 533.

26 *Supra* note 22, at p 153b.

27 *Official Record of Proceedings of the Sitting of the Legislative Council*, 6 July 1994, p 3843.

28 *Hong Kong Legislative Council Annual Report 1994/95*, pp 31-32.

29 *Hong Kong Legislative Council Annual Report 1996/97*, pp 91-95.

passage of the bill, employees were given the right to be represented by a trade union representative, the right to be consulted by the employer, and the right to collective bargaining, by which the employer has to recognize the trade union and negotiate with it.[30] Another example was the *Hong Kong Bill of Rights (Amendment) Bill 1997* introduced by Mr Lau Chin-shek. It helped to clarify that all pre-existing legislations, not only those applied by the Government or public bodies, being inconsistent with the *Hong Kong Bill of Rights Ordinance*, have to be abolished.[31] The passage of this bill has further strengthened the protection of human rights in Hong Kong.

However, we must note that the above two bills have been repealed by the Provisional Legislative Council later. The former was repealed by the *Employment and Labour Relations (Miscellaneous Amendments) Bill 1997*[32]and the latter was repealed by the *Hong Kong Bill of Rights (Amendment) Bill 1998*.[33] This appears to be the beginning of the declining influence of private members' bills after the handover.

As a result of the wider restrictions imposed on the introduction of private members' bills as discussed before, the number of private members' bills successfully introduced has now dropped drastically. Thus, their role played in shaping public policies in the post-handover era has become less significant than before. In order to have a clearer picture, let us now examine the private members' bills passed by the post-handover LegCo.

The first private members' bill passed by the post-handover LegCo was the *Alice Ho Miu Ling Nethersole Hospital Incorporation (Amendment) Bill 1999*. It was also the only private members' bill passed in the 1998/99 session.[34] The *Bill* seeks to amend the definition of the powers of the corporation in the existing *Alice Ho Miu Ling Nethersole Hospital Incorporation Ordinance*, which is merely a technical amendment with no influence in public policies. In the 1999/2000 session, again, there was also only one private members' bill passed, namely the *Smoking (Public Health) (Amendment) Bill 2000*.[35] It aimed at expanding the "no-smoking" areas in restaurants and amending the regulations on health warnings of cigarette packets and advertisements. This is the first private members' bill which is related to government policies and has obtained the consent of the Chief Executive as required by art 74 of the *Basic Law*.[36] In the 2000/2001 session, till now, there is only one private members' bill as well, namely the *Prior of the Order of Cistercians of the Strict Observance Incorporations (Amendment) Bill 2000*, which is again a private bill with purely technical amendments to regulate the affairs of a private body merely.[37]

V. Possible Amendments to Art 74 and Annex II?

As discussed above, art 74 and Annex II of the *Basic Law* are so controversial and they always become the concern of the LegCo members. There is always demand from the LegCo members, particularly the pro-democracy forces, who call for amendments to these two provisions, so that they can enjoy greater power to introduce private members' bills. On the

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30 *Official Record of Proceedings of the Sitting of the Legislative Council*, 10 April 1997, pp 355-358.
31 *Official Record of Proceedings of the Sitting of the Legislative Council*, 30 April 1997, pp 197-199.
32 *Official Record of Proceedings of the Sitting of the Legislative Council*, 15 October 1997, p 69.
33 *Official Record of Proceedings of the Sitting of the Legislative Council*, 21 January 1998, p 116.
34 *Official Record of Proceedings of the Sitting of the Legislative Council*, 12 May 1994, p 7735.
35 "Bills (Year 1999-2000)", at http://www.legco.gov.hk/yr99-00/english/bills/bill9900.htm.
36 *Official Record of Proceedings of the Sitting of the Legislative Council*, 14 June 2000, pp 7587-7589.
37 "Bills (Year 2000-2001)", at http://www.legco.gov.hk/yr00-01/english/bills/bill0001.htm.

other hand, it seems that the pro-government forces, the Administration and the Central Government want to have those two provisions strictly implemented so as to strengthen the executive-led system. Questions and debates over the possibility of amendments to art 74 and Annex II of the *Basic Law* can always be found in the post-handover LegCo. However, it is disappointing to find that none of the discussions reveals any possibility of their amendments. It is thus unlikely that those obstacles in the introduction and passage of private members' bills can be removed in the near future.

For example, in 1998, Mr Lee Cheuk-yan moved an amendment to a motion debate on the relationship between the executive and legislative branches. He proposed to amend the *Basic Law* so as to repeal the restrictions imposed on LegCo members when introducing bills and the divisional voting system on members' bills. However, the amendment could not pass because it could only obtain a majority in the group of members returned by geographical constituencies and Election Committee, but not in that from the functional constituencies.

In January 2000, Mr Leung Yiu-chung tabled a resolution to amend the *Basic Law*. His proposal tried to amend art 74 and Annex II, so as to allow more room for the introduction of private members' bills and to repeal the divisional voting system.[38] This sparked off one of the most controversial and heated debates in the post-handover LegCo in which 20 members had spoken on the motion. Opinions were divided into two camps, the pro-democracy and pro-government forces. Though the resolution was not passed at the end as expected, the debate has generated a lot of meaningful arguments and some of them are extracted below.

A lot of members had spoken in favour of the motion, particularly the democrats, and their dissatisfaction with those restrictions imposed by art 74 and Annex II is apparent. For example, Mr Leong Chi-hung criticized that art 74 "in essence, disables this legislature in the wrangle with an already overwhelming executive-led government". He also commented that "the Government is assured to be the winner" under the voting procedures of Annex II.[39] Mr Lau Chin-shek criticized those restrictions are in fact "running against the objective of this Council to function as a legislature with genuine powers".[40] Mr Yeung Sum commented these two post-handover changes were a "strait-jacket" which imposes great restrictions on the LegCo's power in checking the executive branch.[41] On the other hand, the pro-government forces opposed this motion strongly. For example, Mr Tam Yiu-chung, speaking on behalf of the Democratic Alliance for the Betterment of Hong Kong, criticized those LegCo members in favour of the motion as "being nostalgic for the colonial rule" merely. According to him, art 74 should be implemented so that the executive and legislative branches could discharge their respective responsibilities, as well as check and balance each other. The divisional voting system under Annex II was also desirable as it could ensure a balance of interest among different sectors of the community in the legislative process.[42]

In May 2000, the Administration was asked by members in the LegCo meeting whether it will review and reinterpret art 74. The Secretary for Constitutional Affairs did not respond to the question directly, but only restated the importance of art 74, as it lays down the division of

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38 *Official Record of Proceedings of the Sitting of the Legislative Council*, 19 January 2000, pp 3403-3404.

39 *Ibid* at pp 3408-3409.

40 *Ibid* at p 3410.

41 *Ibid* at p 3427.

42 *Ibid* at pp 3440-3441.

powers between the executive and legislative branches.[43] Evidenced by his response, it seems that the Administration still has no intention to respond to the members' demands to amend art 74. Therefore, at this point, it is likely that the restrictions and voting procedures for the private members' bills will remain unchanged in the foreseeable future.

VI. Conclusion

By comparing with the restrictions imposed on the LegCo members in introducing private members' bills and the voting procedures before and after the handover, it is apparent that the two changes laid down in the *Basic Law*, the new provision in art 74 and the divisional voting system have made the introduction as well as passage of private members' bills in the post-handover LegCo more difficult, particularly for bills relating to public affairs. As a result, only three private members' bills were able to be introduced and passed since the handover. Among the three bills, only one relates to public policies and its impact is in fact far from significant. This is a big contrast with the pre-handover LegCo's situation, in which both the number and influence of private members' bills were growing since the 1990's and had reached a peak in the 1996/97 LegCo session, the last session before the handover. While amendments to art 74 and Annex II of the *Basic Law* are shown to be virtually impossible in the near future, the influence of the private members' bills in public policies is bound to be minimal.

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43 *Supra* note 10 at p 5986.

IS SUING POSSIBLE? THE POTENTIAL LIABILITY OF ISPS

JANIE WONG*

In March 2001, E-Silkroad Holdings was targeted by defamatory statements made in an IceRed.com chatroom. The company brought an action in defamation and libel against the Internet Service Provider (the "ISP") and demanded the identities of the individuals who posted the statements be handed over. This is one of the many libel cases in the context of Internet. The emergence of the Internet brings many new liberties and legal controversies. Should we impose liability for defamation in cyberspace? If we do, we arguably remove people's freedom of speech, and open the floodgates to litigation; but if not, thousands of people will be vulnerable to Internet libel. The author examines the laws in the USA, UK, Australia and Hong Kong and argues for the imposition of liability on ISPs in Hong Kong.

I. Introduction

Particular interest in this area was sparked off when the *IceRed* case made Hong Kong headlines. As with most online forums, IceRed hosts a website where people are free to speak their minds with a high degree of, if not complete, anonymity. Although many have argued that the Internet brings a new meaning to freedom of speech, upon inspection of the content, one rather doubts the necessity of many postings. This is particularly so for those saturated with gossip. Do these online discussion boards fulfil a social purpose? Where threads are overflowing with libellous material or hate speech, it is perhaps as Kierkegaard suggested that "people demand freedom of speech as a compensation for freedom of thought which they seldom use."[1] In some situations, it therefore appears justifiable to afford protection of reputation under the law where "the words tend to lower the plaintiff in the estimation of right thinking members of society generally,"[2] and where no public interest is served.

The Internet poses unique challenges. Listed below are several examples of such:

- Even before consideration of the unaccounted for and ever changing environment of the Internet, existing defamation laws are in a tangled state. A simple example of this is damage to reputation. As it is not a concrete concept, how is it defined? By whose standards? How will these issues be resolved online?
- The Internet, unlike established bodies such as the media and press, is not subject to any codes or practices. Nobody owns or controls the Internet.
- Information is distributed online to millions with the click of a button. The severe harm brought about by the instantaneous and widespread reach of the Internet is one problem and jurisdictional disputes over matters concerning the Internet is another.
- Case authority is currently lacking, but it is predicted that it will not be long before the law responds to the need for maturity in this area.
- Regulations, if any, must be carefully thought through so as to cover rapid and inevitable changes in technology.

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* BBA(Law) III. The author wishes to thank Miss Jill Cottrell for her helpful comments on the first draft of this article. The author also wishes to thank Dr. Kevin Pun for his comments.

1 Søren Kierkegaard (1813-1855) was a Danish philosopher and religious thinker. He is well known for this quote however its original source is unknown to the author.

2 *Sim v Stretch* [1936] 2 All ER 1237, 1240. The test for defamation put forth in this case is among the most frequently cited.

- Internet suits create a possible flood of litigation because the law in this area is still highly undeveloped.
- The protection of a fundamental right, especially of freedom of speech, and the freedom of society as a whole must be carefully balanced with the protection of human dignity and privacy.

II. Defamation in a Nutshell[3]

"The law of defamation is bedeviled by technicalities which seem the more absurd when one considers that the basic principle ought to be a simple one, and one which is rooted in society, and comprehensible to the ordinary citizen."[4] The cases that have been heard in courts thus far have yet to lay out clear and consistent guidelines for the identification of this tort[5] though it is evident that the right to reputation does exist.[6] The *International Covenant on Civil and Political Rights* (the "*ICCPR*"), ratified by the United Nations, is arguably the most significant international instrument that protects the rights and dignity of a person.[7] Article 19(2) grants humans the right to freedom of expression. It is nevertheless submitted that this does not include the right to defame, which is in turn restricted in art 19(3).[8]

To establish defamation under the common law, it is well recognized that it is necessary to show the words complained of are capable of bearing a defamatory meaning.[9] After overcoming this hurdle, the court must then determine whether or not there is sufficient reference to the plaintiff. Then, there is the question of publication. In law, publication requires a reasonable person to understand the imputation to refer to the plaintiff and that the message is communicated to a third party. Common law only condemns the publication of defamatory materials in the legal sense.

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3 The section is in the author's view, a summary of the law of defamation derived from various sources.

4 *Law Lectures for Practitioners*, (Hong Kong: Hong Kong Law Journal Ltd, 1992), p 38.

5 In *Berkoff v Buchill and another* [1996] 4 All ER 1008 at 1011, Neill LJ states that he is "not aware of any entirely satisfactory definition of the word 'defamatory'".

6 *Supra* note 4 for a comprehensive analysis of the situation in Hong Kong.

7 Article 39 of the *Basic Law* of the Hong Kong Special Administrative Region (the "HKSAR") *prima facie* confirms the general applicability of the *ICCPR* in the HKSAR. However, some courts have asserted that the document is only promotional in nature and does not impose an immediate duty on the HKSAR government. For an example of where the court has expressed reservation, see *Santosh Thewe & Anor v Director of Immigration* [2000] 1 HKLRD 717 at 721-722. Nevertheless, in the flag desecration case of *HKSAR v Ng Kung Siu* [1999] 3 HKLRD 907 at 920, the Court of Final Appeal holds that art 19 of the *ICCPR* (*ibid*) is incorporated into the BL though art 39.

8 Article 27 of the *Basic Law* guarantees freedom of speech. However, art 19 of the *ICCPR* goes further to provide that:

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in para 2 of this art carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
(a) For respect of the *rights or reputations of others*;
(b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

Full text of the *ICCPR* at http://www.unhchr.ch/html/menu3/b/a_ccpr.htm.

9 With respect to the ways in which defamation can occur, this article will deal with Internet defamation as libel rather than slander as most content is stored on the server and is therefore in relatively long lasting form. In other words, the content is usually indefinitely accessible. Furthermore, it may be printed. However, the distinction between libel and slander may deserve greater thought if the defamation occurs in a chat room or through a video conferencing connection hosted by an ISP.

In addition to the existing complications of a traditional action in defamation, the Internet poses further areas of uncertainty for the plaintiff. For instance, it is often difficult, if not impossible, to trace the original publisher of allegedly libelous content. In these circumstances, is it reasonable to hold an Internet Service Provider ("ISP") liable for defamation on their website(s)? Also, who has jurisdiction over publications on the Internet?

III. The Precedents

A. The US Position

The reluctance of the American courts to hold ISPs liable is probably largely attributable to the stringent constitutional protection of freedom of speech in the *First Amendment.*[10] *Lunney v Prodigy Services Co*[11] is a case which involved an action by a New York high school student against Prodigy (an ISP). An unknown impostor had, using the student's name, set up an email account and left offensive and threatening messages to the student's boy scout master on a bulletin board hosted by Prodigy. The court examined the role of an ISP in transmitting emails and compared their role to that of a telephone company. It was held that while Prodigy maintained broad editorial discretion to screen bulletin boards, they should not be counted as a publisher. Consequently, *Prodigy* sets a clear American precedent that ISPs are not liable for either objectionable email or bulletin board messages.[12]

B. The English Position

On the other side of the ocean, the UK courts appear more inclined to find an ISP liable for defamation. This is illustrated through the Court of Appeal decision of *Godfrey v Demon Internet Ltd*[13]. The plaintiff was Dr Godfrey, who alleged that "squalid, obscene and defamatory"[14] material was posted purporting to come from him but were in fact a forgery. Godfrey wrote to Demon, the ISP, requesting the removal of the defamatory material. When Demon failed to do so, Godfrey sued for libel. Demon tried to rely on the principle of innocent dissemination but the defence failed. It was held that since the libel had been drawn to the defendant's attention, reasonable care had not been taken. Morland J suggested that because Demon Internet chose to store the material on their server, they were not merely owners of an electronic device through which postings were transmitted, but were regarded as publishers for the present purposes.[15] Though the case was settled in March 2000,[16] and thus no further judgment was delivered on the issue, the position as to whether ISPs are liable for Internet libel in the UK is still not perfectly clear.

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10 Rogers, W V H, *Winfield and Jolowicz on Tort,* (London: Sweet & Maxwell, 1998), p 465.

11 (1998) 250 AD 2d 230, NY SC (App Div).

12 Mariano, G, "Shielding ISPs from Criminal Liability", 13 February 2002, at http://news.com.com/2100-1023-837137.html?tag=cd_mh, where Rep Robert Goodlatte, RVA confirms the current protection of ISPs from civil liability under federal and state law for content posted by a third party.

13 [2001] QB 201.

14 *Ibid* at 205.

15 *Ibid* at 208.

16 "Demon Settles Net Libel Case", at http://news6.thedo.bbc.co.uk/low/english/sci/tech/newsid_695000/695596.stm.

Another notable judgment is perhaps the Court of Appeal decision of *Loutchansky v The Times Newspapers Ltd & Ors*[17]. In this case, a Russian businessman sued The Times over an article that appeared in the newspaper's print and on-line editions. Even though newspapers are subject to different defences in defamation, what might be applicable to the issue of ISP liability is the court's encouragement of responsible maintenance of archives on the Internet. The court held that "where it was known that archive material was or might be defamatory, the attachment of an appropriate notice warning against treating it as the truth would normally remove the sting from the material."[18] The court further added that "the failure to attach any qualifications to the articles published over the period of a year (on the newspaper's website) could not possibly be described as responsible journalism."[19] In essence, the same argument could apply to ISPs if they can be found to be under a duty to responsibly maintain the content stored on their server within reason.

IV. To Sue or Not to Sue?

The ISP, for the purposes of this article, is defined as a service provider that has a network of servers.[20] Although ISPs often play different roles, here it is assumed the services provided include the maintenance of online discussion boards and the hosting of webpages. As mentioned above, a problem with the existence of such communities is that it is easy for an original publisher of a defamatory or offensive posting to remain masked due to the difficulty in tracing users over the Internet.[21] Moreover, it may be the case that the author of a posting is not worth suing because he or she simply does not have money. In some instances, it is therefore my view that the ISP should share liability not because they usually have deep pockets, but because they provide the breeding grounds for such postings yet fail to monitor them tightly.

In my view, although the Internet offers many advantages, we cannot overlook the inherent danger that it creates an easy forum which encourages and fosters defamatory comments among other harmful and offensive materials. It is arguable that free speech is facilitated since the high degree of anonymity enables all inhibitions in expressing one's true view to be discharged. However, this comes with a potentially high cost and it must be borne in mind this freedom is also not absolute. It may become necessary for ISPs to carry the burden of greater security measures in registering users as this freedom is subject to defamatory laws and possibly other controls for national security purposes. Holding ISPs liable for the publication of restricted materials may result in a higher level of self-censorship which may eventually find the balance between the notions of duties and responsibilities over the Internet.

Besides balancing the rights and responsibilities over expressions over the Internet, there are other important practical considerations. Generally speaking, as with most actions, only those who have money are sued. Many fear that by allowing the possibility of defamation lawsuits against ISPs, there is a danger of opening the floodgates of litigation. In terms of public policy, it is perhaps justifiable to limit who can be sued in Internet cases. Moreover, is it reasonable or even possible to require an ISP to monitor the large number of postings on its site? Nevertheless, just as it is difficult for an ISP to spot a defamatory posting, there is also an

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17 [2002] 1 All ER 652.

18 *Ibid* at para 74.

19 *Ibid* at para 79.

20 http://cnet.com/Resources/info/Glossary/Terms/isp.html.

21 For some, this may in fact be desirable!

equal chance that it will never come to the attention of the claimant. The floodgate concern may thus be exaggerated. Furthermore, it is submitted that attaching liability produces a positive deterrent effect by punishing the ISPs for allowing defamatory materials to be distributed through their servers.

A. Implications

A result of allowing the possibility of holding an ISP liable for defamatory comments posted on their sites includes forcing them into the role of the police on the Internet. In order to guard against lawsuits, after having received the slightest complaint, ISPs are likely to remove the posting(s) in question or at least seriously evaluate their value. An ISP may be required to monitor all activity on their sites to guard against lawsuits. This creates several problems. As mentioned above, the obvious concern involves the possibility of such a task. In addition, regulation would no doubt be extremely costly and timely, reaching billions of US dollars, similar to the projections in recent studies on the protection of net privacy.[22] Privacy in itself was contemplated to be a possible issue if monitoring was required. To reduce their own liability, an ISP would probably want to take greater measures to identify their users.[23] What has moreover been heavily debated is the fact that freedom of speech would prima facie appear to be under threat.

V. Common Approaches to the Issue

A. Is the ISP a Publisher?

As illustrated in the English case of *Byrne v Deane*[24], it is crucial to establish that the defendant being sued for defamation is indeed a publisher. This case involved a notice put up on a wall of a club. It provides an interesting and close analogy to the situation on the Internet and reference was made to the case by the court in *Godfrey v Demon*.[25] In *Byrne v Deane*, a notice was posted on a bulletin board on the club's premises which allegedly contained libelous content. Even when the plaintiff complained, the defendants, although they had not made the posting, but were occupiers or had exercised control over the premises, failed to remove it. *Byrne v Deane* stands for the general principle of "where the defamatory matter is placed in a visible manner on the defendant's property by some third party for whom he is not responsible, he may be treated as publishing the mater if he elects to leave it there."[26] In his judgment, Greene LJ also provides an example of a situation where a person would not be liable, even if he or she voluntarily allows such matter to remain. This is if the removal would involve great trouble and expense:

> "[Suppose] somebody with a mallet and a chisel carved on the stonework of somebody's house something defamatory, and carved it very deeply so that the removal of it could only be effected by taking down the stonework and replacing it with new stonework. In a case of that kind it appears to me that it would be very difficult, if not indeed impossible, to draw the

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22 "Net Privacy comes with a Huge Price Tag", *The Wall Street Journal Online*, 8 May 2001, at http://www.zdnet.com/filters/printerfriendly/0,6061,2716528-2,00.html.

23 See an Australian example illustrated in Milne, J, "OzEmail – an ISP's Approach to Privacy," [2000] PLPR 26, at http://austlli.edu.au/au/journals/PLRP/2000/26.html.

24 [1937] 1 KB 818.

25 *Supra* note 13.

26 Milmo, P and Rogers, W V H (ed), *Gatley on Libel and Slander*, (London: Sweet & Maxwell, 1998), p 131.

> inference that the volition of the owner of the house had anything to do with the continued presence of that inscription on his stonework."[27]

Though it may be tempting to put forth the argument that it would be of great trouble and expense, "if not indeed impossible" for ISPs to monitor their sites for defamatory content, the removal of postings once brought to their attention is clearly not such a difficult task. Applying *Byrne v Deane*, the ISP should be liable as a publisher for what is posted online through its servers if it is aware of the matter.

B. The ISP as Compared to the Telephone Company

With greatest respect to the US courts, I regretfully disagree that the role of the ISP is comparable to that of a telephone company as a conduit. The main argument in support of this view is that an ISP's function is to *store* information that is available to anyone with Internet access. The primary service of a telephone company is to only to provide a conduit for person-to-person communication, whereas the Internet provides communication for person-to-world. As their functions are different, the comparison is equivalent to that of apples and oranges.

C. The ISP as Post-Office Argument

In my humble opinion, this argument must also be rejected. Similar to the telephone argument, a post-office's duty is to deliver information. It is true that there is a chance the information may be communicated to third parties in the process as with a postcard. However, the post-office is not in the service to store information to be published to anyone who accesses its domain. The comparison is probably more relevant to an email service provider.[28] In any case, specific protection against defamation actions is afforded to the post office through s 29 of the *Post Office Act 1969* in the UK.[29]

D. The ISP as a Mechanical Distributor

An ISP is perhaps most comparable to distributors of information such as a newsstand or a library. I therefore argue that the same rules should apply with the availability of the common law defence of innocent dissemination.[30] The correct test should be whether the ISP knew or ought to have known, or was the ISP negligent in not knowing that the defamatory material existed. This should be judged on a case by case basis.

However, if deemed necessary to further limit potential litigation that arise out of the Internet, it is suggested that some traditional rules set out in the common law of defamation may be borrowed. The legislature may consider identifying specific categories of material regarded as severe enough to be actionable without proof of special damage. Examples include the categories in slander considered as actionable *per se*, subject to additions and updates[31] and

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27 [1937] 1 KB 818, 838.

28 As this is often a service covered by the ISP, it is submitted that where defamatory material is published through email, the ISP should not be liable.

29 *Supra* note 26, p 133. In Hong Kong, there is no known provision that is equivalent to s 29.

30 This defence is available to distributors such as newsagents, libraries and booksellers, who are also sometimes referred to as "mechanical distributors." *Supra* note 10, p 413.

31 These established categories consist of: 1) Imputation of a criminal offence punishable by imprisonment in the first instance; 2) imputation of an existing contagious disease; 3) imputation of unchastity or

liability could be limited to these areas. Due to the severity of these imputations, publication of such material should not be allowed to slide through simply because it is posted by an anonymous user and should therefore be all the more protected. Again, the point is that an ISP stores content with the intention of it being viewable by anyone with online access thus some degree of responsibility should be imposed, providing that it is reasonable.

VI. The Issue of Jurisdiction

Assuming it is possible to hold an ISP liable for defamation, a key problem appears to be in the area of jurisdiction. The jurisdictional issue could have serious implications for the ISP since its services are generally accessible anywhere a user can get online. It is suggested that the issue of jurisdiction could be determined by the place of publication, which in turn depends on where the content is accessed and read, and where the plaintiff has a sufficient interest in protecting his reputation. Although the House of Lords in *Berezovsky v Michaels and Others, Glouchkov v Michaels and Others*[32] does not directly tackle the issue of jurisdiction on the Internet, Lord Steyn stated that it was nonetheless an "important issue."[33] The actions for defamation were brought by two Russian businessmen, claiming damages in England from an article published by Forbes, an influential fortnightly American magazine. The claimants resided in Russia. Since the American magazine was also published in England, Russia, and was available on the Internet, the House of Lords carefully contemplated whether England was the appropriate forum of adjudication. In a three to two majority, the House of Lords held that the instances were ones in which all the constituent elements of torts had occurred in England; the publication of the defamatory material in England had been significant; and the claimants had reputations in England to protect. In such cases, it was not unfair that the foreign publisher should be sued in England. Moreover, the House of Lords affirmed the long established principle of defamation in *Duke of Brunswick v Harmer*[34] that each individual publication of a libel gave rise to a separate cause of action, subject to its own limitation period. In this respect, the rule of single publication as applied in the United States, is not applicable.

In Internet libel case of *Investasia Limited and Anor v Kodansha Co Ltd and Anor,*[35] the Hong Kong Court of First Instance applied the principles set out in the *Berezovsky* case at the English Court of Appeal.[36] The defendants in *Investasia* were in Japan with no connection to Hong Kong. The articles in question were written in the Japanese language. The first plaintiff was a company that was not registered in Hong Kong and the second plaintiff did not hold a Hong Kong identity card. Findlay J was nevertheless satisfied that, "the place to vindicate a damaged reputation in Hong Kong is in Hong Kong."[37]

Furthermore, in the recent Australian decision of *Gutnick v Dow Jones & Co Inc*[38] concerning the place of publication of Internet material, Hedigan J held that it has long been

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adultery to any woman or girl; 4) imputation as to the claimant's competence or fitness in any office profession, calling trade or business.

32 [2000] EMLR 643; [2000] UKHL 25.

33 See the end of Lord Steyn's judgment at "Postscript on the Internet." The decision could be reached without dealing with the issue of the Internet.

34 (1849) 14 QB 185.

35 [1999] 3 HKC 515.

36 These principles relied on in relation of the proper forum are not inconsistent with the principles set out in the House of Lords judgment.

37 *Supra* note 35, at 522.

38 [2001] VSC 305.

established in defamation laws that "publication takes place where and when the contents of the publication, oral or spoken, are seen and heard, and comprehended by the reader."[39] *Gutnick* was decided on the basis that publication takes place upon downloading.[40] Consequently, it was held that although the article containing the defamatory imputation was written in New York and stored in a web server in New Jersey, since it was published in Victoria, the Victorian Supreme Court had jurisdiction to hear and determine the case.

VII. The IceRed Case

This action recently pushed the much debated issues of free speech and privacy on the Internet into the Hong Kong spotlight.[41] In March 2001, E-Silkroad Holdings, an online exhibition and marketing company, became a target of chatroom threads on IcedRed.com. As a result, E-Silkroad initiated proceedings against the ISP, IceRed, for libel and demanded that the identity of those who posted the offensive comments be revealed. "The whole idea of chatrooms was to set up this opportunity to engage in free and open discussion without having to worry about potential repercussions...(A loss by IceRed) would change that,"[42] said Professor Raymond Wacks, a former law professor at the University of Hong Kong. Nonetheless, shortly after the parties appeared to be reaching a settlement, the defendant was served with a court order forcing the ISP to hand over the relevant data.[43] The implications of this closed-door decision is unclear although it appears that the Hong Kong courts are willing to go even further than the US or the English courts. The basic facts in *IceRed* were similar to those of *Demon*. A significant difference laid in the action that resulted. The offensive postings were immediately removed once IceRed had received complaint. Nevertheless, the court went further to order the release of Internet Protocol ("IP") addresses pursuant to the plaintiff's request. A further point to note when comparing the decisions in England and Hong Kong is the possibility that English courts might have decided on this matter differently if the newspaper rule were to extend to the Internet.[44] It is however submitted that the newspaper rule might not apply to the Internet if it is decided that the Internet cannot be monitored in the same way editors of newspapers can exercise their discretion on what gets published.

A. Distinctions between HK Legislation and that of Other Jurisdictions

Hong Kong's *Defamation Ordinance*[45] was written before the days of cyberspace. Accordingly, it is possible to count the ISP as a publisher when it has not specific legislative protection. Section 25(5) of the *Defamation Ordinance* might apply if the ISP were to rely on the defence of "Unintentional Defamation" although it must be shown that the publication was innocent and that all reasonable care had been exercised.[46]

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39 *Ibid* at para 60.

40 *Ibid* at para 67. This conclusion is reached after considering detailed arguments on the issue of publication.

41 Prior to *IceRed*, there was another unreported decision, which has been cited as *The Asia Online* case. It was raised in Stephenson's book. *Infra* note 47.

42 Ghahremani, Y, "Chill in the Chatrooms," AsiaWeek, Vol 27 No 15 (20 April 2001), at http://asiaweek.com/asiaweek/technology/article/0,8787,106050,00.html.

43 Naime, D, "Court Forces IceRed's Hand on Giving Names," Technology Post, *South China Morning Post*, 22 May 2001, p 3.

44 The "newspaper rule" basically states that newspapers are never required to release the identities of authors.

45 Cap 21.

46 In reality, this is very rarely used as a defence as observed from existing case law.

Since the UK *Defamation Act* was amended in 1996, it has been suggested that s 1(3)(c) and (e) of the *Act* may exclude the ISP from the class of publisher if it is merely "involved...in... operating or providing any equipment, system or service by means of which the statement is retrieved, copied, distributed or made available in electronic form...as operator of or the provider of access to a communications system by means of which the statement is transmitted, or made available, by a person over whom he has no effective control"[47].

It is also interesting to examine the legislative developments on ISP liability in Australia. Laws protecting ISPs who are not "aware of the nature of Internet content" have recently been enacted.[48] Under this legislation, ISPs are not obliged to actively monitor content and are only required to remove content following formal notification by the Australian Broadcasting Authority.[49] This approach differs from the English approach in that there would be no requirement of "reasonable care" for Australian ISPs under the provisions of s 91(1).[50]

VIII. A Feasible Test

In my view, the test for ISP liability should be control over the content of publication. If the ISP has sufficient control over the content stored on its server(s), it should be required to take reasonable care within a reasonable time frame to ensure that its content is lawful. As in the *Godfrey* case, if the Internet libel is brought to their attention and the ISP has the ability to remove it, they should. Alternatively, if it is reasonable that the ISP should know of the defamatory imputation hosted on their server, they should act reasonably. But what is reasonable? In such circumstances, looking back at the Australian example, the ISP may want to consider the approach adopted by OzEmail in tackling privacy issues. It provides an example of steps that may be considered reasonable in monitoring websites hosted by the ISP.[51] At the time of the article, OzEmail, the ISP who provided around 23 percent of Australia's domestic online community, collected "a fair bit of information during the course of doing business."[52] It is in fact not unreasonable and should not be considered as an infringement of privacy for the ISP to request for basic information of its users.[53] Let us take the mobile phone operator as an example. Nobody complains of an infringement of privacy where it is a standard requirement to provide proof of identity, address, and credit card information upon subscription. Making this disclosure a duty may also create a greater sense of responsibility on the part of its users in maintaining proper Net etiquette.

IX. Conclusion

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47 Stephenson, P, Kwan, A and Ellis, D, *Cyberlaw in Hong Kong* (Hong Kong: Butterworths Asia, 2001), p 39.

48 *Broadcasting Services Amendment (Online Services) Act 1999* ("*Online Services Act*"), s 91 at http://www.austlii.edu.au/au/legis/cth/num_act/bsasa1999449/sch1.html.

49 Eisenberg, J, "Safely Out of Sight: The Impact of the New Online Content Legislation on Defamation Law" University of New South Wales Law Journal, at http://www.austlii.edu.au/cgi-bin/disp.pl/au/journals/UNSWLJ/2000/7.html.

50 Section 91(1) of the *Online Services Act* provides that a law of State or Territory, or a rule of common law or equity, has no effect, to the extent to which it:
(d) requires, or would have the effect (whether direct or indirect) or requiring an Internet service provider to monitor, make inquiries about, or to keep records of, Internet content carried out by the provider

51 OzEmail Internet is one of Australia's Internet service providers. *Supra* note 23.

52 *Ibid.*

53 In the aftermath of the horrific events in the US on 11 September 2001, the collection of accurate user information is arguably even more necessary, regardless of the purpose of protection against actions in defamation.

There is no doubt that in a democratic society, freedom of speech must be guaranteed. Nevertheless, it is not an absolute right as reflected in existing laws such as defamation. Restrictions on freedom of expression are acceptable if (a) it is "prescribed by law"; (b) it pursues a legitimate aim; and (c) it is necessary in a democratic society.[54] Internet libel is not a blow to free speech. As highlighted by Lord Nicholls in the House of Lords decision of *Reynolds v Times Newspapers Limited*[55],

> "reputation is an integral and important part of the dignity of the individual. It also forms the basis of many decisions in a democratic society which are fundamental to its well-being: whom to employ or work for, whom to promote, whom to do business with or vote for...a reputation can be damaged forever, especially if there is no opportunity to vindicate one's reputation. When this happens, society as well as the individual is the loser. For it should not be supposed that protection of reputation is a matter of importance only to the affected individual and his family. Protection of reputation is conducive to the public good."[56]

However restrictions must only be applied in exceptional cases and where the three requirements above are satisfied. Also, we should not avoid regulation simply because it seems impossible. Otherwise, we may as well do without defamation laws altogether!

It looks like that different jurisdictions are adopting inconsistent approaches. This should not be of major concern as laws so vary from country to country. Some are nevertheless concerned that this gives potential plaintiffs the opportunity to "forum shop". In other words, they can choose to sue in jurisdictions where the law is more in their favour. But then their choice is limited in that they may sue in a jurisdiction only if they have a significant reputation to protect that. If this is indeed the case, why is it unreasonable for them to have the right to sue wherever they choose? On the other hand, the enforcement jurisdiction of the country where they choose to sue may be subject to further restrictions.[57] In other words, if the server hosting Internet libel is located in a jurisdiction which does not impose civil liability on the ISP, it cannot be guaranteed that their right to protection of reputation can be enforced. This is of particular importance where a plaintiff hopes to get the defamatory content removed.

When asked whether an ISP could bear some liability for defamation on the sites they host, it is my view that in Hong Kong, the answer must be yes. Although the Hong Kong courts have yet to decide a case of this nature, it is my belief that when the time comes, they will lean closer to English and Australian approaches. This is because our libel laws clearly have more in common. It is true that even in these jurisdictions, the answer is not entirely certain. Nonetheless, as opposed to the American position, the English courts are more willing to allow for the possibility of ISP liability where reasonable. For now, the lawsuits continue.[58]

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54 These points are adapted from art 10 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*.

55 [2001] 2 AC 127.

56 *Ibid* at 201.

57 Guernsey, L, "Court Says France Can't Censor Yahoo Site," *New York Times*, 9 November 2001, at http://www.nytimes.com/2001/11/09/technology/09YAHO.html.

58 "Muslims Sue AOL Over Chat Rooms", 31 August 2001, at http://news6.thedo.bbc.co.uk/hi/english/sci/tech/newsid_1518000/1518630.stm.

THE RIGHT OF ASSEMBLY AND THE PUBLIC ORDER: A DESTINED CONFLICT?

OVERVIEW OF THE *PUBLIC ORDER ORDINANCE* AND THE POSSIBLE REFORM

PAUL CHI-YUEN CHAN *

The Public Order Ordinance, being labelled as "evil" or even "draconian", has been severely criticised for restricting the freedom of assembly in Hong Kong. There has been much debate on this issue and the situation reached a climax when seven student protesters were arrested. Although the students were not prosecuted, the highly controversial legislation still remains. The issue revolves around the need, on the one hand, to protect the fundamental right of freedom of assembly, against the societal need for peace and order on the other. A line has to be drawn, and it should be a fine one. The extent to which the Public Order Ordinance has been able to resolve this dilemma is assessed in this article. Drawing from experiences in other jurisdictions such as Britain, Australia and the United States, the author concludes that the Ordinance suffers from many flaws including, among others, vagueness and ambiguity and the imposition of a disproportionate deterrence. This results in jeopardising our freedom of assembly.

I. Introduction

The controversy over the *Public Order Ordinance*[1] (the "*POO*") is perceived as one of the most dramatic but inspiring issues after the handover. Being labelled as the "evil" or "draconian" law, the *POO* was under severe attacks. Certain measures and stipulation of the *POO* were criticized as harsh, unnecessary and detrimental to our fundamental freedom to hold assembly. Politics further complicated the whole discussion as quite a large portion of criticism was directed towards the Provisional Legislative Council. Considered as an unrepresentative legislature, it made certain amendments to *POO* in 1997. In Hong Kong, a city characterized as the "city of protest",[2] the accusation of restricting the freedom of assembly obviously manages to attract international speculation as well as local concern, as it is an effective benchmark of how well "One Country, Two System" is implemented.

Certain radical campaigns aiming at challenging the law were incessantly held. A group of student protesters deliberately held their public processions without notifying the police, on the ground that citizens are under no obligation to comply with draconian and unjust law. The repeated incidents of "civil disobedience" have further derogated the creditability of the *POO* and deepened the conflict between the protesters and the government.

The arrest of seven student protesters once pushed the tension to a climax, yet the decision not to prosecute the students served as an effective relenting move in the end. Then the government surprised the public with a peculiar tactic: tabling a motion to seek the support for the *POO* in the Legislative Council (the "LegCo"). Thanks to the support from

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* The author is deeply grateful to Professor Andrew Byrnes for his invaluable guidance and patience, and wishes him well in Australia. The gratitude extends to Professor Johannes Chan for the inspiring discussion on international jurisprudence of freedom of assembly with the author. Finally, the author wishes to thank Miss Sara Tse for her comments on the final draft.

1 *Public Order Ordinance* (Cap 245).

2 "With more than 6000 public rallies having been held since reunification, Hong Kong has become known as the 'city of protests'". See "Public Order in a 'City of Protests'", *South China Morning Post*, 14 December 2000.

pro-government legislators, the *Ordinance* was upheld by a majority after a prolonged debate in the LegCo. Eventually, the controversial provisions remain and the debate is not yet settled.

The whole controversy illustrated the dilemma between our paramount respect for freedom of assembly and procession, and the societal need for peace and order. It is not disputable that the freedom to hold assemblies, processions and meetings is not absolute and certain restriction is legitimate and necessary. But the puzzling question is to what extent restriction is deemed to be justified. This research paper attempts to evaluate the performance of the *Ordinance* in resolving this dilemma and defining the restriction extent. First, the manner in which our freedom of assembly is guaranteed in Hong Kong will be explored. Then, major aspects of the *Ordinance* will be discussed and analyzed, such as the notification system, the dispersal power and the proportionality of punishment. Moreover, similar public order law from other jurisdiction such as Britain, Australia and United States will be compared. It concludes that certain defects and problematic features do exist in the *POO*, which may put our freedom of assembly in jeopardy. The provisions are vague and subjected to potential abuse by the police. In order to safeguard the proper enjoyment of this right, the government should assume the leading role to remove the loopholes rather than being ignorant to strong public criticism.

II. The Guarantee of Freedom of Assembly and the Restriction

The freedom of assembly and procession is considered as a fundamental human right which deserves strict protection. In Hong Kong, the guarantee of this freedom exists in both the domestic and international dimensions. In the domestic level, freedom of assembly and procession has acquired a status of constitutional right through the entrenchment in art 27 of the *Basic Law*,[3] the mini-constitution of the HKSAR. In the international level, art 20(1) of the *Universal Declaration of Human Rights 1948*[4] declared that everyone should have the right of peaceful assembly and association. Despite the doubt whether the *Declaration* is strictly applicable,[5] another international human right instrument, the *International Covenant on Civil and Political Rights* ("*ICCPR*") is directly incorporated into the jurisdiction of Hong Kong through art 39 of the *Basic Law*.[6] Article 21 of the *ICCPR*[7] provided that the right of peaceful assembly should be recognized. The implication of the two-dimensional guarantee is that freedom of assembly and procession is warranted both by the *Basic Law* and the *ICCPR*.

Under the *ICCPR*, apart from the protection against all kinds of interference,[8] State parties

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3 Article 27, *Basic Law*, "Hong Kong residents shall have freedom of speech, of the press and of publication; freedom of association, of assembly, of procession and of demonstration; ..."

4 Article 20, *Universal Declaration of Human Rights*, "1. Everyone has the right to freedom of peaceful assembly and association."

5 To the contrary, Clarke argued that the Declaration may be enforceable in Hong Kong because it is incorporated into the common law. See Clarke, W S, "Messrs Wong and Ng and the Universal Declaration of Human Rights" (1985) 15 *Hong Kong Law Journal* 137.

6 Article 39(1), *Basic Law*, "The provisions of the *International Covenant on Civil and Political Rights*, the *International Covenant on Economic, Social and Cultural Rights*, and international labour conventions as applied to Hong Kong still remain in force and shall be implemented through the laws of the HKSAR."

7 Article 21, *ICCPR*, "The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others.

8 The vest majority of the delegates in the Human Right Commission in United Nation agreed that the individual should be protected against all kinds of interference hindering the exercise of the freedom of

are also required to provide positive measures to guarantee the exercise of freedom of assembly. They are obliged to offer adequate police protection and prevent clashes or riots. Such responsibility cannot be reduced to a mere duty not to interfere, as stated in the rule upheld by the European Court of Human Right ("ECtHR") in *Platform v Austria.*[9]

But obviously, the freedom of assembly is not absolute. It should be subject to restriction in order to be reconciled with the competing interests such as societal needs for order and peace. The quotation by Lord Scarman in the *Red Lion Square Report*[10] illustrates the dilemma precisely:

> "The problem is more complex than a choice between two extremes – one, a right to protest whenever and wherever you will and the other, a right to continuous calm upon our streets unruffled by the noise and obstruction pressure of the protesting procession. *A balance has to be struck, a compromise found that will accommodate the exercise of the right to protest within a framework of public order which enables ordinary citizens who are not protesting, to go about their business and pleasure without obstruction or inconvenience.*"[11]

The concept of balance is widely recognized and echoed in the domestic public order legislation in most jurisdictions as well as various international human right instruments. Local authorities and police force are often vested with certain power to restrict the freedom. The *ICCPR* also provides that the restriction should be in conformity with the law, necessary in a democratic society and out of certain permissible purposes.[12]

III. Public Order Ordinance

The *Public Order Ordinance* was drafted and passed in 1967. Experiencing the worst civil unrest in Hong Kong, the primary function of *POO* was to prevent and control disorder after the 1967 riot. Wide power was granted to the police to prohibit and regulate public assemblies and meetings. But such power was criticized as unnecessary and unjustifiable. Later when the society resumed its stability, a series of amendments[13] were made to restrain the excessive power.

Yet, the *Ordinance* still confers local authorities various means to regulate the freedom of assembly, ranging from *"prior restraint"* and *"dispersal power"* to *"subsequent punishment"*[14]: The notification system, acting as a "prior restraint",[15] requires organizers to

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assembly. See Nowak, Manfred, *U.N. Covenant on Civil and Political Rights: CCPR Commentary* (Kehl am Rhein: Engel, 1993), p 376.

9 See *Platform 'Arzte Fur Das Leben' v Austria* 13 (1991) EHRR 204, para 32.
". . . In a democracy the right to counter-demonstrate cannot extend to inhibiting the exercise of the right to demonstrate. Genuine, *effective freedom of peaceful assembly cannot, therefore, be reduced to a mere duty on the part of the State not to interfere*: a purely negative conception would not be compatible with the object and purpose of Article 11 (of the *European Convention for the Protection of Human Rights and Fundamental Freedom* ("*ECHR*"), 1980)"

10 Lord Scarman, *Report of the Red Lion Square Disorder*, (1975) CMND 5919.

11 *Ibid* at para 5.

12 *Supra* note 7.

13 The most important amendment to restraining police power was made in 1995. Important features includes: licensing system is replaced by the notification system (ss 13, 13A), lesser power to impose conditions (s 11, 15), fewer grounds to object to public meetings (ss 9, 14), remove the power to make banning order by the Police Commissioner (repeal of s 17D).

14 The terms "prior restraint", "subsequent punishment" and "dispersal powers" are first created by Roda Mushkat to illustrate how the *Public Order Ordinance* operated before the 1995 regime. See Mushkat, R,

notify the Police Commissioner of the holding of public assemblies and processions. With "dispersal power", the police can stop meetings in progress. Failure to notify or comply with specified requirements under the *Ordinance* will lead to "subsequent punishment" and criminal liability.

In order to assess the performance of the *Ordinance*, the focus should primarily be put on the statutory provisions and government attitudes towards the policy. Comparative studies will also be done so as to provide a broader picture of analysis. The following discussion will be separated into the following areas: *notification system, prohibition power, dispersal power* and *subsequent punishment.*

A. Notification

Notwithstanding the fact that any kind of prior restraint would dilute the freedom of assembly to a certain extent, the legitimacy of a notification system is never in doubt. Early notice of public meetings and assemblies is essential for the police to provide optimal traffic control and arrangements. It is especially crucial in Hong Kong as our infrastructure is packed and our population density is among the highest in the world. Chaos and disorders are particularly easy to be triggered, and serious injuries can very likely be caused. Moreover, advance notice is necessary when local authorities have the complex decisions to make concerning priorities between competing uses of public area and facilities.[16]

Lord Scarman once questioned the instrumental value of the notification, and even described the notification requirement as "largely unnecessary" and "an embarrassment to law-abiding citizens"[17]. Nonetheless, after the outbreak of the Brixton Disorder 1981, he remarkably reversed his stance and recognized the necessity of advance notice.[18]

It is not difficult to establish a strong justification for prior restraint. Yet such justifiability does not necessarily render the notification requirement under the *POO* legitimate. Therefore, the main issue should be "the appropriateness of the specific method employed for this purpose."[19]

1. The Notification System

In the submission from the Law Society as well as the Asian Human Right Commission, it is argued that the notification system acts as an *indirect permit system.*[20] Under the *POO*,

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"Peaceful Assembly" in Wacks, R, (ed), *Human Rights in Hong Kong,* (Hong Kong: Oxford University Press, 1992), pp 411 – 415.

15 *Ibid.* In Mushkat's article, "prior restraint" includes licensing, notification and banning order. Following the repealed of the licensing scheme and banning order (s 17D) by the 1995 Amendment, they should no longer be included in this term.

16 Blasi, V, "Prior Restraint on Demonstrations" (1970) 68 *Michigan Law Review* 1481, p 1485.

17 *Supra* note 10, para 129.

18 See Lord Scarman, *The Brixton Disorders 10-12 April 1981: Report of an Enquiry* (London: H.M.S.O., 1986) para 7.45 "First, in my Report on the Red Lion Square Disorders, I expressed the view that the need for advance notice to the police had not been established. I think subsequent events have shown that the need does exist."

19 *Supra* note 14 at p 419.

20 *Submission of Asian Human Rights Commission,* LC Paper No CB(2) 448/00-01/05, p 3, at http://www.legco.gov.hk/yr00-01/english/panels/se/papers/448e05.pdf.

organizers must notify the police and obtain "a notice of no objection" before holding any assemblies. Section 17A(2) states that failure to comply with the notification requirement renders such public assemblies and meetings unauthorized.[21] Commissioner of Police possesses the power to prohibit the meetings. Participating in such meetings is a criminal offence and attracts maximum criminal liability of imprisonment for five years under s17A(3). (Proportionality issue will be discussed in the part "Subsequent Punishment"). *The combined effect is that the notice of no objection from the Commissioner performs the same function as an approval under a permit system.* It is against the notion of constitutional right, as we have to be approved in order to exercise the right we are inherently entitled to.

When comparing with the public order law in other metropolises, we seldom see the failure to notify the police would render the assemblies unauthorized. Normally only nominal penalties and fines are imposed for such fault. In New York, the New York City Administrative Code provides that failure to obtain permit should be liable for a civil penalty not exceeding $25 for each violation.[22] In Queensland, the public assemblies will be authorized even if the notification requirement is not satisfied. The only cost to the organizers is the waiver of legal immunity from the offence of obstruction of public place.[23] While in Britain, such offence is only punishable by fines not exceeding level 3 on the standard scale.[24]

Therefore, the constitutionality of the provision to criminalize a peaceful assembly or procession simply on the ground of failure to give notice, not to mention the heavy custodial penalty it is associated with, is seriously in doubt.[25]

2. Time Stipulation

The *Ordinance* also provides that notification must be filed seven days before the meetings and assemblies. Given the reputation as one of the most effective and efficient units in our bureaucracy, the need of seven days for the police to provide optimal traffic arrangements is questionable. Moreover, it should also be noted that an effective demonstration needs a certain degree of publicity. Therefore, the police are seldom ignorant of the meetings. In Hong Kong, the police tend to learn about most of the public gatherings through informal channels such as the intelligence network and prior publicity,[26] thus enabling them to adopt measures at a much earlier time.

During the debate in the Legislative Council, Councillor To Kun-sun proposed several

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Submission from the Law Society of Hong Kong, LC Paper No CB(2) 354/00-01/01, p 3, at http://www.legco.gov.hk/yr00-01/english/panels/se/papers/b354e01.pdf.

21 Section 17A(2)(a), *Public Order Ordinance*, "Where any public meetings or public processions takes place in contravention of section 7 or 13..., the public meeting, public procession or public gathering or other meeting, procession or gathering of persons, as the case may be, shall be an *unauthorized assembly*."

22 Section 10-110, *New York City Administrative Code* (New York, USA). Please see *Administration's Paper on "Legislation for Regulation of Public Processions and Public Meetings in Eleven Overseas Cities/ States/ Countries"*, LC Paper No CB(2) 525/00-01/01, p 10, at http://www.legco.gov.hk/yr00-01/english/panels/se/papers/b525e01.pdf.

23 Section 6(1), *Peaceful Assembly Act 1992* (Queensland, Australia). Please see *Administration's Paper on "Public Procession Requirements in Overseas Countries"*, LC Paper No CB(2) 303/00-01(01), Annex B-4, at http://www.legco.gov.hk/yr00-01/english/panels/se/papers/b303e01.pdf.

24 Section 11, *Public Order Act 1986* (Britain), see *ibid* at Annex B-5.

25 *The Bar's Submission On the Right of Peaceful Assembly or Procession*, LC Paper No CB(2) 345/00-01/01, para 34 (a), at http://www.legco.gov.hk/yr00-01/english/panels/se/papers/b345e01.pdf.

26 *Supra* note 14 at p 421.

amendments on *POO*, including shortening the time stipulation from seven days to three. But his proposal encountered opposition by the slim majority and was eventually voted down. The majority held the view that the time stipulation should not be a sufficient ground to amend the *Ordinance*. As long as the notification system is justified, the length of the application period is just an innocuous and trivial issue.[27]

However, such argument overlooks the fact that *the notification system will place further onus to exercise the freedom of assembly if the application period is excessively long.* Campaigns to fight for civil rights and protest against governmental policies are frequently held nowadays. Assemblies and parades, being the most popular means to express public views, often take place within a few days or even hours in order to serve as an immediate response to a specific event or government policy. This kind of prompt expression, known as "spontaneous demonstrations", serves as a valuable means of expression in our society.[28] It will be severely proscribed by the harsh application of period requirement.

The government attempted to rebut the argument by emphasizing the possibility of shorter notice within the existing *POO* restriction. Section 13A(2) provides that shorter notice should be accepted "in any case where CP is reasonably satisfied that earlier notice could not have been given". But the rebuttal is deemed to be unconvincing because it again implies that our right to hold spontaneous demonstration is reduced to a mere *discretion* granted by the authority.

B. Prohibition

1. Ground for Restriction

The Commissioner of Police may prohibit the holding of notified public meetings and processions where he "reasonably considers such prohibition to be necessary in the interests of national security or public safety, public order (*ordre public)* or the protection of the rights and freedoms of others" (ss 9, 14). By literally comparing this restriction clause with the one stated in the *ICCPR*, the government came to the conclusion that *POO* is even more liberal than the *ICCPR* because it has not adopted all the restrictions set out in art 21 of the *ICCPR*.[29] But it is neither an objective nor conclusive remark without exploring and analyzing the phrase liberally.

In fact, the international jurisprudence suggests a contrary case. In order to comply with the *ICCPR*, the restriction must be:

1. "in conformity with the law",
2. "necessary in a democratic society" and
3. based on permissible purposes for interference, which are "national security,

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27 Lau Kong-wah's typical comment during the LegCo debate illustrates such line of argument: "Whether (the notice period) is seven days, four days or 12 hours, what are the differences in terms of human rights? No matter what the proposals are, opinions are bound to be diverse. This is not a reason for amending the *Ordinance*." "Stampede 'could be Repeated'", *South China Morning Post,* 21December 2000.

28 "A society committed to a popular expression and involvement in public life must highly value the opportunity to engage in this type of immediate expression.", Baker, C E, 'Unreasoned Reasonableness: Mandatory Parade Permits and Time, Place, and Manner Regulations' (1984) 78 *Northwestern University Law Review* 937, p 1014.

29 "Response to FAQ on Public Order Ordinance" released by the Information Services Department, HKSAR, A6, at http://www.info.gov.hk/gia/general/200012/14/poo.htm.

public safety, public order (*ordre public*), public health and morals and rights and freedoms of others".

In ECtHR case *Sunday Times v United Kingdom*[30], the judges held that to be "in conformity with the law",[31] the restriction must be adequately accessible and formulated with sufficient precision,[32] whereas the phrase "necessary in a democratic society" implies the existence of a "pressing social need".[33] *ICCPR* delegates certain margin of appreciation in assessing the need of restriction. Nonetheless, the requirement of precision, principle of proportionality and minimum democratic standard should be strictly adhered to.[34]

Apparently, the wordings of s 9 and s 14 are not precise enough. The terms such as "public safety", "*ordre public*" or "the protection of the rights and freedoms of others" are broad enough to capture a variety of situations, conferring the police a high degree of discretion to object to a range of assemblies to be held.

The term "national security" was added into the restriction clause after the 1997 amendment. It is defined as "the safeguarding of the territorial integrity and the independence of the People's Republic of China".[35] In spite of its ambiguity and possibility of wide interpretation, the government claimed that this term is clearly defined.[36] A set of special administrative guidelines has been issued to the Police for the purpose of enforcing this provision.[37] However, the reluctance to reveal and publicize the guidelines left the public in confusion as to under what circumstances would such restriction be enforced.

The situation is aggravated by the tendency of the government to interpret vague terms such as "public interest" flexibly to their wishes.[38] Hallowed words render judicial review of these kinds of decisions highly unlikely.[39]

It must be emphasized that copying the terms slavishly from the *ICCPR* does not automatically renders the restriction clause in compliance with the international obligation. Only clearly defined criteria with reference to local context suffices. It is submitted that the terms in the restriction clause are only superficially grabbed from the *ICCPR*. The government does not even recognize the existence of subsidiary responsibilities associated with these expressions under the international jurisprudence and norms. Therefore, it seems to

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30 2 EHRR 245.

31 Actually the expression "prescribed by law" is used in the art 11 in the *European Convention for the Protection of Human Rights and Fundamental Freedoms*. However, it carries the same meaning and implication as "in conformity with the law".

32 *Supra* note 30 at para 59, "In the Court's opinion, the following are two of the requirements that flow from the expression "prescribed by law." Firstly, the law must be *adequately accessible*: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a "law" unless it is formulated with *sufficient precision* to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail."

33 See *Ezelin v France*, (1992) 14 EHRR 362, para 51.

34 CCPR Commentary on Article 21. *Supra* note 8 at p379, para 20, 21.

35 Section 2, *Public Order Ordinance*.

36 *Supra* note 29, A8.

37 *Ibid.*

38 In the decision not to prosecute the New China New Agency and Sally Aw, the Secretary of Justice explain the peculiar consideration of "public interest", which even included not affecting the business of Standard, one of the very few English newspaper publisher in Hong Kong.

39 Bevan, V T, 'Protest and Public Order', (1979) *Public Law* 163, p 169.

be ridicule for the government to conclude that the *POO* is more liberal just because fewer words have been included!

Almost in all overseas countries, there are regulations and criteria for local authorities to object to a procession. The Security Bureau tried to rely on this favourable evidence to justify the relevant clauses in the *POO*.[40] However, it seemed to have overlooked that most of the criteria developed in foreign jurisdictions are clear, unequivocal and subject to narrow interpretation.

For example, in Queensland, Australia, clear criteria are provided. Local authority is not entitled to ban assemblies unless "the safety of persons would be likely to be placed in jeopardy", "serious public disorder would happen" or "the rights or freedoms of persons would be likely to be excessively interfered with".[41]

In Britain, prohibition of processions is a measure of very last resort. Therefore, the only ground for making the prohibiting order is the apprehension of serious public disorder that cannot be prevented even by imposing conditions.[42] For assemblies to be banned, they have to be trespassory in nature. The prohibiting power is given by ss 70, 71 of the *Criminal Justice and Public Order Act 1994*. Such power only covers assemblies held "without the permission of the occupier of the land" and may result in "serious disruption to the life of the community" or "significant damage to land, building or monument with historical, architectural, archaeological or scientific importance".

In the United States, under the "Public Forum Doctrine",[43] only particulars such as time, place or manner of the meetings are subject to restrictions. To justify the restrictions, local authorities must be able to show that the restriction serves a significant governmental interest while leaving open alternative channels for speech.[44] In *Shuttlesworth v City of Birmingham*[45], the Supreme Court struck down the permit system exercised in Alabama because such system restrains the right to free speech "without narrow, objective and definite standards to guide the licensing authority". The US court adopted similar approach in a recent case *Ward v Rock Against Racism*[46]. It held that a regulation "must be narrowly tailored to serve the government's legitimate, content-neutral interest."[47] The restriction adopted should not be substantially broader than necessary so as to achieve the government's interest.

None of the regulations and criteria in the examples above is vague or can be subject to a wide range of interpretations as in the *POO* provisions. It is troubling to observe that the HKSAR government selectively and dishonestly use the above countries' examples and simply ignores the fact that these jurisdictions take a firm stance to reject broad, vague and ambiguous criteria!

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40 *Supra* note 22.

41 Section 13 (1)(b), *Peaceful Assembly Act 1992* (Queensland, Australia), *supra* note 23.

42 Section 13, *Public Order Act 1986* (Britain), *supra* note 24.

43 "Public Forum Doctrine" is the non-statutory doctrine concerning the freedom of speech in public property. It covered major aspect of freedom of assembly, and was derived from the constitutional protection under First Amendment of the US Constitution: "Congress shall make no law ... abridging the freedom of speech."

44 Phelps, A, "Picketing and Prayer: Restricting Freedom of Expression Outside Churches", 85 *Cornell Law Review* 271, p 282.

45 394 US 147 (1969).

46 491 US 781 (1989).

47 *Ibid* at pp 798-799.

2. Who Should the Power Be Vested With?

The ambiguity is not the only questionable feature. Equally problematic is the situation in which prohibiting power is entirely vested with the police, an executive body. Such power is wide enough to allow the police to ban a specified assembly and procession. The appropriateness of placing such an extensive authority on public officials to make crucial decisions concerning the freedom of assembly is doubtful.

In addition, given the prominence of Commissioner of Police in the executive branch of the government, there is a danger that he/she will be subject to improper political influence in exercising the discretion. The vulnerability is further amplified by the *lack of a neutral, non-political and independent reviewing body to check police discretion.*[48] The public is increasingly anxious about the potential for abuse of this power, as they can see the possibility that relevant provisions in the *POO* can be manipulated to hinder politically sensitive groups such as Falun Gong or April the Fifth Action from holding assemblies and processions.[49]

As Lord Scarman stressed, "standards of police conduct and the proper use by the police of their powers mean more to society than the theoretical state of law",[50] the existing defect mentioned deserves great public attention. The application procedures for prohibiting order in Britain and Australia are particularly illuminating here.

In Britain, s13(1) of the *Public Order Act* 1986 provides that application for an order must be made to the local council of the district.[51] Based on the merit of application, councils may, with the consent of the Home Secretary, make an order or refuse the request. The local councils are democratically elected representatives. Thus, the involvement of local councils can add the necessary elements of local knowledge and political accountability. The involvement of the Home Secretary is to further enhance political accountability and consistency in making the orders.[52]

In Australia, the application procedure is governed by the state law and the power to prohibit is vested with the Magistrates rather than the police force.[53] In reviewing the relevant procedures, the Electoral and Administrative Review Commission thought "it would not provide adequate protection for the fundamental right (of peaceful assembly) if one is to rely

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48 *Supra* note 14 at p 425.

49 "*The Public Order Ordinance is enough to prevent the Falun Gong or any other group from undermining Hong Kong's stability.* Public opinion will be on the side of the Government to take action, should any group overstep the boundaries of the law." See "Time to Be More Mute With Cult", *South China Morning Post,* 10 March 2001.

50 Lord Scarman, "The Conflict in Society: Public Order and Individual Liberty", *Papers of the 7th Commonwealth Law Conference* (Hong Kong: The Commonwealth Law Conference Ltd., 1983) p 201, 203.

51 However, a different procedure applies in London under s 13(4), *Public Order Act 1986.* The Commissioner of the City of London Police may himself, with the consent from the Secretary of State, make a banning order. Yet, under s 13(12), participating in a prohibited procession is subjected only to a fine not exceeding level 3 on the standard scale. See *supra* note 24.

52 Card, R, "Processions and Assemblies", in *Public Order Law* (Bristol: Jordans, 2000) p. 209, 233.

53 Take Queensland as an example; under s 12(1) of *Peaceful Assembly Act 1992,* the relevant local authority may apply to a Magistrates Court for an order refusing to authorize the holding of assembly. *Supra* note 23.

upon police discretion not to prosecute the demonstrators."[54]

Placing the power on either a *democratically elected body* or the *judiciary* is more advantageous in several ways. Democratic elections ensure that the bodies are *politically accountable* and responsive to the public, while, in common law, the judiciary acts as the *final rampart of civil rights*. Moreover, separating such power from the bureaucratic structure *enhances the security against internal political pressure*. The extension of judicial involvement and removal of such power from the police can dilute the over-concentrated police power.

C. Dispersal Power

Considerable dispersal power has been given to the police by the *POO* to terminate meetings which are in progress. Section 17(2) provides that any police officer may stop and disperse any public gathering if "*he reasonably believes that it is likely to cause or lead to a breach of the peace*".

Again, the term "breach of peace" suffers from great ambiguity here. No definition of the concept of "breach of peace" is provided in any ordinances. Moreover, it is impossible to find any "modern and authoritative definitions of "breach of peace" amongst English and Commonwealth jurisprudence.[55] Bevan highlighted the wide range of interpretations of this term by providing five shades of meaning. "Breach of peace" can range from an actual outburst of violence to the potential disturbance which opponents may commit![56] With such breadth of the terms, even some slight disturbances can be legitimately caught by the concept, providing grounds for police authority to intervene. Therefore, it is obvious that s 17(2) is too elastic and it places a wide discretion in the hands of the police officer. Dubious standard is extended from the regulation of meetings to be held to the intervention of assemblies which are already in progress by this way.

In the United States, the Supreme Court has used various constitutional principles such as doctrine of overbreadth to narrow the interpretation of "breach of peace".[57] Certain qualifications such as "immediate breach of peace" or "imminent threat of violence" were added to this concept.[58] Such measures aim at confining the scope of discretion enjoyed by the executive branch. Similar approach can be followed in Hong Kong. Any application for judicial review on this provision will offer a golden opportunity to lay down necessary qualifications for this vague concept.

D. Subsequent Punishment

1. Proportionality

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54 Electoral and Administrative Review Commission, *Report of Review of Public Assembly Law* (Brisbane: The Commission, 1991) para 3-166.

55 *Supra* note 39 at p 181.

56 *Ibid* at p 182. The five shades of meaning provided by Bevan: a) a breaking-up of the peace or tranquillity of the neighbourhood. b) an actual burst of violence. c) the potential disturbance which onlookers or opponents may commit. d) personal alarm felt by bystanders. e) the breach of peace which the police believe will result if bystanders were present.

57 *Ibid* at p 183.

58 See *Chaplinsky v New Hampshire* 315 US 568 and *Cohen v California* 403 US 15.

Section 17A-E of the *POO* creates a cluster of offences and punishment. Offenders who fail to comply with the stipulation may be subsequently prosecuted and subject to a spectrum of liabilities. The controversial issue is whether punishment is proportionate for non-compliance offence in s 17A.

Section 17A(2) states that without notifying the Commissioner of Police, the holding of assemblies and processions are deemed to be unauthorized. Section 17A(3) provides that every person who organizes or participates in an unauthorized assembly is criminally liable. The combined effect is that it is possible for a peaceful participant of a public assembly to be convicted simply because the organizers failed to comply with the notification requirement. The offenders may be subject to maximum penalty of imprisonment for five year.

Note that the prosecution requires no proof of threat of any breach of peace or other harm done by persons who are alleged to have committed these offences. They are *simple disobedience offences* only. In addition, a failure to get permission from the police is technical in nature and *lack criminal intent*. The legitimacy to impose such heavy criminal sanctions merely because of non-compliance with notification requirement is disputed.

It is even more puzzling to learn that similar offences which carry greater blameworthiness draw even *less* criminal liability. For example, carrying an offensive weapon in public meetings will only be imprisoned up to 2 years, while the maximum penalty for forcible entry and riots are imprisonment of 2 and 3 years respectively.

Government responded to this criticism by claiming that the maximum penalties for any offence are usually set for the worst examples of the offence concerned. The outcome of severe disorder and chaos is possible if the police are not notified. The five years imprisonment will not be imposed for a mere absence of notification.[59] Therefore, it can be reasonably implied that the heavy custodial penalty is just for the sake of deterrence.

In the first place, deterrence must be tempered by proportionality because "the logical extension of the argument would be the death penalty for all offences at all level including parking offence".[60] To establish more severe criminal punishment, the burden of proof on culpability should be heavier. The government has not yet explained the reason why a breach of disobedience offence should deserve five years in jail. Moreover, the government seems to have ignored the availability of other criminal offences to condemn the more culpable acts. Being more specific in nature, the existing criminal offences are actually in better roles to deter the disorders and chaos which the government keeps on worrying.

The notion of proportionality is widely recognized in the international jurisprudence. In ECtHR case *Handyside v the United Kingdom*[61], it was held that penalty, as a kind of interference, should be "proportionate to the legitimate aim pursued".[62] The principle of proportionality is implied in the *ICCPR* also, requiring that the type and intensity of an interference be absolutely necessary to attain a purpose.[63] Obviously, excessively heavy

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59 "Government Statement on Public Order Ordinance", released by the Information Services Department, HKSAR, at http://www.info.gov.hk/gia/general/200012/14/1214180.htm.

60 Brabyn, Janice, *Submission for LegCo Panel of Security, 9 December 2000*, LC Paper No CB(2) 436/00-01/06, at http://www.legco.gov.hk/yr00-01/english/panels/se/papers/436e06.pdf.

61 1 EHRR 737.

62 "Every 'formality', 'condition', 'restriction' or 'penalty' imposed in this sphere must be proportionate to the legitimate aim pursued." *Ibid* at para 49(2). See also *Silver v UK* (1983) 5 EHRR 347 para 85.

63 *Supra* note 8 at p 379, para 20.

punishment is in contradiction with this principle, thus it is reasonable to conclude that *POO* contravenes the *ICCPR* in this aspect.[64]

Moreover, setting harsh and unreasonable penalty but enforcing it leniently is never a desirable situation. The rationale, *"the law should be strict, but application thereof can be lax"*, is another troubling feature under s 17A. Ronny Tong Ka-wah argued that such attitude is in contrary to the notion of rule of law and justice.[65] The law can be readily manipulated as a tool to impose heavy criminal punishment with a lesser burden to prove culpability. There is a risk that the police will rely on this general offence out of convenience and expedience in order to reach the same penalty.

2. Should Participants be Liable?

The debate on whether participants should be liable for engaging in unauthorized assemblies attracted a significant concern also. Every person who, without lawful authority, knowingly takes part in unauthorized assembly or procession can be criminalized under s 17A(3), including the participants.

The government argued that citizens who "knowingly" participate in meetings of which the police are not notified should be as morally culpable as the organizers of such assemblies. And even if one can distinguish the difference of culpability between participants and organizers, it is not practicable to limit the offence to organizers. In unauthorized assemblies, the police are not informed of who are the organizers. The police would face an impossible hurdle to enforce this law only to the organizers. However, the aforesaid arguments of the government are weak as the ultimate implication would be that peaceful participants should also be heavily penalized because it would make the detective work easier! Moreover, the differentiation is indeed not "impracticable". In most of the foreign jurisdictions, participating in an unnotified meeting is not criminalized, and the organizers are the only ones who bear liability.

IV. Conclusion

Accusing the *Public Order Ordinance* as a draconian law seems unfair if we consider the necessity of public order and security in Hong Kong. Given the need for public order and security, the power granted by the *POO* to the police to impose restrictions is likely to be appropriate.

However, even though the power to impose restriction is justified, such justification cannot conceal the flaws and loopholes in the *Ordinance*. In the present case, it is the content of these restrictions that provokes considerable criticism. The *POO* itself suffers immensely from *ambiguity and vagueness*; at the same time it grants *unnecessarily wide power* on police authority to prohibit public assemblies. The notification system acts as a *de facto permit system*, and failure to comply leads to a heavy custodial punishment, imposing a *disproportionate deterrence. The overall effect is that our fundamental right is reduced to a mere privilege.* Citizens are able to enjoy the freedom of assembly only upon the approval of the police, which is made out of vague guidelines and largely discretionary in nature.

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64 Margaret Ng Ngoi-yee, Legislative Councillor, also raised the same doubt in the LegCo debate on the *POO*. See "Lawmakers Uphold Public Assembly Law", *South China Morning Post,* 22 December 2000.

65 "Peaceful Assembly a Basic Right", *South China Morning Post*, 16 December 2000.

The government further disappointed the public by displaying its proclivity to safeguard public security at the possible expense of impeding our freedom of assembly. Government officials have been advocating the notion of "balance competing interests" all the time. However, instead of balance, their disquieting gravitation towards the need for public order is the only posture the public can identify so far. The radical remarks made by the officials[66] only managed to raise further dissatisfaction towards the irrational adherence to maintain the problematic features in the *POO*. The reluctance to review the law and refer the matter to the Law Reform Commission is yet another clear indication that public security remains to be a paramount concern of the executive officials which is to be kept under their authority.

Despite the tensional relationship experienced recently, it is still believed that protesters and police are not doomed to confront each other. The best solution can only be worked out by trust and co-operation between police and demonstrator, thus enabling each side to act with the greatest flexibility. I find it suitable to end this paper using what was once said by Margaret Ng, "reasonable and rights-sensitive legislation helps to build trust and co-operation and reduces tension, while a self-righteous stance on the part of the Government would increase tension and hostility."[67]

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66 For example, the Secretary for Security Regina Ip Lau Suk-yee once peculiarly cited ancient Chinese philosopher Mencius to support her argument, "These evils growing in the mind do injury to government, and displayed in the government are hurtful to the conduct of affairs." *Supra* note 64.

67 "Old Ordinance Should be Reviewed and Changed", *South China Morning Post*, 19 December 2000.

OFFENCE OF "POSSESSION OF CHILD PORNOGRAPHY"

HELEN HIU-LAM AU*

The production of child pornography puts all children at risk. At present, the only Hong Kong legislation regarding pornography is the Control of Obscene and Indecent Articles Ordinance, which makes publishing and possessing for the purpose of publishing obscene or indecent articles an offence. However, private possession of obscene articles is not included as an offence and no distinction is drawn between child/adult pornography. In June 1999, the government proposed the Prevention of Child Pornography Bill, which prohibits the production, possession and distribution of child pornography, the publication of advertisements on child pornography and the employment of children for the production of pornography, subject to defences. The author examined the elements of the proposed offence, explained the rationale behind it and held out hope of curbing the social evil.

I. Introduction

One may not be surprised that there does not exist a globally accepted definition of child pornography, as standards in each society and culture are subjective and underpinned by differing sexual, moral, ethical, and religious beliefs.[1] Despite national differences, some international bodies have been able to arrive at common definitions of child pornography, most of which focus on visual, rather than written material. The Council of Europe defines child pornography as "any audiovisual material which uses children in a sexual context."[2] International Criminal Police Organisation ("INTERPOL") delegates define child pornography as "the visual depiction of the sexual exploitation of a child, focussing on the child's sexual behaviour or genitals."[3]

Child pornography is a problem of an international scale. The global community recognizes that children are put at risk by those who engage in the production, exhibition, distribution, and consumption of child pornography and that children can suffer serious negative effects as a result of pornographic exploitation.

The young are among the most vulnerable in society. Their lack of maturity and experience renders them less capable of independent judgment, and for this reason, children are especially susceptible to serious harm. Utah Senator Orrin Hatch, in his prepared statement made before the Senate Judiciary Committee, referred to child pornography as "*a pernicious evil...which abuses, degrades, and exploits the weakest and most vulnerable members of our society*".[4]

At present, the only legislation in Hong Kong that sanctions pornography is the *Control of*

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1 Jones, L M, "Regulating Child Pornography on the Internet – the Implications of Article 34 of the *United Nations Convention on the Rights of the Child*", (1998) 6 *International Journal of Children's Rights* 55, p 57.

2 Council of Europe, Recommendation R(91)11 and *Report of the European Committee on Crime Problems* (1993).

3 Interpol Recommendations on Offences Against Minors, INTERPOL 61st General Assembly (1995). World Congress against Commercial Sexual Exploitation of Children, "Child Pornography: an International Perspective", 27 October 2001, at http://www.usis.usemb.se/children/csec/215e.htm.

4 Senator Orrin Hatch, Comments before the United States Senate Judiciary Committee hearings on Senate bill 1237, 4 June 1996.

Obscene and Indecent Articles Ordinance[5] (the "*COIAO*") which covers pornography generally. Publishing, and possessing for the purpose of publishing, obscene or indecent articles, whether or not for profit, is an offence punishable by a fine and imprisonment.[6] The *COIAO*, however, does not specify that it is an offence to possess or produce obscene articles for private purposes. There are no laws making child pornography a separate offence.

In June 1999, the government proposed a bill to provide for various offences specifically relating to child pornography. The *Prevention of Child Pornography Bill* (the "*Bill*") seeks to enhance the protection of children by prohibiting the production, possession and distribution of child pornography, the publication of advertisements on child pornography and the employment of children for the production of pornography.[7]

II. Justification for Criminalizing Possession of Child Pornography

The *Bill* has received a positive response from the community at large. Statistics over the past few years show that the sale, publication and possession of child pornography exists in Hong Kong.[8] Though the problem of child pornography is not very serious now, it may possibly worsen if no measures are taken to tackle the problem. The problem of child pornography on the Internet is especially worrying because the Internet is a quick and cost-effective means of proliferation. Legislative Council members and non-governmental organizations have expressed great concern and have urged the introduction of relevant legislation to combat the problem. Moreover, Hong Kong is under an obligation to protect its children against all forms of sexual exploitation and abuse under art 34 of the *United Nations Convention on the Rights of the Child* (the "*Convention*"). The Security Bureau decided to propose the new bill, aiming to produce a deterrent effect on child pornography and to send a strong message to the community that child pornography-related crimes are intolerable.[9] The *Bill* makes child pornography offences attract more serious penalties and makes child pornography a separate offence. Clause 3(3) of the *Bill* criminalizes anyone who possesses child pornography for all purposes, so as to curb the demand and thus eliminate the problem more effectively.

Clause 3(3) is probably the most controversial part of the *Bill* since it criminalizes possession even for private use which is considered by some as unnecessary infringement of people's freedom. It is worthwhile to note that the target of the *Bill* is not the pornographic photographs by themselves, which may or may not fall within the scope of the *COIAO*, but the process by which the photographs were made. What the *Bill* is attempting to do is to stop the involvement of children under 16 in the production of indecent films or photographs. It is acknowledged in *R v Land*[10] that the object of the corresponding legislation[11] in the United Kingdom is to protect children from exploitation and degradation, and that potential damage to the child occurs when he or she is posed or pictured indecently. The new legislation also seeks to reduce, indeed as far as possible to eliminate, trade in or possession of it as it is the demand for such pornographic material which leads to the exploitation of children.

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5 Cap 390.

6 Section 21(1), *Control of Obscene and Indecent Articles Ordinance*.

7 Speech (in Cantonese) by Secretary for Security, *Legislative Council Proceedings*, 30 June 1999, p 9254.

8 The figures that illustrates the problem of sales, publication and possession of child pornography in Hong Kong for the period of 1 April 1995 to 31 March 1999, could be found at the *Legislative Council Brief Prevention of Child Pornography Bill*, para 6, 27 October 2001, at http://www.legco.gov.hk/yr98-99/english/bc/bc80/general/100_brf.pdf.

9 *Supra* note 7, p 9255.

10 [1998] 1 All ER 407.

11 *Protection of Children Act 1978* (UK).

III. Positions of Other Jurisdictions

Canada, also a signatory to the *Convention*, has laws prohibiting the possession of child pornography.[12] In New South Wales, Australia, s 578B of the *Crimes Act 1900* also renders possession of child pornography an offence. In the United Kingdom, also a signatory to the *Convention*, the *Protection of Children Act 1978* made it an offence to take, or permit to be taken or to make any indecent photographs of a child. Section 160 of the *Criminal Justice Act 1988* has also made possession of child pornography per se illegal, and there are already cases in which individuals were indicted for possession of child pornography under this *Act*.[13] The *Criminal Justice and Public Order Act 1994* inserted a definition into the 1978 statute to encompass the use of computer-generated images.[14]

IV. Definition of "Child Pornography"

The key phrase "child pornography" is explicitly defined in the *Bill* in clause 2(1)[15] and includes computer-generated images.

The inclusion of data in electronic means serves to sanction pseudo-photographs as well – hence a person commits an offence if he loads on to a computer a picture of an adult woman and a picture of a child, neither of which is indecent, and creates from them an image which is indecent and which appears to represent a child.[16]

One may challenge that, as there is no exploitation of the child involved in the process of making the indecent article or picture, it is unfair to criminalize the publication or possession of pornographic pseudo-photographs. However, there are strong reasons that support the inclusion of computer-generated images which constitute pornography. Firstly, it may be technically difficult for the prosecution to prove whether a particular pornographic picture is only a composite. Moreover, indecent pseudo-photographs may be used in the seduction and corruption of children.[17] It is therefore consistent with the policy of protecting children from exploitation to criminalize the publication or possession of pornographic pseudo-photographs.

V. Possession

Under the *COIAO*, simple possession of child pornographic articles is not unlawful and prosecution cannot be instituted.[18] However, clause 3(3) of the *Bill* provides that any person

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12 See *Sharpe* [2001] 1 SCR 45.

13 *Supra* note 1, p 65.

14 *Criminal and Justice and Public Order Act 1994* (UK), s 84(4)(b) reads "data stored on a computer disc or by other electronic means which is capable of conversion into a photograph."

15 Clause 2(1) of the *Bill*:
(a) A film, photograph, publication or computer-generated image or picture that indecently depicts a person who is, or looks like, a person under the age of 16 and includes data stored on a computer disc or by other electronic means which is capable of conversion into such a film, photograph, publication, image or picture; or
(b) Any object that indecently depicts a person who is, or looks like, a person under the age of 16.

16 Stone, R, "Extending the Labyrinth: Part VII of the *Criminal Justice and Public Order Act 1994*", (1995) 58 *Modern Law Review* 389, p 391.

17 HAC Report, *Minutes of Evidence*, p 2, Q 14.

18 Legislative Council Panel on Security, *Minutes of Meeting*, 3 September 1998, para 33, at http://www.legco.gov.hk/yr98-99/english/panels/se/minutes/se030998.htm.

who has in his possession any child pornography commits an offence.

There is an implied mental element in the definition of possession. It is decided in *Warner v Metropolitan Police Commissioner*[19] that, in order to establish possession, it must at least appear that the defendant knew he had the indecent photograph, even though he did not know about its content. According to the Security Bureau, the implied elements constituting the crime of possession are "prior knowledge" and "intent", or in other words "knowing possession". With reference to the Internet, a person knowingly comes into possession of child pornographic articles when he deliberately downloads the materials from the Internet on his own computer and saves them or prints them out. Whether a person would be convicted of knowingly possessing pornographic articles would be a question for the court.[20] Therefore, a defendant principally may defend himself by simply claiming that "he did not know, nor did he have any cause to suspect, it to be child pornography".[21] The onus is on the prosecution to establish such elements.[22]

Clause 4(1)(a) of the *Bill* provides a defence for child pornographic materials that are produced for legitimate reasons.[23] However the *Bill* does not state what a "legitimate cause" is. In general, medical research, purposes of education and news reporting should be justified.[24] It would be for the court to determine whether the use was legitimate after taking into account all the evidence.[25]

Besides the defence of legitimate reasons, the *Bill* also exempts the defendant from liability if "he had not asked for any child pornography and after it came into his possession he endeavoured to destroy it within a reasonable time".[26]

VI. "Indecently Depicting a Person"

Clause 2(2) of the *Bill* provides that references to indecently depicting a person shall be construed as references to depicting a person engaging in sexual activity or depicting a person in an indecent sexual manner or context. However, other than such a literal construction of the phrase, there seems to be no clear definition in the *Bill* of what constitutes child sexual behavior or genitals. One may want to trace from case law the definition of "indecency". In *R v Knuller*[27], Lord Reid held that "*indecency is not confined to sexual indecency...it includes anything which an ordinary decent man or woman would find to be shocking, disgusting and revolting.*" The term remains vague for the purpose of the *Bill*. One may argue for the adoption of a reasonable standard in drawing up the definition. However, as mentioned in the introductory paragraph, since standards vary from society to society or even within society, it may be wise to leave room for the court to decide on the facts of each case and in light of the local context.

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19 [1969] 2 AC 282.

20 *Supra* note 18.

21 *Prevention of Child Pornography Bill*, clause 4(1)(b), *cf.* s 1(4)(b), the *Protection of Children Act 1978* (UK), s 160(2)(b), *Criminal Justice Act 1988* (UK).

22 Speech (in Cantonese) by Secretary for Security, *Legislative Council Proceedings*, 30 June 1999, p 9256.

23 Cf. s 1(4)(a), the *Protection of Children Act 1978* (UK), s 160(2)(a), *Criminal Justice Act 1988* (UK).

24 Speech (in Cantonese) by Secretary for Security, *Legislative Council Proceedings*, 30 June 1999, p 9256.

25 *Supra* note 18.

26 Section 160(2)(c), clause 4(2), cf. the *Criminal Justice Act 1988* (UK).

27 [1973] AC 435 at 458.

VII. Defence of Reasonable Belief as to the Age of Person Depicted

Under clause 4(3) of the *Bill*, where a picture is alleged to constitute child pornography, honest belief that the person in the picture is or is depicted as being 16 years of age or more is not a defence unless the defendant takes all reasonable steps to ensure the age of the person depicted.

It may be technically difficult to determine whether a person is or looks like a child under the age of 16 or he/she is actually above the age of 16. Generally speaking, overseas experience reveals that the court would examine all the available evidence including the appearance of the child in the article in question, medical advice, medical documents as well as the overall impression presented by the article so as to determine whether it constitutes child pornography.[28]

Even though it is true that someone who produces or possesses an article in question being unaware that the person who appears therein is under the age of 16, or being uncertain whether the presentation of the article constituted child sexual behaviour or genitals may still possibly be caught under clause 3 of the *Bill*, it is thought that the defence available under clause 4(3) justifies the presumption of the knowledge of the age of the person depicted in clause 3.

VIII. Conclusion

The new *Bill* should be applauded as it renders illegal not only the publication but also the production and possession of child pornography. Children who are involved in child pornography when they are young will not only suffer from emotional trauma, but will also often become involved in child pornography as adults by either continuing to entice children into the trade or by becoming traffickers of child pornography.[29] Children who are exposed to pornography are in danger of being seduced into believing that pornographic activity is normal.[30] According to experts, there is evidence that individuals use child pornography for sexual gratification, for validation and justification of paedophilic behaviour, blackmail to ensure the lifelong silence of the child, as a medium of exchange with other child pornographers, to gain access to other markets and children and so on.[31] Therefore, child pornography, being an unhealthy notion by itself, should be eliminated at the source. The new *Bill* is a celebrated step towards achieving this goal.

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28 *Supra* note 18.
29 *Supra* note 1, pp 70-71.
30 *Ibid.*
31 *Ibid* at 56.

對《佔用人法律責任條例》第 3 條第(1)、(2)款的分析及建議 – 普通法制度下雙語立法的困難

陳智遠*

香港自七十年代開始法律中文化的工作，在雙語立法過程中，難免碰到很多翻譯及闡述上的問題。再加上香港實行承襲自英國的普通法制度，難免引入以英文表達的普通法詞句，這類詞句很難傳神地以中文去表達，爲雙語立法造成額外的困難。本文以《佔用人法律責任條例》(Occupiers Liability Ordinance)中的普通法詞語「一般謹慎責任」(common duty of care)爲起點探討中英文版本中出現的歧義，繼而闡述《釋義及通則條例》的應用及中英文語序上的不同爲雙語立法帶來的困難。

一. *引言*

香港自七十年代開始法律中文化的工作，務求達致法律雙語化的目標，使法律的中、英文版本皆爲同等真確本 (equally authentic)[1]。當然，雙語立法的過程中，難免會碰到很多翻譯上的問題，導致闡述上的歧義。再加上香港的法律制度爲普通法，而普通法承襲自英國，因此香港的法律制度中亦被引入以英語表達的普通法詞句，這類詞句無法傳神地以中文去表達，爲雙語立法造成額外的困難。

《*釋義及通則條例*》[2](簡稱《*釋*》)第 10B、C 條提供了指引處理中文英文版本歧義的問題。在是次報告中，我選取了《*佔用人法律責任條例*》[3] (*Occupiers Liability Ordinance*) 第 3 條 (1)，(2) 款來進行分析。討論主要分爲兩部分：第一部分研究中英文版本對來自普通法的詞句的演繹，討論在第 3 條出現的普通法詞句「一般謹慎責任」，"common duty of care"[4] 的出處由來，探討其字典中的字面意思能否表達該辭的內含意思，然後再討論《*釋*》第 10C 條是否合理；第二部分則集中討論條文中第(1)、(2)款的中英文版本中出現的歧義，然後嘗試從字面及立法原意出發，再加上《*釋*》及過往案例，嘗試解決並提供意見如何把條文改寫得更完善。

二. *「一般謹慎責任」 = "Common Duty of Care"? 中英文版本對來自普通法的詞句演譯*

《*佔用人法律責任條例*》(簡稱《*佔*》)是參照英國 1957 年頒布的《*佔用人法律責任方案*》(*Occupiers Liability Act*)[5] 而制定的，英文文本在 1959 年頒布，中文真確本則在 1996 年制定。英文文本明顯視爲原文本，中文真確本是翻譯而來。

「一般謹慎責任」的定義在《*佔*》的第 3 條「佔用人的通常責任範圍」的第(2)款清楚列明：

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* 筆者在此特別感謝李雪菁老師的精闢意見及啓發，爲文章注入更多新元素。

1 見《*釋義及通則條例*》第 10B 條第(1) 款：「條例的中文本和英文本同等真確，解釋條例須以此爲依據。」

2 第 1 章。

3 第 314 章。

4 第 314 章第 3 條第(1)、(2)款。

5 *Occupiers Liability Act* 1959 (英國)。

> Section 3 Extent of occupier's ordinary duty
> .....
> (2) The common duty of care in a duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonable safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there.
>
> 第 3 條 佔用人的通常責任範圍
> .....
> (2) 一般謹慎責任既採取在有關個案中所有情況下屬合理謹慎的措施的責任，以確保訪客爲獲佔用人邀請或准許該訪客到處所的目的而促用該處所是合理地安全。

簡單來說，「佔用人」所要負的責任，在於要確保訪客在處所內是「合理地安全」，而要實施適當的措施以履行其對訪客的責任。若不能確保訪客在所有情況下都是合理地安全，佔用人則須承擔其法律責任。

「謹慎責任」("duty of care") 是一個源自普通法中侵權法的概念，但究竟 "common duty of care" 是否和普通法的 "duty of care" 等同？在《*佔*》中並沒有清楚區分兩者，但在第 2 條第(2)款中提及「該等規則並不改變關於何人被如此施加責任或須向何人負上責任的普通法規則」("*the rule shall not alter the rules of common law as to the persons on whom a duty is so imposed or to whom it is owed*")，在條文中已間接表示了 "common duty of care" 和 "duty of care" 是不同，不應混爲一談。

找尋香港其他條例作參考亦可獲得相同結論。在《*管制免責條款條例*》[6](*Control of Exemption Clauses Ordinance*) 第 1 條第(1)款中「疏忽」的釋義中：

> 「疏忽」(negligence) 指不履行：
> .....
> (b) 需要合理程度的謹慎或須運用合理水平的技術的普通法責任；
> (c) 《*佔用人責任條例*》所施加的一般謹慎責任。
>
> "negligence" means the breach ...
> .....
> (b) of any common law duty to take reasonable care or exercise reasonable skill;
> (c) of the common duty of care imposed by the Occupiers Liability Ordinance.

在這裏將「普通法的謹慎責任」和《*佔*》中的「一般謹慎責任」分開闡述，便可知條文是想把兩者定爲不同的概念。「一般法律責任」的原意確是來自普通法，但隨著《*佔*》條文的制定，已把該責任變成由條文施加的法定責任 (statutory duty)；取了普通法的骨幹及內涵，冠以法定責任之名。在「一般謹慎責任」的內容中的一些準則例如「合理」，「安全」，仍然以普通法中的準則爲依歸。

了解該條文的簡單背景及內容後，下一個要討論的問題是，究竟把 "common duty of care" 翻譯成「一般謹慎責任」是否恰當？問題的癥結在於 "common duty of care" 不只帶有字面意思，還附上很多從普通法施加的額外內裏含義，但不憎普通法和英語的市民能否單從中文的字面意思 (literal meaning) 而獲得相同接近的理解？

研究字面意思，最好當然是從字典，辭典入手。翻查眾典籍中「一般」的意思，所刊的

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6 第 71 章。

解釋大同小異，主要可歸納爲以下三種：

(1) 普通；通常（《*辭淵*》[7]、《*辭海*》[8]、《*漢語大詞典*》[9]）
(2) 一樣；同樣；相同（《*辭海*》、《*應用漢語詞典*》[10]）
(3) 一切 (哲學用詞)（《*辭淵*》、《*漢語大詞典*》）

第 (3) 的意思是特有的哲學用詞，不在本文的討論範圍內。

表面上 (1) 的意思 (普通，通常) 和 (2) 的意思 (一樣，相同) 很相似，但當中其實是存在著差異的。「普通」，「通常」的意思中存在一個普遍性，以大部分人所持的普遍的標準爲依歸，講求普及、普遍。可惜，在「一般謹慎責任」的內容中，「合理」(reasonable) 的元素便在這個解釋中完全被忽略。「普通」的標準不一定代表「合理」的標準，是否合理還要取決於其他因素，例如環境，訪客的目的等。而「合理」的元素更是整個概念不可缺少的重要部分。很明顯，「普通」這個意思未能把其概念背後的真正意思帶出來。

(2) 的解釋亦未能傳神地表達這法律概念的意思，反而會爲釋意帶來混亂。「一樣」，「相同」的意思隱含了一個劃一的標準，指出所有佔用人都是承擔著同等的法定責任。但這明顯與「一般謹慎責任」的含意背道而馳，該責任的程度是可按不同個案，不同環境而作調節。在《*佔*》第 3 條 (3)款便列出若訪客是兒童和從事本身職業的人，該謹慎的標準亦會不同。[11] 因此，採用「相同」這意思去理解，不僅未能獲得真正意思，更會造成誤會，理解錯誤。

很明顯，"common duty of care" 的背後原意並不能從「一般謹慎責任」的字面意思上看出來，在釋意上可能引起問題。

但如引用《*釋*》第 10C 條，該問題便可獲解決。該條文內容爲：

> 第 10C 條　英國法律詞句
> (1) 凡條例英文內使用普通法詞句，而中文本內使用對應的詞句，則條例須依該詞句在普通法上等意義解釋。

引用第 10C 條，無論該中文的字面解釋能否表達背後的意思，該詞句還是依在普通法上的意義解釋。但我們還要探討究竟這樣的做法是否合理，雙方面的論據可掀起一番辯論。

在不合理那方面說，首先，雙語立法的最終目的及理想，是要使法律的中英文版本皆爲同等真確本，市民只要看中文或英文版皆可獲得相同理解，但第 10C 條顯然與該目標恰好相反，爲普通法詞句制造例外，遇上普通法詞句便一定要按過去大部分以英語表達的

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7 吳研因等編，《*辭淵*》，(北京：警官教育，1994)，第 1 頁。
8 夏征農主編，《*辭海*》，(上海：上海辭書出版社，1999)，第 3 頁。
9 羅竹風主編，《*漢語大詞典*》，(上海：漢語大詞典出版社，1998)，第 29 頁。
10 商務印書館辭書研究中心編，《*應用漢語詞典*》，(北京：商務印書館，2000)，第 1469 頁。
11 《*佔用人法律責任條例*》第 3 條第(3)款：
(3) 就現時目的而言，有關情況包括通常預期上述訪客會具備的謹慎程度，以及欠缺謹慎的程度，以致(例如)在適當的個案中 —
(a) 佔用人必須防備兒童不及成年人謹慎；及
(b) 佔用人可預期任何人在從事他本身職業時，在佔用人讓他自由行事的範圍內，會意識到並提防該職業通常附帶的任何特別風險。

案例作解釋。不要忘記的是這例子只是冰山一角，香港的普通法還有大量概念是不能以中文準確地表達。

另外，《*佔*》的第 3 條(1)、(2)款其實表達了法律施加的法定責任，已非普通法法規。《*釋義及通則條例*》第 10C 條卻是針對普通法的法律概念，在此可能根本不適用。

最後，亦是最重要的是，不懂英語或普通法的市民便不能單從中文版本清楚理解法律加在自己身上的責任。《*香港人權法案條例*》第一條言明，人人得享受人權法案所確認之權利，並無所操語言之分。第二十二條規定，人人在法律上一律平等，且應受法律平等保護，無所歧視，而語言上的歧視是需要禁止的其中一項。[12] 準確的法律條文翻譯對市民清楚自己法律權力和責任起了關鍵性的一環。若市民只是由於不懂英語而未能清楚自己所負的法律責任，甚至獲得錯誤的理解，則明顯是基於語言上的歧視而獲得不同的保護程度。

但筆者偏向認爲引用第 10C 條的做法是合理的。首先，《*釋*》第 10C 條所指的是「普通法詞句」，就算「一般謹慎責任」是一種法定責任，也不能因此推定這不是「普通法詞句」，第 10C 條仍然適用。

再加上《*佔*》第 3 條 (2)款已明確界定何謂「一般謹慎責任」，不悟英語的市民在中文版本的輔助下，仍可清楚知道自己的法律責任，根本不需依靠該詞的字面意思。當然，這論據並不適用於其他沒有清楚爲該普通法詞句下定義的條文。

最後，我們要理解一個不可改變的事實，那就是普通法概念是以英語來表達，強求以短短的中文詞彙把英語普通法的內裏含意清楚無誤地帶出來，只是吹毛求疵，不切實際，存在實行上的不可能。

三. 《佔》第 3 條第 (1)、(2)款中英文版本有沒有歧義？

第二部分將集中討論第 3 條第(1)、(2)款的中英文版本有否產生歧義，及提出改善之處。

甲. 第 3 條第 (1)款

第(1)款的條文內容如下：

> (1) 處所佔用人對其所有訪客負有同樣責任，即「一般謹慎責任」，但如此處所佔用人有自由而又確實憑協議或其他方式擴大、限制、修改或豁除其對一位或多於一位訪客的責任，則屬例外，但僅以其有自由又確實擴大、限制、修改或豁除的範圍爲限。
>
> (1) An occupier of premises owes the same duty, the "common duty of care", to all the visitors, except in so far as he is free to and does extend, restrict, modify or exclude his duty to any visitors by agreement or otherwise.

只要閱讀第 3 條第(1)款的中文文本，便會發現該款明顯存在問題。其草擬方式繁複冗長，並不跟隨普通中文文法，用的語句又不易懂，令市民需要細讀數次方能明白條文意思。再者，驟眼看來中英文本表面意思好像並無分別，但若仔細比較兩個版本，把意思

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12 《*香港人權法案*》第 1, 22 條，在《*香港人權法案條例*》第 383 章第 8 條

相互配對，不難發現在中文本中的間線部份（「但僅以其有自由又確實擴大、限制、修改或豁除的範圍爲限」）似乎是英文本中所欠缺的，可能使中文本中多了額外意思。面對可能出現的歧義，我們可試用《*釋*》第 10B 條的指引嘗試處理：

> 第 10B 條　兩種法定語文本條例的釋疑
> (2) 凡條例的兩種真確本在比較下，出現意義分歧，而引用適用的法例釋義規則亦不能解決，則須在考慮條例的目的和作用後，採用最能兼顧及協調兩文本的意義

Chan Fung Lan v Lai Wai Chuen[13] 和 *Tam Yuk Ha*[14] 兩個案例涉及運用第 10B 條(3)款，法庭取的方法是先看中英文本的字面意思，若意思仍出現分歧，便搜尋以往案例或制訂該條文時的文件等，以找出其立法原意，若分歧仍存在，便按第 10B 條採取最能兼顧及協調兩文本的意義的版本。

但中文文本在字面上明顯多了一重意思，把佔有人改變法律責任限在他們「有自由而有確實改變了的範圍爲限」，不能在字面意思這層面上解決。

因此，我們有必要翻查案例。1972 年的案例 *White v Blackmore*[15]中一名在賽車比賽的觀眾意外被一條纜纏著，因賽車失事被拋起而喪生。其遺孀向賽事場擁有人(很明顯爲「佔用人」)以 *Occupiers Liability Act* 提出起訴。車場擁有人以由於在入場券上以通告形式豁除其佔有人的法律責任作辯護[16]。最後判決以二比一由被告得直。Lord Buckley 及 Lord Roskill 均認爲條文中 "in so far free to do so" 的句語是指佔有人有自由及權力豁除其責任，而豁除的責任僅限於在該處所已豁除了的實質範圍。案中車場主人有權力及已經透過通告清楚豁除了其對觀眾在觀眾席上所負的佔用人責任，因此判決死者敗訴。Lord Denning 的不同意判決(dissenting judgment)中亦接納這樣對該條文的演繹，他只是否定車場主人有權力豁除對觀眾席上觀眾所需負的責任。

由此可見，其實第(1)款的中英文版本意思是相同，根本不需要利用《*釋*》第 10B 條，只是英文簡單的一詞句 "in so far free to do so and does"，在中文本中要以兩句頗長的句子方能正確表達 — "in so far free to do so" 相對於中文本中的「...有自由...，但僅以其有自由...」，"and does" 相對於「...而又確實...，但僅以...又確實擴大...」。

筆者改善第(1)款的建議可分爲兩方面。首先，其實第(1)款可以寫得更簡潔一點，以免引起誤會。例如其中一句，「其對一位或多於一位訪客的責任」，很明顯是英文的用語，在中文裏簡單「訪客」一詞，已可以包含一位或多於一位之意，可簡單改寫成：「其對訪客的責任」。

另外重覆「有自由又確實擴大、限制、修改或豁除的範圍爲限」這語句其實是不必要，

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13 *Chan Fung Lan v Lai Wai Chuen* [1997] 1 HKC 1.

14 *R v Tam Yuk Ha*, Mag. Crim App No 933 of 1996.

15 *White v Blackmore* [1972] 2 QB 651.

16 同上，第 660 頁。該通告爲：

"WARNING TO THE PUBLIC
Motor Racing is Dangerous
It is a condition of admission, that all persons having any connection with the promotion and/or organisation and/or conduct of the meeting, including the owners of the land and the drivers and owners of the vehicles and passengers in the vehicles are absolved from all liabilities arising out of accidents causing damage or personal injury (whether fatal or otherwise) howsoever caused to spectators or ticket holders."

冗長及複雜的句語除了令條文累贅及難於理解外，普通市民驟眼看中文文本亦很容易誤會第(1)款最後一句賦予了額外的意思。因此最好的解決方法是把條文重寫，摒棄累贅的表達方式，把前後差不多一樣的語句合二爲一，令條文更簡潔同時保留原有意思。筆者建議改寫成：

「處所佔用人對其所有訪客負有同樣責任，即「一般謹慎責任」，除非處所佔用人有自由而又確實憑協議或其他方式擴大、限制、修改或豁除其對訪客的責任範圍，則以此範圍爲限。」

乙. *第 3 條第 (2)款*

第 3 條第(2)款的內容爲：

> (2) 一般謹慎責任即採取在有關個案中所有情況下屬合理謹慎的措施的責任，以確保訪客*爲 (1)獲佔用人邀請或准許該訪客到處所*的 *(2)目的*而 *(3)使用該處所*時是 *(4)合理地安全*。
>
> (2) The common duty of care is a duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be *(4)reasonably safe (3)in using the premises* (2)*for the purposes* for which *(1)he is invited or permitted by the occupier to be there*.[17]

在第(2)款內，我們找不到在(1)款內中英文分歧的問題，但著眼看中文版本，便發覺並不通順，要細閱多次才能明白。究其原因，最主要是盲目跟隨英文語序去翻譯英文原文。在此筆者嘗試比較兩個文本中的語序作闡述。

首先細看以上劃線部分，先憑數字配對中英文本的相對部分：

中文文本：	英文文本：
(1) 獲佔用人邀請或准許該訪客到處所	(1) he is invited or permitted by the occupier to be there
(2) 爲 ……目的	(2) for the purposes
(3) 使用該處所	(3) in using the premises
(4) 合理地安全	(4) reasonably safe

然後我們便可得出各相對部分在兩文本中的鋪排次序：

英文文本 - (4)，(3)，(2)，(1)： ...will be (4) reasonably safe (3) in using the premises (2) for the purposes for which (1) he is invited or permitted by the occupier to be there.

中文文本 - (1)，(2)，(3)，(4)： ...爲 (1)獲佔用人邀請或准許該訪客到處所 的 (2)目的 而 (3)使用該處所 時是 (4)合理地安全。

由此不難發現中文本在最後那句的語序其實恰好是*把英文文本的語序倒轉過來*。中文和英文對主語、賓語及輔助句的排列方法是不同的，在翻譯中把英文的語序如此倒轉實爲無可厚非。

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17 括號及號碼爲筆者所加，並非條文中的內容，旨在方便讀者比較中英文本的分別。

但不要忘記第(2)款的後句，其實是一句輔助句，形容前句中「責任」的內容，因此把賓語先說，再加上輔助句，並不符合中文的語序邏輯。因此，筆者建議把條文改成：

「一般法律責任即在有關個案中，以確保訪客爲獲得佔用人邀請或准許該訪客到處所得目的而使用該處所時是合理地安全，而採取在所有情況下屬合理謹慎的措施的責任。」

四. 結語

香港實行的普通法制度承襲自英國，故本法法律難免牽涉大量以英文表達的普通法詞句，這類詞句很難傳神地以中文去表達，往往在翻譯過程中導致中英文本出現歧義。再加上中英文語序有別，以英文語序去翻譯條文，所得的中文文本則會變得不通順及語理不清，難於理解。筆者希望以《*佔用人法律責任條例*》第 3 條第(1)、(2)款作爲起點，剖析在普通法制度下普通法詞句及中英文語序上的差異爲雙語立法帶來的困難。

其實文中的例子只是冰山一角，在中英文本釋義上的問題實在屢見不鮮。《*釋義及通則條例*》雖提供了若干實用的規則以解決中英文本出現歧義的情況，但仍彌補不了本地法律不能完全擺脫英語的先天「缺陷」。無可否認，自七十年代開始法律中文化的工作，在幫助大部分市民以母語理解法律條文內容的目標上，已收一定成效。可惜，當我們朝向法律雙語化的目標時，這類普通法詞句及中英文語序上的差異，卻成爲雙語立法的必然障礙。

TWO MINDS ON THE ISSUE OF CIVIL DISOBEDIENCE

SARAH PO-SAN CHENG*

Civil disobedience, while being generally viewed as a potential peril to the existing legal system, can on the other hand attribute great value in refining the law for the betterment of the society. In the light of the above, the article outlines a heated debate between two individuals, Thoreau Chan and Socrates Wong, with emphasis placed on the work of two philosophers, Henry David Thoreau and Socrates. Thoreau Chan suggests that obedience to law is not part of the generic duty of the citizens, and that civil disobedience cannot be prescribed clearly in distinct forms. Socrates Wong, however, claims that citizens do have a generic duty to obey the law, and that civil disobedience should be classified into different forms. The substantial argument will then focus on the possible factors of generic obligation of obeying the law and the permissible forms of civil disobedience, which will delve into different conditions of civil disobedience in detail. It will be further developed with an in-depth discussion with Mr. Ronny Tong, the ex-Chairman of the Bar Association, so as to analyze whether protests against the Public Order Ordinance in Hong Kong was a legitimate act of civil disobedience.

I. Introduction – the Dialogue

Socrates Wong and Thoreau Chan have opposing views towards civil disobedience. Socrates Wong argues that citizens have a generic duty to obey the law and that therefore civil disobedience is difficult to justify; and the forms of permissible civil disobedience should be prescribed. In contrast, Thoreau Chan claims that citizens do not have a generic duty to obey the law and that an act of civil disobedience is distinguished by its purpose rather than its form. The characters of Socrates Wong and Thoreau Chan are loosely based on the philosophers Socrates and Henry David Thoreau. Socrates was one of the first philosophers to emphasize the importance of obligation and obedience to the law and put this duty above his own life while Thoreau was one of the first thinkers who thought that civil disobedience was justified because obedience to an unjust law would be against our conscience. However, the dialogue between Socrates Wong and Thoreau Chan will also span the arguments of other thinkers who have applied to themselves the issue of civil disobedience.

The dialogue between Socrates Wong and Thoreau will be split into the following four parts. In the next part they will try to define civil disobedience. Then they will discuss whether there is a generic duty to obey the law. In the third part they will analyze some permissible forms of civil disobedience. Conclusions of the two philosophers will be applied in the final part of the discussion to the protests against the *Public Order Ordinance* in Hong Kong in 2000.

II. What is Civil Disobedience?

Thoreau Chan (TC): Before the discussion, I would like to state what I mean by "civil disobedience". I think civil disobedience is distinguished by its purpose and is an act that lies between revolution and conscientious objection. Revolutionary disobedience is a politically motivated breach of law that is targeted towards a change of government. Conscientious objection is a breach of law performed because the law is against an individual's moral beliefs. Civil disobedience lies between the two, as it is a politically motivated breach of law performed with the purpose of changing, protesting against, or disassociating oneself from a

* The author would like to express her deep appreciation to Professor Raymond Wacks, former professor at the University of Hong Kong for his invaluable help in research, his valuable insights, and his constructive criticisms of this paper.

law or a public policy.[1] It does not aim at changing the structure of the existing government but is a political act protesting against the laws in the existing government.

Some authors have suggested that civil disobedience must by definition be non-violent, used as a measure of last resort after all legal means have been exhausted, confined to breaking the laws against which one being protested against but not other laws, and that one must submit to the legal punishment for their actions. However, I do not think that civil disobedience should be confined so strictly by the means that it employs. These are only attempts to outline the morally permissible forms of civil disobedience, but such an approach does not really capture the essence of civil disobedience, namely, its purpose.[2]

III. Is There a Generic Obligation to Obey the Law?

Socrates Wong (SW): I have some concerns with your definition of civil disobedience purely by reference to its purpose. However, I would like to reserve my comments for later discussion, for surely before we talk about what civil disobedience is, we should first look at whether we have an obligation to obey the law. If we have an absolute obligation to obey the law, then the question of whether we are entitled to disobey any law does not arise at all.

TC: As you wish Socrates. Well, I think that it is clear from the outset that there is no absolute obligation to obey the law. The four reasons that are most often cited for the duty to obey the law are gratitude, consent, the negative consequences of disobedience and the duty of fair play. However, I think none of these multiple grounds for obedience can support an absolute obligation to obey the law.

A. Gratitude

SW: Well, let's go through them one by one to see if you are right. I think that gratitude can support an obligation to obey the law because almost everyone has benefited considerably from the existence of a system of law. The laws of the government have nurtured you even more than your parents and so you are under an obligation of gratitude towards the law. For that reason you should respect it even more than you respect your parents. You cannot casually discard it and disobey laws just because it doesn't meet with your approval. You are not on an equal footing with the law, the same as the fact that you don't have an equal relationship with your parents. If you disagree with the law in any way, then you should work within its framework to honour that respect.[3]

TC: I think the receipt of benefits is inadequate in showing why a person should be grateful to the law, and you are wrong in personifying the law and viewing it as an organism. When you gain a benefit from the law or the government, you think it is your responsibility to repay it. However, in actual fact, the law is just an institution that should ideally deal with matters of expediency. You have no responsibility to it at all. When you happen to benefit from its activity, you do not owe it anything. It is more or less a matter of luck or circumstance when you benefit from the law.

SW: Even if the laws are not personified, a benefactor for the benefits provided by laws can

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1 Raz, J (ed), *Authority* (Oxford: B. Blackwell, 1990), p 263.

2 *Ibid.*

3 Plato, *Crito*, quoted in Bedau, H A (ed), *Civil Disobedience in Focus* (London: Routledge, 1991), pp 13-27.

still be identified in the sense that gratitude can be owed to the people who enact and enforce the laws that we have benefited from.[4]

TC: The problem with this is that another condition has to be satisfied in order for one to be under an obligation of gratitude to the people who enact and enforce laws. It is generally agreed that one would owe another gratitude for some acts that benefit oneself only if the other person does intend to benefit oneself. If we happen to benefit from an act meant by its performer to only benefit themselves, or persons other than ourselves, we owe our benefactor nothing at all.[5] Thus we owe an obligation of gratitude to the people who enact and enforce laws only if they hold altruistic motives towards us. Yet, it is reckless to assume that the dominant motivation of legislators and law enforcers is altruistic, and that if their conduct is motivated mostly by self-interest, then no gratitude is owed to them.[6] Hence, we do not have the obligation of gratitude to our benefactors simply because of the receipt of benefits except where an altruistic motivation on their part is proved.

SW: I do not think that assuming an altruistic motive in the people who enact and enforce laws is so reckless. And if altruistic motives from legislators and law enforcers could be discerned, we should owe them our gratitude and thus have the obligation to obey the laws.

TC: I am not persuaded that we should assume altruistic motives on the part of people who enact and enforce laws. But even if such an assumption is made, and thus that one has an obligation of gratitude, it does not necessarily mean that we should repay by obeying the law, and I think this is another major problem with your argument. While we may owe legislators and law enforcers an obligation of gratitude, this does not entail that the only way to express our gratitude is by obeying all the laws. There may be a variety of ways to express our gratitude to them.[7] "A person with demanding, domineering parents might best display his gratitude towards them by catering to their every whim, but he surely has no prima facie obligation to do so."[8] Some other ways that we can express our gratitude include contributing our money to or spending our time to serve the government.

SW: While I do see some merit in your argument, I think obedience to the law is certainly a minimum requirement for one to express our gratitude to legislators and law enforcers as the very existence of the legal system depend upon widespread obedience to laws,[9] and other means of expressing gratitude can be seen as extras. However, I do concede that while many acts of obedience are necessary to the very existence of the system, not every act of obedience is necessary or important. For example, failing to stop at a red light at 2am in the morning is not likely to affect the functioning of the legal system.[10]

TC: So far, we can conclude that there are two reasons why we have no generic duty to obey the law owing to gratitude for the benefits we receive from the existence of laws. The first

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4 Simmons, A J, *Moral Principles and Political Obligations* (Princeton, New Jersey: Princeton University Press, 1979), Ch 7.

5 *Supra* note 4, pp 107-174.

6 Gans, C, *Philosophical Anarchism and Political Disobedience* (Cambridge: Cambridge University Press, 1992), pp 43-45.

7 *Ibid*, p 48.

8 Smith, M B E, "Is There a Prima Facie Obligation to Obey the Law?", (1973) 82 *Yale Law Journal* 950, pp 953-954.

9 *Supra* note 6, pp 47-48.

10 Greenawalt, K, *Conflicts of Law and Morality* (Oxford: Clarendon Press, 1987), p 106.

reason is that while the existence of altruistic motives on the part of legislators and law enforcers is a necessary condition for an obligation of gratitude, absence of such may negate the existence of such an obligation. The second reason is that not all laws have to be obeyed even if the obligation of gratitude to the system does attach to a particular subject, as gratitude to the law can be expressed in a variety of ways. While obedience to most laws is necessary for the legal system to continue to exist, obedience to some laws may not be that important for the existence of the legal system.

B. Consent

SW: Let's move onto the next ground of consent to justify an obligation to obey the law. It is clear that if one gives his consent to obey the law, then this serves as a clear basis of the obligation to obey the law. The obligation to obey the law arises because the act of giving consent to obey the law creates expectations and reliance on other people, and these expectations and reliance are created voluntarily and intentionally.[11] Thus, legal rules must be seen as obligatory as other people will rely on your consent to behave in accordance with them. If your promise to obey the law is not kept, then agreement cannot be a viable way to manage affairs between the state and its subjects, and it will be a big blow to social cooperation.[12]

TC: I accept that consent is capable of being a ground for the obligation to obey the law to arise but we should note that there are two kinds of consent, namely express and tacit consent. Only express consent – being a voluntary declaration of the individual's intentions to become a member of the state and to be subject to its laws – will give rise to the obligation to obey the law. The problem, however, with basing the general duty to obey the law on expressed consent is the paucity of people who have actually given express consent to obey the law.[13]

On the other hand, tacit consent will not, by definition, be expressed explicitly. Rather, the act of tacit consent will be inferred by some other means, such as actions or even silence. However, if the act of tacit consent is to account for the duty of obedience of members of the state towards the government, it must be an act that is sufficiently general to be applicable to most members.[14]

SW: Well, some acts that have been taken to have sufficient generality that could imply consent by members of the state are continued residence[15] or voting for its legislative bodies. Let us discuss the case of continued residence as it is one of the most often discussed grounds. While one cannot choose the place to be born of, in the case of continued residence there will be an expression of consent to obey the laws of that place or such an expression can be implied. This is obviously qualified by the condition that continued residence will imply tacit consent only if a person can freely choose to leave the state and if that person has a genuine

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11 *Supra* note 6, pp 50-51.

12 Zedalis, R J, "*On First Considering Whether Law Binds*", 69 *Indiana Law Journal* 137. Online. LEXIS-NEXIS Academic Universe.

13 Harris, E A, "*From Social Contract to Hypothetical agreements: Consent and the Obligation to Obey the Law*", 92 *Columbia Law Review* 651. Online. LEXIS-NEXIS Academic Universe. Some examples of groups which have given expressed consent to the law are state officials or naturalized immigrants.

14 *Ibid.*

15 Argued in Plato, *Crito*, p 51, Locke, *The Second Treatise of Civil Government* (Cambridge: Cambridge University Press, 1960), s 119 and Rousseau, *The Social Contract* (London: Everyman, 1950) Book 4, Ch 2.

alternative to staying.[16]

TC: I disagree for two reasons. First of all, even if I agree with you that the fact of continued residence can be viewed as an act of tacit consent, it is clear that few people will fulfil the two conditions you have mentioned. For the majority of people, alternatives to continuing to reside in one's own country are extremely limited.[17] Thus, as you probably recognise, if people who have no practical alternatives of residing elsewhere give their consent, this consent should not be considered as binding because it is given under a form of duress.[18]

Secondly, continued residence should not be taken as an act which expresses tacit consent because most people who continue to live in a certain place are not aware that their continued residence means their consent to obey laws, and do not intend it to be taken as such.[19] Therefore, their continued residence in the state should not be taken as a form of tacit consent.

SW: I disagree with you. I have already said that having alternatives to continued residence in a country is a condition of tacit consent. However, I do not agree that the majority of people have little practical alternatives to continued residence in a certain country as most people have the option to emigrate.[20]

Regarding your second argument, I think that consent which is given unintentionally is still nevertheless binding at times. For example, where someone who has unintentionally given consent in circumstances where they should have known the act would be taken as consent, their act should still be binding.[21] If not, no reckless unintentional act will be taken to be binding and if so, how would we be able to regulate society? This is especially so in a politically mature state. A country is an organization bound by certain rules, and its citizens should be aware that membership of such a country entails that one abides by these rules. If one does not, this is only carelessness on the part of the citizen, and does not exempt one from the duty to obey laws.[22]

TC: There are problems with both your counter-arguments, Socrates. First of all, I believe that emigration is not a practical alternative for many people. Hume has stated it eloquently:

> "Can we seriously say that a poor peasant or artisan has a free choice to leave his country, when he knows no foreign language or manners, and lives from day to day by the small wages which he acquires? We may as well assert that a man remaining in a vessel, freely consents to the dominion of the master, though he was carried on board while asleep, and must leap into the ocean and perish the moment he leaves her."[23]

Apart from being an impractical alternative to many, emigration also imposes unreasonable sacrifices on the individual and so it cannot fulfill the condition of voluntariness to express

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16 Hume, D, "Of the Original Contract", quoted in Eugene, F M (ed), E*ssays: Moral, Political, and Literary* (Indianopolis: Liberty Classics 1985) pp 465, 475.

17 *Ibid.*

18 *Supra* note 6, pp 52-55.

19 *Ibid.*

20 *Supra* note 3, p 51.

21 *Supra* note 6, pp 52-55.

22 Beran, H, "In Defense of the Consent Theory of Political Obligation and Authority", (1977) 87 *Ethics* 260, p 270.

23 *Supra* note 16, p 363.

tacit consent.[24]

Moreover, I think that acts unintended to express tacit consent, which can nevertheless be seen as an act of tacit consent, should not be perceived as being reckless or careless. This is because most people do not regard the state like a normal organisation and so do not think that continued residency is like accepting membership of an organisation and thus accepting the duty to obey laws.[25] They could not be said to have been reckless or careless in failing to realise that continued residence is an act of tacit consent.

SW: Well, I think that we have come to the point where we have elucidated our thoughts on the issue of consent and come to an amicable difference of opinion. Let us move on to the next ground from where the duty to obey the law arises: the utilitarian ground of the negative consequences of disobedience.

C. Negative Consequences of Disobedience[26]

SW: A duty to obey the law arises because disobedience by its members will inevitably cause harm to society. "Do you imagine that a state can subsist and not be overthrown, in which the decisions of law have no power, but are set aside and trampled upon by individuals?"[27] Disobedience to laws will adversely affect the smooth functioning of society and the welfare of its members. Therefore, members of a society have the obligation to obey all the laws passed by its legislature.

TC: I disagree with you for two reasons. First of all, the duty to obey the law is superfluous for the prevention of undesirable consequences flowing from an act of disobedience if acts of disobedience have negative consequences anyway.[28] Secondly, the negative consequences of disobedience cannot support a general duty to obey the law because not all acts of disobedience have negative consequences.[29]

Let me explain in more details. My first claim is based on the fact that when certain conduct is instituted by law, the moral reasons for keeping with a practice lies in the fact of social cooperation in following this arrangement and not from the fact that the law created the

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24 *Supra* note 13. Harris says especially when considering the various ties of family, friends, and community that bind the individual to the society in which she lives.

25 Simmons, A J, "Consent, Free Choice and Democratic Government," (1984) 18 *Georgia Law Review* 791, pp 807-9.

26 Bentham's believed that one should obey laws regardless of their content, and that habitual obedience to laws is fundamentally important to secure a stable society as it is an essential prerequisite for human happiness. See H.L.A. Hart, *Essays on Bentham* (Oxford: Clarendon Press, 1982), pp 262-63. However, Bentham recognized that a time might come when an evil law could create a conflict between legal obligation and moral obligation. In these circumstances, Bentham believed that one could disobey the law where the value of general legal obedience outweighed the negative consequences caused by the law in question. Bentham valued law and obedience to the law because they served utility, not because they are significant themselves; therefore he believed that non-utilitarian moral judgments should not be the basis of deciding whether or not one should practice civil disobedience. See Strassberg, M, "Taking Ethics Seriously: Beyond Positivist Jurisprudence in Legal Ethics" 80 *Iowa L. Rev.* 901. Online. LEXIS-NEXIS Academic Universe.

27 *Supra* note 3, p 50.

28 Raz, J, *The Authority of Law*, (Oxford: Oxford University Press, 1979), pp 245-9; Gans, C, *Philosophical Anarchism and Political Disobedience* (Cambridge: Cambridge University Press, 1992), pp 66-97.

29 *Ibid.*

practice or contributes to its maintenance.[30] When no such practice exists, then the fact that the law forbids it is superfluous because there is no moral reason for refraining to do it. Therefore, the obligation to obey the law cannot be based on the negative consequences flowing from disobedience. This is because the moral reason for doing what the law commands is not due to the laws themselves, but because of the social habit of doing or refraining from performing that act or the nature of the act itself.

My second claim is that not all cases of disobedience to laws have negative consequences. While disobedience may lead to negative consequences of endangering the law as a tool to institute desirable conduct in society, or of encouraging further acts of disobedience, this is not so in most cases.[31] One such example has already been given, which is crossing the street while the stoplight is red at 2 am with nobody seeing it.[32] Thus since not all acts of disobedience cause damage to the community, it does not serve as a basis for the duty to obey the law.

SW: I disagree with both your arguments, Thoreau. Regarding your first argument, it is correct if one only looks at the social practice instituted by the law in isolation; if so, the moral reason for doing that act comes from the fact of cooperation and not because it was instituted and is maintained by the law. However, this is an overly narrow conception of the negative consequences flowing from an act of disobedience. One can separate the harm caused to the law by disobedience on two levels; the damage to the good that results from not following that social practice, and the damage to the law as a tool for determining and enforcing desirable conduct.[33] Your argument neglects the latter damage, which is a serious flaw as the law's existence as an institution for determining forms of conduct in society is harmed by acts of disobedience. Thus the obligation to obey the law is not a superfluous one when considering the consequences that flow from disobedience to law.

While your first argument rests on inaccurate empirical facts, your second argument is logically flawed. I agree that not every act of disobedience towards the law will lead to harmful consequences to the law. However, this does not mean that there is no obligation to disobey altogether. At most, it means that there is no general obligation to obey the law, but it does not mean that harmful consequences do not supply a basis for the imposition of a duty to obey the law.[34] On the contrary, the position is that there is an obligation to obey the law where it leads to harmful consequences. Further, there are very few acts of disobedience that do not harm the law; your example of crossing the road when the stoplight is red and where no one sees is such a one. The condition of having no one to see your act of law breaking is a relevant condition as other people will not be encouraged by your act of disobedience to also break the law. However, such innocuous acts of law breaking are rare, especially in the context of acts of civil disobedience which by its nature is usually a public act that may incite others to disobey laws and thus harm the stability of society.

Therefore, while the negative consequences of disobedience to the law may not be able to serve as a ground for the general obligation to obey the law, it may serve as a ground for the obligation to obey the law in the vast majority of cases.

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30 *Ibid*, pp 245-249.
31 *Supra* note 6, pp 71-73.
32 *Supra* note 10, pp 179-180.
33 *Supra* note 6, pp 70-73.
34 *Ibid*.

TC: I agree that the negative consequences of disobedience can serve as a ground for the moral obligation to obey the law in some circumstances, but not that it gives rise to an absolute obligation to obey the law. This is so also for gratitude where the benefactor with altruistic motives confers benefits to the recipient and the recipient freely accepts the benefit, or where expressed consent to obey laws is given voluntarily. However, let's now move on to the next ground of fair play and to discuss whether it can justify a general obligation to obey the law.

D. Fairness

SW: Very well, but before we express our views on the issue, I would first like to express my understanding of the duty of fair play. I would like to discuss the duty of fair play as expounded by John Rawls, as it is the most influential theory of the basis of the obligation to obey the law in recent years.

The duty of fair play expounded by John Rawls is as follows:

> "Where there is a mutually beneficial scheme of social cooperation, and the advantages it yields can only be obtained if nearly everyone cooperates, and that cooperation requires some sacrifice from each person or at least a certain restriction on his liberty, and that the benefits produced by cooperation are up to a certain point, free. Free means that one knows even if he doesn't do his part, he will get the benefits of others who are doing their part. Under these circumstances a person who has accepted the benefits of the scheme is bound by a duty of fair play to do his part and not to take advantage of the free benefit by not cooperating. The reason that one must abstain from this attempt is that the existence of the benefit is the result of everyone's effort, and prior to some understanding as to how it is to be shared, if it can be shared at all, it belongs in fairness to no one."[35]

Thus the duty of fairness prohibits one from taking advantage of another and at the same time requires that one must comply with the rules governing the state.[36] The rules of any joint-enterprise requires one to limit the freedom and autonomy of everyone involved and so each party is under an obligation to play fairly with the other participants in the enterprise.[37]

The distinct feature of the duty of fairness that places it apart from the obligation to obey arising out of consent and gratitude is that the participant only needs to have accepted the benefits arising out of the just scheme of cooperation in order for one to be bound.[38] Thus the major advantage of the principle of fair play is that it fulfils the requirement of generality in that it is generally applicable to most citizens of a state. No promise is necessary for one to be under the obligation of fair play. Since mere acceptance of benefits is sufficient, one can be bound without knowing that one is performing an act that puts one under an obligation.[39]

However, while Rawls envisions that individuals participating in a co-operative activity must voluntarily accept obligations of fairness,[40] I would submit that obligations of fairness might

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35 Rawls, J, "Legal Obligation and the Duty of Fair Play", quoted in Murphy, J G (ed), *Civil Disobedience and Violence* (Belmont, Calif: Wadsworth, 1971), p 39.

36 Harris, Edward A, "Fighting Philosophical Anarchism with fairness: the Moral Claims of Law in the Liberal State" 91 *Columbia Law Review* 919. Online. LEXIS-NEXIS Academic Universe.

37 *Ibid.*

38 *Ibid.*

39 Simmons, A J, *Moral Principles and Political Obligations* (Princeton, New Jersey: Princeton University Press, 1979), pp 57-74.

40 *Supra* note 37.

be incurred even involuntarily. This may happen in two ways: (1) a person may explicitly refuse to accept the rules of the cooperative scheme, but accept the benefits of the scheme or (2) one may refuse to accept the rules and also not accept the benefit from the scheme.[41] I will deal with these two cases separately.

In case (1) where there is an involuntary participant in the scheme who nevertheless accepts its benefits, the question is whether such a person is still nevertheless under the obligation of fairness. The answer is yes, as their attitudes and statements are irrelevant, so long as they have voluntarily accepted benefits from the scheme and other people have voluntarily entered into the scheme. This is because they owe a duty to carry their share of the burdens of the scheme to the other participants.[42] If not, the problem of free-riding would arise and give rise to unfairness.

A twist occurs in case (1) where the involuntary participant accepts benefits but is ignorant of the rules of benefiting in the scheme of cooperation. In such a case, an obligation of fairness may nevertheless arise, depending on the amount of knowledge one has or reasonably should have about the cooperative scheme.[43] This is because while their participation in the scheme was involuntary, their acceptance of the benefits of the scheme is voluntary.[44]

Regarding case (2), it is difficult to see how someone who refuses to accept the rules of the cooperative scheme and who also does not accept benefits from the scheme is under the obligation of fairness.[45] However, it is very unlikely that one would not benefit in some way from the existence of a legal system, and thus there would be very few people who are not under the obligation of fairness.

I believe that my application of the principle of fairness fits in more with the political reality than Rawls's. Even in the most democratic societies, the state's imposition of legal duties does not involve individual choice in participating in the scheme or to accept benefits from it that the principle of fairness requires.[46] Thus the state imposes legal obligations on citizens whether or not they have voluntarily received benefits from the state. As it stands, I believe that my statement of the principle of fairness can form a near universal basis for the duty to obey the law.

TC: I'm not sure if I fully understand what you mean by a near universal basis for the duty to obey the law. Is it your argument that the duty of fairness applies even in undemocratic and unjust political systems? In Rawls's formulation, the conditions for the application of the principle of fairness are that the political system is just and democratic.[47] Are you suggesting otherwise?

SW: Let's assume for the present purposes that the political system in question is reasonably democratic and just. If so, I believe there is a near universal basis for the duty to obey the law.

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41 *Ibid.*
42 *Supra* note 10, pp 123.
43 *Supra* note 37.
44 *Ibid.*
45 For an opposing view, see Greenawalt, *supra* note 10, p 131.
46 *Supra* note 37.
47 *Supra* note 35.

TC: All right. If so, I would like to query your argument on how obligations of fairness may be imposed on people involuntarily. In case (1), I do not think it could properly be said that those who involuntarily accept the benefits of a just and democratic scheme of cooperation can be said to owe the other participants the duty of fairness. I do not think that fairness requires that people should pay for benefits they have accepted willingly but without knowing that it incurs costs on them.

Even if it can be said that where people receive benefits and fairness requires that they pay for them where they did not consent to such arrangements in advance,[48] I think this does not apply where people do not accept the benefits voluntarily because I do not believe that they should be forced to pay for it or else this will mean that we are demanding people to pay for benefits that they might rather not have and not pay for, than accept and pay for.[49] It will also lead to the undesirable consequence of allowing people to heap unwanted benefits on another, and demanding him to pay for them.[50] The benefits arising out of the existence of a legal system is clearly of this type, where people cannot choose but to benefit from it.[51] Most people fall within this segment, and I believe that they do not have the duty to obey the law out of fairness.

SW: In the case of benefiting in ignorance, as I have said, it may incur the obligation of fairness depending on the amount of knowledge that person holds. However, I believe that in most cases, people benefiting in ignorance should be required to pay for them as they have the choice of whether or not to accept the benefits, even if they do not know its price. Thus if I take advantage of the benefits, it means that I should pay for them out of fairness, [52] as other people have paid for the upkeep and continued existence of these benefits. Allowing one not to pay for what he has got, albeit without knowing the cost in advance, will lead to the problem of free-riding.

In the case where one has no choice but to accept benefits, I do not agree with you that the existence of the legal system should fall within this category. The existence of the legal system does not only serve to create an obligation to obey the law but also brings many other benefits, such as its function to regulate and enforce desirable behaviour, social stability and certainty.[53] Empirically, I believe most people do have a choice and the choice lies between the existence of the legal system and obedience to it or having no legal system and thus no requirement of obedience to it. Therefore it follows that the obligation of fairness can serve as the basis for a duty to obey the law to people who prefers the existence of law and obedience to it to no law and no obedience, which includes the vast majority of people.[54]

TC: I will agree with you on the ability of the duty of fairness to give rise to the duty to obey the law. I agree that it applies to many people including those who prefer the existence of the legal system and obedience, than a society without both. However, I disagree that it covers situations where people receive benefits without knowing its price, or involuntarily. We have by now discussed the four most common grounds which are cited for the obligation to obey the law; gratitude, consent, the negative consequences of disobedience, and fair play. Let me

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48 *Supra* note 39, pp 118-36.
49 Nozick, R, *Anarchy, State and Utopia* (Oxford: Basil Blackwell, 1974), p 93.
50 *Supra* note 6, pp 57-58.
51 *Ibid*, pp 59-60.
52 *Supra* note 6, p 60.
53 *Ibid.*
54 *Ibid*, p 66.

now summarise to the points we have made so far and give a conclusion: all four grounds give multiple grounds for obedience to the law, but only if certain conditions associated with each of the four grounds are satisfied. None of the four grounds can give rise to the generic duty to obey the law, but when they do so in individual cases, a person has the moral obligation to obey the law.

However, I must stress that where there is the moral duty to obey the law, it is, like any other moral duty, capable of being overridden by more stringent moral duties. Where an individual judges that there is an unjust law in a reasonably just society, and the injustice of this law overweighs his moral obligation to obey the law, he may practise civil disobedience.

This conclusion may seem unsatisfactory to those who believe that a generic duty to obey the law is necessary for the existence of a society and maintaining its stability. However, I believe that an absence of a general obligation to obey the law will not necessarily lead to anarchy because the human tendency to behave in a socially acceptable fashion and the apprehension of the application of sanctions is often underestimated.[55] There is little dispute that humans have the inclination to behave in a socially acceptable fashion. Even if there is no general obligation to obey the law, what the law prescribes has a powerful effect on our actions. The apprehension of sanctions has similar effects in affecting our actions and it may be that these two factors may have more to do with the reason why humans in society generally behave according to the law than the fact that law is generally perceived as being obligatory.[56] Therefore, the position that there is no generic duty to obey the law may be less radical and problematic than one instinctively feels. Furthermore if we have come to the conclusion that there is no generic duty to obey the law, then acts of civil disobedience may be more acceptable and easily justifiable. Do you agree, Socrates?

SW: Yes, I do acknowledge the fact that there are many reasons why people obey the law, and perhaps the perception of a moral duty to obey the law may not be the most important factor in determining such actions. Thus we have come to the conclusion that there may not be a generic duty to obey the law and that acts of civil disobedience may be justified in certain circumstances. However, I believe that the particular circumstances where civil disobedience is justified, and the actual forms of permissible civil disobedience need to be carefully considered. If not, acts of civil disobedience may cause great disruption to the stability of society and damage the effectiveness of the law in functioning as one of the primary ways that desirable conduct is formulated and enforced.

At the beginning of our conversation, you have defined civil disobedience as a politically motivated breach of law performed with a view to changing, protesting against, or disassociating oneself from a law or a public policy. Civil disobedience is also distinguished from conventional law breaking, as it is not done to gain personal advantage. However, I would like to stress that civil disobedience is only justified where one perceives that a law is immoral and unjust, and that it is not in every instance where a law is unjust or immoral that one should practice civil disobedience. This depends on whether the injustice caused by or the immorality of the law in question overrides your moral duty to obey the law when you have such a moral duty. However, since one should only practice civil disobedience where there is a moral justification for doing so, and there is a no authority to judge whether your cause is right or wrong in matters of morality, one should generally not practice civil disobedience.

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55 Zedalis, R J, "On First Considering Whether Law Binds" 69 *Ind. L.J.* 137. Online. LEXIS-NEXIS Academic Universe.

56 *Ibid.*

TC: I agree that one should only practice civil disobedience when a law in question is unjust or immoral, and not for personal gain, but I do not agree that since there is no authority to judge matters of right and wrong, one therefore should not practice civil disobedience. Although there is no final authority in matters of morality, what this entails is that there is no one to judge whether the act of civil disobedience is justified or not, but not that there is no right to perform an act of civil disobedience. [57] While one cannot appeal to authority to settle moral disagreements, one can try to settle disagreements by substantial rational arguments,[58] which is what you and I are doing here.

SW: I agree with you Thoreau, but I merely wish to point out that since there is no final arbiter in matters of morality, and since civil disobedience has much potential to do harm to the legal and political system, one should only practise civil disobedience in certain forms after careful consideration. Unlike you, though, I believe that civil disobedience is distinguished by its purpose. I also believe that generally, one should only practice civil disobedience if it fulfils certain criteria. The main ones are that acts of civil disobedience should be confined to breaking the laws that one is protesting against but not other laws, that they should be practised as a measure of last resort after all legal means have been exhausted, that one must submit to the legal punishment for their actions, and that they should be non-violent.

IV. Forms of Permissible Civil Disobedience

A. Whether Acts of Civil Disobedience Should Be Confined to Breaking the Laws That One Is Protesting Against

TC: Well, you are right. I don't think that any of the criteria you have listed are strictly necessary conditions to be fulfilled before one should practice civil disobedience. For the ease of argument, let us explore each of these criteria one by one. Let us begin with the criterion that acts of civil disobedience should be confined to breaking the laws that one is protesting against (also sometimes called 'direct civil disobedience') but not other laws (also sometimes called 'indirect civil disobedience'). I think that indirect civil disobedience is permissible because some laws are inaccessible to direct resistance by some of the people who want to protest against them.[59] For example, in case of laws permitting slavery, only the slaves (the direct victims) or the slave owners (agents of injustice) would be able to practise direct disobedience against those laws. People who are not slaves would not be able to practice civil disobedience at all if indirect disobedience were not permissible. It is clearly unacceptable as it will put civil disobedience beyond the performance of the vast majority of people, especially when we have already come to the conclusion that civil disobedience is morally justified where its claim outweighs the duty to obey the law in the particular circumstance.

SW: I do agree that indirect disobedience can, in some circumstances, be justified, but I believe that generally it is not the case. This is because otherwise just and valid laws are being violated in the course of protesting against the unjust law and this will harm the good produced by the existence of the just law, social stability and the effectiveness of law as a

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57 Raz, J, "Civil Disobedience", quoted in Bedau, H A (ed), *Civil Disobedience in Focus* (London: Routledge, 1991), p 163.

58 *Ibid.*

59 Bedau, H A, "Civil Disobedience and Personal Responsibility for Injustice", quoted in Bedau, H A (ed), *Civil Disobedience in Focus* (London: Routledge, 1991), p 52.

means to regulate society. These consequences need to be taken into account when considering whether one should practice indirect disobedience. If they outweigh other factors such as the likelihood of the success of changing the unjust law and the amount of injustice caused by the unjust law, then I believe that indirect disobedience should not be practiced.

I think that we both agree that indirect disobedience could be justified, but that civil disobedience is easier to justify where there is a close connection between the injustice and the law being disobeyed, [60] as it will target the injustice and lower the harm to other interests. Let's move on to the next issue of whether civil disobedience should only be used as a measure of last resort after all legal means have been exhausted.

B. Whether Civil Disobedience Should Only Be Used As a Measure of Last Resort After All Legal Means Have Been Exhausted

SW: I do not think that civil disobedience should only be used after all legal alternatives have been exhausted as it is impossible to exhaust all legal alternatives. This is so even when one has gone to the highest court of the land and been unsuccessful in one's action, or when one has tried and failed to persuade the current legislature that a certain unjust law should be amended. The reason is that it is always possible to wait for the appointment of a new judiciary and the election of a new legislature so we can appeal to them again. Therefore, I think that one should not be so strict in saying that all legal alternatives must have been exhausted before one should practise civil disobedience, but that as a minimum, one's views on an issue should be presented to the relevant authorities clearly, coherently and lawfully beforehand. This is because communicating one's reasons for believing a certain law to be unjust or immoral to the relevant authorities and trying to persuade them to change their view is an important aspect of one's duty based on consent or fairness.[61]

TC: I agree with you, but with some qualifications. The issue of communicating with the authorities beforehand may not be applicable in circumstances where the law requires the performance of an act against one's conscience before the pursuit of lawful alternatives is possible.[62] In such a case, one will have to disobey first or one will lend oneself to the wrong that one condemns, and this is against our conscience.[63] Also, one need not pursue all legal alternatives when the effort is clearly futile so long as adequate efforts are made and they have proven to be unsuccessful, one has fulfilled one's obligation to pursue legal alternatives.[64] However, I'm glad that we agree on this criterion. Let's move on to the next condition that one must submit to the legal punishment for their actions.

C. Whether Submission to Legal Punishments Is Necessary for an Act to Qualify As an Act of Civil Disobedience

SW: I believe that acceptance of punishment is a critical part of civil disobedience as it reaffirms one's commitment to the existing social order and one's respect of the rule of law despite practising illegal acts which target a particular unjust or immoral law.[65] Acceptance

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60 *Supra* note 10, p 235.

61 *Ibid*, p 229.

62 *Ibid.*

63 Thoreau, H, "Resistance to Civil Government", quoted in Peabody, E (ed), *Aesthetic Papers* (Boston, 1849).

64 *Supra* note 10, p 229.

65 DeForrest, Mark Edward, "Civil Disobedience: Its Nature and Role in the American Legal Landscape" 33 *Gonzaga Law Review* 653. Online LEXIS-NEXIS Academic Universe.

of punishment also reaffirms the purpose of civil disobedience, which is a public act designed to protest against or try to change a certain law within a legal and political system, thus lying between revolutionary disobedience and conscientious objection. If one does not accept punishment, it will be very difficult to distinguish between civil disobedience and revolutionary disobedience. The effectiveness of the act of civil disobedience will also be compromised as it will be more difficult to persuade the public and the authorities of the strength of one's convictions, and that their claim is not just hypocritical rhetoric.[66]

Regarding one's duty to obey the law owing to consent and fairness, submission to legal punishment also serves to lessen one's breach of the duty. In particular, for the duty to obey arising out of fairness, acceptance of punishment will lessen the unfairness arising out of breaching the law as it cancels any unjust advantage the disobedient may enjoy.[67] Acceptance of punishment will also mitigate the duty to obey arising out of the negative consequences of disobeying the law. This is because one affirms one's obedience to the legal system in accepting legal punishment despite protesting against a certain law, so there will be less harm caused to the authority of the law as a whole. Therefore, I think that acceptance of legal punishment is a key feature of civil disobedience.

TC: Your arguments are persuasive, Socrates, and I agree with you that an acceptance of legal punishment is a key feature of civil disobedience. However, I do not think that it is absolute because there are circumstances where acceptance of legal punishments is not necessary for an act of civil disobedience to be justified. The effectiveness of one's act of civil disobedience may depend on its secrecy. For example, if one needs to rescue a slave, then one is likely to need to do so stealthily, and if one wanted to rescue more slaves in the future, then submission to legal punishments would prevent one from doing so.

D. Whether Acts of Civil Disobedience Must Be Non-violent.

SW: Let's move on to the last issue of whether acts of civil disobedience must be non-violent. In my opinion, violent civil disobedience is unjustifiable, as there are strong reasons against the violent acts of lawbreaking in any circumstance under a reasonably just political order. Although violence can be directed against both persons and property, I will focus my discussion on the former because acts falling within this category are most difficult to justify. This is because illegal acts of violence against persons cause great resentment and insecurity among those who are injured and those who fear they may be the next victims.[68] Furthermore, personal violence is extremely disruptive to a stable and peaceful social order. Therefore, no matter how noble the cause is, violence should not be used as the means of changing the law.

TC: I agree that there are usually many harmful consequences of violent civil disobedience but in my opinion, some acts of violent civil disobedience are morally justifiable in particular circumstances. However, the many negative consequences caused by personal violence to the victim, potential victims, and the stability of society mean that compelling reasons for performing violent civil disobedience must exist for it to be justified. I cannot give you an exhaustive list of those circumstances where violent civil disobedience can be justified, but one example is to defend the rights of others or yourself where the law infringes on that right and non-violent civil disobedience is unsuccessful. Legalised slavery, for example, involves a denial of the right to freedom. The right to liberty is so important that its protection permits

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66 *Supra* note 10, p 240.
67 *Ibid*, p 239.
68 *Ibid*, p 246.

the use of violence against those who infringe and systematically suppresses it, and thus I think that violent civil disobedience is justifiable here. However, acts of violent civil disobedience should be directed against those who have the power to change existing laws and who are blameworthy.[69] If it is a principle that innocent bystanders should not be physically harmed, and if it is likely that they will be, then this should be a major consideration when considering whether or not to perform the act.

SW: You have raised an important point. I think that it is a moral principle that innocent bystanders should not be physically hurt. However, they are physically hurt unavoidably in many cases of violent political action. Therefore, violent civil disobedience is not morally justifiable in these cases. Furthermore, civil disobedience depends on its moral integrity to be effective in mobilising public support. Since majority of the public tend to disapprove of violence in general, it seems unlikely that violent disobedience would be effective. The example you have raised above where violent civil disobedience can be justified is to defend the rights of others or yourself where the law infringes on that right and non-violent civil disobedience is unsuccessful. However, where your previous acts of non-violent civil disobedience are unsuccessful, it does not mean that one should then be justified in choosing to use violent means instead, especially since violent acts of civil disobedience are not likely to be more effective.

Gandhi raised another argument against violent civil disobedience – that violence is evil in itself, and thus the use of violence as a means will corrupt the purpose of the enterprise that it is meant to bring about even if the ends were morally good. In other words, both means and ends need to be morally pure in an act of civil disobedience, and as violence is evil in itself, only non-violent acts are justifiable.[70] I realise that this is a pacifist argument that uses a higher moral standard than the public usually accepts, but I believe that there is also some sociological truth to this view. Using violent means to pursue peace, protect rights or some other social ideal suffers from internal contradiction and though the action may succeed, overall it may cause a more violent and unstable social order.[71] Therefore, I believe that since violence is evil in itself, and as it is not effective in mobilising public support, and as it leads to many undesirable consequences, violent civil disobedience is morally unjustifiable.

TC: I think it is not appropriate for me to comment on your argument that violence is evil in itself, since this is a subjective moral judgment, but I would like to say that most people do not hold such a high moral standard.

As to violent civil disobedience being ineffective in mobilising public support, I believe that this is not an argument against the possibility of justifiable violent acts of civil disobedience. While people disapprove violence in general, this only means that the scope of violent acts must be carefully circumscribed. Also, the specific goals of that act must be clearly communicated so that the public can judge whether this particular violent act is justifiable so as to achieve the desired effect of gaining their support.[72] The effectiveness of the form of civil disobedience cannot invalidate the principle that violent civil disobedience may be morally unjustifiable, only that it is a factor to be considered in the justifiability of a particular

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69 *Ibid*, p 256.

70 Gandhi, M K, *Nonviolent Resistance* (New York: Schocken Books, 1961), pp 116, 238.

71 Silliman, M, "Is Civil Disobedience Morally Coherent?" quoted in Silliman M (ed.), *The Ethics of Liberal Democracy: Morality and Democracy in Theory and Practice* (Oxford: Berg, 1994), p 142.

72 Morreall, J, "The Justifiability of Violent Civil Disobedience", quoted in Bedau, H A (ed), *Civil Disobedience in Focus* (London: Routledge, 1991), pp 143.

act of violent civil disobedience.

The same applies to the negative consequences that an act of violent civil disobedience will cause: this is only a factor to be considered when deciding whether a particular act of civil disobedience is justifiable. An act of violent civil disobedience may be morally justified where it is outweighed by the higher injustice that maintaining a particular law will cause, and the likely effectiveness of an act of violent civil disobedience in persuading the authorities and the public that the law should be changed. Granted, owing to the many negative consequences that an act of violence normally causes, there must be compelling reasons for committing an act of violent civil disobedience, but this does not rule out the possibility of justifying violent civil disobedience in principle.

V. The Protests against the Public Order Ordinance

SW: Well, I am afraid that I cannot agree with you that violent civil disobedience may be morally justifiable at times as a matter of subjective moral belief. We have now discussed whether there is an obligation to obey the law, whether civil disobedience is justifiable, and the forms of justifiable civil disobedience. Let us conclude by looking briefly at, on application of our conclusions so far, whether the protests in the Hong Kong Special Administrative Region (the "HKSAR") last year against the *Public Order Ordinance*[73] (the "POO") can be justified.

I think the main features of the HKSAR political system must be described first in order to form the background of our discussion. The handover of sovereignty of Hong Kong by Britain to China occurred on 1 July 1997. Hong Kong was established as the HKSAR under the Basic Law, which is the region's constitutional document. Under the Basic Law, the HKSAR would operate under the "one country, two systems" principle, so that the socialist system and policies will not be practised in Hong Kong.[74] Instead, the capitalist system will be maintained, as well as the laws previously in force in Hong Kong.[75] The HKSAR shall also be vested with a high degree of autonomy, and enjoy executive, legislative and independent judicial powers.[76] The Chief Executive, who is the head of the HKSAR[77], shall be selected by elections held locally and appointed by the Central People's Government.[78] The ultimate aim for these elections is the selection of the Chief Executive by universal suffrage upon nomination by a broadly representative nominating committee in accordance with democratic procedures.[79] The current Chief Executive was elected by the Election Committee composed of 800 people from various sectors in Hong Kong.[80] The corporate bodies in various sectors elect members of the Election Committee on their own.[81] The

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73 *Public Order Ordinance* (Cap 245).

74 Basic Law, Preamble.

75 Articles 6, 8, *Basic Law*.

76 Article 2, *Basic Law*.

77 Article 43, *Basic Law*.

78 Article 45, *Basic Law*.

79 Article 45, *Basic Law*.

80 Including (1) industrial, commercial and financial sectors (2) the professions (3) labour, social services, religious and other sectors, and (4) members of the Legislative Council, representatives of district-based organizations, Hong Kong deputies to the National People's Congress, and representatives of Hong Kong members of the National Committee of the Chinese people's Political Consultative Conference. Each of the four sectors have 200 votes.

81 In accordance with the number of seats allocated and the election method as prescribed by the electoral law.

Legislative Council is composed of 60 members in each term with the ultimate aim of election of all members by universal suffrage.[82] The current Legislative Council is composed of 30 members elected by functional constituencies, 20 members elected by geographical constituencies and 10 members elected from the selection committee. While the HKSAR is not a full democracy in the sense that the legislature and the Chief Executive are not elected by universal suffrage, I will assume for the purposes of discussion that the HKSAR is a reasonably democratic and just society. To facilitate our discussion of whether the protests against the *POO* was a justifiable act of civil disobedience, I have the pleasure of inviting Mr. Ronny Tong, the Bar Association chairman to brief us on the legal aspect of the right to peaceful assembly in Hong Kong.

Ronny Tong: The pleasure is all mine, Socrates. Hong Kong residents enjoy the right to peaceful assembly and the right to freedom of expression under *Basic Law* art 27 and art 19 and 21 of the *International Covenant on Civil and Political Rights* (the "*ICCPR*") which is incorporated into Hong Kong law through art 39 and the *Bill of Rights Ordinance*. Article 27 provides that "Hong Kong residents shall have freedom of speech...freedom of association, of assembly, of procession and of demonstration..." art 39 provides that the provisions of the *ICCPR* applies to Hong Kong and that "the rights and freedom enjoyed by Hong Kong residents shall not be restricted unless as prescribed by law" and these restrictions "shall not contravene the provisions of [the *ICCPR*]". Let's now look at the protection given by the *ICCPR*. Article 17 of the *ICCPR* states that "the right to peaceful assembly shall be recognised. No restrictions may be placed on the exercise of the right other than those imposed in conformity with the law and which are *necessary* in a democratic society..." [my italics]. Therefore, any restrictions on the right of assembly must be necessary, which has a different meaning from "convenient" or "expedient".[83] Thus while such a right is not an absolute right, it cannot be negated or effectively suppressed by severe restrictions.[84] It follows that a law that enables the state to impose heavy criminal sanctions on a person simply because he fails to comply with a procedural requirement which may be convenient or expedient is incompatible with art 17 of the *ICCPR*.[85]

The *POO* imposes advance notification requirements for public processions and public meetings. Notice of an intention to hold a public procession (other than for the purposes of a funeral) or a public meeting must be given to the Commissioner of Police seven days in advance for assemblies of more than 50 people and processions of more than 30.[86] The Commissioner of Police has the discretion to accept shorter notice but must do so where he is reasonably satisfied that earlier notice could not have been given.

Under Part III of the *POO*, police have the power to prohibit the holding of a public meeting and to object to a public procession to be held if the Commissioner of Police reasonably considers that the prohibition or objection is necessary in preserving national security or public safety, public order or the protection of the rights and freedoms of others. The Commissioner of Police is required by law not to exercise the power of prohibition or objection where he reasonably considers that imposing conditions for a public meeting or a public procession is sufficient to protect the interests of national security or public safety,

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82 Article 68, *Basic Law*.

83 "The Bar's Submissions on the Right of Peaceful Assembly or Procession", at http://www.hkba.org.

84 *Ibid.*

85 *Ibid.*

86 Sections 13A(1)(b) and 8(1), *Public Order Ordinance* (Cap 245).

public order or the protection of the rights and freedoms of others.[87] Thus the police's power to prohibit meetings and to object to demonstrations is without clear delineation as the terms "national security" or "public order" are so wide.

The Commissioner of Police can only exercise the power to prohibit a public meeting or to object to the holding of a public procession within the time limits stipulated in s 9(3) and s 14(3) of *POO*. If the Commissioner of Police does not object, he must give a notice of no objection within the time limits. If neither a notice of objection nor a notice of no objection is given within the time limits, the Commissioner of Police is deemed to have issued a notice of no objection for the public procession.[88] Those who take part in unauthorised assemblies face a maximum jail term of five years.

I believe that the length of time for advance notification for meetings and demonstrations of seven days is an unnecessary restriction. Looking at the laws of other jurisdictions, a notice period of 48 hours together with a waiver for spontaneous demonstrations is sufficient and more in line with the spirit of art 27 and 39 of the *Basic Law*. The criminalisation of peaceful meetings and demonstrations simply because of the absence of police permission is unconstitutional, and the heavy penalty imposed is also against the spirit of art 27 and 39.[89] In effect, the requirement of a notice of no objection is a requirement of approval to hold a public procession,[90] as the lack of notification can immediately turn rallies into an unauthorised assembly.

TC: Thank you for your analysis of the legal position, Ronny. I'd like to turn to the protests that sparked the discussion of the issues surrounding the *POO* that occurred over the course of several months in 2000. The protests against the *POO* last year were sparked by the police arrests of students during unauthorised processions against university tuition fees and the right of abode. Further demonstrations against the arrest of these students ensued. In total, the police arrested sixteen protesters.[91] The later demonstrations against the arrest of the student protesters were unauthorised assemblies and they were intentionally held without advance notification to the police. While it is not entirely clear whether these later demonstrations (referred hereafter as the "protests") were performed with the dominant intention of protesting against the *POO* or for other reasons, let us assume that they were carried out as an act of civil disobedience against the *POO* for the purposes of our discussion.[92] The protests whose purpose was to push for the amendment of the *POO* led to two main results. First, the sixteen protesters arrested were not prosecuted, and second, the Legislative Council passed a motion upholding the *POO* and voted down two proposed amendments to the law.[93]

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87 Sections 9(4) and 14(5), *Public Order Ordinance* (Cap 245).

88 Section 14(4), *Public Order Ordinance* (Cap 245).

89 *Supra* note 83.

90 "The Law Society of Hong Kong", at http://www.hklawsoc.org.hk/pub.

91 Reported by Eli Lau, "Students Continue to Defy Authority", *Hong Kong iMail,* 26 October 2000.

92 Such an assumption is supported by various statements made by student representatives leading the unauthorised demonstrations, such as by Richard Tsoi Yiu-cheong, an organiser of the unauthorised protests, and former secretary-general of the Federation of Students. "We shall not observe any evil law. We did not seek police approval this time and we shall not do so in the future. We are prepared to face the consequences and will exhaust all channels to express our discontent," Reported by Chow Chung-yan and Ng Kang-chung, "Marchers Defy Protest Law", *South China Morning Post,* 9 October 2000.

The motion was tabled by the Secretary for Security, Regina Ip Lau Suk-yee, and was passed by a vote 36 to 21 after more than eight hours of debate spanning two days. Two amendments moved by legislators James To Kun-sun and Emily Lau Wai-hing, were also voted down. Reported by Ambrose Leung, "Pro-government Forces Combine to Inflict Heavy Defeat on Democratic Camp Lawmakers Uphold Public Assembly Law", *South China Morning Post*, 22 December 2000.

From Ronny's discussion above, the *POO* is arguably an unjust law in two ways. First of all, it is unjust as the *POO* is unconstitutional in the sense that it denies citizens full enjoyment of their right to peaceful assemblies guaranteed by the Basic Law through arguably unnecessary restrictions. Second, its denial of people from enjoying their fundamental right to freedom of assembly and freedom of expression is morally unsupportable. The seven-day advance notification requirement is mandatory and so no spontaneous demonstrations can be legally carried out under the *POO*. It is also arguably too long[94] and though it is procedural in form, it results in criminal sanctions in the event of non-compliance. That the police has a wide power under the *POO* to prohibit meetings and to object to demonstrations and the penalty imposed on participants in unauthorized assemblies also does not seem to be proportionate to the alleged crime and risks deterring people from exercising their right to peaceful assembly.

The requirements under the *POO* are arguably necessary, and not simply expedient.[95] One may hold valid opinions either way. However, the freedom of association is closely linked with the freedom of expression which is extremely important for participation in a democratic society and the exchange of opinions. Therefore, I shall assume for the purposes of our discussion that the *POO* does unnecessarily restrict the right to freedom of assembly and the freedom of expression and thus that it is an unjust law.

SW: Therefore, we are making two assumptions. First, that the protests were performed as an act of civil disobedience against the *POO*; and second, that the *POO* is an unjust law as it imposes unnecessary restrictions upon the right to freedom of assembly and the freedom of expression.

Therefore, let's now analyze whether the protests against the *POO* have fulfilled our criteria on the limits of justifiable civil disobedience in terms of the forms of disobedience. There is no question here of whether the acts of civil disobedience should be confined to breaking the laws that one is protesting against as the acts of disobedience were limited to protests performed without giving advance notification to the police, and thus were purely acts of direct civil disobedience. There were also no reported violent acts during the protests.

TC: Therefore, our discussion is limited to whether all legal means have been exhausted, whether the protesters submitted to legal punishment, and if not, whether the acts of disobedience were nevertheless justified.

I remember we have come to the unanimous conclusion that civil disobedience need not be practised only after all legal alternatives have been exhausted, but that as a minimum, one's views on an issue should be presented to the relevant authorities clearly, coherently and lawfully beforehand. It is evident that the views of the protesters were communicated to the government clearly beforehand, and were also well reported by the press. The difficulty of pursuing lawful alternatives in the present case is that the law that one is protesting against is one that itself arguably limits a form of expression – the freedom to hold public assemblies to

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94 For example, in Canada, there is no requirement to seek permission to hold a public assembly to the Chief of Police while in Seattle, written notification should be given to the Chief of Police at least 48 hours before the demonstration.

95 For example, according to the Police Director of Operations Dick Lee Ming-kwai, seven days' notice was needed for the police to make arrangements to prevent chaos. Mr Lee said: "Many protests and marches are held at the same place and time ... we need a lot of time to make arrangements." Reported by Susan Shiu, "Motion Designed to Curtail Public Order Law Debate" *South China Morning Post,* 10 December 2000.

communicate one's ideas. While it could be argued that other avenues of expression are legal and open, breaking the law can be an effective and powerful way of expressing one's ideas in terms of emotive appeal and breadth of impact.[96] This is particularly so in the present case where direct civil disobedience is practised, and the law involved concerns one's freedom of assembly and freedom of expression.

Concerning the issue of submission to legal punishment, while the government did not prosecute the protesters who were arrested eventually, the protesters peacefully submitted to be arrested by the police. This reaffirms the protesters' commitment to the existing social order and to the rule of law, lowers the unfairness arising out of breaching the law due to free riding, and also mitigates the duty to obey arising out of the negative consequences of disobeying the law.

SW: I agree with your view, Thoreau. Perhaps it could be argued that the most serious damage suffered by the legal order in these protests was not caused by the protesters but by the Government's non-prosecution of the protesters who were arrested, and its unusual move of tabling a motion to endorse the *POO*. A particular criminal's purpose in breaking the law is no defense to prosecution, even if it is to publicize an injustice.[97] It may be acceptable if prosecutors did consider public opinion before deciding not to prosecute.[98] However, the Government's non-prosecution of the protesters caused damage to the rule of law by not enforcing the law strictly, by not giving reasons for the decision not to prosecute, and also by maintaining that it may consider prosecuting other people for engaging in similar activities in the future without explaining the circumstances that it would decide to do so.[99] Furthermore, the Government's non-prosecution of the protesters and the tabling of a motion to endorse the *POO* prevent the court from examining the constitutionality of the *POO* and leaves the issue to the Legislative Council to decide whether to support or oppose the *POO* by a majority vote.[100] This is wrong because the freedom of assembly is a basic civil right guaranteed by the Basic Law which should not be decided by a majority vote.

TC: Therefore, our conclusion is that the unauthorized demonstrations in Hong Kong protesting against the *POO* were justified as the *POO* is arguably an unjust law, as direct civil disobedience was practised, as the protesters peacefully submitted to arrest by the police, and as exhausting all legal alternatives is not necessary for the act of civil disobedience to be justified. Civil disobedience serves a number of positive functions in society: it contributes to the enlightenment of society, operates as a form of a "safety valve" for the release of societal pressures, as well as raises public concerns which may promote the re-examination of policies within the government.[101]However, while civil disobedience may be morally justified, this does not entail that the government should not punish those who break the law for a moral purpose. Instead, non-punishment of civil disobedients would likely undermine the rule of law. Punishment of law-breakers should instead be seen as the just price to pay for the harm that

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96 Leslie Gielow Jacobs, "Applying Penalty Enhancements to Civil Disobedience" 59 *Ohio St. L.J.* 185. Online. LEXIS-NEXIS Academic Universe.

97 *Ibid.*

98 Opinion of Non-affiliated legislator Margaret Ng Ngoi-yee, who represents the legal profession, reported by Angela Li, "Decision against Action will Avoid Splitting Community", *South China Morning Post*, 26 October, 2000.

99 Cheung, Eric T M, Written Submissions to LegCo Panel on Security on the Public Order Ordinance, (LC Paper No. CB(2)436/00-01(05)).

100 Opinion of Assistant Professor Eric TM Cheung, reported by Susan Shiu, "Motion Designed to Curtail Public Order Law Debate", *South China Morning Post*, 10 December, 2000.

101 Katz, Barbara J, "Civil Disobedience and the First Amendment" 32 *UCLA L. Rev.* 904.

they have caused by their unlawful conduct and submission to legal punishments as an integral part of the speech of those who practice civil disobedience that distinguishes it from other forms of expression.[102]

102 *Supra* note 97.

"CONSENT" AS A DEFENCE FOR SADO–MASOCHISTIC SEXUAL BEHAVIOUR: *R v BROWN* A LIGHT TOWER FOR HONG KONG'S LAW ON OFFENCES AGAINST THE PERSON?

ANDY SIU-KAI HO *

Recent police investigation on "Fetish Fashion", a specialty store for SM costumes and equipment as well as police raids of brothels in Mongkok and Sham Shui Po area where prostitutes offering SM services had put the issue of Sado-Masochism under public scrutiny. The article looks at Sado-Masochism in the context of Hong Kong, and possible criminal liability under the Offences Against the Persons Ordinance (Cap 212). A case arising from its British counterpart, the House of Lords decision R v Brown in 1992, is discussed. An attempt is also made to evaluate the propriety of applying Brown locally.

I. Introduction

A. R v Brown *and the Aim of the Essay*

In December 1992, *R v Brown* reached the House of Lords[1]. It was about a group of men engaging in sado-masochistic ("SM") encounters who were subsequently prosecuted for their acts. They were charged with assault occasioning actual bodily harm and wounding.

The case is very important in that it raised issues that had been haunting the laws on offences against the person for ages. The House of Lords, in handing down judgment for the case, also discussed a number of precedents and other similar factual situations. *R v Brown* is of no doubt the most important case in the common law world in recent years concerning the interplay between offences against the person and consent.

This research essay is written for the purpose of attempting a proposal on whether *R v Brown* should be treated as an appropriate guide in Hong Kong when the court is to deal with cases concerning consensual SM activities. The essay first reviews the effects of *R v Brown* on the law. What the Law Lords said in the judgment about the acts concerned is then identified. The current legal position in Hong Kong is then examined, with the aim of discovering the areas which remain unclear. After that, there is a critical analysis of the *R v Brown* guidelines. Finally, suggestions are made on whether Hong Kong should follow the *R v Brown* guidelines.

B. The Scope of Discussion – What Are Not Covered?

The essay only intends to discuss the potential contradiction between SM acts and offences against the person of a purely physical violent nature. Therefore, the major offences involved will be assault (assault and battery), assault occasioning actual bodily harm and wounding and so on. Offences like indecent assault are beyond the scope of discussion.

Only non-fatal acts are concerned. A case where a participant of SM acts gives consent as far as to "no liability even if killed in the course" is again beyond the scope of discussion. It would be

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* LL.B. (HKU). The writer would like to express his gratitude to Dr. Fu Hua-ling and Miss Jill Cottrell for their invaluable advice.

1 *R v Brown* [1993] 2 All ER 75.

similar to euthanasia for it involves the taking away of lives and is currently still a bit far from the "line" that is constantly under attack.

Whenever "consent" is mentioned in the essay, it refers to "valid" consent given with full capacity. Things such as "mistaken consent", "consent obtained by deceit" or "consent given by the incapacitated" are not the essay's concerns.

There is no intention to discuss the appropriateness of following *R v Brown* in Hong Kong in the constitutional law context. It is for sure that *R v Brown* is a House of Lords Case of the English Court. It is also the fact it was decided in 1993, before the "handover" or the "date" on 1 July 1997. With the three relevant articles in the Basic Law concerning what the law is in the HKSAR[2] and what law the HKSAR courts should apply in adjudicating cases[3], and the debate over what "common law" actually means in the Basic Law, we can go on and on forever. But it is simply not the thing the essay intends to discuss. The only question concerned is whether the Hong Kong court should follow *R v Brown* rationale when it faces the same situation.

II. Effects of R v Brown *on the Law of Offences Against the Person and "Consent"*

A. Offences Against the Person

If we are to attach "value" to the rights that we are entitled to, it is of no doubt that the right to life is the most valuable right we enjoy. Connected with it is the integrity of the person or the body. Thus, apart from the crime of homicide which is traditionally regarded as the most serious and condemnable, we have offences against the person – crimes done against victims without loss of lives. Such offences cover a wide range of acts like assault, assault occasioning actual bodily harm, wounding and so on. There is no doubt that such acts are harmful. No one would like to have a stranger who suddenly comes up to him and attacks him, leaving him a bruised face and a bleeding nose and then walks away as if nothing has happened. Such an act certainly amounts to an assault or even assault occasioning actually bodily harm. The offender will be punished.

In this strange world, however, there are some people who do not mind or indeed are fond of such acts being done on them. People engaged in SM acts are an example.

B. Sado-Masochism?

Sado-masochism, commonly known as "SM" (or sometimes BDSM which stands for "Bondage, Domination and Sado-Masochism"), lacks a strict definition. Despite the fact that we often mention "S" and "M" together, there is no suggestion that the two are closely interrelated.[4]

"Sadism" refers to enjoyment of watching or inflicting cruelty. Sexual pleasure may be obtained from this.[5] "Masochism" refers to the obtaining of pleasure (especially sexual) from

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2 The Basic Law of the Hong Kong Administrative Region of the People's Republic of China, art 8 and 18.

3 *Ibid* at art 84.

4 Leigh, L H, "Sado-Masochism, Consent, and the Reform of the Criminal Law", (1976) 39 *Modern Law Review* 130, p 131

5 Cowie, A P, *Oxford Advanced Learner's Dictionary of Current English*, (Oxford: Oxford University Press,

one's own pain or humiliation.[6] Particular acts involved may include, not exhaustively, the beating of the body, the use of constraints, endurance tests, role play, verbal abuse, maturation, the application of extreme heat or cold, scarification and piercing.[7] The parts of body most involved in physical SM acts are the buttocks, breasts, nipples, thighs, back, feet and genitals.[8]

C. Sado-Masochism and Offences Against the Person

Chief Justice Lord Lane said in *Faulkner v Talbot*:

> "An assault is an intentional touching of another person without the consent of that person and without lawful excuse. It need not necessarily be hostile, or rude, or aggressive, as some of the cases seem to indicate."[9]

Taking the above as some sort of "golden rule" in assault and indeed other forms of offences against the person, we can be certain that any person doing any of the above SM acts mentioned is going to find himself in trouble with the law. However, the factor of "consent" has made the subject difficult, and interesting.

Bearing Lord Lane's definition of assault in mind, the legal difficulties of SM encounters are obvious:
There is no obvious "aggressor" and "victim" relationship.
1. The participants, especially the so-called "victims", consented to the acts.
2. There is no motive to commit a crime in an ordinary sense.

D. Facts of R v Brown[10]

Some time in 1989, when leafing through their copies of a homosexual magazine, the officers of the Metropolitan Police Obscene Publications Squad came upon an unusually interesting advertisement. A videotape subsequently fell into their hands. It showed scenes of violence and perversion with men taking part in homosexual SM acts. Men were hung up by chains and beaten. Hooks were pushed deep into flesh and one man had a nail hammered through his foreskin. The participants ran about, dressed as schoolboys and officers in the SS ("role play").

Investigation was carried out. It ended with a search in a country house in Shropshire. It was shared by Ian Wilkinson, aged 56, a forester, and Peter Grindley, aged 41, a care assistant in a home for the mentally handicapped. The police had in fact uncovered the biggest homosexual vice ring in British history. In the house was found a room specially equipped as a torture chamber. Men would go there and torture or be tortured.[11] They have been doing it for 10 years since 1978. Video cameras were used to record the activities and the tapes were copied and circulated among members of that group. No open sale was involved.

1989), p 1114.

6 *Ibid* at 765.

7 *Consent in Criminal Law (Law Commission Consultation Paper No.139)*, (HMSO, 1995), p 134.

8 *Ibid.*

9 *Faulkner v Talbot* [1981] 3 All ER 468, at p471.

10 *R v Brown and other appeals*, [1993] 2 All ER 75 and "Sado-Masochism and the Law: Consent versus Paternalism", at http://www.btinternet.com/~old.whig/pamphlet/sadomaso.htm.

11 *Ibid.* All sorts of people were present in the ring. Some were living double lives. They were married or had girlfriends. Some were very well-to-do. There was an international lawyer with limited diplomatic immunity. There was a missile designer with security clearance. There was a lay preacher.

A total of 43 men were investigated and 15 were eventually brought to trial, charged with various crimes under the Offences Against the Person Act 1861. The trials ended with a guilty verdict in both the court of first instance and the court of appeal.

Five appellants eventually brought their case before the House of Lords presided by Lord Templeman, Lord Jauncey of Tullichettle, Lord Lowry, Lord Mustill, and Lord Slynn. The charges against them were assault occasioning actual bodily harm and unlawful wounding. The defence raised was consent. (Note: Despite the fact that the SM activities the appellants involved in were clearly of a sexual nature, they were not charged with any sexual offences. It was because the appellants were all consenting adults. There were simply no appropriate sexual offences to incriminate them.)

The appeal was dismissed by a 3-2 majority (Lord Mustill and Lord Slynn dissenting).

E. The R v Brown *Decision – What Does It Say?*

The House of Lords' major concern in *R v Brown* is "whether persons carrying out SM acts in private with consent are guilty of assault occasioning actual bodily harm". In the majority judgements, it was held that consensual SM homosexual encounters which caused bodily harm to the victims were assaults occasioning actual bodily harm and unlawful wounding notwithstanding the victim's consent to the acts done on him.

Lord Templeman gave several reasons of dismissing the appeal which could be traced step by step. I would call them "Lord Templeman's 6 Steps to Conviction":

1. The Authorities Said "Yes" Only to "Lawful Activities"

   The authorities considered, dealing with the intentional infliction of bodily harm, do not establish that that the courts have accepted that consent is a defence to a charge under the 1861 Act. They establish that consent is a defence to the infliction of bodily harm in the course of some "lawful activities".[12] Thus, the question to be decided is whether the defence can be extended to the infliction of bodily harm in the course of SM encounters.

2. The Decision Is to Be Based on "Policy" and "Public Interest"

   The Parliament may well call for expert assistance and take into account public opinion if it is to draft law on the subject. The House of Lords does not have these (or does not have to take these into account) and must decide on the case of the appellants in its judicial capacity. The question is whether the defence of consent should be extended to the consequences of SM encounters. It could only be decided by consideration of policy and public interest.[13]

3. The First Reason for Not Accepting "Consent" – "Impracticality".

   Some appellants argued that the defence of consent, while should not be extended to charges of serious wounding and infliction of serious bodily harm,

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12 *Supra* note 1, at p 82.

13 *Ibid.*

should be available to the offence of occasioning actual bodily harm. Such argument is to be dismissed for its impracticality. The jury will find it highly difficult to distinguish the differences between "actual" and "serious" bodily harm in determining conviction or acquittal.[14]

4. The Second Reason for not Accepting "Consent" – "One Does Not Always Have A Right to Deal With His Body As He Pleases, Not to Mention That of Another Person".

The appellants argued that consent should provide a defence for "every person has a right to deal with his body as he pleases". This cannot be a guide for policy determination for:

i. One does not necessarily enjoy such a right all the time. The criminal law tends to restrain a behaviour which is regarded as dangerous and injurious to individuals and which if allowed and extended is injurious to the society generally. For example, one who abuses his body and mind by taking drugs commits an offence.

ii. The appellants in this case did not mutilate their own bodies but those of willing victims. This is comparable to a situation of suicide. It is lawful for one to commit suicide but one would commit murder or manslaughter if he assists another to commit suicide.[15]

5. "Sex" Is Ok But Not "Sexual Violence"

The appellants made the assertion that sexual appetites of sadoists and masochists can only be satisfied by the infliction of bodily harm. The law should not be used to punish consensual achievement of sexual satisfaction.[16]

The court held that there is no evidence which supports the assertion that that SM activities are essential to the happiness of the appellants or other people in the ring. This argument would be acceptable though if SM involves sex only. However, it is more than that. It is concerned with violence. The practices of the appellants were dangerous and degrading to body and mind and were developed with increasing barbarity and taught to people whose consents were dubious or worthless.

SM encounters were corrupting the youth as some victims were introduced to the ring before attaining the age of 21. The encounters were also dangerous in that drinks and drugs were involved. The efficiency of the so-called "code to stop" was highly doubtful and the participants might expose themselves to violence they have never contemplated. "Bloodletting and the smearing of human blood produced excitement."[17] There were thus dangers of serious

14 *Ibid.*
15 *Ibid.*
16 *Ibid.*
17 *Ibid* at p 83.

personal injuries or blood infection like AIDS.

6. Society Should Be Protected From Sado-Masochism – An "Evil"

"The society is entitled and bound to protect itself against a cult of violence. Pleasure derived from the infliction of pain is an evil thing. Cruelty is 'uncivilized'"[18]. Therefore, the appellants' must be convicted of their acts.

Lord Jauncey and Lord Lowry also made their judgments against the appellants. The basis of their decision was similar to that of Lord Templeman, with the major emphasis on policy grounds. Both Law Lords talked of the need to draw a line between those acts which consent can be a defence and those which cannot[19]. Obviously, to the two Law Lords, SM encounters occasioning actual bodily harm was above the line that consent cannot be a defence.

F. Current Legal Position in Hong Kong

R v Brown was essentially an English case with all the things happened in England and the appellants were all Englishmen. It is time to turn back to Hong Kong and have a look at what the law says about a similar situation here.

In case the Hong Kong police do come across a group of people having the *Brown* type of SM encounters and they decide to prosecute, on what basis would Hong Kong courts adjudicate such a case? Naturally, we have to look at both statutes and case laws.

1. Statutory Provisions

There is nothing in the statutes that say anything about SM. In this, there is no difference between Hong Kong and England. One would then almost instinctively look at the *Offences Against The Person Ordinance* (Cap 212) to see whether some acts in the SM encounters would have constituted an offence stated therein.

For the purpose of resolving an *R v Brown* type of case, going for Cap 212 is both "right" and "wrong". The relevant provisions can be found in section 19 "Wounding or inflicting grievous bodily harm", section 39 "Assault occasioning actual bodily harm" and perhaps also section 40 "Common assault".

It is true that we have all these provisions. Yet, an inspection of them would reveal that they are useless in giving us any guidance on the subject matter. Let's have a look at what these three provisions say:

Section 19
"Any person who unlawfully and maliciously wounds or inflicts any grievous bodily harm upon any other person, either with or without any weapon or instrument, shall be guilty of an offence triable upon indictment, and shall be liable to imprisonment for 3 years."

Section 39
"Any person who is convicted of an assault occasioning actual bodily harm shall be guilty of an offence

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18 *Ibid* at p 84.
19 *Ibid* at pp 90, 94.

triable upon indictment, and shall be liable to imprisonment for 3 years."

Section 40
"Any person who is convicted of a common assault shall be guilty of an offence triable either summarily or upon indictment, and shall be liable to imprisonment for 1 year."

We can clearly see that these three sections are not useful for any practical purposes except for determination of sentences. "Wounding and inflicting grievous bodily harm", "Assault occasioning actual bodily harm" and "Common assault" remain at large common law offences in Hong Kong. The court cannot determine whether a defendant has committed any of the above offences by looking at the statutes alone. We have to turn to the case laws for guidance.

2. Case Laws

The research in locating similar Hong Kong cases has returned with some very interesting results. No local case law on the subject of SM could be discovered. It seems that there is simply no one in Hong Kong who has been prosecuted for participating in SM encounters. The reason is unknown. Perhaps SM is not very popular in Hong Kong or the people practising it have been more successful or luckier than Mr Brown and his fellows in keeping their "evil acts" a secret. Perhaps the police deliberately do not go after them. It is true that the police have carried out several raids on brothels and made some arrests of prostitutes who claimed to provide SM service recently.[20] Yet, there is no news on whether anyone would be prosecuted in the same way as the defendants in *R v Brown*. We may safely assume that the people concerned are more likely to be charged with prostitution-related offences.

There is certainly no lack of Hong Kong authorities on the above three offences against the person. However, they tend to belong to the more common type of acts like an assailant beating or chopping the other person. They cannot be of very much assistance if we are talking about potential breaches of the law in the form of SM acts. The facts of those cases are so different that they are hardly comparable to *R v Brown*. The most obvious point is that there is simply no argument of consent by the victim in that kind of cases.

The last resort is to look for cases which apply *R v Brown*. Similar to the lack of academic discussion on the case, there is also a lack of authorities which apply *R v Brown*. Only one case which applied *R v Brown* has been discovered. *R v Yuen Chong and another* was a case on assault occasioning actual bodily harm.[21] A bit disappointing though for it was not about SM encounters. It was about punishment by beating within a religious sect. A man was caned in front of an altar of a religious sect as an alleged disciplinary action for his misconduct. Actual bodily harm was suffered and the assailants were prosecuted.

The Hong Kong Court of Appeal only considered *Brown*'s discussion on "religious mortification" but said nothing on SM. The Court of Appeal concluded that the caning involved could not constitute an acceptable form of religious rite under public policy. There was no in-depth discussion of consent and there seemed to be a wholesale acceptance of the reasoning in *Brown*. *R v Yuen Chong* can be further distinguished on the point that the consent of the victim was in dispute. In short, *R v Yuen Chong* does not assist our discussion.

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20 *Apple Daily*, 30 March and 11 April 2001.
21 *R v Yuen Chong and Another* (1996) 3 HKC 205.

III. Is R v Brown *a Good Case Law for Hong Kong to Apply?*

The lack of statutory provisions and case law in the subject is apparent. The Hong Kong court may consider itself free to choose whether or not to apply *R v Brown* in a case about SM encounters which comes before it and the court has to decide whether any of the offences as "defined" in sections 19, 39 and 40 has been committed. To give advice on the appropriate approach to be taken, it is better to consider both legal and non-legal factors.

A. Reasons Why R v Brown *Should Be Applied*

R v Brown, perhaps because of the peculiarities of the case and the controversies over SM, has no doubt received quite a lot of attention in the common law world. Yet, it would be wrong to say that it is by all means the first case of this kind or the first case which tries to attempt to draw a line between consent and offences against the person. Authorities around the world have been recovered which, in one way or the other, support the *R v Brown* decision.

B. Support of Authorities

1. England

Several English authorities which include *R v Coney*,[22] *Attorney-General's Reference (No.6 of 1980)*[23] and *R v Donovan*[24] serve as the basis of the common law of consent in offences against the person. All of these were applied in *R v Brown.*

In *R v Coney*,[25] the court held that a prize-fight in public, despite the consent of both parties to take part in it, was unlawful. Stephen J stated that:

> "The consent of the person who sustains the injury is no defence, if the injury is of such a nature, or if it is inflicted under such circumstances, that its infliction is injurious to the public as well as to the person injured."

In *Attorney-General's Reference (No.6 of 1980)*,[26] two men quarrelled and fought with bare fists. Chief Justice Lord Lane said in his judgment:

> "...it is not in the public interest that people should try to cause or should cause each other bodily harm for no good reason... it is immaterial whether the act occurs in private or in the public; it is an assault if actual bodily harm is intended and/or caused...most fights will be unlawful regardless of consent..."

In *R v Donovan*,[27] it was a case in which a man was prosecuted for indecent assault and common assault by caning a seventeen-year-old girl for sexual gratification. Swift J said:

> "If an act is unlawful in the sense of being itself a criminal act, it is plain that it cannot be rendered lawful because the person to whose detriment is done consents to it. No person can licence another

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22 *R v Coney* (1882) 8 QBD 534.
23 *Attorney-General's Reference (No 6 of 1980)* [1981] QB 715.
24 *R v Donovan* [1934] 2 KB 498.
25 *Supra* note 22.
26 *Supra* note 23.
27 *Supra* note 24.

to commit a crime."

2. United States

In *United States v Basic Airman Cal J. Holmes*,[28] the accused was charged and convicted of assault and battery of a female acquaintance. The prosecution evidence maintained that the accused tried to force a Miss Taylor into her house after having an argument with her. In the course of that, the accused knocked Miss Taylor to the ground and jabbed her on her face with his bare foot. The accused even jumped on her body with both feet and struck both her head and her shoulders. The victim's mouth was seen to be so badly bruised and swollen that she had difficulty in speaking and could not drink her tea.

The defence evidence disputed the above. Miss Taylor was shown to have a reputation for inviting beatings from her male companions. Another airman who used to be Miss Taylor's companion also testified that she desired and required slapping and physical abuses before engaging in sexual intercourse. It was also agreed by the court that the prosecution's account of the event was at variance with Miss Taylor's testimony. There was no mention about SM in the case. However, if the defence version of the story was true, the accused and Miss Taylor were no doubt engaged in a SM encounter.

In rejecting the defence argument of "consent", the court cited the rule stated by Stephen J in *R v Coney* as stated above.

The court also applied *Commonwealth v Farrell*,[29] a case in which the accused was charged with aggravated assault and battery by inflicting cigarette burns and superficial razor cuts on the body of his female acquaintance in the privacy of a hotel room. It was held in *Farrell* case that, "[I]t is settled that to commit a battery upon a person with such violence that bodily harm is likely to result is unlawful, the consent thereto is immaterial." In the light of the above authorities, the court held that: the want of consent is not an element of the alleged crime, ie assault; no lawful consent could have been given to provide an excuse for – the act committed was one injurious to the public and Miss Taylor. The injury inflicted was more than merely transient and trifling.

3. New Zealand

Edmonds v Police[30] was not about a sexual encounter but a "traffic offence". The Supreme Court of Palmerston North, New Zealand, did discuss the use of consent as a defence in a criminal act though.

The accused was convicted of driving in a manner which might have been dangerous by towing a youth sitting on a tyre secured to the rear bumper by a rope 20 feet long. His car was driven at a speed of 10 to 20 mph at the material time.

The defence of consent was raised. The court cited the English case *R v Donovan* and approved the judgment by Swift J as mentioned above. The defence was rejected accordingly.

4. Australia

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28 *United States v Basic Airman Cal J Holmes* 1957 CMR Lexis 314.

29 *Commonwealth v Farrell* 322 Mass 606.

30 *Edmonds v Police* [1970] NZLR 267.

Pallante v Stadiums PTY Ltd. (No. 1)[31] was a civil case in which a former boxer sued the company which conducted the fight that injured him. The Supreme Court of Victoria discussed the law on assault and the role of consent as a defence.

R v Coney was again applied. Apart from citing the same judgment by Stephen J as in *United States v Basic Airman Cal J. Holmes*, the judgment given by Hawkins J was also cited with approval. The main idea was that it is not in the power of any man to give an effective consent, or has a direct tendency to create a breach of the peace. The court further agreed to the proposition[32] that consent is nugatory when the harm that had been consented to was really grievous as in the case of maiming.

In *R v Vollmer and others*,[33] the defendants were charged with manslaughter, recklessly causing serious injury and false imprisonment. They allegedly conducted an exorcism on a woman who ended up dead due to cardiac arrest brought about by compression of the neck.

In discussing consent in obiter, the court cited and regarded as correctly stating the law on consent *Pallante v Stadiums PTY Ltd (No.1)*, *R v Coney*, *Attorney-General Reference (No 6 of 1980)* and "our case" – *R v Brown*. The most important expression of the court's view followed its discussion on *Attorney-General Reference (No 6 of 1980)*. It said,

> "So, in our judgment, it is immaterial whether the act occurred in private or in public; it is an assault if actual bodily harm is intended and or caused."

The point I intend to illustrate has become very clear now. The decision in *R v Brown* did not come about as an accident. At the back of the decision is a chain of "interlocking" and "mutually supportive" authorities which together may represent some sort of "judicial attitude" in the common law world. This may help to explain, if not in full, the reasoning of *R v Brown*. Truly, these decisions are "foreign". Yet, the Hong Kong courts would no doubt find it more comfortable to apply a well-supported case law in the common law world. It is safe and Hong Kong may benefit from the "accumulated wisdom" which *R v Brown* represents.

C. Practical Difficulties Will Arise if "Consent" Is Accepted as a Defence

One may think of a "floodgates" argument. It is not the "floodgate" we usually refer to like people filling up the courts due to an unjustifiable extension of the threshold of offenders. It is the other way round, ie, the "floodgate" is opened that most people can get away from being caught by the law. This will make the criminal law on offences against the person obsolete or incapable to fulfill its functions.

This point cannot go very far for SM only represents one of the many situations that may call for a reconsideration of where "the line" should be drawn. Therefore, even if we are going to ignore *R v Brown* and other authorities and give total freedom to whatever harm the people can agree upon in SM encounters, it will not lead to a total collapse in the law on offences against the person. Perhaps the only fear is that it will serve as a beginning and people will base on this and ask for more freedom in other controversial cases such as a "square fight", maiming or even euthanasia. Perhaps some men do indulge themselves very much in the medieval romance and

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31 *Pallante v Stadiums PTY Ltd. (No. 1)* [1976] VR 331.

32 *Stephen's Digest of Criminal Law* (1926) 7th ed, Art 290.

33 *R v Vollmer and others* [1996] 1 VR 95.

will want to utilize whatever "gap" consent may provide and ask for a revival of the pre-nineteenth century right of dueling?

In any case, in all the authorities examined, all the defendants tended to accept that there exists a line between the degree of harm which consent can negate liability and that which consent cannot. The only problem is about where the line should be drawn. The courts said anything that amounted to actual bodily harm was not allowed. The defendants asked for the opposite.

The 3rd Step of "Lord Templeman's 6 Steps to Conviction" deserves credit. He talked about the impracticality of making consent available to the offence of occasioning actual bodily harm. He said that the jury would find it highly difficult to distinguish the differences between "actual" and "serious" bodily harm in determining conviction or acquittal.

Indeed, this is true. We may have a look at how the law defines these different degrees of harm.

For "wounding", the "essence" is that "the continuity of the whole skin must be broken".[34] So, it is not enough that the outer skin alone is broken while the inner skin remains intact.[35] It has been held that an internal rupturing of optical blood vessels[36] and the breaking of a collarbone with no wound on the skin were not wounding.[37] Be the definition of "wounding" makes sense or not, it possesses some degrees of objectivity and thus clarity. The jury should have no problem in deciding whether an injury is a wound or not.

The really "messy" part comes with "bodily harm". In *DPP v Smith*, the House of Lords said "bodily harm" needed no explanation and "grievous" meant "no more and no less than really serious.[38] Professor JC Smith comments that from this it seems the "harm" in "assault occasioning "actual bodily harm" does not need to be "really serious".[39]

What exactly the court was saying in "giving the words a meaning other than that which they convey in their ordinary and natural meaning" seemed to be the use of common sense. Indeed, as Lord Templemen said, how can one possibly distinguish between "actual" and "grievous" with such vague guidelines? Even if one claims that he can, inconsistency is bound to arise when different cases are decided by different fact-finders.

R v Brown thus took the approach of using "harm" to decide on the "operation perimeter" of "consent". If it is just common assault with no harm, "consent" can exempt one from liability. If there is "bodily harm", be that "actual" (not serious) or "grievous" (serious), "consent" fails to take effect. This can avoid the above problems.

Moreover, if the court is to place strict limit on how consent should work, ie, the consent must match with the particulars of the assault but not a general consent to be assaulted, further problems may arise. A Scottish case *Smart v Her Majesty's Advocate*,[40] which essentially followed the same line as the English cases in making out its decision on a lead of consent negating liability in an agreed fight, illustrated this clearly. Lord Clerk wrote in his judgment:

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34 *Moriaty v Brookes* (1834) 6 C & P 684.
35 *Reg v M'Loughlin* (1838) 8 C & P 635.
36 *C (a minor) v Eisenhower* [1984] QB 331.
37 *Wood* (1830) 1 Mood CC 278.
38 *DPP v Smith* [1961] AC 290, at 334.
39 Smith, J C and Hogan, B, *Criminal Law*, (London: Butterworths, 1999), p 425.
40 *Smart v Her Majesty's Advocate* [1975] JC 30.

> "It is the essence of the crime of assault lies in the mind of the assailant and not in the mind of the victim. If we had in every case or in cases such as these to go into what in fact the victim consented to, the cases would never be done. You will have to find out whether they consented to a choice of weapons; what degree of injury would the victim consent to. He might, for example, consent to being punched on the nose but not to have a bruise on his leg..."

Again, the adoption of *R v Brown* approach can prevent the problem.

D Sado-Masochistic Encounters Are Bad!

Here, I am saying there are obviously many people who are against SM and do think that it is "bad" or "evil". Hong Kong, in formulating its own law of SM, should certainly take all this into consideration.

Lord Templemen mentioned the various dangers of SM. Some are self-evident.

If bloodshed is involved and the equipment involved does not receive proper sterilization, there is the danger of transmission of blood diseases such as AIDS.

Some of the techniques involved can be highly dangerous. The infliction of harm attributed to beating can be severe. It is true that SM partners usually maintain some sorts of communication between them in the course of the encounters. Communication, however, may become blurred at times, and the level of violence may go beyond anticipation,[41] resulting in serious injuries. "Bondage" is another potentially dangerous technique often used in SM. A rope is used to tie up a partner in different ways, often with arms and legs twisting in all postures, and then other ways of "torture" (such as beating or dropping hot wax) are done by the other partner. A preview of some adult-oriented web sites about SM has led to a discovery that some will go as far as to have the whole of the "tied-up partner" hung to the roof (so-called "Japanese style"). Miscalculations may turn the partner from being hung to being hanged. In case of a fall, it is likely that some ruptured bones or joint dislocations will be sustained.

Some interpret "dangers" in another way. The feminists claim that women, who are overwhelmingly victims of sexual abuses, are already receiving insufficient protection from the law. Liberalization of SM encounter by allowing consent as a defence is likely to increase their miseries for it would amount to legalizing violence against women due to the difficulties of consent.[42]

E Reasons Why R v Brown *Should Not Be Applied*

1. Strong Dissents from Lord Mustill and Lord Slynn

The Law Lords in *R v Brown* did not come to a unanimous decision and the appeal was dismissed by a three to two majority. The strong dissents from Lord Mustill and Lord Slynn, which in no way make less sense than the majority decisions, should not be ignored by Hong Kong courts.

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41 *Supra* note 4, p 135.

42 Bradwell, J, "Consent to Assault and the Dangers to Women", (1996) 146 *New Law Journal* 1682.

A review of the minority decisions reflects different interpretations of public policy, how the criminal law on offences against the person should work and where "the line" should be drawn. To view them from another perspective, they are like questioning the reasoning behind the majority decisions.

Lord Slynn disputed with the majority over where the line should be drawn. He commented that if the standard was to be workable and certain, consent should be a defence for anything other than grievous bodily harm or death.[43] Thus, the appellants' case which involved only actual bodily harm should be one that consent could be used as a defence.

On public policy, Lord Slynn recognized the importance of social and moral factors but considered that it was a matter for the legislature to decide. He was against an attitude of "judicial paternalism" by introducing into statutory crimes on offences against the person concepts (eg SM) which do not properly fit there.[44]

Lord Mustill's judgement was particularly inspiring. Lord Mustill seemed to think that the whole thing about bringing the case before the court was wrong. He started by questioning the wisdom to prosecute the appellants. He stated that "it should be a case about the criminal law of private sexual relations, if about anything at all.[45]"

He was critical about the selective prosecution. The reason why the appellants were charged with the offences in question but not others doing "the most disgusting conduct" was because "the prosecuting authorities could find no statutory prohibition apt to cover this conduct". The appellants' sexual conduct could at least arguable be brought within the law of "assault occasioning actual bodily harm" and "wounding" and thus they were prosecuted[46].

Moreover, Lord Mustill seemed to lean towards deciding whether consent would provide a defence by looking at the "category" of acts or the context under which violence was done. He found the approach of using bodily harm to draw the line unacceptable[47]. It was further proposed that in the case where, as a matter of law, the infliction of bodily harm is incapable of being consented to, it ought to consider whether such private sexual activities should be treated as an exempt category.[48]

The majority's concern (and probably one of the reasons to convict) of possible grave injuries when SM encounters get out of control came under fire before Lord Mustill. He advocated that the court should look at the actual consequences instead. In case when substantially serious injury or death does result, those responsible can be punished as if the same thing has happened in ordinary sexual intercourse. In case when a preventive approach is to be taken, it is the work of the Parliament but not the court.[49]

I submit that this is agreeable, especially in the context of the case or other well-staged SM encounters. It has been suggested that SM encounters are "scenes", well staged and planned.[50]

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43 *Supra* note 13, p 122.
44 *Ibid* at 124.
45 *Ibid* at 101.
46 *Ibid* at 102.
47 *Ibid* at 113.
48 *Ibid* at 116.
49 *Ibid* at 116-117.
50 X, Hollander, *The Happy Hooker* (Dell Books, 1972), p 210 cited in *Sado- Masochism, Consent, and the Reform of the Criminal Law* (*supra* note 4), at p 135.

It is indeed quite strange to punish people for doing something with precautions taken to avoid the dangers and in fact there is no serious injury or death just because "it may cause serious injury or death".

Last but not least, Lord Mustill suggested repugnance and moral objection are not grounds upon which a new crime should be created by a court.[51] This can certainly win applause from the liberals.

To conclude, the strong dissents have no doubt undermined the authority of *R v Brown* as the guide in the law in SM. Hong Kong courts should not accept the decision and the majority reasoning too readily.

F Defects of R v Brown – *Biases and Misconceptions?*

Several places of potential biases and misconceptions can be found in the judgement of *R v Brown*. They may not have formed the very core of the reasoning but they are worrying signs. They cast doubts on the real reasons behind the appellants' conviction and thus the appropriateness of following *R v Brown*.

1. Bias against Homosexuals?

When Lord Templemen talked about how the appellants' "ring" corrupted a youth "K", a peculiar passage written by Lord Lane CJ in the Court of Appeal was quoted and apparently without any objection. He wrote:

> "[A Cadman and one of the appellants Laskey] were responsible in part for the corruption of a youth 'K'... It is some comfort at least to be told, as we were, that 'K' has now seemed settled into a normal heterosexual relationship..."[52]

The reason of how that "comfort" came about was a mystery. It is true that homosexuality still may not be very widely accepted in Hong Kong and discriminations against homosexuals still exist over the world. In law, however, having a homosexual relationship is no longer a crime. A man only has to be 21 years old to avoid being prosecuted for homosexual buggery[53] and gross indecency[54] with another man over the age of 21. Thus, the court should be careful in not arousing suspicion of bias against the homosexuals. *R v Brown* was about homosexual SM. Yet, the central concern was only about SM encounters but not the sexual preference. The expression of approval to "normal", "heterosexual" relationship is deemed inappropriate.

2. Sado-masochism is Connected with AIDS?

SM was portrayed as involving a high risk of transmitting blood diseases. Lord Templemen specifically referred to the fact that two members of the ring had died from AIDS and one had contracted an HIV infection, "though not necessarily from the practices of the group" (thus not excluding the possibility)[55]. It seemed that the "AIDS risk" factor was used to add force to criminalization of the SM encounters for the sake of public health.

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51 *Supra* note 13, p 116.
52 *R v Anthony Joseph Brown* [1994] Cr App R 302, p 310.
53 Section 118C, *Crimes Ordinance* (Cap 200).
54 *Ibid*, s 118H.
55 *Supra* note 13, p 83.

I submit that the "AIDS risk" argument is highly unsound. Lord Mustill tried to be fairer and said:

> "[To criminalize SM to help curb the spread of AIDS] The consequence would be strange, since what is currently the principal cause for the transmission of this scourge, namely consenting buggery between males, is now legal.[56]"

It is a pity that Lord Mustill was scientifically wrong, too. It was quite surprising for by 1993, when the case was decided, AIDS should be nothing new to the world. We all know that AIDS can be spread by all means whenever there is transfusion of blood or body fluids.[57] It is not limited to homosexual buggery, not to mention SM encounters. Lord Mustill was right in his reasoning though. In case we are going to criminalize SM to help curb the spread of AIDS, it will be very odd for many of the acts which are responsible for more AIDS cases or involve higher risks are legal. Ordinary sexual intercourse, blood transfusion, surgical operations, sharing of hypodermic needle by drug addicts or even careless handling of a cut wound or bleeding nose are all in the agenda.[58]

No man in Hong Kong would like to be prosecuted one day for assault by not wearing a condom when having sexual intercourse with a consenting partner. If we allow such a start with AIDS, what can't happen? We certainly want no witch-hunting of any kind here.

G *The Difference between Sado-Masochistic Encounters and "Lawful Activities" – A Myth? A Nonsense?*

The majority in *R v Brown* decided that SM did not belong to any category of lawful activities and thus consent could not be a defence to assault occasioning actual bodily harm. Apart from the fact that those categories of "lawful activities" were "well-established", the House of Lords did not explain adequately to us the difference between SM encounters and those "lawful activities" and why the former could not be "lawful".

A review of these "lawful activities" leads me to the belief that they represent some sort of a myth or mere nonsense. The undefined "good reason" is particularly susceptible to criticism.

First of all, rough and undisciplined horseplay has been held to be "lawful", even if injuries are thus caused. The leading authority is *R v Jones*.[59] In that case, two boys were tossed into the air several times and ended up with one suffering a ruptured spleen and the other a broken arm. The convictions of the defendants, six youths who did the tossing, were quashed in the Court of Appeal. The defence proposition was accepted that consent to rough and undisciplined horseplay must be a defence when there is no intention to cause injury. This effectively allowed exemption from liability even if the act was known to involve a high degree of risk of serious injury or even death.[60] The "good reason" behind, as written by Professor J C Smith, was neither about legal right or a need in public interest, but recognition that boys (and probably men) always have indulgence in horseplay![61] Truly, I do not think it was "good reason" in any

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56 *Ibid*, p 117.
57 Yahoo!, "Health", at http://health.yahoo.com/health/dc/000594/0.html.
58 *Ibid.*
59 *R v Jones and others* [1986] 83 Cr App R 375.
60 Smith, J. C., "Case commentary R v Jones and others Inflecting Grievous Bodily Harm", [1987] *Criminal Law Review* 123.
61 *Ibid*, p 124.

sense.

Why is such undisciplined horseplay lawful while SM encounters which often are well-staged and within control to prevent grave injuries are criminalized? It is a mystery. Furthermore, if we are to say that SM serves no practical purposes but violence and corruption of the minds of the participants, it is equally true for horseplay. We are not animals. We have no need to prepare ourselves to hunt nor to fight for a mating partner and we can socialize and strengthen our bodies in various ways. What is horseplay "good" for? It cannot be better than SM.

Tattooing is the same. It definitely leads to actual bodily harm and may contribute to the spread of AIDS. In *Wilson,*[62] a man cut his initials on his wife's buttocks at her request. The injuries suffered could no doubt amount to actual bodily harm. Yet, the act was held to be lawful for it was comparable to the conduct of a tattooist. Moreover, in the local context, a show of tattoos on the body is probably more damaging to one's image than having SM encounters in privacy, for tattoos are traditionally related to triad members. The only "good reason" for its being lawful for consent to provide a defence is probably because it is long established to be so.

The same seems to be true for boxing. It is quite amazing that in most cases about consent in assault, the example of boxing is cited. It has been suggested that professional boxers suffer from severe brain and neurological damage,[63] grievous kind of bodily harm that one do not often find in SM encounters. Yet, it is still celebrated as an example of "lawful activities". The argument that it is lawful for there are rules and referee to minimize injury is not very convincing for the injuries alleged are suffered in such carefully monitored context. One can only imagine death would be common without them. Lord Mustill's account failed to be an anatomy of the paradox but his honesty about the lack of substantial ground for boxers' immunity was worth our appraisal:

> "the heroic efforts of the learned judge [McInerney J. in *Pallante v Stadiums Pty Ltd (No. 1)*] to arrive at an intellectually satisfying account of the apparent immunity of professional boxing from criminal process have convinced me that the task is impossible. It is in my judgment best to regard this as another special situation which for the time being stands outside the ordinary law of violence because society chooses to tolerate it.[64]"

The last type of "lawful activity" which I find lack of any practical "good reason" behind is ritual circumcision. In most cases, as the ritual is done when the boy is still a baby, there is simply no consent. Some may need circumcision for medical reasons. Those are individual cases and cannot justify a "ritualistic foreskin overkill". Strange enough, in *R v Adesanya,*[65] the Nigerian mother was convicted of assault occasioning actual bodily harm by making incisions with a razor in the cheeks of her two sons. Her two sons consented to the act. The incisions were probably no more serious injuries than a wound from circumcision. They are also the same in nature as circumcision, ie to be a sign that one belongs to a group. Having read the discussion in *Re J,* a case about a Muslim father applying for an order to take his son from his divorced Christian wife to have him circumcised in accordance with the Islamic tradition, I submit that it is actually all about the Muslim and Jewish ritual being "long-accepted" or "well-established in law" again.[66] Needless to explain, this is disappointing.

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62 *R v Wilson* [1996] *Criminal Law Review* 573.
63 *Supra* note 4, p 165.
64 *Supra* note 13, p 109.
65 Cited in *Re J* [1999] 2 FCR 345.
66 *Re J* [1999] 2 FCR 345.

It is by now very clear that what has been alleged as "lawful activities" are "lawful" not because there is any substantial good reasons but because they have been there for so long. They are old and well-established that no one wants to question them. They are part of our "culture". This is bad but not as bad as branding SM criminal merely for it is not similar to any of the established categories. In fact, plenty of information can be found about SM from its terminology to techniques. Expert advice and support can also be found. It is probably more organized and under control than it seems and is in not way a great deviation from other games with defined rules.[67] The line of reasoning in *R v Brown* and other cases about the various offences against the person should not be followed in Hong Kong.

H R v Brown *Is Against Civil Liberties*

We are all presumably rational human beings and thus all would strive towards maximizing our happiness. As Dr Leigh said in his famous article on the subject of SM and criminal law, no one would wish to deny conjugal partners (perhaps even non-conjugal partners) the right to employ certain practices in their intimate relations if they find these satisfying and would contribute to a better sexual reunion.[68] Behind this maximization of happiness, however, is the fundamental question about "rights" and "civil liberties". Criminalizing an act is effectively placing a restriction on our freedom. In Hong Kong, in case a *R v Brown* type of case does go to court, it is the most likely that a conviction will be challenged on liberty and autonomy grounds.

The Basic Law does not say anything about "freedom of sexual expression". It says about the inviolability of the properties of Hong Kong citizens but it is about the right to be protected from unlawful search and intrusion instead.[69]

The *Hong Kong Bill of Rights Ordinance* arguably provides some grounds to launch an attack on infringement on the freedom of sexual expression.[70] However, it is by no means clear. Yet, in the spirit of the Hong Kong Bill of Rights and respect for civil liberties, I submit that the courts should show restraints to criminalize private consensual acts without solid grounds.

In *Consent in the Criminal Law*, a consultation paper by the English Law Commission, published after the *R v Brown* decision, negative comments on control over SM acts were recorded.[71] It was recorded that many of the respondents had told the Commission that it was no business of the state (and the court, of course) to criminalize activities that it found distasteful while the participants were doing no harm to others. Two of the very good and representative views are reproduced below.[72]

> "Respect for personal autonomy is important in our law in maintaining liberties. An argument which denies people autonomy is particularly subversive of liberties, since it impliedly fails to treat the person concerned as worthy of the respect which is normally a citizen's due"
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> "A rule which overrides the decision of an autonomous person merits exhaustive scrutiny because it may go beyond legitimate action respecting autonomy and become a means whereby those in power

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67 For example, the site "The Deviants Dictionary" at http://www.queernet.org/deviant/links.htm is a very good source about SM. It has things like a dictionary of terms used in the SM ring, fact sheets about techniques used and safety instructions and links to contact experts.

68 *Supra* note 4, p 138.

69 *Supra* note 2, art 29.

70 Section 8, art 14 "Protection of privacy, family, home, correspondence, honour and reputation" and art 16 "Freedom of opinion and expression".

71 *Supra* note 4, pp 13-14.

72 *Ibid.*

> may impose their version of the good life on rationally capable people who lack power and in the result lose their autonomy."

They are convincing. In the existing laws there are already safeguards to protect those acts which are done without consent or consent is obtained from those incapable of giving it (eg children, infirm). There is really no reason why the court should punish mentally capable adults who can be responsible for their actions in pursuance of what they perceive to be part of their good lives.

Civil liberties organizations have protested strongly against the *R v Brown* decision.[73] They suggest that the role of the courts in a free society is to protect the lives, liberty and property of individuals from force and fraud. The decision that SM is unacceptable is probably too personal and not in line with the liberal view that the state or the court should not dictate what is politically correct. There is no logical reason for the court to dictate what is sexually acceptable. Any such criminalization is like branding SM participants "demonic" and invites discrimination against them as did the homosexuals in the past.[74] This is unfair and cannot be justified. It represents a backward move in a world when we are trying to liberalize the law and allow people to deal with their bodies as they please.[75]

Ignoring whether the liberals are too hysterical or not, it is worrying that the decision to criminalize SM brings about suspicion as to the motive behind. It has been suggested that it was "disgust" or "abjection". "Abject" is a thing that is alien, taboo and unclean. It leads to "abjection", ie a rejection, a casting out and the creation of a barrier between the subject and the abject.[76] Whatever they may be, it is something that ought not to exist and ought not to be perceived to exist in our legal system.

On the principle of individual determination and for the sake of liberty, consent should provide a complete defence.

IV. Last But Not Least: Explore Sado-Masochism in Hong Kong

As the main purpose of the essay is to consider whether it is desirable for Hong Kong to follow *R v Brown* in criminalizing SM encounters, merely looking at merits and demerits of the case and how other "universal factors" may bring about desirable and undesirable consequences to Hong Kong is not enough. It is the most desirable to examine the practice in the context of Hong Kong and to learn about how widespread is the practice, the practical acts of "SM-ers" in Hong Kong and hopefully how they feel about possible criminalization of their activities.

The search for such materials turned out to be largely futile. It seems that the government, the academics and the public do not feel a pressing need to consider the relationship between consent and criminal law, at least in the SM context. Perhaps it is also a factor that the public attitude is still conservative to talk about such alternative sexual practices and the participants dare not disclose their preference.

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73 For example, the Libertarian Alliance.

74 Tame, Chris R, "Why Sado-Masochism Should Not Be Criminalised", (Libertarian Alliance, 1994), at http://www.libertarian.org/LA/sadocrim.html.

75 Buxton, L, "*Taste, Morals and the Law*", (1992) 142 *New Law Journal* 484.

76 Sutherland, K, "Legal Rites: Abjection and the Criminal Regulation of Consensual Sex", (2000) 63 *Saskatchewan Law Review* 119.

Only a few sources have been found. The first is about recent police raids on brothels providing SM service.[77] The newspaper articles did not tell us very much about SM in Hong Kong. Nevertheless, from the fact that there are prostitutes providing such services, there must be a "local market" for SM encounters.

There is also one shop called the "Fetish Fashion" near the Central Escalator. Founded in 1994, the shop specializes in the sale of SM costumes and equipment. The owner of the shop, Decima, said that her shop intends to show that SM is okay and it represents freedom.

Apart from the sale of SM related items, the shop has two specially designed torture chambers ("playrooms") for rent. It is said that the majority using these rooms are Asian men. Also, there are many flying in from Taiwan and Singapore to have a good time in the room fitted with a rubber lined voyeur box, a whipping bench, a "Catherine wheel", hanging strap and other erotic toys and equipment. For hygienic reasons, no equipment of penetrative nature is provided. The rooms are also rented out to couples and groups for parties. It is said that strict discipline on the use of the "playrooms" is maintained. The users are always interviewed before they begin their activities in the room. Moreover, no smoking, drinking or drugs are allowed.

Monthly "play parties" are organized and fetish get together at the playrooms of the shop. Such parties can be mixed, gay or female only. The participants may take part in BDSM or they may just watch others doing it. "Safe, sane and consensual" are said to be the rules governing the play parties and no sexual intercourse is involved.

On the whole, Decima commented that Hong Kong people have become more willing to join the parties. Concerning the types of BDSM techniques involved, it was claimed that Hong Kong has not taken up the "edge play" of branding, scolding and needles. It seems that in most cases bodily harm is not involved.[78]

It is indeed a pity to have so little information about SM in Hong Kong. With this, hardly any practical advice can be given on the way Hong Kong should go. However, one thing that we can be sure of is that a community of "SM-ers" does exist in Hong Kong. It is possibly growing and the present acts involved are generally more moderate than those in *R v Brown*. There may exist a need to prepare for a potential conflict between criminal law and SM.

V. Conclusion

I vividly remember an episode of "South Park" about Christmas ("Mr Hankey the Christmas Pooh"). As the South Park people wanted to have a Christmas that was offensive to no one, they began to take down anything that disgusts anyone. First, the kids were banned from putting up a play about the birth of Jesus. Then, the Christmas tree, Christmas decorations and even Santa Claus were all banned. The people ended up with nothing and all were upset.

I confess that I have entered quite a number of adult sites about SM in the course of research. The pictures and description of the things done were bewildering. Many would definitely feel disgusted about them. However, is it that just because some (or even most) people feel disgusted about something we have to make it criminal? Is it going to be the beginning of witch

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77 *Supra* note 24.

78 Information in the three preceding paragraphs are taken from Whitehead, K, "Let's Talk about Sex", at http://www.totallyhk.com/TimeOff/Entertainment/Article/FullText_asp_ArticleID-20000802160711704.asp and "Fetish Fashion Homepage", at http://www.fetishfashion.com.hk.

hunting which will end up with a "South Park's Christmas" tragedy?

We do not doubt the necessity to employ criminal law to control some types of behavior. There is little regret when we see that some cruel rituals or traditions are banned and discarded. The point, however, is that we should not ban anything lightly. Extra care should be taken especially when the act is one which involves consent.

I admit that the above discussion is predominantly about the merits of *R v Brown* itself. It is rather "universal". Any place on earth which experiences a problem with SM and offences against the person may look at it and think upon it. It is not particularly beneficial for Hong Kong though. Provided with the limited information we have on SM practices in Hong Kong, I dare not say that the above discussion will lead to a very satisfactory proposal on how Hong Kong courts should deal with a case like *R v Brown*. I strongly regret about that and I hope that some kind of studies will be conducted locally.

If I am to make any solid recommendation based on the above findings and all the limitations, I am going to say that *R v Brown* is a bit controversial to be accepted readily as the authority of the law about SM. Without the help of sufficient local materials, which I believe will still not be available in a short time, the court should be careful in whatever decisions it is going to make. The doubts and shortcomings of *R v Brown* must be overcome, especially at a time when "rights issues" are increasingly sensitive, to avoid suspicion and criticism.

Having said all this, we may have come back to the point that *R v Brown* should have been "a case for the legislature". Yet, provided with the seemingly lack of interests to legislate on the matter, one should not feel surprised when a case is heard by the court before any other more appropriate actions taken. Who knows when the Department of Justice will give a try on the *R v Brown* line? The need to consider the legal position of SM beforehand is definitely present.

FREEDOM OF EXPRESSION: SOME CRITICAL COMMENTS ON THE FLAG CASE AND THE *PAUL TSE* CASE

A COMPARISON BETWEEN THE TWO CASES TO DETERMINE THE PERMISSIBLE SCOPE OF FREEDOM OF EXPRESSION IN FUTURE CASES

ALAN TUNG-SANG YIP *

Freedom of expression is no doubt highly treasured in our society, but it remains controversial under what circumstances should this fundamental right of free speech be restricted. This article examines two contrasting Hong Kong cases – the Ng Kung Siu flag case and the Paul Tse defamation case – to explore the fine line that the court has drawn between freedom of expression and protection of societal interest or individual reputation. The author also utilizes the theory of American Realists – 'Rule Skepticism' – as an analytical framework to explain the outcome of the two cases, and concludes by arguing that freedom of expression should be given the highest priority and only under very exceptional and urgent situations can its deprivation be justified.

I. Introduction

This paper focuses on the *scope* of freedom of expression in Hong Kong guaranteed by the Court of Final Appeal in its decisions on the two freedom of expression cases: *HKSAR v Ng Kung Siu and another*[1] (the "Flag case") and *Albert Cheng and another v Tse Wai Chun Paul*[2] (the "*Paul Tse* defamation case"). This paper is divided into six parts: Part *I* is the introduction. Part *II* analyses the *justifications* of freedom of expression and the laws which guarantee such freedom. This part intends to provide an overview of the significance of freedom of expression in a democratic society. This forms a solid base for the subsequent parts of this paper. Part *III* focuses on the Flag case and determines how "public order (*ordre public*)", a ground of restriction on the freedom of expression, was much more widely and loosely defined in Hong Kong than in other jurisdictions, hence limiting the permissible forms of expression in Hong Kong. Part *IV* analyses the *Paul Tse* defamation case and examines how the long-established scope of "*fair comment*", a kind of defence in defamation cases, was "clarified" by the Court of Final Appeal and substituted with a lower threshold which gives an impression that it may be easier to plead fair comment in defamation cases. Part *V* discusses why the Court of Final Appeal adopted two extremes in the above two freedom of expression cases (ie *restricting* free expression by way of extending the scope of "public order (*ordre public*)" but *liberalising* free expression by way of lowering the threshold of "fair comment"). The significance of "*non-legal factors*" emphasized by the theory of American realism will be applied to determine the reasons behind the two judgments. It also discusses *how we should reconcile the two cases* in order to predict the outcome of future cases concerning the freedom of expression. This paper ends with the significance of the protection of freedom of expression towards a community and explains why priority should always be given to the protection of this kind of fundamental individual right.

II. Justifications of Freedom of Expression, Its Legal Sources and Limitations

* The author wishes to express his gratitude to Mr Tony Yen, Law Draftsman of Department of Justice, for his insights and valuable comments on a draft of this article.

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

2 *Albert Cheng and another v Tse Wai Chun Paul* [2000] 3 HKLRD 418.

A. Justifications for the Freedom of Expression: Its Values and Functions[3]

> "The freedom of speech (or the freedom of expression) is a freedom that is essential to Hong Kong's civil society."[4]

It is appreciated that our Court of Final Appeal, by Li CJ, expressly affirmed in the *Paul Tse* defamation case the importance of free expression. Indeed, 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".[5] The concept of freedom of expression has been recognised as the most essential foundation of *all* other human rights in a democratic society.[6] 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 (emphasis added)."[7]

Freedom of expression, in terms of democracy, is essential to assure one's self-fulfilment since the essence of democracy is to allow different voices to be heard by the public at large.[8] It enables the circulation of ideas and maximises the diversity of opinions.[9] It was accepted that "the best test of truth is the power of thought to get itself accepted in the competition of the market".[10] The search for the truth would be handicapped and democracy could not be achieved if such freedom is suppressed. The European Commission on Human Rights in *Handyside v UK*[11] recognised that freedom of expression is "to promote the individual self-fulfilment ... the attainment of truth"[12] and these elements are the "demands of that

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3 There are many justifications for freedom of expression. This paper focuses on the argument from democracy and argument from 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 Greenawalt, K, "Free Speech Justifications", (1989) Singh (ed), *Comparative Constitutional Law* (Lucknow: Eastern Book Co., 1989).

4 *Supra* note 2 at 422 F-H.

5 Soli, J S, "The Importance and Use of International on Comparative Law: the Indian Experience", *The Article 19 Freedom of Expression Handbook* (London: Articles 19, 1993), p 3.

6 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 Boyle, K, "Freedom of Opinion and Freedom of Expression", Chan, J and Ghai, Y (ed), *The Hong Kong Bill of Rights: A Comparative Approach* (Hong Kong: Butterworths Asia, 1993), pp 304-5; it was also argued by 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, 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.

7 United Nations, *General Assembly Resolution 59(1)*, 14 December 1946.

8 Boyle, K, "Freedom of Opinion and Freedom of Expression" in Chan, J and Ghai, Y (ed), *The Hong Kong Bill of Rights: A Comparative Approach* (Hong Kong: Butterworths Asia, 1993), p 307; Emerson, T I, *The System of Freedom of Expression* (New York: Ransom House Inc., 1970), pp 6-7.

9 For detailed arguments on this issue, please refer to Keane, J, *The Media and Democracy* (Cambridge: Polity Press/Bazil Blackwell, 1991).

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

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

12 *Ibid* at 146-7.

pluralism, tolerance and broadmindedness without which there is no democratic society"[13].

Greater degree of harmony and stability can also be ensured if freedom of expression is protected because the public is more ready to compromise and accept different views through open discussion. The possibility to make rational judgment is then higher because different ideas allow people to think critically by analysing a particular issue from different perspectives.[14]

Despite the justifications and significance of freedom of expression mentioned above, it is unusual to find the grant of rights in absolute terms since a *balance* between the degree of the right to freedom of expression and the general welfare and interests of the community as a whole must be struck.[15]

B. Sources of Law Relating to Freedom of Expression in Hong Kong

After the transfer of the sovereignty of Hong Kong, the principal legal 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*, ("*Bill of Rights*").[16] To find out the sources of law relating to freedom of expression under the 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*. It 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 Bokhary PJ in the Flag case 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".[17] This view was shared by Li CJ in the *Paul Tse* defamation case.[18]

Freedom of expression is also guaranteed by art 16(2) of the *Bill of Rights*. The equivalent article in the *International Covenant on Civil and Political Rights* ("*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*

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13 *Ibid* at 64.

14 Yuen, T, "The Freedom of Expression and Article 23 of the Basic Law", (1997) 3 *Hong Kong Student Law Review* 192.

15 Ghai, Y, "Derogations and Limitations in the Hong Kong Bill of Rights" in Chan J and Ghai Y (ed), *The Hong Kong Bill of Rights: A Comparative Approach*, (Hong Kong: Butterworths Asia, 1993), p 161 (hereinafter called "Flag Case").

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

17 *Ibid* at 143 E-F.

18 *Supra* note 2 at 422 F-H.

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*.[19]

In fact, the source of art 19 of the *ICCPR* is art 19 of the *Universal Declaration of Human Rights* ("*Universal Declaration*").[20] Article 19 of the *Universal Declaration* is also the principal inspiration of the articles which guarantee freedom of expression in the *European Convention on Human Rights* and the *American Convention on Human Rights*. Therefore, 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 and hence cases concerning art 16 should be decided based on this international jurisprudence.

C. Restrictions on Freedom of Expression

1. General Restrictions

Despite the importance of freedom of expression, such freedom is not absolute. It may be subject to restrictions to ensure that societal interests are not damaged or may be subject to limitations if it conflicts with other people's rights.[21] The followings are only *some* examples:

1. The right to freedom of expression protected must be read *in the context*.[22] For example, the *Basic Law* itself provides that freedom of expression may be limited by *other provisions* therein.[23]
2. 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.
3. There are also many restrictions under the common law. For instance, no one can defame others;[24] sedition is strictly forbidden;[25] and interference of the administration of justice is prohibited.[26]

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19 To determine whether the HKSAR courts have jurisdiction to have "direct application" of the *ICCPR*, please refer to Shiu, Sin-por, "Judicial activism creates court chaos", *South China Morning Post*, 20 February 2001, p16; Eu, Audrey "Our Judges, Our Laws", *South China Morning Post*, 25 February 2001; Ng, Margaret, "Covenant must be honoured", *South China Morning Post*, 27 February 2001; Shiu, Sin-por, "Abide by rule of law – not judges", *South China Morning Post*, 2 March 2001.

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

21 Kiss, A, "Permissible Limitations on Rights" in Henkin, L (ed), *The International Bill of Rights: The International Covenant on Civil and Political Rights* (New York: Columbia University Press, 1981), p 290; *supra* note 15, p 161.

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

23 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. 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 16, p 369 and note 3.

24 For example, the famous cases on defamation after handover were *supra* note 2 and *Eastern Express Publisher Ltd & Another v Mo Man Ching & Another* [1999] 3 HKLRD 530.

25 See *Basic Law* art 23.

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)*, 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 Hong Kong Special Administrative Region ("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*.[27]

2. The Restrictions Upon Free Expression in the Flag Case

The defendants in the Flag case relied on art 27 of the *Basic Law* and argued that the relevant sections of the *National Flag and National Emblem Ordinance*[28] and the *Regional Flag and Regional Emblem Ordinance*[29] deprived the freedom of expression (more detailed discussion in Part *III*). However, we can see from the above-mentioned examples of restrictions that, 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* because, as suggested by Professor Yash Ghai, they should be treated as "*one constitutional document*".[30] Article 16(3) of the *Bill of Rights* provides:

> "The exercise of the rights provided for in paragraph (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:
> (a) for respect of the rights or reputations of others; or
> (b) for the protection of national security or of public order *(ordre public)*, or of public health or morals."

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

> "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."[31]

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26 For more detailed discussion on these issues, please refer to Curry, H L and Dassin, J R (ed), *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).

27 See 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.

28 *National Flag and National Emblem Ordinance* (Cap 2401).

29 *Regional Flag and Regional Emblem Ordinance* (Cap 2602).

30 However, it was agreed by both Professor Yash Ghai and Bokhary PJ that although the *ICCPR, Bill of Rights* should be read with the *Basic Law* as a whole, the *Basic Law* should always prevail when there is inconsistency between them since, as a general rule, the *ICCPR* which is '*incorporated*' by the *Basic Law* should be subject to the latter. *Supra* note 27 at p 451 and see Bokhary PJ *supra* note 1 at 144A-C.

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

The *ICCPR* requires that restrictions must be "necessary" to protect the listed interests within the provisions.[32] Only when all three parts of the test is satisfied can the restrictions be legitimate and applied.

Part *III* of this paper focuses only on how our Court of Final Appeal *widened* the scope of "public order (*ordre public*)" as a ground of restriction on freedom of expression.[33]

3. The Restrictions Upon Free Expression in *Paul Tse* Case

As mentioned in section *C*1.3 of this Part pa, one of the restrictions of free expression is that one must not defame others. As it will be discussed in Part *IV* of this paper, the plaintiff sued the defendants for defamation (libel) related to the defendants' conversations in their popular "phone-in radio programme". The law on defamation is governed by common law.

The usual defences available in defamation cases are:

1. qualified privilege; and
2. fair comment

"Malice" in the mind of defendants is an important element to *both* defences. The defendants in the *Paul Tse* case relied on the defence of fair comment. They challenged the long-established meaning of "malice" (more detailed discussion in Part *IV*) and argued that, since malice did not exist, they should not be liable.

*III. The Flag Case and the Widening of the Scope of "Public Order (*Ordre Public*)" – Towards a More Restrictive Approach to Freedom of Expression*

A. The Facts of the Case

This case arose on 1 January 1998. A lawful and orderly public demonstration was organised 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. During the procession, the two defendants waved in their hands a defaced national flag and a defaced regional flag. At the end of the procession, they tied the flags to the railings of the Central Government Offices. The flags were substantially defaced by the defendants.

In the first instance, both of the defendants were convicted under s 7 of both the *National Flag and National Emblem Ordinance* and the *Regional Flag and Regional Emblem*

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32 *Supra* note 22, p 109.

33 For detailed and thorough discussion on the other restrictions like "provided by law", "national security", "public health and morals", "necessary", please refer to Kiss, A, "Permissible Limitations on Rights" in Henkin, L (ed), *The International Bill of Rights: The International Covenant on Civil and Political Rights* (New York: Columbia University Press, 1981), pp 290-310; Lockwood, B B, Jr, Finn, Janet and Jubinsky, G, *"Working Paper on Limitation Provisions"* (1985) 7 *Human Rights Quarterly* 35; Byrnes, A, *"Permissible Limitations on Rights Under the* ICCPR *and the Bill of Rights", Seminars on the Hong Kong Bill of Rights Selected Materials Vol. 1* (Faculty of Law, HKU 1991), p 31; *supra* note 15 at pp 161-198; *supra* note 16 at pp 392-401; Boyle, K, "Freedom of Opinion and Freedom of Expression" in Chan, J and Ghai, Y (ed), *The Hong Kong Bill of Rights: A Comparative Approach* (Hong Kong: Butterworths Asia, 1993), pp 321-322.

Ordinance. The former prohibits desecration of the national flag and emblem by publicly and wilfully 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 wilfully defiling it.

Both of the 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 the Court of Final Appeal and the Court upheld the constitutionality of statutory provisions in question.

Li CJ of the Court 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 art 16(3) 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).

B. Definition of "Public Order (Ordre Public)*" by the Court of Final Appeal*

At the outset, Li CJ ruled that the prohibition of desecration of flags by the statutory provisions in question is a limited restriction 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".[34]

In examining whether the restriction was within "public order (*ordre public*)":

1. Li CJ, by referring to *Tam Hing-yee v Wu Tai-wai*[35], *Secretary for Justice v Oriental Press Group Ltd*[36] and *Wong Yeung Ng v Secretary for Justice*[37], 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 *Oriental Press Group Ltd*[38] 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*)" is elusive especially when the phrase has different meanings in private and public law; its meaning should differ depending on the context in which it is being used.[39]

2. 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 used as a basis for

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34 *Ibid* at 136 B-C.

35 *Tam Hing-yee v Wu Tai-wai* [1992] 1 HKLR 185, p 190.

36 *Secretary for Justice v Oriental Press Group Ltd.* [1998] 2 HKLRD 123, p 161.

37 *Wong Yeung Ng v Secretary for Justice* [1999] 2 HKLRD 293, p 307I.

38 *Secretary for Justice v Oriental Press Group Ltd.* [1998] 2 HKLRD 123.

39 *Ibid* at p 669C-H.

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 as well as economic order, are met".[40] Moreover, the concept must remain a "function of time, place and circumstances".[41]

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."[42]

3. Furthermore, in 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*) ... (emphasis added)"[43]. Article 30 of that convention provides that the restriction on rights or freedoms may not be applied "except in accordance with laws enacted for reasons of *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; its boundaries could not be precisely defined;
2. "Public order (*ordre public*)" includes the protection of general welfare or the interests of the collectivity as a whole. Examples include prescription for peace and good order; safety; public health; aesthetic 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.

He put much emphasis on the third point by explaining the significance of the *very special* characteristics in terms of "time, place and circumstances" in Hong Kong: Hong Kong has a new constitutional order. The People's Republic of China ("PRC") resumed the exercise of sovereignty over Hong Kong. Hong Kong has become an alienable 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

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40 Kiss, A, "Permissible Limitations on Rights" in Louis Henkin (ed), *The International Bill of Rights: The International Covenant on Civil and Political Rights* (New York: Columbia University Press, 1981), pp 301-2.

41 *Ibid.*

42 See (1985) 7 *Human Rights Quarterly* 3-14.

43 Restrictions of the rights and freedoms of the American Convention/the word "laws" in art 30, Advisory Opinion No OC-6/86, in (1986) 7 *Human Rights Law Journal* at p 234.

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*).[44]

C. Balancing Act by the Broad and Wide Scope?

One may note that Li CJ's reasoning seemed to provide an extraordinary wide definition on the scope of "public order (*ordre order*)" as a ground of restriction on free speech. Many other kinds of expression may easily fall under 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*". 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 includes political issues like the resumption of the exercise of sovereignty over Hong Kong by the PRC.[45] This gave the public an impression that the court, while balancing the degree of the right to freedom of expression allowed in a society and the interests of the community as a whole, apparently put more emphasis on the public interests than on the individual freedoms.[46] 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 more on the "special characteristics" in terms of "*time, place and circumstances*" of the post-handover situation of Hong Kong than on the importance of the protection of freedom of expression as a fundamental human right.

D. Comments on the Definition of "Public Order (Ordre Public)*" in the National* Flag *Case – To See How the Court's Definition Was Different From That of Its Long-Established Definition in Other Jurisdictions*

Secretary for Justice Ms Elsie Leung Oi-sie, after the delivery of the judgment, said in welcoming the court's decision that the restrictions conformed 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 criticizing the government and the mainland."[47]

She also commented that in exercising the freedom of expression, one "must have regard to public order, which includes the collective need of the community".[48] Here, the "collective need of the community" was the symbolism of the nation and the regional flag. This was in line with the opinions of Professor Albert Chen 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 Chinese sovereignty in Hong Kong'"[49].

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

45 Editorial, *South China Morning Post*, 16 December 1999.

46 Editorial, *Hong Kong Standard*, 16 December 1999.

47 "Leung Welcomes Court's 'Well-supported' Decision", *Hong Kong Standard*, 16 December 1999.

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

49 Prof Albert Chen's comments are quoted by and reproduced in, Yeung, C, "Flag Ruling Casts Shadow over Liberty", *South China Morning Post*, 18 December 1999.

However, questions may arise on why a high degree of freedom to express dissent is being compromised for the sake of 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 to dissent may be further limited in favour of the symbols of sovereignty by the application of such vaguely defined "public order (*ordre public*)".[50]

1. Human Rights must be given the first priority even under the notion of "Public Order (*ordre public*)" – a well-established principle in international jurisprudence

Without doubt, the application of any restriction on any human right must be balanced. A line must be drawn between the degree of the right and the interests of the community: none of them 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"[51].

Li CJ, by quoting Kiss' article, held that while the definition of the words "*ordre public*" is wide and elusive, the focus should be on the ways to protect the "existence and the functioning of the state organization". He quoted arts 30 and 32(2) of the *American Convention on Human Rights* and ruled that restriction is legitimate if it is in the interest of the adequate functioning of the public institutions to the collectivity or 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*".

However, giving priority to the protection of human rights has been the long-established principle because it is the most important way to preserve the existence and the proper functioning of a state. The concept of public order remains a "function of time, place and circumstances", but it should not render individual human rights unprotected. According to Kiss' article:

> "[*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 (emphasis added)."[52]

In times of "conflicts" between individual rights and freedom on one hand, and the collective interests on the other, the Court held in a Hong Kong case *R v Sin Yau Ming* (the *Sin Yau Ming* case) by Silke VP 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 the individual* (emphasis added)."[53]

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50 *Ibid.*

51 Higgins, R, "Derogations Under Human Rights Treaties" 48 The *British Year Book of International Law* (Oxford: Clarendon Press, 1978) at 281-2.

52 *Supra* note 40, p 301.

53 *R v Sin Yau Ming* [1992] 1 HKCLR 127 at 145, per Silke VP.

Indeed, art 3 of the *Siracusa Principle* ("the *Principle*"), on which Li CJ heavily relied on, also expressly provides that "all limitations shall be interpreted strictly and in favour of the rights at issue"[54].

Therefore, when conflicts arise under the concept of "*ordre public*", priority should always be given to the protection of human rights. It is submitted that Li CJ focused too heavily on the importance of "community interests" in terms of the functioning of the state organisation. Protection of human rights is more important in the "existence and the functioning of the state organisation" since *ordre public* also "implies that human rights must be respected within a democratic society".[55]

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*". Here, the "principles of civilisation and justice" should be understood as the protection of human rights. Kiss strongly suggested that:

> "[h]uman rights of individual are part of ... minimum civilised order and *cannot be lightly sacrificed even for the good of the majority* or the common good of all (emphasis added)."[56]

By the same token, when art 23 of the *Principle* 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 *Principle* itself that "... respect for human rights is part of public order (*ordre public*)".[57]

Meanwhile, "*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."[58] One may note that the protection of individual human rights is as equally important as the "collective interests" of 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, the Court chose a definition which was departed from the long-established definition in most common law jurisdictions and by academics.

2. International Jurisprudence Requires *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 a society. Owing to this, Kiss, while commenting on the *Principles*, argued the restriction *ordre public* could be justified:

> "only if the situation or the conduct of the persons concerned constitutes a sufficiently *serious threat* to public order (emphasis added)."[59]

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54 *Supra* note 42.

55 Kiss, A, "Commentary by the Rapporteur on the Limitations Provisions" (1985) 7 *Human Rights Quarterly* 15 at 19-20.

56 *Supra* note 40, p 302.

57 *Supra* note 42.

58 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).

59 *Supra* note 55.

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, Professor Yash Ghai commented 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*]."[60]

"General welfare" is regarded in the judgment as an integral element of "*ordre public*" in democratic societies. Inter-American Court of Human Rights, while expressing the view on the word 'laws' in art 30 of the *American Convention on Human Rights*, suggested 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'* (emphasis added)."[61]

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

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 order" one. The desecration of the flags, during such lawful and order demonstration, neither posed any threat to the community nor committed any other serious offences that threatened the principle of "One Country Two Systems".[62] The Court failed to explain how the desecration of the flags posed threat to either the community at large or the principle of "One Country Two Systems".

Cases from other jurisdictions may help to explain this point. The US Supreme Court in *Brandenburg v Ohio*[63] held that free expression may only be proscribed 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". 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".[64] Since 1952, the second prong of the test was declined by the Court 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.[65]

Following the test in these US cases, the desecration of 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.

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60 Ghai, Y, "What if Flag is the Message?", *Hong Kong Standard*, 22 December 1999.

61 *Supra* note 43.

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

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

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

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

Even if the defendants' acts might be described as disturbing the peace, the government still should not prohibit it since expression should not be prohibited merely on the basis that an audience who takes serious offence to the expression may disturb the peace. It is because the government cannot assume every expression of a provocative idea will incite a riot, but must look to the actual circumstances surrounding the expression. 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.

Again, one may also notice from the above discussion that, with respect to the concept of "substantial threat to the general welfare of society", the Court took a very different view from that of other jurisdictions and reputable and authoritative academics.

3. *Not Practically Possible* to Have a Clear Separation of "Substance" And "Mode" in Other Jurisdictions

Bokhary PJ, the dissenting judge in the Flag Case held that any restriction on any right or freedom, including *ordre public*, must be "*reconcilable with*" that right or freedom. His Lordship said that to be reconcilable, the restriction must be narrow and specific. His assumption is that freedom of expression can be divided into "substance" (*what* is expressed) and "mode" (*how* it is expressed) and the two flag ordinances restrict *only the latter*.

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 represents the "message" ("substance" in the words of Bokhary PJ).[66] He argued, from a historical point of view, that the current Chinese flag, unlike many other national flags, are "suffused with the symbolism of the Communist Party" without deep historical roots or which are "based on commonly accepted insignia of nationhood"[67]. 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 (emphasis added)."[68]

It is not practically possible to have an absolute "clear cut" of the substance and the mode. The desecration itself represents both the mode as well as the substance of expression, especially when facing the historical reality in the case of China. Cases law in other jurisdictions may 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 the *Dundesflagge* case, the Constitutional Court held that attacks against national symbols, including national flag, even if harsh and satirical, must be tolerated to protect freedom of expression since the act of attack itself can be regarded as the substance of expression.[69]

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66 *Supra* note 60.
67 *Ibid.*
68 *Ibid.*
69 81 FCC 278, 294 (1990); See also 81 FCC 298, 306 (1990) (*Bundeshymne* case).

In the United States, the Supreme Court held that while 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 conducts based on the message delivered by the act of desecration sought to be conveyed. For instance, in *Texas v Johnson*[70], 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. In *United States v Eichman*, the Supreme Court, by invalidating another act which criminalizes 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* (emphasis added)."[71]

It is submitted that the desecration of flag is a kind of "artistic" or "symbolic" expression of which the act itself should be viewed as a *unique* way to express dissent. This cannot be substituted by any other mode. The desecration of flags during the demonstration represented the anger towards the suppression of the Chinese Government in the "June Fourth Crackdown". The desecration 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 anger towards the suppression of the democratic movement by the Chinese Government in the "June Fourth Crackdown". Restriction of the mode is then equivalent to the restriction of the message delivered in that special occasion.[72]

4. 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."[73]

This comment reflects that his Lordship accepted that flag desecration was only just within the bounds of 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 the rest of the Court, including the Chief Justice. This casts doubt whether this approach will be followed in the future.

To this, Chris Yeung, the political editor of the *SCMP*, commented that Bokhary PJ was the "lone fighter for two systems and that the upper limit for the restrictions is merely wishful thinking"[74]. And it was also argued by Martin Lee, president of Democratic Party and senior counsel, that:

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

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

72 *Supra* note 62.

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

74 Yeung, C, "Flag Ruling Casts Shadow over Liberty", *South China Morning Post*, 18 December 1999.

"[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."[75]

E. Short Conclusion on the Flag case

Without doubt, the Flag case is one of the most controversial constitutional cases after the handover. Some scholars may claim that the case provides an excellent opportunity to define clearly the scope of what the "new constitutional order" should be when a case involves sensitive political issue.[76] However, it is clear from the above discussion that the definition of "public order (*ordre order*)" by the Court of Final Appeal is very different from its long-established definition. The balance between individual freedom of expression and the community interests at large may become more difficult to strike because if the scope is so *broad and loose*, other forms of expression may easily fall into its scope and be restricted: once the court starts to say that the state has the power to protect its symbols by applying the extraordinarily vague and poorly-defined concept of "public order (*ordre public*)", it may not stop at the flag.

IV. Paul Tse *Defamation Case and the Scope of "Fair Comment" – Towards a More Liberal Approach to Freedom of Expression*

A. The Facts of the Case[77]

In 1991, Mr Au Wing Cheung was employed as a tour escort by Select Tours International Co Ltd. After a few week of work he was instructed to lead a tour group to the Philippines. While going through the customs in Manila airport, Mr Au and a member of the tour group, Mr Wong Chuen Ming, were arrested for trafficking a drug colloquially known as "ice" and they were prosecuted, convicted and sentenced to life imprisonment by the court in the Philippines.

These happenings attracted much publicity in Hong Kong. Some people believed they were innocent and hence formed various groups organising campaigns seeking their release. One of these groups was the Tourist Industry Rescue Group, of which Select Tours was a member and the plaintiff of the instant case, Mr Paul Tse Wai Chun, was its honorary legal adviser. The first defendant of the instant case, Mr Albert Cheng, organised another group. As a result of the campaigns by these groups and other incidents that happened in the Philippines, Mr Au and Mr Wong were released in 1996. Different people claimed credit for their successful return.

In fact, Select Tours ended Mr Au's employment in 1991 unilaterally. After his return a question arose over whether Mr Au should claim compensation from his former employer for the period of his imprisonment in the Philippines, on the ground that he was arrested and incarcerated while carrying out his duties as an employee. Mr Cheng and others urged Mr Au to make a claim while Mr Tse advised him not to do so.

On 1 August 1996, Mr Cheng and Mr Lam Yuk Wah were co-hosts of a phone-in radio talk show broadcast on the Chinese channel of the commercial radio station run by Hong Kong Commercial Broadcasting Co Ltd. They were already at loggerheads over the rescue

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75 *Ibid.*

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

77 For a more detailed description of the facts of the case, *supra* note 2 per Lord Nicholls of Birkenhead NPJ.

operation. Part of the programme consisted of a conversational dialogue in Cantonese between the two hosts. Defamatory remarks were made in respect of Mr Tse in the course of this dialogue; so Mr Tse commenced this action against Mr Cheng, Mr Lam and the Hong Kong Commercial Broadcasting Co Ltd.

Throughout the proceedings, "fair comment" was the ground of defence relied on by the three defendants. In reply, Mr Tse pleaded that the defendants made the statements maliciously. Therefore, the presence or absence of malice became the decisive factor in the instant case. The jury in the first instance held in favour of the broadcasting company but against the two individual defendants and awarded $80,000 damages.

Mr Cheng and Mr Lam then appealed to the Court of Appeal. While their appeal was dismissed in the Court of Appeal, they appealed to the Court of Final Appeal. They challenged the *correctness and adequacy of the judge's summing up on the issue of malice.*

B. Definition of "Malice" by the Court of Final Appeal

1. The Underlying Issue of the *Paul Tse* Case is the Same as That of the Flag Case

Before turning to the definition of malice, Li CJ affirmed the significance of freedom of expression. He also held, by relying on *Eastern Express Publisher Ltd & Another v Mo Man Ching & Another*[78], that since the right of fair comment was one of the most important elements in the freedom of expression, the courts should adopt a generous approach when considering this right, so that the right was maintained in its full vigour. From this, we can see that the underlying issue in the *Paul Tse* case was the same as that of the Flag case – both of the cases require the determination of the scope of freedom of expression in Hong Kong notwithstanding its determination in different contexts (ie freedom of expression was determined in the context of "public order (*ordre public*)" in the Flag case while freedom of expression was determined in the context of "fair comment" in the *Paul Tse* case).

2. The Definition of "Malice" in Fair Comment

A unanimous decision was reached and the leading judgment was delivered by Lord Nicholls of Birkenhead NPJ with which all the other judges in the Court of Final Appeal concurred.

In examining the definition of "malice" in fair comment:

1. Lord Nicholls reviewed the settled ingredients of fair comment, *viz.* defendants may not rely on this defence unless the comment:
   a) is on a matter of public interest;
   b) is recognizable as comment;
   c) is based on facts which were true or protected by privilege;
   d) explicitly or implicitly indicates, at least in general terms, what the facts were on which the comment was being made; and
   e) is one which could have been made by an honest person, however prejudiced he might be, and however exaggerated or obstinate his views are.

   These ensured that defamatory comments could be seen as what they were, namely comments as distinct from statements of fact and that those reading the comments had the material enabling them to make up their own minds on whether

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78 *Eastern Express Publisher Ltd & Another v Mo Man Ching & Another* [1999] 3 HKLRD 530.

they agreed or disagreed.[79]

2. A plaintiff could defeat the defence of fair comment by proving that the comments were actuated by "malice". Lord Nicholls held that the underlying purpose for the existence of this defence was to facilitate freedom of expression on matters of public interest especially in the social and political fields, where those who made public comments usually acted not dispassionately. They did have their own motives. However, the existence of those motives did *not* mean the defence was being misused.[80] This is because:
   a) to hold otherwise would involve judicial censorship of speech;
   b) liberty to make such comments lays at the very heart of the defence since commentators, of all shades of opinion, were entitled to have their own agenda and own political or other ambitions.

   Therefore, it should not be for the court, which ought to play no role in political issues or considerations, to choose between "public" and "private" motives; or between motives they regarded as morally or socially or politically desirable and those that they regarded as undesirable.[81]

3. In this sense, "malice" in the context of fair comment only covered the case where the defendant did *not genuinely hold* the view that he expressed. It was a *subjective* test and looked to the *defendant's own state of mind* rather than that of a reasonable man. Once the defendant *himself honestly believes* in the soundness of his comment, malice will not be sustained and his protection of the defence of fair comment will *not* be deprived even if his purpose of the comment, for instance, is to inflict injury or damage political opponent.

C. *Comments on the Definition of "Malice" in the* Paul Tse *Case*

1. "Dismissing" the Long-Established Definition on Malice?

The long-established rule on the meaning of malice in the context of fair comment is the same as that of qualified privilege. The meaning of malice has been comprehensively analysed in relation to the defence of qualified privilege, most notably in the speech of Lord Diplock in *Horrocks v Lowe*[82]. But no similar exposition has been undertaken regarding fair comment. Most textbooks on defamation take "the view that, as with qualified privilege, so with fair comment, the defence of an honest defendant may be vitiated by the motive with which the words were published"[83]. For example:

1. *The (English) Report of the Committee on Defamation* stated that "a person was acting maliciously where he was dishonest or reckless or actuated by spite, ill-will, or any other indirect or improper motive"[84].
2. Volume 28 of the *4th Edition of Halsbury's Law of England* defined "malice" as "ill will or spite towards the plaintiff or any indirect or improper motive in the

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79 *Supra* note 2 at 424E-425D, 429H.
80 *Ibid*, pp 429F-430H.
81 *Ibid*
82 *Horrocks v Lowe* [1975] AC 135.
83 *Supra* note 2.
84 *The (English) Report of the Committee on Defamation* (1975) at para 153.

defendant's mind"[85]. It also stated that "it seems that the *same principles apply to the defence of fair comment* (emphasis added)"[86].

3. *Gatley on Libel and Slander* (9th edition) states the same direction: "it is submitted that the authorities on malice in the different contexts of fair comment and qualified privilege are essentially *interchangeable*... (emphasis added)"[87].

The Court of First Instance and the Court of Appeal were of the same view that even if the defendants believed the truthfulness and soundness of their comment, the comment would still be a "malicious" one if there existed ill motive or spiteful comments towards the plaintiff in the defendants' mind.

However, the Court of Final Appeal held that "malice" does not bear the same meaning for the defences of fair comment and qualified privilege because they have entirely different rationale. As to qualified privilege, the rationale is that there are circumstances when there is a need, in the public interest, for a particular recipient to receive frank and uninhibited communication of particular information from a particular source. Therefore, if a person's dominant motive is not to perform this duty or protect this interest, he is outside the ambit of that defence. However, the rationale of fair comment is not based on any notion of performance of a duty or protection of an interest and its basis is:

> "the high importance of protecting and promoting the freedom of comment by everyone at all times on matters of public interest, irrespective of their particular motives."[88]

Therefore, *honesty of belief* is the touchstone in the determination of whether there exists "malice" and the underlying motive of the comment should totally be disregarded to prevent judicial censorship of the contents of expression.

Prima facie, the Court of Final Appeal dismissed the so-called long-established principle on the defence of fair comment. Mr Ma Lik, National People's Congress deputy, wrote an article in *Hong Kong iMail* that the Court wrongly dismissed the previous long-established case law and argued that the law of malice now hinges on whether a person genuinely believes in his own statement and:

> "according to Lord Nicholls, the existence of spite has no relevance to one's truthful belief. In other words, *when a judge deems a man as honest, he may consciously criticise other, however prejudiced he might be, and however exaggerated or obstinate his view* (emphasis added)."[89]

However, the Court did recognise that, before pleading this subjective sense of "malice", the five *objective* ingredients of fair comment must first be proved (ie elements (a)–(e) in Part *IV.B.*2.1 above). An article written on behalf of the Bar Association in *Hong Kong Economic Times* also suggested that if the statement in question itself was not supported by the objective

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85 *Halsbury's Laws of England* (4th Ed, reissue), vol. 28 para 149, p 78.

86 *Ibid.*

87 Lewis, P, (ed), *Gatley on Libel and Slander*, (London: Sweet & Maxwell, 1998) at 426; please see also Carter-Ruck, Peter F and Starte, Harvey N A, *Carter-Ruck on Libel and Slander*, (London: Butterworths, 1997), p 116 and Rogers, W V H, *Winfield and Jolowicz on Tort*, (London: Sweet & Maxwell, 1998), p 427 which also share the same view on the meaning of "malice" in the context of fair comment.

88 *Supra* note 2 at 432C-434G.

89 Ma Lik, "A Judgment Found Wanting", *Hong Kong iMail*, 5 December 2000.

truth and facts as evidence, the defence would fail and the issue of malice, a subjective question, would not arise.[90]

As repeatedly stated by the Court in the *Paul Tse* case and according to the long history of case law on libel, there are two undisputed matters on the word "malice", whether in fair comment or qualified privilege:

1. It is always a subjective matter; and
2. It covers the case of a defendant who does not genuinely hold the view he expressed (eg he acted dishonestly).[91]

According to these, the definition of malice is always a subjective matter. The only "uncertain point" is whether "malice" should bear the same meaning in fair comment and qualified privilege defences. Therefore the Court did not "dismiss" the long-established rule but merely "*clarified*" this uncertain part of the law: The Court merely clarified, owing to different rationale behind fair comment and qualified privilege, that malice should not have the same meaning in them.[92]

2. The Consequences and the Effect on Future Fair Comment Cases After the *Paul Tse* Case

It was argued by Ma Lik that the case "paved the way for lowering media standards of fair comment" in the future defamation cases and hence the defendants will be easier to escape liability for his "wrongful" comments or statements.[93] It is submitted that, in common law history, there is *no* judicial distinction between the "correctness" or "incorrectness" of comments or statements because to draw a line between them by judges, who were not expected to determine political correctness of expression, would be very dangerous. Judicial censorship of expression in Hong Kong might exist and the court, which must be politically neutral to avoid bias or prejudice towards or against other branches of our system, would inevitably be involved in politics. As a result, judicial independence, which is one of the most important ingredients of rule of law, would be jeopardised.[94]

Meanwhile, in a letter to the *Hong Kong iMail*, the Secretary for Justice Elsie Leung Oi-sie wrote that:

> "it should be remembered that, in accordance with the Basic Law, the common law continues to apply, and to evolve, in Hong Kong. And the Court of Final Appeal is the final arbiter of what is the common law in Hong Kong."[95]

It is appreciated to see that our Secretary for Justice affirmed the significance of respecting our Court of Final Appeal. In fact, the confidence on whether our government would still respect the decisions of the Court of Final Appeal is seriously eroded after the controversial right of abode cases. Therefore, it is hoped that her statement may "re-affirm" the

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90 Bar Association, "終院沒放鬆「公正評論」", *Hong Kong Economic Times*, 5 December 2000.

91 *Supra* note 2.

92 蘇紹聰，陳綺雯, "終院對言論自由的肯定", *Ming Pao*, 13 December 2000.

93 *Supra* note 89.

94 *Supra* note 90.

95 The substantial parts of the letter is reproduced in: Li, W, "Foreign judges backed", *Hong Kong iMail*, 9 December 2000.

international as well as local confidence towards our government that it will not play any "pro-active" role to invite any intervention of the National People's Congress Standing Committee (the "NPCSC") to challenge the Court of Final Appeal's final decision in the future.

The suggested use of the "subjective test" to determine malice, the suggested abolishment of using the word "malice" when giving direction to the jury to avoid confusion, and the substitution of malice by the phrase "did not genuinely believe his opinion"[96] possibly make fair comment easier to plead in future defamation cases.

The questions now arise include:

1. why was the case so different from the "long-established" meaning of malice in the context of fair comment; and
2. if the Court of Final Appeal tried to expand the scope of "public order (*ordre public*)" in the Flag case to limit and restrict the permissible scope of freedom of expression, why the same Court tried to substitute a "brand new" definition of "malice" which gave an impression that the Court was adopting a more liberal attitude on the same concept of freedom of expression?

These questions will be dealt with in the following part with the aid of the American realism's theory on how "non-legal factors" influence the decision of judges.

V. Comparison Between the Flag Case and Paul Tse *Case*

The Court in the two cases seemed to exhibit two different attitudes towards the same concept (ie free expression): one seemed to restrict the freedom of expression while the other gave an impression to liberalise the freedom of expression. This part tries to find out the reasons behind this by applying the theory of "rule scepticism" (a stream of American realism), which emphasizes how "non-legal factors" may affect judicial decisions when the rigid legal rules fail to explain the decisions.

A. Brief Introduction to American Realism and Why Use This to Analyse the Two Cases

The main idea of American realism may be best described by Holmes J, the founder of the American realism. *Pragmatic approach* to judicial decision-making should be adopted since:

> "the general propositions [i.e. legal rules] do *not* determine concrete cases ...[and hence] no case can be settled by general propositions"[97]

Realists' emphasis focuses on *what the courts may actually do in reality*, rather than on abstract logical deduction from general rules. Realists desire to discover *non-legal factors* in judicial decision-making and are of the view that, in the words of Holmes, "the life of the law has not been logic, it has been *experience*"[98] (i.e. factors *outside* rigid legal rules). Thus

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96 *Supra* note 2 at 438E-G.

97 Holmes, O W cited in Rumble, W E, *American Legal Realism: Skepticism, Reform and the Judicial Process* (Ithaca, NY: Cornell University Press, 1968) at 39-40.

98 Lerner, M (ed), *The Mind and Faith of Justice Holmes: His Speeches, Essays, Letters, and Judicial Opinions* (New York: Random House, 1943), pp 51-4.

realists attack formalism, or "*formal style*" described by Llewellyn[99], which encourages strict reliance on legal rules and precedents, and a dismissive attitude to any analysis of the impact of non-legal factors on law with little discretion on the part of judges.

American realism is applied because realism, especially rule scepticism, focuses, apart from the role of legal rules and common law precedents, on how non-legal factors such as social, political and economic considerations may affect on the judicial decision and it was precisely the situation in Hong Kong concerning the two cases:

B. Rule Scepticism and the Flag Case[100]

> "[T]here are usually *plenty of precedents* to go around . . it is no great problem .. to find legal authority for most propositions (emphasis added)."[101]

Realists argue that there are so many precedents, there can never be reconciliation in a coherent way and judges have to *choose one* since there is no unique right answer. Realists also insist that there are numerous techniques for interpreting conflicting precedents and hence judges can downgrade unfavourable precedents while boosting those that favour their views.[102] Llewellyn, for instance, listed sixty-four "available, impeccable precedent techniques" used by judges for interpretation. Inconsistent precedents and numerous construction methods increase the *uncertainty* of law because judges are able to "*choose*" a particular precedent they favour to fit in the case before them.[103]

The Flag case[104] clearly reflected such phenomenon. The issue was freedom of expression versus protection of the national and regional flags. Bokhary PJ in his judgment held that there were in fact "*two coherent approaches*": one was that although there were always more effective modes of expression than desecrating the flag, such desecration, however boorish and offensive, should nevertheless be tolerated. The other approach was that by reason of the reverence due to them for what they represent and symbolise, those flags should be protected from desecration. Neither approach can be said to be unsustainable in law since each approach has its *own* precedents.[105]

On the one hand, precedents supporting the former approach include the majority judgments of the two United States ("US") cases.[106] And the US Supreme Court in *Brandenburg v Ohio* held that free expression might be proscribed *only* where the expression was "directed to inciting or producing *imminent lawless action*".[107] In other words, only expression that tends to produce an *immediate breach of peace* would be criminalized.[108] In the Flag case, the said

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99 See, for example, Llewellyn, K N, *The Common Law Tradition* (Boston, Mass: Little, Brown & Co., 1960), pp 35-45: Llewellyn criticized the formal style's arguments that judicial decision can yield reckonable results only when the rules of law are clear and dismissed the formalistic notion that policy is for the legislature but not for the courts.

100 *Supra* note 1.

101 Douglas, W O, "*Stare decisis*", in *Essays in Jurisprudence from the Columbia Law Review* (New York: Columbia University Press, 1963) at 19.

102 McCoubrey, H, and White, N D, "American Realism" in *Textbook on Jurisprudence* (London: Blackstone Press, 1999), p 212.

103 Llewellyn, K N, *The Common Law Tradition* (Boston: Little, Brown, 1960), pp 75-92.

104 *Supra* note 1.

105 Ng, M, "Dangers of Saluting the Flag", *South China Morning Post*, 24 December 1999.

106 *Supra* note 71.

107 *Brandenburg v Ohio* 395 US 444 (1969).

108 *Supra* note 64.

desecration happened in a peaceful demonstration and, in Professor Yash Ghai's words, "no turmoil or uprising happened in the pro-democracy march"[109]. On the other hand, however, precedents supporting the latter approach include the strong dissenting judgments in the two US flag cases[110]and other persuasive decisions in European countries (although not common law systems but were *expressly referred to by CFA*[111]) which upheld the flag desecration legislations like Germany[112], Portugal[113] and Italy.[114]

The Court of Final Appeal preferred the latter approach and held the desecration should be criminalized. The question is *why* the Court preferred *that* particular set of precedents but not the other. Oliphant, a realist, claimed that what was more important was to discover the *reasons* why a judge will accept a particular proposition but not others:

> "[Such a] choice was not based on rigid legal rules but on *reasons of policy, morality and the judicial responses to certain fact situations* (emphasis added)."[115]

The aim of rule scepticism is thus to show that simple reliance on legal rules is a fallacy and the ideal of an absolute coherent system is impossible to achieve and hence judges are not bound by any antecedent rules due to the fact that too many inconsistent precedents exists.[116] Therefore, as argued by Rodell, another rule sceptic, the way to "*choose*" particular set of precedents into a case involved "*value judgment*" by judges and such judgment should be based on *extra-legal factors*.[117]

Andrew Bruce SC, the leading counsel for the government in the Flag case, was of the same view when he gave a speech in the *Constitutional Law Conference on Implementation of the Basic Law*. Since there were inconsistent precedents, the decision was a "*values-driven decision*".[118] Nevertheless, rule sceptics argued that decisions were still predictable because:

> "... decisions could be explained by an analysis of the '*real rules*' which comprised both paper rules [i.e. legal rules] and extra-legal rules (emphasis added)."[119]

The question is thus what *extra-legal factors* influenced such *value* judgment in the Flag case.

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109 *Supra* note 60. Li CJ also expressly admitted in the judgment that the demonstration in question was a "peaceful and orderly demonstration".

110 *Supra* note 71. The bare majority in the 2 cases were 5 to 4 and hence the dissenting judgments were very persuasive.

111 *Supra* note 1 per Bokhary PJ, p 146.

112 *German Flag Desecration Case* 81 Entscheidungen des Bundesverfassungsgerichts 278 (Constitutional Court of Germany).

113 Article 332(1) of the *Portuguese Penal Code* provides: "anyone who by words, gesture, in writing or by any other means of public communication, desecrates the Republic, national flag or the national anthem the symbols or emblems of the Portuguese sovereignty, or in any other way fails to pay them their due respect, shall be punished with a prison sentence of up to 2 years or with a pecuniary penalty of up to 240 days."

114 *Re Paris Renato* Judgment No.1218, General Registry No.3355/88.

115 Oliphant, H, "A Return to Stare Decisis" (1928) 14 ABA J 73.

116 *Supra* note 102, p 213.

117 Rodell, F, *Woe unto You Lawyers!* (New York: Pageant, 1957), pp 114-5.

118 Bruce, A, "The Flag Case: A short reflection on the presentation of the case and its significance as a piece of constitutional decision-making" in *The Constitutional Law Conference on Implementation of the Basic Law: A Comparative Perspective* (from April 28 to April 29, 2000 at Furama Hotel, Central).

119 Frank, J, *Law and the Modern Mind* (English ed, 1949) which is reproduced in Freeman, *Lloyd's Introduction to Jurisprudence* (London: Sweet & Maxwell Ltd. 1994), p 679.

A true realist would identify *all* extra-legal factors such as judicial prejudice, public policy, governmental pressure, public opinion, morality, economic, social and political factors to predict the outcome. However, such a task would be impossible and most realists tended to concentrate on *judicial behaviour* and eschewed any attempt to explain what the factors motivated judicial behaviour.[120] Oliphant, for instance, advocated behaviouralist approach to forecasting and concentrated on *judges' non-vocal behaviour* behind the *vocal* judgments (ie written delivered judgments).[121]

Applying this theory to the Flag case, the outcome of the case should have been predicted by reference to the examination of those *extra-legal rules* as suggested by rule sceptics:

1. Special Function of "Time, Space and Circumstances"?

Li CJ put much emphasis on the notion that the concept of "*ordre public*" must remain a function of "time, place and circumstances". 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".[122] He added that the national flag was the unique symbol of the "one country" and the regional flag was the unique symbol of the HKSAR as an inalienable part of the PRC. He held, because of such *special circumstances*, the "legitimate societal interests in protecting the national flag and the legitimate community interests in the protection of the regional flag are interests within the concept of public order (*ordre public*)".

Therefore, it should have been predicted that *shortly* after the handover, cases involving the "sovereignty" of the PRC would be sensitive political topics and, in the words of Professor Albert Chen[123], that the flag plays a "more sensitive [political] role because it is one of the few manifestations of Chinese sovereignty in Hong Kong".

2. Societal and Community Interests?

The judgement referred to "*societal and community interests*" as "wishing to protect its emblems". Reading from the plain words of the judgment, it should have been predictable that in the "new order", with Hong Kong as part of China, there is a *new societal interest*, ie individual freedom should be subordinate to the sovereignty and its symbols.

3. Prevent *Another* NPCSC Intervention?

The judgment of the instant case was delivered shortly after an invitation by the pro-active HKSAR government to the NPCSC to interfere with the decision of the Court with regard to the controversial right of abode cases, whereupon the NPCSC made a re-interpretation "clarifying" the Court of Final Appeal's judgment on the *Ng Ka Ling (an infant) & Ors v Director of Immigration*.[124] Under such circumstances, it might be implied that the Court of Final Appeal was under strong though invisible political pressure that, if it ruled against the government this time, the HKSAR government might invite another interpretation by the

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120 *Supra* note 102, p 215.

121 *Supra* note 1.

122 Editorial, "New Order on Common Law", *Hong Kong Standard*, 16 December 1999; Editorial, "Balancing Act", *South China Morning Post*, 16 December 1999.

123 *Supra* note 74.

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

NPCSC.[125] In the words of Bokhary PJ, such "*time and circumstances*" may give the public an impression that the court would not rule against the Government whenever a case is brought against it in the future.

As suggested by Professor Raymond Wacks[126], the Court of Final Appeal had subjected its legal reasoning to the "*constitutional realities*" in that the Court was now under invisible governmental pressure (ie if the Court ruled against the government on such politically sensitive issue, the Government may probably "invite" another NPCSC "re-interpretation"). Mr Martin Lee SC, chairman of the Democratic Party, also described the ruling as an obvious trend towards the subordination of the judiciary to the executive branch.[127]

4. To Preserve the Ultimate Purpose of the Court?

One may argue that the ultimate purpose of the Court to rule in favour of the Government is to preserve the authority of the jurisdiction of the courts of the HKSAR. It is because if the Court ruled against the Government, the Government might 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 the *Basic Law*, might also be subject to interpretation. It is highly possible that the NPCSC may comment that the *ICCPR* has no direct legal effect on Hong Kong.[128] If this really happens, the courts of Hong Kong may lose the authority and autonomy to continue to apply the *ICCPR* directly in future judicial review cases.

In this sense, in order 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 may try 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.

Using the terminology of rule scepticism, all the above factors are "*extra-legal*" and depend very much on the "*value judgment*" of the court. However, the rule sceptics did not go as far to ignore the legal rules absolutely. Llewellyn was at pain to point out in his later works[129] that, according to the fifth law-job (ie *juristic method*, namely the traditions of handling legal materials and tools for the other law-jobs) in his famous "*law-jobs theory*", "*judicial craft*" was developed and judicial decisions consisted not merely extra-legal rules but also legal rules. As mentioned above, the latter approach did have its *own* legal precedents for CFA to follow. In other words, as reflected in the judgment, the decision of the Flag case did consider both legal and non-legal rules.

C. Rule Scepticism and Paul Tse *Case*

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125 Editorial, "Balancing Act", *South China Morning Post*, 16 December 1999.

126 "Lawyers Applaud Judgment 'Fairness'", *South China Morning Post*, 16 December 1999.

127 Editorial, "New Order on Common Law", *Hong Kong Standard*, 16 December 1999.

128 It is argued that the NPCSC, while interpreting the second paragraph of art 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).

129 Llewellyn, K N, *My Philosophy of Law* (Boston: Little, Brown, 1941), p 188.

The Court implicitly "dismissed" (or "clarified") the *long-established* definition[130] on "malice" and held that the defendant would not be liable so long as he genuinely held the view on what he expressed.[131]

As mentioned in the previous discussion, the question is: why did this case enlarge the scope of free expression but not the Flag case when both cases involved the concept of free expression?

It is desirable to look for non-legal considerations to try to find out why the Court "changed" such a long-established and settled legal principle in this aspect. Applying the theory of rule scepticism, the decision may also be explained by *extra-legal* factors:

1. Prevent Judicial Censorship and No Political Issues Involved?

The Court was of the view that it would be inappropriate for the court to judge the contents of a speech because to do so would involve judicial censorship of speech (as analysed in details in the above parts).[132] If the Court was involved in such a process and drew a line between the "correctness" and "incorrectness" of expressions, it would lose its political neutrality, and the confidence towards the independence of our judicial system would then be eroded.

Another possible extra-legal factor might be the fact that this case involved no politically sensitive issues (eg sovereignty), nor did it involve any governmental pressure or threat of NPCSC intervention. Therefore, as contrasted with the Flag case, the Court might be more willing to rule in favour of the protection of free speech.

2. A Kind of "Remedy" or "Compensation"?

It is submitted that the real reason behind such ruling *might* be this – since the Court provided a very restrictive scope on the freedom of expression in the context of "public order (*ordre public*)" in the Flag case (owing to the fact that the case involved the sovereignty and hence the need to subordinate the protection of human rights to sovereignty), it tried to *re-confirm* the significance of free speech and hence to *re-strengthen* the guarantee of free expression in the context of defamation when political issues were not involved. This may boost the international confidence in the integrity and independence of the HKSAR judiciary.

D. Prediction of Future Freedom of Expression Cases by Way of American Realism

If the above submissions on the reasons behind the rulings of the two cases are correct, it may be difficult to predict the outcome of the following hypothetical case: a radio programme host criticises a Chinese political figure in Hong Kong and he sued the host for defamation (*assuming the facts are the same as those of the above defamation case but the plaintiff is now a Chinese political figure*). This hypothetical case involves non-legal elements of the above two cases. How can the outcome of the case be predicted?

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130 The CFA *firmly rejected* the most authoritative text, *Halsbury's Laws of England* (4th ed, reissue), that provides that malice is defined as ill will or spite towards the plaintiff "or any indirect or improper motive in the defendant's mind" and it cited for this proposition is *Horrocks v Lowe*, a case on the defence of "qualified privilege" and adds that "it seems that the same principles apply to the same principles [of qualified privilege] apply to the defence of fair comment".

131 *Supra* note 2 at 438 B-D.

132 *Supra* note 2 at 429F-430H.

1. Rule Scepticism and "Grand Style"

Rule scepticism claims that predictability depends on an analysis of "*real rules*" which comprises both legal and extra-legal factors. If we apply the ratio in the defamation case, the defendant would not be liable; however, if we apply the extra-legal factors in the Flag case, it seems that the defendant would be liable. If *extra-legal* factors included the symbolic meaning placed upon the flag, the said "symbol" could also be represented by some *other objects* such as the NPC or Chinese political figures.

To ascertain the *real rules* for judicial reasoning, Llewellyn suggested "*grand style*" of judicial lawmaking, which used a mixture of *principles*, that "yield patent sense and order", and *policy*, namely the "prospective consequences of the rule under consideration", to keep decision predictable.[133] He argued that what was required was an examination of "*what was bothering and what was helping the court as it decided*"[134]. The moving away from a concentration on the ratio of a case to a *wider social context* works best when judges are open about their use of policy and wider issues of principle rather than trying to hide them behind formal reasoning.

Applying this theory to the hypothetical case, we should consider the *needs of the society*. Freedom of expression is a symbol of democratic societies and the "prejudicial" attitude towards the respect of basic freedom has been repeatedly affirmed by previous Hong Kong decisions such as in the *Sin Yau Ming* case that there must be "*a bias towards the interests of the individual*".[135] Under the societal demand on a more and more responsible and transparent community, criticisms towards politics and executive policies should be welcome. The said host in the above hypothetical case should not be liable provided that he genuinely believes his criticism is for the welfare of the community. However, as claimed by the rule sceptics, *judicial behaviour* is of utmost importance. Therefore, if one follows the judicial behaviour in the Flag case where the protection of the symbolic objects of the sovereignty was indeed in accordance with our legitimate *societal interests*, judges in Court of Final Appeal may be of the view that the protection of the reputation of Chinese political figures meets Hong Kong's societal interests.

VI. Conclusion: Respect of Human Rights Must Be of Utmost Importance

As mentioned in Part *V*, one may notice that "non-legal factors" require a balance between the legitimate freedom of expression enjoyed by individuals and the collective societal interest of the community. The question is: how should we strike such a balance in future cases concerning freedom of expression? Ronald Dworkin's theory may provide some guidance in this balancing exercise:

According to Dworkin, it is beyond dispute that the perpetuation of common law is a *sine qua non* of our liberty[136]. A legal system consists not only of rules because it is also a sort of moral system. Law contains "non-legal standards" and when a judge faces a "*hard case*" (for example, there are conflicting precedents for the court to choose), he must draw on those

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133 *Supra* note 118, p 37.
134 *Supra* note 118, p 178.
135 *Supra* note 53 at 127.
136 Wacks, R, "Our Flagging Rights", (2000) 30 *Hong Kong Law Journal* 1.

non-rule "moral" or "political" standards to reach a decision. As a result, a judge is in fact engaging in a constructive interpretation of laws where he must try to apply the laws to:

> "form part of a coherent theory justifying the network of political structures and decisions of the judge's community" [137]

In other words, judges must "accept law and legal rights wholeheartedly ... by securing a kind of equality among citizens that makes their community more genuine and improves its moral justification for exercising the political power it does": law as integrity[138]. Therefore, in hard cases, judges must "decide on the theory of law and justice which best coheres with the institutional history of judges' community"[139]: the soundest theory of law.

Although the institutional and constitutional history of Hong Kong does not reveal a record of democracy, our courts "have long cleaved to the common law's tradition of protecting rights".[140] Therefore owing to the early period of the handover of Hong Kong, the relatively weak power of the Legislative Council due to its failure to achieve a wholly democratic combination (ie without universal suffrage) and its limited power to check and balance the powers of the executive branch (due to the provisions in *Basic Law*), the judiciary plays a more important role to check and balance the traditional executive-led (or even the domination of executive branch) style of our system in order to prevent individual rights and freedom from being unnecessarily subject to the government intervention.

As Lord Hoffmann held in the *R v Central Television plc*:

> "... there is no question of balancing freedom of speech against other interests. It [freedom of speech] is a *trump card*, which always wins."[141]

The judiciary should oblige itself to give the protection of the freedom of expression the highest priority so that only in very exceptional and urgent situations can the deprivation or derogation of human rights be justified. When our courts face cases similar to the facts of the Flag case, which involve some highly sensitive political issues in the future, they should take individual liberties and freedom as its highest priority.

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137 Dworkin, R M, *Law's Empire* (London: Fontana Press, 1986), p 245.

138 *Ibid*, pp 95-6.

139 *Supra* note 120, p 5.

140 Smith, P W, "*Protecting Human Rights in Hong Kong*" in Wacks, R (ed), *Human Rights in Hong Kong* (Hong Kong: Oxford University Press, 1992).

141 *R v Central Television plc* [1994] 2 WLR 20 at 30.

PRIVACY IN THE WORKPLACE:
REGULATION OF WORKPLACE SURVEILLANCE IN HONG KONG*

BELINDA ELIZABETH LLOYD**

For most people, their offices are places where they spend a large part of their life; but they are also places that afford least protection of privacy. With the advancement of modern technology, employees are increasingly subject to various forms of surveillance. Workplace surveillance, though useful and effective from employers' point of view, amounts to an invasion of employees' right of privacy and jeopardizes their dignity. The author pinpointed the inadequacies of existing legal means, including the common law, the Personal Data (Privacy) Ordinance and the Code of Practice on Human Resources Management, in protecting employees from video surveillance. Looking forward, the hope of better protection to employees is raised by the proposal of the Privacy Commissioner to issue a Code of Practice on Workplace Surveillance. The prospect of creating a new tort on invasion of privacy, which has already undergone review by the Law Reform Commission, is also seen by the author as a feasible way of filling the existing void.

I. Introduction

> "Our lives are an open book to a mildly determined detective. Personal lives are becoming increasingly transparent to governments, interested corporations and even to one another."[1]

The workplace has become a place where many people spend a large part of their daily life, yet it is also a place which affords the least amount of privacy.[2] Employees around the world are frequently subjected to some form of monitoring by their employers. Traditionally, monitoring employees for the purpose of gathering information involved some form of human intervention and the consent of employees. However, due to the changing structure and nature of the workplace, there has been a growth in using more invasive and covert methods of monitoring employees. Such invasive conduct call into question employees' rights to privacy and dignity within the workplace.

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* The Office of the Privacy Commissioner for Personal Data issued a *Draft Code of Practice on Monitoring and Personal Data Privacy at Work* (the "*Draft Code*") for the purpose of public consultation in March 2002. The *Draft Code* represents an initiative designed to assist employers in complying with certain aspects of the requirements of the *Personal Data (Privacy) Ordinance* applicable to employee monitoring. It draws attention to the need for employers to be open and unequivocal about the employee monitoring policies they adopt and they should ensure that the monitoring policies are brought to their employees' attention. Specifically, the *Draft Code* proposes that the monitoring policy should covers matters such as the business interests served, the type of monitoring systems employed, locations at which monitoring devices are operative, except where covert monitoring is justified, times at which monitoring is in effect, criteria for accessing monitoring records, and the retention period of records. See http://www.pco.org.hk/english/ordinance/codes.html for the complete consultation paper. This research paper was written before the issue of the *Draft Code* and therefore does not include the new proposals.

** LL.B. (HKU). The author is deeply grateful to Professor Raymond Wacks and Miss Jill Cottrell for giving her the opportunity to write a paper on a subject that she feels extremely passionate about. The author learnt a great deal about legal research and privacy law throughout this project and will keep that very close to her heart. Special thanks also must go to Abigail Wong and Harpal Kaur for their support all the way. Last but definitely not least the author wishes to thank Kevin Martin for being a huge pillar of support. The love and gratitude extends to author's mother, sister Alison, and brother-in-law Kelvin.

1 Froomkin, M, "The Death Of Privacy?" in Reference Paper of *One World One Privacy*, International Conference on Privacy and Personal Data Protection, Venice, 28-30 September 2000, p 337 at 340.

2 Banisar, D, and Andrews, S, "The World of Surveillance Pr 4: Workplace Privacy", (2000) 7 *Privacy Law and Policy Reporter* 6, pp 105-124.

The right to privacy in the workplace has faced a major blow due to various advances in information technology. Privacy laws face a continuing battle to keep up with modern science but advances in technology have given rise to problems that test the ability of the law to provide adequate protection against abuse of privacy rights.

The technology that we have today is extremely powerful[3] – software programs which are available on the market can detect the number of keystrokes; miniature video cameras can monitor an employee's movements around the workplace; telephone management systems can determine the length and destination of phone calls made by employees. As the cost of surveillance technology decreases, the quality and quantity of data collected on an individual increase, thereby creating a loss of control an individual may have over his personal information.

According to a recent survey conducted by the American Management Association, nearly three-quarters of major US companies said that they record and review their employees' telephone calls, email messages and computer files. The same survey showed that active monitoring of employees' communications and job performance had increased to 74 per cent.

Last year, the Office of the Privacy Commissioner for Personal Data in Hong Kong conducted a survey on personal data privacy. The findings of that survey concluded that approximately 64 per cent of the responding organizations installed at least one type of workplace surveillance facilities. Forty-eight per cent of these organizations had video cameras installed in the premises, 25 percent had other forms of surveillance monitoring computer use, web browsing and phone usage. Among these organizations, which participated in the survey, only 18 per cent of them said they had a written policy on surveillance activities while 25 per cent did not know if they had such a policy that existed within their firm. When employees were asked how they would feel if employers kept them under surveillance, many employees said that they would not like it.[4]

Employers and human resources managers put down various justifications for monitoring their staff that revolve around economic, social and security reasons. Corporations may want to enhance productivity. They may want to make sure that their employees are not involved in illegal activities or serious misconduct. There are instances in certain industries where it is necessary to monitor employees as in the telemarketing industry, where employees are monitored through their telephone calls for employers to measure their performance and customer service skills.

However, such monitoring can have a significant impact to the detriment of employees. Workplace surveillance can have serious consequences on the privacy and dignity of employees and it could also have a detrimental effect on self-respect. Studies have shown that workers are under a lot of stress as a result of constant monitoring and they behave differently once they are under surveillance. Knowledge of their conduct in the workplace being subject to video surveillance unsettles workers' psychology and emotional autonomy. Employees are likely to lose work morale and therefore are less likely to carry out their tasks effectively.[5]

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3 *Ibid* at 119.

4 *Newsline*, Current Affairs Programme on ATV World. Episode on Privacy in the Workplace and E-Commerce, April 2001. Interview with Mr Stephen Lau (Privacy Commissioner) and Mr Nigel Waters.

5 Wacks, R, "Home Videos: Is the Surveillance of Domestic Helpers Unlawful?", (2000) 7 *Privacy Law and Policy Reporter* 5, p 102.

There are many methods of monitoring employees – it can range from the type of software discussed above to intercepting employees' emails and tapping their telephone calls. All these forms of monitoring serve the function of obtaining personal information about the employee through intrusive means, usually without his or her consent, thereby causing a hindrance on an employee's right to privacy. However, this paper will only focus on workplace surveillance in the form of video surveillance of employees and in turn will look at the manner and extent to which existing laws solve the problems that video surveillance brings about.

Video surveillance in the form of installing Closed Circuit Television Cameras (CCTV) constitutes nearly half of the forms of surveillance that are practiced by corporate organizations in Hong Kong. Employers usually use video surveillance to obtain personal information of their employees for various reasons including the reasons stated above. However, video surveillance poses a threat to the privacy of employees, in particular their informational privacy, as there is a potential risk of employers abusing their personal information. There is a potential danger of employers using the information for a purpose other than the original purpose for collecting the information. Employees are often left in the dark as to who holds or controls their personal data, how long the data is kept for, or they may even simply be oblivious to the fact whether or not their personal data has been collected as employers may place covert cameras around the workplace. Nowadays, cameras are compact enough to be hidden in household items like clocks and radios. There is also considerable debate as to whether such methods of data collection are "lawful and fair in the circumstances" as required by the Data Protection Principles.

Not only do video cameras present a potential risk in obtaining personal information other than what is necessary, they also give rise to intrusion, which involves the intentional interference with someone's seclusion or solitude. As Wacks pointed out, the collection of personal data is not the primary concern arising from the use of surveillance techniques, although it is of practical significance. The surveillance process itself constitutes an interference with the privacy of the individual.[6] It could also ruin the relationship of trust between the employer and the employee.

There are laws in Hong Kong that guarantee the right of privacy to Hong Kong residents. Even though the common law provides us with a piecemeal approach in dealing with invasions of privacy, we do have the *Personal Data (Privacy) Ordinance* (*PDPO*),[7] which protects individuals' privacy in relation to personal data. The enactment of the *Ordinance* is a welcoming step in filling the big gap in protecting an individual's privacy. But the main limitation is that the *Ordinance* only protects a person's informational privacy rather than personal privacy itself. As we shall see throughout the course of this paper, in respect of video surveillance and its impact on privacy, there remain loopholes that need repairs as soon as possible. Given the rapid pace at which privacy-destroying technologies are being invented and deployed, some measures must be introduced before it is too late.

The structure of the paper is as follows: Part I is the introduction. Part II will focus on the right to privacy in general. It will look at what is meant by "privacy" and the legal development of the notion of privacy. The recognition of the right to privacy at an international level through the *International Convention on Civil and Political Rights* and at a local level will also be discussed. Part III looks at current measures in Hong Kong that protect the right to privacy. It comprises of three sections. The first section will discuss the manner and extent to which the

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6 Wacks, R, *Personal Information: Privacy and the Law* (Oxford: Oxford University Press, 1993), p 247.

7 *Personal Data (Privacy) Ordinance* (Cap 486).

common law protects an individual's privacy. The discussion would then extend to the *PDPO*, which is the main piece of legislation dealing with the protection of an individual's personal data. Thirdly, the recent Code of Practice on Human Resources Management, issued by the Office of the Privacy Commissioner for Personal Data, will be looked at to see how it deals with video surveillance. Part IV will look at some of the proposed measures that have been put forward in Hong Kong in protecting workplace privacy.

II. Recognition of the Right to Privacy

A. Privacy Defined

Privacy may be regarded as a right of fundamental importance. However there is no universal definition of what "privacy" means. Countless attempts have been made by many people to define "privacy", but some of these attempts have been subject to criticisms.

Justice Brandeis' simple definition of privacy as "the right to be left alone - the most comprehensive of rights and the right most valued by civilized men" has been regarded as giving an "appearance of differentiation while covering almost any conceivable complaint anyone could ever make."[8] Others may regard privacy as an individual's control over access to information about himself. However, it is submitted that this definition seems incomplete as it ignores the possibility for an invasion of privacy to occur where there is no loss of sensitive or personal information as illustrated by the example given by the Hong Kong Law Reform Commission.[9] A person may peep into a dining room that is not occupied by anyone. A person may not gain any information out of it, but this still constitutes a clear case of privacy intrusion. Nevertheless, there are some useful definitions that provide us with some idea of what is meant by privacy. Alan Westin defines "privacy" as:

> "The claim of individuals, groups or institutions to determine for themselves when, how and to what extent information about them is communicated to others. Viewed in terms of the relation of the individual to social participation, privacy is the voluntary and temporary withdrawal of a person from the general society through physical or psychological means, either in a state of solitude or small-group intimacy, or when, among larger groups, in a condition of anonymity or reserve."[10]

The Parliamentary Assembly of the Council of Europe defines "privacy" as the right to live one's own life with minimum interference:

> "It concerns private, family and home life, physical and moral integrity, honour and reputation . . . protection against misuse of private communications, protection from disclosure of information given or received by the individual confidentially."

B. Development of the Legal Notion of Privacy

Warren's and Brandeis's essay on "The Right to Privacy" provides the foundation for the legal notion of privacy. They argued that the common law protects an individual's solitude and privacy from snooping journalists. They based their arguments on English common law cases from different areas of law such as breach of confidence, copyright and property law. In their opinion, the common law developed from the protection of the physical person and corporeal

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8 The Law Reform Commission of Hong Kong Privacy Sub-Committee, *Draft Report on Civil Liability for Invasion of Privacy* (2000), p 7.

9 *Ibid.*

10 Westin, A F, *Privacy and Freedom* (New York: Atheneum, 1968), p 7.

property to the protection of the individual's "thoughts, emotions and sensations". A person's right to determine the extent to which his thoughts were communicated to other persons was already under legal protection but only in respect of copyright and breach of confidence. Although English cases recognizing the right of privacy were based on the protection of tangible property, they were in their opinion, an acknowledgement of "inviolate personality" in reality.

Their theory on the right to privacy was given full recognition by the Supreme Court of Georgia in *Pavesich v New England Life Insurance Co*[11]. Almost every American state has incorporated in its laws the right to privacy. The American common law recognises a complex of four torts. These four torts capture the principle dimensions of the law of privacy. Prosser identifies these four torts as:

1. Intrusion upon the plaintiff's seclusion or solitude, or into his private affairs;
2. Public disclosure of embarrassing private facts about the plaintiff;
3. Publicity which places the plaintiff in a false light in the public eye; and
4. Appropriation of the plaintiff's name or likeness for the defendant's advantage.

It is submitted that the last two "torts" should not be included in the legal notion of privacy as the third tort overlaps with the tort of defamation while appropriation overlaps with the right of publicity. Nevertheless, the first two torts provide useful guidance as to what constitutes an invasion of privacy.

C. Recognition of the Right to Privacy at an International and Local Level

1. The *International Covenant on Civil and Political Rights*

The *Universal Declaration of Human Rights* and the *International Covenant on Civil and Political Rights (ICCPR)* recognize privacy as a fundamental human right. Article 17 of the *ICCPR* provides:

> "1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour or reputation.
>
> 2. Everyone has the right to the protection of the law against such interference or attacks."

The *ICCPR* imposes on the Government of the Hong Kong Special Administrative Region (the "HKSAR") a positive duty to protect the right of privacy. It is also under a duty not to engage in interferences that are inconsistent with art 17. Subsection 2 of art 17 puts the SAR Government under an obligation to enact laws that are necessary to protect the right of privacy and to prohibit interference or attacks against the fundamental human right. The "protection of the law" can include private and administrative measures as well as prohibitive measures under the criminal law. In relation to arbitrary interference, such interference as provided for by the law must not only accord with the Covenant but be reasonable in the particular circumstances.

In 1976, shortly after the *ICCPR* was enacted, the Secretary-General of the United Nations published a report which included various points to be taken into account when drafting international standards concerning respect for the privacy of individuals in light of modern recording devices. One of its recommendations was that states should adopt legislation or

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[11] *Pavesich v New England Life Insurance Co* [1905] 122 Ga 190 (50 SE 68).

update existing legislation in order to provide protection for the privacy of an individual against invasion by modern technological devices. A General Comment on the *ICCPR* made in 1988 by the Human Rights Committee of the United Nations stated that "surveillance, whether electronic or otherwise ... should be prohibited."

2. The *Basic Law* of the Hong Kong Special Administrative Region

The provisions of the *International Covenant on Civil and Political Rights* have been incorporated into the laws of Hong Kong through art 39 of the *Basic Law* of the HKSAR. Article 39 provides that provisions of the *ICCPR*, as applied to Hong Kong previously before 1 July 1997, shall remain in force and shall be implemented by the laws of the HKSAR. Such rights shall not be restricted unless prescribed by law. This imposes an obligation on the HKSAR Government to implement the provisions of the *ICCPR* through its laws, thereby making it necessary to enact laws that give effect to the right of privacy as recognized by the Covenant.

The *Basic Law* also guarantees the right to privacy in art 28, art 29 and art 30. Article 28 provides:

> "Arbitrary or unlawful search of the body of any resident or deprivation or restriction of the freedom of the person shall be prohibited."

Article 29 extends the protection of arbitrary and unlawful search of the body to a resident's home or other premises, while art 30 of the *Basic Law* protects the freedom and privacy of communication of Hong Kong residents.

Articles 28 and 29 are reminiscent of the *Fourth Amendment* to the *Constitution of the United States*, which provides that "the right of the people to be secure in their person, houses, papers and effects, against unreasonable searches and seizures, shall not be violated."[12]

3. The Hong Kong *Bill of Rights Ordinance*

Article 14 of the *Bill of Rights Ordinance* replicates the wording of art 17 of the *ICCPR*. However, the main limitation here is that s 7 of the *Bill of Rights Ordinance* states that the *Ordinance* only binds the Government and other public authorities as well as any person acting on their behalf. It has no direct effect on inter-citizen relationships.[13] Nonetheless, it provides a constitutional guarantee to every person in Hong Kong who may have a cause of action against the Government or a public authority for breach of the right to privacy.

III. Protection of Privacy under Existing Laws

A. The Common Law

The common law in Hong Kong, which is based upon the common law of the United Kingdom,

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12 The Fourth Amendment protects individual privacy and dignity against unwarranted intrusion by the state. It was originally used to afford protection to tangible items as represented by persons, houses, papers and effects. But in recent years, it has been used before American courts to provide individuals with a reasonable expectation of privacy to be free from intrusion of electronic surveillance. Supra note 8, p 5.

13 *Supra* note 8 at 5.

as previously applied before 1 July 1997, remains effective according to the *Basic Law*.[14] The common law does not recognise a general right to privacy. The failure of the common law to protect individual privacy can be demonstrated in the *Kaye v Robertson*.[15] The plaintiff, who was a well-known actor in the United Kingdom, suffered serious injuries to his brain. He was hospitalised in a private room with a notice on the door, notifying visitors to see a member of staff before entering his room. The defendant journalists ignored this notice and made their way into the room. Even though the plaintiff apparently agreed to talk to the journalists, he was in no fit condition to be interviewed. The court held that there was no right to privacy in English law and accordingly there was no right of action for a breach of privacy. However serious the invasion of one's privacy may be, it would not entitle a person to relief under the common law.

If a person's privacy has been invaded and he seeks protection under the common law, that person must show that the invasion of privacy or the conduct of the intruder amounts to the commission of a well-recognised tort for which that person has a cause of action. If the invasive act does not fall within a recognised category and is hence lawful, this would not give rise to an action for damages, even though the act may have caused emotional distress or extreme embarrassment. Nor does the law grant compensation for mere injury to feelings.

In this part, I will examine the extent to which common law protects the right to privacy under various heads of tortious liability. Even though there are a number of areas of the common law which may possibly protect privacy, I will only deal with the ones which, at first glance, are relevant to victims of video surveillance. Trespass to land, nuisance, breach of confidence, and intentional infliction of emotional distress will be considered.

1. Trespass to Land

A plaintiff will have a cause for action in the tort of trespass to land when the defendant, without lawful justification, enters on the plaintiff's land, or remains on the land after his right of entry has expired, or places or projects any object on the land. A trespass to land therefore requires an intrusion onto private property without lawful justification or consent. It can occur when someone places a video camera on the plaintiff's premises.

The tort of trespass is called upon to protect proprietary interests in land and the plaintiff's enjoyment of it. Its function does not include the protection of an individual's privacy as such. This can be demonstrated in *Bernstein v Skyviews & General Ltd.*[16] In this case, the defendant took aerial photographs of the plaintiff's house without the plaintiff's consent and later offered those photographs for sale to the plaintiff. The plaintiff requested the court to issue an injunction restraining the defendant from entering his airspace and taking such photographs. The court, however, refused to grant the injunction on the basis that a flight several hundred feet above the plaintiff's property did not interfere with the enjoyment of his land, nor was taking such photographs without committing trespass on his land unlawful.

Because the tort of trespass only protects a person's property and the enjoyment of it, the complainant must have a proprietary interest in the land. Merely being a lawful occupant or a mere licensee of the land would not suffice – such person would have no right to sue. Therefore this action would be of little use to employees, who have no proprietary interests in his workplace. The employer would be the legal person who has a proprietary interest in the area of

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14 Article 18, *Basic Law*.

15 *Kaye v Robertson* [1991] FSR 62.

16 *Berstein v Skyviews & General Ltd* [1978] QB 479.

the workplace. Technically speaking, he would not commit a tort of trespass by installing a video camera in his premises.

2. Nuisance

The tort of private nuisance provides protection from physical invasion of the plaintiff's land which unduly interferes with the use or enjoyment of it. The physical invasion must continue for a prolonged period of time. It could take the form of physical damage to the property or the imposition of discomfort upon the occupier.[17] The persistent making of annoying phone calls which interferes with the ordinary and reasonable use of the property could constitute nuisance, as held by the English Court of Appeal in *Khorasandjian v Bush.*[18] In this case, the plaintiff sought relief in respect of her ex-boyfriend's pestering behaviour, whose phone calls interfered with the plaintiff's enjoyment and use of the property in which she lived.

Nuisance was another issue before the court in *Bernstein v Skyviews & General Ltd.* A person who takes a photograph of another cannot be liable in nuisance. However, if the plaintiff was subjected to "the harassment of constant surveillance of his house from the air, accompanied by the photographing of his every activity", this would not only constitute a monstrous invasion of the plaintiff's privacy but would also be an actionable nuisance for which relief would be given.

It is submitted that the tort of private nuisance provides little assistance for an employee who wishes to protect his privacy from the invasion of surveillance cameras in the workplace for two reasons. Firstly, there is the problem of proprietary interest. Nuisance has the same limitation as the tort of trespass as both require the person who has been subjected to an invasion of privacy to have a proprietary interest in his property. Therefore a mere licensee, such as a guest in a hotel or employees who have licenses to enter the workplace, have no right of exclusive possession and cannot rely on nuisance. *Khorasandjian* held that in light of changing social conditions, relief in nuisance should be granted against callers making annoying phone calls, regardless of whether or not the plaintiff has a proprietary interest.[19] However, it is argued that that this principle would only apply to occupiers of a private dwelling as the plaintiff was the occupant who did not have proprietary interest in the property. It is doubtful whether this principle could extend to employees in the workplace.

Secondly, nuisance purports to protect the use and enjoyment of the land. There is a major difference between an act that constitutes a nuisance and an act which invades privacy, therefore the tort of nuisance is of limited use in protecting individuals against surveillance activities.[20] Spying on someone alone is not enough for an actionable tort of nuisance to occur – it must be accompanied by a view of compelling the victim to pursue (or not to pursue) a particular course of conduct. As pointed out by the Younger Committee, an eavesdropper or a spy does not seek to interfere with the activities of his victim nor does he seek to change his victim's behaviour. On the contrary, he hopes that the activities will continue unchanged, so that he could have the opportunity of seeing those activities unnoticed.

3. Breach of Confidence

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17 *Supra* note 8 at 25.

18 *Khorasandjian v Bush* [1993] QB 727.

19 The Law Reform Commission of Hong Kong, *Consultation Paper on Regulation of Surveillance and Interception of Communications*, p 24.

20 *Supra* note 8 at 26.

Breach of Confidence has been described as the most useful remedy to a data subject in the field of personal information.[21] If A imparts confidential information concerning his private life to B, any subsequent unauthorized disclosure by B to a third party would amount to a breach of confidence as well as an infringement of A's right to privacy. There is no need for a prior relationship to exist between the confider (A) and the confidant (B). However, a confidential relationship may be implied in various relationships, such as employer and employee, doctor and patient, and lawyer and client.

In order to succeed in an action for breach of confidence, the following three elements, which are conjunctive, need to be satisfied:

1. The information must have the necessary quality of confidence about it,[22]
2. The information must have been imparted to another in circumstances importing an obligation of confidence; and
3. There must be an unauthorized use of that information to the detriment of the confider.

An action based on breach of confidence is helpful where the confidential information is disclosed or otherwise used by the confidant without authority. The law of privacy purports to protect unauthorized disclosure of personal information regardless of whether or not a confidential relationship exists. The law on breach of confidence, on the other hand, protects information which is imparted in confidence regardless of the offensiveness of its content.

Although breach of confidence may be useful in protecting one's personal information under the common law, it is submitted that it provides little assistance for an employee whose movements are monitored by the employer by way of video surveillance. There may be a breach of trust in the sense that neither the employer or employee can trust the other, but this does not fall within breach of confidence.

One of the reasons why breach of confidence is of little use in the context of video surveillance is because of the first requirement that needs to be satisfied in order to prove a breach of confidence. Video cameras may have been placed around the workplace monitoring an employee's movements – the video camera may catch an employee doing various activities, such as typing on a computer, chatting to colleagues, leaving his seat for a toilet break or going to the pantry to make himself a cup of coffee. The employer may be spying on an employee's movements, but it would seem odd to classify those movements as confidential information. An employee's movements not only capture the attention of employers, but other employees can easily see what their colleagues are up to in the workplace. Nor does it satisfy the second requirement as there could be instances where there are cameras placed around the workplace in a covert rather than an overt manner. The author wonders how it would be possible in this manner for the employee to impart confidential information to the employer thereby imposing an obligation of confidence.

It is submitted that even though breach of confidence may not be strongly applicable in cases of

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21 Berthold, M and Wacks, R, *Data Privacy Law in Hong Kong*, (Hong Kong: FT Law and Tax Asia Pacific, 1997), p 30.

22 The information having the necessary quality of confidence is not limited to trade secret or various government documents containing government secrets. Personal information can also be protected under a duty of confidence, such as communication between spouses – *Duchess of Argyll v Duke of Argyll* [1967] 1 Ch 302.

video surveillance, it would be useful in other aspects of workplace privacy. An employee may impart confidential information to his employer on his health, for example the employee carried the HIV virus, and the employer told other people, knowing that this matter was supposed to be kept private. In this instance, breach of confidence would be appropriate to protect the employee's privacy interests.

4. Intentional Infliction of Emotional Distress

The effects of monitoring employees were discussed in the introduction of this paper. Not only does video surveillance make employees less effective in performing their job, but it could also subject employees to a considerable amount of stress. In effect, there is a possibility that stress could lead to physical sickness in some instances as stress can have an impact on the human body and in particular the immune system.

A person who has wilfully[23] done an act, which is calculated to infringe the right to personal safety of another person without justification, and has in fact caused physical harm to the person, is liable for intentional infliction of emotional distress. The origins of this tort can be found in the case of *Wilkinson v Downton.*[24] In that case, the defendant played a practical joke on the plaintiff by telling her that her husband had an accident and he was lying in a pub with broken legs. As a result, the plaintiff fell seriously ill and sought damages for mental anguish and her consequent illness. The court held that the defendant was liable as he did an act that was calculated to cause physical harm and that physical harm did come about. Even though the act here was making a false statement, the principle laid down in *Wilkinson v Downton* can be applied to threats and other conduct.[25]

At first sight, this may seem to provide some assistance to the employee, whose privacy is invaded or intruded upon by his employer. However, the main difficulty with this cause of action is that the plaintiff needs to establish something more than a transient reaction of emotional distress, no matter how severe the emotional distress may be.[26] The reaction must change into something physical which lasts for a certain period of time. Another difficulty is that the plaintiff must show that the defendant had wilfully done an act calculated to cause physical harm. Mere mental suffering is not enough to have a claim under this cause of action.

Therefore, this action would not assist an employee. The surreptitious use of a video camera installed in the office may make an employee feel annoyed or embarrassed, but it is only in extreme cases that physical or mental harm would ensue.[27]

5. Is the Common Law Protection of Privacy Adequate?

I have tried to examine the manner and extent to which the common law protects privacy and I have done so in the context of video surveillance. By examining various actions under the common law, which at first glance may seem to be of some use, a closer look at these actionable torts shows that they are far from an effective method of protecting privacy, in particular protecting personal information of an employee. The common law is extremely piecemeal and

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23 In this context, "wilful" means with intention or recklessness.

24 *Wilkinson v. Downton* [1897] 2 QB 57. This case was also relied upon in *Janvier v. Sweeney* [1919] 2 KB 316.

25 *Supra* note 19 at 51.

26 *Supra* note 8 at 29.

27 *Ibid.*

inadequate. This is partly due to the fact that all these common law actions focus on protecting an individual's interest in his person or property whereas privacy interests have a wider scope.[28] The courts never recognised a general right to privacy and to date, the court fails to recognize such a general right – they would only protect someone's privacy if another's interest that is recognised by the courts has also been violated. The common law's attempt to give individuals a reasonable degree of protection from unwarranted intrusion is "uncoordinated and unsatisfactory".[29]

B. The Personal Data (Privacy) Ordinance

The *Personal Data (Privacy) Ordinance* (*PDPO*) was enacted on 3 August 1995 and came into force on 20 December 1996.[30] The *Ordinance* is a welcoming move towards the protection of individual privacy. The scope of the *Ordinance* can be shown from the long title of the *Ordinance*, which is:

> "To protect the privacy of individuals in relation to personal data and to provide for matters incidental thereto or connect therewith."

A person (the data subject) who suffers damage as a result of a contravention of the requirements of the *Ordinance* by the data user in relation to his personal data can make a claim for compensation from the data. The damage includes injury to feelings.[31]

Personal data is defined in the *Ordinance* as data that:

1. directly or indirectly relates to an individual;
2. from which the identity of the individual can be directly or indirectly ascertained; and
3. in a form in which access to or processing of data is practicable.[32]

Data is defined in the *Ordinance* as "any representation of information in any document and includes a personal identifier".[33]

The regulation of personal data is achieved through the application of six principles of fair information practice. These six principles are known as the "Data Protection Principles" (DPP) and these principles are listed out in the first Schedule of the *Ordinance*.[34] They provide that personal data should be:

- collected only if they have been collected in a lawful and fair manner. They must also be relevant to the data user's activities (DPP 1)
- accurate and should not be kept longer than is necessary (DPP 2)
- used only for the purpose for which the personal data was collected, unless the data subject gives the data user express consent to use the personal data for other purposes (DPP 3)

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28 *Ibid* at 32.

29 Comment made by the International Commission of Jurists in their report on privacy: *JUSTICE, Privacy and the Law* (London, Stevens and Sons, 1970), para 85.

30 However, s 33 was still not in force.

31 Section 66, *PDPO*.

32 *Ibid* at s 2.

33 *Ibid.*

34 Wacks gives a useful summary on the content of the Data Protection Principles. *Supra* note 19, p 1.

- held securely against unauthorised or accidental access. (DPP 4).

The data subject should be able to ascertain a data user's policies and practices in relation to personal data (DPP 5). The data subject also has a right of access to personal data that is related to him (DPP 6).

Section 4 of the *PDPO* stipulates that a data user shall not do an act contravening any of the Data Protection Principles unless the act or practice is required or permitted under the *Ordinance*. However, Part VIII of the *Ordinance* provides exemptions from complying with the data protection principles. For our convenience, these exemptions can be divided into three groups:[35]

1. Exemptions which fall within the public interest – s 57 is an exemption that can be used by the Government to safeguard security, defence or international relations. There are also exemptions placed on personal data for the purposes of the prevention or detection of crime as well as the prevention, preclusion or remedy of seriously improper conduct (s 58). Other exemptions which fall in the public interest sphere include health[36], news activity[37] and research[38];
2. Exemptions which fall within the domestic sphere (s 52); and
3. Exemptions which fall within the employment sphere (s 53 provides for the personal data that is collected for staff planning while s 54 covers transitional provisions).

It should be noted that where personal data are exempted from complying with the Data Protection Principles, the relevant provision that exempts personal data neither confers any right nor imposes any requirement on any person.[39] These exemptions are permissive in nature as they allow the data user to alter the use of the data or bar the data subject from accessing the personal data. The exemptions do not require data users to do so.[40]

The *Ordinance* applies only to data that is recorded as demonstrated by the definition of "data", which has been discussed above. Therefore, visual surveillance would not fall within the protection of *PDPO* unless it is recorded. Video cameras that record movements of employees may fall within the protection of the *PDPO* as documents include "film, tape or other device in which visual images are embodied so as to be capable of being reproduced."

The personal information must also be capable of identifying a person either directly or indirectly. It is not enough for personal data to be protected if the data user was indifferent towards the identity of the data subject. Even if the data subject were identifiable by her colleagues or friends this would not suffice for protection under the *Ordinance*.[41]

The *PDPO* is one step forward towards the protection of an individual's privacy. Employees who have been subjected to video surveillance may be able to rely on the *PDPO* and the *Ordinance* is bound to provide more assistance than the common law. Videotapes satisfy the

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35 *Supra* note 19 at 210.
36 *Supra* note 7 at s 59.
37 *Ibid* at s 61
38 *Ibid* at s 62.
39 *Ibid* at s 51.
40 *Supra* note 19 at 211.
41 *Eastweek Publisher v Privacy Commissioner for Personal Data* [2000] 1 HKC 692.

requirement for the need of data to be recorded on a document. Those videotapes are used by data users (the employer), who want to know what their employees are doing or their job performance. Therefore those employees would be identifiable to an employer; and the collection of personal data of employees by means of video surveillance must comply with the Data Protection Principles if the purpose of collecting an employee's personal information does not fall within s 53, which is an exemption in relation to staff planning. Even if it does fall within the exemption, it is not a mandatory requirement the employer should refuse the employee from having access to that data.

However, there are some limitations of the *PDPO* which need to be addressed here when determining the manner and extent of the *Ordinance* in protecting personal information.[42]

One of the main limitations of the *PDPO* is that its purpose is to protect information privacy rather than personal privacy as such – it aims at protecting personal data, which is not necessarily the same thing as personal information. Even though a breach of a Data Protection Principle may occur, this does not necessarily entail an invasion of privacy. In *Eastweek Publisher v Privacy Commissioner for Personal Data,*[43] Ribeiro JA held that the complainant would be entirely justified in regarding the article and the photograph criticizing her dress taste as an unfair intrusion of her personal privacy. However, as the *Ordinance* does not protect "personal privacy", it does not intend to establish general privacy rights against all possible forms of intrusion.

Another instance in which it could be shown that the *PDPO* may not be effective in protecting "personal privacy" can be demonstrated by DPP 3, which provides for the use of personal data. This principle provides that personal data shall not be used for any purpose other than the purpose for which the data were to be used at the time of the collection of the data or a purpose directly related to the original purpose unless the data user has the prescribed consent of the data subject.[44] This principle only limits the purpose of a disclosure or use of personal data rather than protecting a person's private life from unwarranted intrusion.[45]

Another limitation in using the *PDPO* to protect an employee's personal data is the wording of the Data Protection Principles. Take DPP 1, for example. DPP 1 relates to the manner and purpose of the collection of person data:

> "(1) Personal data shall not be collected unless-
> (a) The data are collected for a lawful purpose directly related to a function or activity of the data subject;
> (b) Subject to paragraph (c), the collection of the data is necessary for or directly related to that purpose; and
> (c) The data are adequate but not excessive in relation to that purpose.
>
> (2) Personal data shall be collected by means which are –
> (a) Lawful; and
> (b) Fair in the circumstances of the case."

The Data Protection Principles are statement of principles. These principles are expressed in general terms as shown by the use of words in DPP1 such as "lawful and fair in the circumstances of the case", "excessive" and "lawful purpose". There is no provision in the

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42 *Supra* note 8 at 20

43 *Supra* note 41.

44 *Supra* note 7, Principle 3 of Schedule 1.

45 *Supra* note 8 at 20.

ordinance that gives a definition for these terms and therefore these words are subject to wide interpretation. What is considered to be excessive? Where do we draw the line? The Hong Kong Law Reform Commission's Draft Report on Civil Liability for the Invasion of Privacy uses DPP 1(2) to demonstrate this argument. The *PDPO* does not define the "lawful" and "fair in the circumstances of the cases" in a precise manner as to determine the circumstances under which liability would be imposed on wrongdoers.[46]

1. Surveillance of Domestic Helpers – Can a Domestic Helper Seek Protection under the *PDPO*?

In recent times there has been some confusion as to whether or not the *PDPO* can be applied in cases where an employer uses covert video surveillance to monitor his or her domestic employee. This has been brought about by the recent line of cases involving domestic helpers who have been charged with child abuse with the help of hidden video cameras placed in the premises which captured them abusing the child that was under her care.[47]

It is understandable that parents would want to prevent any act of violence that may occur when they leave their child under the care of a domestic helper. A number of domestic helpers have been convicted of offences captured on video. In September 2000, a domestic helper was given a two-month sentence, suspended for two years, after admitting assault. A hidden video camera was placed in the living room and captured her pulling a toddler by his hair and slapping his back after the child wet himself in a highchair. She admitted using force on the child but explained that she was merely trying to discipline him. In May 2000, an Indonesian domestic helper pleaded guilty to a charge of cruelty causing unnecessary harm to a child. A hidden video camera captured her beating a two year-old boy by punching him in the face and the thigh before swinging him onto a sofa.[48]

The first Data Protection Principle provides that personal data shall be collected by means which are both lawful and fair in the circumstances of the case. However, s 52 of the *PDPO* provides an exemption from all the Data Protection Principles. Section 52 provides that:

> "Personal data held by an individual and
> (a) concerned only with the management of his personal, family or household affairs or
> (b) so held only for recreational purposes
> are exempt from the provisions of the data protection principles. . ."

It is arguable that since such data captured on video camera is related to the management of personal and/or family affairs, such personal data would be exempt from the Data Protection Principles including DPP 1(2). However, Wacks contends that this argument is wrong[49] on at least two grounds.

The first ground relates to the word "held", which is used in the exemption for domestic purposes. If data is to be held by someone, it must have been collected before an individual can hold it, whether it has been collected by the person holding the data or by some other person. In Wacks' opinion, the use of the word "held" in s 52 may be an oversight that the draftsman made

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46 *Ibid.*

47 "Camera captures maid assaulting toddler", *South China Morning Post*, 19 September 2000.

48 "Employers allowed to spy on maids – Privacy Commissioner permits hidden Cameras in common areas of flats if helpers are suspected of abuse", *South China Morning Post*, 15 June 2000.

49 Wacks, R, "Home Videos: is the Surveillance of Domestic Helpers Lawful?", (2000) 7 *Privacy Law and Policy Reporter* 5, p 100.

while drafting the *Ordinance* and therefore the effect of s 52 is not to exempt DPP1's requirement that personal data shall be collected by means which are lawful and fair in the circumstances of the case. This remains to be the case even in the context of data held for domestic purposes. This was the view taking in the "Peeping Tom" case where a university student filmed a female university student undressing in her room. Even though the defendant argued that the tape falls under s 52 as it was used for "recreational purposes", the Privacy Commissioner was of the opinion that it still constituted a breach of DPP 1(2):

> "A recorded image of a living individual from which it is practicable to identify that person and in a form in which access to or processing of the data is practicable is personal data of that individual. In the absence of any other overriding public interest, it is unfair to photograph or video-tape a person's image in a private place with an intent to collect that person's personal data without that person's knowledge or consent." [50]

The second ground relates to the scope of s 52 of the *PDPO*. In its recommendations, the Hong Kong Law Reform Commission's sub-committee on privacy took the view that personal data held by a private individual should be exempted from the data protection principles as such data carried little or no risk of harm to the persons who were data subjects.[51] The type of information that would fall under s 52 would be a list of names and their addresses for the purpose of sending Christmas cards.

Employers who secretly videotape their domestic helpers would not be able to rely upon s 52 because covert monitoring of employees is carried out with the purpose of obtaining evidence of child abuse with a possible view of prosecuting the offender.[52] This would definitely not fall within the category of the domestic sphere.

It is submitted that there should be no distinction in the application of the law between domestic helpers and other employees. Just because they may assist at someone's home rather than an office, this should not lead them to be distinguished from other employees in general. They should be given equal protection. The employment of domestic helpers encourages women to join the workforce,[53] and like other employees they have an employer and earn a monthly wage, so why should they be treated differently?

Therefore even though the collection of personal data from a hidden video camera may be subject to the Data Protection Principles, we still need a clear and specific code of practice which deals with the issue of video surveillance. Such a code of practice would provide employers with some guidance as to what circumstances can a video camera be used to collect personal data on employees.

C. The Code of Practice on Human Resources Management

The Code of Practice on Human Resources Management was issued by the Privacy Commissioner for Personal Data under the power conferred to him under s 12 of the *PDPO*. This Code of Practice was published in the Gazette of the HKSAR Government on 22 September 2000 and has taken effect from 1 April 2001. According to Roth, this code of practice reflects the level of demand there is for specialized guidance in this area of law as well

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50 Quote made by Mr Steven Lau. Available on the Internet at http://www.pco.org.hk/english/infocentre/press_19971013.html.

51 Wacks, R., "Analysis: Domestic Helpers' Privacy" (2000) 30 *Hong Kong Law Journal* 364.

52 *Ibid* at 363.

53 *Supra* note 47 at 101.

as the weakness of privacy legislation of general application in this context.[54]

The purpose of this Code is to provide employers and its Human Resources practitioners some guidance on how to handle personal data throughout various stages in the course of someone's employment. These stages involve recruitment, current employment and former employee's matters.

A breach of the Code of Practice does not constitute a criminal offence but according to s 13 of the *PDPO*, it would give rise to a presumption against the employer in any proceedings involving an alleged breach of the *Ordinance*.

Chapter 1 of the Code contains general requirements that an employee should take into account when collecting, processing and handling employment-related personal data. It also includes precautions regarding Internet usage, requiring employers to inform employees of its written policy on the use of Internet access facilities, including email, and whether the employer reserves the right to access and read emails sent and received by employees using the email system.[55]

However, the code seems to provide little guidance to employers and human resources practitioners on the topic of surveillance of employees in the workplace in the form of using video cameras. Surveillance is dealt with in s 3.4 of the Code under Performance Appraisal.[56] This provides that if an employer carries out a policy of performance appraisal on his employees by collecting personal data on employees, personal data should only be collected for the purpose of:

- Assessing the employee's performance;
- Assessing the suitability for advancement;
- Determining the employee's continuance in employment; or
- Determining the employee's job posting or training needs.

An employer should not collect personal data on an employee which is considered excessive for the purpose for which the information was collected. Data should be collected by means which are fair in the circumstances.

The Code of Practice also states that it would not be fair to use electronic surveillance on employees at work unless there is no other less privacy-intrusive means of collecting personal data.[57]

In general, it is useful to have a Code of Practice which is specific in dealing with a certain matter. The current code of practice may "clear the air" a bit by stating which purposes are acceptable for collecting data, but it does not deal with the issue of video surveillance in depth. Nor does the Code of Practice include the stance of the Privacy Commissioner's Office on video surveillance. In one of their newsletters,[58] the Privacy Commissioner's Office was of the view that it is justifiable to have overt cameras installed in the common areas of the workplace.

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54 Roth, P, "Workplace Privacy: new HK and UK codes", (2000) 7 *Privacy Law and Policy Reporter* 6, p 111.

55 PCO Code of Practice on Human Resources Management, p 9, para 1.4.6.

56 PCO Code of Practice on Human Resources Management, p 27, para 3.4.1.

57 *Ibid* at p 28.

58 Online version of PCO Private Thoughts (August 2000) – available at http://www.pco.org.hk.

It also suggested placing a Personal Information Collection System (PICS) policy guideline next to the video camera. In its opinion, visual data should only be retained for a certain period of time and to be used for security purposes only.[59]

Nor does the Code of Practice provide any guidelines on what is "fair in the circumstances" or what constitutes an "excessive" collection of data, something that the *PDPO* fails to do.[60] If the issue of video surveillance in the workplace is to be dealt with in an adequate manner it is a good idea to enact a Code of Practice that deals specifically with this matter. Video surveillance is a worldwide issue and it is a pity to see how little attention it has received in this Code of Practice.

IV. The Need for Adequate Measures in Protecting Privacy

In the previous part, I have tried to show the inadequacy of the common law to protect an individual's privacy from invasive or intrusive conduct. I have also examined the manner and extent as to how the *PDPO* deals with privacy interests. My analysis showed that the *Ordinance* does a better job in protecting privacy than the common law. However, weaknesses remain in the *Ordinance* when one looks at the perspective of protecting employees who are subject to video surveillance. The Code of Practice on Human Resources Management specifically deals with employment-related personal data but unfortunately, it does not say much on video surveillance in the workplace nor did it define terms such as "fair in the circumstances".

These three existing measures fail to answer some preliminary questions in relation to video surveillance, which are in the author's view important in order to understand how the right to privacy should be protected in the workplace.

The introduction of this paper pointed out to the conflict of interests between the employee and the employer. On one hand, the employees should be entitled to the right to privacy and dignity. On the other hand employers may need to use video surveillance for legitimate business purposes. We do recognise the need to strike a balance between these two interests,[61] but the problem of how we strike the balance derives from this recognition. If, in the future, any laws or regulations are passed in relation to video surveillance, this is one question that should be taken into account.

Another question that one should take into account when determining how privacy should be protected from video surveillance, which is related to the first question, is how should privacy rights be conferred to employee? At the present moment, we do not have any satisfactory or uniform determinations as to what level of privacy are employees entitled to and how that level of privacy should be protected. There is an imbalance of power in the workplace – many people believe that since employers have ownership or control over the workplace, employees give up all rights and expectations to privacy and freedom from invasion.[62] Other employers seem to avoid the question by making employees consent to surveillance, monitoring and testing as a condition of employment.

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59 However the newsletter failed to state how long the Privacy Commissioner's Office thought was acceptable in keeping the visual data.

60 The author wonders whether these terms would also be subject to wide interpretation as the Data Protection Principles.

61 "Guidelines to Protect Employee Privacy", *South China Morning Post*, 25 February 2001, p 4.

62 *Supra* note 2 at 120.

This part purports to look at any proposed methods on the protection of privacy in respect of video surveillance and whether or not they fill the void which existing measures have left us with.

A. Proposed Code of Practice on Workplace Surveillance

The Privacy Commissioner for Personal Data has announced its intention to issue a Code of Practice on Workplace Surveillance. The Privacy Commissioner's Office is drafting guidelines at the present moment and hopes to issue the code later in 2001. He has commissioned a privacy-consulting firm headed by Nigel Waters to help out in drafting the guidelines.[63] The proposed code looks at five forms of workplace surveillance that are commonly used by organizations:

- Closed Circuit Televisions
- Tracking of web-browsing
- Tracking of emails
- Tracking of telephone calls
- Location Monitoring.

The substantive views of the Privacy Commissioner's Office are indicative of the values that it would like to implement in the proposed Code of Practice on workplace surveillance. The Office discourages the practice of continuous or habitual surveillance of employees in the workplace.[64] It also discourages the collection of employees' data that is of a personal or intimate nature through any means of workplace surveillance. The Office is also of the view that data which is captured by surveillance systems may not exclusively relate to employees but it could also capture personal data on clients who visit the employer's premises.

The PCO disapproves of the general practice of using covert surveillance.[65] Employers should only use covert surveillance if it is permissible under conditions that may be explicitly stated in the Code of Practice.

Another substantive view that would also be implemented in the proposed Code of Practice is the requirement of employers to notify all parties (such as employees and visitors of the workplace) that they may be subject to workplace surveillance. The employer must state the type of data to be captured by surveillance systems and the format in which the data are to be recorded. They must notify all the parties on the purpose for which the data are collected.

The PCO is also of the view that even when surveillance equipment may be used in the workplace for legitimate purposes, the employer should uphold the essential rights of all employees to privacy and dignity. Employees should be secure in the knowledge that the employer has made available specified areas, facilities and periods during the working day in which employees are not subjected to any form of surveillance.[66]

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63 Waters, N, "Workplace Surveillance: A Background Paper for Privacy of Personal Data in the New Economy", (paper presented in a conference organized by the Office of the Privacy Commissioner for Personal Data, Hong Kong SAR, 26 March 2001). See also note 54.

64 *Ibid* at 1.

65 *Ibid* at 2. For views on the PCO's policy on overt surveillance please see the previous part under the Code of Practice for Human Resources Management.

66 *Ibid* at 2.

It is submitted that the proposed Code of Practice on workplace surveillance provides a useful solution in protecting the privacy rights of employees, and it is a step forward in covering the holes that are left in by existing measures that are currently used to protect privacy. It deals with the problem of workplace surveillance in a specific matter which supplements the generality of the *PDPO*. It also helps to provide a solution to the preliminary questions stated above, in relation to striking a balance between conflicting interests and how privacy rights are to be conferred. In respect of the latter, we could see that the PCO, which will be implemented in the new Code, is against surveillance of employees "around the clock" and it provides for employers to uphold their rights, thereby making sure that employees would feel secure in knowing that various areas are not subject to video surveillance.

In respect of the former issue, Waters argues that it would be desirable to review the application of the data protection principles in the light of international experience and a review of legal issues.[67] A review of legal issues would assist in providing a bottom line of acceptable practices. International practices can also be taken into account to see what are the existing norms and practices that take place in the workplace and apply these practices in Hong Kong to set a standard for what is and is not permissible and to provide a balance between individual interests and business interests. It will help to identify a consensus as to what is considered acceptable and what safeguards there should be in the light of the discretion allowed by the Data Protection Principles. We have already seen the difficulty of using words that are subject to wide interpretation in the previous part. If we look at the legal context and the international experience in relation to video surveillance, this would provide employers with guidance on what would be "fair under the circumstances".[68]

It is also interesting to note how the proposed code deals with the danger of employers making employees consent to surveillance and monitoring as a condition of employment. The proposed code may require that all new staff recruited by the employer should be notified and provided with a copy of the employer's workplace surveillance policy prior to being given a formal offer of employment. This would prevent employers from using a clause in the employment contract to incorporate their right to surveillance of employees.

B. Civil Liability for Invasion of Privacy

The Law Reform Commission of Hong Kong published a consultation paper on civil liability for invasion of privacy in 1999. It has yet to publish a formal report on its findings but there is a draft report on the same subject matter that was made last year.

The Law Reform Commission calls for the creating of a new tort, namely a tort of the invasion of privacy by intrusion upon the solitude or seclusion of another. It is of the opinion that intrusion into private affairs is wrongful because it is an "assault on human personality and a blow to human dignity. The potential of one's privacy being intruded has increased due to the technological developments in electronic surveillance.[69]

Intrusion is an actionable tort in America. The Restatement of the Law of Torts in the United States defines the tort as:

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67 *Ibid* at 6.

68 *Ibid* at 6.

69 Law Reform Commission of Hong Kong, *Consultation Paper on Civil Liability for Invasion of Privacy* (1999) p 70.

> "One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person".

The Privacy sub-committee believes that the new intrusion tort requires proof of either an intrusion upon the solitude or seclusion of another or an intrusion into another's private affairs. The intrusion need not be physical – it could also occur through non-physical means. It must have been done in a wilful manner and the intrusion must be seriously offensive and objectionable to a reasonable person.[70]

The Law Reform Commission is of the opinion that a person has a reasonable expectation of privacy if

1. He seeks to preserve something as private; and
2. His expectation of privacy is something that would be regarded as objectively reasonable under the circumstances.

A reasonable expectation may occur in the workplace. This is one of the examples cited in the Consultation Paper. The Law Reform Commission has pointed out in its paper that employees are subject to stress if they are placed under constant video surveillance. Video surveillance may be used for a variety of reasons but there is a potential of video cameras to capture certain private behavior and activities of employees.[71]

Creating a new tort of invasion to privacy does help to balance the interests between employees and employers. In determining whether or not the employer would be liable for privacy invasion under the new tort the court would have to assess whether the employee has an expectation of privacy and if so, whether the employer has a legitimate justification for the intrusion. However, it does not afford adequate protection to employees because there is a risk of employers arguing that their actions are justifiable because they need to protect property or personal safety. This would be a hindrance in creating a balance between the two conflicting rights.

V. Conclusion

The proposed Code of Practice provides a useful solution for protecting information generated by video surveillance. It manages to strike a balance between conflicting interests and it provides specific guidance on how the Data Protection Principles of the *PDPO* should be applied in the specific context of video surveillance by looking at legal contexts as well as international practices.

It is submitted that it would be useful if the Privacy Commissioner's Office could take into account, when drafting the new code, the Code of Practice on the Protection of Workers' Personal Data, which has been devised by the International Labour Organisation.[72] Even though the code does not form part of international law and has no binding effect, it provides guidance in the development of legislation and regulations.

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70 *Ibid* at 81-82.

71 *Ibid* at 89.

72 International Labour Office, *Code of Practice on the Protection of Workers' Personal Data*, (Geneva, International Labour Office, 1997).

The Code contains strong privacy principles which may be of use for the PCO when devising the proposed Code of Practice on workplace surveillance. Some of these principles include the lawful and fair use of personal data, collected for reasons that are directly relevant to the employment of the worker and only for the purposes for which the personal data were originally collected, the right of workers to be informed in advance of any monitoring practices adopted in the workplace, and the employer's duty not to collect sensitive personal data unless it is directly relevant to an employment decision and in conformity with the law. Section 5.13 provides that workers may not waive their rights.

The PCO may also consider the feasibility of adopting legislation on the specific issue of video surveillance. In New South Wales, Australia, the *Workplace Video Surveillance Act 1998* prevents employers from using video surveillance in the workplace unless it is used to prevent unlawful purposes and the use of covert video recording is authorized by a magistrate[73]. Legislation has also been enacted in the United States. The *Notice of Electronic Monitoring Act*, which was introduced in July 2000, prevents employers from secretly monitoring the communications and computer use of their employees.

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73 *Workplace Video Surveillance Act 1998* (New South Wales), s 7(1).

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We would like to give our very special thanks to the Friends of the Faculty, for their financial and moral support in our mission. They have on a consistent basis supported us from the very founding of the Review. We extend our deepest gratitude to the following:

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