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香港學生法律評論

With a Foreword by
The Honourable Secretary for Justice, Ms Elsie Leung

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

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Message from the Secretary for Justice

It gives me great pleasure to write this Foreword for the 2003 Issue of the Hong Kong Student Law Review.

The dazzling socio-economic development of the Mainland in an era of globalization presents the people of Hong Kong with opportunities and challenges. Many of us (indeed too many of us) feel less certain about the future. Our successes and strengths are unjustifiably belittled. We can choose to play spectator and watch, thus contribute to, the stagnation or even regression of our home city. We can also act with the attributes that elevated Hong Kong to the league of leading metropolis: self-motivation, perseverance, dedication, passion for excellence, commitment to the rule of law and care for our community and the less privileged members of it. I am profoundly encouraged by the demonstration of those qualities by our promising law students in the endeavours to produce this publication.

The importance of upholding the rule of law cannot be stressed too much. For the aspiring legal profession of Hong Kong, the continued flourishing of our legal system under the unique constitutional order is a fertile ground for experiment and study. We have capitalized on the relic left by our predecessors, and we look to our successors to build on it. Identifying a legal issue and articulating on the analysis of it add not only to the legal literature that nourishes the common law, but also to the competence with which the young law students should graduate and practise.

I congratulate and applaud the contributors and editors and all others who have assisted in the publication of the Journal. It is an achievement that the budding scholars and those who raised, taught, supported and inspired them can be proud of.

The Honourable Elsie Oi-sie Leung, G.B.M., J.P.
Secretary for Justice
Hong Kong Special Administrative Region

Message from the Dean

In the early nineties, for various reasons the Faculty has decided to abolish the compulsory requirement of a dissertation for an LLB degree. Gone were the days where law students spent their summer running around in the library working on their masterpiece. As a substitute, we encouraged our students to do more research essays and Guided Research. Each year we find some excellent pieces of work. Therefore, when the students proposed to launch a student publication for their research work, we readily embraced their initiative. In North America, most law reviews are run by students. There is no reason why we should not start this great tradition here. We believe it is one of the best means to encourage students to engage in independent and intellectually vigorous research. Research lies at the heart of any university. It is a tortuous process, the value of which is usually appreciated only after it has been done. It requires continuous reflection and challenges of one's assumptions, arguments and underlying values. It is a solitary process, yet once done, it provides great satisfaction.

At the same time, the preparation of a publication requires teamwork, innovative ideas, careful planning, organizational skills and marketing entrepreneur. The process itself provides an excellent educational opportunity, which we believe is equally important as formal education in university. It is with these two objectives in mind - the nurturing of scholastic mind and aptitude and the cultivation of responsibilities and teamwork - that we encouraged our students to start the *Student Law Review* 8 years ago.

They have not let us down. In recent years there are a lot of misgivings about the quality of law graduates. One only needs to refer to the *Hong Kong Student Law Review,* which provides one of the strongest pieces of rebuttal evidence. It is a publication run and edited entirely by law students. The broad range of topics covered and the high standard of the publication testify to the scholastic quality of Hong Kong law students. Like its previous volumes, this volume covers a wide range of timely topics. Some articles examine contemporary socio-legal issues such as the protection of marginalized classes in Hong Kong - foreign domestic helpers, prisoners as well as South Asian children. Some articles explore institutional issues, such as the adequacies of the current correctional services and the desirability of having mandatory court-annexed mediation. Some discuss conceptual issues, such as theories of human rights and their contribution to the interpretation of the Basic Law, as well as cross-border issues, such as the correct judicial approach in handling the concept of legislative interpretation by the Standing Committee of the National People's Congress, and the application of the doctrine of *res judicata* to Mainland judgments. The analysis on black letter law, namely directions on defendant's evidence of good character, is equally impressive. They amply demonstrate thorough research, critical thinking, well reasoned arguments and independent judgment, and more importantly, originality, a mature approach to law, and sensitivity and appreciation of the interaction between law and society.

It gives me great satisfaction to witness how the *Student Law Review* has grown over the years. I would like to offer my warmest congratulations to the editors of another fine piece of work, a product of which both our students and colleagues are able to take pride.

PROFESSOR JOHANNES M M CHAN SC
Dean
Faculty of Law
University of Hong Kong

Preface

"The ultimate measure of a man is not where he stands in moment of comfort and convenience, but where he stands at times of challenge and controversy."
---- Martin Luthur King, Jr

For two decades, Hong Kong experienced a rapidly booming economy and unprecedented prosperity. When the economic downturn came, Hong Kong was hit fast and hard. The present moment is certainly one of the most difficult times we face. Immediately after the Asian financial turmoil, many of us at least still kindled this naïve hope that the economic plunge would be transient and the property market would suddenly pick up again. But when our last hope diminishes to a point of near extinguishments, we now find ourselves lost in an ever-changing world of uncertainty and instability.

These days, we hear so many voices of complaints and anger, frustration and demoralization. What comforts us, as editors, is the tone of positivism in the submissions we receive this year, and the diversity of topics, directing at different areas of concern in Hong Kong. There are no chants of dissatisfaction, but demonstration of care and concern for the society. There are no signs of desperation, but a display of thoughtful recommendations and constructive solution to the problems identified. We have articles directing at the interests of various vulnerable groups in the society, such as articles on the protection of foreign domestic helpers, unequal education opportunities of South Asian children and rehabilitation of offenders. We have two submissions debating on constitutional issues of Hong Kong, examining the impact of human rights theories and the interpretative power of the NPCSC on the interpretation of the *Basic Law*. One of our articles is devoted to the reform of the court process, assessing the desirability of court-annexed mediation; while another touches upon the subject of private international law, examining the doctrine of *Res Judicata* and the enforcement of PRC judgments in Hong Kong. Last but not least, we also receive a short commentary evaluating a Court of Final Appeal's decision with regard to defendant's evidence of good character. On behalf of the editorial board, we would like to congratulate the authors on their outstanding achievements, which represent their diligence, zeal and perseverance.

As the Review is approaching its tenth anniversary, the Editorial Board finds itself in a state of uncertainty and difficulty as well. On the one hand, there is no doubt that the Review continues to mature and serve as a forum for law students to debate on current, controversial legal issues; on the other hand, we are still far from establishing ourselves as a leading student law journal in the world (which we admit only a few exist). Questions like "how to build up our reputation?", "how to increase our readership?", "how to improve our quality?" recur in our minds every now and then. We certainly find it disheartening if only a few read the *Review*, which after all embodies months of preparation and hard work. This year, efforts have been made to build up the *Review's* reputation by, for example, launching our new website (http://web.hku.hk/~hkslr), inviting submissions from law students of the City University, expanding our network with other leading law journals in the world through our exchange programme and improving circulation of the *Review*. Unsurprisingly, our efforts are met with a mixture of success and failure. However, our team will not be deterred. Our team will continue to strive in time of adversity. May we take this opportunity to thank everyone in the Editorial Team for his or her devotion, enthusiasm, cooperation and display of team spirit.

A special note of thanks goes to Ms Elsie Leung, our Secretary for Justice, who kindly wrote us the Foreword for this edition. We echo everything she says and feel sincerely grateful for her words of encouragement. We wish her every success in her terms of office. We would also like to express our deepest gratitude to our Dean, Professor Johannes Chan, for his foreword, and the Faculty of Law for its unfailing assistance and guidance, and last but not least, to the Friends of the Faculty for their generous support, without which we would not have gone this far.

We wish all readers would enjoy this latest edition!

HESTER LEUNG
MIKE LUI
Editors-in-Chief

April 2003

DIRECTIONS ON DEFENDANT'S EVIDENCE OF GOOD CHARACTER
A COMMENTARY ON THE *TANG SIU MAN* CASE

HESTER WAI-SAN LEUNG*

In Tang Siu Man v HKSAR [1998] 1 HKLRD 350, the Court of Final Appeal departed from the English approach and made a landmark ruling on the directions to be given in relation to defendant's evidence of good character. In this commentary, the author outlines the English position, the background to the instant case and the implications of our Hong Kong decision which, instead of laying down artificial rules of practice, prefers a more general and broader approach. While acknowledging the reservations of the dissenting judgment, emphasis has been placed on criticisms of the English position, both in theory and practice. The author also raises some issues that are still left unresolved and provides guidance on how they may be approached. All in all, the correctness of the decision has been supported and it is opined that this bold step taken by the Court of Final Appeal, is a step in the right direction.

I. Introduction

In *Tang Siu Man v HKSAR*[1], the Court of Final Appeal (CFA) handed down a landmark ruling in which the majority refused to adopt the "bemusing"[2] English approach in relation to defendant's evidence of good character. The decision, which clears up previous confusion as to good character direction in Hong Kong, should be welcomed. This commentary will assess its implications and consider issues that remain unresolved in the area.

II. The English Position

As a background to the case, the position of the English law has to be outlined. Evidence of good character has a dual relevance to the proof of guilt: firstly, it raises the *credibility* of the accused in the eyes of the jury (direction to this effect is often referred to as the first "limb"); and secondly, it creates doubt as to whether an inference of guilt should be drawn, or the *propensity* of the accused to have committed the crime (the second "limb"). At one time, it was held that a trial judge was never obliged to direct the jury as to the relevance of such evidence, such matter being always within the judge's discretion (*R v Smith*[3]). However, since the case of *R v Berrada*[4], there was a "veritable sea-change in judicial thinking"[5], culminating into *R v Vye; R v Wise; R v Stephenson*[6], in which the Court of Appeal expounded the famous *Vye* principles, summarized as follows:

> A credibility direction is to be given where the defendant has testified or made pre-trial answers or statements.
> A propensity direction is to be given, whether or not he has testified, or made pre-trial answers or statements.
> Where D1 of good character is jointly tried with D2 of bad character, (1) and (2) still apply.

This conversion of a trial judge's *discretion* to an *invariable rule of practice* was affirmed by

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* The author would like to thank Mr Simon Young for his comments and valuable insights on an earlier draft of the article.

1 [1998] 1 HKLRD 350.

2 Munday, Roderick, "What Constitutes a Good Character?", (1997) *The Criminal Law Review*, p 248.

3 [1971] Crim LR 531.

4 (1990) 91 Cr App R 131.

5 *R v Aziz* [1995] 3 All ER 149 at 156, *per* Lord Steyn.

6 [1993] 3 All ER 241.

the House of Lords in *R v Aziz*[7], subject to a residual discretion exercisable by the trial judge to decline to give any character directions, in the case of a defendant *without previous convictions*, if the judge considers it an *insult to common sense* to do so; or to qualify the directions by adding appropriate words to deal with the defendant's criminal conduct revealed in the course of the trial.

III. Facts

Turning back to the Tang case, the facts of which were simple: during a surveillance operation, police found quantities of drugs and drug-manufacturing equipment in a flat leased by Tang (the accused). Tang arrived at the flat 40 minutes after the search and was arrested. He was charged with manufacturing and trafficking dangerous drugs. The police testified that when Tang first arrived at the flat, he had said "Ah Sir, I've been caught red-handed . . . " This was denied by Tang, who defended that he only sub-let the flat and had nothing to do with the drugs there. No doubt the issue turned on credibility. Tang had one previous conviction for assault occasioning bodily harm; but in the summing-up, the trial judge directed the jury to treat him as a person of good character. He gave a credibility direction but omitted the propensity direction. Tang was eventually convicted of both counts. Unsurprisingly, he appealed against the conviction, arguing that the trial judge had misdirected the jury on the use of the evidence that he is of a good character. The appeal, dismissed by the Court of Appeal, went up to the CFA, the certified question of law being "whether the trial judge having decided to direct the jury to treat the [defendant] as a man of good character in spite of a previous conviction, is then *obliged* to give a direction on both credibility and propensity".

IV. The Decision and Implications

With the House of Lords' authority standing in the way, the question essentially boils down to whether *Vye* should be followed. The majority (Bokhary PJ dissenting) took the courageous step in reaching the decision that there is no need to impose the *Vye* regime in Hong Kong, leaving the matter to trial judges' discretions. *The ultimate test will be whether the summing-up is fair and balanced.* It is submitted that the majority had come to a correct conclusion. Several cogent reasons were put forward by Litton PJ in his leading judgment: firstly, artificial rules of practice, while helpful in achieving uniformity and consistency, tend to make the trial process mechanical and are inflexible to cover the wide spectrum of circumstances. Secondly, the application of the *Vye* rules caused great difficulty in practice, as illustrated by a handful of cases that the majority had referred to. "They might amount to no more than the incantation of a well-worn formula. The need to heavily qualify the direction, to avoid an affront to common sense, might make the words virtually meaningless . . . It might also confuse the jury"[8]. Thirdly, the rules have not demonstrated to work well in other jurisdictions. Quoting with approval the dissenting judgment of Thomas J in *R v Falealili*[9], the majority acknowledged that the rules at times "stretch the jury's common sense to the limit"[10]. Fourthly, the *Vye* principles came into being at a time when the English Court of Appeal had been inundated with appeals on good character directions. As the majority quite frankly pointed out, these principles are "born of convenience and the need to cut down on appeals"[11]. However, such situation did not exist in Hong Kong and the existing flexible regime, based on

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7 *Supra* note 5.
8 *Supra* note 1 at 366.
9 [1996] 3 NZLR 664.
10 *Supra* note 1 at 367.
11 *Ibid* at 364.

humanity and common sense, had demonstrated to work reasonably well.

Bokhary PJ had, on the other hand, insisted on strict adherence to the *Vye* regime. The certainty and consistency arguments relied on in *Vye* were no doubt part of his reasonings, but he put forward another counter-argument that is apparently of great force. He was of the view that the *Vye* direction, being simple and moderate, *represents a minimum level of protection due to an accused in a jury trial*, below which no judge has any legitimate discretion to go. The majority, in contrast, were not troubled by this and expressed the usage of good character evidence as "nothing more than common sense writ large"[12]. The differing conclusions between the majority and Bokhary PJ are interesting, since both of them have relied on *fairness* as the ultimate benchmark, and it seems that their critical point of divergence rests solely on their perception of and confidence in the jury.

The majority also discussed what would constitute good character evidence. Conceding that it is an "elusive", "amorphous" and "imprecise" concept, the majority identified three situations covered by *Aziz* which constitute good character: "(1) where the defendant is of *positive* good character: that is where the defendant has adduced evidence to establish his . . . own standing and reputation; (2) the case of a defendant with no previous convictions; . . . this might also include the situation where the defendant has previously offended but was treated by the judge as a person of good character because the previous convictions were deemed irrelevant; and (3) where the defendant has no previous convictions, although in the course of the trial itself it is shown that he has acted discreditably or dishonestly, but the judge nevertheless decides to treat him . . . as a person of 'good character'"[13]. In *Aziz*, the House of Lords refused to distinguish between them and held that a trial judge was obliged to give a full *Vye* direction in all these situations, subject to the residual discretion mentioned earlier. The adoption of a legal meaning to good character had been questioned by academics of its absence of probative value, while the anomalous and illogical results this definition produced had aroused much criticism.[14] A good illustration of the difficulties can be found in *Aziz* itself, where the three co-accused appealed their convictions for charges of defrauding the Revenue and VAT. None of them produced positive evidence as to their good character, while two of them admitted of dishonest conduct. One would have thought that characters as such should not be entitled to good character directions, but the House of Lords held that the trial judge was obliged to give so. The correctness of the decision has been impugned by the full court in *Falealili*, and also by the majority in *Tang*. Quite rightly, the majority recognized that "the mere fact of a clear record, with reference to a person barely out of his teens, is hardly evidence at all"[15].

Having refused to lay down any rules of practice, the majority did provide some indications as to when the failure of a trial judge to give good character direction will amount to a misdirection in the three situations mentioned above. Firstly, where *positive evidence* of good character has been adduced, a summing-up which fails to give a full *Vye* direction "might well render" it unbalanced and unfair. Secondly, where the accused was simply relying on a mere absence of previous convictions, trial judges may, "as a matter of humanity and indulgence", give both "limbs" of the good character direction; but sometimes, for example, where credibility is the central issue and to give the propensity limb may be a surplusage, trial judges in exercising their discretions may properly decide that one "limb" is enough.

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12 *Ibid* at 361.

13 *Supra* note 1 at 355.

14 *Supra* note 2; Orchard, Gerald, "Directions on a Defendant's Good Character", (1994) *The New Zealand Law Journal*, p 56.

15 *Supra* note 1 at 360.

Moreover, "absence of previous convictions" is a concept to be flexibly construed by trial judges, who retain a wide margin of appreciation on whether minor offences may be overlooked. Thirdly, where discreditable matters concerning the accused arose in the course of the trial, trial judges again have a wide margin of appreciation as to the appropriate direction to be given.

A predictable outcome following the decision may be that prudent counsels will always introduce *positive* evidence of good character to ensure both "limbs" of direction are given. The legitimate worry, as raised by Bokhary PJ, is whether trials would then be overburdened by such evidence and perhaps rebuttals of such evidence. But less pertinent this may be, the more genuine concern is: where positive evidence is absent, will the enormous flexibility left to trial judges produce *inconsistent* directions which become difficult to challenge in light of the present ruling? One major deficiency of the decision is failure to provide any guidance. Also, with reduced scrutiny from appellate courts, trial judges may become light-hearted on the issue, as demonstrated by a subsequent case, *HKSAR v Au Yeung Suk Yee*[16], the facts of which were strikingly similar to *Tang*. There, an accused with no previous convictions was charged with trafficking in dangerous drugs. The issue again turned on credibility. Upon invitation by the prosecution, the trial judge reminded the jury of the defendant's good character but said that these were matters for their *background knowledge* which they might or might not wish to take into consideration in their deliberations. The Court of Appeal, following *Tang*, held that although a propensity direction was not mandatory, the failure of the trial judge to properly explain the relevance of the evidence to credibility of the accused did constitute misdirection. It even took the rare course of criticizing the trial judge's approach. Nonetheless, putting undue focus on this case may be an over-exaggeration of the problem, as this may well be an exceptional case.

The majority also departed from the rule in *Vye* that a full direction should nevertheless be given where the defendant had not testified in court and relied on exculpatory portions of a mixed statement. It held that where the probative value of the statement was virtually nil, it might be more consistent in common sense to emphasize the propensity direction and ignore the credibility direction altogether. To this effect, some Hong Kong cases following *Vye*, such as *R v Lai Hon-man*[17] and *R v Fong Shun-yuen*[18], may now be decided differently.

V. Unresolved Issues

Although the decision has cleared up much confusion that has clouded the courts in the past, two points remained unanswered. Firstly, the CFA was ambiguous on whether the distinction between evidence as to *reputation* (which is admissible) and *disposition* (which is inadmissible) ought to be abolished.[19] Given that the law now encourages *positive evidence* to attract both "limbs" of the good character direction and the observations by the majority that the rule was often transgressed in practice, it is unfortunate that it did not clarify the sort of evidence allowed to prove a defendant's character.

Secondly, the case still left open the position of law where D1 was of good character and D2 of bad character, so that emphasizing D1's good character might highlight D2's bad character,

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16 [2001] 2 HKC 392.
17 [1993] 1 HKC 219.
18 [1995] 2 HKC 498.
19 *R v Rowton* (1865) 10 Cox CC 25; *R v Redgrave* (1982) 74 Cr App R 10.

resulting in a prejudicial effect on D2. It was suggested in *R v Gibson (Rodney)*[20] that the best course to take in order to achieve fairness amongst the co-defendants, in the case where *absence of previous convictions* were relied on by D1, may be for the judge to say nothing about the matter, leaving it to counsel's address, unless direction was insisted on by counsel (*R v Shaw*[21]). *Vye* refused this compromised approach, primarily because a good character direction is something that D1 is entitled to. However, it did not redress the prejudicial effect to D2. With the retention of the flexible regime in Hong Kong, there may be a better prospect of achieving fairness amongst co-defendants. It is submitted that the court can again adopt different approaches according to the three situations: where positive evidence has been adduced by D1, the trial judge may decide to give a good character direction with respect to D1, and instruct the jury not to speculate on the absence of information as to D2 (where appropriate). But where D1 is only relying on the mere absence of previous convictions, the trial judge may decide not to give any directions as to character, following *Gibson*.

Moreover, whereas *Vye* prohibited "negotiation" between the judge and counsel over the content of the summing-up, this does not preclude the judge from inviting submissions from counsels whenever he/she proposes to give a direction which is unlikely to be anticipated by counsels. Indeed, this is the "commendable practice" recommended in *Aziz*.

VI. Conclusion

As a few years have elapsed since *Tang*, it will be illuminating to compare the impacts of the different approaches. In the UK, not only did the rigid rules fail to stop the spate of appeals, but the courts had reached a point of extreme technicality where directions of trial judges were challenged and impugned for reasons which seem to be a question of semantic. For example, in *R v Miah (Badrul)*[22], the Court of Appeal disapproved of directions using "entitled to" in preference to "should" take into account; and in *R v Lloyd (David)*[23], an appeal was allowed and a retrial ordered simply because the trial judge used rhetorical questions instead of positive statements in his direction. Whereas in Hong Kong, our flexible regime has continued to work reasonably well – it has not opened the floodgate for appeals, and cases have been sensibly resolved.[24]

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20 (1991) 93 Cr App R 9.
21 *The Times*, 31 December 1992, p 660.
22 [1997] Crim LR 351.
23 [2001] Crim LR 250.
24 There are only few appeals, see for example *Au Yeung Suk Yee*, *supra* note 16.

ARE FOREIGN DOMESTIC HELPERS PROTECTED IN HONG KONG?

VIVIENNE WAI-MAN FUNG*

They make our lives easier. They are the ones who work in a novel environment, infrequently bossed around by others. They are treated as second-best. These are the persons who are working as foreign domestic helpers in Hong Kong. Their jobs may have been pre-determined by the unstable economic and political situations back home, and many have to work overseas to make a living, separated from their families for a considerate amount of time. Yet, even more dismal is the situation of these individuals who run afoul of the legal system in Hong Kong, rendering their basic rights as promised, artificial.

The following article scrutinizes the rights of the domestic foreign helpers as stipulated in the legislations and administrative policies, and in turn, revealing the daunting experiences and challenges faced by these individuals in Hong Kong. The calamity is magnified when a city that prides itself in its judicial system and equality amongst its people compared to neighbouring countries, contains foreign domestic helpers that are still facing the insurmountable problems of racial and social discrimination. There have been practical and specific suggestions as to improvements attending the legislation and policies. They should be addressed with immediacy and resolution. Hong Kong cannot tolerate injustice based on nationality.

I. Paper Rights Protections

For years, particularly in the present protesting climate against any further wage-cut, the government has been insisting that its policies are not exploiting the foreign domestic helpers (FDHs) in Hong Kong, on either ground of "anti-migrant or racist".[1] Before exploring these seemingly conflicting standpoints of the government, it may be appropriate for us to first examine what rights of the FDHs have been laid down explicitly in documents, starting with the international regime and then the domestic framework in Hong Kong.

A. The International Human Rights Convention

According to *Elimination of All Kinds of Discrimination Against Women* ('CEDAW'), and the *International Covenant on Civil and Political Rights* ('ICCPR'), the HKSAR government has the responsibility to ensure that all employees are treated equally in the job market, regardless of their sex and their identity as local or migrant workers.

On top of the list, there is the *International Labour Convention* No 97 ('ILO') and the *Migration for Employment Convention* (Revised) 1949 ('the Convention'), which came into effect in Hong Kong without modification on 11 August 1980. Pursuant to paragraph 1 of Article 6 of the Convention,[2] the HKSAR government is under an international obligation to

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* The author is deeply grateful to Ms Tam Sun Lin, a friend of her parents, who is working in a foreign domestic helper employment agency. Her kind arrangements enabled the author to share the real experiences of several Indonesian maids working here.

1 See response from the Deputy Secretary for Education and Manpower, Mr Philip Chok Kin Fun, to the question of any possibility in lowering the minimum wages, during an interview with a press reporter reported in "Review may cut maids' pay again", *South China Morning Post*, 18 November 2001.

2 Paragraph 1 of Article 6 of the Convention provides:
"1.Each Member for which the Convention is in force undertakes to apply without discrimination in respect of nationality, race, religion or sex, to immigrants lawfully within its territory, treatment no less favourable than that which it applies to its own nationals in respect of the following matters:
in so far such matters are regulated by law or regulations, or are subject to the control of administrative authorities –
remuneration, including family allowances where these form part of remuneration, hours of work, overtime arrangements, holidays with pay, restrictions on home work, minimum age for employment,

ensure that migrant workers receive a remuneration which is no less favourable than that received by local workers.

B. The Employment Ordinance and the Immigration Policy

On the positive side, it is true that FDHs enjoy certain rights under the Employment Ordinance (Cap 57) ('EO'). In section 2, the word "employees" is given a broad interpretation as "any person who has entered into a contract of employment to employ any other person as an employee and the duly authorized agent", regardless of the person's nationality. Throughout the whole Ordinance, other substantial measures can also be found. For example, an FDH is entitled to a mandatory rest day,[3] statutory holidays[4] and paid annual leave.[5] In respect of dismissal, the employment can only be terminated with notice or payment in lieu of notice, unless there are grounds for lawful dismissal.[6] Like other local employees, FDHs are protected from excused dismissal when pregnant or sick.[7] Moreover, the Employment Agency Regulations (Cap57A) ('EAR') stipulates that an employment agency should not charge a successful job seeker an agency fee of more than 10% of the first month's wages,[8] whether or not the case involves a FDH or any other worker.

Most importantly, there exist the minimum wages[9] protection and standard contracts. These protections are administrative measures, which are determined by the Director of Immigration, and aim at protecting the FDHs. Because of their weak bargaining power and language disability, the FDHs are particularly vulnerable to exploitative conduct of the local employers. Actually, given that these protections are available only to FDHs, they are arguably better protected than other local workers who struggle in the economic downturn and earn at the bottom of the wage hierarchy.[10]

Sheltered by both the local legislative and administrative protective mechanisms, FDHs in Hong Kong could probably be better protected than their counterparts in other parts of Asia. For instance, while employees in Taiwan are generally protected under the Labour Standards Law, foreign domestic workers and caretakers there are the few exceptions not entitled to those protective measures relating to minimum wages, working hours, standardized terms and conditions of employment contracts, etc.[11]

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apprenticeship and training, women's work and the work of young persons; membership of trade unions and enjoyment of the benefits of collective bargaining accommodation".

3 See EO, s 17. It is mandatory for every FDH to be given at least one rest day, defined as "a continuous period of not less than 24 hours during which an employee is entitled to abstain from working for his employer", in every period of seven days.

4 See EO, s 39. A FDH is entitled to the same number of statutory holidays as other employees.

5 See Part VIIIA of the EO.

6 See EO, s 31 and 32.

7 See EO, ss 12 and 15.

8 See EAR, Regulation 10(2) and Schedule 2 Part II.

9 The existing minimum wages for FDHs is HK$3,670 per month. The standard is subject to review by the government from time to time. Note that the government is reviewing the current threshold figure when this article is being written and will probably make an announcement by January 2002.

10 Virtually this is the view of supporters of the recently proposed wage-cut. For more details, see section "Economic Inequalities: Unbalanced Bargaining Power".

11 See "Report on Protection of Rights for Foreign Workers in Taiwan" (27 December 2001), obtainable from http://www.evta.gov.tw/labour_dsigh/ehome4.html.

II. The Real Situation

Mere paper rights would never be equivalent to genuinely effective protection, and unfortunately, the author's interviews with FDHs reveal that many of them in Hong Kong are indeed suffering from significant discrimination in various ways. In order to help us understand the real situation in which FDHs in Hong Kong work in, the simplest way would be to follow a rundown of their typical experience.[12]

Often, FDHs in Hong Kong come from the poorer Asian countries with high unemployment rates, such as the Philippines, Indonesia, Thailand, India and Sri Lanka. For the sake of earning enough to support their families' expenses, many women there reluctantly choose to leave their husband and children for the higher wages in Hong Kong. This wage difference is deep-rooted in their minds making it predictable that many FDHs are willing to work in Hong Kong while receiving wages far less than the minimum standard as set by the Government.

Actually, many FDHs are not informed and thus ignorant of the minimum wages protection. Their ignorance is a result of the conspired tricks by local employment agencies employers. For example, many Indonesian domestic helpers working in Hong Kong experience wages deprivation. Usually they would be told that there exist two types of employment contracts – Type A applies to those who have previous experience of working in Hong Kong, to which the minimum wages of $3,670 is applicable; Type B is for those having no overseas working experience, thus discounting their wages to a surprisingly small amount of $2,000. Given that the wages of a domestic helper working in an affluent family in Jakarta is about HK$200 per month, whereas that for those working in other ordinary families there is about HK$100, it is hence understandable that even the outrageously low wages offered in Type B contracts would sound appealing to these Indonesian women.

Once in Hong Kong, the new arrivers will receive basic instructions on housekeeping and cookery at the employment agencies' premises. During their stay, the Indonesian FDHs are often taken to the bank to open an account with the bankbook and ATM card withhold by either the agency or the employer, so that withdrawals can be made after the full wages are deposited into the account. In a recent court case involving an employer's attempt to avoid actually paying the minimum wages, sums ranging from HK$1,000 to HK$4,500 had ever been taken out of the FDH's account without her consent or even knowledge, whilst the employment agency was virtually entitled to HK$376 per month, that is, 10 per cent of the FDH's HK$3,760 salary.[13]

Being transferred to the employer's home for work always means the start of a long period of harshness.[14] In the absence of maximum working hours specified in either the statutory provisions or the employment contract, the FDH is expected to serve the employer's family intermittently on a 24-hour standby basis. Even waking up early at 6 am, seldom could the FDH finish the work until mid-night because of the voluminous work. The FDH is not only

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12 Information regarding the Indonesian domestic helpers is based on the author's interviews with the author's friends and relatives, either working as employment agencies staff, or living in Jakarta.

13 See, for example, the claim brought by an Indonesian maid against an employment agency to the Small Claims Tribunal, reported in "Maid takes job agency to tribunal in fees row", *South China Morning Post,* 15 August 2001.

14 Information is obtained from the author's interviews with the Indonesian domestic helpers, who are working for the author's friends, what they have ever heard or actually experienced before.

required to work at her employer's premises, more than one in some cases, but also at homes of her employer's relatives, or to help out in her employer's business premises. Kitchen or a crowded storeroom is usually the resting place. While she needs to prepare food for her employer's pets, her food, ironically, sometimes consists of spoiled food or leftovers. Moreover, she is usually deprived of holidays for several months, without which the opportunities to share and compare the working conditions with her peers are lost, let alone the chance to seek legal advice.

Given that the local employers are always pressurized by the present economic downturn, their emotional revert to FDHs has been striating the problems between the two groups. According to a recent report, nearly 90% of the FDHs admitted having problems with their employers, of which 70% have experienced racial discrimination; and nearly 20% of the employers admitted having beaten their FDHs when they are dissatisfied with their work.[15] As noted by the magistrates when he sentenced the violent abusers in *HKSAR v Liu Man Kuen*[16] and *HKSAR v Sek Siu Fun*[17], FDHs in Hong Kong during the economic bites are indeed more vulnerable to violence by their employers within the confinement and privacy of their employers' homes.

Because of their parental fears of child abuse by FDHs, it has been a common practice for the local employers to keep their FDHs under round-the-clock surveillance by installing hidden video cameras. Probably due to the general perception that FDHs from poorer Asian countries are rude and uncivilized, as well as the increasing number of recent child abuse cases widely covered by the press,[18] this strategy has become more popular. However, the lawfulness of such a practice is indeed doubtful, especially when FDHs are also entitled to privacy protection under the Personal Data (Privacy) Ordinance (Cap 486).[19]

A. The Structural Dilemma

However, even if the FDHs know that there has been wrongful deprivation of their legitimate rights enjoyable in Hong Kong, they are coerced into swallowing the discontent or complaints and continue to work for the same employer. Though FDHs are entitled to terminate their employment contract by giving notice or payment in lieu of notice, giving up the existing employment would exhaust their means to repay the employment agency fees, which is far beyond the mandatory 10% ceiling.[20] Yet, to find a new employer would only mean another speculative risk for them, as well as an additional debt burden to their agencies as profiteers. The problem is even worse for the Indonesian FDHs, as the Indonesian government insists on

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15 See the report prepared by the Hong Kong Children and Youth Service in late January 2001, which is summarized by the Catholic Migrants Community on 2 April 2001, obtainable in its official website at http://mabuhay.catholic.org.hk/hknews/hknews0225.html.

16 [2000] 3 HKLRD 394.

17 WSCC 3167/2001, reported in *South China Morning Post,* 27 October 2001.

18 See, for example, the most recent case involving an alleged child abuse by an Indonesian maid, reported in *South China Morning Post,* 24 December 2001.

19 The uncertainty has largely been discussed upon by Professor Raymond Wacks in his article, "Domestic Helpers' Privacy", (2000) *Hong Kong Law Journal* 361.

20 The current practice of employment agencies is to charge the FDHs for agency fees of about six month of their wages, which is remarkably higher than the statutory ceiling of 10%. To avoid a caught by the Ordinance, the common trick is to make a "mutual arrangement" with the employers to divert the FDHs' wages, such as by withholding the FDHs' ATM cards as mentioned above.

the existence of an employment agent in the recruiting process.[21] In this way, it seems that the remaining solution is to seek the final resort – litigation.

What further worsens the structural dilemma faced by the FDHs is the immigration policy of two-week rule, rationale of which has been criticized by many NGOs[22] and questioned by the Court of Appeal.[23] When an employment contract is terminated prematurely, either by the employer or employee, the FDH must leave Hong Kong within two weeks, for otherwise she would be committing the criminal offence of overstaying in Hong Kong. This rule has long been introduced by the Immigration Department since 1987 to prevent job hogging of the FDHs before the expiration of their two-year contract, so as to protect the interests of local employers. Notably, the rule only applies to FDHs but not other migrant workers.

Actually, many FDHs are barred from bringing their complaints to the Labour Department owing to the two-week rule, as they are afraid of being dismissed. As a matter of course, deportation would follow, as the two-week period is practically never long enough for the FDHs to find a new job. Even assuming the FDH is gutsy enough to bring a claim to the Labour Department, she is always further barred from entering into a new employment until the case comes to an end. This puts the FDH in another dilemma that on what they could rely to live with the high living standard in Hong Kong during this period. Even she is able to find accommodation and legal support,[24] would all these just mean excessively speculative investments?

B. Disadvantageous Employment Terms and Conditions

In light of all the above uncertainties, our understanding will only be enhanced by looking at the terms and conditions on which the FDHs are working in Hong Kong. This in turn requires us to explore the employment contract itself as well as relevant employment and immigration laws and policies. To start with, a rough glance at some of the present practices suggests that the FDHs are actually further deterred from seeking legal redress by a list of lop-sided conditions of stay. For instance, a FDH must only serve her master and work in his premises, whose name and address are respectively specified in the employment contract. In other words, working for a non-contractual employer or in non-contractual premises would be a *prima facie* breach of the FDH's conditions of stay, of which they are deemed to know. As ignorance of law provides no defence, it is almost a certainty that the FDH would be found

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[21] Though the Indonesian government has 'lessened' its insistence to the extent that the Indonesian domestic helpers are no longer required to pay agency fees in renewing their contracts (see "Fees victory lifts helpers' campaign", *South China Morning Post*, 7 January 2001); agency fees are still relevant in forming the first contract, or upon a change of employer.

[22] See comment of the Hong Kong Human Rights Commission in 1995, in Submission to the United Nations Human Rights Committee on the 4th Periodic Report by Hong Kong Under Article 40 of the ICCPR, at http://www.hkhrc.org.hk/content/publications/UN_reports/1995iccprreport/iccp9503.htm.

[23] See, for example, the implicit comment of the Court of Appeal on the rule in *Semana Bachicha and Poon Shiu Man* [2000] 2 HKLRD 833 at 851D-I, which will be discussed in more details below under section entitled "Litigation as the only Resort?".

[24] Currently, FDHs organizations, like the Bethune House, are providing "shelter premises" for those foreign maids who are launching complaints against their employers, or who are unsafe if they continue to live in the employers' homes. According to an interview with the Director of the Bethune House (reported in "Black market turns screw on maids", *South China Morning Post*, 3 July 2001), there were 38 FDHs living there at the time of writing this article – 29 Indonesians being underpaid, 7 Filipinos and 2 Sri Lankans being assaulted as well as underpaid.

guilty and deported subsequently. However, given the reality being that most FDHs are virtually compelled to serve their masters' relatives and work in their masters' business premises, would it be justified to impose such a liability on the no-choice group?

Moreover, the legal prohibition of underpayment, which intends to protect the FDHs, creates another unintended difficulty to the vulnerable group. Whenever there is suspicion that the FDH either agrees to be paid under the statutory minimum, or knows of the legal requirement of minimum wages but nevertheless agrees to accept underpayment, investigations and even prosecutions by the immigration authorities will be triggered. Again, given that ignorance of law is not an excuse, experience shows that claiming to the Labour Department might even render the FDH herself being prosecuted. Needless to say is the uncertainty of whether they could still work and where they could accommodate in Hong Kong during the troublesome stages of investigation.

C. Settlement as Solution?

To avoid being driven into the timely and uncertain legal proceedings, the parties would often seek to settle their dispute at the conciliation meeting conducted at the Labour Department and presided by the Labour Relations Officer. However, even in most cases where an interpreter will assist the FDH, since parties in such informal negotiating stage cannot be legally represented, it is common to find that the bargaining power of the parties are significantly differentiated. In the urge by the officer, who actually lacks formal training on how to advise the parties, settlement is commonly reached quickly with misunderstandings, or even at the expense of the FDH's legitimate rights. Given that the helpless FDH usually lacks comprehensive legal advice on discharging her allegations, to which is added the presumed knowledge of their staying conditions, the FDH could virtually do nothing to protect their rights.

The deplorable practice is demonstrated and commented by the Court of Appeal in a recent case *Semana Bachicha v Poon Shiu Man*[25]. The case involved a settlement agreement, which was signed by the defendant employer and his maid from the Philippines, the plaintiff, who had had been subject by the defendant to "an oppressive and exploitative work regime" and coerced to give up the job after six months. Desiring to settle the dispute, the parties negotiated at a conciliation meeting presided by a Labour Relations Officer. Before signing the agreement, the officer had informed the parties that she was not a judge and could not resolve disputed factual allegations, and that all she could do was to "advise" the parties on their rights upon the undisputed facts being put forward. The plaintiff alleged that she was led by the Officer to believe that she was legally taken to walk out of her job and hence incurred a net liability to her master. Hence, the only choice for her was to accept the concession by the defendant, which the Officer described as "anything she was entitled to". In fact, at subsequent hearings it was found that the Officer's advice "obviously failed to convey the legal position", and most remarkably, the Court of Appeal commented that "as a matter of commonsense, legal advice cannot be given on the foundation of only such part of the facts as may happen to be undisputed". As a result, the settlement agreement was held to be a unconscionable bargain and thus set aside.

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[25] [2000] 2 HKLRD 833.

D. Litigation as the only effective resort?

The *Semana* case can be regarded as a pleasant signal to FDHs that, their rights in Hong Kong are readily recognized and protected by authorities at higher level in the judicial hierarchy. The Court of Appeal in this case affirmed the lower court judge's decision that the FDH (the plaintiff) had been constructively dismissed by the employer who forced the plaintiff to do work in breach of her visa conditions and subject her to "physical and psychological abuse of a degrading and frightening nature", so the defendant had knowingly taken advantage of the plaintiff's social and economic disadvantages throughout. Setting aside the settlement agreement and making a remark on the limited jurisdiction of the Labour Tribunal,[26] the Court of Appeal held that it was the defendant and his family whose conduct had breached the implied term in the employment contract that, either party would not undermine the "trust and confidence required for the employment relationship"[27]. Accordingly, in addition to the damages for wrongful dismissal, the plaintiff was also awarded damages for breach of that implied contractual term.

In quantifying damages, the Court of Appeal was reluctant to comment on the general impact of the so-called "notoriety" upon a FDH because of the strict "two-week rule".[28] However, the judges expected that, "as a matter of simple commonsense", an employee whose employment is terminated lawfully would have a *real and substantial prospect*, rather than a merely speculative chance, of securing the permission of the Immigration Department to seek a new job. In the particular circumstances of that case, it was found that the plaintiff was deprived of such a significant chance as a result of the defendant's constructive dismissal and allegations made against the plaintiff prior to her vindication by the lower court judge. Hence, the plaintiff was entitled to a larger amount of damages to reflect her loss of chance.[29]

In a more recent case *Andayani v Chan Oi Ling*[30], a tricky practice commonly adopted by employment agencies was brought before the court. The plaintiff in this case was a young Indonesian domestic helper, who complained to the police of assault by the defendant employer and thus terminated the employment prematurely. In deciding whether the plaintiff was entitled to her arrears of wages,[31] the Court of First Instance confronted with two alleged contracts between the parties: an oral contract made when the plaintiff was told that her wages would be HK$2,200 per month; and a standard form contract approved by the Hong Kong Immigration Department, which stipulated that her wages would be the minimum amount set for FDHs,[32] and was signed by the plaintiff at the request of the employment agency just before leaving Indonesia.

The Court of First Instance held that the only enforceable contract between the parties was the

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26 *Ibid* at 842E. The defendant argued that the first instance judge, in setting aside the settlement agreement, "had taken the defendant by surprise and that he was prejudiced by not having had the opportunity of calling the officer in question" as witness for his side. Ribeiro JA rejected this argument and said that "the Presiding Officer transferred the matter to the District Court on the express and sole ground that his Tribunal lacked jurisdiction to deal wit setting aside the settlement agreement".

27 *Ibid* at 844I-845I, 849G-850E.

28 *Ibid* at 851B-I.

29 *Ibid* at 852D-G.

30 [2001] 1 HKC 252.

31 The claim was previously dismissed by the Labour Tribunal, see earlier proceedings in [2000] 4 HKC 233 (CA).

32 At the relevant time of making the contract, minimum wages was set at HK$3,860.

oral contract for wages of HK$2,200, since that was what the parties had actually contemplated at the time of entering into the employment relationship.[33] However, with a view to discharge Hong Kong's international obligations under the ILO, though the underpaid contract was not illegal for being contrary to legislation, it was nonetheless unenforceable for being contrary to public policy, since "no migrant worker would be lawfully admitted into Hong Kong on such a contract"[34]. Another compelling reason for the court not to uphold the legality of the oral contract was that such a contract involved fraud, unconscionable conduct and undue influence. The court criticized the underpaid contract as a "contract of exploitation", as the plaintiff was not informed of the minimum wages protection and was coerced to enter into such a contract by undue influence on the part of the employment agency, obviously the defendant employer was well aware of that and had therefore taken advantage of the plaintiff's ignorance and weaker bargaining power.[35]

The court in the *Andayani* case seemed to have sympathized with the plaintiff and opined that she should be entitled to "recover her toil and labour on a *quantum meruit* or on a *principle of unjust enrichment*". To do such a "full justice", which was described as having fallen outside the jurisdiction of itself, the court made a welcomed but rather shaky attempt to hold that, despite the oral contract was void for illegality, there had been a contract of employment created by the parties' *de facto* relationship in that particular case. Most importantly, it impliedly laid down the minimum terms upon which the Director of Immigration should approve a migrant worker to lawfully work in Hong Kong.[36] Accordingly, the plaintiff was awarded damages, which was accessed on the basis of the set minimum of HK$3,860.

In other more serious cases involving physical violence and abuses, the courts had taken upon themselves an even more affirmative role in protecting the FDHs. In the high-profiled case *Liu Man Kuen*, in which an employer pressed a hot iron on her Filipino maid in order to "wake her up" for work at 5 am early in the morning, the Court of First Instance sentenced the employer to 18 months' imprisonment for causing grievous bodily harm. In *Sek Siu Fun*, a rich employer was jailed for 7 months for causing actual bodily as she expressed her dissatisfaction with her Filipino maid by kicking, punching, pitching rusted pin into the maid's head and arm, etc.[37] In another controversial case *HKSAR v Tang Kwok Wah Dixon,*[38] the Court of Appeal rejected the tactic arguments of a professional solicitor, and sentenced him to 7 years' imprisonment for raping his domestic helper.[39] Similarly in another case an employer who lured a Filipino domestic helper to a 'love hotel' and raped her twice was sentenced to 7½ years' imprisonment by the Court of First Instance, which summarized the views of its learned colleagues: Filipino domestic helpers were a vulnerable part of SAR society and had to be protected by the law.[40]

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33 *Supra* note 30, at 256A-C.
34 *Ibid* at 256A-B, 257F-G.
35 *Ibid* at 257H-258E.
36 *Ibid* at 259D-H.
37 WSCC 3167/2001, reported in *South China Morning Post,* 27 October 2001.
38 [2001] 2 HKC 301.
39 Though another conviction of indecent assault was dismissed on appeal, the sentence was not affected.
40 Reported in *South China Morning Post*, 10 November 2001.

III. The Root Cause of the Plights

A. Structural Inequalities: Two-week Rule and the Legal Processes

Despite the seemingly favourable rulings of the courts, we should not be distracted from the more realistic widespread sufferings of FDHs in Hong Kong. As mentioned in preceding paragraphs, the truth is that the FDHs are gutless to report cases of violation of their rights – even sexual harassment is involved – because of the "two-week rule". Not only would they fear losing their jobs as well as their visas, sometimes even death threats would be made to them by employers or employment agencies if they launch their complaints to the courts.[41] Moreover, given that they often lack the provision of sound and reliable legal advice, it is indeed too risky and unlikely to succeed in proving an alleged abuse beyond reasonable doubt in a criminal trial. On this point, the Mission for Filipino Migrant Workers Society, a concern group for the Filipino maids, had suggested that the government should set up a special unit to handle cases involving FDHs, which should be run and supervised by female counsellors and police officers. Under this system, the complainants are only required to show a certain grain of truth that is sufficient for the unit to make recommendations to the Immigration Department for granting a stay and accommodating the FDHs to sheltered premises so as to protect them against their employers' disturbance.[42]

B. Social Inequalities: Hostile Attitudes of the Locals

In order to effectively bring their complaints to the Labour Department, or subsequently to the judicial bodies, the FDHs demand support from an advisory network. As for more active enforcement of their paper rights in Hong Kong, the FDHs must unite their weak voices into a more vocal one. To achieve all these, they must possess collective bargaining power, for example, in the form of trade unions.

Despite the existence of various FDHs organizations as an affirmation of the discharge of Hong Kong's international obligations under ILO in respect of trade unions, it is observable that the general public in Hong Kong is hostile to any collective conduct of the FDHs. For a long time, there have been complaints about the FDHs, particularly the Filipinos who gather regularly at the Charter Garden, that they have jammed the public places. Not only are such complaints denying the normal social life enjoyable by everybody, they also bar the FDHs from establishing their essential supporting network. In view of this, the government announced a proposal in 1994 that, there would be Sunday centres in various districts for the FDHs to "settle". However, this compromising proposal was abandoned as a result of the strong objections from both the local residents and district-board members. Is that because the FDHs are simply treated as the locals' "maids and slaves", so that they should be doubly discriminated for both their race and social class?

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41 For example, an Indonesian FDH, with the help of a domestic helpers' organization, launched a complaint to the Small Claims Tribunal against an employment agency for over-charging her a commission. During hearing at the Tribunal, the helper claimed that the director of the agency threatened her that she would be killed when she returned to her home country if she continued to pursue her claim. See, more generally, the news reported in *South China Morning Post,* 7 September 2001.

42 Reported in "Unit for abused helpers demanded", *South China Morning Post,* 19 February 2001.

C. *Economic inequalities: Unbalanced Bargaining Power*

There has long existed unequal bargaining power in the FDHs recruitment market, which could have arguably resulted from the changing recruitment pattern across the nationalities – in both the legitimate and black market – in recent years. When the FDHs were first introduced in the early 80s, most of them were Filipinos. However, when adaptation has fostered these Filipinos with collective bargaining power for better rights, such FDHs were gradually perceived as troublemakers who were more difficult to be controlled. Given that the power to choose FDHs is generally in the employers' hands, gradual elimination of the too vocal nationalities would then be expected to follow. This is exactly the reasons why Indonesian maids are now preferred to the Filipinos, as they are still perceived as new arrivers who are generally more easily controlled because of their ignorance and lack of social connections. Indeed, such elimination has been reflected by both the figures from the Immigration Department,[43] as well as the salaries for different nationalities in the black market.[44] As this way has proved to be successful, it seems that the same cycle would repeat when the Indonesian maids are able to gather and enforce their rights sooner or later. By then it would not be unusual for them to be replaced by other new comers from Sri Lanka, India, etc.

In respect of maternity protection for FDHs, there are statutory provisions in the EO stipulating their rights in this aspect, and the Labour Department had also proposed amendment of the law in 1999. The government opined that flexibility of the Ordinance is needed for uniqueness in the employment of FDHs, and therefore proposed that an "agreement" can be formed between the parties to terminate an employment contract when the foreign maid is pregnant. Given the loophole regarding maternal dismissal under the existing legal regime, where an employer can lawfully dismiss a pregnant maid on ground like poor quality of work,[45] this proposed amendment is in fact further reducing the maternity protection. On the justification of "uniqueness", the question should be why the FDHs are treated differently from other pregnant women having other occupations?

During the present economic recession, there have been strong calls for the FDHs' wages to be levied, or a reduction in their minimum wages. While the Government has clarified that they have no intention to implement the former call "at that time",[46] the latter call is still

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43 Figures from *The Annual Report of the Immigration Department* show that: in March 1998, there were about 175,000 FDHs in Hong Kong, of which 80% were Filipinos; in March 1999, there were about 181,000, 77% of them were Filipinos; and in March 2000, Filipinos composed a decreasing proportion of 73% of the total 199,800 FDHs in Hong Kong.

44 See "Black market turns screw on maids", *South China Morning Post,* 3 July 2001. According to statistics provided by several FDH groups, including the Bethune House, the Filipino Migrant Workers and the Association of Indonesian Migrant Workers, the Filipino domestic workers are now being paid HK$2,000 per month in the black market, which is much lower than the amount of HK$3,000 payable before the economic crisis. However, the Indonesians, on the other hand, have been "slightly better" paid, with their black market salaries increased from HK$1,600 in 1996 to HK$2,000 now, probably because the Indonesians are now more vocal in complaining about illegal underpaying.

45 At a conciliation meeting at the Labour Department, the Hungary's consul-general was allegedly accused of unfairly sacking his foreign maid on ground of pregnancy; however, the consul-general argued that she was dismissed after many warnings over quality of work, see *South China Morning Post,* 26 April 2001.

46 See, more generally, the discussion reported in "Timing way off on maid levy plan", *South China Morning Post,* 9 August 2001. A proposal to levy a HK$400-per-month fee on employers of FDHs was emerged from a working group set up by the Education and Manpower Bureau and the Labour Department in response to labour sector legislator, Mr. Leung Fu Wah, in July. Despite the comforting words from the Secretary for Education and Manpower, the author and several concerns groups

subjected to an increasingly vigorous debate. In November this year, a top official has hinted that the government is now considering lowering the FDHs' minimum wages for the second time in three years. Since the last wage-cut of 5 per cent to HK$3,670 in 1999, the minimum wages has been frozen. However, it is worth noting that the salaries of FDHs are becoming far less than that of the locals.[47] The recent review has divided the Hong Kong society into two groups. On one hand, it is the employers and capitalists who seek to justify the proposed reduction on the economic difficulties facing by Hong Kong people generally,[48] the furtherance of employment prospects for local maids (in this regard there is also a suggestion in capping the maximum number of FDHs at 100,000),[49] as well as the insignificant impact of reduction on the FDHs as their home currencies have been depreciating. On the other hand, the FDHs oppose any further wage-cut, even if it is only a hundred and more – which is not a big deal for the locals, but it virtually means much to them, who have to send their income back to their families in their home country as well as to pay for their high living standards in Hong Kong.[50] There has also been criticism that using the FDHs as scapegoats is unjust and is equal to triggering a vicious circle of exploiting the poorest amongst the poor.[51]

IV. Conclusion

While social attitudes towards FDHs are hard to change within a short period, changing the law and policy does serve an effective way to educate the public and create a more favourable environment for the FDHs in Hong Kong. In light of the above discussions as to the aspects of how the FDHs in Hong Kong are underprivileged and discriminated, I think the root underlying the problem is the lack of an effective mean to express their discontent to the whole community. Given the extreme situations in their home countries, one can say that the Asian FDHs should be satisfied and even happy to obtain the current benefits: underpayment, humiliating working conditions, and occasional beatings from their civilized bosses. Yet it should not be taken to mean that the rights of FDHs should fall short of the standard of

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expressed their worries that "the trail balloon of the levy plan will remain afloat" when the issue would probably be redropped during the new session of the Legislative Council begins in October.

47 According to the report by the Catholic Migrants Community on 7 December 2001, in the early 80s, the salary of the FDHs was 70% of that earned by the locals for the same work; the percentage then dropped to 50% in the early 90s; and further to 35% before the 1999 reduction. After the reduction in 1999, the salary of FDHs only amounted to 20% of that of the locals doing similar work. The report is obtainable from http://ipcom.catholic.org.hk/focus/foreign-do-helpers/foreign_do_helpers.htm.

48 The Employers of Overseas Foreign Domestic Helpers' Association supported cutting the wages of FDHs, and suggested that the wages should be cut "by about 15 per cent, or about HK$500". For other supporters' views, see the articles "Review may cut maid's pay again", *South China Morning Post,* 18 November 2001; "United they gather", *South China Morning Post,* 25 November 2001;"Should domestic helpers face further pay cut?", *South China Morning Post,* 27 November 2001.

49 The "maximum number" suggestion was made by an independent legislator, Ms Li Fung Ying. To tackle the increasing unemployment rate, particularly among the local middle-aged women, the government has been implementing various programs to re-train the job-losers as part-time domestic helpers. However, at present there is still a strong demand for live-in domestic helpers in Hong Kong, with insufficient supply locally for it. Thus there is suggestion that the current policy should be kept, without setting the maximum number of FDHs allowed to come and work in Hong Kong.

50 In an interview with the press reporter, a Sri Lanka domestic helper stressed that while she could not go back to her home country empty-handed, she had to live up with the high standard in Hong Kong. According to her experience, she would spend about HK$200 on a day off; moreover, she had to buy food and winter clothes for living in Hong Kong, which she didn't need at home. Various groups have also expressed their concern over the FDHs' human rights in Hong Kong and opposed wages reduction, see "United they gather", *South China Morning Post,* 25 November 2001; and "Review may cut maid's pay again", *South China Morning Post,* 18 November 2001.

51 To have more details on the opposing views, see also the three articles noted above in note 48.

legitimate protection to which they are in fact entitled, even during the time of economic harshness. As noted by the NGOs and the judges in the recent cases, the FDHs are virtually playing an important role in the Hong Kong economic development since the 80s, as their efforts have freed the local women into the labour and professional market.

With the repeating calls by various concerns groups and NGOs in recent years, it is a welcomed step that our judicial bodies are paying more attention to the protection of this vulnerable minority group. While launching their complaints to the court seems a suicidal resort for the FDHs when their rights are deprived of by employers, the recent proposal by the Privacy Commissioner for Personal Data seems to be a pleasant attempt in facilitating communication as well as rebuilding trust and confidence between the FDHs and the employers.[52] However, the indomitable obstacles the FDHs are still facing are the controversial two-week rule, the cunning employment agencies which play an essential role in the recruitment processes but are not subject to close supervision throughout, as well as no or late awareness on the part of FDHs of their legal rights. Before any legal and policy changes are promptly carried out, it is still too far to say that, the FDHs are and will be enjoying their legitimate rights in Hong Kong.

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[52] *Supra* note 19.

AN EXAMINATION ON THE REHABILITATION OF OFFENDERS IN HONG KONG

KERENSA TIN-YAN CHAN*

Traditionally, the penitentiary system in Hong Kong was not premised upon the goal of rehabilitating prisoners. Along history of the local penitentiary system, it took several stages for the penal objective to transform from one of deterrent to one of rehabilitative. It was only since the establishment of the Hong Kong Correctional Services Departments (CSD) in 1982 that the rehabilitative role of the penal system had received confirmation.

This article provides an overview of the rehabilitative process in Hong Kong by beginning with a survey of the rehabilitative programmes provided by the CSD The author then points out the various inadequacies of the current correctional services as a means to achieve rehabilitation of offenders, and suggests reforms for dealing with these inadequacies. Finally, in light of recent experience in other jurisdictions, the author argues for the privatization of prison institutions as a means to facilitate rehabilitation of offenders.

I. Introduction

In the recent decades, institutional authorities around the world have taken up an immensurable task. In addition to the traditional role as guardians of the dangerous elements in the society, an attempt has been made to serve as mentors of the inmates as well, thus putting on a rehabilitative outlook. The penitentiary system in Hong Kong is not immune from this rehabilitative wave.

It is the purpose of this paper to provide a comprehensive overview of the rehabilitative process in Hong Kong. The paper is divided into six parts. Part one depicts the emergence of the penal system in Hong Kong. Part two discusses the theory of rehabilitation. Part three paints a picture of the rehabilitation programs implemented in Hong Kong with an evaluation in Parts four and five. Part six presents privatization of institutions as an attractive alternative to the current system.

It is worthwhile to note that academic research conducted on rehabilitation efforts in Hong Kong is limited. As a result, foreign literature will be used throughout the discussion. Nonetheless, the penal policies in Hong Kong have always been shaped by local contingencies, in addition to influence from other jurisdictions, such as Canada, United Kingdom and the United States.

II. Evolution of the Penal System

In 1844, the landscape of the Island of Hong Kong was changed forever. In the canvas-covered town of Hong Kong, the first permanent buildings were erected: the Victoria Gaol.[1] The construction of the Gaol signified the British Government's determination to enforce law and order in Hong Kong. It also set forth a stage for the evolution of the penitentiary system.

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* The author is deeply grateful to Miss Jill Cottrell and Dr. Fu Hua Ling, that without their support the completion of this paper would not be possible.

1 Lui, P, and Sinclair, K, *Society's Guardian* (Hong Kong: Correctional Services Department, 1999), p 6.

From the late 19th century to the 20th century, several major attributes contributed to the different philosophies adopted by the penal system in various eras. These included the administrative needs of the colonial Government, and the penal philosophies in Great Britain. However, it is interesting to note that unlike the penal evolutions in other commonwealth jurisdictions, which usually began with retribution, the evolution in the Hong Kong penitentiary system did not involve a retributive stage. Under the principle of retribution, punishment is imposed for its own sake and for an offender to pay for his or her wrongdoing by suffering from the exact same act. In other words, it is a notion of "an eye for an eye and a tooth for a tooth"[2]. An imposition of punishment is not supposed to achieve any particular result or end, such as deterrence and rehabilitation.

In contrast, the different stages of evolution in the Hong Kong penitentiary system had always been based upon pursuance of various goals. Putting a convict in an institution is not an end in itself. Rather it is a means to achieve a particular goal. Generally speaking, there are four main stages, each reflecting a lucid objective, to the development of the penitentiary system: Deterrent, Humanitarian and Reformative, Conservative, and Rehabilitative.[3]

A. The Deterrence Period

When Hong Kong was ceded to the British Empire in 1841, pirates, renegades, bandits and smugglers plagued the Island. Consequently, law and order became of paramount importance to the new colonial administration.[4] Penal practices originated in Great Britain were introduced.[5] The prevailing attitude in Britain towards the penal system could best be summed up in the Jail Committee Report of 1877 where Mr F Snowden stated unequivocally that "the primary objective [of imprisonment was] to deter from crime"[6]. In fact, well before the report was written, Britain had already adopted a deterrent approach.

Under the influence of the British, Hong Kong inherited deterrence as a norm of imprisonment. The conditions inside a prison were made as grim as possible. It was described by one of the Colonial Surgeons as a "filthy [and] disgusting place"[7]. Various penal practices were implemented to punish offenders as well as to convey the deterrent message to the criminal elements roaming the streets of Hong Kong. Public executions were made into public spectacles. Branding of criminals on the cheek or ear and the cutting of queues of the Chinese offenders conveyed shamming effects. Life behind bars was made as unbearable as possible through a poor ration and tedious and non-reproductive work, such as operating cranks and treadwheels, picking oakum, and breaking stones. Visits were prohibited unless with permission from the Magistrate. Conversations among prisoners were forbidden by a silent system.[8] In sum, the aim of prison at this point in time emphasised deterrence and

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2 Griffiths, C T, and Verdun-Jones, S N, *Canadian Criminal Justice* (Toronto: Harcourt Brace & Company, 1994), p 414.

3 Yiu, K, "Rehabilitation for Adult Prisoners in Hong Kong", (MA Thesis in Public Order, 1996, University of Leicester in association with The University of Hong Kong), p 9.

4 Chan, S, A lecture at The University of Hong Kong: Penal Policy and Programme in Early Hong Kong (1841-1945) given on 30 January 1996, quoted in Yiu, K, *ibid* p 14.

5 *Supra* note 1, p 11.

6 *Ibid*, p 16.

7 *Ibid*, p 7.

8 Rule 21 of the *Regulations for the Government of the Gaol at Victoria 1876* states: "The Superintendent shall enforce the observance of silence throughout the prison, and prevent all intercourse or communication between the prisoners, so far as the formation and the conduct of the business of the prison or the labour of the prisoners will permit, and shall take care that all necessary and unavoidable intercourse or communication between prisoners be conducted in such manner only as he shall from time

punishment. Any subsidiary objective of rehabilitation was ignored.

B. The Humanitarian and Reformative Period

In 1895, the British Parliament questioned the theories of imprisonment as a form of deterrence.[9] Since then, reforms were carried out swiftly in the British penal system. Humanity was emphasised upon with a hope of leading to the ultimate aim of reforming a prisoner. However, changes in Hong Kong did not appear until after the Second World War. In the war-rampaged era of Hong Kong, it was suggested that penal policy had to pick up a more humane and rehabilitative outlook to ease the tension in society.[10]

In the 1950s, many changes were made aiming to increase self-confidence and to instill work discipline, leading up to the implementation of a social work model. Instead of being pre-occupied with mindless activities, such as stone breaking, prisoners residing in minimum-security prisons were allowed to engage in work outside the prison to build up work habits. Earning scheme was introduced to create incentive for work through reimbursing prisoners for work performed during imprisonment. Also, visits by friends and relatives were encouraged to foster links between the inmates and the society.

At the same time, penal philosophies were influenced by legislative intervention. The *Training Centres Ordinance* (Cap 280) and the *Drug Addiction Treatment Centres Ordinance* (Cap 244) were enacted. The former aimed at "[training] and [reforming] offenders"[11]. The latter was enacted to rehabilitate offenders "who were suffering from addiction to dangerous drugs"[12]. Statutory aftercare services were also introduced.[13] The above measures marked the switch in penal philosophy from a deterrent approach to a humane and reformative approach. But the progress in the penal system came to a halt in the late 1960s.

C. The Conservative Method

In the late 1960s, Hong Kong witnessed a trend in teenage violence sparked by civil unrest and political agitation. Street robberies, thefts, assaults and demonstrations became common. The effect of the rehabilitative measures previously in place was doubted. And the government reacted swiftly by putting a halt on the progress on rehabilitation, thus reverting to the deterrence model. It might be the case that the government perceived the lenient treatments of inmates had prompted the masses to break the law.

One of the moves adopted by the Government in this era was the passage of the *Detention Centre Ordinance* (Cap 239) in 1972, anchoring at placing young troublemakers into a detention centre under. As few educational opportunities and vocational work advantages were offered inside a detention centre, the aim of reforming or rehabilitating the young inmates were set aside. Instead, the inmates would be subjected to a "Short Sharp Shock" (Short Sentence, Sharp Movement and Response, and Shock Experience and Training) regime

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to time direct". See Chan, S, "Development of the Hong Kong penal policy and programme under the British Administration (1841-1945)", (MA Thesis in Public Order, 1994, University of Leicester in association with The University of Hong Kong), p 59.

9 *Supra* note 1, p 12.

10 *Supra* note 3, p 10.

11 Section 1(a), *Training Centres Ordinance* (Cap 280).

12 Long Title, *Drug Addiction Centre Ordinance* (Cap 244).

13 Section 5, *Training Centres Ordinance* (Cap 280).

to instill discipline, thereby, deterring young offenders from re-committing crime.

Furthermore, the riot in Stanley Prison in 1973 led to the government's continuance in exerting a cautious approach towards its treatment with offenders. Security measures behind bars were tightened. Visits by friends and relatives were stopped. The previous progress in reforming and rehabilitating offenders were undermined to inject law and order to the society, resembling the penal attitudes practiced earlier in the 19th century. After all, it would be wiser for the government to exert a cautious and conservative attitude towards the penitentiary system rather than pursuing its previous liberal rehabilitative approach, which, according to the then *status quo*, might have contributed to the social turmoil.

D. The Rehabilitative Period

As social unrest died down, the penal philosophies reverted to the reformative and rehabilitative model adopted in the post-war era. In 1982, the Prisons Department was renamed the Correctional Services Department.[14] Rather than to punish and deter, the Department embarked on a mission to correct and rehabilitate inmates.

Many changes were made to the penal system regarding visits, vocational training, educational opportunities, personal development, counselling services, sentence planning, and psychiatric services. The law caught up with the development by enacting the *Long-Term Prison Sentences Review Ordinance* (Cap 524) whereby review of an indeterminate or long-term sentence became mandatory.[15] Various post-release schemes were also introduced to provide aftercare services for released inmates. In addition, new services are bound to be introduced in the near future following the establishment of the Rehabilitation Division in 1998.

Over the past a hundred and fifty years, the evolution of the Hong Kong penitentiary system had followed in the footsteps of the United Kingdom. The system advanced from a punitive and deterrent model to a humanistic and reformative model. Similar to its antecedent, principles of rehabilitation has been put in doubt from time to time. It has been two decades since the effort was first taken up by the Correctional Services Department and the rehabilitative model ceases to be at its infancy. Therefore, it becomes timely and important to evaluate whether the penitentiary system serves its primary purpose of transforming a malicious criminal offender into a law-abiding citizen.

III. Principles of Rehabilitation

Rehabilitation is described by many as a "continuous process"[16]. It begins once an inmate is placed in an institution and continues after his release. Unlike the deterrence model, which has been criticised for failing to provide long-term protection to society, rehabilitation is seen as providing "protection [to] society by actively encouraging and assisting offenders to become law-abiding citizens"[17].

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[14] *Supra* note 1, p 49.

[15] Section 11, *Long-Term Prison Sentences Review Ordinance* (Cap 524).

[16] *Supra* note 2, p 519.

[17] Mission Statement of the Correctional Service of Canada, 1989, quoted in Tkachuk, B, "Protecting Society through Assistance and Control - an Overview of the Reintegration and Rehabilitation of Federal Offenders in Canada", *Pacific Rim Regional Conference Proceedings on Re-integration of Discharged Prisoners: Rehabilitation, Employment & Prevention of Recidivism* (Hong Kong: The Society for the Rehabilitation of Offenders, 1997), ch 8-35.

According to criminologists, an individual who enters an institution undergoes a process of "mortification"[18] or "prisonalization"[19]. Through various "status degradation ceremonies", he will be transformed from a member in a "free" society to a resident of an institution. He will be issued an identification number, prison clothing and a list of institutional rules geared at controlling every aspect of his life, including contacts with the outside world.[20] Obviously, incarceration can be psychologically stressful to a new inmate who used to exercise full autonomy over his life. Pains that are associated with imprisonment include the loss of liberty, individual autonomy, personal security, the lack of privacy, boredom, the lack of access to goods and services and, in some extreme cases, heterosexual relationships.[21]

Due to the nature and conditions of confinement, it becomes impossible for an inmate to isolate himself from the prison milieu.[22] He will be affiliated with a group, thus, becoming a part of the inmate's social system. He may be associated with hard-core criminals, acquiring criminal knowledge and returning to a career of crime upon release. In addition, the unpleasant experience attached to incarceration can lead to the adoption of anti-social attitudes and behaviours during confinement and upon release.

Rehabilitation attempts to tackle all of the problems addressed in the above through reintegration, internalisation and reintegrative shaming. While reintegration and internalisation can be discussed collectively due to their emphasis on reforming an offender through education, reintegrative shaming has an entirely different standpoint. It deals with restoring harmony between an offender and a victim, with heavy emphasis on the potential rehabilitative impact that can be pulled through by a victim. Before a thorough discussion on the three approaches can be made, it is essential to turn to the debate denouncing and recognising the effectiveness of rehabilitation in reforming an inmate. After all, views expressed by protagonists and antagonists of rehabilitation may have an impact upon the evaluation of the overall success of rehabilitation.

A. "Nothing Works" vs "Some Thing Works"

"With few and isolated exceptions, the rehabilitative efforts that have been reported so far have had no appreciable effect on recidivism"[23]. Those were the words of Robert Martinson, a renowned antagonist against rehabilitation. He came up with a "nothing works" conclusion after an examination of over two hundred evaluations of correctional treatment programmes.

Martinson's critique sparked off a chain of debates in the field of criminology. In response, Gendreau and Ross took a "some thing works" approach.[24] They denounced Martinson as obsessed with the "winning arguments than seeking the truth"[25].

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18 Goffman, E, *Asylums: Essays on the Social Condition of Mental Patients and Other Inmates* (New York: Doubleday Books, 1961), pp 18-20, quoted in Griffiths, C T, and Verdun-Jones, S N, *supra* note 2, p 502.

19 Clemmer, D, *The Prison Community* (Boston: Christopher Publishing Company, 1940), quoted in Griffiths, C T, and Verdun-Jones, S N, *supra* note 2, p 503.

20 Garfinkel, H, "Conditions of Successful Status Degradation Ceremonies", (1965) 61 *American Journal of Sociology* 420, quoted in Griffiths, C T, and Verdun-Jones, S N, *supra* note 2, p 503.

21 Sykes, G M, *Society of Captives – A Study of a Maximum Security Institution* (Princeton: Princeton University Press, 1958), quoted in Griffiths, C T, and Verdun-Jones, S N, *supra* note 2, p 504.

22 *Supra* note 2, p 503.

23 Martinson, R, "What Works? – Question and Answers about Prison Reform", (1974) 35 *The Public Interest* 22, p 25.

24 Gendreau, P, and Ross, B, "Effective Correctional Treatment: Bibliography for Cynics", (1979) 25 *Crime and Delinquency* 464, quoted in Griffiths, C T, and Verdun-Jones, S N, *supra* note 2, p 518.

25 *Ibid.*

Antagonists of rehabilitation state that reformation acts only as a façade to mask the harsh reality of doing time, thus softening and humanising the prison environment.[26] In reality, it undermines justice, punishment, autonomy and security.[27] Rehabilitation is conducted through controlling and assisting an inmate. Individualised treatment requires discretion, which lends itself to inconsistency and unfairness. Each correctional officer may have different philosophies and styles of decision-making.[28] This will lead to an unjust situation whereby offenders who committed similar wrongs whilst coming from a different a social milieu with a different personality might be treated differently.

Rehabilitation is also criticised for being paternalistic and authoritative.[29] Success in reformation is often associated with the voluntary participation of an inmate. This belief is reflected in the voluntary nature of most of the correction programme currently in place. This all is theoretically sound since what is the use of rehabilitation if an inmate is coerced into participation, which can lead to cynicism and resistance?[30] Logic, however, speaks differently.

Under the reformative model, the relationship that exists between a correctional officer and an inmate is no stranger to human nature. It is one between a parent and a child. Alike parenting, an officer is acting as a parent or a guardian of an inmate. But unlike a child, an inmate has flourished into a human being with his own preferences, thoughts and beliefs.[31] When an officer recommends a certain treatment programme for an inmate, he is acting as a parent who commends full authority towards an inmate. Thus, he is effectively coercing, instead of encouraging, an inmate into submission. Logic speaks that a child will not challenge his parents because they feed him. A parallel exists between a correctional officer and an inmate. Giving in to the fear of possible negative consequence flowing from a refusal to participate in a programme, an inmate will not object to an officer's recommendation, even if it is against his wish to participate.[32] As it is very difficult to make a treatment fully voluntary, the success of rehabilitation is questionable. In addition, coercion, no matter how minimal or well intended, is a blatant disregard of the autonomy of an individual. It is an ironic outcome considering the goal of rehabilitation is to teach inmates to think rationally and objectively and to take responsibility themselves.

Other arguments against reformation include the leniency of treatments, the faulty theoretical basis of rehabilitation and the case of a chronic petty offender. Rehabilitative treatment is based on the theory of "medical delusion"[33]. Crime is perceived as a "disease"[34] and its causes

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26 Gaes, G G, and Logan, C H, "Meta-Analysis and the Rehabilitation of Punishment", (1993) 10 *Justice Quarterly* 245, p 256.

27 *Ibid*, p 255.

28 The Solicitor General of Canada had criticized that the different philosophies and styles of decision making of parole officers had led to inconsistent treatment of parolees. A similar analogy can be drawn with correctional officers across different jurisdictions, including Hong Kong. See Solicitor General of Canada, *Solicitor General's Study of Conditional Release: Report of the Working Group* (Ottawa: Supply and Services Canada, 1981).

29 *Supra* note 26, p 258; and Morris, H, "A Paternalistic Theory of Punishment", (1981) 18 *American Philosophical Quarterly* 154.

30 *Supra* note 26, p 256.

31 Morris, H, "A Paternalistic Theory of Punishment", (1981) 18 *American Philosophical Quarterly* 154, p 155.

32 *Supra* note 26, p 259.

33 Gottfredson, M R, "Treatment Destruction Techniques", (1979) 16 *Journal of Research in Crime and Delinquency* 39, p 51.

34 *Supra* note 23, p 49.

are classified as "pathological"[35]. Thus, criminals are considered to be sick and law abiders healthy. Critics have pointed out that all human beings are capable of committing crimes, and thus the theoretical basis of rehabilitation is unsound.[36] In addition, it has been suggested that rehabilitation does not work on all types of offenders, for example, in the case of "chronic petty offenders"[37]. A chronic petty offender is one who commits petty offences and receives rehabilitative treatments over and over again. Nonetheless, he continues to commit offences. This category of offender is considered to be a social retard and "nothing works" on him.

It is a fact of life that a majority of the inmates serving sentences in institutions will be released someday. It is safe to assume that some, however minimal the number, of the inmates will return to a career of crime upon release, therefore, jeopardising the security of the society. In response to Martinson's claim of "nothing works", protagonists of rehabilitation believe that "some thing works" as long as appropriate treatments are administered to reduce recidivism, thus safeguarding the security of the society.

In variance with the antagonists' view that differential treatments of offenders yield injustice, differential treatments are perceived as central to the idea of reformation.[38] It has been identified that the success of rehabilitation is pronounced by three principles: the risk, need and responsivity principles.[39] The risk principle suggests that delivery of services to an offender with a higher risk of recidivism is more effective than a lower risk offender. Correctional programmes, in order to be effective, should focus on treating the criminogenic needs of an inmate. Criminogenic needs are identified as causes of criminal behaviour that can be modified over time, for example, an offender's attitude towards employment, peers, authority, familial relationships and substance abuse.[40] The responsivity principle dictates that the style and mode of treatment must be matched to the personality and learning style of the offender.[41] In order to deliver services to higher risk offenders, to target on criminogenic needs and to match the attitudes of offenders with the programme, it is important to deal with each offender differently to ensure the effectiveness of the treatment programmes.

The three principles adopted by protagonists of rehabilitation reflect that some offenders are more amenable to treatment than the others. It follows that not all offenders can be treated and transformed into law-abiding citizens. Nonetheless, the three principles, coupled with recidivism rates provide unique benchmarks to measure the success or failure of a correctional service. As mentioned earlier, rehabilitation is implemented through reintegration, internalisation and reintegrative shaming. It is worthwhile to note that the risk, need and responsivity principles play a role in all of the three approaches towards rehabilitation.

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35 Weiler, P, *Studies of Sentencing* (Ottawa: Law Reform Commission of Canada, 1974), p 124, quoted in Gottfredson, M R, *supra* note 33, p 47.

36 *Ibid.*

37 Miller, F P, "The Reintegration of the Offender into the Community: Some Hopes and Some Fears", quoted in Perlstein, G R, and Phelps, T R (eds.), *Alternatives to Prison: Community-Based Corrections* (California: Goodyear Publishing Company, 1975), p 190.

38 Voorphis, P V, "Correctional Effectiveness: The High Cost of Ignoring Success", (1987) 51 *Federal Probation* 56, p 57.

39 Andrews, D A, et al, "Does Correctional Treatment Work? A Clinically Relevant and Psychologically Informed Meta-Analysis", (1990) 28 *Criminology* 369, p 374.

40 Gendreau, P, et al, "Intensive Rehabilitation Supervision: The Next Generation in Community Corrections?", (1994) 58 *Federal Probation* 72, p 75.

41 *Supra* note 39, p 42.

B. Reintegration & Internalisation

Reintegration, as the word speaks for itself, depicts the attempts made to reintegrate an ex-offender into the society as a normal and law-abiding citizen. An inmate, upon release, will find himself circumscribed by a whole chain of problems, such as relationships issues, and employment difficulties.[42] Without reintegrative efforts, a discharged inmate, when confronted by problems, may opt for an easy and familiar way out: return to a criminal career. Reintegration and internalisation takes an inmate through two stages: pre-release programmes, and sound supervision and assistance after release.[43] For the purposes of this paper, pre-release programmes will be focused upon.

Pre-release prison programmes focus on three specified areas: cognitive and interpersonal skills training, education and vocational training, and special intervention programmes. One of the many temptations confronting a released inmate is the desire to commit previous offences. Cognitive skills training addresses the criminogenic needs of an offender by teaching him to think rationally and objectively and to accept responsibility for his behaviour. Therefore, when an offender is released into the society, he will be able "to prejudge [his] actions and to determine what the long-term consequences of those actions will mean to the others and himself"[44].

As mentioned earlier, the pains of imprisonment may lead to the adoption of anti-social attitude which is identified by many as a cause of crime. And it becomes essential to equip an offender with interpersonal skills to allow him to communicate with the society, especially friends and families, after release. In the United Kingdom, a report by the National Association for the Care and Resettlement of Offenders noted that ex-offenders who have strong and supportive family ties are more likely to lead to law-abiding lives after release.[45]

Education and employment play a significant part in the success of reintegrating an offender. It has been expressed that an unemployed offender is a probable recidivist. Indeed, researches have shown that "criminality [is] a functional substitute of a legitimate career"[46]. In light of this, a key aspect of reintegration is to equip offenders with job skills. Prison industries have been introduced as a means to provide practical work experience for inmates as well as to instill work discipline before release. In order to maximise reintegrative efforts, an inmate is carefully matched with a job based on his ability, echoing the principle of responsivity.[47]

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42 Ali, B, "New Trends in the Re-integration of Discharged Prisoners: An International Perspective", *Pacific Rim Regional Conference Proceedings on Re-integration of Discharged Prisoners: Rehabilitation, Employment & Prevention of Recidivism* (Hong Kong: The Society for the Rehabilitation of Offenders, 1997), ch 7-1; and Chan, P, "Equal Opportunities for Discharged Prisoners", *Pacific Rim Regional Conference Proceedings on Re-integration of Discharged Prisoners: Rehabilitation, Employment & Prevention of Recidivism* (Hong Kong: The Society for the Rehabilitation of Offenders, 1997), ch 8-8.

43 Ali, B, *supra* note 42, ch 7-13.

44 Anderson, M, "Clearer Thinking: New Cognitive Skills Program Offers Major Building Block to Offender Reintegration", (September 1990) *Let's Talk* 4, quoted in Griffiths, C T, and Verdun-Jones, S N, *supra* note 2, p 513.

45 *Supra* note 43, ch 7-2.

46 Tewksbury, R A, and Vito, G F, "Improving the Educational Skills of Jail Inmates: Preliminary Program Findings", (1994) 58 *Federal Probation* 55, quoted in Ali, B, *supra* note 42, ch 7-3.

47 Pownall, G A, "Employment Problems of Released Prisoners", quoted in Perlstein, G R, and Phelps, T R (eds.), *Alternatives to Prison: Community-Based Corrections* (California: Goodyear Publishing Company, 1975), p 246.

In recent years, increased attention has been given to specialised intervention programmes, aiming at curbing dependence on drugs. Researches indicate that there is a strong affiliation between drug use and crime.[48] With decreasing consumption of drugs, the chances of being arrested for crimes decline significantly. Indeed, drug users are classified as high-risk offenders who can be rehabilitated if the appropriate treatment is given.

C. Reintegrative Shaming

Unlike other efforts towards rehabilitation, which embarks on an offender-oriented approach, reintegrative shaming involves a victim in addressing the rehabilitative needs of an offender. The principle of reintegrative shaming stems from restorative justice. In essence, restorative justice is the compromise of differences between a victim and an offender.[49] As a result of a criminal act, a victim will suffer from disempowerment, loss of dignity and insecurity. On the other hand, a loss of dignity will also be inflicted upon an offender through the shame that comes with an arrest.

Reintegrative shaming attempts to address the underlying injustice of a crime and restores what has been lost through a series of victim-offender reconciliation meetings,[50] where forgiveness can be cultured and compensation be agreed upon. Unlike disintegrative shaming or stigmatization, which involves treating an offender as a social outcast, reintegrative shaming involves a strong disapproval of a criminal act while treating an offender as essentially good.[51] As a case study conducted inside the Hong Kong penitentiary system shows, one of the causes in the failure of rehabilitation is an offender's occupation of shame.[52] Through the riddance of shame, an offender will likely be free of the burden of his criminal conduct and be reintegrated successfully into the society.

In sum, rehabilitation can be achieved by pursuing an offender-oriented approach, through reintegration and internalisation treatments, or alternatively a victim-oriented approach, through reintegrative shaming. As indicated earlier, the success of reformation depends on the satisfaction of the principles of risk, needs and responsivity. It is essential that all three of the approaches be taken into account while designing treatment programmes.

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48 *Supra* note 2, p 515; and Dembo, R, *Drugs and Crime* (USA: University Press of America, 1992), quoted in Chan, S, "Ex-Offenders with Drug-Crime Lifestyle and Their Rehabilitation", *Pacific Rim Regional Conference Proceedings on Re-integration of Discharged Prisoners: Rehabilitation, Employment & Prevention of Recidivism* (Hong Kong: The Society for the Rehabilitation of Offenders, 1997), ch 9-8.

49 Braithwaite, J, "Restorative Justice and Reintegrative Shaming", *Pacific Rim Regional Conference Proceedings on Re-integration of Discharged Prisoners: Rehabilitation, Employment & Prevention of Recidivism* (Hong Kong: The Society for the Rehabilitation of Offenders, 1997), ch 7-30.

50 *Supra* note 43, ch 7-10.

51 *Supra* note 49, ch 7-29.

52 Interview conducted with prisoner Lau who was sentenced to life imprisonment for murder and who rejected visits from friends and family. See Yiu, K, *supra* note 3, p 43.

IV. Rehabilitative Programmes provided by the Hong Kong Correctional Services Department

As discussed earlier, the penal system in Hong Kong has witnessed different stages of development in the treatment of prisoners. Since 1982, the penal philosophy is one of rehabilitation or reintegration, downplaying punishment or deterrence. It is perceived by the Commissioner of the Department that discipline behind bars is the means to achieve the rehabilitative end.[53] In a system where control and assistance are emphasised, a "humane confinement" providing a framework for education, work, psychological services and rehabilitation can be established. Unheard of in the field of criminology, the Commissioner supported rehabilitation through the theory of a "Chinese personality"[54]. He held that with a Confucian ethical background, which respected and obeyed hierarchy, Chinese inmates would succumb to authority and behave properly. The imposition of a "Chinese personality" as a ground for the provision of education, work, psychological services and rehabilitation behind bar seems to be sound, if the Commissioner had addressed Confucianism on its whole rather than focusing on a meager part of it.

Obviously, it is logical to borrow from Confucianism to justify the adoption of the rehabilitative goal since 95 percent of the inmates are ethnically Chinese. However, it is essential to point to the other side of the coin. Generally, Confucianists believed that people should be taught what was right and wrong and inculcated with the *li*. Thus, people would behave properly according to their conscience and not because of the threat of punishment.[55] This will have been a much stronger basis for rehabilitation, which transgresses into treating inmates humanely with the *li*. In sum, the presentation of a "Chinese personality" or more appropriately, Confucianism, to lay out the framework for humane confinement has demonstrated the Department's determination on embarking on a reintegrative approach, thus injecting a social work element into the system.

Currently, the Department operates twenty-four correctional institutions across Hong Kong, which include prisons, psychiatric centre, training centres, detention centres, drug addiction treatment centres and half way houses.[56] The rules regarding the management of prison is laid down in the *Prison Ordinance* (Cap 234) and the *Prison Rules* (Cap 234 sub. leg.). Other institutions are established under the *Training Centres Ordinance* (Cap 280), the *Detention Centres Ordinance* (Cap 239), and the *Drug Addiction Treatment Centres Ordinance* (Cap 244). It is interesting to note that of all the ordinances that are relevant to the correctional services, only the *Training Centres Ordinance* and the *Drug Addiction Treatment Centres Ordinance* make express reference to the "reformation" or "rehabilitation" of offenders in their Preambles.

Different rehabilitative programmes are offered in different institutions, concurring with the principles of need and responsivity mentioned earlier. For example, young offenders confined in a training centre will have different needs from an adult offender serving a life sentence in a prison, justifying the different styles of treatments towards the two groups. Indeed, since the beginning of the century, young offenders have always been the focus of rehabilitative

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53 *Supra* note 1, p 52.

54 *Ibid.*

55 Chen, A, *An Introduction to the Legal System of the People's Republic of China* (Hong Kong: Butterworths Asia, 1998), p 8.

56 Hong Kong Correctional Services Department, "Hong Kong Correctional Services Department", 20 April 2002, at http://www.correctionalservices.gov.hk/about_us/index.html.

programmes.[57] For the purposes of the paper, however, rehabilitative programmes afforded to adult prisoners will be focused upon.

A. Cognitive Skills Training

The responsibility of the Psychology Unit in the Department is premised upon the principle of need. Various literatures suggest that if a treatment focuses on the non-criminogenic needs of an offender, for example, anxiety, depression and loss of self-esteem, it will not reduce an offender's propensity to crime.[58] Therefore, treatments offered by the Unit deal only with the criminogenic needs of an offender. Through psychological interventions, it is hoped that an offender will accept responsibility for his criminal conduct, cope with pressures arising out of it and refrain from committing a crime in the future.[59] In the Canadian jurisdiction, life skills training, which is of a broadly similar nature to psychological interventions in Hong Kong, is found to have produced positive impacts upon inmates and has increased the likelihood of full reintegration upon release.[60]

B. Education

"Academic education is still non-existent for adult prisoners"[61]. This blunt statement was made by Commissioner J.T. Burdett in 1951. Back in the 1950s, educational programmes were directed solely towards young offenders, perhaps due to a misconception that the chance of reforming an adult offender is slim.[62] However, as the penal philosophies evolved overtime, the educational opportunities afforded to adult prisoners increase.

Nowadays, courses such as accounting, bookkeeping, English and design, are made available to adult offenders. Qualified teachers are employed by the Department to conduct evening classes inside the institution which adult offenders enlist voluntarily.[63] Alternatively, offenders can opt for self-studying courses or distant learning programmes. The advantage carried by participation in educational programmes is two-fold. First, valuable knowledge and useful skills will assist an offender in reintegrating into society. Second, educational achievements will be taken into account when the Long-term Prison Sentences Review Board reviews an inmate's sentence.[64] This practice highlights the potential of educational programmes in rehabilitating an offender.

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57 *Supra* note 3, p 1.

58 *Supra* note 40, p 76.

59 *Supra* note 1, p 98.

60 Marshall, W L, *Evaluation of Life Skills Training for Federal Penitentiary Inmates* (Ottawa: Corrections Branch, Ministry of the Solicitor General, 1989), quoted in Griffiths, C T, and Verdun-Jones, S N, *supra* note 2, p 513.

61 *Supra* note 1, p 110.

62 *Supra* note 3, p 1.

63 Hong Kong Correctional Services Department, "Education", 22 April 2002, at http://www.correctionalservices.gov.hk/rehabilitation/index7.html.

64 Section 12(3), *Long Term Prison Sentences Review Ordinance* (Cap 524).

C. Vocational Training

Work has always been a part of life behind bars since the emergence of Victorian Prison. Unlike the 19th century where work was devised to keep inmates occupied and exhausted for security reasons,[65] the objective of the modern era is not merely to kill time.[66] Through various workshops and mandatory working hours,[67] it is hoped that offenders will acquire work habits and job skills that will be of assistance upon release.

In 1977, Correctional Services Industries ("CSI") was introduced to incorporate a wide variety of industries into the institutional setting. Some of the industries include silk screening, carpentry, fiberglass, bookbinding, metal making, and laundry. Since the primary concern of the CSI is to provide valuable work experiences, the products that are being manufactured are constantly updated according to market demand. After all, equipping inmates with outdated job skills, such as the making of brooms and mailbags, is not going to help inmates to secure employments after release.

D. Specialised Intervention Programmes

In ensuring the successful rehabilitation of offenders and in attending to the principle of need, attention is given to the specialised treatment needs of certain offenders. These include sex offenders, mentally disordered offenders and drug users. Sex offenders and mentally disordered offenders are sent to Siu Lam Psychiatric Centre, where psychiatric programmes and counselling sessions will be tailored to the needs of these mentally troubled offenders. For example, the Psychological Care Unit organises programmes to cure men with a history of sexually molesting children while the Vulnerable Patients Unit provides assistance to transvestites.[68] In addition, most of the officers working inside Siu Lam have received special psychiatric trainings to maximize the effectiveness of treatment programmes.[69]

In 1998, seven out of every ten inmates were involved in drugs.[70] The strong link between criminality and dependence on drugs dictates that detoxification must be incorporated as a reintegrative measure. Currently, there are two Drug Addiction Treatment Centres in Hong Kong. The restoration of health and the uprooting of psychological and emotional dependence on drugs are the two objectives in rehabilitating drug addicts.[71] These are achieved through medical treatment, physical training, work therapy, and counselling. Similar to the staff in Siu Lam, doctors and correctional officers working in a Drug Addiction Treatment Centre have received special training to ensure the quality of the treatments. As mentioned earlier, rehabilitation begins with an institutional sentence and continues after release. Therefore, a statutory twelve-month supervision is imposed on an inmate to ensure he does not resort to drugs upon release.[72]

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65 *Supra* note 1, p 10.

66 *Supra* note 1, p 136.

67 Adult offenders work eight hours a day and six days a week. See Lui, P, and Sinclair, K, *supra* note 1, p 136.

68 *Supra* note 1, p 57.

69 Characteristics of correctional officers are found to have an impact upon the effectiveness of rehabilitative programs. See Andrews, D A, et al, *supra* note 39, p 372.

70 *Supra* note 1, p 103.

71 *Supra* note 3, p 17.

72 Section 5(1), *Drug Addiction Centre Ordinance* (Cap 244).

E. Contacts with the Outside

One of the pains associated with incarceration is loneliness. This may lead to the development of anti-social behaviour, which is fatal to reintegration. Therefore, familial visits are encouraged by the Correctional Services Department, despite that restrictions upon the frequency, length and characters of prison visits are in place. Prisoners are generally permitted two thirty-minute visits per month with up to three people at a time.[73] Open and close visits are both used. A close visit is conducted with both parties sitting on either side of a glass or a plexiglass screen. Conversation is conducted through telephone and an intercom system. An open visit takes place in a room equipped with a long table with parties sitting on either side of the table speaking to each other directly. Limited physical contact, such as the shaking of hands, is allowed.[74]

In addition, various voluntary organisations, such as the Prisoners' Friends Society, the Hong Kong Christian Kun Sun Association and the Lotus Branch,[75] pay regular visits to inmates who lack outside contacts. The aim of these volunteer agencies is to offer social connections as well as to care for the spiritual, psychological and physical needs of inmates. Unlike a correctional officer who exercises authority over inmates,[76] volunteers act as friends. Development of close and personal relationships, characterised by mutual trust, between the volunteers and inmates become possible. Through the maintenance of contact with the world beyond bars, it is hoped that anti-social attitudes can be reduced, thus increasing the likelihood of reintegration.

In sum, the rehabilitative approach adopted by the Correctional Services Department is one of reintegration and internalisation. Cognitive skills training, education, vocational training, specialised intervention programmes and prison visits, are the means to achieve a rehabilitative end. However, the Department's success in achieving this end is doubtful, echoing Martinson's claim that "nothing works" in reforming offenders.

V. Evaluation of the Rehabilitation Programmes

As mentioned earlier, most of the ordinances that deal with institutional administrations do not include the words "reformation" or "rehabilitation" in their preambles. For example, the *Prison Ordinance* (Cap. 234) lays out the conditions of confinement in details without any references to the rehabilitative programmes. Without any legislative attempt to incorporate the rehabilitative end to the correctional services, it is not surprising that the Correctional Services Department retains its basic responsibility as a custodian of dangerous elements to the society.[77] At the same time, the Department strives to bring the rehabilitative end into the system. But is it possible to hold an inmate under physical custody while attempting to reform him into a productive member to the society?

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73 Prison Rule No 48.

74 Human Rights Watch, Hong Kong, "Prison Conditions in 1997", 30 April 2002, at http://www.hkhrm.org.hk/english/reports/prison.html.

75 *Supra* note 1, p 144.

76 *Supra* note 3, p 44.

77 *Supra* note 1, p 52.

A. Measuring Programme Effectiveness

The best indicator to the success of treatment is recidivism rates. Martinson described them as "a phenomenon which reflects most directly how well our present treatment programmes are performing the task of rehabilitation"[78]. In definition, recidivism rates are the rates of return of released offenders back into an institution.

However, it is important to note that recidivism rates do not provide an accurate measure of programme effectiveness. Several shortcomings exist.[79] First, despite the central focus on reforming an inmate into a law-abiding citizen, other ends to rehabilitative treatments exist which includes an increased level of education or acquisition of a vocational skill. Focusing on the violation of law as a measure of success undermines other aims to the treatment programmes. Second, a released inmate may have returned to a criminal career without being detected by the authorities. Third, an inmate's success in rehabilitation depends on a variety of factors, for example, family and community support, other than participation in the programmes. Fourth, the fact that inmates who participated in a programme return to prison is not conclusive evidence that the programme is ineffective.

B. Recidivist Trend in Hong Kong

The Correctional Services Department issues statistic tables annually up until 1999. They provide useful statistical information regarding all aspects of the institutions, for example, number of receptions into various institutions, the age and gender of offenders, and the length of sentences. Specifically, they provide numbers on the receptions of inmates with previous institutional sentences. Based on the information provided, two observations can be made.

1. From the year 1948 to 1953, recidivism rates were on an increase.[80]
2. From the year 1994 to 1998, recidivism rates were on an increase except in the year of 1998 when rates dropped by 3%.[81]

The increase in recidivism rates in the 1950s did not come as a surprise. As discussed in the first section, the penal philosophy in the 1950s was dominated by a deterrence approach. It is true that some progress took place with the aim to make the penitentiary system more humanistic, but little was done to cater for the rehabilitative needs of the inmates. As the rehabilitative model was introduced in the 1980s with the aim of reforming inmates, one would expect to see a decline in recidivism rates. In reality, however, it is the opposite that is true.

Despite the fact that recidivism rates cannot be entirely relied upon, and perhaps the economic turmoil in recent years have downplayed the effectiveness of rehabilitative treatments, the statistical results contain a subliminal message. As more resources are pooled into the Correctional Services Department, the quality of reformative treatments is supposed to be better, thus reducing recidivism rates. If the reverse is true, something must not be right with the current system.

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78 *Supra* note 23, p 24.

79 *Supra* note 2, p 519.

80 The recidivism rate in 1949 was 14.9%; 1950 was 20.1%; 1951 was 23.6%; 1952 was 39.6%; 1953 was 42.7%. See *Annual Departmental Reports of the Prison Department 1952, 1953 and 1954.*

81 The recidivism rate in 1994 was 51%; 1995 was 53%; 1996 was 56%; 1997 was 56%; 1998 was 53%; 1999 was 53% (based on male prisoners). See *Annual Statistical Tables of the Hong Kong Correctional Services Department 1994, 1995, 1996, 1997, 1998 and 1999.*

VI. Barriers to the Effectiveness of Rehabilitative Efforts

It remains to be true that the outcome of rehabilitative treatments depends on a variety of factors, some of which are beyond the control of the Correctional Services Department. For example, in the case of employer's discrimination or the lack of family support, there is very little the Department can do, except for the launching of television campaigns. Studies indicate that the environment to which an inmate returns has more impact on his behaviour than institutional treatments.[82] Understandably, the Department cannot be made accountable for the increase in recidivism rates. However, after observing the current treatments in place in Hong Kong, it is clear that more can be done to realize the rehabilitative end.

A. Education

One of the means employed by the Department to rehabilitate offenders is education. The case is apparent in young offenders where they have to spend half of a day in classes. Work hours will be matched with their periods of study accordingly.[83] The situation is different for adult offenders.

Under *Prison Rule* No 38, every prisoner is required to engage in useful work for eight hours a day. Furthermore, *Rule* No 43 says that "the hours of labour shall not be less than six nor more than ten daily". Generally, adult offenders work eight hours a day and six days a week.[84] In effect, if an inmate wishes to pursue academic studies, he has to do so after working hours. After a day of work, it is inevitable that inmates will be flooded with fatique, thus losing interest to learn. Studies have shown that education is pivotal to an inmate's re-entry into society.[85] Inevitably, a stipulation of hours of work in the *Prison Rules* presents an obstacle in the rehabilitative effects of education.[86]

If the benefit of educational programmes is to be preserved, it is necessary for the Department to amend its *Prison Rules*. A flexible approach towards the hours of work requirement is necessary. In a system that emphasises individualised treatment of inmates, it is essential to bear the needs of inmates in mind. The variance in the Departments' treatments between young and adult offenders is based on an assumption that all young offenders will benefit from educational programmes while adult offenders will most likely benefit from work programmes instead. In reality, it can be the case that an illiterate adult offender, who lacks elementary education, needs a basic education more so than a younger offender who has undergone secondary education. One of the factors that dictate the success of rehabilitative treatments is the "need principle". An inflexible treatment of adult offenders, namely, without taking into account the educational need of an inmate, is a blatant disregard of the need principle! Such practice will lead to decreased effectiveness of educational programmes and naturally, a waste of financial resources.

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82 *Supra* note 43, ch 7-2.
83 Prison Rule No 38A.
84 *Supra* note 1, p 136.
85 *Supra* note 2, p 515.
86 *Supra* note 3, p 40.

B. Vocational Training

Security has always been an overall imperative to the Correctional Services Department. Activities and work equipment, which are perceived to present a danger to security of institutions, are strictly banned.[87] In fact, the Correctional Services Industries (CSI) concedes that in deciding the nature of work programmes, security plays a paramount role over quality and profit.[88] Against this background, inmates are expected to acquire work skills that will help them in looking for employments in the future. The result is a failure to provide work experiences comparable to those found in the market.

In the last decade, the economy in Hong Kong has switched from a labour-intensive manufacturing economy to one that is premised upon the provision of services. However, the CSI has failed to pay regards to the change. The thrust of the prison industries is based on labour-intensive industries, such as carpentry, toy making, tailoring, knitwear, metal fabrication, and uniform and shoe making. Almost no vocational training programmes[89] are provided for in the services sector, which occupies 44% of the entire workforce in any given year.[90]

Another weakness to the vocational programmes is that some programmes are associated with institutional maintenance. For example, in Ma Hang Prison, inmates spend their work hours tending rose gardens and greenhouse plants. In other institutions, beautification schemes are carried out to make the setting around the institutions more pleasant. Some inmates are even sent to attach coils of razor tape to the security fence of institutions.[91] These activities are not vocational trainings *per se*. They do not instill job skills and work disciplines towards inmates.

It is crucial for the vocational training programmes to establish a correlation with the reality. One measure to achieve this is through the location of prison industries outside an institution.[92] For example, the CSI can establish restaurants or canteens outside an institutional setting. Security will not present a barrier if a careful screening exercise of inmates is conducted.

Another measure to bring the prison industries closer to reality is to abolish labour-intensive industries and introduce modern automated equipment. After all, not a lot of toys or clothes are being hand-made in Hong Kong. Training in the operation of modern machineries will be more practical.

In other jurisdictions, institution industries enter into agreements with private companies to train and employ inmates in private ventures inside an institution.[93] Such practice helps the

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87 *Ibid*, p 38.

88 *Supra* note 1, p 135.

89 With the exception of Lai Sun Correctional Institution for young inmates which has a training restaurant to provide training in the hospitality industry. Similarly, in Lai Sun Correctional Institution for female inmates, courses are provided in the cosmetic and beauty care industry. See Lui, P, and Sinclair, K, *supra* note 1, pp 86, 152.

90 Hong Kong Trade Employment Council, "Number of Employment in Hong Kong", 1 May 2002, at http://stat.tdc.org.hk/monthly/emphk.htm.

91 *Supra* note 1, p 140.

92 *Supra* note 47, p 242.

93 In Canada, the federal prison industries corporation (CORCAN) is given authority to enter into agreements with private firms to train and employ inmates in private ventures located within an institution. See Griffiths, C T, and Verdun-Jones, S N, *supra* note 2, p 517.

inmates to foster a closer relationship with the market beyond bars. It also allows companies to share their expertise with the inmates, thus providing practical experiences comparable to the outside world. In Hong Kong, the CSI have not entered into any agreement with private companies in hiring inmates. In order to maximise the benefit of vocational training, it is essential to introduce the private sector into the institutional landscape.[94]

C. Correctional Officers

Correctional officers occupy a critical position in the correctional institutions. In addition to their normal role as custodians of the inmate population, they are also charged with the duty of addressing the needs and interests of inmates and lending a helping hand towards reformation. Despite their important role in rehabilitating offenders, they have been criticised as academically unqualified to render rehabilitation services.[95] This does not come as a surprise as the Staff Training Institute does not serve to train officers in social work or criminology. The bulk of the training programmes are targeted towards management, law, area of duty and discipline.[96] Laying down the discipline or rules inside an institution is a very different matter from addressing the personal needs or providing counselling towards offenders.

Shortage of correctional officers presents another blow towards rehabilitative efforts. Out of the 7,290 staff members, only 200 of them are engaged professionally in inmate rehabilitation duties.[97] As of December 2001, there are 10,651 inmates[98] behind bars. That comes to one rehabilitation officer to fifty-three inmates. Intensive rehabilitative programmes count on individualised treatments to inmates. However, with the current rehabilitation staff-inmate ratio, effectiveness of treatments is compromised.

Another obstacle towards the delivery of rehabilitative programmes is the preoccupation of suspicion among correctional officers and inmates. Officers work in a rotational system where their positions switch from time to time. This has made it hard for mutual trust to develop among inmates and officers.[99] The *Prison Rules* present another obstacle towards the formation of a close relationship. Under *Rule* No 239(h)(iii), an officer commits a disciplinary offence if he "allows any undue familiarity between a prisoner and himself".

Mutual trust is important in rehabilitative efforts. The lack of trust may make it hard to solicit inmates' participation in rehabilitative programmes. After all, if an inmate views an officer sceptically, he is unlikely to take an officer's advice wholeheartedly. Also if an officer is perceived as unapproachable, an inmate is unlikely to reflect his genuine needs to an officer, therefore, making it hard to tailor treatment programmes for him.

Reform to the correctional officer regime is necessary. It is important to afford intensive training in rehabilitation towards all correctional officers. The *Prison Rules* should be amended and formation of mutual trust be encouraged behind bars. It is true that the working personality of correctional officers as law enforcers, instead of counsellors, is hard to be eradicated. Nonetheless, correctional officers should be merited for their efforts in establishing truthful relationships with inmates. Alternatively, there can be a division of

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94 *Supra* note 47, p 243.
95 *Supra* note 3, p 42.
96 *Supra* note 1, p 40.
97 *Supra* note 3, p 42.
98 Hong Kong Correctional Services Department, "Population in Penal Institution as at 31 March 2002", 1 May 2002, at http://www.correctionalservices.gov.hk/publication/index4.html.
99 *Supra* note 3, p 42.

labour between correctional officers, those responsible for security matters behind bars, and rehabilitation officers, those responsible for the welfare of inmates. If this measure is in place, it is essential to raise the number of rehabilitation officers on a par with correctional officers. After all, a decrease in rehabilitation staff-inmate ratio is necessary for intensive rehabilitation to take place.[100]

D. Visits from Family

Family support is crucial to the effectiveness of reformative treatments. In Hong Kong, the Correctional Services Department serves to incorporate a familial element behind bars through allowing regular family visits. However, the *Prison Rules* have undermined the rehabilitative effect of family visits through instituting restrictions on the length, frequency and conditions of visits.

Despite it is hard to decide how long a visit has to be in order to be effective, two thirty-minute visits per month is not enough to address the familial needs of an inmate. Since a lot of correctional institutions are located in remote sites, relatives have to travel for hours to reach an institution. Inevitably, such practice burdens family ties for requiring relatives to spend so much time commuting for a merely half-hour visit.[101] Closed visits are also emotionally unsatisfactory for family members. The physical barrier and conversation over the telephone and intercom system makes the visit impersonal and stressful. The electronic monitoring and recording of meetings invades the privacy of inmates and their families.[102] In the case of open visits, a ban on intimate physical contact is strictly imposed. Even the most natural supportive gestures, such as hugs or kisses, are prohibited.[103]

The visiting system in Hong Kong is overwhelmingly conservative, which calls for amendment to the *Prison Rules*. In other jurisdictions, conjugal[104] and private family visits[105] are allowed. Such practice should be introduced in Hong Kong. After all, it is difficult and stressful to foster family ties and to share family issues openly when inmates cannot talk to their relatives in private.

E. Visits from Voluntary Agencies

Apart from visits from families, various voluntary associations also pay regular visits to the institutions. The aim of these visits is to provide a bridge between the society and institutions. But the physical setting of an institution, conditions on visits and the lack of communication between the voluntary agencies and the authorities curb the rehabilitative end.

The physical settings of correctional institutions are originally designed for the custody of

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100 *Ibid*, p 45.

101 *Supra* note 74.

102 Correspondence between the Hong Kong Human Rights Monitor and a superintendent of the Hong Kong Correctional Services Department revealed that in at least one maximum-security institution, conversations between inmates and their visitors are recorded. From April 1996 through March 1997, sixty-eight visits were recorded. See Human Rights Watch, Hong Kong, *supra* note 74.

103 Interview conducted by the Hong Kong Human Rights Monitor with a superintendent in Tai Tam Gap Institution. See Human Rights Watch, Hong Kong, *supra* note 74.

104 National Advisory Commission on Criminal Justice Standards and Goals, "Correctional Programs", quoted in Perlstein, G R, and Phelps, T R (eds.), *Alternatives to Prison: Community-Based Corrections*, (California: Goodyear Publishing Company, 1975), p 89.

105 *Supra* note 17, ch 8-41.

offenders.[106] Naturally, little regard was paid to the purpose of offender rehabilitation. For example, individual chambers for counselling or rooms for religious gatherings are lacking. The limits on facilities restrict the running of activities in multi-functional hall, which are also used as a sports hall, lecture room, associational room and gathering hall. Therefore, it is impossible for an organization to reserve a venue for a long period of time to provide services.[107] It follows that construction of rooms specially adapted for various purposes are necessary.

Prison Rule No 48 stipulates that "no persons, other than the relatives and friends of a prisoner, shall be allowed to visit". Accordingly, members from voluntary associations, such as Prisoner's Friends Society, can only visit inmates who lack outside contacts. If an inmate receives one visit, no volunteers are allowed to approach him.[108] This practice fails to recognise that familial support and community support are two different matters. In order for successful reintegration into the society, both familial and community supports are just as important. Allowing access to one type of support while denying the other is a blow to rehabilitative efforts.

As discussed earlier, inmates prefer discussing their problems with members of voluntary agencies to officers because of the absence of role conflicts. The rehabilitative roles played by volunteers cannot be ignored, and a better communication network between the Department and the voluntary agencies will definitely assist in reforming inmates. In addition, it is unlikely that these volunteers, being members of the public, are familiar with institutional subculture.[109] It is essential to introduce the volunteers to the institutional operation, which can be achieved through talks or tailor-made courses[110] given by front line correctional officers. Such practice will also facilitate communications between the Department and voluntary agencies.

F. Reintegrative Shaming

As discussed earlier, there are two approaches to rehabilitation: reintegration and internalisation, and reintegrative shaming. So far, in Hong Kong, rehabilitative treatment is a matter between a correctional officer and an inmate; a victim plays no role in the process. The aim of treatment programmes is to correct the criminogenic mentalities of an inmate rather than correcting the harms done upon a victim. Through premising upon an offender-oriented approach, the Correctional Services Department has mistakenly left out the potential impact a victim can bring towards rehabilitating an offender.

In the Canadian criminal justice system, victim-offender reconciliation programmes (VORPs) have emerged as a means to mediate and to effect reconciliation and understanding between a victim and an offender.[111] Volunteers from various non-profit organisations act as mediators. The essence of rehabilitation is a normal re-entry into the society. Involving the community in the process increases the public's awareness and possibly acceptance of rehabilitated

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106 Most of the institutions were built in the 1970s. Some could be traced back to the 1930s. Designs of prisons are matched with the penal philosophies in place. See Yiu, K, *supra* note 3, p 41.

107 *Supra* note 3, p 41.

108 *Supra* note 74.

109 In previous years, volunteers were found to stop paying visits to institutions due to misunderstandings. See Yiu, K, *supra* note 3, p 45.

110 *Supra* note 3, p 45.

111 *Supra* note 2, p 38.

offenders.[112] In an atmosphere where both condemnation and forgiveness are encouraged, rehabilitative effect is instigated.

There is a strong case for reintegrative shaming, by means of VORPs for minor offences,[113] to be introduced to Hong Kong. In a criminal conduct, two parties are affected: a victim and an offender. Logically, the role played by correctional officers in mitigating conflicts arising out of a crime is minimal since they are not personally affected. Without involving all of the parties who are directly affected by a misdeed, it is impossible for an inmate to confront the shame and accept responsibility for his act. Besides, no treatment programme is going to work if he constantly lives under the shadow of his past misdeed!

G. Correlation between the Barriers and Recidivism Rates

In sum, the barriers discussed above plagued all facets of rehabilitative treatments undertaken by the Correctional Services Department. The Department even conceded its failure in rehabilitating offenders in the Report of the Working Party on Rehabilitation Services for Offenders.[114] So does this failure have anything to do with the increase in recidivism rates? The answer is both in the affirmative and negative.

Obviously, if there are problems in the reformative programmes, the offenders are not going to benefit from the treatments. As a result, they are not going to be rehabilitated. On the other hand, there is no guarantee that even if all the problems in the programmes are wiped out, the offenders can be rehabilitated. This reflects the eternal debate between "nothing works" and "something works".

VII. Alternative to Incarceration: Privatisation of Institutions

Over the past decade, there has been a movement towards the privatisation of institutions in other jurisdictions. In the United States, privatisation of institutions took place in response to the increase in the inmate population, which called for the construction of new detention facilities. If the state wanted to build a new infrastructure, it would be necessary to go through the government procurement procedure, which is a lengthy process.[115] On the other hand, financially independent private contractors had the power and capital to build an institution expeditiously. As rent payments of the "private institution" would be paid out of a state's operating budget instead of accounted as a capital expenditure, the privatisation of institutions is perceived as a "creative financing" technique in ensuring the supply of bed spaces meet the demand of the inmate population without delay.[116] In addition, in the United Kingdom, privatisation of institution was also perceived to serve as a "springboard for the development of a truly rehabilitation programme"[117].

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112 *Ibid*, p 39.

113 In Canada, Victim-Offender Reconciliation (VORP) is conducted at a pre-sentencing level for minor offences. See Griffiths, C T, and Verdun-Jones, S N, *supra* note 2, p 38.

114 Hong Kong Correctional Services Department, *Report of the Working Party on Rehabilitation Services for Offenders* (Hong Kong: Correctional Services Department, 1994), quoted in Yiu, K, *supra* note 3, p 14.

115 McDonald, D C, "Public Imprisonment by Private Means: The Re-emergence of Private Prisons and Jails in the United States, the United Kingdom, and Australia", quoted in Adams, Kenneth, et al (eds.), *Incarcerating Criminals: Prisons and Jails in Social and Organizational Context* (New York: Oxford University Press, 1998), p 269.

116 *Ibid*, p 271.

117 *Ibid*, p 272.

A privatisation scheme typically involves a government contracting out the administration and the construction of a facility to a private entrepreneur. Several advantages are meted out by a contracting mechanism. First, competition amongst various private entrepreneurs with the risk of being replaced put pressure on private operators to consider the proper rules to adopt behind bars to ensure compliance with the governmental standards. Second, contracting forces the government to establish specific and written performance standards and goals. Third, the delegation of administrative power to a private manager gives room to the adoption of a different approach towards institutional administration, rather than adhering to the traditional approach as a "stony face guard on a fixed post"[118]. In other words, private sector involvement can bring forth a desirable attitudinal change in the correctional officers; for example, a switch from the preoccupation with order and discipline to the attendance of the needs and desires of inmates, thus facilitating rehabilitation.

However, as cautioned by various criminologists, the cutting back of the public sector involvement in institutional administration has two complications. First, an open-minded government is needed for contracting out the operations in government-owned facilities.[119] Second, it is essential to devise a mechanism to ensure the welfare of the inmates is safeguarded.[120] Since the first complication has to do with the political value of the governing majority, it is beyond the scope of the current discussion. In regard to the second complication, the problem raised is not difficult to overcome. For example, the rights of the inmates can be built into a contract. Indeed, the issue of the welfare of the inmates subsists under the existing system involving the public sector in institutional administration. Therefore, the current safeguards, such as regular visits from the Justice of the Peace, can be simply carried into a privatisation scheme.

As outlined above, the Hong Kong Correctional Services Department is not performing well in carrying out the rehabilitation of offenders. Also, the problem of overcrowding in the institutional landscape of Hong Kong is as lively as its counterpart in the United States and the United Kingdom. Coupled with the advantage afforded by the involvement of the private sector and the ease in overcoming the complications, the privatisation of institutions presents a feasible alternative to ease overcrowding as well as to bring forth rehabilitation efficiently.

VIII. Conclusion

After conducting an elaborate tour on the rehabilitation of offenders in Hong Kong, it is worthwhile to summarise the observations made. Since the 1980s, the penal system has entered a rehabilitative stage. Compared with the beginning eras of rehabilitation, recidivism rates have remained more or less the same. Could it be the case that Hong Kong is trapped in a vicious cycle whereby no matter how much expenditure is afforded towards rehabilitative efforts, the recidivism rates will not change at all? Or could it be the failure on the part of the Correctional Services Department to implement rehabilitation effectively?

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118 Macinois, S, "Contract Management in Corrections: The Queensland Experiences", (paper presented at the Conference of the Private Sector and Community Involvement in the Criminal Justice System, 1992, Wellington), quoted in McDonald, D C, "Public Imprisonment by Private Means: The Re-emergence of Private Prisons and Jails in the United States, the United Kingdom, and Australia," in Adams, Kenneth, et al (eds.), *Incarcerating Criminals: Prisons and Jails in Social and Organizational Context* (New York: Oxford University Press, 1998), p 277.

119 *Supra* note 115, p 275.

120 *Ibid*, p 283.

No satisfactory answer can be given to the questions above. It could be the case that rehabilitation is merely a fiction that can never be realised, echoing Martinson's "nothing works" proposition. It could also be the case that if an authority has implemented rehabilitation wholeheartedly, it will have succeeded in bringing forth rehabilitation.

Whatever the answer may be, one thing is certain in Hong Kong. It has only been two decades since the criminal justice system has taken up a rehabilitative outlook. No research or evaluation has been conducted on the impact of rehabilitative treatments on recidivism rates. Perhaps the situation in Hong Kong is not as bleak as in the United States where Martinson's studies revealed "nothing works". But an authoritative statement regarding the success or failure of rehabilitation cannot possibly be made until the Correctional Services Department gives a wholehearted effort towards rehabilitating adult offenders.

In the short run, it is obviously worth a try to continue to spend valuable tax dollars on the rehabilitative programmes. After all, the Department has already expended money in introducing various programmes. It will be a waste if the efforts are discontinued without any statistics affirming or denouncing the effect of rehabilitation. In the long run, however, if no positive impact is felt, it may be wise to discontinue rehabilitation and resort to the ingenious invention of prison as a mode of punishment.

UNEQUAL EDUCATION OPPORTUNITIES
THE PLIGHT OF SOUTH ASIAN CHILDREN IN HONG KONG

ANN TIEN-YEN LUI

Theoretically speaking, a person's racial origin or nationality should not affect his or her eligibility to education under the current educational policy in Hong Kong. Children should be able to fully exercise their rights to education and should enjoy equal opportunities by getting a fair chance to go as far as their talents and abilities can take them. However, data and information show that school-aged children of South Asian origin in Hong Kong encounter hardships and discrimination in the field of education. There appears to be contradicting information, statistics and opinions from the government side and the NGO side. The problem is definitely much more serious than what the government is claiming. It is believed that the current legal framework in Hong Kong does not provide adequate protection for the ethnic minorities. South Asian children face challenges in application for admission, language, and in assimilating to the local society. This, in turn, further creates other problems, for example, unemployment. This paper calls for an urgent need to enact a domestic anti-racial discrimination legislation and to demand greater compliance with the international standards. In order to attain multiculturalism and alleviate the problem of racial discrimination, administrative measures, public education and legislation should be employed together, neither one by itself would be sufficient.

I. Introduction

> "In truth, the world has no choice but to pay heed and ensure a basic education of good quality to all children. Such is their due as one of the inherent human rights."[1]

Despite much denial, racial discrimination is a serious problem in Hong Kong, and there is at present no legislation to combat this problem. According to statistics and case studies collected by various non-governmental organizations (NGO's),[2] ethnic minorities in Hong Kong face discrimination in both the public and private sectors. Racial discrimination is practiced in an extensive spectrum of fields, including employment, accommodation, public health, immigration policy, provision of goods and services, provision of education and training etc.

It has been alleged that our education system is perpetuating discrimination and racism, causing the children of ethnic minorities to become chronic underachievers, thus continuing the inequality from generation to generation creating a cyclical trap.[3] This paper aims to investigate the hardships and discrimination encountered by children of South Asian origin in Hong Kong in the field of education, as well as the seriousness of the problem in order to illustrate the desirability of legislating against racial discrimination. In an effort to present the situation from different points of view, the information contained in this paper is mainly obtained through interviews with a Filipino student residing in Hong Kong, an Education Department officer, as well as a frontline social worker helping these South Asian youth. The most recent statistics on ethnic minorities collected by both the Government of the Hong Kong Special Administrative Region (HKSARG) and a NGO[4] are also compared and analyzed. In this paper, "South Asian children" refers to those aged 3-18 who are mainly of

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1 United Nations International Children's Emergency Fund (UNICEF), "Education for All", 1998.

2 This list includes, amongst others, Hong Kong Against Racial Discrimination (HARD), Hong Kong Human Rights Monitor (HKHRM), Society for Community Organization (SoCO), and Yang Memorial Methodist Social Service (YMMSS).

3 Hong Kong Human Rights Monitor, *Shadow Report to the United Nations Committee on the Elimination of Racial Discrimination Regarding the Report of the Hong Kong Special Administrative Region of the People's Republic of China* (Hong Kong: Hong Kong Human Rights Monitor, 2001).

4 Yang Memorial Methodist Social Service Yau Tsim District Outreaching Social Work Team.

Indian, Pakistani, Bangladeshi, Sri-Lankan Nepalese and Filipino ethnicity.[5]

II. "Discrimination in Education" – Definition

Although Hong Kong is not a party to the *Convention Against Discrimination in Education* adopted by the United Nations Educational, Scientific and Cultural Organization in 1960, the definition of "discrimination in education" in this *Convention* is the most comprehensive. This *Convention* explicitly states that a person should not be deprived of access to education of any type or at any level; nor be limited to education of an inferior standard; nor have conditions which are incompatible with the dignity of man inflicted upon them based on grounds of race, sex, language, religion, economic condition etc.[6] "Education" refers to all types and levels of education, and the access to education, the standard and quality of education, and the condition under which it is given should all be taken into account when considering a child's right to education.[7]

III. The Present Situation

Hong Kong currently has a system of nine-year free and compulsory education for children aged 6-15. Theoretically, a student's racial origin or nationality should not affect his or her eligibility[8] to education under the current policy.[9] However, as the information presented in this paper will show, school-age minority children are unable to fully exercise their rights to education due to lack of equal opportunities. The basic philosophy of equal opportunities is to create a level-playing field for individuals, giving individuals a fair chance to go as far as their talents and abilities can take them and assuring equal participation for every individual in all aspects of public life.[10]

According to the 2001 Population Census, where statistics concerning ethnic minorities in Hong Kong[11] were formally collected by the Census and Statistics Department for the first time, there were in total 9503 South Asian children in Hong Kong. This number included only those Hong Kong residents aged 0-18 who were of Indian, Pakistani, Bangladeshi, Sri-Lankan and Nepalese ethnicity, and Filipino children were not included. However, according to a survey[12] performed in early 2000 by Yang Memorial Methodist Social Service (YMMSS), another set of figures emerged claiming that about 20,000 South Asian children (including Filipino children) were studying in schools in Hong Kong.

Some parents of these South Asian children are not even aware that their children are entitled to 9 years of free universal education. In addition, they may not know the means and the place to seek advice and assistance. As revealed in the survey by YMMSS, 25% of the 593 respondents did not know about the nine-year free education policy, almost 40% had difficulties in finding school placement, and yet only 23% sought assistance from the Education Department (ED). The ED does not keep separate statistics on the number of South

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5 Adapted from the 2001 Population Census.

6 Article 1, *Convention Against Discrimination in Education*. Hong Kong is not a party to this Convention.

7 *Ibid.*

8 Please see Annex I for the admission criteria to public sector schools.

9 Education Department, "Education in Hong Kong – A Brief Account of the Educational System", 2001.

10 Hong Kong Equal Opportunities Commission (EOC), at http://www.eoc.org.hk.

11 Statistics on ethnic minorities and South Asian children provided by the Statistics Section of the Education Department, "Hong Kong 2001 Population Census Thematic Report – Ethnic Minorities".

12 Yang Memorial Methodist Social Service, Educational Needs and Social Adaptation of Ethnic Minority Youth in Hong Kong (Hong Kong: Yang Memorial Methodist Social Service, 2000).

Asian children who have sought the Department's assistance to find school places in the past three years, nor the number of successful cases, since the ED considers that the placement service is provided to all local children alike.[13]

Most South Asian children come from low-income families and they might not be able to afford the relatively expensive school fees for international schools. Therefore, most of them need a place in the public sector. According to the data provided by the ED,[14] there are four primary schools (two governments and two aided comprising a total student population of 1558) and two secondary schools (one government and one on the Direct Subsidy Scheme with a student population of 1267) that provide more focused support services for the South Asian children.[15] There are spare classrooms in three of these schools where additional classes can be operated to cater for the needs if demands are identified, hence the ED considers that there are sufficient school places for these South Asian children. On the other hand, according to the survey by YMMSS, 50% of the respondents said that it took longer than six months for them to allocate school placement in a government-subsidized school, and the survey also claimed a severe shortage of school places for these youngsters. Moreover, the 2001 Population Census revealed that half of the South Asian children were below the age of six, hence inferring from the age structure there may be growing demand for support service with respect to schooling in the coming years.

South Asian children are often found wandering in the streets during school hours, and this is one of the problems reported by the press.[16] The 2001 Population Census showed that 60% of these South Asian children were studying in full-time schools, and 4% claimed that they had completed their course and were not attending school as of March 2001. It is worth noticing that a number (87 out of 9503) of them were still within the age group of 6-14 for universal basic education. In her reply to Legislative Council question number 13 on 15 November 2000, the Secretary for Education and Manpower, Mrs Fanny Law, said that at that time there were only three South Asian children who dropped out from schools, and the ED was actively finding school places for them. This number clearly contradicts the information presented in the 2001 Population Census, and it is most likely that the drop-out rate of South Asian children from universal basic education is not as low as Mrs Fanny Law had claimed it to be.

Another problem that South Asian children face in finding school placement is the language barrier. Most of them do not know both Chinese and English. However, as most of the schools are using Chinese as the medium of instruction, it is sometimes difficult to place these children in mainstream schools.[17] The 2001 Population Census revealed that the most commonly used language among these South Asian children is Bengali (31%). 86% spoke English either as the usual language or as another language, and 40% of them spoke Chinese. Very often mainstream schools are reluctant to admit these South Asian children because they do not speak or write Chinese. Apart from international schools charging high school fees, a small number of local secondary schools use English as the medium of instruction and offer French as the second language instead of Chinese. However, since these are all "elite" schools, places are extremely competitive and very few South Asians are admitted. Schools catering

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13 Written reply by Mrs Fanny Law, Secretary for Education and Manpower, to LegCo Question No 13: Education for Non-Chinese Asian Children and Youths, LegCo Meeting, 15 November 2000.

14 Information obtained at an interview with Mr Chan Ka Ling, Senior School Development Officer (SSDO), Yau Tsim and Mong Kok District Education Offices on 16 January 2002.

15 Please see Annex II for a list of the schools providing more focused support services for the South Asian children.

16 "Education Needs of Minorities Ignored", *South China Morning Post*, 29 October 2001.

17 "Equality the Loser in the Race for Places", *South China Morning Post*, 20 October 2001.

for South Asian children only offer elementary Chinese courses, and since not enough opportunities are provided to these children to learn or master Chinese, they find it very difficult to integrate into the local society and find jobs upon graduation. As a consequence of not achieving proficiency in Chinese, higher secondary, tertiary and vocational training opportunities for South Asian children are also extremely limited.

IV. Laws in Hong Kong

There are now three existing equal opportunities laws banning discrimination based on sex,[18] disability[19] and family status,[20] but there is no legislation against racial discrimination — in other words, Hong Kong still *legally* tolerates many forms of discrimination. The push for anti-discrimination legislation is not new, as many believe that it is the best way to combat the deeply entrenched problem of racial prejudice in Hong Kong. Unfortunately, despite several attempts to introduce race discrimination bills by private members in the Legislative Council, the efforts were unsuccessful.[21]

The HKSARG has always believed that education, not legislation, is the best way to eliminate racism, as legislation prohibiting racial discrimination would in fact lead to racial disharmony.[22] There are, indeed, both international treaties and domestic laws that protect basic human rights, including the right to education, in Hong Kong, but whether the rights of ethnic minorities are soundly protected within the general legal framework of Hong Kong has raised much controversy.

A. International Treaties

In general, treaties that apply to Hong Kong do not have the force of law in the domestic legal system of Hong Kong, and lawsuits by individuals are highly unlikely to be upheld if based on these treaties rather than local statute law.

1. International Covenant on Economic, Social and Cultural Rights (ICESCR)

Article 13(1) recognizes "the right of everyone to education", and states that "education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups". Moreover, art 2(2) states that rights outlined in the *ICESCR*, ie including the right to education, shall be exercised "without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status".

It might be interesting to note a statement made by the HKSARG concerning the right to education of minority children within the context of this article:

> "We acknowledge without reservations that art 13 of the *ICESCR* requires Governments to provide free and compulsory primary education to all within their jurisdiction. But it does not

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18 *Sex Discrimination Ordinance* (Cap 480).

19 *Disability Discrimination Ordinance* (Cap 487).

20 *Family Status Discrimination Ordinance* (Cap 527).

21 *Supra* note 3.

22 "Chief Executive Opts for Education over Legislation to Get Rid of Discrimination despite UN Criticism Tung Rejects Anti-racism Law Idea", *South China Morning Post*, 15 June 2001.

require that they provide free education to the specifications of particular groups . . "[23]

The HKSARG further emphasized that parents' liberty to send their children to private institutions approved by the HKSARG is respected. However, the HKSARG seemed to have overlooked the fact that the tuition for international schools is extremely high in Hong Kong, which most ethnic minority families cannot afford. The stance that the HKSARG took as expressed in the above statement did seem somewhat apathetic.

In May 2001, the Committee on Economic, Social and Cultural Rights (CESCR) declared that "the HKSAR's failure to prohibit race discrimination in the private sector constitutes a breach of its obligations under art 2 of the Covenant". The Committee called upon the HKSAR to extend its prohibition of race discrimination into the private sector[24] by legislation.

2. International Covenant on Civil and Political Rights (ICCPR)

The *ICCPR* prohibits race discrimination in art 26. The United Nations Human Rights Committee – the body that oversees the *ICCPR* – has called on Hong Kong to outlaw racial discrimination in the private sector on several occasions.[25]

3. International Convention for the Elimination of All Forms of Racial Discrimination (ICERD)

Article 5(e)(v) states that State parties shall "undertake to prohibit and to eliminate racial discrimination in all its forms and guarantee the right of everyone . . . economic, social and cultural rights, in particular . . . the right to education and training".

4. Convention on the Rights of the Child (CRC)

Article 28 states the right of a child to education on the basis of equal opportunity – primary education should be compulsory and available free to all; different forms of secondary education, including general and vocational education, and education information should be made available and accessible to every child. Article 29 states that the education of the child should be directed to the development of the child's personality, talents, and mental and physical abilities to their fullest potential; and the development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own.

B. Domestic Laws

1. Basic Law

Under art 39 of the *Basic Law*, provisions of the *ICESCR* and *ICCPR* as applied to Hong Kong prior to 30 June 1997 have continued to remain in force in the HKSAR. However, it does not have a specific article that actually punishes the infractions of these United Nations

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[23] Report of the Hong Kong Special Administrative Region under Article 9 of the International Convention on the Elimination of All Forms of Racial Discrimination, 2000, para 155.

[24] Committee on Economic, Social and Cultural Rights, *Concluding Observations*, E/C.12/1/Add/58, para 30.

[25] Human Rights Committee, *Concluding Observations*, CCPR/C/79/Add 57, and Human Rights Committee, *Concluding observations*, CCPR/C/79/Add 117, para 15.

covenants.

2. Bill of Rights Ordinance (BORO)[26]

The *BORO* does provide for violations of *ICCPR* rights by the government and public bodies. It prohibits race discrimination in the public sector but there is no legislation that does the same for the private sector. Article 23 explicitly states the rights of minorities "to enjoy their own culture, to profess and practice their own religion, or to use their own language".

3. Education Ordinance[27]

Section 74 of the *Education Ordinance* states that the Director of Education has the duty to ensure that all children aged between six and fifteen must attend school. The issue of discrimination on the ground of race is not mentioned.

V. The Voice of a Young Filipino Girl[28] *- An Illustration of the Inadequacy of the Laws at Present*

The analysis in the previous section suggests the rights of ethnic minorities deserve more protection within our general legal framework. The problems that the lack of such protection creates for South Asian children can be further elucidated in the following case study of a Filipino secondary school student studying in Hong Kong.

Although the *Education Ordinance* and government policy ensure equal access to nine years of compulsory education to children of all ethnicities, there is clearly a lack of equal opportunities for South Asian children to receive quality education. Marjolyn Bellavar is a Form 3 student at Sir Ellis Kadoorie Secondary School (West Kowloon) (SEKSS), the only government secondary school catering for the special needs South Asian students. Although she is born in Hong Kong and has lived here for her entire life, she has never attended a local mainstream school despite numerous attempts to gain admission into one.

South Asian children have very few choices when it comes to choosing an institution for their schooling. For example, despite her parents' wishes for Marjolyn to attend a mainstream all-girls' Catholic school for her secondary education and integrate into the local society, she was allocated to her present secondary school upon graduation from Shu Chun Public Primary School, a school with only 15 students of different nationalities. The lack of choices for schooling that South Asian children have can be further reflected by the fact that all South Asian children from Shu Chun Public Primary School were allocated to SEKSS in 1999.

There is a general reluctance of mainstream schools to admit South Asian students because some schools say that the teachers do not know enough about the special needs of these children; others say that they do not have enough resources to help them to integrate into the local student body. Marjolyn's mother, a devout Catholic, and the priest from the church she attends wrote to not less than ten mainstream Catholic schools seeking admission, but all to no avail. Although Marjolyn was never rejected explicitly on the ground of race, the excuses given by these schools were often unreasonable. Despite having passed all the entrance exams

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[26] *Hong Kong Bill of Rights Ordinance* (Cap 383).

[27] *Education Ordinance* (Cap 279).

[28] Interview with Marjolyn Bellavar on 16 January 2002.

to these schools, schools using Chinese as the medium of instruction simply assumed that she would not be able to catch up with her school-work, although she has been learning Chinese since Primary One; schools using English as the medium of instruction and offering French instead of Chinese rejected her on the ground that she had "neither a perfect command of Chinese nor French".

South Asian children allocated to an "ethnic" school often face the problem of not having access to higher education. As a result, job opportunities for South Asian youths are also severely limited, preventing them from reaching the higher strata in society and creating a vicious cycle. According to statistics provided by SEKSS, over 90% of their students are of Indian, Pakistani, Filipino, Nepalese and Thai origin, and out of the 54 students who sat for the Hong Kong Certificate of Education Examination (HKCEE), only three of them gained 14 points or more, and only six secured Form Six places in other secondary schools (as SEKSS only operates classes from Form One to Form Five). Most of the Form Five graduates from SEKSS either enter the workplace or continue their studies in their home countries, as very few alternatives are available to them. Very few of them enter the Institution of Vocational Education (IVE) as most of the courses there are conducted in Chinese. The Springboard Scheme offered by the ED to local students with less satisfactory results in the HKCEE to further their education is not accessible to South Asian youngsters who do not speak Chinese as the courses under this Scheme are only conducted in Chinese.

VI. The Stance of the Education Department and Attempts at Improving the Situation[29]

There are obviously problems with the present government policy, and the attempts that are being made by the government in order to break this vicious cycle of South Asian children being denied the best education opportunities are worth looking into.

According to Mr Chan Ka Ling, the Senior School Education Officer of the Yau Tsim and Mong Kok District Education Offices, the Government's policy is to help all newly arrived children, including South Asian children, integrate into the local education system as soon as possible. While the media has often focused on what the HKSARG is *not* doing for these South Asian children, it would be unfair to completely ignore what the government *is* doing after all the commotion that the media coverage has stirred up. The performance pledge of the ED is to find a school place for these children within 21 working days, and the ED is committed to providing sufficient school places for South Asian children.

With a view to help the South Asian children adapt to the local education system and overcome the language barrier, since the academic year 1999-2000, grants of $2,750 per primary and $4,080 per secondary student are provided to schools which admit non-Chinese speaking (NCS) students. This is intended as an incentive for mainstream schools to consider the application of NCS children for admission. In addition, subsidies are provided to NGO's for running Induction Programmes to help these children adapt to the local environment. The ED is thinking about allotting subventions to NGO's to conduct induction programmes in conversational Cantonese and written Chinese on district basis so that South Asian children can gradually overcome the language barrier, adapt to the local community and be prepared to get admission to a local mainstream school. However, it is pointed out that some South Asian children prefer to look for a place in schools that operate specific curriculum designed for

[29] Interview with Mr Chan Ka Ling, Senior School Development Officer (SSDO), Yau Tsim & Mong Kok District Education Offices, on 16 January 2002.

them even though a local mainstream school opens its door to them as they like to stick together with others of similar ethnic origins

The ED realizes the problems that teachers face in teaching South Asian children and is thinking about offering necessary training to teachers on teaching of NCS students to enable them to run lessons more effectively and efficiently for the integration of such students. The ED promises to monitor the situation and continue to consider other modes of support services to meet the needs of these South Asian children.

VII. The Public's Effort to Remedy the Problem - A Follow-up to the Situation of Poinsettia Primary School[30]

About 80 Nepali children are attending the Poinsettia Primary School in Yuen Long, which operates in a disused shopping center. After its plight was highlighted in a South China Morning Post report,[31] the school received $100,000 in donations to help repay its monthly deficit of $60,000.[32] The Director of Education, Mr Matthew Cheung Kin-Chung, also promised to keep an open-dialogue with the Poinsettia Primary School "with a view to helping the children in whatever way we can"[33]. When asked about the donations, school principal Ms Gigi Warne says she is very grateful for the help from the general public and the donations had helped to finance for the rent of the school site and the salary of the teachers. The ED had offered two new school sites, one in Tuen Mun and the other one in Yuen Long, to the Poinsettia Primary School, hence Poinsettia Primary School will most likely be moving out soon from their current address at the shopping center in Yuen Long, but the school still has not come to a conclusion as to which site to choose at this time. There is no current plan of building a secondary school for the Poinsettia students, and Ms Wayne hopes to concentrate on consolidating the foundations for the current primary school first.

VIII. Why the Government Policy failed – The Story from a Social Worker's Point of View[34]

Unison Hong Kong was established in March 2001 with the aim of assisting ethnic minorities participate in society and attain equal access to education, employment, legal and social rights. Fermi Wong, a frontline social worker working with mainly South Asian children, describes this group of children as the "most vulnerable group in society" as most of them have low social status do not even know about the basic rights that they possess. She considers the HKSARG's denial of the seriousness of racial discrimination in Hong Kong "shameless" and "irresponsible". The education reform in Hong Kong proposes to bring our students a "quality education", but a quality education is of no use if some of these children are not even going to school. The rights of these South Asian children were probably not even taken into account when the education reform was being drafted, and many of these children turn to crime after repeatedly failing to gain acceptance into local schools and being denied the chance to integrate with local Chinese peers.

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30 Telephone interview with Ms Gigi Warne, Principal of the Poinsettia Primary School on 19 January 2002.

31 "Learning the Hard Way", *South China Morning Post*, 10 October 2001.

32 "Donations Flood in the Help Poor Nepali Primary School", *South China Morning Post*, 12 October 2001.

33 "Ethnic Groups Studied After School Facilities Criticized", *South China Morning Post*, 13 October 2001.

34 Interview with Fermi Wong, a social worker for Unison Hong Kong on 14 January 2002.

Fermi "begged" the ED for two years to include the South Asian children in the Induction Programme and the Initiative Programme, which were originally catered for only the new immigrant children from the Mainland to help them adapt to the schooling system of Hong Kong. Such support from the ED might be better late than never, there is still a long way to go before these children will start receiving fair treatment from the government. Education is their keystone to economic advancement and allows them to move up the social ladder, and Fermi pointed out that at present our education system is wasting good talent as many of these children are not given the opportunity to stretch to their full potential.

Legislating against racial discrimination in order to protect these children's rights to equal opportunities in education might be the best solution. She firmly believes that legislating is the least that the HKSARG can do to combat racial discrimination in Hong Kong, as legislating can give a legal definition to racial discrimination, which serves as a basis for both educating the public and protecting the rights of minorities.

IX. Conclusion

Hong Kong needs to develop a comprehensive policy to combat discrimination and cultivate a multicultural society. The problems that South Asian children face in education is only one of the many aspects in which blatant racial discrimination can be found to exist in Hong Kong, and education and legislation should be employed together to combat the problem.

While the ED is finally taking measures to address the special needs of the South Asian children, the policy still lacks a real understanding of the problems or a commitment to encouraging diversity. At the moment, many South Asian children are segregated and isolated from mainstream Hong Kong society, and encouraging greater integration for these children into mainstream schools can avoid the current situation as well as provide Hong Kong Chinese students with the opportunity to come into contact with students from other backgrounds.

In many instances, the commitment of providing equal opportunities in education for South Asian children has narrowly focused on policies and programmes to get more of these children into school and keep them there for longer periods of time. However, improving access, while a significant accomplishment in itself, is not all there is to ensure a child's right to education. We should strive to provide education opportunities for all children where they could enter school prepared to succeed; where they could learn what is necessary to integrate into society; where their varied talents are revealed and flourish. The quality of what happens after children enter school is no less important than educational access itself.

Annex I

Public Sector Schools: Admission Criteria
(Education Ordinance, Cap. 279, Laws of Hong Kong)

Admission is restricted to children who hold one of the following documents:

(1) Hong Kong Birth Certificate –
   (a) births registered before 1 January 1983: the birth certificate alone is sufficient proof of the holder's eligibility for admission to such schools;
   (b) births registered between 1 January 1983 and 30 June 1987: must indicate the holder's Hong Kong belonger status as "*Established*";
   (c) births registered on or after 1 July 1987: must indicate the holder's permanent resident status as "*Established*";
   (d) Hong Kong belonger status or Hong Kong permanent resident marked "*Not established*": require a "*Permit to Remain in Hong Kong*", or valid travel documents with one of the endorsements in (c) below; or

(2) Hong Kong Identity Card issued on or after 1 July 1987; or

(3) a valid travel document: with any of the following endorsements –
   (a) "*Permitted to remain until (date)*" (the date showing the stay in Hong Kong to be still valid at the time of admission to school);
   (b) "*Permitted to remain extended until (date)*" (the date showing that the stay in Hong Kong to be still valid at the time of admission to school);
   (c) "*The holder of this travel document has the right to land in Hong Kong (Section 2AAA, Immigration Ordinance Cap. 115, Laws of Hong Kong)*";
   (d) "*The holder arrived Hong Kong on (date) and was permitted to land*";
   (e) Permitted to stay with no condition attached;
   (f) "*Previous conditions of stay are hereby cancelled*"; or
   (g) "*Holder's eligibility for Hong Kong permanent identity was verified*".

Annex II

Schools providing more focused support services for the NCS children[35]

(1) Government Primary Schools
   (a) Sir Ellis Kadoorie (Sookunpo) Primary School (in Wanchai; 17 NCS classes/581 students, 4 spare classrooms)
   (b) Li Cheng Uk Government Primary PM School (in Shamshuipo; 22 NCS classes/ 677 students)

(2) Aided Primary Schools
   (a) Yaumati Kaifong Association School (in Yau Tsim & Mong Kok; 6 NCS classes/ 191 students)
   (b) Islamic Primary School (in Tuen Mun; 6 NCS classes/103 students, 3 spare classrooms)

(3) Government Secondary School
   (a) Sir Ellis Kadoorie Secondary School (West Kowloon) (in Yau Tsim & Mong Kok; 17 NCS classes/515 students, 13 spare classrooms)

(4) Direct Subsidy Scheme (DSS) School
   (a) Delia Memorial School (Hip Wo) (in Kwun Tong; 20 NCS classes/752 students)

[35] Information provided by Mr Chan Ka Ling (SSEO) (YTM).

MANDATORY COURT-ANNEXED MEDIATION IN HONG KONG?

CAREEN HAU-YAN WONG

The Chief Justice appointed a Working Party to review the civil rules and procedures in our courts and to make recommendations as necessary in February 2000. In November 2001, the Working Party on Civil Justice Reform published an Interim Report and Consultative Paper. This document identified some common complaints against the court system such as cases take too long to come to a conclusion and time to be expected is too uncertain and that the costs involved are very often uncertain and disproportionately high in relation to the amount of claim and resources of litigants. This brings to the question whether any court-annexed alternative dispute resolution should be adopted. In this article, the author examines the issue of court-annexed mediation and discusses whether it should be adopted in Hong Kong.

I. Introduction

In February 2000, a working party was appointed by the Chief Justice to review the civil rules and procedures of the High Court, and to make recommendations on the assurance and improvement of access to justice at reasonable cost and speed. In November 2001, the Working Party on Civil Justice Reform published an interim report and consultative paper (the Paper). It identified some common complaints against the court system. One concern was that as part of the realization of the overriding principle of procedural economy, whether any court-annexed alternative dispute resolution (ADR) should be adopted, and the extent of such.

This paper will focus on the issue of court-annexed mediation and discuss whether it should be adopted in Hong Kong. It seeks to argue that court-annexed mediation does present benefits to the court, the government and the public, and should be pursued in Hong Kong on the basis of mandatory by rule. However, it would be unrealistic to see court-annexed mediation as a panacea. In order to ensure procedural as well as substantive justice, a lot of concerns have to be addressed.

II. The Problems with Traditional Litigation and the Need to Address

The Paper identified the criticisms against the civil justice system that yields pressures for reform, which can be summarized as follows:[1]

1. It takes too long to bring the case to conclusion and the time expected to spend on the case is too uncertain;
2. The costs involved are very often uncertain and disproportionately high in relation to the amount of claim and the resources of the litigants;
3. The system is too complex; court rules are very often incomprehensible to the general public and hinder their access to justice;
4. Procedural obligations may be redundant or disproportionate to the needs of the case, and are very often abused to delay proceedings; and
5. The system is too adversarial and that cases are run by the parties rather than the court, rules are often ignored by the parties and not enforced by the courts.

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* The writer would like to express her gratitude to Ms. Katherine Lynch for her invaluable guidance and comments throughout the preparation of this paper.

1 Chief Justice's Working Party on Civil Justice Reform, "Civil Justice Reform Interim Report and Consultative Paper", para 24.

The Paper held the view that such defects are not peculiar to Hong Kong and has led to reforms in many jurisdictions.[2] It raises the question whether these defects of the systems can be resolved by court-annexed mediation.

III. Court-Annexed Mediation

In the Paper the working party discussed on the desirability of adopting court-annexed ADR in Hong Kong. Methods of adopting court-annexed ADR were not specified, but mediation was identified as the usual process adopted. It is submitted that confining the present discussion to mediation will yield a more meaningful discussion. The nature of different kinds of ADR methods are very different and the analysis of whether one should be annexed to the court may not be the same as the other.[3]

A. Nature of mediation

It is submitted that mediation can be defined as follows:

> "The process by which the participants together with the assistance of a neutral person or persons, systematically isolate disputes in order to develop options, consider alternatives, and reach a consensual settlement that will accommodate their needs."[4]

The above definition, not to be confined, does suggest some characteristics of mediation which differentiates itself from other processes of dispute resolution. Mediation involves voluntary negotiation of the parties with the assistance of a neutral third party in private. It is a process to facilitate parties to reach a solution to settle the disputes by themselves. The mediator plays a neutral role in facilitating parties to discover common grounds and interests and should not impose on the parties what he or she thinks the solution should be. These characteristics give rise to the advantages of mediation over litigation, but at the same time present problems to mediation which may not appear in litigation.

B. Mediation may relieve problems of the court system

In view of the problems of the existing court system identified in the Paper, it is submitted that mediation, with its nature and characteristics, can alleviate the problems in the following ways:

1. In reducing delay

Because of its informal nature, parties to mediation need not go through the complicated court procedures, thereby reducing the complexities and delays involved. Since parties negotiate between themselves instead of arguing in front of a judge, they do not have to wait for a free court slot to have their case handled in court. Moreover, there is an increasing number of unrepresented litigants in Hong Kong, who not only are unfamiliar with court procedures, but

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2 *Ibid*, para 4.

3 Professor Sander is also of the view that before asking whether one agrees with mandatory ADR or not, one should make clear what kind of ADR he or she is referring to. Sander, F E, Allen, H W, and Hensler, D, "Alternative Dispute Resolution Symposium: Judicial (Mis)use of ADR? A Debate", 27 *Univeristy of Toledo Law Review* 885, p 886.

4 Folberg, J, and Taylor, A, *Mediation: A Comprehensive Guide to Resolving Disputes Without Litigation* (San Francisco: Jossey-Bass, 1984), as included in "Mediation", (1995) *Australian Dispute Resolution Journal.*

also very often require additional court resources, such as preparing bilingual documents.[5] This will lengthen the litigation process. If they can have their disputes resolved through a process that they can easily understand, those additional resources can be saved and the disputes could be settled sooner.

2. In reducing cost

The informal nature and the simple procedures involved in mediation can help parties save a lot of money from employing lawyers for their paperwork and instruction to counsel, which would otherwise have incurred in litigation. This is particularly important for Hong Kong because, as identified in the Paper, the enormous expense on litigation in Hong Kong has deterred people from bringing their disputes to Hong Kong court for litigation. This has not only led to fewer opportunities for the local legal profession, but in a broader context, it has made Hong Kong a less attractive place to do business, which in turn has adverse effect to Hong Kong's position as a commercial and financial centre.[6]

3. Improving accessibility

With the simple and informal procedures, parties can reach a solution to the problem by themselves, and in this sense mediation can be regarded as empowering.

Although the rules and procedures of the court afford protection to litigating parties, its complexity do present difficulties to be understood by those who have little legal knowledge. As a result, although it is their own dispute which is being litigated, parties very often find themselves having little control over what is going to happen but to rely on their lawyers. Mediation, on the other hand, can be said to 'empower' the parties because, through the simple and informal procedures which are easy to understand, parties are more confident and encouraged to reach solutions to problems by themselves, and in this way they regain more control over their own disputes.

4. Reducing adversarial nature

As parties in mediation negotiate with each other and reach conclusion that is acceptable to both sides, mediation promotes the attainment of a win-win situation and avoid the all-or-nothing consequence in litigation. In this way, relationships between parties are very much preserved from hostility.

In addition, mediation may reduce the impact of imbalanced financial power. While expensive litigation may deprive ordinary people of justice by deterring them from fighting against wealthy individuals or corporations in court; mediation, being a potentially cheaper and quicker way to resolve disputes, may reduce the problems that wealth inequality brings.[7] For example, the wealthy party may take advantage of his position to threaten litigants. Also, the presence of the neutral third party will help maintain an equal platform during the process.

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5 *Supra* note 1, para 19.

6 *Supra* note1, para 10.

7 Clarke, G R, and Davies,I T, "Mediation – When is It an Appropriate Dispute Resolution Process?", (1992) *Australian Dispute Resolution Journal* 70, p 73.

IV. Mandatory Annexation to the Court

The above advantages serve as grounds for supporting court-annexed mediation. However, it has been well-recognized by commentators that parties are reluctant to initiate mediation for fear of showing a sign of weakness.[8] Making it part of the court process may avoid this problem. It may serve as a procedure required before litigation, so that parties need not go through the court procedures for litigation that might eventually turn out to be unnecessary. In this way, time and resources of both the parties and the court can be saved.

Article 35 of the *Basic Law* and s 11(2)(d) of the *Hong Kong Bills of Rights* provide that people should enjoy equal access to the court. Court-annexed mediation does not violate such guarantees. If the parties fail in settling through court-annexed mediation, they can resort to the court. But efforts of court-annexed mediation have not gone in vain. It may have helped parties clarify or reach agreement on some of the issues, which not only save court's time, but also to some extent reduce the confrontation between the parties, and moderating hostility in the relationship of the two parties.

Although there are strong grounds for court-annexed mediation, making it mandatory in nature will probably provoke great controversies.

It has been criticized that mandatory court-annexed mediation is a contradictory concept. ADR connotes the idea of voluntariness. Making mediation mandatory violates the fundamental idea of mediation as an alternative dispute resolution, and will render it another ordinary settlement process being glossed with the name of mediation.[9] Two responses are submitted with regard to this contradiction. First, bearing in mind the flexibility of ADR, we are indeed free to borrow the elements of mediation to make up our own process of ADR. How this process is termed does not really matter, what is most important is its effectiveness in helping parties to reach a settlement. Second, it can be argued that just like any other procedural rules, it is legitimate to require parties to comply with this mandatory rule if they want to get their case heard in the court. Thus the justifiability of introducing mandatory court-annexed mediation should not be doubted.

Professor Sander has argued in favour of mandatory mediation by giving people a push to do what they find helpful:

> "The question then becomes, 'Is mandatory mediation an oxymoron?' I think not, because I believe there is a clear distinction between coercion *into* mediation and coercion *in* mediation. The latter is not mediation; the former, in my view, is akin to affirmative action: It is not an ideal solution, but it is a temporary solution for the problem created by the fact that when people use mediation, they are very pleased with it (and the empirical research supports that conclusion) but because our system is so court- and adjudication-oriented, people do not know about the benefits of mediation and hence do not use it enough voluntarily. So mandatory mediation is a temporary expedient to get people to experience this process that the users find so helpful."

It is submitted that rather than being an issue of voluntariness of the parties to initiate mediation, the real issue is their willingness to engage in mediation. It was argued that mandatory court-annexed mediation would become less effective when the parties do not

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8 *Supra* note 1, para 644.

9 Hughes, P, "Mandatory Mediation: Opportunity or Subversion?", 19 *Windsor Yearbook of Access to Justice* 161, p 202.

choose to take part in it.[10] This argument is not totally unrealistic, but the experience of the Ontario Mandatory Mediation Program (OMMP) seems to suggest that people are not necessarily discouraged in reaching settlement simply because it is made mandatory.[11] OMMP first appeared in 1999 as a pilot project in Ottawa and Toronto pursuant to r 24.1 of the *Rules of Civil Procedure*, requiring case-managed civil, non-family actions to undergo mandatory mediation unless exempted by the court. This Pilot Project lasted for 23 months and demonstrated that mandatory mediation could first, reduce time and costs of disposing cases; second, ensure earlier settlement of a larger proportion of cases than in the litigation process; and third, satisfy litigants and lawyers with the process. Six out of ten cases achieve settlement on at least some of the issues. Now the Rule has been made permanent. The success of OMMP at least provides some empirical support for making court-annexed mediation mandatory.

Thus rather than debating on whether mediation should be voluntarily entered into, the proper concern should be the willingness of the parties to engage in the process.[12] It affects their confidence in ADR in reaching settlement and the extent to which they insist on their rights and disclose information, all of which will ultimately influence the likelihood of success of the process.

It has also been argued that encouraging the use of ADR moves disputes from public to private spheres thereby reducing precedents available for future cases and hindering the development of the law.[13] However, it may also be argued that after all, for civil cases, it is the parties themselves who bring their cases to the court, who should be entitled to make informed choices as to the methods by which they can resolve their disputes. To push the argument to the extreme, it may be said that if parties fail to resolve disputes on their own, they will eventually bring it to the court for adjudication. Anyhow, some cases may not be best resolved by litigation, and forcing such cases to be solved by litigation may produce less desirable precedents which would adversely affect determination of similar cases in future.

In the context of Hong Kong, bargaining in the shadow of the law and the high rate of case settlements right before or at the early stage of trials suggest that many cases may not actually need to be resolved by litigation. Coupled with the needs to maintain an efficient and economic way to resolve disputes as previously mentioned, mandatory court-annexed mediation is worth pursuing in Hong Kong. Indeed, the traditional Chinese culture has created a more favourable environment for mandating mediation here. Despite certain disagreements, different schools of Chinese thoughts are all in favour of harmony and avoidance of disputes,[14] and encourage people to solve their disputes rather than allowing it to ruin personal relationships. For example, the Family Pilot Mediation Scheme, despite being carried out on the basis of parties' voluntary participation, recorded that 60% of the cases referred to mediation has achieved full settlement, providing support for endorsing mediation in Hong Kong.

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10 See, for example, "Alternative Approaches to Dispensing Justice", (1995) Lord Woolf's Report on Access to Justice, Ch 18, para 30.

11 "Evaluation of the Ontario Mandatory Mediation Program (Rule 24.1): Final Report – The First 23 Months", 12 March 2001, Ch 2.

12 Smith, G, "Unwilling Actors: Why Voluntary Mediation Works, Why Mandatory Mediation Might Not", 36 *Osgoode Hall Law Journal* 847, pp 873-881.

13 Brunet, E, "Questioning the Quality of Alternative Dispute Resolution", (1987) 62 *Tulane Law Review* 1, pp 16-18.

14 Wong, B K Y, "Chinese Law: Traditional Chinese Philosophy and Dispute Resolution", 30 *Hong Kong Law Journal* 304, p 309.

In conformity with the research of the writer, the benefits of ADR are widely acknowledged. It follows that many of the academic discussions are not really about whether it *should* be pursued, but *how* it should be pursued.

V. Mandatory by Rule

The Paper has suggested three ways of making court-annexed mediation mandatory.[15] It is my belief that mandatory by rule, when compared with the other two, seems to be the better means to address the problems encountered in litigation.

While mandating court-annexed mediation by court order may provide flexibility in deciding which case will go to court-annexed mediation, Hong Kong's experience in adopting a similar measure in the court construction list has not been very successful. Indeed, under this rule the number of cases that will go to court-annexed mediation will very much depend on the discretion of judges, which poses uncertainty to its effectiveness. If judges are reluctant to exercise discretion, then the resources of the court is unlikely to be conserved.

For the other suggestion of making court-annexed mediation mandatory upon one party choosing to resort to mediation, the most obvious benefit is that at least one party perceives the use of mediation suitable who therefore is willing to pursue it, which in turn increases the likelihood of success. But it is this very nature that may create a sense of unfairness to the other party as he or she may feel coerced by the electing party who actually has no authority to decide for others.

The same problem of uncertainty about the number of cases resorting to court-annexed mediation will arise, rendering it less effective in addressing the recognized problems with litigation.

One may notice that since it is the parties who choose to pursue court-annexed mediation, it is indeed not that different from voluntary mediation. However, it should be recalled that enforcing court-annexed mediation is intended to divert suitable cases to mediation, including those which parties have not thought about using mediation. If it depends on parties to choose whether to resort to mediation, those cases that should be mediated but overlooked by the parties would still be left out.

The third suggestion of making court-annexed mediation mandatory by rule may first seem rigid. However, from the lesson of OMMP, there may be a clause for parties to opt-out, so that in appropriate cases the court can exempt parties from pursuing court-annexed mediation. Mandating by rule does not have the problem of uncertainty of effectiveness which would be encountered in the previous two methods, since cases that belong to a specific class will be required to go through mediation. It seems that in this way, the problems of litigation can be better addressed by court-annexed mediation. Moreover, unlike mandating court-annexed mediation upon election by one party, in which the non-electing party may feel that the court is placing greater emphasis on the preference of the electing party, mandating by rule does not depend on the choice of either party, and it is better in accordance with the well-known maxim that "justice must not only be done, but must manifestly be seen to be done".

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[15] *Supra* note 1, para 640-651.

Therefore the writer contends that mandatory court-annexed mediation by rule is the best means among the three. Yet this is premised on the assumption that the suitable cases are correctly identified.

VI. What Cases are Suitable for Mandatory Court-Annexed Mediation?

Having argued for the pursuance of mandatory court-annexed mediation in Hong Kong, it is equally, if not more, important to be able to identify cases which should be mediated. It is because under an arbitrary implementation of the scheme, unsuitable cases is unlikely to be successfully mediated, and therefore, eventually they have to be referred back to court, thus incurring additional costs, doing no good to both the court and the parties. Only if suitable cases are mandated for mediation will the benefits of court-annexed mediation be realized. The proper identification is also important to ensure that cases are not directed to mediation simply because it can relieve the court from hearing huge amount of cases, but that disputes which are suitable to be resolved by mediation or court litigation respectively can be directed to their appropriate place for resolution, avoiding the creation of a "two-tier" justice.[16]

It is generally agreed that not all cases are suitable for mediation and that cases involving the following conditions should not go to mediation:[17]

- Cases which involve significant imbalance of power
- Where there is a need to set legal precedent or obtain an injunction, for example, cases raising constitutional issues
- Neighbour disputes where there are serious issues of harassment or mental health problems
- Where ADR is being abused to prejudice one of the parties in dispute

From the experience of OMMP, civil cases that are case-managed are suitable for court-annexed mediation. However, administrative law cases should probably not be included in view of the possible significant imbalance of power and involvement of public interests.

In OMMP, cases involving less than a specified sum are not subjected to court-annexed mediation. However, it is uncertain whether cases involving a smaller monetary claim would render it inappropriate for mediation. The concern on the monetary claim is probably that if mediation fails, parties will have to go back to the court, which may result in an increase in the overall expense. To keep court-annexed mediation to cases involving larger monetary claim will prevent the overall costs being disproportional to the sum involved.

I submit that courts should be given discretion to exempt parties from court-annexed mediation, so as to provide flexibility and reduce the chance of increasing overall costs and time. When exercising the discretion, in addition to the factors previously mentioned, further considerations may include the number of plaintiffs and defendants involved, as well as whether the parties have tried mediation or negotiation.

Another issue is when mediation should take place. Court-annexed mediation has been criticized as coming in too late, which by the time court-annexed mediation can come into

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16 Critics from Richard Abel and Owen Fiss argued that ADR mechanisms results in the creation of second class justice for the poor and disadvantaged groups.

17 *Supra* note 1, para 636 and Lord Chancellor's Department Report, "Alternative Dispute Resolution: A Discussion Paper" (November 1999), para 4.9.

play, either some steps to implement formal adjudication have already been taken, or parties may have tried some form of settlement negotiations and have already failed.[18] Parties were therefore simply pushed back to negotiation which is bound to be fruitless, but to add another barrier in the litigation process. However, the results in OMMP showed that for every case type, cases are disposed of more promptly under the programme than the control group and mandatory mediation is useful not only at early stages.[19] Moreover, views have been expressed by mediators, lawyers and litigants that for certain cases the mediation should have come even later in the proceedings.[20] Of course for the purpose of saving costs and time in pursuing unnecessary litigation, early mediation is preferred, but in terms of appropriateness, it is submitted that this depends on the circumstances of each particular case, which can be addressed by incorporating a rule, allowing parties to apply to the court for an extension of the time limit to engage in court-annexed mediation as in OMMP.

VII. The Need to Do Procedural As Well As Substantive Justice

The characteristics of mediation have been previously discussed and it is believed that they have brought about advantages over litigation. However, by its very nature, they are also capable of causing problems which cannot be overlooked.

A. About the informal nature

The informal nature of the process of mediation has been the subject of much criticism. Given the lack of discovery rules in court cases with the presence of judge to administer the disclosure of information, incomplete disclosure of information is bound to exist, and the settlement reached might not be appropriate.[21] The lack of formal court rules may also bring power imbalances into play, which would be reflected in the settlement. However, it has been argued that to determine generally whether mediation is an effective way to deal with power imbalance is to ignore the complexity and nuances of the concept of power and the mediation process; rather the answer to this question depends very much on the nature of power imbalance involved and the style of the mediator.[22]

B. Importance of mediator skills

This reminds us of the importance of the skills of the mediator. While mediation does possess advantages as previously discussed, it does depend a lot on the skills of the mediator in, for instance, handling power imbalances and facilitating parties to resolve their disputes efficiently to save costs and time. Indeed, as mentioned, it has been identified in the OMMP report that the experience of the mediator has significant effect on the likelihood of disputes being settled.

VIII. Concerns to be Addressed

The evaluation of the OMMP showed that in both Ontario and Toronto, roughly, four out of

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18 Roberts, S, "Mediation in the Lawyers' Embrace", (1992) 55 *Modern Law Review* 258, p 260.

19 *Supra* note 11, para 3.3.

20 *Ibid*, para 1.4.2.

21 *Supra* note13, para 31-38.

22 Gewurz, I G, "(Re)Designing Mediation to Address the Nuances of Power Imbalance", (2001) 19 *Conflict Resolution Quarterly* 2, pp 135-139.

ten cases could not attain either complete or partial settlement.[23] Given this as well as the above concerns, it is proposed that if court-annexed mediation is to be made mandatory, the following aspects have to be adequately addressed.

A. Mediators

Based on the previous discussion, the skills of mediators are crucial to the success of mediation, therefore the selection and training of mediators are very important.

A likely outcome of introducing mandatory court-annexed mediation is that some lawyers may lose a considerable amount of cases for litigation, and thus would be driven into the mediation business. However, having been trained and practiced as an adversarial advocate, it may not be easy for a lawyer to assume a neutral role in mediation. This is undesirable as the neutral role of the mediator is crucial in building up confidence of the parties' in the mediation process, and with that confidence, parties would be more willing to reveal information useful for reaching a settlement. Therefore, even though a lawyer has expertise to contribute when becoming a mediator, the lawyer mediator's quality of being neutral would be a serious issue.

The training for mediators is critical. The problem may be less about the supply of such, as Hong Kong has an increasing amount of mediation courses offered by different bodies, for instance, the Hong Kong Mediation Council and the Hong Kong Catholic Marriage Advisory Council. However, what attracts more attention is the need to equip mediators with the skills to deal with power imbalances. The importance of such skills has been discussed, and it is worth noting that although OMMP has achieved encouraging results, the ability of the mediators in handling power imbalances has been less positively rated.[24] While there is necessity to ensure neutrality of the mediator, but if a mediator rigidly adheres to his or her neutral role and treats two unequal powers equally, the result might actually be one of inequality.[25] When redressing power imbalances, a mediator may need to actively prevent oppression by any party, which will require the compromise of his or her neutrality. It has been suggested that a specific mediation style may be justified for certain particular situations, depending on the power dynamics between the parties.[26] The training providers should take this into account.

The issue of expertise should also be attended to. A legal practitioner has expressed to the writer that while mediators may be equipped with the skills, they may not necessarily have the expertise to deal with different types of cases. But this may be solved by specialization in mediation, so that those who have knowledge in a specific area will mediate in the corresponding class of cases.

Having discussed about the first concern of who is going to be the mediator, the next concern is: who is to run the programme? In Canada, OMMP is run by the government. But it is worried that while the goal of the government in pursuing court-annexed mediation is to ensure efficient and quick settlements and to conserve court resources, this may set a frame to the work of mediators.[27] Although it may not necessarily restrict the mediator's approach, it

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23 *Supra* note 11, para 5.2.1.

24 *Ibid*, para 6.2.

25 Astor, H, and Chinkin, C, "Power Imbalances in Mediation" in *Dispute Resolution in Australia* (Sydney: Butterworths, 1992), p107

26 *Supra* note 21, para 150-160.

27 *Supra* note 9, para 192.

may become an overriding objective for the mediator to achieve in the mediation process. In the worst case, the mediator may forgo his neutral role and urge the parties to settle.

The third concern goes to the supply of mediators. It is normal to give litigants' their power to choose their mediators, but the experience in Toronto suggests that litigants usually do not exercise this right and depends on a mediator assigned to them. In this regard, if mandatory court-annexed mediation is to be pursued, ensuring enough mediators is necessary. In Ottawa and Toronto, there are currently 121 and 298 mediators on roster respectively.[28] At present, 132 and 94 mediators have been accredited in Hong Kong in the general and the family panel respectively,[29] which demonstrated an increase since the Paper was published.[30] But it is also worth noting that in Ontario, there is the problem of unequal distribution of workload among members, with four mediators have taken up 49% of the total cases, as a result of which many cases were left pending.[31]

B. Funding

The problem of who is going to pay for the mediation may go as far as affecting what kinds of cases should be mediated. The crux is that if the mediation is not successful, there is the possibility that the cost will be increased. If parties are to pay for the mediation, are they willing to bear additional costs?

C. Regulation

The lack of formal rules in mediation gives rise to an arguable need to impose some form of regulation. The risk of unregulated mandatory mediation has been described as

> "private informal procedure enjoying authority of court but stripped of procedural safeguards of adjudication."[32]

However, if we use rules to govern mediators' practice by, for example, code of conduct, we run the risk of standardizing mediation, limiting the flexibility that mediation as an alternative form of dispute resolution is supposed to provide. To use regulations to govern confidentiality issues rather than leaving it to be decided by the parties may also gloss over the unease parties may have.[33] Issues of confidentiality serve as an indicator of the parties' trust for each other as well as for the mediator. Using rules to govern confidentiality takes away the chance for discussion which may help the parties understand more about the reservations they have about the other actors and the process. Moreover, too many rules may excessively formalize and legalize the process, bringing mediation back to the problems of court litigation. To ensure substantive justice Brunet suggested that judicial screening or some form of substantive review of the settlement agreements may provide a certain degree of protection to substantive justice.[34]

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28 Ottawa Roster, 5 April 2002, at http://www.attorneygeneral.jus.gov.on.ca/html/MANMED/ottawaroster.htm.
Toronto Roster, 3 April 2002, at http://www.attorneygeneral.jus.gov.on.ca/html/MANMED/torontorosterofmediators.htm.

29 http://www.hkiac.org/en_panelam.html.

30 It was written in the report that there were 81 and 79 accredited in the general and family panel respectively.

31 *Supra* note 11, para 1.4.5.

32 *Supra* note 17, para 262.

33 *Supra* note 9, para 196.

34 *Supra* note 13, para 53.

D. To build confidence in the system

The success of mandatory court-annexed mediation depends not only on a sound institutional framework, but also the dedication and confidence of the participants. In Hong Kong, ADR seems unfamiliar to many people, including the legal profession. ADR courses are now available at law schools, but many existing members of the legal profession may be unfamiliar with ADR methods. I have heard worries and reservations about the effectiveness of mandatory court-annexed mediation from existing legal practitioners. It seems educating and promoting to them about the benefits of mediation is favourable in at least two senses. First, as previously mentioned, the problem with mandatory mediation may not be the mandatory nature, but the willingness of parties. Willing parties may not necessarily feel coerced as a result of the mandatory nature. To build better knowledge in the public may help building up parties' confidence in the scheme and thereby enhance their willingness to have their problem resolved through mediation rather than feeling as part of a routine procedure.

Second, as advisors to clients, solicitors have an important role to play in the scheme if it is pursued. Equipping them with the knowledge of mediation will not only enhance their confidence in and thereby generating support for the scheme, but also through their advice to clients, it helps building up the willingness of their clients. Indeed in OMMP, particularly in Toronto, a substantial minority of lawyers and litigants expressed negative views regarding the attainment of fairness in mediation,[35] despite the satisfactory result the scheme has achieved.

IX. Conclusion

It will be unrealistic to expect that court-annexed mediation can be a panacea to the longstanding problems in litigation. But given its nature and characteristics, there are grounds to support the pursuance of mandatory court-annexed mediation in Hong Kong, especially with the prevalent Chinese culture that emphasizes harmony. Moreover, Hong Kong, as an international financial centre, needs the introduction of ADR that can help save time and money. But to succeed in the scheme, the class of cases that should be subject to court-annexed mediation should be correctly identified so that the likelihood of success can be predicted. It is submitted that case-managed civil cases are generally suitable for court-annexed mediation, but probably not for administrative law cases, given the likelihood of significant imbalance of power and public interests involved. Annexing mediation to cases that involve larger monetary claims may reduce the risk of overall costs being disproportional to the sum involved. I further submit that courts should be given discretion to exempt parties from court-annexed mediation, so as to provide flexibility and reduce the chance of increasing overall costs and time.

At least equally important is to adequately address concerns regarding the selection, training and conduct of mediators as well as the degree of regulation of the scheme. The role of adequate supply of information about mediation cannot be overlooked in enhancing confidence of the public and the legal profession, which is beneficial to the overall success of the scheme.

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[35] *Supra* note 11, para 1.4.4, r 18.

THEORIES OF HUMAN RIGHTS

A CRITICAL ANALYSIS OF THEIR CONTRIBUTION TO *BASIC LAW* INTERPRETATION

MIKE SAI-KIT LUI

The expression "human rights" is relatively modern and recent, and its content and application are still controversial and far from certain Moreover, some countries resist the application of human rights theories on the basis of their western origin The author argued for the application of human rights theories to the special context of Hong Kong, and highlighted its significance in the constitutional interpretation exercise by judges in light of Hong Kong's new political and constitutional order The author also critically examined the Ng Kung Siu *case and demonstrated how a contrary result would have been reached had the CFA taken into account these human rights theories.*

I. Introduction

The expression "human rights" is relatively new and modern, having come into everyday parlance only since the Second World War and the establishment of the United Nations in 1945. Since the proclamation of the *Universal Declaration of Human Rights* in 1948,[1] the concept of "human rights" has been treated by the international community as one of universal application. Despite criticisms of the universal nature of this concept, the subsequent enforcement of the *International Covenant on Civil and Political Rights* (*ICCPR*)[2] as well as the *International Covenant on Economic, Social and Cultural Rights* (*ICESCR*)[3], together with their ratification and incorporation by an increasing number of countries, show that such concept has at least been internationally recognised by sovereigns around the world.

In recent decades, human rights have become the main concern in every aspect of advancement in the world, and the legal system is not an exception. Far from a clear and uncontroversial development, the laws on human rights and its interpretation had shown much uncertainty as judges seemed to adopt different perspectives in dealing with human rights issues. This can be accounted for by a number of reasons, including their different perspectives in the utility of the international materials, excessive reliance on the solidity of national laws, and the nature of constitutional frameworks in which the judges exercised their powers of interpretation.[4]

The purpose of this paper is to illustrate the possible contributions of some human rights theories in the interpretation of the *Basic Law* on human rights protection in the HKSAR. I will also critically comment the reasoning adopted by the Court of Final Appeal in the case of *HKSAR v Ng Kung Siu*[5] from a theoretical perspective.[6] In order to prevent the discussion from remaining at a purely theoretical level, my analysis will also rely on some judicially recognised methods of constitutional interpretation in the HKSAR, in addition to the Court of

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1 The *Universal Declaration of Human Rights* was adopted without dissent by the General Assembly on 10 December 1948. It includes a catalogue of rights which is scarcely less than the aggregate of all important civil, political, economic, social and cultural rights internationally recognised today.

2 The *ICCPR* was opened for signature on 16 December 1966 and came into force on 23 March 1976.

3 The *ICESCR* was opened for signature on 16 December 1966 and came into force on 3 January 1976.

4 Byrnes, A, "Bringing Human Rights Principles into Domestic Legal Reasoning" in "Human Rights Treaties Before Domestic Courts: The Case of the Convention on the Elimination of All Forms of Discrimination Against Women" (International Bar Association Annual Meeting 1998), Vancouver, 18 September 1998.

5 *HKSAR v Ng Kung Siu* [2000] 1 HKC 117.

6 As seen in the following parts of the paper, my comments will be based on some competing theories of human theories, and such analysis will be purely a theoretical one.

Final Appeal judgment in the flag case.

II. Human Rights – A Purely Western Concept?

As the human rights theories discussed in this paper originated from the West, one may doubt the appropriateness and plausibility in adopting them to assess the situation of the HKSAR, which reflects, strictly speaking, a non-Western culture.[7] This is actually one of the most hotly debated aspects of the notion of human rights in recent years. While advocators of universal application of human rights insist that the concept is independent of time, place and culture,[8] the cultural relativists argue that one can only understand and evaluate social actions by reference to the rules and norms that are internal to that culture.[9] In my view, it would not be constructive to deal with the plausibility of arguments of either side, because both have their own merits and deficiencies.[10] For the purpose of this paper, I would adopt the view as expressed by Eliza Lee that "the general limitation of the universalist and relativist mode of thinking is the way they treat political order as static and unchanging"[11]. I think the author is right when she suggests that "any living tradition is an adaptation to changing objective conditions"[12], and we can never come to a sensible conclusion if we assume every culture would resist every stimulation which is new or alien to itself. We should accept that tradition is an ongoing discursive process, and it works with other political traditions and communal values which change over time.

Furthermore, it is my view that the Confucian tradition in Chinese culture shows some theoretical compatibility with the modern notion of human rights. For example, the theories of benevolence (*ren xue*), tolerance (*shu*) and justice (*yi*) in the *Analects* are indeed conducive to the promotion of human rights.[13]

One should also note that the common law jurisprudence has survived the transfer of sovereignty,[14] and the legal principles as well as the rationale therein are by and large heavily influenced by Western ideologies. On the basis of these arguments, it appears unobjectionable to apply western theories of human rights in assessing the situation of the HKSAR.

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7 On this point, I would define the cultural background of the HKSAR as a Chinese one, even though it can be argued that Hong Kong had been under the reign of the British for 100 years and thus has a Chinese culture which is not complete. However, I think the culture of HKSAR is fundamentally a Chinese one, particularly after at least four years of resumption of sovereignty by the PRC.

8 See Donnelly, J, *Universal Human Rights in Theory & Practice* (New York: Cornell University Press, 1989), pp 66-87. The universal conceptualisation argues that human rights are something inherent in every human being, and it owes its existence some common characteristics shared by all humanity, which should not be affected or destroyed by cultural differences.

9 *Ibid.*, pp 109-124.

10 Lee, E, "Human Rights and Non-Western Values", in Davies, M C (ed.), *Human Rights and Chinese Values – Legal, Philosophical, and Political Perspectives* (Hong Kong: Oxford University Press (China) Limited, 1995), pp 72-90.

11 *Ibid*, p 76.

12 *Ibid*, p 85.

13 For a more profound analysis of the theoretical compatibilities of Confucian culture and the modern notion of human rights, see Gangjian Du and Gang Song, "Relating Human Rights To Chinese Culture: The Four Paths of the Confucian Analects and the Four Principles of a New Theory of Benevolence" in Davies, *supra* note 10, pp 35-36.

14 Under art 8 and art 18 of the *Basic Law*, the common law system previously practiced would not be affected by the transfer of sovereignty on 1 July 1997.

III. Interpreting the Basic Law *with Human Rights Theories*

This section consists of two parts, both of which involve the application of human rights theories in interpreting those provisions under the *Basic Law* that guarantee fundamental rights and freedoms (referred to as "right-conferring provisions" hereafter). The first part will highlight the generous approach of interpretation, while the second part will focus on interpretation by reference to relevant extrinsic materials.

A. Is the Generous Approach for Interpretation Too Vague?

In *Ng Ka Ling v Director of Immigration*[15], Li CJ stated:

> "What is set out in Chapter III . . . are the constitutional guarantees for the freedoms that lie at the heart of the Hong Kong's separate system. The courts should give a generous interpretation to the provisions in Chapter III that contain these constitutional guarantees in order to give to Hong Kong residents the full measure of fundamental rights and freedoms so constitutionally guaranteed."[16]

Since this case, judges have treated the generous approach as the dominant and prevailing approach in interpreting rights-conferring provisions of the *Basic Law*.[17] But what is meant by "generous"? Is it concerned with the attitude of judges, or with the treatment of statutory words? Unfortunately, there have been few authorities deciding on the meaning of "generous". In my view, it is crucial for judges to understand the notion of rights and freedoms because they should give a generous interpretation of such provisions of the *Basic Law*, while at the same time not to construe such provisions too widely and loosely as to distort the original intention of the drafters. In this respect, I think the natural rights theory and the concept of individualism, which underlie the notion of human rights, would be helpful.

1. Natural Rights Theory

The natural rights theory owed its existence to the doctrine of natural law, which embodied those elementary principles of justice which were deemed to be the "right reasons", unalterable, eternal and in accordance with nature. Natural law is founded on the natural characteristics of human beings which, according to many natural law philosophers,[18] is the social impulse to live peacefully and in harmony with others.[19] This doctrine led to the birth of the natural rights theory, which is obviously entrenched in the *French Declaration of the Rights of Man*[20], the *US Declaration of Independence*[21] as well as the *Universal Declaration of Human Rights*[22], the principal human rights document. The natural rights theory advocates that there are some rights every human being must have by virtue of his or her human nature. One point to emphasise here is that the natural law doctrine as well as the natural rights theory had been subject to much criticism from scholars and philosophers. The major weakness they spotted is that the rights considered to be natural can differ from theorist to

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15 *Ng Ka Ling v Director of Immigration* [1999] 1 HKLRD 315.

16 *Ibid* at 326 C/D-E *per* Li CJ.

17 Li CJ had repeated in his leading judgment in the case that "[f]reedom of expression is a fundamental freedom in a democratic society. It lies at the heart of civil society and of Hong Kong's system and way of life. The court must give a generous interpretation to its constitutional guarantee". *Supra* note 5.

18 For example, Hugo Grotius. See Grotius, H, *De Jure Belli Et Pacis* (Book 1, 1689).

19 See Machan, T R, "For Individual Rights", (Spring 97) 39(2) *Modern Age* 133.

20 *Declaration of the Rights of Man and of Citizens* (France 1789).

21 The *Declaration of Independence* (US 1776).

22 *Supra* note 1, Preamble of the *UDHR*.

theorist, depending upon their conceptions of nature.[23] As a result, the theory does not provide strong support to universal rights, as the substance of such a theory is clearly not universal! However, the natural rights theory seems to have revived in the last few decades, through its transformation by scholars into a doctrine of natural necessity. This modern version argues that "some modes of treatment of human beings are so fundamental to the existence of anything that one would be willing to call a society that it makes better sense to treat an acceptance of them as constitutive of man or woman as a social being, rather than as an artificial convention"[24]. What is persuasive about this new theory is its view of human life as encompassing certain freedoms and sensibilities without which the designation of "human" would make no sense.

My suggestion of utilising the natural rights theory in assisting the interpretation of relevant provisions of the *Basic Law* does *not* rest solely upon an ideological level by emphasizing its theoretical persuasiveness, but also on a practical level. In this respect, one should pay attention to the preamble of the *Universal Declaration of Human Rights*, which states that "[w]hereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world"[25] and in art 1 the words "[a]ll human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood"[26]. It is crystal clear that the terms "inherent dignity" and "inalienable rights" owe their existence to the natural rights theory.

Even though the *Universal Declaration of Human Rights* is not a legally binding treaty, nevertheless, because of an eighteen-year delay between the adoption and the completion for signature and ratification of the *ICCPR* and *ICESCR*, it has acquired a status juridically more important than originally intended. It has also been used worldwide as a means of judging compliance with human rights obligations under the *United Nations Charter*. This is exactly the reason for my claim that reliance on the natural rights theory has its "practical" aspect, and not only a theoretical advantage. In light of the above, it seems not inappropriate for the HKSAR judges to find the *Universal Declaration* persuasive in delivering their judgments, or rely on the natural rights theory in adopting the generous approach in interpreting the rights-conferring provisions of the *Basic Law*. If judges have regard to such nature of human rights, as argued by the natural rights theory, I am confident that they would be vigilant and cautious in accepting arguments unfavourable to the protection and enjoyment of freedoms and rights.

2. *Individualism*

Another important theoretical support for universal human rights is the notion of individualism. An accepted understanding of human rights, traditional or modern, should be their adherence to individuals, which are separate beings of dignity and worth, endowed with reason and conscience. Human rights are also "rights of individuals, to meet the needs and purposes of individuals"[27]. This underlying notion has been commented as "the ideological identification of the individual as the sole unit of social analysis, and . . . the extolling of

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[23] Shestack, J J, "The Philosophic Foundations of Human Rights", (1998) 20 *Human Rights Quarterly* 201, p 208.

[24] *Ibid*, p 216.

[25] *Supra* note 1, Preamble.

[26] *Ibid*, art 1.

[27] Macfarlane, L J, *The Theory and Practice of Human Rights* (London: Maurice Temple Smith Ltd, 1985), p 6.

private wills as the supreme expression of human faculties"[28]. Indeed, this concept needs no further elaboration for the purpose of this paper, and suffice it to say that it centralises on the importance of every individual in a society, and emphasizes his or her autonomous status without adverse interference from others in the absence of his or her consent.

Attention should be paid to the concept of "without interference", as "the question of interference is crucial for the social and political definitions of individual freedom"[29]. The content of fundamental rights like human rights and their prioritisation actually have a profound impact on the conceptualisations of the state's obligations, and of state intervention.[30] This means that the concept of individualism exhibits itself as an opposition to those interventions of the state which are not consented to by individuals. Therefore, with individualism as an underlying principle of human rights, it functions to preserve the autonomous status of every human being, prevent abuse of power and unreasonable interference by the government to the detriment of individuals, and thus is crucial for the protection of human beings who are then able to "pursue their particular conception of the good life"[31].

How does the concept of individualism facilitate the judicial interpretation of rights-conferring provisions in the *Basic Law*? The first point to be noted is that claims of human rights usually appear in case of alleged violations. When the right of an individual, which fall under the category of human rights and not *purely* legal rights, is infringed, the individual can claim that he or she has such rights by virtue of his or her human nature. The *Ng Kung Siu* case is one of such cases, where the debate between the government and the protesters was on the statutorily imposed restrictions on freedom of expression.[32] Without discussing the case in detail, it is sufficient to highlight that the job of the court there was to strike a balance between the interests of the HKSAR and the protesters, with a focus on the introduction of restrictions by the government on freedom of expression. In my view, if judges had proper regard to the concept of individualism in such situation, they would better appreciate the nature of human rights and be more vigilant in condemning state violation of fundamental rights. This should have significant influence on the attitude of judges in adopting the generous approach of interpretation, by preventing them from easily satisfied by the government's contention, at the expense of freedoms and rights of individuals.

To conclude, the natural rights theory and the concept of individualism should undoubtedly be conducive to the interpretative task of judges on those rights-conferring provisions of the *Basic Law*.

B. Reference to Extrinsic Materials – Constitution of the PRC *and Human Dignity*

In *Ng Ka Ling* case, it was held that:

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28 Freeden, M, *Rights* (Minneapolis: University of Minnesota Press, 1991), p 89.

29 Souillac, G, "Universal Human Rights: Philosophy of the Person and Social Vision in the Work of Two Contemporary French Intellectuals" (A thesis submitted for the degree of Doctor of Philosophy of the University of Hong Kong), April 2000, p 29. In this thesis, the author gives a profound analysis of the relation between individuals and the state when discussing human rights and political liberalism, pp 28-38.

30 *Ibid*, p 31.

31 *Ibid*, pp 29-30.

32 The reasoning in the judgment of *Ng Kung Siu* would be dealt with Part IV of this paper concerning my critical comment on that case.

> "It is generally accepted that in the interpretation of a constitution such as the *Basic Law* a purposive approach is to be applied. The adoption of a purposive approach is necessary because a constitution states general principles and expresses purpose without condescending to particularity and definition of terms . . . the courts are bound to give effect to the principles and purposes declared in, and to be ascertained from the constitution and relevant extrinsic materials . . . The context of a particular provision is to be found in the *Basic Law* itself as well as relevant extrinsic materials . . ."[33]

The *Constitution of the People's Republic of China* (*PRC Constitution*) is undoubtedly a relevant extrinsic material to which the courts of HKSAR can make reference to when interpreting the *Basic Law* provisions.[34] How can the *PRC Constitution* help in interpreting provisions of *Basic Law* concerning fundamental rights and freedoms? On a careful reading of those provisions of the *PRC Constitution* which guarantee human rights, art 38 states that "[t]he personal dignity of citizens of the People's Republic of China is inviolable . . .". These words are absent from Chapter III of the *Basic Law*, which includes all provisions that guarantee the rights and freedoms of HKSAR citizens.[35] In my view, this provision of the *PRC Constitution* indeed reveals another important underlying theory of human rights -- human dignity.

Actually, all discourses about human rights presuppose recognition of the dignity and worth of human beings. The notion of human dignity has been explicitly recognised in international human rights documents like the *Universal Declaration of Human Rights*[36], *ICCPR* and *ICESCR*.[37] The relations between human dignity and human rights are indeed very complex, but there is an obvious correlation between them, that human rights are based upon or derivative from human dignity, and it is because humans have dignity that they should also have human rights. Some religious philosophers believe that human dignity is an inherent quality of the sacredness of human beings and an entire rights system can flow from that concept. But how should the vague notion of human dignity be defined for the purpose of our discussion?

Concerning its definition, the view of Alan Gewirth,[38] that dignity should be an *inherent dignity*, will be adopted here. According to him, dignity "signifies a kind of intrinsic worth that belongs equally to all human beings as such, constituted by certain intrinsically valuable aspects of being human"[39] and it is "permanent and unchanging, not transitory or changeable"[40]. It seems obvious that "dignity" included in the *Universal Declaration of Human Rights* refers to this inherent dignity.[41]
How is dignity related to the notion of human rights? On this, McDougal gave a modern and

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33 *Supra* note 15 at 340 *per* Li CJ.

34 Actually, in the case of *Ng Ka Ling*, the Court of Final Appeal did rely on some provisions of the Constitution of PRC, like art 31, in the interpretation of relevant provisions of the *Basic Law*.

35 Indeed it is no surprise if the constructions of the two constitutions are different, as they are framed under different political atmosphere and order. But since art 37 of the *PRC Constitution* is similar in content to art 28 of the *Basic Law*, I think absence of the quoted words in art 38 of the *PRC Constitution* should not be neglected as they may be conducive to the interpretation of *Basic Law*.

36 *Supra* note 25.

37 The preambles of *ICCPR* and *ICESCR* state that "[t]hese rights derive from the inherent dignity of the human person".

38 Gewirth, A, "Human Dignity as the Basis of Rights", in Meyer, M J, and Parent, W A, (eds), *The Constitution of Rights: Human Dignity and American Values* (New York: Cornell University Press), p 10 at pp 11-2.

39 *Ibid*, p 12.

40 *Ibid.*

41 In the work of Alan Gewirth, he classifies dignity into empirical dignity and inherent dignity.

practical explanation that "demands for human rights are demands for wide sharing in all the values upon which human rights depend and for effective participation in all community value processes"[42]. In this sense when one demands respect for human rights, he is also demanding a sharing and respect of values depended upon by human rights. The ultimate goal for such respect is a "world community in which a democratic distribution of values is encouraged and promoted, all available resources are utilized to the maximum"[43] and human rights should be regarded as a paramount objective of social policy. To conclude the above in the simplest way, human dignity promotes the sharing of a common value system as it encourages an attitude of respect among human beings,[44] and such respect is significant in the sense that it would ultimately result in an optimal utilization of resources for the interests of society.

What I am concerned here is that the courts should be aware of the nature of human dignity and its positive contribution to the human society. Firstly, judges should not treat dignity as an equivalent of "insistence" or "stubbornness"[45], because in this way, human rights would be more prone to suppression by whatever means. While "insistence" and "stubbornness" can be treated as something negative depending on the circumstances, human dignity seems not possible to bear any negative meaning, unless one denies his or her own human nature. Such inappropriate equivalences would inevitably create more rooms for the introduction of excuses in suppressing human rights. Secondly, we should not be too quick in assuming that the promotion of human rights has the *only* goal of protecting individuals at the expense of community interests. Such misconception is due to an inadequate understanding of the theories of human rights. If the explanations given by McDougal and Alan Gewirth do not suffer from serious defects of irrationality and self-contradiction so as to render it theoretically incorrect, it seems that the notion of human dignity does express the way in which human rights can contribute to our community. To summarise, such contribution is that human rights, by emphasising the importance and inalienability with human dignity, would promote a common sharing of values and ultimately lead to a full and optimal utilization of resources in the society.

In concluding this part, I wish to draw readers' attention to the *PRC Constitution*, which includes a provision recognising the notion of human dignity in protecting human rights. I believe that courts of the HKSAR, in considering relevant extrinsic materials in the interpretation of the *Basic Law*, should take this into account. As argued previously, a correct understanding of human dignity would undoubtedly help judges in their tasks of interpreting the rights-conferring provisions of the *Basic Law*, by preventing them from introducing various unreasonable justifications for the restriction of human rights. They should recognise that the promotion of human rights does not necessarily oppose or detrimentally affect societal interests.

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42 *Supra* note 23, p 225.

43 *Ibid*, p 226.

44 *Supra* note 38, pp 16-7. Alan Gewirth agrees with Joel Feinberg that in attributing human worth to everyone we may be ascribing an attitude towards humanity in each man's person. And this necessary respect consists in an affirmative, rationally grounded recognition of and regard for a status that all human beings have by virtue of their inherent dignities. I will not go into details here about the theological aspect of the concept of human dignity, which is rather abstract and unhelpful in this paper.

45 By treating dignity as the equivalent of "insistence" or "stubbornness", it means that we are talking dignity in the empirical sense (as suggested by Alan Gewirth). *Supra* note 41.

IV. Critical Analysis of Ng Kung Siu *with Reference to Human Rights Theories*

So far I have discussed how human rights theories can assist judges in the interpretation of the *Basic Law*. In order not to make this paper too prospective and solely a prediction, this part would be based on the decided but controversial *HKSAR v Ng Kung Siu* case ("flag case"). In the flag case, the Court of Final Appeal considered two questions to be crucial. The first is whether the legitimate societal and community interests in the protection of the flags are within the concept of public order (*ordre public*). If the answer is in the affirmative, the second question is whether the restriction to the right to freedom of expression is necessary in light of such societal and community interests.[46] Without discussing in details on the methodology of reasoning adopted by the court, suffice it to say that the court unanimously responded to the first question by concluding "the legitimate societal interests in protecting the national flag and the legitimate community interests in the protection of the regional flag are interests which fall within the concept of public order (*ordre public*)"[47] and the relevant statutory provisions[48] are "necessary for the protection of public order (*ordre public*)" and "justified restrictions on the right to the freedom of expression and are constitutional"[49].

In this section I would first identify the reasoning of the court with some theoretical principles related to the notion of human rights, and then try to argue that such reasoning *may*, from a purely theoretical perspective, violate the fundamental nature of human rights.

A. Utilitarian Approach Adopted by CFA

As I have mentioned before, individualism and the natural rights theory are individualist principles, which assigns priority to the basic interests of every single individual, and have become fundamental rationales behind the notion of human rights. The general definition of utilitarianism,[50] on the other hand, is "a maximizing and collectivizing principle that requires governments to maximize the total net sum of the happiness of all their subjects"[51]. There are indeed many branches of utilitarianism, and for the purpose of this paper, I would base my discussion on classical utilitarianism.[52] Classical utilitarianism is a moral theory that "judges the rightness of actions affecting outcomes in terms of securing the greatest happiness to all concerned"[53]. As a result of its central idea, classical utilitarianism has been criticised for its failure to recognise the autonomous status of individuals and to take rights seriously. Moreover, even though utilitarianism seems to treat individuals as equal, it actually treats them equal as a component in the mathematical equation in calculating the total amount of happiness generated, instead of attributing worth to each human being and recognising his or her inherent value and dignity. In light of the acute criticisms by human rights advocates that such pragmatic and anti-individualistic approach will suppress human dignity to a negligible level in terms of priority, utilitarianism "justifies the treatment of some people as mere means

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46 *Supra* note 5 *per* Li CJ.

47 *Ibid* at 140B-D *per* Li CJ.

48 Section 7 of the *National Flag and National Emblem Ordinance* and s 7 of the *Regional Flag and Regional Flag Ordinance*.

49 *Supra* note 5 at 141 *per* Li CJ.

50 Utilitarianism is another theory, other than individualism, which has played a commanding role in political and moral philosophy in the western world.

51 *Supra* note 23, p 213.

52 Jeremy Bentham has been treated as the most significant figure in the development of this branch of utilitarianism.

53 *Supra* note 23, p 213.

for the benefit of others when it allows for the sacrifice of some individuals when the benefit to others results in a net increase in utility, happiness or whatever other good utilitarianism says is to be maximized"[54].

In my view, utilitarianism does not necessarily violate the rights of individuals, nor would it in every case conflict with the inherent worth attributed to human beings. But one thing certain is that utilitarianism never places the interests of individuals as foremost consideration when conflicts arise, thus leaving the rights and freedoms of individuals vulnerable to contingencies and therefore at risk. On this point, I completely agree with Jerome J Shestack, who commented that "in an era characterised by inhumanity, the dark side of utilitarianism made the philosophy too suspect to be accepted as a prevailing philosophy"[55], and I think it is unhelpful, or even opposed to, the protection of universal human rights.

In the flag case, the court relied on the concept of "*ordre public*" to build up its reasoning and concluded that the interests in protecting the flags should be within the concept of "*ordre public*" and thus entitled to protection by legislation. The CFA seems to have proceeded with the primary assumption that freedoms of citizens should be restricted if community or societal interests are under threat, and it is exactly the reason for it to go directly to consider the scope of "*ordre public*" (public interests) without discussing the issue I mention above. On this point, some may argue that such neglect by the court can be justified because art 19(2) and (3) the *ICCPR* provide:

> (2) Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
>
> (3) The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
>
> (a) for respect of the rights or reputation of others;
> (b) for the protection of national security or of public order (*ordre public*), or of public health or morals.

According to art 39 of the *Basic Law*, this provision of the *ICCPR* will be incorporated into the *Basic Law* and art 39 further states that "the rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless as prescribed by law". For this the *Hong Kong Bill of Rights Ordinance* (Cap 383) provides for the incorporation of the various provisions of the *ICCPR* into the laws of HKSAR and art 16 of this Ordinance is identical to art 19 of the *ICCPR*.[56] On the basis of this chain of reasoning, it seems unproblematic for the CFA to dismiss the question of whether restrictions on freedoms and rights can be justified for protecting societal interests.

This view is, in my opinion, full of colour of legal positivism. It is not necessary here to elucidate the meaning of positivism in details, but suffice it to say that positivists assume all authority stems from what the state and officials have prescribed, so views on what the law ought to be have no place in law and are cognitively worthless. Hence, positivism negates the moral philosophic basis of human rights.[57] My analysis will not cover the reason why the

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[54] Rawls, J, *A Theory of Justice* (Cambridge: Mass, 1971), p 28.
[55] *Supra* note 23, p 214.
[56] It is also the part of the reasoning of the Court of Final Appeal in the flag case.
[57] See Hart, H L, "Positivism and the Separation of Law and Morals", (1958) 71 *Harvard Law Review* 593.

CFA did not deal with the issue but simply assume it to be free from any theoretical problems, and I will proceed by arguing that the CFA had been utilitarian in its judgment.

In the judgment, the court referred to and agreed with the opinion of the Inter-American Court of Human Rights[58] on the word "laws" in art 30 of the *American Convention on Human Rights* which states:

> "The requirement that the laws be enacted for reasons of general interests means they must have been adopted for the 'general welfare' (art 32(2)), a concept that must be interpreted as an integral element of public order (*ordre public*) in democratic States, the main purpose of which is 'the protection of the essential rights of man and the creation of circumstances that will permit him to achieve spiritual and material progress and *attain happiness* [emphasis added]'"

My view is that the court had been utilitarian in its reasoning by trying to justify the restrictions of freedoms on the basis of attaining "happiness". Having referred to some more quotes in the *American Convention of Human Rights*, the CFA concluded, without explanation or any elaboration, that "*ordre public*" was an imprecisely defined concept, but it "includes what is necessary for the protection of the general welfare or for the interests of the collectivity as a whole"[59]. Actually, from the American Court's opinion we can see that "*ordre public*" does exhibit a utilitarian characteristic by requiring laws to be enacted for *mainly* promoting general interests or "general welfare". The American Court opined that the purpose of "*ordre public*" is to protect human rights and create circumstances for people to achieve "spiritual and material progress" and attain happiness: a first glance of such would suggest that "*ordre public*" is *not* against human rights, but when combined with the core element of protecting general welfare, the meaning of that can be completely distorted. My interpretation of the American Court's opinion will be, as a result of understanding the last sentence under the theme of "general welfare", that "*ordre public*" aims to protect human rights and allow everyone to attain happiness by providing a suitable environment, *provided that* the general interests are not sacrificed. Therefore one can understand the last sentence in another way round as pointing to a group of people, *not* an individual: "*ordre public*" aims to protect the rights of a majority in society and to create circumstances for the majority to progress spiritually and materially, and to attain happiness. The opinion by the American Court, in my view, does show some elements of utilitarianism, even though it says that the enactment of laws for general interests has been the protection of rights of man.[60]

B. Elusive and Imprecise Concept of Ordre Public

The undesirability of this utilitarian approach, adopted by the CFA, to the protection of human rights had been compounded by the concept of "*ordre public*". As concluded by Li CJ, "the concept is an imprecise and elusive one. Its boundaries cannot be precisely defined"[61], therefore one can still doubt whether the interests alleged to have been protected from the acts of the defendants in that case are really within those interests belonging to the concept of "*ordre public*", even though the court had concluded in the affirmative.

The utilitarian approach is primarily concerned with the protection or promotion of societal interests, therefore for it to function properly, the concept of "*ordre public*" must be clearly

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58 Inter-American Court of Human Right, Advisory Opinion No OC – 6/86.

59 Supra note 5 at 139 *per* Li CJ.

60 I have mentioned before that utilitarianism does not necessarily violate human rights, but only subject such rights to risk by not placing them on the top of the list of priority when conflicts arise.

61 *Supra* note 5 at 140A-B *per* Li CJ.

defined. If the interests considered by the court do not fall within the scope of interests that need to be protected, the court might face the risk of flawed reasoning in its judgment.

The Court of Final Appeal judges had, in their judgments, shown excellent argumentative skills which masked their inherently utilitarian stance. It started off by examining the human rights allegedly violated and emphasizing the importance of protecting them. Proceeding upon the restrictions imposed on such rights, they tried to justify the imposition by introducing an elusive and vague concept of "*ordre public*". Having seemingly undergone a balancing process, it finally concluded that the imposition of restrictions was justified for their negligibility when compared with the societal interests valued. But if we are more critical in its methodology, it is obvious that the CFA had not gone into details in the balancing process between the protection of freedoms of expression and preservation of societal interests. The crucial question is how the CFA could plausibly conclude that the societal interests are so important as to render the restrictions negligible or minor, and inarguably this suspicion is triggered by the absence of mentioning any standard or criteria adopted in the balancing exercise.

The above error in methodology adopted, the mere reliance on American Court's opinion in the interpretation of "*ordre public*" without explanation of its relevance, as well as the inherent utilitarian nature of "*ordre public*" are indicators to arouse my suspicion of the CFA's position in delivering its controversial judgment. The thrust of my arguments is the superficial and purposively articulated flow of arguments has indeed masked the actual utilitarian stance of the CFA.

Concluding the above, my concern is that any utilitarian elements in justifying the restrictions imposed on the fundamental rights and freedoms of individuals should be undesirable, since utilitarianism is theoretically opposed to the underlying principle of individualism for human rights. Bearing in mind that the logic of the CFA "defines away a democratic right in the absence of compelling evidence that its exercise should invoke a criminal sanction"[62], the CFA tried to justify the restrictions in question by taking into account the protection of societal interests (which in my view is utilitarian in nature), and when this is combined with the fact that the concept of "*ordre public*" is an elusive and imprecise one, the persuasiveness of the reasoning in this case is put to doubt.[63]

V. Conclusion

Modern global discourse on universal human rights stresses the importance of recognising the identity of human beings, and tries to persuade countries all over the world to comply with the standards set up by the international community in their protection of human rights. But even with an increasing number of countries following such standards, the level of compliance around the world is still far from ideal. Undoubtedly, one of the main reasons for this is the variety of understandings and interpretations of such international standards. Also, some countries may find it uneasy to allow the intrusion of such standards into their own distinct cultures, either because of some obvious normative incompatibilities between the international norms and local traditions, or the impracticability of following such standards in light of the local legal or political structures.

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62 Wacks, R, "Our Flagging Rights", (2000) 30 *Hong Kong Law Journal* 1, p 2.

63 One point to stress again is that my comment originates purely from a theoretical perspectives, and to certain, it may have neglected its practicability. However, I think it must be constructive to try to explore the theoretical deficiencies of the reasoning of the court, for the sake of protecting human rights.

In the HKSAR, the political climate exerts a strong influence on the observance of international human rights standards. The Mainland government has always treated the promotion of human rights as a threat to its superior status over the region, and thus a weakening of its sovereign power. Under the constitutional framework set up by the *Basic Law*, the HKSAR is undoubtedly subordinate to the Mainland government, despite the high degree of autonomy guaranteed by various provisions of the *Basic Law*. As a result of such relationship, pressure from the Chinese authority will easily affect the attitude of judges in protecting the rights of HKSAR citizens.

I believe one has to admit that such political reality is unavoidable, hence in this paper, the emphasis has been put on finding other ways through which the courts can help in promoting the protection of human rights. In my view, only by understanding the underlying principles of human rights will the courts be able to interpret those rights-conferring provisions in a way which is truly beneficial to the protection of human rights. Only by comprehensive knowledge of those theories of human rights will judges appreciate the importance of protecting such rights and freedoms and stand boldly in resisting its restriction.

THE DOCTRINE OF RES JUDICATA AND THE ENFORCEMENT OF MAINLAND PRC JUDGMENTS IN THE HONG KONG SPECIAL ADMINISTRATIVE REGION

PETER MO-CHING LAW*

For those who have not come across the term nor the doctrine of res judicata, the term itself is in the Latin language meaning "a thing adjudicated", which, in modern terms, is defined as "a final and conclusive judicial decision on the merits by a judicial tribunal having competent jurisdiction". This rule sets an international norm the rationale of which is to ensure justice and fairness that no one should be vexed with his opponent without end. This issue is particularly relevant when we enforce Mainland judgments in the HKSAR under the rules of the private international laws of Hong Kong because the fatality most criticized of Mainland judgments is the failure to satisfy finality. As a result, many common law cases in Hong Kong have shown to preclude the enforcement of Mainland judgments, an observation which triggered the author's interest in this topic. As economic developments take flight in the Mainland and the degree of collaboration intensifies between the Mainland and Hong Kong, it is crucial that such an enforcement issue be given more attention. No doubt jurisdictional developments in the Mainland remains to be seen, but it is suggested that through the evaluation of different kinds of Mainland judgments, we may gain insight as to the meaning of "finality", allowing flexibility to take place in the enforcement of Mainland judgments at common law.

I. Introduction

At the opening of the Legal Year 2002, the Secretary of Justice announced that the government is hoping to make arrangement for the reciprocal enforcement of certain commercial judgments between Hong Kong and Mainland China.[1] As the Secretary for Justice pointed out, the reciprocal enforcement of judgments between Mainland PRC and Hong Kong is important for cross-border commercial activities and certainly would be attractive for international businessmen.[2] Indeed, the increasing economic activities between Hong Kong and the Mainland necessitate greater judicial interdependency which could only be harmonized by providing greater certainty to the dispute resolving mechanism across the two regions. Moreover, the certainty of being able to enforce a rendered judgment, and thereafter pursue assets from one legal district[3] to another would encourage international trade and commerce, and in turn, be beneficial to Hong Kong in sustaining its status as an international legal service hub.[4] As Ghai suggested: "the global movement of capital requires

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1 See at http://www.info.gov.hk (Last visited 11 March 2002).

2 *Ibid.*

3 For details, see Benny Tai, "Mutual Recognition and Enforcement of Judgments between Hong Kong and the People's Republic of China", a paper presented at "Symposium on Legal Interaction between Hong Kong and China" (June 1991, Faculty of Law, University of Hong Kong). Mr Tai suggested that the term "legal district" would be more appropriate in that it is defined as a separate though not necessary an independent territorial region. On the other hand, the term "jurisdiction", though is an orthodox term, can lead to confusion. See also Horace, E, Read, *Recognition and Enforcement of Foreign Judgments in the Common Law Units of the British Commonwealth* (Massachusetts: Harvard University Press, 1938), p 6. Read used the term "Law Districts" in similar manner and cited Dicey saying "A law district means a district or territory which is the whole of a territory subject to one system of law".

4 See Qingjiang Kong, "The Enforcement of Hong Kong SAR Judgments in the Mainland", (1999) *Hong Kong Law Journal* 150, p 151 where the author stated that the mainland is now the Hong Kong's largest trading partner while Hong Kong has become the mainland's second largest trading partner. Also see

the certainty which can only be established by an effective and reliable mechanism for resolving disputes and enforcing the outcomes"[5].

However, the arrangement of mutual enforcement between Hong Kong and Mainland PRC is likely to be problematic. Unlike western legal systems, the distinct legal framework of Mainland PRC appears to have precluded the enforcement of their judgments in Hong Kong. So far, it appears that the fatality of mainland judgments lies in their failure to satisfy the final and conclusive requirement and thus could not be considered as *res judicata* for the purpose of enforcement under the rules of Hong Kong's private international law.[6] Although this topic seems to be of immense importance to Hong Kong, it has received limited attention and hence very little jurisprudence has developed locally. It is thus the aim of this paper to broadly review the problems and difficulties surrounding the enforcement of mainland judgments in Hong Kong, with a special focus on the issue of finality requirement. For the sake of the limitation imposed, the following discussion will be confined to money judgment and the analysis will be viewed from a Hong Kong perspective.[7]

Since the discussion of the subject-matter without some basic evaluation of the current mechanism for enforcement of foreign judgment would be an evaluation in *vacuo*, Part II of the paper aims to outline the present mechanism of enforcing a foreign money judgment in Hong Kong. The writer then seeks to consider the problem of finality and conclusiveness that is associated with the enforcement of Mainland judgments in Hong Kong in Part III. In Part IV and V of this paper, the writer will evaluate the finality requirement and the doctrine of *res judicata* in greater detail and will also discuss the policy consideration behind the operation of the rule. Next, Part VI attempts to reconsider whether mainland judgments are indeed lacking in finality for the purpose of enforcement. Lastly, Part VII will be discussion of some possible relief and suggestions in relation to the recent government proposal for judgment enforcement between the Mainland and the HKSAR.

II. Enforcement of Foreign Judgments in Hong Kong

The theoretical basis for recognizing and enforcing a foreign judgment in Hong Kong is almost identical to that found in English law. As advocated by Dicey, it is now accepted as a general principle of English conflict of laws that a right acquired under the law of any civilized country considered applicable is recognized and where appropriate enforced in England.[8] Accordingly, a foreign judgment may, in appropriate circumstances, be considered by an English court to be capable of recognition or enforcement. By *recognizing* the foreign

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Bradford, A, Caffrey, *Enforcement of Foreign Judgments* (Australia: CCH Australia Limited, 1985) as cited in Tai, *supra* note 3, p 1.

5 See Ghai, Y, "The Rule of Law and Capitalism: Reflections on the Basic Law", in Wacks, R (ed.), *China, Hong Kong and 1997: Essays in Legal Theory* (Hong Kong: Hong Kong University Press, 1993), p 344. Also see Grams, S R, "The Impact of Hong Kong's Transfer of Sovereignty on the Enforcement of Arbitral Awards", (1998) 4 *Hong Kong Student Law Review* 107, p 109.

6 This issue will be discussed in greater detail in Part III of this article.

7 In the context of Private International Law, different types of judgments are governed by slightly different rules. Judgments can be classified as judgments relating to personal status, judgment in rem and judgment in personal. See Smit, H, "International Res Judicata and Collateral Estoppel in the United States", (1962) 44 *UCLA Law Review*, p 48. The definition of money judgment is "judgments which have been rendered on the merits of a suit resulting in a judgment for a definite sum of money in favour of the plaintiff." See Tai, *supra* note 3, p 2.

8 See Dicey, *Conflict of Laws* (London: Steven & Sons Ltd. 1958), p 981. Also see *Nouvion v Freeman* [1889] AC 1 at 8, *per* Lord Herschell.

judgment, the judgment creditor may use it as a shield to prevent re-litigation of the dispute that has already been decided by the foreign court. Alternatively, when a judgment creditor seeks to *enforce* a foreign judgment, the effect is to execute the foreign judgment in the local court so as to pursue the local assets belonging to the judgment debtor. Accordingly, recognition is the *sine qua non* for enforcement, and since enforcement goes further than recognizing the foreign judgment to the extent that the judgment debtor's local property may be subjected to the power and scrutiny of the foreign court, the conditions for enforcement is identical to, if not more stringent than, the conditions preclusive to recognition.[9]

In Hong Kong, there are effectively two ways to enforce a foreign judgment: by statute or at common law. The efficiency that the statutory scheme offers to judgment creditors by way of registration is one of the most apparent purposes of having two separate enforcement mechanism. In any event, similar to the English system, the enforcement of a foreign judgment under either scheme would be conditional upon the Hong Kong Courts being satisfied that the foreign judgment have met certain requirements. For the sake of clarity, hereinafter the foreign court will be addressed as *F-1* or foreign court while the Hong Kong court will be addressed as *F-2* or the 'local court'.

A. Enforcement under Common Law

For a foreign judgment to be enforced at common law, the judgment creditor must bring an independent cause of action on the foreign judgment. It must be noted that the action in the *F-2* court is not based on the original cause of action which founded the foreign judgment but is based on the judgment itself.[10] That is, the original cause of action brought before the foreign court (*F-1* Court) is no longer relevant in the enforcement proceedings since it is the vested right upon the foreign judgment which enables its enforcement.[11] Accordingly, enforcement at common law does not require reciprocity between respective nations of enforcement.

Before enforcement is permitted in the local court, a foreign judgment must satisfy certain criteria.[12] First of all, it must be proven by the applicant that the foreign court which pronounced the judgment has jurisdiction by reference to private international law rules of

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9 See Briggs, A, and Rees, P, *Civil Jurisdiction and Judgments* (2nd ed.) (London: LLP, 1997), p 35. Also see Smit, *supra* note 7, p 67.

10 The action non-merger rule was abolished by the Foreign Judgment (Restriction on Enforcement and Recognition) Ordinance (Cap 46). Section 5(1) stated that if the foreign judgment is enforceable in Hong Kong, then the original cause of action is gone. But if there is no alternative available to enforce the foreign judgment, the plaintiff can still sue on the original cause of action so that the substantive issues between the parties will be relitigated in the Hong Kong court.

11 Dicey and Beale were of the view that private international law was founded on the theory of vested rights and the recognition of foreign judgment was based on the same principle. When a local court enforces a foreign judgment, it is in fact enforcing a right created by the local court and not that created by the foreign court. Further discussion of the doctrine will be discussed at later stage. For details, see Diwan, P, *Private International Law: Indian and English* (3rd ed.) (New Delhi: Deep & Deep Publication, 1993), p 617.

12 See Dicey and Morris, *The Conflict of Laws* (12th ed.) (London: Sweet & Maxwell, 1993) Vol 1, p 457: The plaintiff may apply for summary judgment under order 14 of the Rules of the Supreme Court (or the rules of the High Court of Hong Kong) on the ground that the defendant has no defence to the claim. Also see Brom-Reid, M, "Recognition and Enforcement of Foreign Judgment", 3 *International and Comparative Law Quarterly* 49, p 50.

Hong Kong.[13] Secondly, the action to enforce must be brought within 12 years from the date which the judgment became enforceable.[14] Thirdly, the action must be for a debt or a definite sum of money not being a sum payable in respect of revenue or penalty of any kind.[15] Fourthly, the judgment must be final and conclusive in the court which pronounced it.[16] Upon fulfilling the above conditions, the foreign judgment is enforceable in the courts of Hong Kong.

Once the judgment is found to be enforceable, the judgment debtor may advance on defences against enforcement by arguing that one of the abovementioned criteria has not been satisfied and thus the foreign judgment ought not be enforced. Furthermore, the court can also refuse enforcement if the defendant can prove that the foreign jusgment was obtained by fraud,[17] or whereby its enforcement would be contrary to Hong Kong's public policy or the notion of natural justice, or given in proceedings brought in breach of a jurisdiction or an arbitration clause.[18]

The common law action is the most widely applicable mode of enforcement of foreign judgments in Hong Kong. It is the only method in respect of judgments from courts in United States of America,[19] Canada and theoretically any of the countries that were not excluded by the statutory scheme.

B. Statutory Enforcement of Foreign Judgments

Under the statutory regime, the legal principles governing the recognition and enforcement of foreign orders and judgments are substantially similar whether enforcement occurs through registration or by suing on the judgment at common law. In fact, enforcement through registration may be regarded as a modification of the original common law scheme under which a foreign judgment is deemed to be a civil debt arising from an implied contract to pay the amount of the foreign judgment. The difference between the common law and the statutory regime seems to lay in the procedure for enforcement in that the latter is provided with by a system of registration.[20]

The statutory enforcement regime is governed by the *Judgments (Facilities for Enforcement) Ordinance* and the *Foreign Judgments (Reciprocal Enforcement) Ordinance*.[21] These two statutory instruments together provide the enforcement of foreign judgments by way of registration for those countries that are listed therein.[22] While the validity of the *Judgment (Facilities for Enforcement) Ordinance* is questionable in the post-handover era,[23] the

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13 See *Adams v Cape* [1990] 1 AC 433. Also see Dicey and Morris, *supra* note 12, Rule 37, p 492.

14 See Limitation Ordinance (Cap 347) of the Laws of Hong Kong, s 4(4).

15 See Dicey and Morris, *supra* note 12, Rule 35, p 461. See also *Nanus Asia Co Ltd v Standard Chartered Bank* [1990] 1 HKLR 396.

16 See Dicey and Morris, *supra* note 12, Rule 35, p 461.

17 See *Maydwell v WFM Motors Pty Ltd* [1997] 2 HKC 244. See also *Owens Bank Ltd v Bracco* [1992] 2 All ER 193 and *Owens Bank Ltd v Etiole Commerciale SA* [1995] 1 WLR 44 (PC).

18 See Dicey & Morris, *supra* note 12, Rule 45, p 514 and Rule 44, p 511.

19 See *Nintendo of America Inc v Bung Enterprises Ltd* [2000] 2 HKC 629.

20 See Tai, B, *supra* note 3, p 6.

21 Chapter 319 of the Laws of Hong Kong.

22 See Tai, B, *supra* note 3, for a good summary of the process of registration.

23 The validity of Chapter 9 is questionable after the handover of sovereignty. The reading of s 2A(2)(b) of the Interpretation and General Clauses Ordinance (Cap 1) inserted by s 5 of the Hong Kong Reunification Ordinance (Cap 2601) provides that any Hong Kong ordinances which confer privileges on the UK or

Foreign Judgment (Reciprocal Enforcement) Ordinance remains useful for those parties seeking to enforce a judgment where the foreign country is listed in the latter *Ordinance*.[24] Basically, any countries that are listed in the *Foreign Judgments (Reciprocal Enforcement) Ordinance* can have its superior courts' judgments registered in the High Court of Hong Kong.[25] Once the judgment is registered, the judgment creditor could enforce the judgment with the same force and effect as any other judgments given in the High Court of Hong Kong.[26] Statutory enforcement must be based on reciprocity.[27] Accordingly, in the absence of any reciprocal arrangement between the mainland authorities and the Hong Kong government, mainland judgments could not be enforced under the statutory regime.

III. Problems of Enforcing Mainland Judgments in Hong Kong

Having excluded the possibility of enforcement under the statutory regime; at first blush, the general application of the common law would enable judgments from the PRC to be enforceable in Hong Kong, similar to that from any other foreign countries. However, as will be seen from below, the enforcement of Mainland judgment is problematic in that it suffers from a technical problem of lacking in finality and thus could not be enforced at common law. In fact, there has been no reported case in which a Mainland judgment had been enforced in Hong Kong before the change of sovereignty, and as the following cases seek to illustrate, enforcement continues to be problematic immediately after the handover.[28]

In the pre-handover case *Chiyu Banking Corporation Ltd v Chan Tin Kwun*[29], the Supreme Court of Hong Kong ruled that a judgment rendered by the Fujian Intermediate People's Court could not be considered final and conclusive for the purpose of enforcement at common law. The summary of the facts is thus: the plaintiff bank commenced an action in the Fujian Intermediate People's Court in the PRC against the defendant who acted as the guarantor of the debt of one of the bank's customers. The plaintiff's case was that the defendant executed the guarantee in favour of the plaintiff in consideration of the plaintiff granting banking

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other commonwealth countries will now have no effect, unless they give effect to reciprocal arrangement. In light of this insertion, the validity of Chapter 9 is highly questionable since there was never reciprocal arrangement between the United Kingdom and the Colony of Hong Kong in relation to enforcement of judgment. Rather, it is more correct to say that the arrangement under Chapter 9 was a privilege conferred on the United Kingdom *vis-à-vis* Hong Kong.

24 For discussion of the validity and the functioning of Chapter 319 after the handover, see Smart, P, "Enforcing Foreign Judgments after 1997", (April 2002) *Hong Kong Lawyers*. The issue on Chapter 319 will be discussed in later part of this article, see *infra* note 123.

25 See Cap 319, the foreign country must be listed under the Ordinance to be covered in the statutory regime. For a judgment creditor seeking enforcement in Hong Kong, it is important for the party to make sure as to whether that particular foreign judgment came within Chapter 319 or fell under the common law rules because if a judgment is enforceable under the FJREO, no action could be brought on the judgment at common law (see s 8 in Chapter 319). The full list of Countries can be found in the two schedules in Chapter 319 which include various superior courts of Australia, New Zealand, Singapore, Israel, France, Netherlands and various countries.

26 *Supra* note 4.

27 *Infra* note 86, whereby the writer seeks to discuss this issue in greater detail.

28 *Supra* note 4. Also see *Ever Chance Development v Chng Kai Chiu* (t/a Wing Hung Hardwares & Machinery Co) (Civ App 8/1997), unreported; digested at [1997] HKLY 542 whereby the Hong Kong Court of Appeal allowed the enforcement of a Mainland judgment in Hong Kong. A Chinese judgment may nevertheless be enforceable in Hong Kong if the parties do not seek to argue the finality issue. It appears to the writer that the judgment was enforced because the litigants had simply ignored the issue of finality, and hence the court did not have to deal with this particular issue.

29 [1996] 2 HKLR 395.

facilities to the bank's customers. The Fujian Intermediate Court found for the plaintiff. The defendant appealed, and shortly afterward, the Higher People's Court dismissed the appeal. Subsequently, the plaintiff sought to enforce the PRC judgment in Hong Kong. In the Hong Kong court, Cheung J thoroughly reviewed the relevant civil procedure of the PRC, and found that, the defendant was still capable of lodging a protest against the decision of the Intermediate Court to the Fujian People's Procuratorate. Since the defendant had already presented such a petition to the provincial Procuratorates, Cheung J decided against the plaintiff bank since the Fujian judgment did not qualify the final and conclusive requirement, the court said:

> "Based on the material before me, the supervisory function of the Supreme People's Procuratorate and the protest system are not simply an appeal process. The intermediate court judgment is final in the sense that it is not appealable and it is enforceable in China, but it is not final and conclusive for the purpose of recognition and enforcement by the Hong Kong courts because it is not final and unalterable in the court which pronounced it."[30]

The position after the handover seems to have remained identical to the colonial era and Mainland judgments continue to suffer from the same technical problem. In *Tan Tay Cuan v Ng Chi Hung*[31], the Court of First Instance decided the case in similar fashion as in *Chiyu Banking Corporation Ltd. v Chan Tin Kwun*[32] and rejected the enforcement of yet another Fujian judgment. The court again ruled that the judgment delivered by the Fujian Intermediate People's Court could not be considered as final and conclusive for the purpose of enforcement in Hong Kong. In this case, the plaintiff sued the defendant for breach of agreement in relation to transfer of shares in certain companies for a certain price. The Fujian Intermediate People's Court in Xiamen gave judgment in favour for the plaintiff. The case was then brought before the Higher People's Court in Fujian Province, and again, judgment was given in favour of the plaintiff. Thereafter, the plaintiff sought to enforce the Fujian judgment in Hong Kong. At first, the High Court Master found for the plaintiff and ordered the judgment to be enforced against the defendant in Hong Kong. The defendant appealed against the master's decision on the ground that the judgment lacked finality. In the Court of First Instance, Waung J allowed the defendant's appeal on the basis that the judgment obtained in the Mainland was not final and conclusive. The Court said:

> "The legal system in place in China is such that the judgment of the Higher People's Court of 27 March 2000 is arguably not a final and conclusive judgment because it is a judgment which by their procedure is capable of being corrected on review and on retrial."[33]

The Court gave further reasoning:

> "We also have uncontested evidence that there was an application which was made by the defendant to the Supreme People's Court of China in Beijing, which ordered that the lower court should deal with the application, review and deal with it. It is pertinent to note the Supreme People's Court did not reject the application for retrial or dismiss it, which seems to suggest that there are possible good grounds for retrial. Of course, once the grounds have been established, as I read Article 179, then the court has no discretion but to order retrial. So, it is plainly at present that the Higher People's Court has been directed by the Supreme People's

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30 *Ibid* at 399.
31 (2000) High Court Action No 5477.
32 *Supra* note 29.
33 *Ibid.*

> Court to consider the application for a retrial and to deal with it. A retrial may take place. It does not necessary mean that it will take place but certainly it may take place."[34]

In another Court of First Instance case *Wuhan Zhong Shou Hong Real Estate Company Limited v The Kwon San Hong International Limited*[35], the judgment creditor sought to enforce a Supreme People's Court judgment in Hong Kong while the defendant argued that the judgment was not a final and conclusive one in that it could still be subjected to the scrutiny of a potential protest from the Supreme People's Procuratorate. The defendant applied for a stay of proceedings on the basis that there is a possibility of retrial and/or that the earlier judgment of the Supreme People's Court may be nullified. Yeung J allowed the defendant's application and refused to enforce the judgment on the ground that the judgment was potentially not a final one, since the defendant had already lodged a protest to the People's Supreme Court for a retrial and also a petition to the Supreme People's Procuratorate for a review on the judgment. Hence, even a judgment given by the highest court in the mainland was unenforceable in the SAR.

In these cases, the Hong Kong court appears to have reached the same conclusion on the finality issue via two different routes. Firstly, the court ruled that since a Mainland judgment is capable of being corrected on review by their civil procedure, and the higher people's courts or the People's Procuratorate also have the power to order a retrial, thus Mainland judgments cannot be considered as final and conclusive.[36] Secondly, as in the *Tan Tay Cuan*[37] case, the court concluded that there was 'uncontested evidence' that there was an application which was made by the defendant to the Supreme People's Court of the PRC in Beijing which, if indeed allowed, would definitely vacate the Fujian judgment, thus also preclude any enforcement effect to be given to it. Similarly, in the *Wuhan Zhong Shou Hong Real Estate* case, enforcement was refused by the court since the defendant was able to produce evidence which suggested that an appeal/petition had indeed been lodged to the Supreme People's Court and the Supreme People's Procuratorate for a reconsideration of the judgment in concern. While the second reasoning is based on evidential footing such that the defendants were in fact still contesting the legality of the Fujian judgment and the Supreme People's Court judgment respectively, the writer submits that the first reasoning given by the Hong Kong Court is of general application in that it appears to be based an observation of the Mainland legal framework, and that means a Mainland judgment cannot be final and conclusive. Thus, such reasoning would necessarily preclude the enforcement of any mainland judgment here in Hong Kong.

The above cases demonstrate the current position in common law that all Chinese judgments are unenforceable in Hong Kong. The inability of Mainland judgment to meet the final and conclusive requirement at common law is triggered by its civil procedure, which is capable of rendering its courts judgment being dismissed by some external institutions, such as the Procuratorates. Accordingly, the core issue in enforcing a mainland judgment lies on the final and conclusive requirement. Although the three Hong Kong cases have reached conclusion on an identical basis such that Mainland judgments lack finality, it is the writer's observation that the Hong Kong court may have applied the finality requirement over simply. With respect, the application of the finality rule in both cases was bald and the court had not clearly defined and

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[34] *Supra* note 31.
[35] [2000] HKCFI 702 or High Court Actions No 14325/1998.
[36] For discussion on the finality issue , see Part VI of this article.
[37] *Supra* at 31.

explained the precise application of the finality rule. Without identifying the exact premise of the finality rule, it remains questionable as to whether the rule has been applied overly broad by the Hong Kong Courts. The following discussion seeks to explore the finality requirement in greater details.

IV. The Doctrine of Res Judicata

A. Finality and Conclusiveness

Although the final and conclusive requirement is a settled principle of private international law, such requirement cannot be defined without circularity and is often too baldy stated.[38] Cheshire has even gone as far as saying that "the extent to which a foreign judgment is effective as *res judicata* has not always been clear"[39]. The finality requirement coincides with the broader principle of *res judicata* in the context of recognition and enforcement of foreign judgment. The term *res judicata* in the Latin language is defined as "a thing adjudicated" and in accordance with this maxim, academics have further defined the doctrine as "a final and conclusive judicial decision on the merits by a judicial tribunal having competent jurisdiction over the matter in dispute and the parties"[40]. While the wider meaning of *res judicata* subscribes to the meaning that a judgment is final in the sense that it qualifies all the enforcement requirements,[41] the term is also used to represent the final and conclusive requirement.[42]

In the context of recognition proceedings, it appears that there are in general two rationales behind the operation of the finality requirement. The first one entails some elements of state interest that it is a fundamental objective to most legal systems that disputes between parties must ultimately come to an end. That is, once a matter has been litigated by the parties in a legitimate forum, the decision must be taken as final and such a matter should never be re-litigated again by the same parties.[43] The second reason in favour of the operation of *res judicata* is vested on the principle of justice and fairness that no one should be vexed by his opponent twice for the same claim.[44] These rationales are conversely applied in the context of enforcement: it would be unfair to allow the enforcement of a foreign judgment whereby the issues between parties have not been fully litigated. Furthermore, if a judgment has not been fully litigated in the foreign law district, it would be illogical to enforce it in the local court since this would give greater effect to the judgment than its original legal status in the *F-I court*. Therefore *a fortiori* to recognition, the enforcement of foreign judgment should be restricted unless the judgment is final and conclusive in the same sense as recognition.[45] Since the finality principle is open-textured, to further understand the precise application of

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38 See Rogerson, P, "Issue Estoppel and Abuse of Process in Foreign Judgments", (1998) 17 *Civil Justice Quarterly* 91, p 93.

39 See Cheshire's comment as cited in Borm-Reid, *supra* note 12, p 51.

40 See Barnett, P, R, *Res Judicata, Estoppel and Foreign Judgments: The Preclusive Effects of Foreign Judgments in Private International Law* (3rd ed.) (London: Oxford University Press, 2001), p 31.

41 For example, conditions such as the foreign court having competent jurisdiction over the case, the judgment must be for a definite sum of debt and other conditions that were stated in Part II of this article.

42 See *Nouvion v Freeman* (1889) 15 App Cas 1 whereby Lord Watson associated the term *res judicata* with the final and conclusive requirement.

43 See Barnett, P, R, *supra* note 40, p 4.

44 *Ibid*, p 56. Also see Smit, *supra* note 7, p 46.

45 See Barnett, P, R, supra note 40, p 33. The author stated that "[a] court must recognize for preclusive purposes every judgment that it enforces even although it need not enforce every judgment recognized for the purposes of preclusion".

the finality rule and the rationale behind its operation, the word *final* must be read in light of more cases.

The leading authority which exemplified the final and conclusive requirement is *Nouvion v Freeman*[46], a House of Lords decision whereby their Lordships had decided on the enforceability of a Spanish 'remate' judgment in England. Under the Spanish legal system, there existed two types of proceedings: summary proceedings and ordinary proceedings. In the summary proceeding, if a *prima facie* case is made out the judge issues attachment order without any notice to the defendant. Then the notice is given to the defendant and he may defend the case. But the defences available to the defendant are few and he is not permitted to impeach the original transaction upon which he had been sued. However, the party defeated in the executive action may then bring a plenary action (an ordinary action) and all defences available to him under the ordinary law may be taken by him in the identical court. Under the Spanish law, the 'remate' judgment cannot be pleaded as *res judicata*. Therefore, when the plaintiff brought an action in an English court on the basis of 'remote judgment', the House of Lords refused to enforce the judgment as the rights and liabilities of parties were not finally determined by the judgment, nor did the judgment operated as *res judicata*. In the judgment of the House, per Lord Herschell:

> "I think that in order to establish that such a judgment has been pronounced it must be shown that in the Court by which it was pronounced it conclusively, finally, and for ever established the existence of the debt of which it is sought to be made conclusive evidence in this country, so as to make it res judicata between the parties. If it is not conclusive in that same Court which pronounced it, so that notwithstanding such a judgment the existence of the debt may between the same parties be afterwards contested in that Court, and upon proper proceedings being taken and such contest being adjudicated upon, it may be declared that there existed no obligation."[47]

This writer finds the dictum of Lord Watson very helpful in enunciating the limit of the doctrine:

> "No decision has been cited to the effect that an English Court is bound to give effect to a foreign decree which is liable to be abrogated or varied by the same Court which issued it. All the authorities cited appear...to assume that the decree which was given effect to had been pronounced *causa cognita*, and that it was unnecessary to inquire not the merits of the controversy between the litigants, either because they had already been investigated and decided by the foreign tribunal, or because the defendant had due opportunity of submitting for decision all the pleas which he desired to state in defence...a foreign decree need not be final in the sense that it cannot be made the subject of appeal to a higher court; but it must be final and unalterable in the Court which pronounced it."[48]

The dicta of the two law lords encapsulated the basic elements that define a final judgment in the context of English private international law. Firstly, the judgment must be conclusive in the sense that the court which pronounced the judgment cannot subsequently discharge, revise, modify or review the decision after it gave effect to the judgment, so that the judgment could be properly considered as *res judicata* in the country where it was given.[49] It is important to note that whether the decision is final is judged according to law of the *lex fori,* namely the

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46 (1889) 15 App Cas 1.

47 *Ibid.*

48 *Supra* note 46 at 13 per Lord Watson.

49 See Rogerson, P *supra* note 38. Also see Brom-Reid, *supra* note 12 , p 55.

F-1 court. Secondly, it must permanently establish the existence of the debt in the law of the country to which the judgment was rendered. Altogether, if a judgment leaves the rights of one of the parties undetermined so that a final determination may be reached only in subsequent proceedings, no obligation has been created upon which an action can be based in the local court.[50]

The requirement was further developed and exemplified some hundred years later in another but more recent House of Lords decision *Carl Zeiss Stiftung v Rayner & Keeler Ltd (No.3)*[51]. Though the judgment was directed specifically to the application of issue estoppel, their lordships also had to consider whether the West German courts' judgment was final and conclusive in West Germany regarding other proceedings between the same parties. Per Lord Reid:

> "We should have to be satisfied that the issue in questions cannot be re-litigated in the foreign country. In another words, it would have to be proved in this case that the courts of the German Federal Republic would not allow the re-opening in any new case between the same parties of the *issues decided* by the Supreme Court in 1960, which are now said to found an estoppel."[52]

So far, the cases seem to be coherent in affirming the stringent interpretation of the word *finality* in recognition and enforcement proceedings so that there should be no re-litigation of the same issues between the parties in the same court. However, it is submitted that the stringent operation does not appear to be convincing all at once. It appears that their Lordships had reached what now seems to be a stringent rule only in the context of the particular case that they were dealing with, particularly when *Nouvion*[53] was only concerned with the situation whereby a foreign court has rendered a provisional decision, subject to a later decision in the same court. However, it remains questionable as to whether the finality requirement should be given an absolute meaning when the situation differs, or situations whereby an exception is justifiable.

At this stage, it is safe to say that in order for a foreign judgment to be enforced at common law, the foreign court must at least have disposed and examine all the issues that arise in the very case and not leave some of those issues or defences for a later trial. This sub-rule derived from the greater finality principle is sound in that it is consistent with the desirable policy to deal justly with individual litigants. As Smit remarked:

> "Whether relitigation is unfair, however, is not to be determined only in the light of the assumed correctness or incorrectness of the prior judgment, but rather by evaluation of all relevant circumstances including the extent to which the parties in the prior action had a full opportunity there to litigate, and actually litigated, the issues of their concern."[54]

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50 See Brom-Reid, *supra* note 12, p 49.
51 [1967] 1 AC 853 (HL).
52 *Ibid* at 918 per Lord Reid.
53 *Supra* note 42.
54 See Smit, *supra* note 7, p 71.

B. The Limit of the Finality Requirement

The finality requirement cannot operate without limit for otherwise very few judgments could ever be enforced at common law.[55] Thus even Lord Watson's dictum in *Nouvion*[56] has made clear that in some situations, a judgment may still be enforceable even though technically it is not a final one. His Lordship approved the situation in that a foreign judgment need not be final in the sense that it cannot be made the subject of appeal to a higher court, although a stay of proceeding in the action of the foreign judgment should normally be given pending on the outcome of the appeal in the foreign court.[57] Thus, the finality requirement appears to operate only to the extent that the decision could not be reopened in the same court by further proceedings and such power to alter a judgment must be retained by the court which pronounced it.[58] Hence, the definition of finality is relaxed when a foreign judgment is subject to an appeal.

Turning now to a consideration of the theoretical aspect of the finality rule in relation to the situation of an appeal, it appears to some academics that a distinction should be drawn between appeal with an effect of *supersedeas* to execution and 'an appeal' which could result in a trial *de novo*.[59] While the former represents the temporary stay of execution on the pending appeal in the foreign court, the latter term connotes an absolute vacation of the original judgment. According to such distinction, it is the latter situation which brings into existence the rationale behind the finality requirement in that a vacation of the original judgment cannot be said to have formulated an obligation for the defendant towards the plaintiff.[60] On the other hand, if an appeal has the effect of *supersedeas* to execution, then the court would normally order a stay in the proceeding until the appeal is concluded. One interpretation of the finality is thus to draw distinction between the effect of *supersedeas* and *de novo*. It is submitted that the distinction as drawn is not satisfactory in that it fails to address situations whereby a judgment is enforceable at *F-1* though it is technically subject to changes. It appears to the writer that the situation of an appeal is only one of many situations whereby a judgment can be enforced even though it is technically not final. As Read recognized, it is also possible that in some circumstances the effect of taking an actual appeal in a foreign court would be similar to that when an English appeal in equity is taken of entirely avoids or vacates the decree.[61] Thus, if a foreign judgment is subject to an appeal of such nature that could potentially vacate the original decision, it would not be considered as *final* under the traditional interpretation of the *Nouvion* Principle. In such a situation, should the *F-2* court really prevent itself to enforce the foreign right on the basis of this mere technical possibility?

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55 It is submitted that theoretically speaking, all judgments can be reviewed if finality is to be given an absolute meaning. Take fraud as an example. If a court in a common law system discovers fraud on the court, a rendered judgment can be subjected to scrutiny, though of course, the chance of this happening is very slim.

56 *Supra* note 42.

57 See Read, *supra* note 3, p 83. See also *Nouvion v Freeman*, *supra* note 42 at 14 per Lord Watson.

58 See Read, *ibid*, p 64. Also see *Nouvion v Freeman*, *supra* note 42.

59 Schlesinger, R, "The Finality of Judgments in the Conflicts of Laws", (1941) 41 *Columbia Law Review* 879, p 881.

60 For further understanding of the obligation theory, see Part C on discussion in relation to the basis of recognition and enforcement.

61 *Supra* note 3, p 84.

The question posed above leads to the second possible interpretation of the finality requirement, based on the following hypothesis: even if a judgment could be technically vacated and hence de novo, it can nevertheless be enforced if the local court concludes that, as a matter of fact, the judgment is final, and can be enforced in accordance with the foreign law. Such interpretation is flexible and is effectively a much narrower interpretation of *Nouvion v. Freeman*[62]. The acceptance of the hypothesis would result in a judgment being enforced even though it lacks finality in the technical sense, subject to the requirement that it is enforceable under the law of the *lex fori*. This hypothesis found support in the context of enforcing foreign default judgments by the commonwealth courts. In *Boyle v Victoria Yukon Trading Company*[63], where the Supreme Court of British Columbia found that a default judgment is final and conclusive as long as it could be executed, unless and until further proceeding has taken place. The Chief Justice of BC said:

> "A default judgment may be set aside either absolutely or on terms, but so long as it stands it is a final and conclusive adjudication that a debt is due by the defendant if the claim is for debt...this judgment is *not unalterable in the wide sense*, because it can be set aside by a Judge of the Yukon Court, but it is unalterable in the sense that it is conclusive while it stands...if we were to say merely because a default judgment may be set aside by the Court in which it is taken that therefore it is of not final legal validity for the purpose of international suit, we would, in effect, be saying that the clearer the plaintiff's case the more useless his judgment would be."[64]

At first, this may seem to go directly against the *Nouvion* principle, as such interpretation would virtually leave all judgments as having met the finality requirement. But a closer look of the dictum of *Nouvion* would suggest the otherwise – since finality is judged in accordance with the law of the *lex fori*, it would be illogical to suggest that their Lordships were intending to prevent any forms of enforcement which could be technically altered or vacated at a later stage, in particularly if an appeal at foreign law is in nature substantially different from the English perception. Thus, the flexible interpretation may allow a foreign judgment to be enforced at common law albeit technically not a final one. However, by saying that, the flexible interpretation does not operate so as to allow all foreign judgments to benefit from this wide door, since the burden remains on the plaintiff to prove that, on a balance of probability, the decision is final and enforceable at the place where the judgment was obtained. The following Hong Kong cases are apparently examples of the application of the relaxed interpretation.

In *Nintendo of America Inc v Bung Enterprises Ltd*[65], the Hong Kong Court of First Instance dismissed a case against the enforcement of a default judgment rendered by the State of California by the judgment debtor. In this case, the defendant sought to argue against enforcement by relying on *Nouvion* that the particular Californian judgment was not final and conclusive. The defendant claimed that the judgment was not given by the Californian court after a consideration of the merits of claims and that it may be set aside by the trial court upon a reconsideration motion or overturned on appeal.[66] Recorder Chan SC rejected the defendant's bald argument and ordered judgment be entered against him. In his judgment, the Recorder was of the opinion that *Nouvion* must be read in light of the context of the case and

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62 *Supra* note 42.

63 *Boyle v Victoria Yukon Trading Company* (1911) 9 BCR 213 available at http://www.westlaw.com (last visited: 8 June 2002). Also cited in Read, *supra* note 3, p 84.

64 *Ibid.*

65 [2000] 2 HKC 629.

66 *Ibid* at 631.

thereafter narrowly defined the parameter of the finality rule by saying that "the [Spanish] court would have to consider a judgment of the Spanish Court which was known as a "remate" judgment which was a judgment after consideration of limited issues and which was liable to be reconsidered in 'plenary' proceedings where the whole merits of the matters might be gone into"[67]. Such interpretation of *Nouvion* would confine their lordships' reasoning to the facts of the case so that the decision only applies to situation whereby the foreign court has not fully considered the merits of a case, such that a judgment is provisional in nature. By saying that, the recorder also affirmed part of the finality requirement such that a judgment should not leave something, *ex facie*, to be judicially determined or ascertained before the decision could become effective and enforceable.

In rejecting the defendant's claim, the recorder concluded that although it was possible that the foreign default judgment could be altered in the court that pronounced it if the defendant successfully filed the relevant motion in the California Court, the limitation period for doing so had expired. Alternatively, even though it was theoretically still possible that the default judgment may be vacated on some grounds by filing a motion to the U.S. Federal Court, the recorder said that "the defendant had not shown that such step was being undertaken". Furthermore, the recorder concluded that even if the defendant was indeed planning to seek a reconsideration of the default judgment and to appeal if the reconsideration motion should fail, such evidence was insufficient to avoid enforcement in Hong Kong.[68]

In another recent Court of First Instance case *Biard Laboratories SA v Rosumi Ltd*[69], a similar decision was reached in an enforcement proceeding regarding a French provisional judgment. The plaintiff company sought to enforce a French judgment in Hong Kong by way of registration under the *Foreign Judgment (Reciprocal Enforcement) Ordinance*. The defendant applied to set the registration of the French judgment aside under s 6(1)(a) of Cap 319 by arguing that the judgment was not final and conclusive. The defendant argued that the judgment rendered by the Court of Appeal of Lyon was not final in that it was a provisional decision without consideration of the underlying merits of the case. Relying on *Nouvion*, the defendant further argued that the judgment was not enforceable given its provisional nature. In the Court of First Instance, Keith J rejected the argument and refused to set aside the registration. The court made clear that the whether the foreign judgment is literally a provisional judgment does not necessarily prevent enforcement *per se*. Per Keith J:

> "Does the fact that the [judgment] is described as an "interim decision" means that it is not capable of being recognized by Hong Kong law as final and conclusive? I think not. If the reason for the making of the order was because it needed to be made urgently without consideration the merits, I can see how the order is interim in the sense that it continues in force only until the merits have been determined. But if the order is made because, having considered the merits, the existence of the obligation cannot be seriously questioned, it is difficult to see how the decision is anything more than final and conclusive."

In relation to the *Nouvion* Principle, Keith J made the following comment:

> "The House of Lords' conclusion on the facts of [*Nouvion*] case do not assist me in determining whether the [judgment] in the present case was final and conclusive. In both the remate and plenary proceedings, the issue was whether one of the parties was indebted to the

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67 *Ibid* at 632.

68 *Ibid.*

69 (1997) High Court Miscellaneous Proceedings No 252.

> other. The remate proceedings did not conclusively resolve the issue. It resolved only some of the questions which bore on the issue."

Similar to the *Nintendo* case, it is clear that the above dictum saw the court's attempt to narrowly confine the *Nouvion* principle to the facts of the decision itself. Given this interpretation, it could be argued that other forms of provisional judgments which are capable of being vacated in subsequent proceedings are potentially enforceable under the approach taken by the commonwealth courts in enforcing foreign default judgments.

The writer is of the view that the findings in both Hong Kong cases are consistent with the second hypothesis. First, the court concluded in both cases that the finality requirement must be read in light of the context of each case. Secondly, instead of baldly applying the technical definition of finality, the court has given finality a flexible meaning and rejected the defendants' claim on the lack of evidential basis to prove that the judgment was not a final one.

At this stage, two possible interpretations of the finality requirement can be deduced from *Nouvion*. The first interpretation is based on a wider construction, such that a foreign judgment could be considered as final only if it is not capable of being reopened by the court that pronounced it. Under this construction, the defendant only has to show an arguable case that the judgment was not final and conclusive under the law of *F-1* without adducing any evidence. On the other hand, the narrower and flexible interpretation put forward by this writer is less absolute: as long as the judgment is enforceable in the sense that it is capable of execution by the law of *F-1*, the foreign judgment would have fulfilled the finality requirement unless it could be shown by the judgment debtor on evidence that further action has been undertaken to render the judgment inconclusive. Hence, the flexible interpretation would prevent the judgment debtor from relying strictly on theoretical ground that the judgment is not final. It appears to the writer that this interpretation of the finality rule would make it closer to being a rule of evidence in that it operates only if the defendant has shown that an appeal has actually been lodged, thus rendering the judgment not final for the time being.

Thus, it is shown that, arguably the finality rule could be subjected to quite different interpretations. So far, the article has provided analysis as to *how* a judgment should be considered as final and conclusive. The next logically enquiry must go to the fundamental problem as to on what basis is a foreign judgment recognized and enforced, in order to ascertain the scope of the finality rule.[70] This would be useful for ascertaining the basis that justifies the finality requirement, which in turn, determines the precise scope of its operation.

C. Basis of Enforcement: The Theory of Vested Right

The earlier view from the English court is that enforcement is purely based on the doctrine of comity, which closely connoted with the notion of reciprocity.[71] The doctrine of comity rests upon the theory that foreign judgments were originally enforced in England because the law of nations was considered to require the courts of one country to assist those of any other and

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70 *Supra* note 8, p 986.

71 *Gever v Aguilar* (1798) 7 *Term Rep* 681 at 687.

closely associates with the notion of courtesy.[72] The doctrine "hangs somewhere between duty and courtesy" and thus is often being criticized for its failure to provide certain results.[73] Thus, this view was rejected to be the exclusive reasoning for recognition and enforcement when Lord Broughan said: "The courts of England can hardy be said to act from *curtesy ex comitate* but *ex debito justitiae*"[74]. Instead, the modern prevailing view is based on the obligation theory propounded by various scholars and is adopted in England.[75] Horace Read concluded that the true basis for enforcement of a foreign judgment is the vested right that was created by the foreign judgment.[76] Simply speaking, Read viewed the subject-matter as being the judgment rendered by the foreign court had effectively created a new right and a new duty between the parties. It is this new right and its correlative duty that are recognized and enforced at common law.[77] In effect, the foreign judgment constitutes a new species of private obligation such that it is "a settlement of the rights of *private parties* of a peculiarly solemn nature, by which such parties should be bound, as for instance, they are bound by their contracts"[78].

The result of the obligation theory is that if it is the new right created by the F-1 court which the F-2 court is enforcing, the existence of the right must be ascertained to the extent that the decision rendered in the F-1 court must be final and conclusive. Enforcement of a foreign judgment would otherwise be illogical if the foreign judgment is given a more conclusive force in the local court than it possessed where it was rendered.[79] As Read remarked:

> "The idea is that at common law the utility of a foreign judgment to a party in an action brought in an Anglo-Dominion court is to establish that he has acquired a foreign created right. It is this new judgment-created right that is recognized, and he has no vested right of this sort as long as either the foreign court has not made a definition disposition of the cause or retains control over the extent to which, if at all, a remedy should be available."[80]

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72 *Supra* note 8, p 983. Also see Dicey & Morris (London: Sweet & Maxwell, 2000), p 469 whereby it was suggested that comity derived from English judges' fear that English judgments would not be enforced abroad. Comity continues to be the basis of enforcement in American Courts. See *Hilton v Guyot* 159 *United States: Supreme Court Reports* 113, at 163-4 whereby Comity was defined: "Comity, in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience and to the rights of tis own citizens or of other persons who are under the protection of its law".

73 See Peterson, C, "Res Judicata and Foreign Country Judgment", (1963) 24 *Ohio Law Journal* 291, p 293.

74 See *Warrender v. Warrendor* (1835) 2 Cl & Fin 488 at 530, per Lord Brougham. Also see *Williams v Jones* (1845) 13 M & W 810 at 819 and *Godard v Gray* (1870) LR 6 QB 139 at 149.

75 See Peterson, *supra* note 73, p 295.

76 See Read, *supra* note 3, p 121, where he said "[t]he true basis on which authorities place the recognition of a foreign judgment is that it proves the fact that a vested right has been created through the judicial process by the law of a foreign law district. This basis not only supports and explains the finality requirements and conclusiveness rule; it is implicit in the doctrine of territoriality of law. This, however, is not to say that the common law of foreign judgments gives effect to the so-called vested rights doctrine of conflict of law to the extent of recognizing every right created by a foreign territorial law through judicial process. To be recognized as an operative fact a right must have been crated by the law of a law district which had judicial jurisdiction in the international sense and have satisfied other requirements yet to be considered".

77 See Read, *supra* note 3, p 63.

78 See Yntema, H E, "The Enforcement of Foreign Judgments in Angle-American Law", (1935) 33 *Michigan Law Review* 1129, p 1130.

79 *Supra* note 51 at 918-9 per Lord Wilberforce.

80 See Read, *supra* note 3, p 84.

To define the scope of the finality rule, the first step that must be taken in order to bring the finality requirement into some logical form is to determine an accepted theoretical basis of enforcement. If one starts from the hypothesis that the enforcement of a foreign judgments is within the exclusive domain of the obligation theory, such that the only rationale under any enforcement proceeding is for the local court to enforce a private right[81] invoked by one litigant towards another, the logical conclusion of defining the scope of the finality requirement must be based on the rights of parties asserted over one another. The adoption of an absolute obligation theory would therefore effectively eliminate any suggestions as to the interest of the foreign state in the enforcement proceeding of the foreign judgment. It is submitted that, on a practical basis, when a defendant exhausts his or her right to challenge a judgment, for example after the expiry of the limitation period, the judgment should be considered final between the parties. Thereafter the judgment binds the parties and is also enforceable against the defendant, regardless of the foreign state's potential influence over the judgment.

Hence, by adopting the theory of obligation as the basis of enforcement, an inference can be drawn in that there is an assumption at common law that the foreign right enforced is a matter of private right dispute and there is no external interest in the enforcement proceeding. It is thus suggesting that the finality requirement is strictly limited to the rights that the actual parties can assert against each other. The remaining question is whether the foreign judgment has indeed defined a legal obligation between two parties by the applicable foreign law, which will be the matter of discussion in the next part.

D. Summary

The above discussion enables the formulation of a summary as to the proposition taken by judicial decisions upon which a feasible hypothetical can be formulated. There are two approaches to define *finality*. The first, a rather rigid one, is the traditional interpretation of *Nouvion*, such that a judgment must be final in the sense that it can never be reopened by the same court that pronounced it. The judgment must be for a definite sum of money. Under this interpretation, the court should apply the absolute definition of finality, so that a foreign judgment is not capable of being enforced in the local court, regardless of how minimum the chances of reopening the case might be.

The essence of the alternative approach is to ignore the problem of definition. This is accomplished by shifting the emphasis away from the literal understanding of *Nouvion*, and to put it instead on the problem of justifying the rule with subsequent cases. The analysis of cases and the theoretical basis of enforcement affirm that in order to enforce a foreign judgment, the judgment could be considered *final* in the sense that the court has clearly imposed an obligation on one litigant towards another, and that all the issues that have been disputed must be disposed of before rendering the judgment. Secondly, it must also be for a definite sum of money. Thirdly, the judgment can be enforceable even though it is subject to an appeal or potential vacation, unless the defendant has shown by evidence that positive steps have been taken. Under this approach, the obligation would bind the litigants once they have exhausted their rights to question the judgment, and thus render the judgment a final one.

After the above analysis, the writer seeks to argue that a subscription to the alternative approach may nevertheless render a foreign judgment enforceable in Hong Kong, if the

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[81] *Ibid.*

following three criteria are met: - (a) All the issues have been disposed of and tried by the court which renders the judgment in concern and thus did not leave something, *ex facie*, to be judicially determined before the decison could become effective and enforceable,[82] subject to the exception of a default judgment; (b) Under the law of the *F-I court*, the rendered judgment is enforceable or executable;[83] (c) There is no contrary evidence adduced by the defendant that an appeal has in fact been lodged or such that a motion has been filed to the respective body in the place where the judgment was rendered, which is capable in vacating the judgment if the appeal is successful.[84]

V. Whether PRC Judgments Are Final and Conclusive?

A. Arguments against Enforcement

Having extensively discussed the finality requirement in the context of common law, the writer now seeks to reconsider whether mainland judgments can be seen as final and conclusive for the purpose of enforcement. Before going into the analysis, the writer seeks to discuss further the framework of the mainland legal system and some counter-arguments against enforcement. Apart from cases, academics and Mainland officials have also come up with arguments such that, if accepted, they would render finality of mainland judgment virtually non-existing.[85] First, some argued against enforcement by demonstrating the circularity of mainland judgments that they can be reopened again without any time limitation. Secondly, it has also been extensively argued by academics that Mainland judgments can never be considered as final and conclusive from a common law perspective, if 'finality' is to be given a Chinese meaning.[86] These issues must be considered before looking at the feasibility of applying the hypothetical test. The following institutional and procedural defects are said to be the reasons for the lack of finality.

1. The Trial System in the Mainland

In the context of civil proceedings, Mainland PRC has adopted a two-trial system (*liangshen zhongshen zhi*).[87] That is, the aggrieved defendant may appeal against the decision of the Court of First Instance to the people's court at the next higher level for one time only. The subsequent decision rendered by the court of second instance would be the final decision.[88] Hence, under the regular civil procedure, no further appeal shall be allowed thereafter and the

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82 See *Nouvion v Freeman*, *supra* note 42. It is submitted that even though default judgments would not qualify criterion (a) as suggested by this writer, a default judgment is nevertheless enforceable, as it has already been approved by various courts in the commonwealth. By using the liberal test of finality, the writer seeks to argue that, apart from default judgments, all other forms of money judgments are *arguably* enforceable.

83 *Supra* note 63.

84 See *Nintendo of America Inc. v Bung Enterprises Ltd.*, *supra* note 65. Also see *supra* note 63.

85 *Infra*, note 104, the Mainland judges are also concerned with the finality issue.

86 See Liu, N P, "A Vulnerable Justice: Finality of Civil Judgments in China", 13 *Columbia Journal of Asia Law* 35, available at www.lexis.com.

87 See *PRC Civil Procedure Law*, art 10 and art 158. Also see Chen, A, *An Introduction to the Legal System of the People's Republic of China* (Hong Kong: Butterworths Asia, 1998), p 173.

88 See *PRC Civil Procedure Law*, art 158.

second judgment is also legally effective.[89] Although a mainland judgment is said to be "final" at the end of the second instance, academics such as Dr Liu has argued that the term "finality" in the Chinese context should be carefully inspected. He argued that there are at least four institutional bases which support reopening the "final" judgment.[90] But even before that, the first argument that Dr Liu advanced is to distinguish the court of second instance in the Mainland from the common law appellate court in that the former is empowered to act like a trial court.[91] That is, the Court of Second Instance in the Mainland has the power to inspect new evidence and consider new issues, thus virtually reopen any issues that have been disposed of in the Court of First Instance. This effectively renders the Court of Second Instance in substance a trial court rather than an appellate court.[92]

This problem can be dealt with at once since there is no clear decision which goes against alteration or modification of a lower court judgment by a superior court at common law. As decided in *Nouvion*, the finality rule applies only if the judgment can be reopened by the same court which pronounced it. In the present situation, although the practice of the Court of Second Instance being institutionally a trial court in the mainland can practically insulates the judgment of the Court of First Instance, this problem can be easily overcame by simply taking a literal approach to the dictum of *Nouvion*.

2. The Supervisory Function of the Higher People's Court

The second possible problem with the finality issue is the intrusion of supervision procedure towards a mainland judgment.[93] Interestingly, the trial supervision only applies to a "final judgment" in either the court of first or second instance.[94] There are two ways that could lead to the application of the supervision procedures. It may either be lodged by the defendant of the case or by the higher level People's Court.

The supervision procedure is applicable to a case if the higher people's court finds that a decision of a lower court has been reached with "definite errors",[95] in such a situation, a new trial will be conducted and the previous 'final decision' would be suspended until the new decision is issued.[96] There is no time limit imposed on the court to exercise its supervisory

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89 *Supra* note 86, Dr Liu argued that the term "legally effective" is intentionally asserted in lieu of the word "finality" for that the Mainland authority had they comprehend the difficulties of achieving finality in the PRC.

90 See Liu, *supra* note 86.

91 *Ibid.*

92 *Ibid.* It must be noted that although the Court of Second Instance is capable of acting as a trial court from a common law perspective though the process is not an automatic one. A Court of Second Instance in the Mainland may render a judgment without a trial, which is similar to the function of appellate courts in the common law system.

93 See Chen, *supra* note 87, p 173.

94 See *PRC Civil Procedure Law*, art 180. It appears that the supervision procedure is applicable only when a legally effective judgment comes into force. Also see Liu, *supra* note 86.

95 The *PRC Civil Procedure Law* does not clearly spell out what should be considered as definite error. Dr Liu suggests that the supervision procedure may be allowed "if insufficient evidence or inappropriate application of law contributed to the previous decision". He is also of the opinion that supervision is applicable if it is demonstrated that the court severely violated applicable procedures in reaching its judgment, or the judges were corrupt. Also see art 30 of *1979 Organic Law of People's Court* as amended in 1983, the Supreme People's Court is responsible for supervising the administration of justice by local People's Court at various levels.

96 See *Civil Procedure Law*, art 200. Also see Liu, *supra* note 86.

function.[97] Thus, on a theoretically basis, a decision can be reopened many years after the case has been disposed of, if definite error is found from a judgment. More problematic is that even a decision made under the Supervision Procedure may nevertheless be a non-final decision.[98] Academics have generally agreed that the finality of the new decision rendered under the supervision procedure will depend on the nature of the original decision.[99] For example, a new decision rendered under the supervision procedure by way of challenging a second instance decision is final.[100] On the other hand, a new decision reached by the supervising court after reviewing a decision of the court of first instance would still be subject to further challenges.[101]

Alternatively, the supervisory procedure may be invoked by an actual party to the case. A litigant to the case may request for a retrial provided one of several specified conditions is satisfied, within two years from the time the judgment concerned becomes legally effective.[102] This effectively provides for the defendant an extra leeway to vacate or appeal against adverse judgment outside the ordinary two-trial procedure.

3. *External Influence to the Judgments of People's Court*

Apart from the ordinary supervision procedures that the courts can exercise, an external institution which plays an important role in the Chinese legal framework is the People's Procuratorate: the constitutional supervisory organ of the state.[103] It is the body responsible for the supervision of the courts of all level below. The power of the Procuratorate extends to interfere with civil proceeding by way of adjudicative supervision.[104] The Procuratorate is empowered to supervise any legally effective decisions made by the People's Court by the operation of "protest".[105] Under the civil procedure, such protest may only be exercised by a procuratorate of higher level against a judgment rendered by a lower level court.[106] If a protest is lodged by the procuratorate against a decision rendered by the People's Court, the Court has

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97 There is no time limit on the supervisory bodies to exercise their power to revisit a rendered decision. However, as will be seen in the discussion below, there is a two years limitation period for an actual party to invoke the supervisory procedures.

98 See Liu, *supra*, note 86.

99 *Ibid.* See also Jiang, W (ed.), *Civil Procedure Law* (Beijing: People's University Press. 2000) (*in Chinese*), p 257. 江偉(主編)《民事訴訟法》(中國人民大學出版社).

100 *Ibid.*

101 *Ibid.*

102 See Chen, *supra* note 87. Also see Jiang, W, *supra* note 99, p 252 and Meng, C C, "Civil Procedure Law", in Guiguo Wang and John Mo (eds.), *Chinese Law* (London: Kluwer Law International Ltd., 1999), p 207. Under *PRC Civil Procedure Law* art 178 and art 179, a party to an action may petition the original trial court or the court at a higher level to retry the case if the party believes that the judgment is erroneous. The party must prove that (1) there is sufficient new evidence supporting the reversal of the original judgment (2) the substantial evidence on which the facts were ascertained in the original judgment was insufficient (3) there was definite error in the application of the law in the original judgment (4) there was violation by the court of the legal procedure which may have affected the correctness of the judgment (5) there was corrupted misconduct of judicial officers during the trial.

103 See Constitution of the PRC, art 129. Also see *PRC Civil Procedure Law*, art 14 and Lin, F, *Constitutional Law in China* (Hong Kong: Sweet & Maxwell Asia, 2000), p 221.

104 See Chen, *supra* note 87, p 125.

105 See Liu, *supra* note 86.

106 See *PRC Civil Procedure Law*, art 177

no choice but to order a retrial.[107] Similar to the Court's own supervision, there is no time limit imposed on the People's Procuratorate in lodging such protest against a problematic judgment. Recently, the power and function of the procuratorate in civil proceedings have been questioned by senior Chinese judges.[108] Indeed, the writer finds the high overturning rate of judgments subsequent to protest lodged by the procuratorate supportive of the "non-finality" argument.[109] However, it has been suggested that the number of protests lodged by the procuratorate is minimal comparing to the total number of cases being tried every year.[110] In light of the potentially circularity that could occur if the procuratorate repeatedly protest against a particular decision for more than once, some mainland academics are of the view that the new judgment rendered after a successful protest shall be the final judgment.[111]

4. Legally Effective Judgment

Despite there are various ways which could reopen a rendered judgment in the mainland, academics are of the opinion that mainland judgment is still theoretically legally effective, and hence enforceable, at various stages under the civil procedure:

a) Judgments rendered by the Court of Second Instance after the two-year limitation period has expired.
b) Judgments rendered by the Court of Second Instance after the higher level court has exercised its supervisory function to order retrial.
c) Judgments given by the Supreme People's Court.
d) Judgments rendered by the People's Court after the Supreme Procuratorate has lodged a protest.

The above examples are not intended to be an exhaustive list of all judgments which are 'final' in the Mainland, but rather, since these judgments stated above are theoretically enforceable under the Civil Procedure Law of the Mainland, it is submitted that these judgments can arguably be considered as final and conclusive under the liberal interpretation of the final and conclusive requirement under the common law regime as stated in Part IV of this article, which will be further discussed in the following analysis.

B. Analysis

In summary, the Chinese legal system is indeed more problematic than the cases have demonstrated. Since Mainland judgments can theoretically be overturned by the higher court or the procuratorate under the supervisory procedure, as shown in subheadings (ii) and (iii) of

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107 See Shen, D Y, "Certain Problems regarding the Work of Trial Supervision", (2001) No 8 *People's Judiciary (In Chinese)*. 沈德詠「審判監督工作改革若干問題」，《人民司法》.

108 See Liu, *supra* note 86.

109 See Li, M W, *Research on Judicial Reform* (2nd ed.) (Beijing: Law Press China, 2001) (*in Chinese*). 王利名《司法改革研究》(法律出版社). The author of this book provides comprehensive statistical information as to number of cases that has been overturned after the procuratorate has lodged a protest. It said that from 1991 to 1998, there have been 20,501 protests lodged by the procuratorate across China. Out of those cases, 45 percent ended up having a retrial. Out of the 45 percent of cases that has been retried, 82 percent of the original decisions have been altered as a result of the retrial.

110 See Wang, J Q, "Judicial Reform and Judicial Supervision" in *Procedural Law and Judicial System* (2000) no 2, p 27 (*in Chinese*). 王景琦「司法改革與民事檢察監督審議」，《訴訟法學，司法制度》.The total number of protest only takes up 0.0027% of the total number of cases in 1999.

111 See Liu, *supra* note 86. Also see Wang, *supra* note 110.

Part V, the conclusion seems to be that Mainland judgments should be precluded from any form of enforcement at common law, particularly when there is no limitation period imposed on the respective supervisory bodies to govern their power to revisit a 'final' judgment. Indeed, this would be the inevitable result if the Hong Kong court adopts the most stringent definition of *res judicata*, namely the traditional interpretation of *Nouvion*. Accordingly, a defendant may prevent a mainland judgment from being enforced against him simply by adducing some evidence that the mainland judgments are inherently lacking in finality.[112] As Dr Liu commented, a party can avoid enforcement of a mainland judgment in Hong Kong simply by employing a strategic move of claiming that they have applied to the procuratorate for a protest after a judgment has been rendered.[113]

Although the application of the traditional definition of finality would be seemingly harsh for the judgment creditor, risk theory would add some volume to this rigid rule.[114] The theory assumes that a person who has close ties with the foreign community should not be heard to complain of the disadvantages of his membership in it. Thus, in the words of Smit: "It is reasonable to have the member carrying the burden as well as enjoying the privileges of his membership and to hold him bound by the judicial determination of his own community"[115]. Hence, if a litigant decides to begin his action in Mainland PRC, he or she should be taken to have known the law of the country and thus be held to accept the disadvantages of the supervisory system. Arguably, it is ironic that the litigant can also enjoy the advantages of having no end to litigation by virtue of the respective civil procedure. If the Hong Kong courts continue to adopt this approach, it is unlikely to see the enforcement of mainland judgment in Hong Kong in the near future, especially without any evidence of foreseeable changes that are going to take place in the mainland legal system.

However, as seen from Part IV, the writer seeks to argue in favour of enforcement in limited circumstances by going back to the fundamental theory. By drawing on the assumption that the foreign judgment enforcement is founded on the obligation theory, a judgment should be enforced as soon as the judgment debtor has exhausted his or her entire rights to argue against the judgment, because this judgment is final between the actual parties.[116] In another word, if we recognize the judgment of the foreign court as imposing a private obligation between two parties, the judgment should be binding on the litigants, subject to his or her right of appeal.[117] Hence the judgment debtor who fails to lodge an appeal for retrial in accordance with the two years limitation period under the supervision procedure, the result would be for the debtor to accept the finality of the Mainland judgment. It is the writer's comment that, at the stage when the defendant's right to appeal has by passed, all potential remedies of seeking retrial in the Mainland system would virtually come to an end.

However, the writer concedes that the abovementioned solution is not an absolute one. It is true that the PRC supervisory institutions may still alter the judgment and order a retrial in limited circumstances, with or without the request from the actual party to trial. However, it is submitted that whether or not the supervisory institutions take further action, such as ordering

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112 See *Nintendo American Inc*, *supra* note 65.

113 See *Chiyu Banking Corporation* case, *supra* note 29. Also see Liu, *supra* note 86.

114 See Smit, *supra* note 7, p 67.

115 *Ibid.*

116 The writer will further deal with this particular issue later in this article such that a distinction should be drawn between private rights and public function.

117 See Yntema, *supra* note 78, p 1142.

retrial of the case, would be within the domain of state function and thus outside the scope of obligation between parties.[118] This distinction drawn between public function of reopening a court judgment and the private obligation that allows the litigants to appeal against a decision has received attention from mainland academics.[119]

Secondly, in accordance with the above analysis, it would be desirable to adopt a flexible interpretation of finality to enable the court to exercise its inherent discretion in either allowing or refusing the enforcement of Mainland judgments in light of the facts of each case. By saying that, the writer is not suggesting that in terms of a general discretion such that the court can reach uncertain and arbitrary decisions, but instead the discretion should be exercised in light of the evidence of each case. If it could be shown by the defendant's evidence that one of the supervisory bodies is *in fact* reconsidering the judgment in question, the Hong Kong court may stay the execution process. An example is the *Wuhan Zhong Shou Hong Real Estate* case whereby the defendant was able to produce a letter from the Supreme People's Procuratorate in support of the contention that the Procuratorate had decided to review the judgment in concern.[120] In such situation, it would be right for the Hong Kong court to stay the action until the matter is decided by the Mainland authority. Alternatively, if the court is of the opinion that the appeal or protest is vexatious and designed primarily for delaying enforcement, as demonstrated in the *Nintendo* case whereby the defendant had not taken any steps to challenge the *F-1* judgment in the foreign court, the Hong Kong court should refuse to exercise its discretion in granting stay and order for execution of the judgment in Hong Kong.[121]

Therefore, as the analysis in Part IV has shown, apart from arguing that it is open for the court to decide on the finality issue with certain degree of flexibility, the writer also seeks to argue that the finality hurdle can be overcome by looking at the enforceability of the Mainland judgment. A mainland judgment is *legally effective* once the court has pronounced its decision.[122] If the judgment is enforceable at the place where it was rendered, the local court could enforce its judgment by adopting the narrow and flexible interpretation of *Nouvion*. Thus, although a Mainland judgment is capable of being overturned or vacated without any time limit, they remain enforceable under the applicable law of the PRC, and thus the Hong Kong court can give effect to it. Indeed this has been the method of enforcing a Mainland judgment employed by the French court (though a "civil law" law district) – to consider

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118 *Ibid.* Also see Wang, *supra* note 110, p 540 where the author had implicitly suggested that the distinction should be drawn between public and private functions. See also R, Brown, *Understanding Chinese Court and Legal Process* (The Hague: Kluwer Law International, 1998), p 74 whereby he suggested that the procedure for review is discretionary. Furthermore, he said that the purpose of having the supervision procedure is to maintain control over the quality of justice and ensure social harmony by correcting substantive injustice. Brown also suggested that adjudicative supervision is one method used to address the shortcoming of "local protectionism" and thus the supervisory function implicitly embraces an element of political purpose. See also Jiang, W, *supra* 110, p 257 whereby it was suggested that the supervision procedure only applies when there is serious infringement of legal procedure or that there has been fraud on the court.

119 See Wang, *supra* note 110, p 540.

120 *Supra* note 34, *per* Yueng J.

121 See Liu, *supra* note 86. It is the writer's view that if the protest or petition to any of the supervisory institutions in the PRC is based on a strategic move so as to delay enforcement in Hong Kong, the Hong Kong court should refuse to stay the enforcement proceeding. In reality, this will be difficult to implement but a possible way for the court to tackle this problem is to compel the defendant to show that positive steps have been taken to lodge a petition and that one the supervisory bodies in the PRC is indeed reviewing the judgment concerned.

122 See Liu, *supra* note 86.

whether the judgment is executable instead of the common law notion of final and conclusive.[123]

VI. Possible Enforcement Methods

A. Enforcement at Common Law

As illustrated in previous parts of this article, the writer seeks to argue that certain mainland judgments can be enforceable in Hong Kong at common law. It has been argued that, in order to allow any form of enforcement, the Court could adopt a narrow and flexible interpretation of the finality requirement. The first criterion the Court should look at is whether the Mainland court has tried all issues so that the judgment did not leave something, ex facie, to be judicially determined before the decision could become effective and enforceable. At this stage, it seems little problem would arise in that a decision rendered under first or second instance in the mainland would normally have considered all the issues before the court. Secondly, the court should investigate as to whether the judgment seeking enforcement in Hong Kong is enforceable in the Mainland. As Part V has shown, certain Chinese judgments can be considered as legally effective in the Mainland and hence enforceable under the applicable law. Thirdly, when the court decides on whether the action should be stayed or to continue with execution, it should also consider whether the defendant can, as a question of fact, demonstrate that respective supervising institutions in the Mainland are reconsidering the judgment and that such claim is not vexatious so as to allow further delay of the enforcement proceeding.

B. Agreement of Reciprocal Enforcement

However, even if enforcement is possible at common law, very limited cases may benefit from it and the proceeding is likely to be uneconomical and cumbersome. Accordingly, an alternative to enforcement at common law would be an arrangement of reciprocal enforcement between Hong Kong and the Mainland. As the government suggested, reciprocal enforcement will take place as soon as the two law districts can reach an agreement.[124] From Hong Kong's standpoint, it will be necessary for a new legislation to be enacted to implement the agreement once it is reached.

The basis of enforcement by statute is more closely related to the doctrine of comity than the obligation theory.[125] This is evident from previous statutory enforcement, such as Cap 319, which requires reciprocity and thus indicates the enforcement is conditional upon the other

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123 *Ibid.*

124 See letter from the Government to Mr Phillip Smart. "Reciprocal Enforcement of Foreign Judgments in Commercial Matters between the HKSAR and the Mainland" 20 March 2002: CSO/ADM CR 7/3221/01. Also see *Basic Law of the Hong Kong Special Administrative Region*, Article 95 whereby the constitutional basis of reciprocal arrangement to enforcement of judgment can be found as "[t]he Hong Kong Special Administrative Region may, through consultation and in accordance with law, maintain juridical relations with the judicial organs of other parts of the country, and they may render assistance to each other".

125 See Smit, *supra* note 7, p 53 whereby it stated that comity may also connote reciprocity. Since reciprocity is required under the statutory regime, it is logical to suggest that the statutory regime is more closely associated with the doctrine of comity.

law districts in recognizing the judgments of the local court.[126] Thus, the intention of mutual enforcement is the intrinsic benefit of having the local court's judgment being enforced outside its jurisdiction.[127] As shown in Part II, the existing statutory enforcement mechanism is also conditional upon the judgment having satisfied similar requirements at common law, including the need for the judgment to achieve finality.[128]

One may argue that, under this model, statutory enforcement will in effect be identical to the existing common law practice and thus it is needless to provide a statutory arrangement. However, one must not ignore other potential benefits that a statutory regime can provide us with. Although the finality issue may still be at stake after the introduction of a statutory scheme, other issues, such as the jurisdiction of the Mainland courts and the question as to which level of court judgment should be deemed enforceable, can be solved by the provision of a statutory instrument. Thus, a statutory scheme is likely to be more efficient and to produce more consistent results.

It must be pointed out that the finality requirement in the statutory recognition process will be fundamentally different from that at common law as the former is likely to be based on an almost automatic process of recognition, such as the method of registration. Thus, unlike common law recognition whereby *res judicata* is concurrently inspected at the recognition stage, such inspection does not exist under statute. Since the statutory basis of enforcement is by and large different from the common law principles, the finality requirement must be revisited. Again, how can *res judicata* be established under the new arrangement?

From the writer's point of view, it is advisable that future enforcement should be conditional upon the Mainland judgments having qualified for certain conditions, such as jurisdiction and finality. A full faith and credit recognition similar to the USA or automatic recognition process like the Brussels Convention or Lugano Convention would not be favorable to the situation of Hong Kong vis-à-vis the Mainland, and thus should be rejected.[129] If the future agreement is a conditional one, it is the writer's view that a statutory regime similar to the existing Cap 319 would be the most appropriate for the present situation. The SAR courts should retain its

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126 Strictly speaking, the condition of reciprocity is not a directly requirement under the recent Hong Kong Court of First Instance judgment in *Koninljike Philips Electronics NV v Utran Technology Development Ltd* (HCMP 4509 of 2000, 26 October 2001) whereby the Court allowed the enforcement of a judgment rendered in Netherlands, although it was clear that the government of the Netherlands had clearly indicated that, in the absence of any international agreements, judgments of the HKSAR courts are now not to be enforced in the Netherlands. In the said case, Woolley J allowed the enforcement of the judgment on the ground that Chapter 319 was not affected by the change of sovereignty. The judge referred to s 3(1) of the FJREO and interpreted it in a way that it was necessary for the Chief Executive of the SAR to positively exercise his power in s 3(1) to vary or revoke the operation of the FJREO, even if the foreign country no longer gives reciprocity to HKSAR judgments. Since the Chief Executive had not removed Netherlands from the list in Chapter 319, Wolley J allowed the judgment to be registered. See Smart, Phillip, *supra* note 24, for a comprehensive summary and commentary on the case. Mr Smart is of the opinion that this decision is *per incuriam* for the ruling that the Chapter 319 'has been unaffected by the change of sovereignty' cannot be supported. The most apparent reason given in the commentary was that s 2A(2)(b) of the Interpretation and General Clauses Ordinance should be construed as that it covers privileges in Hong Kong indirectly through international agreements with the power of the United Kingdom. Mr Smart also suggested that it is sometimes difficult to determine what constitutes sufficient degree of reciprocity so as to satisfy s 2A(2)(b) of Chapter 1. It appears that the idea of reciprocity is in itself uncertain in the absence of any guidance from the existing statutory scheme and cases.

127 See Smit, *supra* note 7, p 53.

128 Chapter 319 of the Laws of Hong Kong.

129 See Tai, *supra* note 3.

discretionary power to set aside registration of a judgment if it considers that, as a question of fact, a judgment is inconclusive or suffers from other defects. This is particularly important in light of the various channels from which a Mainland judgment may be overturned under the present Chinese legal framework. It is also submitted that a possible way to provide greater chance of enforcement is to ignore the traditional rigid approach of understanding finality, and shifts the emphasis to constructing a rule which would allow enforcement as long as the judgment is executable in the Mainland.[130]

In the recent government proposal, the finality requirement has yet received any definite suggestion as to its operation in the future between the two law districts.[131] This indicates that, at least for now, there is no consensus between Mainland and the SAR as to how finality should be defined in the future arrangement. As far as Hong Kong is concerned, the writer suggests that the following comments can be considered as being some basic conditions to be included in the new statutory regime once the mutual agreement is reached. In light of the limit imposed on this article, the following discussion aims to be directive rather than substantive.

First of all, the arrangement should clearly specify the level of court in delivering judgment and provide what nature of a Mainland judgment would make it capable of enforcement in Hong Kong. In the present government proposal, it has been suggested that "judgments given by the Intermediate People's Courts or above" will be *prima facie* enforceable.[132] As shown in Part V of this article, it is clear that such implementation is likely to be problematic in that the supervisory procedure in the mainland can potentially vacate any judgments given at the Intermediate levels. To tackle this problem, the Hong Kong officials should avoid using *level of courts* as the determinative factor for enforcement, but rather to investigate more precisely as to the *nature* of different types of mainland judgments, in another words, what mainland judgments can be safely considered as being a final one. For example, those "legally effective" judgments rendered by Mainland courts as outlined in Part V of this article can be considered as final for the purpose of enforcement in Hong Kong. It is submitted that only when it could be confirmed that mainland judgment of a particular nature can be safely considered as final should then it be listed in the future statutory schedule for enforcement purposes. One can also consider a provision in the future statutory instrument which invokes a presumption that judgments listed in the schedule are final and conclusive for the purpose of recognition so as to enhance the efficiency of the scheme.

Secondly, one can also consider shifting the overall burden to disprove finality upon the defendant, thus effectively raising a presumption of finality. It is submitted that such reversal of burden of proof could eliminate defendant's strategy of delaying enforcement. Thirdly, one can consider changing the term 'final' to become 'legally enforceable' so as to enlarge the scope of enforcement and to promote consistency with the nature of Mainland judgments in

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130 See Liu, *supra* note 86. The French courts have enforced Mainland PRC judgments that are capable of execution, subject to the flexible discretion of the court.

131 *Supra* note 124. The letter stated that "the arrangement will only permit the enforcement of a judgment that is final and conclusive. The issue of how and when a judgment should be treated as final and conclusive will be considered in [the government's] discussions with the Mainland authorities to ensure that an arrangement that is mutually satisfactory will be reached".

132 *Supra* note 124.

the future agreement.[133] Fourthly, the new statutory instrument should have provisions similar to those in the existing Cap 319 for empowering the Hong Kong courts to exercise discretionary power in setting aside registration based on the evidence of each case.

VII. Conclusion

The principal purpose of this paper is to broadly analyze the finality rule from the common law perspective so as to consider the possibility of enforcing Mainland judgments without substantially changing them. The issue of finality, or *res judicata*, in the absence of any foreseeable changes to PRC civil procedure laws, is likely to remain problematic in relation to the recognition and enforcement of PRC judgments in Hong Kong. It seems to the writer that this issue is likely to have a deeper impact in that the draft Hague Convention on International Jurisdiction and Recognition and Enforcement of Judgments in Civil Matters also includes a section which requires a foreign judgment to be *res judicata* for the purpose of enforcement.[134] Since China is likely to adopt the future Hague Convention, the finality issue that has been discussed in this article perhaps deserves greater attention from academics and legal profession in Mainland PRC.

As the above analysis has shown, the rigid interpretation of the finality principle in *Nouvion* cannot always be maintained, particularly in light of various decisions supporting the enforcement of default judgments across the commonwealth jurisdictions and the underlying theoretical basis of enforcement. The writer has sought to demonstrate that the dividing line between what is considered a *final* or *provisional* judgment is somewhat blurred. Furthermore, it appears that there is no coherent and logical basis which renders a judgment unenforceable *per se* in light of the cases discussed in this article. Accordingly, as far as enforcement of Mainland judgments in Hong Kong is concerned, it is submitted that since default judgments are enforceable in Hong Kong, a Mainland judgment may nevertheless be arguably enforceable at common law. As the writer has argued, this could be achieved by giving finality a relatively flexible meaning rather than adopting strictly the traditional interpretation under the *Nouvion* case.

Regarding the proposed arrangement of reciprocal enforcement between Hong Kong and the Mainland, the writer submits that judgment finality will remain a difficult issue and must be dealt with in order to achieve an effective enforcement scheme. It is submitted that a closer consideration is required for evaluating the nature of different kinds of Mainland judgments so as to ascertain what would constitute a "final" judgment in the Mainland in reality. Furthermore, once an agreement is reached between the HKSAR and the Mainland, attempts can be made in raising certain presumptions in the future statutory framework in order to strike a legally sound balance between the rights of the Mainland judgment creditor and the respective debtor, such that, on one hand the judgment debtor cannot delay or set aside registration simply by way of baldly arguing the lack of finality of the Chinese judgments, while on the other enforcement will not be prejudicial to the rights of a judgment debtor,

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[133] See Liu, *supra* note 86. Dr Liu has made a similar comment in recommending the use of the word 'legally effective' in lieu of 'final' so as to provide greater chance for the recognition of a Mainland judgment.

[134] See Preliminary Draft Convention on Jurisdiction and Foreign Judgments In Civil and Commercial Matters (adopted by the Special Commission on 30 October 1999) at http://www.hcch.net/e/conventions/draft36e.html (Last visited 9 June 2002). In the draft convention, art 25(2) requires the judgment to have the effect of *res judicata* in the country of origin while art 28(1)(a) states that a court can refuse enforcement "if the judgment is pending before a court of the state addressed".

bearing in mind it is equally important to ascertain that the Mainland judgment is sufficiently final in having determined the legal obligation between the parties.

It is undoubtedly true that the facility of mutual enforcement of judgments between the SAR and the Mainland is crucial to the future continuing economic cooperation between the two regions, but this would require further jurisprudential development relating to this subject-matter such as in addressing the issue of finality. It is the writer's wish that this article can serve to inspire further academic investigation over this interesting, and yet, problematic issue.

A CRITICAL REVIEW OF THE AFTERMATH OF THE NPCSC INTERPRETATION

LEGISLATIVE INTERPRETATION AND HOW SHOULD OUR COURTS HANDLE IT?

EDWIN WAI-YIM KWOK *

More than 5 years have passed since the handover The constitutional order in the HKSAR has since undergone many changes, whereby numerous controversial debates have been triggered Among all such debates, the PRC law concept of legislative interpretation by the NPCSC, which is introduced to the Hong Kong legal regime by virtue of the Basic Law, was the subject matter of severe criticisms. This is because such concept has no place in the common law system inherited in accordance with the Basic Law. In this article, the author first examines the nature and development of legislative interpretation in the PRC Building on the understanding of such a concept, the author then analyses, with reference to the landmark constitutional cases of Lau Kong Yung, Chong Fung Yuen and Ng Siu Tung, how our courts have handled this unfamiliar concept Lastly, the author comments on whether our courts have handled such a concept in a most beneficial way to Hong Kong, and if yes, how those judgments may be rationalized, and what the correct judicial approach should be if we are to minimize the damage to Hong Kong's autonomy by legislative interpretation

I. Introduction

More than three years have passed since the Court of Final Appeal ("CFA") handed down the highly controversial *Ng Ka Ling*[1] and *Chan Kam Nga*[2] judgments, the first two cases which triggered extensive constitutional and political debate in Hong Kong.[3] In fact, it is difficult to look for any other cases in our history, at least so far since the Hong Kong Special Administrative Region (HKSAR) was established, that can attract so many public reactions and concerns as the *Ng* and the *Chan* case. It might be recalled how the CFA declared the exit permit requirement unconstitutional,[4] why the time of birth restriction was in contravention with art 24(3) of the *Basic Law*,[5] and the statement that the courts in Hong Kong had the jurisdiction "to examine whether any legislative acts of the National People's Congress or its Standing Committee are consistent with the *Basic Law* and to declare them to be invalid if found to be inconsistent"[6]. However, all these bold assertions were short-lived. Upon the request of the Director of Immigration, the CFA made an unprecedented clarification[7] in stating that it could not question the authority of the National People's Congress Standing Committee ("NPCSC") to make an interpretation according to art 158 or to do anything which is in accordance with the *Basic Law*.[8] On 26 June 1999, the NPCSC issued an interpretation

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1 *Ng Ka Ling & Others v Director of Immigration* (1999) 2 HKCFAR 4.

2 *Chan Kam Nga & Others v Director of Immigration* (1999) 2 HKCFAR 82.

3 For the constitutional debate triggered by the two cases, see Chan, J and Fu, H and Ghai, Y(eds.), *Hong Kong's Constitutional Debate: Conflict over Interpretation* (Hong Kong: Hong Kong University Press, 2000).

4 *Supra* note 1 at 33I-37C.

5 *Supra* note 2.

6 *Supra* note 1 at 26A-B.

7 *Ng Ka Ling & Others v Director of Immigration (No. 2)* (1999) 2 HKCFAR 141.

8 *Ibid* at p 142D-E. Whether the clarification by the CFA could be considered as a "*retreat*" of its previous brave proposition that it could "examine whether any legislative acts of the National People's Congress or its Standing Committee are consistent with the *Basic Law* and to declare them to be invalid if found to be inconsistent" was questionable. In the clarification, the CFA left the question of who had the authority to examine whether the acts of the NPCSC were in accordance with the *Basic Law* open. It did not expressly say that it lacked authority in doing so. The Court might have deliberately left it out in order to make the clarification ambiguous so that it would not give an impression that the Court was making a total retreat

(i.e. following Chinese terminology, one may call this "legislative interpretation"[9]) on arts 22(4) and 24 of the *Basic Law*[10] which in effect overturned most of the CFA's previous interpretations on the two articles ("the Interpretation"). Taking the clarification and the Interpretation together, what the *Ng* case left us is no longer a binding precedent, but rather, it establishes its place in our constitutional history by representing an important starting point in our three-year long constitutional and right of abode saga.

Looking back at the saga, if the *Ng* case symbolized the start, then the Interpretation must be the climax. Debate among the critics, who treated the Interpretation as undermining judicial independence and the rule of law, and the government, who lauded it for realizing the principle of "one country, two systems", can hardly be any hotter.[11] The Interpretation is not a mere reflection of the legislative intent behind the two articles. It raises many more issues which are crucial in our political and legal contexts. China is one of the few remaining countries that still practise legislative interpretation.[12] The concept of legislative interpretation is not founded anywhere in the English common law world. As our legal system is principally based on the English common law system, the Interpretation raises some unprecedented legal issues on how our courts should handle this unfamiliar legal concept. What is the proper approach to determine the nature, effect and power of this completely different and unfamiliar concept from our traditional common law perspective? At the same time, it also raises a lot of important political issues that touches upon the concept of sovereignty, "one country, two systems" and the principle of autonomy. Its impact is far-reaching because it represents a key change to our traditional constitutional norms.

Those who think that the Interpretation represents an end to our constitutional saga are wrong. After the Interpretation was issued, our courts were inundated with a series of right of abode cases which either directly or indirectly touched upon all the issues mentioned in the preceding paragraph. All these cases travelled up to the CFA. Among them, three cases were most important. First, we had *Lau Kong Yung*[13]. The *Lau* case is a foundation in our constitutional context now because it is the only case where the CFA discussed the Interpretation in depth. Subsequently, we had *Chong Fung Yuen*[14], in which the CFA had to decide whether an incidental comment on some other provisions in the Interpretation had a binding effect or not. Recently and lastly, we had *Ng Siu Tung, Li Chuk Fan, Sin Hoi Chu*[15] (*"Ng Siu Tung"*) which touched upon the remaining question of who were affected by the

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of its previous proposition. Professor Johannes M M Chan argued that the clarification indeed clarified nothing. The Court has partially salvaged its reputation by not reversing any reasoning. The value of the clarification lies not in what it said, but the fact that it was done. See Chan, J, "What the Court of Final Appeal Has Not Clarified in Its Clarification: Jurisdiction and Amicus Intervention", *supra* note 3, p 171 at p 180.

9 Kong, X, "Legal Interpretation in China", (1991) *Connecticut Journal of International Law* 491. For a more detailed analysis about legislative interpretation, see the section on "An Overview of Legislative Interpretation" below.

10 LN 167 of 1999.

11 Ghai, Y, "The NPC Interpretation and Its Consequences", *supra* note 3 , p 199.

12 In Europe, Turkey had legislative interpretation until 1961. The majority of countries with continental legal systems, including countries such as France or Germany, have already given up legislative interpretation. Taiwan still retains legislative interpretation. Legislative interpretation also exists in Belgium and Greece. See Lin, F, *Constitutional Law in China* (Hong Kong: Sweet & Maxwell Asia, 2000), p 107, para 4.53 note 200 and Chen, A, "The Interpretation of the Basic Law: Common Law and Mainland Chinese Perspectives", (2000) 30 *Hong Kong Law Journal* 380, pp 408-409.

13 *Lau Kong Yung & Others v Director of Immigration* (1999) 2 HKCFAR 300.

14 *Director of Immigration v Chong Fung Yuen* [2001] 2 HKLRD 533.

15 *Ng Siu Tung and Others v The Director of Immigration; Li Shuk Fan v The Director of Immigration; Sin Hoi Chu and Others v The Director of Immigration* [2002] 1 HKLRD 561.

Interpretation.

It is believed that most of the important issues have been tackled since *Ng Siu Tung*. As the *Ng* case almost marks an end to this three-year saga, this is the appropriate time to assess the aftermath of this constitutional crisis. This essay tries to serve two purposes. First, as the Interpretation represents a big change to our traditional constitutional norms, this essay will analyse the development and the nature of legislative interpretation. Second, by critically evaluating *Lau Kong Yung*, *Chong Fung Yuen* and *Ng Siu Tung*, this essay also analyses how our courts handled the aftermath of this constitutional crisis. Did the CFA handle the Interpretation in such a way that is most beneficial to Hong Kong? How can we rationalize the CFA's judgments? What should the common law lawyers here learn from this saga?

II. An Overview of Legislative Interpretation

A. The Development of Legislative Interpretation in the PRC

Legislative interpretation is defined as an interpretation of laws by the legislature. Under the PRC 1982 Constitution, the NPCSC can *interpret* and supervise the enforcement of the Constitution[16] or interpret statutes[17]. Thus, in the PRC, legislative interpretation exists on two levels, namely: (1) Interpretation of constitutional documents ("constitutional interpretation") and (2) Interpretation of laws and regulations ("legal interpretation").[18] Although some Chinese scholars have suggested that legislative interpretations do not only include the interpretations by the NPCSC, but also the interpretations on the administrative rules by the State Council ("SC"), this viewpoint is not widely-accepted.[19]

Legislative interpretation was first developed in the continental legal system some two centuries ago with its origin in Roman law.[20] The main difference between the continental legal system and the common law system lies in the concept of "legislation".[21] The English common law system puts a lot of emphasis on precedents. Its doctrine of *stare decisis* provides that a court is bound to follow the *ratio decidendi* emerging from a court above it in the hierarchy. The legislature is independent of the judiciary in the sense that judges can interpret any statutes enacted by the legislature. However, under the continental law system, there is a complete separation of legislative and judicial powers.[22] Much more emphasis is being placed upon "legislation" rather than on "judicial work". It emphasizes that laws must be complete, clear and highly logical; otherwise the judge will unavoidably perform legislative functions.[23] However, no laws can be so flawless or logical that do not require judges to make some difficult interpretations. Legislative interpretation is thus derived from the concept that where the law is not clear enough, judges shall ask the legislature for an authoritative interpretation in order to truly ascertain the legislative intent behind it and

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16 Art 67(1).

17 Art 67(4).

18 Lin, L, Gu, M and Zhu, G, "An Analysis of the Legislative Interpretation System in the PRC", (Aug 1999) *Hong Kong Lawyer* 56, p 57.

19 *Ibid*, p 58.

20 Wang, G, "The Development of Legislative Interpretation", (Aug 1999) *Hong Kong Lawyer* 49, p 50.

21 *Ibid*.

22 Merryman, J, *The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America* (California: Stanford University Press, 1969), p 30; and Wang, G, *supra* note 20.

23 *Supra* note 20.

prevent them from engaging in making some difficult or controversial interpretations.[24]

Even though nowadays most of the European countries with continental legal systems have already abandoned legislative interpretation, the concept of legislative interpretation has inspired a lot of the former socialist countries (eg the Soviet Union). As Professor Albert Chen observed, "[t]hese countries never accepted even in theory the bourgeois constitutional doctrines of the separation of powers and checks and balances. Their constitutions affirmed the sovereignty of the people, and the people were supposed to exercise political power through their representatives in the national assemblies . . . In theory the national assembly of people's deputies exercised supreme political power; the laws they made were a supreme expression of the will of the people and were not subject to judicial restraint"[25].

The system of interpretation of the law in China is basically modelled on the system of the former Soviet Union.[26] As the Chinese Communist Party ("CCP") also shares the same ideology that all powers originate from people and the will of the people should not be subject to any restraint, including judicial restraint, it naturally explains why the NPC is supreme[27] and why it has power over the judiciary. Legislative interpretation is a realization of the supremacy of the NPC. At the same time, it has been argued that legislative interpretation is beneficial because it can reflect the true legislative intent, clarify the boundaries of the relevant provisions in a national law or supplement it.[28]

Today, art 67 of the 1982 Constitution,[29] the NPCSC 1981 Resolution on Strengthening the Work of Interpretation of Laws ("the Resolution")[30] and the new Law on Legislation ("the Law")[31], which was promulgated in 2000, form the basic framework for legislative interpretation. Article 67 only confers a power on the NPCSC to make legislative interpretation, but it does not lay down more specific guidance on how and under what circumstances this power is to be exercised. Prior to the Resolution, there was no proper system of interpretation. It is argued that the purpose of the Resolution is to improve the socialist legal system by overcoming the weak sense of legality due to the serious sabotage to the socialist legal system caused by the Lin Biao and Jiang Qing counter-revolutionary cliques

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24 As Merryman observes, the assumption behind legislative interpretation is that it does not arise frequently. It tends to occur in the early stage of implementation of the legislation. Questions concerning uncertainties, incompleteness, inconsistencies of the law are expected to be resolved within a short period of time after the law is enacted. After this short period, the law will be clear. So, in some of the very early continental systems, the judge's role was quite simple. He was like a specialised workman carrying out the legislature's orders. Save in exceptional circumstances, the judge in court merely heard and received the facts in dispute and ruled on the legal consequences already established by the law. The functions of the judge were limited to identifying the legal provisions relating to the cause of action and arriving (basically automatically) at a conclusion by comparing the provisions with relevant facts. In most cases, the judge did not have to interpret the law. Legislative interpretation is important so as to keep the judge's role simple and keeps a complete separation of legislative and judicial powers. See *supra* note 22, p 36 and *supra* note 20.

25 Chen, A, "The Interpretation of the *Basic Law*: Common Law and Mainland Chinese Perspectives", (2000) 30 *Hong Kong Law Journal* 380, p 409.

26 *Supra* note 20.

27 Art 57 of the 1982 Constitution.

28 Lin, F, *Constitutional Law in China* (Hong Kong: Sweet & Maxwell Asia: 2000), p 107, para 4.53 note 201.

29 See texts which accompany notes 16 and 17.

30 For a detailed discussion on the 1981 Resolution, see *supra* note 25, pp 411-412; Chen, A, *An Introduction to the Legal System of the Peoples Republic of China*, (Singapore: Butterworths Asia, 2nd ed, 1998), pp 95-102; *supra* note 18, p 57 and *supra* note 20, p 52.

31 For a detailed analysis of the Law, see Li, Y, "The Law-making Law: A Solution to the Problems in the Chinese Legislative System?", (2000) 30 *Hong Kong Law Journal* 120.

and the baneful influence they spread in this regard.[32]

The Resolution set out four basic principles.[33] First, where limits to articles of law and decrees need to be further defined or additional stipulations need to be made, the NPCSC shall provide interpretations or make stipulations by means of decrees. Second, if the interpretations by the Supreme People's Court ("SPC") and the Supreme People's Procuratorate ("SPP") are at variance with each other, they shall be submitted to the NPCSC to interpret. Third, the SC and its departments may interpret questions involving the specific application of laws and decrees in areas unrelated to judicial and procuratorial work. Lastly, interpretation of local rules shall be provided by the relevant standing committees of the local people's congresses. However, this list is not exhaustive. The Resolution does not say that the NPCSC cannot exercise the power of legislative interpretation outside the situations prescribed above. It only says that if the situation falls under one of the first two situations, then interpretation[34] is mandatory.

Aimed at curing legislative disorder and other problems plaguing the Chinese legal system,[35] the NPC enacted the Law which further defined the purpose and the scope of legislative interpretation. Under the Law, the NPCSC has the power to make legislative interpretation under the following two situations[36]: (1) when the law is too general and is necessary to clarify the law; or (2) when a new situation arises after the law has been passed. Further details have been laid down concerning who has the authority to seek legislative interpretation when one of the above conditions is satisfied and the procedures in doing so.[37] It is believed that the Law now supersedes the Resolution on the parts in regulating the exercising of legislative interpretation.

The NPCSC had exercised legislative interpretation twice after the enactment of the Law. The most recent interpretation was carried out in August 2001 in which the NPCSC interpreted ss 228, 342 and 410 of the *Criminal Law*. Another interpretation was carried out in April 2000 where the NPCSC interpreted s 93(2) of the *Criminal Law*. The April interpretation did not mention anything about the Law. It is in the nature of a supplementary legislation.[38] On the other hand, the August interpretation, although the interpretation itself did not mention the Law, the report of the interpretation mentioned that the interpretation was made pursuant to the Law so as to further clarify the three sections.[39] The August interpretation was the first interpretation which the NPCSC expressly acknowledged that the interpretation was made pursuant to the Law.

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32 *Supra* note 11, p 204.

33 *Supra* note 25, p 412; *supra* note 18, p 57.

34 "Interpretation" here means an interpretation by the NPCSC, but not any interpretation by the SC or the standing committee of the local people's congresses.

35 *Supra*, note 31, p 120.

36 Art 42(2) of the Law; See also *supra* note 31, p 137 and *supra* note 25, pp 414-415.

37 See arts 44 -47 of the Law.

38 Gazette of the NPCSC of the PRC, No 3 of 2000, p 223. (中華人民共和國全國人民代表大會常務委員會公報 2000 年 3 號, p 233) In this interpretation, the NPCSC interpreted what the phrase "other officials acting in accordance with the law" under s 93(2) meant. The NPCSC interpreted the word "officials" as meaning 7 groups of officials covering a wide range of fields. It is a supplementary legislation as it would seem more appropriate to enact the interpretation as a new subsection 93(2)(1) after s 93(2).

39 Gazette of the NPCSC of the PRC, No 6 of 2001, p 469 at p 470 (全國人大法律委員會關於《中華人民共和國刑法第三百四十二條、第四百一十條修正案〈草案〉》審議結果的報告在中華人民共和國全國人民代表大會常務委員會公報 2001 年 6 號, p 470).

One then can see, from the Resolution to the newly enacted Law, China is developing a more systematic approach towards the exercising of legislative interpretation. Compared to the situation before the Resolution, substantive progress has already been made. However, although the Law tries to restrict the power of the NPCSC to make legislative interpretation and the August interpretation seems to prove that the NPCSC does not forget the Law when exercising legislative interpretation, its effectiveness still has to be further proved. What is meant by "the law is too general so it is necessary to interpret the law"? How general is too general? What is meant by "a new situation arises after the law has been passed"? New situation unavoidably arises after a piece of legislation is enacted. To what extent is this change in situation enough so as to qualify the NPCSC to make an interpretation? These two provisions are far from perfect as they can be so broadly construed that render their purpose in restricting the NPCSC a failure. Furthermore, under the Law, the NPCSC retains the power to interpret all laws, including the Law itself. In such a way, the effectiveness of any laws attempting to restrict the power of the NPCSC is highly questionable since in the end the final interpretation power on such a law is still vested under the firm grip of the NPCSC.

B. Legislative Interpretation in Hong Kong

The doctrine of legislative interpretation extends to Hong Kong as a result of the promulgation of the *Basic Law*. It is now enshrined in art 158, particularly art 158(1), which reads:

> "The power of interpretation of this Law shall be vested in the Standing Committee of the National People's Congress.
>
> The Standing Committee of the National People's Congress shall authorize the courts of the Hong Kong Special Administrative Region to interpret on their own, in adjudicating cases, the provisions of this Law which are within the limits of the autonomy of the Region.
>
> The courts of the Hong Kong Special Administrative Region may also interpret other provisions of this Law in adjudicating cases. However, if the courts of the Region, in adjudicating cases, need to interpret the provisions of this Law concerning affairs which are the responsibility of the Central People's Government, or concerning the relationship between the Central Authorities and the Region, and if such interpretation will affect the judgments on the cases, the courts of the Region shall, before making their final judgments which are not appealable, seek an interpretation of the relevant provisions from the Standing Committee of the National People's Congress through the Court of Final Appeal of the Region. When the Standing Committee makes an interpretation of the provisions concerned, the courts of the Region, in applying those provisions, shall follow the interpretation of the Standing Committee. However, judgments previously rendered shall not be affected.
>
> The Standing Committee of the National People's Congress shall consult its Committee for the *Basic Law* of the Hong Kong Special Administrative Region before giving an interpretation of this Law."

Article 158 (ie equivalent to art 169 of the first draft of the *Basic Law*), which is the centre of discussion of this essay, is perhaps the most important article in the *Basic Law*. Its significance is derived from the fact that it represents the principal area of legal interface between the two systems.[40] The best way to understand art 158 is by breaking it down into

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[40] The other articles which also signify areas of interface between the two systems are articles 17, 18, 19, 159 and 160. For the concept of legal interface, see Ghai, Y, "Litigating the Basic Law: Jurisdiction, Interpretation and Procedure", *supra* note 3, p 3, pp 10-13.

two categories.[41] The first consists of provisions "within the autonomy" (art 158(2)). The second relates to "provisions concerning affairs which are the responsibility of the Central People's Government ("CPG"), or concerning the relationship between the Central Authorities and the Region" (art 158(3)). Under the first situation, it is not necessary to refer the case to the NPCSC to interpret. It is only under the second situation, providing that the "referable" issue will affect the judgment of the case, then the CFA is bound to refer the case to the NPCSC.

It is not a mistake to regard art 158 as the most problematic article in the *Basic Law*. It is a complex provision which itself raises several acute problems of interpretation.[42] The community expressed wide-spread worries over the draft art 169 during the drafting process of the *Basic Law*.[43] A few prominent Chinese and Hong Kong constitutional scholars[44] highlighted some of the significant problems, including:

1. Lacking express provisions on whether the NPCSC may exercise its power to interpret provisions solely within the autonomy of the HKSAR.
2. Difficult to state with confidence which provisions are related to the autonomy of the region.
3. Failing to establish a mechanism to deal with the situations where the courts of the HKSAR should, but refused to seek an interpretation from the NPCSC.
4. Lacking explanation on what the expression "other provisions" (ie the second category) means. Under the second situation, the HKSAR can deal with a matter outside the limits of its autonomy, although it is hard to image what remains after the other two categories.[45]

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41 Professor Ghai suggested that it should be broken down into three categories, with one more category consisting of "other provisions" although it lacks guidance or explanation on what this category covers (Art 158(3)) ("the third category"). See Ghai, Y, *Hong Kong's New Constitutional Order* (Hong Kong: Hong Kong University Press, 2nd ed, 1999), p 203. However, the second category here (ie provisions concerning affairs which are the responsibility of the CPG, or concerning the relationship between the Central Authorities and the Region) should have already included the third category in the CFA's point of view. This is because only the CFA is under a duty to decide whether an issue shall be referred to the NPCSC. The lower courts do not have such a duty. From the perspective of the lower courts, they do not have to consider the second category as the second category deals with when a referral to the NPCSC is needed. For all provisions which do not fall under the first category (ie provisions "within the autonomy"), they can simply consider those provisions as "other provisions" and fall under the third category. For the CFA, because it has a duty to decide whether a referral is needed or not, it has a duty to consider whether a provision falls under the second category. If it falls under it, then a referral is mandatory. So, for all provisions which do not fall under the first category, the CFA can consider it as falling under the second category. The third category does not exist from the perspective of the CFA since it is difficult to imagine a situation where a provision which does not fall under the first category and the second category will fall under the third category. Logically speaking, the third category covers nothing extra after the first and second categories. The third category may concern the lower courts, but it is a bit unrealistic to draw such a tiny distinction.

42 *Ibid*, p 195. Bokhary PJ also agreed that art 158 is problematic in *Ng Siu Tung*, see *supra* note 14, para 305.

43 For the general debate on article 169, see Wesley-Smith, P and Chen, A (eds.), *The Basic Law and Hong Kong's Future* (Hong Kong: Butterworths, 1988); Lee, M and Szeto, W, *The Basic Law: Some Basic Flaws* (Hong Kong: Martin Lee, Szeto Wah, 1988); McGurn, W, *Basic Law, Basic Questions: The Debate Continues* (Hong Kong: Review Publishing Company Ltd, 1988); Fung, D, "The Basic Law of the HKSAR of the PRC: Problems of Interpretation", [1988] 37 *The International and Comparative Law Quarterly* 701.

44 Professor Wu Jinguang had highlighted some of the problems, see *supra* note 18, p 58. The first three points below are Professor Wu's criticisms. See also Professor Ghai's criticisms on art 158, *supra* note 41, pp 195-230.

45 *Supra* note 41, p 203.

5. No guidance on how to determine whether the interpretation would or would not affect the judgment.[46]

The list above is not exhaustive. For instance, under what circumstances can the NPCSC exercise its power to interpret? Can it exercise this power at any time it likes subject to no restriction at all? Will the Interpretation affect a person who is in the same position as the actual party to the litigation but is not a party to the litigation? Does legislative interpretation have retrospective effect? Just look at these questions and the list above, one could see how the approach of art 158 may go wrong.

These are exactly some of the problems in which our courts have to face. It is the appropriate time to look at how the CFA looked at these issues. *Lau Kong Yung* is the point to start.

III. Lau Kong Yung - Recognizing the New Constitutional Order

The facts of *Lau Kong Yung* were straightforward. The seventeen applicants in the case were born in mainland China. Most of them came to Hong Kong on two-way permits and all the seventeen applicants arrived in Hong Kong before the delivery of the *Ng Ka Ling* judgment. None of them held a certificate of entitlement. The original immigration scheme before the *Ng* case was that an abode claimant must hold both a valid one-way exit permit and a valid certificate of entitlement before he could claim his right of abode in Hong Kong. However, the CFA in *Ng Ka Ling* held that the original scheme was constitutional except to the extent that it required claimants to hold exit permits. Part of the original scheme was struck down. The CFA modified the original scheme and ordered the Director of Immigration to specify a new arrangement for the application of the certificate of entitlement because it was not sure whether the Director still wanted to involve the mainland authorities in the certificate's application process.[47] As a result, even though a "modified scheme" existed after the *Ng* case,[48] this modified scheme was unworkable unless the government could work out a new arrangement as to the procedures of applying for the certificate. A "gap" thus existed. Unfortunately, the government failed to work out a new arrangement (ie actually, it seemed that the government had no intention to specify a replacement procedure at all). Removal orders were served on the seventeen applicants on the basis that none of them held a valid certificate of entitlement although there was no specified manner to apply for one.

A. The Reasoning of the CFA and How They Viewed the Interpretation

The majority, comprised of Li CJ, Litton PJ (as he then was), Ching PJ and Mason NPJ were of the view that the Court of Appeal erred in quashing the removal orders, but they reached their conclusions through different paths. Li CJ, Ching PJ and Mason NPJ regarded the issue on the Interpretation as a central question in the appeal.[49] They reached their conclusions by first analysing the Interpretation and then applied the Interpretation to consider whether the Director had committed an error of law in trying to remove the applicants and whether such an error was a relevant error, an error in the actual making of the decision which affected the decision itself. Litton PJ, on the other hand, was the only judge who did not give individual comments on the Interpretation.[50] He disposed the applicants' case solely on the grounds of

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46 *Ibid.*

47 *Supra* note 1 at 36F-H.

48 *Supra* note 1 at 38F-I.

49 *Supra* note 13 at 321C-D, *per* Li CJ.

50 But Litton PJ agreed with Mason NPJ's observations on the Interpretation. *Supra* note 13, at 333H.

administrative law. He considered the argument that the orders should be quashed because the Director had failed to consider the applicants' materials placed before him when making the orders as flawed. The Director simply had no such duty.[51] It was not right to say that such a duty existed because the Director had to implement the new legal position after *Ng Ka Ling*. He said, where there existed a gap in the *Basic Law* on how the power was to be exercised, it would be rare for the Director to exercise his power not by construing the relevant statute but by the *Basic Law* itself.[52] In such a way, Litton PJ did not consider that the Director had committed any error of laws. It was completely legitimate for him to exercise his power to remove in the context of the absence of the certificate of entitlements.

On the question of the Interpretation, the CFA was unanimous in its conclusions.[53] They agreed that art 67(4) of the Chinese Constitution and art 158(1) of the *Basic Law* confer a power on the NPCSC to interpret the *Basic Law*.[54] The power of interpretation under art 158(1) is in general and unqualified terms and is not restricted in any ways by arts 158(2) and (3).[55] The NPCSC can interpret any provisions in the *Basic Law*, not just the excluded provisions, and this power can be exercised at any time.[56] Mason NPJ described such an unrestricted power to interpret as a "free-standing" power.[57] It follows inevitably from a consideration of the text and structure of art 158 and there is no reason to "spell out the obvious"[58]. The interpretation operates from 1 July 1997.[59]

Li CJ, Ching PJ and Mason NPJ all agreed that the Director had made an error of law because the decision to removal was made in the context of the absence of the time of birth limitation and the modified scheme, which was not the correct legal position at that time since the Interpretation had retrospective effect.[60] This approach was different from Litton PJ. However, such an error was not a relevant error since the time of birth limitation would still be there even if there was no such error, which would be even more fatal to the applicant's claim.[61] The power to remove under the modified scheme was the same as under the original scheme. So, although the Director made an error to remove by ignoring the original scheme, such an error would not be a relevant error.[62] The same result to remove would still be reached whether there was any error or law or not. Besides, the Director was not under a duty to consider humanitarian grounds in exercising his power (ie Bokhary PJ disagreed on this point).[63]

There are some conceptual curiosities with the majority's error of law argument. Quite obviously, the government had no intention to honour the *Ng Ka Ling* judgment at all. The Interpretation had always been the government's own understanding of the law. It seems unrealistic to argue that the government committed an error of law by making the removal in the context of the absence of the time of birth limitation and the modified scheme.

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51 *Supra* note 13 at 338A-C.
52 *Ibid* at 338D-E.
53 *Supra* note 13, at 348D. Even Bokhary PJ, the only dissenting judge in the case, agreed with the majority's observation on the Interpretation.
54 *Ibid* at 322D-324I, *per* Li CJ; at 341A-D *per* Ching PJ; at 344G-H *per* Mason NPJ.
55 *Ibid* at 323B-C, *per* Li CJ; at 341D *per* Ching PJ; at 345A-I *per* Mason NPJ.
56 *Ibid* at 323F-H, *per* Li CJ; at 345G-I *per* Mason NPJ.
57 *Ibid* at 345D.
58 *Ibid* at 345I.
59 *Ibid* at 326D-F, *per* Li CJ; at 341G, *per* Ching PJ; at 344G-H *per* Mason NPJ.
60 *Ibid* at 331H *per* Li CJ.
61 *Ibid* at 331I-J.
62 *Ibid* at 332A-D.
63 *Ibid* at 332G *per* Li CJ.

Another interesting aspect in *Lau Kong Yung* is whether the Interpretation is in reality an important element affecting the outcome of the case. Litton PJ argued on the basis as if there was no Interpretation. For the other three majority judges, if the Interpretation does not exist, the Director will have committed no error of law at all. In such a case, there is no need even to proceed further to see whether there is any relevant error. So, no matter whether the Interpretation existed or not, the same result would still be reached. Whether the Interpretation is really "a central question in the appeal"[64], as described by Li CJ, is doubtful. Arguably, everything the CFA said on the Interpretation was only *obiter dicta*.

B. Assessing the Impact of Lau Kong Yung

Sharply contrasting *Ng Ka Ling*, the CFA demonstrated its acceptance of the new constitutional order by construing art 158 in such a broad way. Such a broad interpretation created worries in the community. Some commentators described the CFA judgment as "the start of unlimited anxieties"[65] and "severely restricting the scope of judicial independence"[66]. Mr Martin Lee portrayed the judgment as stabbing our rule of law to death.[67] Professor Ghai criticised the CFA approach as "contradiction that eats at autonomy" and grafting the mainland principles on to Hong Kong law.[68] What are the impacts of the *Lau* case? Does the *CFA* deserve these kinds of criticisms?

1. Impact on Autonomy, "One country, Two systems" and Judicial Independence

One of the very adverse consequences of the *Lau* case arises from the way in which the CFA construes art 158(1). The CFA agreed that the NPCSC's power to interpret under art 158(1) is unqualified, unrestricted, not limited to any provision but includes those that fall entirely within the autonomy of the HKSAR. And, this power can be exercised at any time. Accordingly, the NPCSC can "step-in" to make an interpretation at any time before, in mid of or after a particular litigation takes place. The NPCSC may justify its "stepping-in" by saying that the court fails to reflect the true legislative intent of the article in dispute. At worst, the NPCSC may not even provide any reasons to justify its interference. Such a constitutional framework is highly dangerous. As Professor Ghai propounded, legislative intent is a bit of fiction.[69] For a legislature as large as the NPC, legislative intent is even more difficult to ascertain.[70] Different members will have different understandings of the same provision and have different reasons for supporting it.[71]

It is also even more unpromising to justify or prove the legislative intent of a particular provision by relying on supplementary materials. The English common law traditionally views using supplementary materials in proving legislative intent with scepticism. It was not until *Pepper v Hart*[72] that the House of Lords started to recognize using parliamentary debates as an aid to interpret a statute. There may be numerous supplementary documents to

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64 *Ibid* at 321C-D.

65 Appledaily, p A2, 4 December 1999 (香港《蘋果日報》12 月 4 日的標題是「昨天的裁決是無盡憂慮的開端」).

66 Editorial, Hong Kong Economic Journal, p 1, 4 December 1999 (香港《信報財經新聞》12 月 4 日的社評認爲「經過這場釋法和終院最新判決香港司法獨立的範圍已經受到新的規限，已經收窄」).

67 Wenwuipo, p A2, 4 December 1999.

68 Ghai, Y, "Contradiction that eats at autonomy", *South China Morning Post*, 4 December 1999.

69 *Supra* note 11, p 208.

70 *Ibid*.

71 *Ibid*.

72 *Pepper v Hart* [1993] 1 All ER 42.

an article purporting to reflect its purpose. This time the NPCSC may rely on the Opinions of the Preparatory Committee to reflect the true legislative intent behind art 24. Next time, it can dig out another supplementary document from anywhere it likes, which maybe totally unknown to the public beforehand, and use it to reflect the legislative intent of the articles which it has to interpret. To be more extreme, the NPCSC may not even prove legislative intent with any supplementary documents at all. So, the idea that the NPCSC can make an interpretation because it has to reflect the true legislative intent of an article is more or less the same as giving the NPC the power to make an interpretation in any manners it likes. The NPCSC's power is simply unbounded.

What if such an interpretation is bizarre, absurd, ridiculous or obviously frustrating human rights? Suppose the NPCSC interprets the act of treason, secession, sedition or subversion against the CPG in art 23 of the *Basic Law* includes making any kinds of criticisms against the CPG under any circumstances. Then our government may enact laws which prohibit making any kinds of criticisms against the CPG in Hong Kong.[73] If the NPCSC issues the interpretation in the example above in accordance with art 158(1), our courts have to follow, because we cannot question the NPC's acts which are in accordance with the *Basic Law*.[74] Our courts still have to accept such an interpretation which fundamentally violates our freedom of speech. There is simply no way for us to challenge the NPCSC. If art 158(1) is construed in such an unlimited way, where does our autonomy remain? Where is the respect for judicial independence, one of the most important foundations of the rule of law?

Another possible, yet dangerous, consequence is that while the CFA uses such an unrestricted approach in interpreting art 158(1), it is totally possible that the CFA will use a similar approach to interpret art 159. Article 159(1) states that "the power of amendment of the *Basic Law* shall be vested in the NPC". It plainly has no difference with art 158(1) except for the fact that it deals with the power of amendment and the power is vested in the NPC, but not the NPCSC. Applying the logic in *Lau Kong Yung*, the NPC will then have an unlimited power to amend the *Basic Law*. Although the amendment could not contravene the established policies of the PRC regarding Hong Kong (ie art 159(4)), the protection offered by art 159(4) must be viewed with suspicion. This is because basically all the established policies of the PRC regarding Hong Kong are set out in the Joint Declaration ("JD"), which are incorporated into the *Basic Law*. Since the NPCSC has an unlimited power to interpret any provisions in the *Basic Law* under art 158(1), the CPG accordingly can change its policies by first issuing interpretations on different articles. The established policies are thus always changeable according to the way the NPC sees fits. In view of that, the NPC can always amend the *Basic Law* without the worry that the amendment will contravene the established policies of Hong Kong.

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[73] This is totally possible in light of the current composition of the Legislative Council. Out of its 60 members, only 24 legislators are directly elected by the public. Most of the legislators are pro-government or pro-Beijing which tended to support the government's bills under most situations. If the government proposed such a bill (maybe under the pressure by Beijing), it is not surprising that such a bill will go through.

[74] Even if the NPCSC is doing something which is not in accordance with the *Basic Law*, whether our courts can challenge its validity is uncertain and has attracted wide-spread academic debates. See Ling, B, "Can Hong Kong Courts Review and Nullify Acts of the National People's Congress?", (1999) 29 *Hong Kong Law Journal* 8; Chen, A, "The Court of Final Appeal's Ruling in the 'Illegal Migrant' Children Case: Congressional Supremacy and Judicial Review", *supra* note 3, p 73 and Chan, J, "Judicial Independence: A Reply to the Comments of the Mainland Legal Experts on the Constitutional Jurisdiction of the Court of Final Appeal", *supra* note 3, p 61.

In such a way, the notions of "high degree of autonomy" and "judicial independence" are almost meaningless. Our autonomy then largely depends on the exercising of self-restraint by the NPC. Looking at the above consequences, one will naturally question whether the original purpose of art 158(1) is really so broad and absolute. Did the CFA misconstrue art 158(1)? How can we rationalize the CFA interpretation on art 158(1)?

a. Rationalizing the CFA's Interpretation on Art 158

There are some arguments that may suggest art 158(1) is not to be so broadly construed but they are not considered by the CFA. First, the approach adopted by the CFA in interpreting art 158 was very literal. Inherent in its reasoning is that, basically because art 158(1) states "the power of interpretation of this Law is vested in the NPCSC", then the court has to give effect to what it states. Nothing can qualify this plain and straight-forward sentence. However, the court can always read the statute as a whole to interpret a particular provision.[75] The purpose of the whole *Basic Law* is to establish a constitutional framework so as to implement the policies behind the JD. The most important policy in the JD is enshrined under art 3(2) which states that the HKSAR shall enjoy a high degree of autonomy, except in foreign and defence affairs which are the responsibilities of the CPG. Articles 12 and 19 of the *Basic Law* incorporate this fundamental policy by respectively stating that the HKSAR shall enjoy a high degree of autonomy and independent judicial power except that our courts should not have any jurisdiction over acts of state such as defence and foreign affairs. If art 158(1) is so broadly construed, which means the NPCSC has the power to knock down our courts' decisions at any time it wants and interprets a provision which is entirely within our own autonomy, then the primary purpose behind art 3(2) of the JD and the *Basic Law* will obviously be frustrated. Why is it that arts 12 and 19 of the *Basic Law*, and art 3(2) of the JD, whose purposes clearly contradict such a broad interpretation, cannot impose some qualifications over art 158(1)? Why should art 158(1) prevail over all other provisions? If art 3(2) of the JD represents the purpose of the *Basic Law*, why should art 158(1) even prevail over the purpose of the *Basic Law*? How can we rationalize the CFA's approach to art 158?

b. In Terms of Autonomy: Does the CFA's Interpretation Contradict Art 12?

To rationalize the CFA's judgment, a very fundamental issue is what type of autonomy the HKSAR is enjoying. Article 3(2) of the JD is capable of being interpreted in two ways. On one hand, it can be construed as that a high degree of autonomy means, except for defence or foreign affairs which are the responsibilities of the CPG, the CPG leaves all the internal matters for us to decide.[76] On the other hand, it can be interpreted as meaning that foreign affairs and national defence shall be managed by the CPG, but it does not mean that the affairs managed by the CPG are limited to foreign affairs and national defence.[77] There is a big difference between these two ways of interpretations. If the first interpretation is correct, then obviously the NPCSC should not have a power to interpret a provision which is entirely within our own autonomy. If the second interpretation is correct, then the CPG's power will not be limited to foreign affairs and national defence. The NPC may have a power to deal with affairs which are entirely within the autonomy of the HKSAR.

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75 Zander, M, *The Law-Making Process* (London: Butterworths, 1994), p 131.

76 *Supra* note 41, pp 143-144.

77 Wu, J, "Several Issues Concerning the Relationship between the Centre of the PRC and the HKSAR", (1998) 2 *Journal of Chinese Law* 65, pp 67-68; see also *supra* note 41, p 143 note 4.

Autonomy is a phenomenon that exists in everyday life. The major question surrounding autonomy is about its extent.[78] Hannum suggests that there are three general factors which should be considered when examining the extent of autonomy enjoyed by the local authority.[79] The first factor concerns the notion of "residual powers", which means that any power which has not been expressly assigned to the local government remains vested in the sovereign or vice versa. The second factor is "veto powers". Does the sovereign government retain either a legislative or executive veto over local enactments? The third factor relates to "constitutional amendment power", which means whether the local entity can independently amend its constitution without the approval of the sovereign. There are some correlations between the first two factors. Where the autonomous government retains residual powers, the central government normally will not have any veto power over local legislation.[80] However, the constitutional amendment factor generally does not link with the question of residual powers.[81]

So, what sort of autonomy is the HKSAR enjoying? Does the CPG intend to give us residual powers over all affairs that are within our autonomy? During the drafting stage of the *Basic Law*, some political figures did propose that the HKSAR should be given residual powers.[82] Looking at the *Basic Law*, it contains an impressive list of different powers that are currently exercised by the HKSAR. Yet, this list is not exhaustive. As Professor Ghai observes, there are a lot of other matters like transportation, energy, water supply, postal services, housing, marine development, meteorology etc., which are not expressly mentioned in the *Basic Law*. It is unreasonable to suggest that the HKSAR does not enjoy autonomy over these "unlisted" matters.[83] The inference is that Hong Kong is intended to have autonomy over all matters other than foreign affairs and defence.[84]

Unfortunately, this argument was not accepted by the CPG. The concept of residual powers has to be viewed with the issue of whether the autonomous entity was an independent state prior to the creation of the new relationship in concert with another state.[85] Professor Wu Jianfan pointed out, the concept of residual powers is appropriate only in federations where previously independent entities merge and give up some of their powers to the centre, retaining the residual for themselves.[86] As Hong Kong has never been an independent state, there has not been any power for us to retain. It has never been the intention of the CPG to grant residual powers on Hong Kong. The sovereign retains all the residual powers.

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78 Chen, A, "The Relationship between the Central Government and the SAR" in Chen, A, and Wesley-Smith, P (eds.), *The Basic Law and Hong Kong's Future* (Hong Kong: Butterworths, 1988), pp 107-108.

79 Hannum, H, and Lillich, R, "The Concept of Autonomy in International Law" in Dinstein, Y (ed), *Models of Autonomy* (US: Tel Aviv University: 1981), p 215, pp 224-225.

80 *Ibid*, p 227.

81 *Ibid*, p 226.

82 Sezto Wah proposed an article to the effect that Hong Kong would be given authority over all powers not specifically vested in the Central Authorities. *Supra* note 41, p 62.

83 *Supra* note 41, p 148.

84 *Supra* note 41, p 148.

85 Thus, the formerly independent or at least separate entities of Eritrea, the sheikdoms within the U.A.E, and the Swiss cantons all retain residual governmental powers, while regions which were not independent but gained autonomy as a result of constitutional change in the central government like Catalonia and the Basque country, Greenland, the Aland Islands, the New Zealand territory of Tokelau, and the U.S. territories all do not have residual powers. *Supra* note 79, pp 226-227.

86 *Supra* note 41, p 148, note 7.

As discussed above, where the sovereign retains residual powers, it is likely to retain power to veto local legislation as well. This general observation also applies to Hong Kong. Article 17 of the *Basic Law* confers a power on the NPCSC, after consulting the Committee for *Basic Law*, to invalidate any laws enacted by the Legislative Council if it considers that the law is not in conformity with the provisions of the *Basic Law* regarding affairs within the responsibility of the CPG or relationship between the CPG and the HKSAR. For the third factor, the HKSAR apparently does not have an independent constitutional amendment power. Article 159 sets out the strict procedures in amending the *Basic Law*.[87] The requirements under art 159 are stringent.

In such a sense, it is clear that the HKSAR does not have residual powers, independent constitutional amendment powers or exclusive legislative power. The type of autonomy that we are enjoying is not federal in nature, but rather in the form of autonomy within a unitary state.[88] We are enjoying a very high degree of autonomy economically, but not politically. The CPG has never intended to grant us exclusive authorities to deal with matters which are entirely within our autonomy. Articles 17 and 159 are examples in which the sovereign reserves the powers to exercise its authorities over some matters such as legislation and constitutional amendment. It has been suggested that these kinds of "power reserve" in a territory with no residual powers are not in itself unreasonable or objectionable because in any arrangement for autonomy, there must be mechanisms for ensuring that the autonomous entity does not exceed the permitted scope of its autonomy.[89] The central or national authority needs to ensure that any trespass on the limits of autonomy by the autonomous entity can be effectively checked and rectified.[90]

Article 158 can be understood in a similar way. The NPCSC reserves its power to interpret the *Basic Law*. As the CPG has never intended to give up its residual powers, art 158(1) confers a power on the NPCSC on all the provisions in the *Basic Law*, not just for the excluded provisions.[91] Even though art 158(1) may be in conflict with art 12 of the *Basic Law*, it must prevail. Otherwise, the SAR will enjoy residual powers over all internal matters, which is not the legislative intent of the *Basic Law*. The legislative intent that Hong Kong is not to have any residual powers is well-illustrated by Professor Xiao Weiyun, one of the members in the drafting committee of the *Basic Law*. In his account of the drafting process of the *Basic Law*, he stated, "the relationship between the country and the HKSAR is a relationship between the Central Authorities and a local government, and not a relationship between a federal government and a member state, or any equivalent status"[92].

So, even though critics strongly criticised the CFA's concession that the NPCSC could

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87 If the HKSAR wants to amend the *Basic Law*, it must first submit amendment bills to the NPC by the delegation of the Region to the NPC after obtaining the consent of two-thirds of the deputies of the Region to the NPC, two-thirds of all the members of the Legislative Council, and the Chief Executive (Art 159(2)). Then the bill will be put on the agenda of the NPC subject to its approval after the Committee for the *Basic Law* of the HKSAR has studied and submitted its views on it (Art 159(3)).

88 *Supra* note 78, p 113.

89 *Ibid*, p 112.

90 *Ibid*.

91 Provisions which (i) concern affairs which are the responsibility of the CPG or (ii) concern the relationship between the Central Authorities and the Region, are defined by the CFA in *Ng Ka Ling* as excluded provisions. See *supra* note 1, at 30F-G. Those provisions which are not excluded provisions are non-excluded provisions.

92 Xiao, W, *One Country, Two Systems, An Account of the Drafting of the Hong Kong Basic Law* (Beijing: Peking University Press, 2001), p 135.

interpret non-excluded provisions as severely undermining the notion of autonomy,[93] this is *an unacceptable, yet unavoidable consequence*. The reality is that, Hong Kong is not enjoying a type of autonomy to an extent that the CPG is to be excluded from exercising its authorities over matters within our own autonomy. Another type of criticism, as suggested by Jerome Cohen, was that *Lau Kong Yung* required only a determination that the NPCSC had the power to make the final interpretation of the excluded provisions and the CFA had gone out of its way to decide that the Standing Committee had the power of final interpretation even regarding the other non-excluded provisions.[94] Again, this criticism is not powerful. The NPCSC has interpreted both arts 22(4) and 24. As accepted by the CFA in *Ng Ka Ling*, art 22(4) is an excluded provision, while art 24 is a non-excluded one. In order to examine whether the court shall be bound by the interpretation on art 24, the CFA *must* examine whether the NPCSC has a power to interpret a non-excluded provision. One may argue that although art 24 is not an excluded provision when standing alone, it becomes an excluded provision when it has to be interpreted together with another non-excluded provision (art 22(4)). Arguably, if the CFA accepts such an argument, it can then refrain from discussing whether the NPCSC has a power to interpret a non-excluded provision and do less harm to our autonomy. But this argument has not been explored in *Lau Kong Yung*, probably because the CFA is not prepared to overturn its ruling in *Ng Ka Ling* on the nature of art 24.

c. In Terms of the Rule of Law: Does the CFA's Interpretation Contradict Article 19?

Judicial independence is an important element in the rule of law. During the drafting stage of the *Basic Law*, the biggest criticism to the then art 169 was that independent judicial power would appear meaningless if the SAR courts were to have no power to interpret authoritatively and in a binding manner.[95] Besides, the possibility of abuse of its interpretation power by the NPCSC cannot be ignored.[96] If it exercises the power before or in mid of a litigation for the purpose of securing a particular outcome of the case, then our judicial independence will be seriously jeopardized, particularly if the case is concerned purely with matters within our own autonomy.[97] The CFA interpretation in *Lau Kong Yung* once again ignites these worries.

Although interpreting art 158(1) in such a way may be an insult to the judicial independence enshrined in art 19, the CFA has not erred in its interpretation. In Professor Xiao Weiyun's account of the origin legislative intent of art 158, he pointed out that judicial independence in the *Basic Law* had to be understood in a different context.[98] In our common law system, the power to interpret and the power to adjudicate cannot be separated. The judiciary has the final power of interpretation, as well as the final power of adjudication. But in Chinese law, there is a difference between adjudication and interpretation. Final adjudication is the final stage of power of adjudicating a case in the courts. It relates to the level of judgment, but not the interpretation of the law.[99] The CPG has never intended to grant the CFA the final power of interpretation, but only the final power of adjudication. That is why, the word "adjudication" is explicitly expressed under several different articles in the *Basic Law* (arts 19, 82, 158). A

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93 The Hong Kong Bar Association, "Should the Common Law System in Hong Kong be maintained?", 2 July 1999, *supra* note 3, p 394; Cohen, J, "A Lack of Caution", *South China Morning Post*, 2 April 2000.

94 *Ibid*, Cohen, J.

95 Fung, D, "The Basic Law of the HKSAR of the PRC: Problems of Interpretation", [1988] 37 ICLQ 701, p 707.

96 *Supra* note 78, p 131.

97 *Ibid.*

98 *Supra* note 92, pp 171-176.

99 *Ibid*, p 173.

good example is art 82, which states that the power of final adjudication of the HKSAR shall be vested in the CFA, but it does not say that the power of final interpretation of the HKSAR is to be vested in the CFA. The result embarrasses the notion of judicial independence, but again, this is *an unacceptable, yet an unavoidable consequence.*

Indeed, during the drafting process of art 169, the CPG stressed that the NPCSC must be vested with the power of final interpretation amid all the criticisms. The argument was that NPC was the institution that promulgated the *Basic Law*. It is also the institution that best understands the legislative background and implications of the provision.[100] Most importantly, the NPC feared that if they were not vested with such a power, they could not correct the CFA's interpretation if such an interpretation was different from the original legislative intent of the *Basic Law.*[101] So, one of the primary purposes of art 158 is to safeguard the NPC's power to "correct" the CFA in case the CFA went wrong. Sadly, this NPC's "fear" turned into a reality just two years right after the change in sovereignty.

Judicial independence, enshrined under art 19, must from now on be understood in a different context. The CFA was correct in pointing out the difference between "adjudication" and "interpretation" and held that we only had the power of final adjudication, but not the power of final interpretation.[102] But still, that does not mean that provided that the CFA power of final adjudication is respected, then judicial independence is also respected. The government argued that the Interpretation did not undermine judicial independence because the CFA's ruling was not affected by the Interpretation. The court's power to adjudicate is respected and unaffected. A common law court's interpretation is always subject to being changed by the legislature. The NPCSC is simply acting like a legislature and change a court's interpretation. It did nothing that undermined judicial independence. The government put forth such an argument in rebutting the criticisms from the bar and the democrats.[103] But such an argument is flawed. To say that judicial independence is already respected since our courts enjoy a final power to adjudicate is unrealistic. If the *ratio decidendi* of a case decided by our highest court can be knocked down in such a brutal manner, it is difficult to say judicial independence is not affected even if the rights of the actual litigating parties are unaffected. Nor is it correct to say that the NPCSC is acting like a legislature. In the Interpretation, the NPCSC is interpreting the law, but not legislating a new law. Even if the Interpretation is in fact legislative in nature, why should we accept that the NPCSC can legislate for Hong Kong? Article 158 only authorizes the NPCSC to interpret, but not to legislate. The NPCSC cannot and should not act as a legislature for Hong Kong. To respect the integrity of our system and the dignity of our courts, art 158(1) should not be used as a tool to knock down the CFA decision in case its interpretation goes wrong. To do so would virtually place the NPCSC as the real CFA of Hong Kong.

2. *Impact on the Relationship between the Constitution and the* Basic Law

The Interpretation stipulated that it was made under art 67(4) of the PRC Constitution and art 158(1) of the *Basic Law*. While a legislative interpretation can be made pursuant to art 158(1), whether the NPCSC can rely on the PRC Constitution to exercise its authority over the *Basic Law* is problematic. The *Basic Law* does not provide any guidance on the applicability of the PRC Constitution in Hong Kong. In lots of aspects, the *Basic Law* and the Chinese

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100 *Supra* note 92, p 175.

101 *Ibid.*

102 Supra note 14 at 345A-C, *per* Mason NPJ.

103 Leung, E (Secretary for Justice), "Reply by Secretary for Justice on 14 June 1999", *supra* note 3, p 408.

Constitution are incompatible. The Consultative Committee for the *Basic Law* had proposed establishing some channels or mechanisms to clarify the applicability of the Chinese Constitution in Hong Kong. However, all the proposals were rejected by the Chinese authorities. Indeed, the NPC even declared that the *Basic Law* as consistent with the Constitution on the same day it passed the *Basic Law.*[104]

The issue whether the NPCSC can rely on art 67(4) to exercise legislative interpretation in Hong Kong is important for several reasons. First, it revives the question on the applicability of the very incompatible Chinese Constitution in Hong Kong. If the NPCSC can invoke art 67(4) to interpret the *Basic Law*, can it invoke arts 67(2) and 67(3) to amend the *Basic Law*?

Second, under art 67(4), the NPCSC has the power to interpret *statutes*. If the NPCSC can interpret the *Basic Law* by relying on art 67(4), then the *Basic Law* will have the status as a *local statute* of the PRC, rather than the special status as the constitution of a special administrative region. Interestingly, if the *Basic Law* is only a piece of local statute of the PRC, it shall be subject to the whole Constitution and the Constitution shall prevail over the *Basic Law*. The nature of the *Basic Law* is so different from any local statutes of the PRC. To argue that it is a mere piece of local statute is quite unacceptable. The necessity in treating the interpretation of the *Basic Law* by the NPCSC as independent of its interpretation of local statutes also derives support from the principle of "one country, two systems". Wen Hongshi argues that the principle which is reflected in art 67(4) of the Constitution and the Resolution is the principle of democratic centralism and such a principle shall not be reflected in art 158 of the *Basic Law* for it is inconsistent with the principle of "one country, two systems".[105] Furthermore, such an independent treatment is of importance because if the NPCSC's power to interpret the *Basic Law* is treated as an extension of its power to interpret some local statutes, then the demerits in the NPCSC's interpretation of the local statutes will inevitably be imported into the legal system of Hong Kong.[106]

In order to exercise the power to interpret the law, there must be one or more power conferring provisions which confer the power to interpret on the NPCSC.[107] To examine whether the NPCSC can interpret the *Basic Law* solely through the *Basic Law* without the aid of the Constitution, it is necessary to consider whether the *Basic Law* properly *confers* a power on the NPCSC to interpret. If art 158 can confer such a power, then it is unnecessary to rely on art 67(4) on the Constitution. Put it in another way, if art 158 is good enough in conferring a power on the NPCSC to interpret the *Basic Law*, why is it necessary to rely on another article in a totally different instrument whose applicability to Hong Kong is questionable? The NPCSC simply does not have to rely on two different power conferring provisions to make an interpretation particularly as relying on art 67(4) can generate problems mentioned in the two preceding paragraphs.

Accordingly, the argument that the NPCSC shall solely rely on art 158 to interpret the *Basic Law* will fail if art 158 is not a power conferring provision. Article 67(4) is undeniably a power conferring provision. Article 158 is more ambiguous in nature. Article 158(1) states that the power of interpretation of the *Basic Law shall be vested* in the NPCSC. There can be

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104 Fu, H L, "Supremacy of a Different Kind", *supra* note 3, p 99.

105 Wen, H, "Interpretation of Law by the NPCSC", *supra* note 3, p183, at p 193.

106 *Ibid.*

107 Of course, one may argue that there is no need to rely on a power conferring provision. It is enough simply rely on the "relevant" provision which concerns legislative interpretation (Art 158) and no need to consider whether it is power conferring or not. However, it is reasonable to expect our highest court to find out the proper sources of law that authorise an authority to act in such a way.

two opposite constructions of art 158(1). One argument is that while the power to interpret vests in the NPCSC means that the NPCSC has a power to interpret, art 158(1) must have intended to confer a power on the NPCSC to interpret otherwise it is meaningless to just state that the power to interpret vests in the NPCSC.[108] Accordingly, as a matter of natural construction, the phrase "shall be vested" is good enough in conferring a power on the NPCSC to interpret the *Basic Law*. On the contrary, one may argue that the phrase is merely describing the fact that the NPCSC can interpret the *Basic Law*. The language is descriptive rather than power conferring. The purpose of art 158 is not to confer a power on the NPCSC to interpret, but to lay down some specific guidance on how such a power is to be exercised. This argument can draw support from the natures of arts 158(2) and 158(3). Article 158(2) describes the situation when a referral is necessary. Article 158(3) lays down further procedure guidance before the NPCSC interprets the *Basic Law*. Both are procedural regulations. So, art 158 should not be a power conferring provision.

It is not easy to say with confidence whether art 158 is a power conferring provision as both arguments have force. However, as Professor Ghai rightly pointed out, it is important to respect the self-contained nature of the *Basic Law*.[109] Reliance on the Constitution should be exercised stringently otherwise it could raise considerable doubts about the status and the effect of the *Basic Law* in the face of several contrary provisions in the Constitution.[110] So, although art 158 can be construed in rivalry, the court shall adopt an interpretation which better respects the self-contained nature of the *Basic Law*. It is quite unfortunate that the CFA did not comment on the using of art 67(4) as a source of law for the Interpretation. Even if some of the above adverse consequences may only be a matter of academic interests, it still deserves our highest court's attention.

3. Impact on Past Rights: Should the Interpretation have Retrospective Effect?

The Interpretation does not explicitly express whether it is retrospective or not. Without much analysis, the CFA applied the common law declaratory theory and stated that the Interpretation declared the law as it always had been. The Interpretation has always been the law since 1 July 1997. So, the Interpretation is to have retrospective effect. The NPCSC acts like a common law judge. It only declared the law but it did not invent or create new laws. In such a way, the CFA viewed the Interpretation by the NPCSC as a "judicial act" (i.e. the NPCSC is like a judge, merely interpreting the law, but not creating the law), rather than a "legislative act" (i.e. the NPCSC is like a legislature, enacting and creating new laws), because the declaratory theory cannot apply to laws enacted by the legislature. To argue that the legislature has not created laws but only declared laws is ridiculous. The question is, is it proper to use the declaratory theory, which is unfound in any civil law system, to explain the retrospective nature of the Interpretation?

Up till now, the NPCSC had exercised legislative interpretation on ten occasions. Prior to the Interpretation,[111] it is believed that the NPCSC had exercised legislative interpretation on eight occasions.[112] On the first six occasions, the interpretations issued by the NPCSC did not concern Hong Kong. The NPCSC either made "decisions" that amplified existing provisions in the Constitution or the laws or vested certain powers in the public security organs. They are

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108 Professor Ghai supported this argument. He suggested that it was unnecessary to rely on the Chinese Constitution., *supra* note 11, p 210.

109 *Supra* note 11, p 210.

110 *Ibid.*

111 See texts which accompany notes 38 and 39.

112 *Supra* note 18, p 59; note 25, pp 412-413; note 104, pp 189-190.

decisions, but not interpretations. The seventh and eighth occasions involved the implementation of the PRC Nationality Law in the HKSAR and in the Macau SAR respectively.[113] All these legislative interpretations are in the nature of supplementary or amendment legislation.[114] None of them had any retrospective effect. In fact, all the legislative interpretations rendered by the NPCSC were in the nature of a "legislative act", rather than a "judicial act", prior to the Interpretation.

Chinese legal scholars had long argued that legislative interpretation should not be a "judicial act" because it cannot solve the problems of retrospective application of laws.[115] Retrospective application of laws in China is generally prohibited. Article 84 of the Law imposes a general prohibition on the retrospective application of laws and regulations, unless special circumstances arise. Chen Sixi argues, if the effective date of the Interpretation is taken as the date in which the law first came into existence, this will contravene the principle that law should not have retrospective effect.[116] It seems prior to the Interpretation, the academic consensus is that legislative interpretation can only be a "legislative act", but not a "judicial act". If that is so, then the CFA will have gone wrong in applying the declaratory theory to the Interpretation.

However, apart from some scholars' criticisms, no law in the PRC says that legislative interpretation can never be a "judicial act". The *Lau* case serves as the first case to indicate that legislative interpretation can have a dual nature. It can either be judicial or legislative in nature depending on the construction of the interpretation in question. If the NPCSC is merely interpreting the law in the Interpretation, it shall be a "judicial act". On the other hand, if the NPCSC is making supplementary or amendment legislation in the Interpretation, it will be a "legislative act". The question of whether the Interpretation is in the nature of a mere interpretation or supplementary legislation is not always easy to answer. The CFA did not give an answer to this question explicitly. It is only in Mason NPJ's judgment, where he said, "the Interpretation is not simply legislation, *as an amendment to the Basic Law would be*"[117], which throws some light onto the question. Mason NPJ is right in regarding the Interpretation as not in the nature of a legislative amendment, otherwise it simply follows that the Interpretation shall be a legislative act and shall not have any retrospective effect. A legislative amendment cannot be within the reach of art 158(1). Article 158(1) authorises the NPCSC to *interpret*, and art 159 concerns *amendment*. If legislative amendment can also come under the meaning of the word "interpretation" in art 158(1), then the distinction between interpretation and amendment will be lost. Such a distinction is extremely important. Without it, the NPCSC may amend the *Basic Law* through a legislative interpretation under art 158(1), without reference to art 159. Such a "broad" construction on art 158(1) is not beneficial to the integrity of the *Basic Law*.

Unfortunately, even Mason NPJ did not give a reason why the Interpretation is not a piece of legislation. The distinction between interpretation and legislation is often obscure, especially for legislative interpretation rendered by the NPCSC, which in itself is a legislature. Why should we regard the Interpretation as an interpretation, but not as legislation? A general

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113 The Court of Appeal recently dealt with a case involving the proper interpretation on the NPCSC's interpretation on the implementation of the PRC Nationality in the HKSAR. See *Tse Yiu-Hong v The Director of Immigration* CACV 351/2001 (2002-01-28) (This is an English translation of the party names. The judgment is only available in Chinese). 「謝耀漢對入境事務署署長」

114 *Supra* note 25, p 413.

115 *Supra* note 105, p 191.

116 *Ibid.*

117 *Supra* note 13 at 346D.

argument is that because its purpose is to indicate the legislative intent of the two articles in dispute, so it has to be an interpretation, but not legislation. This approach may not necessarily be correct. In terms of nature, it is arguable that the Interpretation is no different from laying down a new law. Professor Ghai is forceful in saying that the Interpretation is even more than legislation. It is much more in the nature of rulings that common law courts make. He regards it as a combination of clarifying the law, correcting lower tribunals, providing instructions or guidelines and preserving past rights.[118] It is not right that every legislative interpretation rendered for the purpose of reflecting the legislative intent is to be regarded as an interpretation. If that is so, then the NPCSC can always use the notion of "legislative intent" as a protective shield for the purpose of carrying out a supplementary legislation through art 158(1).

In order to apply the declaratory theory, a pre-requisite is that the Interpretation must only be a mere interpretation, but not a supplementary legislation. Perhaps, the most straightforward way in explaining why the Interpretation is a mere interpretation is because the Interpretation is materially the same as the CA's interpretation on the two articles.[119] As a court's decision must be an interpretation, rather than a piece of legislation, it follows directly that the Interpretation must also be an interpretation.[120] Another point which is important is that, without actually considering the "unaffected persons question" before deciding this issue, it will be later argued that the CFA achieved a gross unfair and unjust result to the abode claimants.[121] Anyway, whether correct or not, using the declaratory theory to explain the nature of the Interpretation is inputting a new dimension and crafting a common law concept onto the civil law system in the mainland. It is a good example of how the ideology of the two systems can inspire and affect each other. The next case, *Chong Fung Yuen*, is another example of how the two systems interrelate each other.

IV. Chong Fung Yuen[122] *– Establishing a Constitutional Convention?*

Chong Fung Yuen was a Chinese citizen born in Hong Kong in September 1997. At the time, his parents were visiting Hong Kong under two-way permits. Neither parent had the right of abode in Hong Kong at the time of his birth. Article 24(2)(1) provided that Chinese citizens born in Hong Kong were Hong Kong residents. The primary issue in this case was that in the Interpretation, it states that the legislative intent of all categories of art 24(2) of the *Basic Law* have been reflected in the Opinions on the implementation of Article 24(2) of the *Basic Law* ("the Opinions") adopted by the Preparatory Committee for the HKSAR of the NPC. The Opinions states that art 24(1) only refers to people who are born during which either one or both of their parents are lawfully residing in Hong Kong and does not include parents who are visitors under the two-way permits. The purpose of the Interpretation is to interpret arts 22(4) and 24(2), but not art 24(1). The question is, while the Interpretation has made an incidental comment on art 24(1), which is not purpose of the Interpretation, should our courts be bound

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118 *Supra* note 11, p 207.

119 For the Court of Appeal's decision, see *Cheung Lai Wah & Others v Director of Immigration* [1998] 1 HKLRD 722.

120 Professor Albert Chen supported this argument. See Chen, A, "The Interaction between the Hong Kong and Mainland Legal Systems after the Re-unification: Retrospect and Prospect", in Lau, S K (ed), *Blueprint for 21st Century Hong Kong* (Hong Kong: Chinese University of Hong Kong Press, 2000) (in Chinese) (*回歸後香港與內地法制的互動：回顧與前瞻*, 在劉兆佳(編),*香港二十一世紀藍圖*,(香港中文大學出版社：2000 年)), pp 37, 41-42.

121 See the discussion below on *Ng Siu Tung v The Director of Immigration*.

122 For an in depth analysis of *Chong Fung Yuen*, see Chen, A, "Another Case of Conflict Between The CFA and the NPCSC?", (2001) *Hong Kong Law Journal* 179.

by such an incidental comment of the Interpretation? And, whether the CFA is obliged to refer art 24(1) to the NPCSC to interpret?

The CFA answered both questions negatively. The CA had held that the NPCSC incidental comment on art 24(1) was only *obiter dicta* which does not bind our courts. The CFA affirmed such an approach. On the second question, the CFA regarded art 24(1) as a non-excluded provision. It is completely within our own autonomy. There is no need to refer it to the NPCSC.

Certainly, the CFA decision in *Chong Fung Yuen* should be applauded. After the very restrictive approach in *Lau Kong Yung*, the *Chong* case restored some confidence that our courts are still determined to protect our rule of law by refusing to surrender a non-excluded provision to the NPCSC to interpret. Also, our courts have successfully limited the impact of the Interpretation to only arts 22(4) and 24(2), but not the others. Like the declaratory theory in *Lau Kong Yung*, by applying the common law concept of *ratio decidendi* and *obiter dicta* to analyse the Interpretation, the CFA has again, crafted another common law concept into a civil law invention. In such a way, both the *Lau* case and the *Chong* case can be said to have brought some common law insights onto the civil system in the mainland.

The *Chong* case is a success, not just because the CFA stands on its feet and refuses further damage to our system, but also because the NPCSC has exercised proper self-restraint. As the NPCSC has an unlimited power to interpret, if the NPSCS decides to interpret art 24(1) in light of the CFA decision, then no matter how bold the CFA is, it is still useless. But the NPCSC did not intervene. That is the reason why Professor Albert Chen regarded the *Chong* case as successfully achieving a win-win situation[123]. Both sides exercised constraint and mutual understanding. While the *Lau* case can be regarded as recognizing a new constitutional order, the *Chong* case is a case which recognizes a new constitutional convention in Hong Kong. This constitutional convention refers to a practice that the NPCSC will not interpret the *Basic Law* unless under some circumstances which are agreed upon by both sides. Such a constitutional convention is highly beneficial and important in our constitutional framework now (see the conclusion part for further discussion). While the CFA decision in *Chong Fung Yuen* should be appreciated, the next case, *Ng Siu Tung*, is a sad case that illustrated the heartlessness, and the cruelty, of our courts.

V. Ng Siu Tung – The Inhumane CFA

In *Lau Kong Yung*, the CFA accepted the Director's request not to deal with the question of who should or should not be affected by the Interpretation.[124] This unaffected persons question was delayed to *Ng Siu Tung*, understandably because lots of complex legal issues were involved and the CFA did not want to deal with it prematurely in the *Lau* case. Unlike the *Lau* case and the *Chong* case, the *Ng* case did not *directly* involve the Interpretation, nor did the CFA restate any of its previous assertions on the Interpretation. The issues involved in *Ng Siu Tung* were administrative law issues. It is not the purpose of this essay to discuss administrative law. However, the author finds it necessary to discuss this case because of the very inhumane approach taken by the CFA towards the abode seekers. Seeing all the miserable results generated by this judgment, it is necessary to rethink two questions: first, whether the Interpretation should have retrospective effect and second, whether the decision in *Lau Kong Yung* that a court is under no duty to consider humanitarian concerns is correct or

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123 *Ibid*, p 186.

124 *Supra* note 13 at 326E.

not.

A. The "Judgment Previously Rendered" Issue

The facts of the Ng case can be summarized as follows. There were a total of 5114 applicants. Some were born after a parent became a Hong Kong permanent resident (ie these persons were only subject to the exit permits restriction) but most of them were not (ie these persons were subject to both the exit permits restriction and the time of birth limitation). Their times of arrival in Hong Kong were different and the CFA divided the time interval into five periods.[125]

Five issues were raised in the case. Among them, all of the applicants mainly rely on the legitimate expectation issue and the concession issue. In the end, about 500 applicants were granted a right of abode as they succeeded on the two issues (ie some succeeded on the periods 1 and 2 issue, but the number is very few). The purpose here is not to analyse administrative law principles, but rather, it is the "judgment previously rendered" issue that deserves some discussion in our constitutional context. The Interpretation stated that it "does not affect the right of abode in the HKSAR which has been acquired under the judgment of the CFA on 29 January 1999 by the parties concerned in the relevant proceedings." What is meant by "parties concerned in the relevant proceedings"? This issue is important because this phrase seems somewhat like a kind of standard phrase that the NPCSC would include in its future possible interpretations. All the applicants here basically share similar backgrounds, statuses and experiences with the litigating parties in *Ng Ka Ling*. In fact, all the parties in the *Ng* case are "representative parties" representing all the other persons who shared the similar background in their litigation. Should these 5114 persons, be considered as "parties concerned in the relevant proceedings"?

The phrase "parties concerned in the relevant proceedings" can be interpreted in three ways. First, it can convey a message that the Interpretation is not of any retrospective effect in the sense that it only becomes effective on 26 July 1999 (Interpretation 1). Second, the Interpretation is of retrospective effect. It becomes the law since 1 July 1997. However, the NPCSC gives a concession not to affect the rights of the parties who shared similar backgrounds with the representative parties in *Ng Kar Ling* (Interpretation 2). Lastly, the Interpretation's declaration of right was confined to the actual plaintiffs in the *Ng* case. It was not a declaration of right in favour of anyone else (Interpretation 3). Interpretation 2 actually has not much difference from Interpretation 1. If Interpretation 2 is accepted, then the Interpretation will not affect the rights of the persons who shared similar backgrounds with the representative parties in *Ng Ka Ling*. It virtually has no effects on past rights although it may still be regarded as having been in operation since 1 July 1997. In such a case, the Interpretation is, in reality, not retrospective in nature.

Unfortunately, the majority[126] favoured the narrowest Interpretation 3. The Court did not actually interpret the phrase. Indeed, it decided the issue solely by construing art 158(3). Art 158(3) is different from the phrase as in art 158(3), there is no stipulation that "the rights of the parties concerned in the relevant proceedings would not be affected". It only mentions that

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[125] *Supra* note 15.

[126] The *Ng* judgment is perhaps the longest judgment the CFA has ever issued since its establishment. Another interesting aspect of the case is that the majority judgment is co-written by four judges together, namely Li CJ, Chan PJ, Riberiro PJ and Mason NPJ, with Bokhary PJ dissenting. It is an unusual practice in a common law court that a judgment is co-written by several judges together. Possibly, the CFA wants the judgment to be more weighty and coherent by doing so.

"judgment previously rendered shall not be affected". Article 158(3) is more restrictive than the phrase. The majority decided that the word "judgment" in art 158(3) has to be understood as only signifying formal orders pronounced by the courts in determining litigation. It is used to denote only the judge's decision, but not the judge's reasons for his decisions.[127] Bokhary PJ is of a different opinion. He preferred Interpretation 2. He believed that the *Ng Ka Ling* and *Chan Kam Nga* litigation was constitutional litigation about an entrenched right. The nature of constitutional litigation about an entrenched right is such that all persons whose existing circumstances put them in the relevant position acquire crystallized rights under a favourable judgment.[128] By relying on a series of cases, Bokhary PJ argued that the word "judgment" could be broadly construed.[129] It has a wide meaning and its meaning depends on its context.[130] As argued above, Interpretation 2 is more or less the same as Interpretation 1. So, even though Bokhary PJ in *Lau Kong Yung* agreed that the Interpretation was retrospective, his interpretation in *Ng Siu Tung* was virtually the same as denying the retrospective nature of the Interpretation.

B. The Inhumane CFA

It is difficult to argue whose approach, the majority or Bokhary PJ's, is better. However, when one looks at all the miserable results generated by this case, one will naturally ask whether Interpretation 3 should be adopted. Here are some examples of the inhumane results generated:

1. A 51-year-old man, who had been in Hong Kong for twenty years, was forced to go back to China leaving his children alone in Hong Kong.[131]
2. An Alzheimer's disease sufferer's daughter, whose mother had a habit of running away from home, was forced to leave her alone in Hong Kong.[132]
3. A group of mainland pupils, who just started studying in local schools for several months, had to return and there would be no one to take care of them in the mainland. Some may even be homeless when they go back.[133]
4. A pregnant unmarried Shenzhen woman had to return where there is a high chance that she would be forced to have an abortion when returned to mainland.[134]
5. Many elderly parents will have no one to take care of them once their children went back to China. Their children have been with them for many years. They have to face the reality that they may not see their children again if they are returned to the mainland.[135]
6. A 73-year-old man feared that no one would take care of his close to dying father after being forced back to the mainland by the judgment.[136]

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127 *Supra* note 15, para 31.
128 *Ibid*, para 325.
129 *Ibid*, paras 320-324.
130 *Ibid*, para 321.
131 "I'll be Left in Limbo if Sent Back After 20 Years, Says Father", *South China Morning Post*, 23 April 2002.
132 "Orders Leave Sick Mother Stranded", *South China Morning Post*, 15 January 2002.
133 "Abode Pupils Enjoy Farewell Treat", *South China Morning Post*, 7 March 2002.
134 "Single Woman Fears Forced Abortion if Sent Back", *South China Morning Post*, 23 March 2002.
135 "Fleeting Glimpse of Victory Nothing but a Cruel Illusion", *South China Morning Post*, 2 April 2002.
136 "Room for More Compassion", *South China Morning Post*, 5 April 2002.

These are only some of the miserable results. There may be much more. The above examples show how families are brutally split up by the judgment. The right to family union, one of the very core rights human beings enjoyed, is denied in an inhumane manner. Our highest court allowed the Interpretation and immigration policies to trump over fundamental individual rights without mercy. These cases, should surely by any definition of "humanitarian grounds", warrant a decision in our courts to allow the seekers to stay. Unfortunately, not only did our CFA fail to protect these rights, but also, it decided that the courts were not in a position to take humanitarian grounds into consideration.[137] In such a way, all these miserable abode seekers have to rely on the leniency of the government in exercising discretion to let them stay. Sadly, our government stressed more than once that it was not prepared to grant amnesty to abode seekers. Discretion will only be strictly exercised. Even though the CFA had granted the right of abode to some 500 applicants, its treatment of the remaining 4500 applicants could be regarded as a serious violation of human rights.

All these miserable cases, to some extent, are due to the retrospective application of the Interpretation. The law has been in a state of confusion until the NPCSC finally rendered the Interpretation.[138] If we want to be humane and protect fairness, then there is no reason to treat persons with similar backgrounds to the actual parties in *Ng Ka Ling* different from those representative parties. Interpretation 1 and 2 are naturally better construction which can avoid unfairness. To interpret the word "judgment" leniently can prevent all these miserable cases and avoid our society being condemned as an inhumane society.[139] The principal argument against such a construction is that adopting Interpretation 2 will frustrate the immigration policy as a whole. However, there are only 5114 applicants in this case, not ten, twenty or hundred thousands. Unlike *Chan Kam Nga*, in which the CFA's interpretation may allow 670000 to come to Hong Kong, how serious is the effect and impact on our society by letting a mere 5114 persons to stay? Is it proper to frustrate all their rights and legitimate expectations simply because it is necessary to secure this immigration policy? Moreover, it is argued that the CFA shall have interpreted the phrase instead of solely relying on art 158(3). The phrase is less restrictive, which can give the CFA more rooms to manoeuvre. The CFA interpretation in *Ng Siu Tung* is no different from a machine-gun approach that refuses any kind of rights, equality and fairness that these abode seekers deserved.

All in all, perhaps, the CFA should have brought its attention to the legal theory of the one of the most prominent jurists, Ronald Dworkin, before giving a decision on *Ng Siu Tung*, in which Dworkin said:[140]

> "Rights are best understood as trumps over some background justification for political decisions that states a goal for the community as a whole. If someone has a right to moral independence, this means that it is for some reason wrong for officials to act in violation of that right, even if they (correctly) believe that the community as a whole would be better off if they did."

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137 *Supra* note 13 at 331I-J.

138 Professor Albert Chen suggested that the government may treat 26 June 1999 as the cut-off date, instead of 29 January 1999, in order to be more humane to the abode seekers. See "Abode Leniency Option 'Still Open'", *South China Morning Post*, 5 April 2002.

139 The Washington Post and Sydney Morning Herald, when reviewing the right of abode incident, quoted, "This is a government without conscience". See "Mix of Sympathy and Criticism in Chinese Papers", *South China Morning Post*, 2 April 2002.

140 Dworkin, R, "A Trump Over Utility" in Freeman, M D A, *Lloyd's Introduction to Jurisprudence* (London: Sweet & Maxwell, 2001, 7th ed), p 593.

VI. Concluding Remarks

This is the fifth year since the handover. The idea of "one country, two systems" has been challenged, questioned and tested thoroughly during these five years. Probably, no incident in these five years can stretch the limits of "one country, two systems" to such an extent as this right of abode saga. It is unfortunate that it is in the courts that most of these challenges took place, turning our courts into somewhat like a political podium. The question on how to balance the "one country", on one hand, and the "two systems", on the other hand, so as to minimize the impact on our high degree of autonomy becomes extremely important. The court in *Lau Kong Yung* gave too much to the notion of "one country" and placed the notion of "two systems" at stake. Even though the CFA in *Chong Fung Yuen* seems to have restored some of the lost confidence, many of the problems in *Lau Kong Yung* continue to haunt us. To be more accurate, they haunt us, not because the CFA is wrong in its interpretation, but the CFA is simply not in a position to make any changes to the reality. For those who believe that a high degree of autonomy is fundamental to the success of the HKSAR, *Lau Kong Yung* cannot be welcomed.

Although some critics cannot accept this, the CFA in *Lau Kong Yung* had not made big mistakes in interpreting art 158(1), except that in light of the miserable outcomes in *Ng Siu Tung*, it may not be correct to regard the Interpretation as having retrospective effect. There is nothing in the *Basic Law* that can properly empower the CFA to restrict the NPCSC in carrying out legislative interpretation on the *Basic Law*. Even though some counter arguments can be made, as illustrated above, these arguments cannot stand because the wording and the legislative intent behind art 158(1) are abundantly clear. Nor it is proper for the court not to deal with art 158(1) in *Lau Kong Yung* in the midst of the political and social concerns at that time. The court had arrived at an unacceptable, yet unpreventable conclusion. It simply had to recognize this new constitutional order.

To mitigate the damage done to our autonomy, what can we do? The success or failure of "one country, two systems" has to depend on one crucial factor, that is the word: "*system*". Without an adequate system governing the two sides by balancing the powers between the two sides, the weaker side may be subject to severe interventions by the stronger side. This is the situation recognized by *Lau Kong Yung*. The *Basic Law*, to some extent, is a failure. While it seems to be quite impressive in granting us a lot of rights and freedoms, it fails to truly protect our autonomy by giving an unrestricted power to the NPCSC to interpret anything in the *Basic Law*. It lacks an adequate system to check and balance the NPCSC in exercising this power. One may argue that the NPCSC will only exercise this power under exceptional circumstances, like this abode incident, and critics like Professor Ghai and Jerome Cohen are exaggerating the impact of the Interpretation. However, if the smooth-running of "one country, two systems" is to be largely dependent on the exercise of self-restraint of one side, without a proper legally based system to safeguard the weaker side, their worries are entirely legitimate. But it is promising to see that the PRC is enacting a new law (ie the Law) to further regulate the exercising of legislative interpretation, which hopefully will be applied if the NPCSC decides to interpret the *Basic Law* again in future.[141]

What can we do then? One may propose an amendment to art 158 through art 159, but such a proposal is naïve and unrealistic. The CPG will not accept any amendment to the *Basic Law*. The only possible thing which both the PRC and the HKSAR can do is to establish a

[141] The Law is not directly applied to Hong Kong, but it is believed that the NPCSC will be bound by the Law when it exercises legislative interpretation no matter in mainland China or in Hong Kong.

constitutional convention that the NPCSC will not interpret a provision that is entirely within the autonomy of the SAR. Such a constitutional convention has to respect the idea of judicial independence as well. As argued above, it is not correct to regard the Interpretation as not undermining judicial independence simply because the rights of the parties to the litigation are not affected.

A constitutional convention is not easy to establish. It needs mutual tolerance and understanding. *Chong Fung Yuen* is a good example to illustrate the mutual tolerance of both sides. To think positively, the *Chong* case may be paving the way for establishing such a constitutional convention. In this process, a lot of co-ordinations are necessary. The NPCSC has to consult the Committee for the *Basic Law* before issuing any legislative interpretation in Hong Kong. The Committee is the most suitable body to facilitate understanding and tolerance between the two sides. A common law lawyer, while acknowledging the constitutional reality of the NPCSC's power of interpretation, still has to stand on his feet to withstand any unreasonable interference with our system. It is no longer useful to question or challenge whether the NPCSC can make these kinds of interpretations. It is a reality that we have to accept. But acceptance does not equal approval. We must continue to believe that a high degree of autonomy, judicial independence and the rule of law are the foundations of our legal system. Any unjust interference into our system must be rejected and resisted.

The rest remains to be a challenge for the future!

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142 Fung, D, *"The Basic Law of the HKSAR of the PRC Problems of Interpretation"*, [1988] 37 ICLQ 701, p 707.

143 Chen, A, *Supra* no. 78, p 131.

144 Chen, A, *Supra* no. 78, p 131.

145 Xiao, W, *Supra* no. 92, pp 171-176.

146 Xiao, W, *Supra* no. 92, p 173.

147 Xiao, W, *Supra* no. 92, p 175.

148 Xiao, W, *Supra* no. 92, p 175.

149 *Supra* no. 14, p 345A-C, *per* Mason NPJ.

150 Leung, E (Secretary for Justice), "Reply by Secretary for Justice on 14 June 1999", exhibited in Supra no. 3, p 408.

151 Fu, H.L., *"Supremacy of a Different Kind"*, in *Supra* no. 3, p 97 at p 99.

152 Wen, H, *"Interpretation of Law by the NPCSC"*, in *Supra* no. 3, p183 at p 193.

153 *Ibid.*

154 Of course, one may argue that there is no need to rely on a power conferring provision. It is enough simply rely on the 'relevant' provision which concerns legislative interpretation (Art 158) and no need to consider whether it is power conferring or not. However, it is reasonable to expect our highest court to find out the proper sources of law that authorise an authority to act in such a way.

155 Professor Ghai supported this argument. He suggested that it was unnecessary to rely on the Chinese Constitution. See *Supra* no. 11, p 210.

156 Ghai, Y, *Supra* no. 11, p 210.

157 Ghai, Y, *Supra* no. 11, p 210.

158 See texts accompanying notes 38 and 39.

159 Lee L, Gu, M, & Zhu, G, *Supra* no. 18, p 59; Chen, A, *Supra* no. 25, pp 412-413; Weng H, *Supra* no. 104, pp 189-190.

160 The Court of Appeal recently dealt with a case involving the proper interpretation on the NPCSC's interpretation on the implementation of the PRC Nationality in the HKSAR. See *Tse Yiu-Hong v The Director of Immigration*, CACV 351/2001 (2002-01-28) (This is an English translation of the party names. The judgment is only available in Chinese). 「謝耀漢對入境事務署署長」.

161 Chen, A, *Supra* no. 25, p 413.

162 Weng, H, *Supra* no. 105, p 191.

163 *Ibid.*

164 *Supra* no. 13, p 346D.

165 Ghai, Y, *Supra* no. 11, p 207.

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