

Conclusion

The increased dependence on IT for our information needs is leading us down a path of no return. Undoubtedly, new technology has given life to new business opportunities. Increased access to information has placed more power in the hands of those parties responsible for the various corporate governance mechanisms of companies. But with power comes responsibility. High standards of corporate governance can only be achieved if parties are able and willing to actively fulfill their respective roles in achieving such standards. No doubt, advances in IT will continue to alter the significance of information both as a business tool and as an asset. Consequently, corporate governance mechanisms that involve the protection and generation of information must adapt to these changes. As highlighted above, this will have an impact on the role of corporate directors, auditors, investors, and regulators. It is therefore imperative that these parties familiarise themselves with potential IT applications in their respective corporate governance roles as well as the emerging legal issues and problems that are likely to arise.

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Why Second-Generation Mainland Children Have No Right of Abode in Hong Kong

In 1999 the government of the Hong Kong Special Administrative Region (HKSAR) announced¹ that the number of people newly eligible for the right of abode in the HKSAR would be around 1.67 million. This figure, a re-estimation, was compiled according to the results of a government conducted survey following the handing down of two judgments from the Court of Final Appeal (CFA) on the right of abode of mainland children.²

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¹ The speech was delivered in the motion debate concerning the right of abode in the Legislative Council on 28 April 1999. The full text of the speech can be found at <http://www.info.gov.hk/gia/general/199904/28/sfs0428.htm>. The figure was later finalised at 1.6 million. See <http://www.info.gov.hk/gia/general/199906/25/0625153.htm>.

² *Ng Ka Ling v Director of Immigration* [1999] 1 HKLRD 315 and *Chan Kam Nga and Others v Director of Immigration* [1999] 1 HKLRD 304. According to BL24(3), the children of Chinese nationality of the two categories of HKSAR permanent residents under BL24(1) and BL24(2) also become permanent residents of the HKSAR. BL24(1) provides that Chinese citizens born in Hong Kong before or after the establishment of the HKSAR are permanent residents of the HKSAR and BL24(2) provides that Chinese citizens who have ordinarily resided in Hong Kong for a continuous period of not less than seven years before or after the establishment of the HKSAR are also permanent

This announcement immediately aroused much concern about sudden and 'unexpected' population growth and its impact on Hong Kong's society.³ Controversy also arose over proposed political and legal solutions to the problem. In the end, the government approached the State Council and asked the Standing Committee of the National People's Congress to re-interpret the relevant provisions of the Basic Law.⁴

The estimate of an additional 1.67 million people included the first and second-generations of newly eligible persons. First-generation mainland children (G1) comprise those who acquired the right of abode directly under the two CFA judgments, and they number around 700,000. Second-generation mainland children (G2) are the offspring of G1 born outside Hong Kong after their parents had ordinarily resided in Hong Kong for seven years. Their number was estimated to be around 900,000.

This essay argues that persons falling within BL24(3) cannot transmit their permanent resident status to their children. Such children would have to acquire it either by being born in Hong Kong under BL24(1) or by living in Hong Kong for seven years under BL24(2). Thus, according to the Basic Law, G2 have no right of abode in the HKSAR. As will be seen, this state of affairs is consistent with nationality laws which place a limit on the transmission of nationality as regards children born overseas to a parent who only acquired his or her status by virtue of the 'jus sanguinis' principle. Furthermore, if G2 are excluded, the figure of newly eligible permanent residents (PRs) will be drastically reduced and thus, the social and economic pressure placed on Hong Kong's society would not be as great as alleged by the government. Also, if this were the case, a possibly damaging re-interpretation by the Standing Committee of the National People's Congress could have been avoided, thereby neatly side stepping the negative effects on Hong Kong's autonomy and rule of law.

residents of the HKSAR. Following the interpretation adopted by the CFA, these so-called 'mainland children' include those born out of wedlock and those born before their parents became permanent residents of the HKSAR.

³ The HKSAR government alleged that a total capital cost of \$710 billion (comprising \$347 billion for construction, \$93 billion for land production, and \$270 billion for providing the transport infrastructure) would be required within the next ten years for providing housing, education, vocational training and retraining, medical and health care, welfare services, employment services, transport, etc to the newly eligible PRs. The total annual recurrent cost was estimated to be around \$33 billion by the 10th year. The government also claimed that a total of 1,277 additional hectares of land and premises with a floor area of 500,000 square metres would be required for providing these facilities/services. See 'Assessment of Service Implication,' a paper on the assessment of service implication in relation to the judgment of the CFA on the right of abode issue tabled at the Legislative Council by the HKSAR government. The full text of the paper can be found at <http://www.info.gov.hk/gia/general/199905/06/0506104.htm>.

⁴ The Chief Executive made the request to the State Council on 10 June 1999 and the Standing Committee of the National People's Congress made an interpretation on BL22(4) and BL24(2) on 26 June 1999.

Ratio or dicta?

The legal basis for G2 to acquire the right of abode in the HKSAR is not directly provided for in the Basic Law. Such a right may have originated from the reasoning of Bokhary PJ in *Chan Kam Nga and Others v Director of Immigration*.⁵ The issue in that case was whether the parent of a child claiming to be a PR of the HKSAR under BL24(3) would have to have acquired this status before the child's birth.⁶ In analysing the correct interpretation of BL24(3) and the purpose of the Basic Law, Bokhary PJ decided (with the agreement of the other judges of the CFA) that the Basic Law would grant the right of abode to children even if the child was born before either of its parents became PRs of the HKSAR. In the Court of Appeal, the Chief Judge of the High Court had adopted a contrary interpretation, arguing that it could not have been intended under the Basic Law for thousands of persons born in mainland China to eventually become PRs of the HKSAR, in the same manner as one can acquire permanent residency status by staying in Hong Kong for a continuous period of seven years.⁷ The Chief Judge criticised the judge in the Court of First Instance for understating the serious consequences of adopting an interpretation similar to that of the CFA in *Chan Kam Nga and Others v Director of Immigration*.

However, Bokhary PJ of the CFA disagreed with the Court of Appeal that such an interpretation would give rise to unnatural population growth patterns. He pointed out that for generations population growth in Hong Kong has been typical of growth patterns in different parts of the world. He also noted that these thousands of people born in mainland China would not all become PRs of the HKSAR simultaneously, but only after at least one of the parents had ordinarily resided in Hong Kong for a continuous period of seven years. This seven-year period would apply to each succeeding generation born on the mainland.⁸ Thus, he did not dispute the possibility of the emergence of G2.

In other words, it appears that Bokhary PJ is suggesting that a PR who acquires his or her right of abode under BL24(3) will also become a PR under BL24(2) if he or she stays in Hong Kong for a continuous period of seven years after being admitted to the territory. As they would become PRs under BL24(2),⁹ their children, of Chinese nationality, born outside Hong Kong would also be able to acquire the right of abode under BL24(3) following the seven-year period.

⁵ See note 2 above.

⁶ BL24(3) provides that the children of Chinese nationality of the two categories of HKSAR permanent residents under BL24(1) and BL24(2) born outside Hong Kong are also permanent residents of the HKSAR.

⁷ [1998] 2 HKC 405, at 414.

⁸ [1999] 1 HKLRD 304, at 311.

⁹ BL24(2) provides that Chinese citizens who have ordinarily resided in Hong Kong for a continuous period of not less than seven years before or after the establishment of the HKSAR are permanent residents of the HKSAR.

However, one could argue that it is unsafe to establish a legal principle on this basis as it was not the ratio decidendi or the general reason of the case, but merely a passing remark made by the judge in his response to a counter-argument. Thus, there was no thorough argument and discussion on this legal question in the judgement. Even if Bokhary PJ's pronouncement could be regarded as an assertion of a legal principle, it would be a dictum with very little persuasive effect.

Non-overlapping of categories of permanent residents

In order to decide whether G2 really have the right of abode in the HKSAR, one has to return to BL24. The issue is whether a PR under BL24(3) can also become a PR under BL24(2) after they have stayed in Hong Kong for a continuous period of seven years. If a PR under BL24(3) cannot become a PR under BL24(2), then G2 will have no right of abode in the HKSAR.

The first question is whether BL24 allows the six categories of PRs to overlap. If its intention is to provide six mutually exclusive categories of PRs, then a PR under BL24(3) cannot also become a PR under BL24(2), even if they have stayed in Hong Kong continuously for seven years. The six categories listed in BL24 acquire their status of PR on the basis of specific connecting factors. These connecting factors illustrate a certain kind or degree of link between the claimant and Hong Kong.

For category one PRs (C1), under BL24(1), the connecting factors are place of birth and nationality.¹⁰ As regards category two PRs (C2) under BL24(2), the connecting factors are period of residence in Hong Kong and the nature of the person's stay.¹¹ Under BL24(3), the connecting factors applicable to category three PRs (C3) are the claimant's relationship with a PR of the HKSAR, his place of birth, and nationality.¹²

Similarly, under BL24(4), the nationality, period of residence in Hong Kong, and the nature and intention of the claimant's stay in Hong Kong of category four PRs (C4) are the vital factors.¹³ For category five PRs (C5) under BL24(5), the connecting factors are the claimant's relationship with a PR of the HKSAR, his age, and place of birth.¹⁴ Finally, the connecting factor of category six PRs (C6) under BL24(6) is the claimant's relationship with Hong Kong before the establishment of the HKSAR.¹⁵

¹⁰ The person must be born in Hong Kong and be of Chinese nationality.

¹¹ The period must be not less than seven years and the stay must be continuous and lawful.

¹² The person must be a child of a PR under BL24(1) or BL24(2), and his or her birthplace must be outside Hong Kong. They also must be of Chinese nationality.

¹³ The person need not be a Chinese national, but his or her stay in Hong Kong must not be less than seven years and must be continuous and lawful. In addition, it must be his or her intention to take Hong Kong as a place of permanent residence.

¹⁴ The person must be a child below 21 years of age of a PR under BL24(4), and born in Hong Kong.

¹⁵ Such persons must only have had the right of abode in Hong Kong and no other place, before the establishment of the HKSAR.

Thus, it appears there are two clear categories of factors. C1, C2, and C3 deal specifically with people of Chinese nationality whereas C4, C5, and C6 cover those of non-Chinese nationality. As the Chinese Nationality Law does not recognise dual nationality,¹⁶ a person cannot be a Chinese national and a national of another state thereby qualifying under both categories simultaneously. However, within each category, potential overlaps are possible. Under C1, the claimant's place of birth must be Hong Kong, but under C2 and C3, his birthplace may be outside the territory. C6 incorporates all claimants who enjoyed the right of abode in Hong Kong before the establishment of the HKSAR, but not those already covered by the previous five categories.

Unfortunately, it is unclear whether C2 and C3, or C4 and C5 may overlap. As regards C4 and C5, strong reasons have been put forward to suggest that the intention of the article was to prevent such overlapping. First, it is expressly stated that those claimants under C5 must be the children of C4 and they cannot therefore be their own parents. Second, under C4 the applicant must have intended to make Hong Kong their place of permanent residence, but no such requirement is present under C5. As C5 cannot be above 21 years of age, it appears that the article presumes that they do not have the capacity to satisfy the intention requirement under C4.¹⁷ If all the other categories cannot overlap, one could argue that the same principle applies to C2 and C3. Hence, the 'non-overlapping of categories of PRs.'

Another question is whether a PR can move from one category to another. If so, C3 could move up to C2, thereby preventing people from being subject to more than one category at the same time. Furthermore, it seems that PRs under particular categories may move to other categories if they acquire the relevant connecting factors. For example, C1 or C2 may switch to C4 if they renounce their Chinese nationality in accordance with law.¹⁸ C4, C5, and C6 applicants may become C2 if they successfully apply for naturalisation as Chinese nationals in accordance with law. C5 may resort to C4 when they reach above 21 years of age and if they can also satisfy the additional requirements.

All these changes between categories are legally or factually possible without infringing the non-overlapping principle. In other words, a PR under one category may sever himself from the connecting factors of that category and

¹⁶ Art 4 of the Nationality Law of the PRC.

¹⁷ An argument against this interpretation is that the right of abode of the children of persons under C5 born in Hong Kong will be affected. As the Basic Law does not grant the right of abode to such persons, if C5 may not overlap with C4 even if the additional requirements are satisfied, they will have no right of abode in the HKSAR. However, when a person who was originally a C5 reaches 21 years of age, he may become a C4 then if all the additional requirements are satisfied. Their children born in Hong Kong will immediately acquire the right of abode in the HKSAR under C5. There is no requirement that the birth of the child must be after the person becomes a C4. It would thus appear that this interpretation will not seriously affect the right of abode of the children of C5.

¹⁸ Art 11 of the Nationality Law of the PRC; Interpretation on Several Questions Relating to the Implementation of the Nationality of the People's Republic of China in the HKSAR adopted by the Eighth National People's Congress Standing Committee at its 19th Session on 15 May 1996; and the Chinese Nationality (Miscellaneous Provisions) Ordinance.

acquire the connecting factors of another category. However, the previous statement does not apply to C3 claimants who may not change their parent-child relationship legally or factually.¹⁹ Even if they were to acquire the connecting factors of C2, such persons would still be prevented from applying under C2 because of the non-overlapping principle.

Even if it were impossible to establish this general principle, the article's natural construction may also preclude an overlapping of C3 and C2. BL24(2) provides that PRs of the HKSAR shall be Chinese citizens who have ordinarily resided in Hong Kong for a continuous period of not less than seven years before or after the establishment of the HKSAR. If C3 may also claim under C2 after staying in Hong Kong continuously and lawfully for seven years, the article has to be read to mean PRs of the HKSAR shall be those who are already PRs of the HKSAR. This meaning is redundant and cannot be the intention of the article. A more satisfactory interpretation of BL24(2) would be that it only includes persons who are *not yet* PRs of the HKSAR (ie *before* they satisfy the requirements on the period and nature of their stay in Hong Kong) which would exclude people who are already PRs under another category.

Intention of the Joint Declaration

We may also refer to extrinsic materials to ascertain the true purpose of BL24 on whether the non-overlapping principle can be established. BL24 originates from s XIV of Annex I of the Joint Declaration.²⁰ The description of each group in the Joint Declaration uses similar wording to the Basic Law, as the relevant provision of the Basic Law was copied mainly from the Joint Declaration. From the use of conjunctions such as 'or' and 'and' in the appropriate places, we may also reach the same understanding developed above; that the groups of PR provided in the Joint Declaration may not overlap with each other.

However, the wording in the Joint Declaration may be even clearer. In the Joint Declaration, C3 under the Basic Law are described as 'persons of Chinese

¹⁹ The biological father of the child is presumed to be the legal father of the child by law subject to exceptions. This presumption may not apply in cases where the birth was a result of medical treatment. (See Parent and Child Ordinance, s 10.) Under s 6 of the Parent and Child Ordinance, a claimant may apply to the court for a declaration that the person named in the application is or was in law their parent. However, it is not possible for the person to apply for a negative declaration from the court. It is also morally unacceptable for persons to terminate their relationship with their parents to enable their children to enjoy the right of abode in Hong Kong.

²⁰ It provides that:

The following categories of persons shall have the right of abode in the HKSAR, and, in accordance with the law of the HKSAR be qualified to obtain permanent identity cards issued by the HKSAR, which state their right of abode: all Chinese nationals who were born or who have ordinarily resided in Hong Kong before or after the establishment of the HKSAR for a continuous period of seven years or more, and persons of Chinese nationality born outside Hong Kong of such Chinese nationals; all other persons who have ordinarily resided in Hong Kong before or after the establishment of the HKSAR for a continuous period of seven years or more and who have taken Hong Kong as their place of permanent residence before or after the establishment of the HKSAR, and persons under 21 years of age who were born of such persons in Hong Kong before or after the establishment of the HKSAR; any other persons who had the right of abode only in Hong Kong before the establishment of the HKSAR.

nationality born outside Hong Kong of such Chinese nationals.’ ‘Such Chinese nationals’ are ‘Chinese nationals who were born or who have ordinarily resided in Hong Kong before or after the establishment of the HKSAR for a continuous period of 7 years or more.’ This phrase clearly indicates that when such a person is born to another such person, the former will belong to a separate category of persons; the two being mutually exclusive. It is unnatural and illogical to suggest that a person born to another such person may include himself.

Other nationality laws

Another question is whether this principle will contravene any other provision of the Basic Law. Both BL25 and Art 26 of the International Covenant on Civil and Political Rights as applied to Hong Kong through BL 39 provide that all Hong Kong residents are equal before the law.

If we apply the non-overlapping principle it would result in the children of C1 and C2 having the right of abode in Hong Kong even if born outside Hong Kong. In contrast, the children of C3 would not have the right of abode in Hong Kong unless born *in* Hong Kong. C1, C2, and C3 are all Chinese nationals and the main differences among them are their methods of acquisition of the right of abode. C1 acquire the right through their birthplace, C2 through their period of residence, and C3 by descent. The issue is whether it is justifiable to treat people differently on the basis of how they acquired their right of abode.

These three methods of acquiring the right of abode under the Basic Law are very similar to the three main methods to acquire nationality: *jus soli* (acquisition by birth in the territory of a state), naturalisation, and *jus sanguinis* (acquisition by descent). I shall now refer to the laws on nationality and citizenship in other countries, to examine whether it is accepted practice elsewhere to restrict the rights of nationals (who have acquired nationality or citizenship by descent) to pass it to their children born outside the state.

For example, the British Nationality Act put a limit on the right of British citizens to pass nationality to their offspring. Thus, a person born in the United Kingdom may only become a British citizen if at the time of birth, his father or mother was a British citizen or was settled in the United Kingdom.²¹ However, a person born outside the United Kingdom may only become a British citizen if at the time of birth his father or mother is a British citizen otherwise than by descent.²² In other words, a British citizen who acquires nationality solely by descent will not automatically be able to pass this citizenship down to the next generation.²³

²¹ British Nationality Act, s 1(1).

²² *Ibid*, s 2(1).

²³ The child of a British citizen by descent may still acquire British citizenship by registration if the grandparent of the child is a British citizen otherwise than by descent and his or her parent satisfies a period of residence in the United Kingdom. The application for registration must be made within twelve months of the date of the birth unless it is extended (*ibid*, s 3).

Other examples abound. According to s 7 of New Zealand's Citizenship Act 1977,²⁴ persons born outside New Zealand will be New Zealand citizens by descent if, at the time of birth, their father or mother is a New Zealand citizen *otherwise* than by descent. In Israel, citizenship may be acquired by birth to persons born outside Israel, only if his or her parent acquired their citizenship other than by descent.²⁵ Similarly, s 6 of Ireland's Nationality and Citizenship Act 1986²⁶ provides that persons may be deemed Irish citizens if their father or mother was an Irish citizen at the time of birth. However, if the person was born outside Ireland and the father or mother through whom they are claiming citizenship were also born outside Ireland, no Irish citizenship will be conferred to that person.²⁷ In Belgium, parentage alone is not sufficient for the attribution of Belgian nationality. The additional requirement is that either the birth of the child must be in Belgium, or if the birth of the child was outside Belgium, that the Belgian parent was born in Belgium.²⁸

Thus, it can be seen that these countries have adopted similar practices of not allowing nationals born outside the state to pass their nationality to children also born outside the state,²⁹ which suggests it is not unusual to limit automatic inheritance of nationality or citizenship through the generations. The link between a person who acquires nationality or citizenship by descent and the state is comparatively less direct than those who acquire their nationality or citizenship through birth or residence in the state. This may be the reason why international practices recognise these limitations.

However, even if the non-overlapping principle may be established, this does not prevent G2 from acquiring the right of abode in Hong Kong. They may still apply through the usual immigration procedures for admission into Hong Kong. After ordinarily residing in Hong Kong continuously for more than seven years, such persons may become C2. In other words, they would acquire the right of abode through their own residence in Hong Kong, and not by their blood relationship to other PRs. Of course, under that scenerio, whether or not they will be admitted into Hong Kong in the first place will be a matter of immigration policy.

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²⁴ Citizenship Act 1977, s 7. The full text of the legislation can be found at <http://www.knowledge-basket.co.nz/gpprint/acts/public/text/1977/se/061se7.html>.

²⁵ Art 4 of the Nationality Law, 5712-1952. Relevant information can be found at <http://www.israel.org/mfa/go.asp?MFAH00mz0>.

²⁶ The full text of the legislation can be found at <http://www.knowledge-> <http://www.geocities.com/CapitolHill/Lobby/1834/eire.txt>.

²⁷ Irish Nationality and Citizenship Act, s 7.

²⁸ Belgium Nationality Code. See Dennis Campbell and Joy Fisher (eds), *International Immigration and Nationality Law* (Dordrecht/Boston/London: Martinus Nijhoff Publishers, 1993), vol 1, BEL-X-1.

²⁹ However, the Chinese Nationality Law allows Chinese nationals who acquire their nationality by descent, to pass their nationality to the next generation. See Arts 4 and 5 of the Nationality Law.

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