CONFERENCE ON IMMIGRATION LAW AND POLICIES

Conference on Immigration Law and Policies

24 February 2001 (Saturday)
Council Chamber, 8/F, Meng Wah Complex, HKU

9.00 am Registration

9.20 am Opening Speech
Professor Albert HY Chen, Dean, Faculty of Law, HKU

1st Session: Immigration Policies - An Overview

Chair: Mr Benny Tai, Department of Law, HKU

9.30 am Hong Kong's Immigration Policy on Persons from the Mainland of China
Mr Timothy Tong, Deputy Secretary for Security

9.50 am Immigration and the Basic Law: Hong Kong Permanent Resident
Ms Gladys Li SC

10.10 am Quota System and One Way Permit
Mr Ho Hei Wah, Director, Society for Community Organisation

10.30 am Discussion

10.50 am Tea Break

2nd Session: Immigration and the Due Process

Chair: Ms Jill Cottrell, Department of Law, HKU

11.05 am Discretion and Immigration Control
Mr Philip Dykes SC

11.25 am Immigration Law and Discretionary Powers
Mr T K Lai, Deputy Director of Immigration

11.45 am Inherent Contradictions and Inconsistencies in the Immigration Ordinance
Mr S H Kwok

12.05 pm Due process and Aliens
Mr Paul Harris

12.25 pm Discussion

12.45 pm Lunch

3rd Session: Protection of the Right to Family Life

Chair: Professor Johannes Chan, Head, Department of Law, HKU

2.00 pm Immigration, Family Life and Unity, and International Obligation on the Protection of Family Life
Dr Athena Liu, Department of Law, HKU N.B. Title changed.

2.20 pm Immigration and Children
Dr Bart Rwezaura, Department of Law, HKU

2.40 pm The Cultural Politics of Mainland Chinese Migration to Hong Kong
Dr Khun Eng Kuah-Pearce, Department of Sociology, HKU

3.00 pm Discussion

3:20 pm Tea Break

4th Session: Immigration and Social Policies: The Future

Chair: Professor Cecilia Chan, Dean, Faculty of Social Sciences, HKU

3.35 pm Integration or Segregation: The Political Attitude of New Arrivals
Dr Robert Chung, Journalism & Media Studies, HKU

3.55 pm Housing and Welfare Services for New Arrivals from China: Inclusion or Exclusion?
Dr Ernest Chui, Social Work and Social Administration, HKU

4.15 pm	Immigration and Health Care *Dr Chow Chun Bong, Consultant Pediatrics, Princess Margaret Hospital*
4.35 pm	Immigration and Education *Dr Cheung Kwok Wah, Department of Education, HKU*
4.55 pm	Discussion
5.20 pm	Closing remarks *Professor Johannes MM Chan, Head, Department of Law, HKU*

Papers Not Available

Please note that the following paper in the conference is not included in this volume.

Immigration and Children
Dr Bart Rwezaura, Department of Law, HKU

March 2001
Lui Che Woo Law Library

Hong Kong's Immigration Policy on Persons from the Mainland of China

Mr Timothy Tong

HONG KONG'S IMMIGRATION POLICY ON PERSONS FROM THE MAINLAND OF CHINA

I. Introduction

As a major international city, a top-10 world trader, a regional financial centre and a formidable service-provider at the gateway to the Mainland of China, the Hong Kong Special Administrative Region is also an important transport hub in the Asia-Pacific region. Some 400 000 persons enter or leave Hong Kong daily by air, land or sea. To effectively handle such volumes of people, an efficient immigration service is an absolute necessity. The immigration service is administered autonomously in Hong Kong as spelt out in Article 154 of the Basic Law, which states that the HKSAR Government may apply immigration controls on entry into, stay in and departure from the Region by persons from foreign states and regions.

The overall objective of Hong Kong's immigration policy is to facilitate the movements of *bona fide* travellers while controlling against abuse. In sum, maintaining the delicate balance between facilitation and control is at the heart of immigration policy considerations and measures. This applies to the entire travelling community, including persons from the Mainland. With Mainlanders, however, there is an added emphasis on family reunion which is important not only as a basic element of Hong Kong's admission policy but also to the administration of the entire SAR. Families are united by admitting persons from the Mainland at the highest rate Hong Kong can cope with in terms of physical, social and economic infrastructure.

Given the close historical, social and economic ties between the HKSAR and the Mainland, there has always been a high level of mobility of residents across the boundary. An average of 304 000 persons travel to and from the Mainland every day. The volume of cross-boundary traffic has risen at an annual rate of 12% over the past four years. The Basic Law provides the constitutional framework for regulating cross-boundary visits and movements. Article 22(4) stipulates

that "[f]or entry into the Hong Kong Special Administrative Region, people from other parts of China must apply for approval. Amongst them, the number of persons who enter the Region for the purpose of settlement shall be determined by the competent authorities of the Central People's Government after consulting the government of the Region". Under the Immigration Ordinance, persons without the right of abode or right to land in Hong Kong are subject to immigration control. There are therefore two separate but related facets to immigration control over cross-boundary movements of persons, namely exit approval under the prerogative of the Mainland authorities and entry control by the HKSAR Government.

In view of the increasing social and economic ties between Hong Kong and the Mainland, and the public interest shown in litigation over the right of abode issues, this paper will focus on Hong Kong's immigration policy as it relates to the entry of persons from the Mainland of China.

II. Entry for Settlement

Historical Overview

In the first half of the 20th century, residents from Guangdong were allowed free access to Hong Kong. However an influx of Mainland residents to Hong Kong in the 1940s put enormous pressure on the provision of housing, health and other services, and created various social problems such as the proliferation of squatters on hillsides and rooftops[1]. Since 1950, exit from the Mainland has been regulated by the Central People's Government through a permit system which subsequently became known as the One-way Permit (OWP) scheme. This system of regulation remains today, but has been refined and improved over the years. Exit and entry control in the Mainland comes under the purview of the Bureau of Exit-Entry Administration (BEEA) of the Public Security Ministry.

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[1] Some of those who came during those periods were both the cause and the victims of the big fire at Shek Kip Mei in the 1950s which prompted the Government to expedite the first public resettlement estate work programme featuring the Mark I Model with an allocation of 24 sq feet floor space per person.

In 1950, the CPG issued 50 permits per day to Mainlanders who wished to settle in Hong Kong. By the late 1970s, it was clear that residents of many parts of China, mainly Guangdong but also elsewhere, were entering Hong Kong in rapidly increasing numbers. Following detailed consultations between Mainland and Hong Kong authorities, it was agreed in 1982 that the daily quota for OWP should be increased to 75.

In 1993, as part of preparations for the reunification of Hong Kong with the Mainland, the daily OWP quota was raised from 75 to 105. The reason for the increase was to facilitate the admission of a large number of long-separated spouses and children born to Hong Kong permanent residents who would be eligible for right of abode under Article 24(2)(3) of the Basic Law. In 1995, the quota was further increased to 150. By then a proficient allocation system for the 150 OWP quota had emerged, with priority given to eligible children and spouses whereby –

(a) a daily sub-quota of 60 children of all ages who are eligible for right of abode in Hong Kong under Article 24(2)(3) of the Basic Law.

(b) a sub-quota of 30 for long-separated spouses (those separated from their spouses in Hong Kong for more than 10 years).

(c) an unspecified sub-quota of 60 for other OWP applicants allocated to the following categories of persons:

- Separated spouses irrespective of the length of separation;
- Dependent children coming to Hong Kong to join their relatives;
- Persons coming to Hong Kong to take care of their dependent parents;

- Dependent elderly people coming to Hong Kong to join their relatives; and

- Those entering Hong Kong for the inheritance of property.

The administration of the OWP Scheme, including the queuing, allocation and the granting of the permit, is the responsibility of the relevant Mainland authorities. This is in line with Article 22(4) of the Basic Law.

Family Reunion and the OWP Scheme

Whereas an established system of regulating the entry of Mainland residents into Hong Kong had been in existence long before the resumption of sovereignty in 1997, family reunion remains the single most important goal of the policy on cross-boundary immigration control and regulation. Yet the right balance needs to be struck between bringing families together and Hong Kong's physical ability to cope with more people, given that close to seven million people already live within the SAR's 1 100 square kilometres of land (much of which is hilly and unsuitable for human habitation). Regulation is necessary in Hong Kong as it is in any part of the world. Few, if any, governments will unquestionably allow the admission of family members of their residents without some form of regulation or control.

Over the years the OWP Scheme has been adjusted and improved to take into account the number of Mainlanders waiting to settle in Hong Kong within the constraints of socio-economic resources and infrastructure. As a result, some 4 500 Mainland residents are now admitted for settlement in Hong Kong every month, or 54 750 every year. This represents an annual intake of about 0.8% of population, compared to 0.2% to 0.3% in Western countries with much more space than Hong Kong. The family reunion programme is, therefore, by no means ungenerous. Since the resumption of sovereignty, some 197 600 persons, including 85 412 eligible children and more than 80 600 separated spouses have entered Hong Kong for settlement.

The administration of the OWP Scheme have improved over the years as follows –

*(a) **Points system***

In May 1997, the BEEA of the Public Security Ministry introduced a points system to determine the priority for issuing OWPs under the non-specified quota of 60 and the specified quota of 30 for separated spouses. Under the system, an applicant becomes eligible for an OWP after attaining the required points in accordance with a list of published criteria. As a rule, more points are awarded the longer the period of separation.

*(b) **Non-eligible children***

Persons who have been separated from their Hong Kong spouses can bring with them one child aged 14 or below to settle in Hong Kong, irrespective of whether the child is eligible for right of abode under the Basic Law.

*(c) **Enhance transparency***

Since late 2000, the Guangdong Public Security Bureau has published lists of successful OWP applicants in newspapers. The public has the right to raise any query or objection to the published lists.

*(d) **Relaxed measures recently announced by Guangdong***

The Guangdong Public Security Bureau recently announced a series of relaxed measures for OWP applicants. The period of separation required for long-separated spouses has been reduced from 10 to 9 years. For persons coming to take care of dependent parents, previously the age requirements for the applicant and the

dependent parent were 30-50 and 65 or above respectively. These have now been relaxed considerably to 18-59 and 60 or above. The age requirement for dependent elderly people coming to join their relatives has been lowered from 65 to 60.

Certificate of Entitlement (C of E) Scheme

Article 24(2)(3) provides that persons of Chinese nationality born outside Hong Kong of Hong Kong permanent residents under Article 24(2)(1) and (2) will also have permanent resident status. To prevent abuse and to ensure orderly entry it is essential for the Government to verify whether a Mainland resident claiming right of abode under Article 24(2)(3) is in fact entitled to this right. Such verification must be done before the claimants enter Hong Kong. Otherwise, Mainland residents, including non-eligible persons, will be tempted to illegally enter Hong Kong or to contravene their conditions of stay by overstaying on the pretext of waiting for the verification process.

The Immigration (Amendment) (No. 3) Ordinance 1997 was enacted on 10 July 1997 to put in place a scheme for the establishment of the status of persons who claim right of abode under Article 24(2)(3) and paragraph 2(c) of Schedule 1 to the Immigration Ordinance. The Ordinance provides that a person's status as a permanent resident under Article 24(2)(3) can only be established by his or her holding a valid travel document with a C of E affixed to it, a valid HKSAR passport, or a valid permanent identity card. In this connection, Mainland resident claimants have to hold a valid travel document, namely a OWP, and have a C of E affixed to it, before they can exercise their right of abode and enter Hong Kong for settlement. As stated previously, exit approval is the responsibility of the relevant Mainland authorities. The need for exit approval under Article 22(4) applies to all Mainland residents who wish to enter Hong Kong, including those eligible for right of abode in Hong Kong under the Basic Law.

In the two landmark judgments by the Court of Final Appeal on 29 January 1999, the court upheld the C of E to the extent that it is directed towards verification of the entitlement of right of abode. The Court of Final Appeal, however, ruled that Article 22(4) did not qualify Article 24(2)(3) and therefore Mainland residents were not required to hold the OWP issued by the Mainland authorities before they could enjoy the right of abode in Hong Kong, and that claimants under Article 24(2)(3) were eligible for right of abode whether either parent was a permanent resident at the time of their birth or after their birth.

After thoroughly reviewing the court's decisions, the Administration came to the view that the court's understanding of Articles 22(4) and 24(2)(3) of the Basic Law, which differed from the HKSAR Government's understanding, might not truly accord with the legislative intent of those provisions. A practical and disturbing consequence of the judgment was the extension of the right of abode to a very large number of people, both in terms of absolute numbers and, more importantly, in terms of the implications on Hong Kong's resources and services to absorb the additional permanent population.

Against this background, the Chief Executive sought the assistance of the State Council to seek an interpretation of the relevant provisions from the Standing Committee of the National People's Congress (NPCSC). The interpretation delivered by the NPCSC affirmed the 'time of birth' requirement and the need for eligible persons to obtain an OWP to enter Hong Kong for settlement. Thus the link between the C of E Scheme and the OWP Scheme was re-established, which reaffirmed the long-standing system of exit-entry administration between Hong Kong and the Mainland. The Court of Final Appeal ruled in December 1999 in respect of the Lau Kong Yung case that the NPCSC interpretation was valid and binding and the courts of the HKSAR are under a duty to follow. Since July 1997, over 85 000 C of E holders have settled in Hong Kong, a daily average of 69.

The HKSAR Government introduced the Immigration (Amendment) Bill 2000 to the Legislative Council on 18 October 2000. The Bill empowers the Director of Immigration to specify by notice in the Gazette a prescribed genetic test procedure for the verification of a claimed parentage in connection with a C of E

application whenever the Director is not satisfied with the claimed parentage based on available evidence for establishing the applicant's claim for right of abode. The prescribed procedure is a necessary facility for the effective processing of C of E applications.

As a result of thorough discussions between the Mainland authorities and HKSARG, the prescribed genetic test procedure will be conducted by the Immigration Department and the Mainland authorities on a collaboration basis to generate test results that will be adopted by the former to process C of E applications, and by the latter to process OWP applications separately and independently. There will be a full array of measures in place to protect the integrity of the procedure and to prevent abuses, and to ensure the accuracy and reliability of the test results.

The Bill is now being scrutinised by a Bills Committee of the Legislative Council. It is hoped the Bill will be enacted at an early date so that affected persons can have their claimed parentage verified and can enter Hong Kong to exercise their right of abode as soon as their Hong Kong permanent resident status has been established.

Challenges

Right of Abode Litigation

(a) Ng Siu Tung case and Sin Hoi Chu case

Whilst the legality of the NPCSC interpretation has been affirmed in the Court of Final Appeal ruling in the Lau Kong Yung case in December 1999, there is ongoing litigation in respect of who should ***not*** be affected by the NPCSC interpretation and the scope of Government's Concession decision. The most representative cases are the Ng Siu Tung case and Sin Hoi Chu case. Together they involve some 5 000 claimants who came to Hong Kong at different periods, from before 1 July 1997 to after the NPCSC interpretation on 26 June 1999. These claimants argued that they should also be unaffected by the NPCSC interpretation as a matter of right and that their right of abode claim should be dealt with in accordance with the Court of Final Appeal's ruling on 29 January

1999. They also challenged Government's position on the meaning and scope, as well as the application, of the Concession decision announced by the Chief Executive on 26 June 1999, the same date the interpretation was delivered. Under the Concession, those claimants who satisfy the following conditions will not be affected by the interpretation –

- a claim for right of abode must have been lodged with the Director of Immigration whilst the claimant was present in Hong Kong within the period from 1 July 1997 to 29 January 1999; and

- the claim must be one of which the Director has a record.

The Concession decision was made based on the principle that judgments previously rendered shall not be affected. It is estimated that some 3 700 claimants fall under the Concession.

The Court of First Instance ruled in June 2000 that the right of abode claims of Mainland residents have to be determined in accordance with the NPCSC interpretation unless they were the actual parties to the test cases which culminated in the two judgments in the Court of Final Appeal of 29 January 1999, or otherwise treated by the Director as parties to those two test cases subject to an undertaking not to remove them from Hong Kong pending the final outcome of the two test cases, or accepted by the Director as falling within the Concession. The Court further ruled that it is bound to respect the interpretation placed on the Concession by the Government. This ruling was unanimously upheld by the Court of Appeal in December 2000. The appellants have been granted leave to pursue the case in the Court of Final Appeal. The hearing will take place in May this year.

(b) Chong Fung Yuen case

Another right of abode court case which has drawn considerable public interest recently is the Chong Fung Yuen case. Chong Fung Yuen was born in Hong Kong in September 1997 whilst his Mainland parents were staying in Hong

Kong on Two-way Permits (TWP), a travel permit issued in the Mainland that allows Mainland residents to ***visit*** Hong Kong. Chong's grandfather sought a judicial review on his behalf to challenge the decision of the Director of Immigration that Chong did not enjoy the right of abode in Hong Kong under Article 24(2)(1), contending that Article 24(2)(1) is unqualified so that a Chinese citizen born in Hong Kong is a permanent resident regardless of the circumstances of his birth. The Director contends that the true construction of Article 24(2)(1) by necessary implication does not include those Chinese citizens who are born to illegal immigrants, overstayers or people residing temporarily in Hong Kong.

Both the Court of First Instance and the Court of Appeal have ruled in Chong's favour. The Court of Final Appeal will hear the case in March.

A number of other cases are also scheduled to be heard by the Court of Final Appeal shortly. It remains to be seen whether the court rulings will have an impact on immigration policies or measures.

Illegal Immigration

Given the proximity of Hong Kong and the Mainland, and the aspirations of many Mainland residents to come to Hong Kong for a various range of reasons, illegal immigration has always posed serious threats. The problem was most serious in the 1970s, when Hong Kong still adhered to the 'touch-base' policy under which illegal immigrants intercepted at the border were repatriated whilst those who successfully reached the urban areas were granted permission to stay. The daily arrival of illegal immigrants reached 528 in 1979. The 'touch base' policy was abolished on 24 October 1980. Since then, all illegal immigrants from the Mainland have been repatriated to the Mainland unless there are strong or compassionate reasons which are considered on a case-by-case basis. Average daily arrival of illegal immigrants was below 50 in the 1980s after the 'touch base' policy was abolished.

Upon reunification in 1997 there was no surge in illegal immigration. This can be attributed to the clear provisions in Articles 22(4) and 154 of the Basic Law regarding exit and entry control. However, in the period before and after the Court of Final Appeal's ruling of 29 January 1999, there was a marked increase in the number of Mainland residents entering Hong Kong illegally or contravening conditions of stay. Some of these lodged right of abode claims or brought judicial review proceedings against the Government. In July 1999 alone, a total of 2 042 such persons, including 527 illegal immigrants, were registered by the Immigration Department. In December 1999, the Court of Final Appeal affirmed that the NPCSC interpretation was legal, constitutional and binding on the courts of the HKSAR. In June and December 2000, the Court of First Instance and Court of Appeal consecutively ruled against the appellants in the Ng and Sin case. By December 2000, no more than 108 abode claimants were recorded, none of which were illegal immigrants.

The Government will continue to combat illegal immigration in accordance with the law. Many illegal immigrants are involved in illegal employment, vice activities such as prostitution and petty crime such as burglary over which Hong Kong's disciplined services have law enforcement responsibilities. The act of illicit entry is of itself a physically dangerous undertaking and many of those who attempted it have fallen prey to their own follies, if not also to the greed of the human traffickers commonly known as 'snakeheads'. The smuggling of pregnant Mainland women to give birth in Hong Kong is another area of concern, not least because both the prospective mothers and their unborn children are more vulnerable to injury. It is therefore essential for the Government to take a tough stance against illegal immigration, in particular towards the snakeheads who profit from this unsavoury business.

There is no credibility in any arguments which use family reunion as an excuse for human smuggling. Most of the Mainland families of Hong Kong residents live in Guangdong and may visit Hong Kong twice a year for up to three months for each visit. Their families in Hong Kong can visit them any time. Currently, more than 1 000 Two-way Permit visitors come to Hong Kong every day. Mainland residents can also visit Hong Kong by joining the Group Tour Scheme

under which the current daily quota of 1 500 will shortly be increased to 2 000. There is a high level of mobility for cross-boundary visits.

Settlement applicants do have to wait a certain period of time before they can obtain a OWP but it is not true that eligible children under the C of E Scheme have to wait indefinitely. In a survey conducted by the Census and Statistics Department in March to May 1999, it was estimated that some 97 000 children born within registered marriage and some 170 000 children born out of registered marriage[2] were eligible for right of abode as at that date. Since 1 July 1997, over 85 000 C of E holders have come to Hong Kong for settlement. Most are children born within a registered marriage. The waiting time for eligible children will very much depend on the future trend of cross-boundary marriages, whether the estimated number of children born out of registered marriage is accurate and whether all of them would apply to come to Hong Kong. Applicants waiting in the queue may still come to visit their families in Hong Kong before the issue of their OWPs.

Assessment on the OWP Scheme

Notwithstanding the various challenges and pressures, through co-operation between the HKSAR Government and the Mainland authorities, the OWP and the C of E schemes have been effective in bringing families together in an orderly manner. A total of 724 986 OWP holders have been admitted into Hong Kong since 1982, of which some 197 589 entries (27%) were registered after 1 July 1997.

The HKSAR Government and the Mainland authorities are committed to facilitating family reunion in the fairest and most equitable manner. Family separation is, by its nature, a sad story but it is also the result of decisions taken by adults aware of the long-standing immigration procedures in Hong Kong and the Mainland. As Patrick Chan, formerly CJHC, said in his judgment on the Chan Kam Nga case delivered on 20 May 1998: "... the permanent resident may

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[2] Children born out of registered marriage include those born of de facto marriage and those born out of wedlock.

be split from his children and family. But it would be a split of his own choice. He has chosen to leave his children and family in Mainland China and come to stay in Hong Kong for seven years in the first place .... The situation would be similar to a person who has gone abroad to work or further his studies and has subsequently acquired citizenship in another foreign country".

This situation of family separation is not unique to Hong Kong. We do not believe our policy is wrong or administered heartlessly. The Director of Immigration may, on compassionate grounds, exercise his discretion to grant permission to stay to particular individuals. However, with so many people wishing to come to settle in Hong Kong, they must take their place systematically in the queue to be fair to all other applicants. It is also important that the programme for family reunion is administered in such a way so as not to unduly strain the infrastructure and resources of the community. This is in the best interests of all Hong Kong residents, including the new immigrants coming to settle here. At the same time the Government must maintain vigilant immigration control in order to ensure that no illegal entrants can piggyback onto on-going litigation. Removal action will be taken in accordance with the law.

III Entry for Business and Employment

Whilst family reunion is the heart of our policy on entry from the Mainland, the current immigration regime also allows Mainland residents to enter for business visits and employmer..

Background

As an international city and a regional financial and economic centre, Hong Kong has a liberal policy towards the entry of foreign nationals for employment. As long as they possess skills and knowledge not readily available in, and of value to, Hong Kong, and are offered a remuneration package broadly comparable to the prevailing market rate, foreign nationals may be allowed to work in Hong Kong. This policy, however, does not apply to the Mainland of China and a number of other countries which pose security and immigration risks. This restriction is placed on entry from the Mainland primarily due to immigration risks, as evident in the illegal immigration problem over the years, and possible circumvention of the OWP system.

Social and economic changes in the Mainland since the 1970s and ever increasing trade and business ties between the Mainland and Hong Kong led to a review of immigration policy on entry from the Mainland –

- Since the adoption of the open door policy by the Mainland authorities in 1978, Hong Kong businessmen have made use of the opportunity to establish businesses in the Mainland. Many Hong Kong firms, particularly those in the manufacturing and textile industries, have moved their operations to the Mainland to take advantage of cheaper labour, plentiful land and other sundry resources. Operations in Hong Kong are now focused on design, marketing, strategic management and other value-added services.

- China has experienced accelerating economic growth since the adoption of the open door policy. In the 20-year period from 1978 to 1998, China sustained an average real Gross Domestic Product (GDP) growth rate of 9.7%. In the nine years from 1990 to 1998, the average real GDP growth rate was even higher, at 13.8%. In the first three quarters of 2000, China's GDP grew by 8.2% in real terms, which exceeded the official target growth rate of 7% for 2000 as a whole. The Chinese Academy of Social Sciences

estimates GDP growth of 8.1% for 2001.

- China's imminent accession to the World Trade Organisation (WTO) will bring about new business opportunities for Hong Kong. According to an assessment by the Government Economist in 1999, Hong Kong's GDP will grow by an additional 0.5% annually over the next decade as a result of increased business opportunities arising from China's accession to the WTO.

In order to take advantage of these economic opportunities, it is clearly important not only for Hong Kong residents to be able to invest and work in the Mainland. It is equally vital for Mainland residents to be able to come to Hong Kong for business visits, training and employment. This will facilitate cross-fertilization and further enhance the synergy between the two places.

Business Visits and Training

Both the Mainland and Hong Kong authorities adopt a facilitating policy towards short-term business visits. The Business Visit Scheme was introduced in March 1998, under which Mainland residents may apply for an exit-entry permit and a business visit endorsement from the BEEA, or provincial public security bureau offices, to visit Hong Kong. There are different types of business endorsements allowing single entry, double entry or multiple entry. Visitors are allowed to stay for seven to 14 days on each landing. Implementation of the Business Visit Scheme is under the purview of the Mainland authorities. The HKSAR Immigration Department imposes no restriction on the entry of Mainland business visitors with the necessary permit and business visit endorsement. The Department holds regular consultations with the BEEA to review the operation of the scheme. The daily arrival of Mainland business visitors has increased significantly since the introduction of the scheme - from a daily average of 210 in 1998 to 740 in 1999. This more than doubled to a daily arrival of some 1 795 last year.

Mainland residents are also allowed entry for *bona fide* training. Some 1 400 to 1 500 Mainland applicants were approved to undertake training in Hong Kong in 1999 and 2000. This represented an approval rate of over 96%. Applications are rejected if there are strong indications of abuse, mostly in the form of disguised employment.

Entry for Employment

Until the introduction of the Admission of Talents Scheme in December 1999, there was no standing immigration policy to allow Mainland residents to come to work in Hong Kong in private enterprises.[3] The objective of the Scheme is to allow talents from all over the world, particularly those from the Mainland, who possess outstanding qualifications and skills/knowledge not locally available to come to Hong Kong work. These talents will enhance the competitiveness of Hong Kong as a services and manufacturing centre, particularly in technology-based, knowledge-intensive and high value-added activities.

By the end of January 2001, a total of 439 applications had been received, of which 111 were approved, 199 rejected, 80 withdrawn and the remaining still being processed. The majority of successful applicants work in the IT, telecommunications, engineering, environmental protection and financial fields.

The response has been lower than expected. The Talents Scheme is now being reviewed. In the meantime, there have been increased publicity efforts, including making available the Labour Department's interactive Employment Service website for employers to advertise vacancies in order to recruit talent from outside Hong Kong.

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[3] There was a pilot scheme on the entry of Mainland professionals in 1994. The objective of the scheme was to admit 1 000 professionals within one year. There were various requirements under the scheme, e.g. recruitment had to be done through designated Mainland agencies, and only graduates of 36 key Mainland universities were eligible. Only 602 were admitted after three years of implementation. The scheme was discontinued in 1997.

Apart from admitting talents, there are increasing calls from the private sector to admit Mainland professionals to fill positions not readily taken up by the local population. Talents and professionals are playing different but complementary roles to enhance economic development. Talents focus more on innovation and research which will bear fruit in the medium to longer term. Professionals, on the other hand, attend to firms' immediate operational needs. Currently, Mainland professionals who fall short of the requirements of the Admission of Talents Scheme cannot come to Hong Kong to work.

The 21st century will be an era of competition based on knowledge and technology. There is now a world-wide scramble for skilled professionals. Mainland talents and professionals are keenly sought after in the Mainland as well as overseas. Hong Kong will lose out if it does not adjust its policies to take into account latest developments and manpower needs. Against this background, the Chief Executive announced in the 2000 Policy Address that immigration policy would be reviewed in a prudent but proactive manner so as to admit more professionals from the Mainland and abroad. The Security Bureau is conducting this review in consultation with other relevant Government bureaux and departments, including the Education and Manpower Bureau, the Information Technology and Broadcasting Bureau and the Innovation and Technology Commission.

V. Concluding Remarks

The HKSAR Government strives to maintain efficient and quality immigration services for Hong Kong residents and international travelers. The legal basis of its immigration policies are firmly grounded in the Basic Law and in domestic legislation. Similar to immigration authorities all round the world, in exercising its power under the law, the Immigration Department needs to strike a careful balance between all pertinent factors, including general social, economic, legal and security considerations as well as the peculiar circumstances of individual cases.

Given the close social and economic ties between Hong Kong and the Mainland, entry from the Mainland for settlement and employment is an extremely important aspect of Hong Kong's immigration policy. These are delicate and emotive issues for many. The Government endeavours to implement immigration policy in a sensitive and equitable manner, taking into account, where appropriate, humanitarian and compassionate considerations pertaining to individual cases, while at the same time seeking to maintain an overall balance acceptable to the community. Family reunion will continue to be facilitated at a pace and rate with which socio-economic infrastructure and resources can cope. Mainland residents will be admitted for business visits and employment in line with the long-standing objective of facilitating economic development whilst safeguarding job opportunities for the local population. As with most public policies, not everybody will be satisfied with what is being done. Different stakeholders have different interests. The Government will maintain an open mind to ideas, suggestions and criticisms. The Government is committed to conducting regular reviews of immigration policies to take into account changing needs and to implement improvements that better serve the community.

Timothy Tong
Deputy Secretary for Security

February 2001
(Total words : 5 522)

Immigration and the Basic Law: Conjugating the Concept of Hong Kong Permanent Resident

Ms Gladys Li SC

Immigration and the Basic Law:
Conjugating the Concept of Hong Kong Permanent Resident

Introduction

Before the Joint Declaration and the promulgation of the Basic Law, the status of persons in Hong Kong and their right to remain was a matter of local legislation which could be changed with relative ease. While the Basic Law did not provide that all those who had the status of being irremovable from Hong Kong prior to the establishment of the HKSAR should continue to have that status, at least it appeared to promise certainty and security by defining those who were to have that status in the future. No legislation passed by the HKSAR could take away what the Basic Law gave and so short of an amendment to the Basic Law (which could not contravene the established basic policies of the People's Republic of China regarding Hong Kong), everyone knew where they stood or so it was thought.

Since then, the following conjugation might be considered to reflect the short and sorry history, so far, of the concept of Hong Kong Permanent Resident, itself a short form for Permanent Resident of the Hong Kong Special Administrative Region:

" I am a Permanent Resident of the HKSAR (at least until the reissue of permanent identity cards), you were a Permanent Resident of the HKSAR (or at least you claimed to be until the Interpretation but if you got your claim in early enough you might still be),

he/she (being mainland-born) is definitely not a Permanent Resident of the HKSAR (at least not until the number 888,888 comes up in the queue for the DNA testing laboratory) " and so on.

This paper examines some of the highlights and lowlights of the sorry history and the effect on the concept of permanent resident.

The Joint Declaration

The term " Hong Kong Permanent Resident " does not appear in the declaration by the PRC Government of its basic policies regarding Hong Kong nor in the elaboration of its basic policies in Annex I to the Joint Declaration. Instead, a variety of expressions is used such as " local inhabitants ", " local " and " inhabitants ". Examples of each are:

"The government and legislature of the Hong Kong Special Administrative Region shall be composed of local inhabitants "[1]

" ... consisting of not fewer than three local judges. " and " ...shall on its own make provision for local lawyers ..." [2]

" The Hong Kong Special Administrative Region Government shall protect the rights and freedoms of inhabitants and other persons..."[3]

In Section XIV, the categories of persons who shall have the right of abode in the HKSAR are set out. They are

" - all Chinese nationals who were born or who have ordinarily resided in Hong Kong before or after the establishment of the Hong Kong Special

Administrative Region for a continuous period of 7 years of 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 Hong Kong Special Administrative Region for a continuous period of 7 years or more and who have taken Hong Kong as their place of permanent residence before or after the establishment of the Hong Kong Special Administrative Region;
- any other persons who had the right of abode only in Hong Kong before the establishment of the Hong Kong Special Administrative Region. "

On the same date as the Joint Declaration was signed by both Governments, the British Government delivered to the PRC Government a Memorandum stating the British Government's position regarding British Dependent Territories Citizens as from 1 July 1997. The PRC Government in a Memorandum in response stated:

" Under the Nationality Law of the People's Republic of China, all Hong Kong Chinese compatriots, whether they are holders of the "British Dependent Territories Citizen's Passport" or not, are Chinese nationals. "

In the UK Government White Paper introducing the draft Agreement which had been reached between the two Governments and inviting comment on its overall acceptability, this exchange of Memoranda is described as an exchange " on the status of persons after 30 June 1997 who at present are British Dependent Territories citizens, and related issues." [4]

While we shall probably never know the thinking behind the PRC Government's statement in this Memorandum, it is reasonable to infer from its language that the PRC Government wished to make clear its stance that all BDTCs were Chinese nationals while reassuring them that they could continue to use their travel documents. The statement that all Hong Kong Chinese compatriots including BDTCs were Chinese nationals was a statement of the existing position not just of the position as from 1 July 1997. Further, as the only reference to Chinese nationals in Annex I to the Joint Declaration is in Section XIV stating the categories of persons who are to have right of abode in the HKSAR, it is also reasonable to assume that the PRC Government wished to reassure BDTCs that they would have right of abode in the HKSAR.

Right of abode

The term " right of abode " first appeared in the United Kingdom Immigration Act 1971. As Lord Denning M.R. put it in *R.* v. *Home Secretary Ex p. Phansopkar* [5]

> " In 1971 the Parliament of the United Kingdom invented a new word. It made a new man. It called him *" patrial."* ... Parliament gave this new man a fine set of clothes. It invested him with a new right. It called it *" the right of abode in the United Kingdom."* It is the most precious right that anyone can have. At least I so regard it. It is declared in simple but expressive words. Every patrial " *shall be free to live in, and to come and go into and from, the United Kingdom without let or hindrance* "; section 1(1) of the Immigration Act 1971."

Although Lord Denning described the right as a new right, the common law position prior to the Immigration Act 1971 (and the Commonwealth Immigrants Act 1962) had been that a British subject had the right to enter the United Kingdom without let or hindrance when and where he pleased and to remain in the United Kingdom as long as he liked.[6]

It is ironic that the PRC Government should choose to employ the term " right of abode " in declaring the basic policies when the racist philosophy underlying the Immigration Act 1971 occasioned its first use. Use of the term has had unfortunate consequences since our literal-minded civil servants have tended to concentrate on the expression " right of abode " rather than the concept embodied in the expression when translating the Basic Law into immigration legislation.

It is evident from the last category of persons entitled to the right of abode i.e. " any other persons who had the right of abode only in Hong Kong before the establishment of the Hong Kong Special Administrative Region " that the PRC Government must have intended to refer to those who had previously had the right to enter Hong Kong without let or hindrance and to remain in Hong Kong as long as they liked since at the date of the Joint Declaration, no-one had " the right of abode " in Hong Kong as such. This term was not to enter immigration legislation in Hong Kong until 1987.

There are a number of significant pointers as to the intention of the PRC Government. The PRC Government could have stated that Chinese

nationals who were born or who had ordinarily resided in Hong Kong for a continuous period of 7 years or more before the establishment of the HKSAR would have right of abode and then made separate provision for the entitlement of the children of such persons and for those born or who completed a period of ordinary residence in Hong Kong after the establishment of the HKSAR. This was not the chosen course. Instead, by including the words " or after the establishment of the HKSAR ", no intention to distinguish between those born before and those born after or who completed the period of ordinary residence before or after can be inferred. If the control of numbers had been a matter of concern, the words " and persons of Chinese nationality born outside Hong Kong of such Chinese nationals " could simply have been omitted. There were many options open to the PRC Government but there is no reason to suppose that the expression of the basic policies on this issue was anything other than a deliberate and carefully considered choice. There is certainly nothing which suggests that in defining the categories of those who were to have right of abode in the HKSAR, the purpose of the PRC Government was to control immigration from the mainland into Hong Kong.

On the contrary, the inclusion of children born outside Hong Kong of such Chinese nationals implies a generous and family-centred approach to the issue of entitlement to right of abode in the HKSAR.

Article 4 of the PRC Nationality Law provides that any person born in China whose parents are both Chinese nationals or one of whose parents is a Chinese national shall have Chinese nationality. Article 5 provides that any person born abroad whose parents are both Chinese nationals or one

of whose parents is a Chinese national shall have Chinese nationality but a person whose parents are both Chinese nationals and have both settled abroad, or one of whose parents is a Chinese national and has settled abroad, and who has acquired foreign nationality at birth shall not have Chinese nationality.

Thus mainland born children of such Chinese nationals would clearly be entitled to right of abode in the HKSAR but children born elsewhere might well not qualify if their parents or parent had settled abroad and if they had acquired foreign nationality at birth. This effect of providing entitlement to right of abode for persons of Chinese nationality born outside Hong Kong of such Chinese nationals must also have been considered and intended. In particular, the beneficiaries of the 'touch-base' policy which had operated in Hong Kong until October 1980 had every reason to expect that they could finally be reunited with their mainland-born children after 1 July 1997.

The Draft Basic Law/BL Article 24(2)

The lapse of time between the Joint Declaration and the promulgation of the Basic Law was substantial; certainly longer than the drafting period of most national constitutions. Such material as is available for public scrutiny concerning the drafting process is confined to the Reports and drafts produced by the Basic Law Consultative Committee together with the views solicited from the public on the drafts. These show that the full implications of the provisions in the Joint Declaration governing who should be entitled to right of abode along with many of the issues which

have arisen since the establishment of the HKSAR were recognised, raised and discussed at the drafting stage.

For example, the Final Report of the Special Group on Inhabitants' and the Other Persons' Rights, Freedom, Welfare, and Duties notes:

" In categorizing the persons with the right of abode under the Joint Declaration, nationality is one of the means. The requirement to be satisfied by the respective categories of persons for gaining the right of abode varies with their nationalities. Take, for instance, the first category of persons: since they are Chinese nationals, they may retain the right of abode without being required to reside in Hong Kong or to have taken Hong Kong as their place of permanent residence..."

The Special Group were of course referring to the first category in Section XIV of the Joint Declaration, not the then draft Article being formulated for inclusion in the Basic Law. In the Conclusion of the Special Group's Final Report, these words of wisdom are to be found:

" Thus, it is imperative to give precisely the definition of inhabitants of the SAR."

Another example is to be found in the Final Report on Immigration Control; the Issuing of Passports and Travel Documents of the Special Group on External Affairs and the Special Group on the Relationship between the Central Government and the SAR. With reference to the provisions in the Joint Declaration governing entitlement to right of abode and to the statement that entry into the HKSAR of persons from other

parts of China shall continue to be regulated in accordance with the present practice, the question is posed whether the children born in the mainland of parents who have the right of abode in Hong Kong should automatically enjoy the right to land in Hong Kong or whether they should be treated equally as other mainland people and subject to quota restriction. Views expressed by members of the Special Group differed as to whether such children should be subject to quota, some members expressing the view that there was no conflict between these provisions in the Joint Declaration since the regulation of entry of persons from other parts of China only applied to persons who had no right of abode in Hong Kong, others that persons in this category may not necessarily be entitled to the right of abode in Hong Kong and should be included in the daily quota.

The April 1987 Draft of the Basic Law referred to "permanent inhabitants" not " permanent residents " but apart from insignificant textual changes, the definition of the categories in substance reproduced what was in the Joint Declaration. The same is true of Article 23 of the April 1988 Draft (the Draft Basic Law for Solicitation of Opinions) which is essentially the same as Article 24 of the Basic Law.

Many opinions were collected on the draft Basic Law from different organisations and individuals. In relation to category (3) of (draft) Article 23, supporting views included the following:

" Based on the principle of family reunion, persons listed in category (3) may reside in Hong Kong "

and opposing views, the following:

" This provision is too lenient.

Reason:- A lot of Hong Kong residents have children on the mainland. According to the present provision, they may be allowed to reside in Hong Kong after 1997.

Objection is expressed to the provision that Chinese children born outside Hong Kong shall be permanent residents of Hong Kong.

This provision would cause an influx of Chinese after 1997, which Hong Kong could not accomodate.

According to this provision, persons born on the mainland of Hong Kong residents and persons born outside Hong Kong whose parents have successfully applied for residence in Hong Kong may become permanent residents of the HKSAR after 1997. These persons will enter Hong Kong on 1 July 1997, causing a drastic increase in the population and problems in housing, employment and schooling...

This category contradicts the provision in [draft] Article 21 that " people from other parts of China must apply for approval for entry into the Hong Kong Special Administrative Region ".

Neutral views which noted the effect of the provision or raised questions for consideration included the following:

" Persons born outside Hong Kong before 1997 of those residents listed in category (2) who do not have the right of abode then, will have the right of abode after 1997.

Persons born outside Hong Kong of those residents listed in category (2) who have resided in Hong Kong for a continuous

period of less than 7 years will have the right of abode after their parents have become permanent residents...

Whether persons listed in category (3) (children born on the mainland) will still be subject to the restrictions of entry quota after 1997 remains an issue to be resolved..."

Despite the fact that these issues were raised at the time, no changes of any significance were made to address them. It is scarcely surprising that the parents of mainland-born children continued in their expectations that come the establishment of the HKSAR, they could be reunited with their children. on the basis of entitlement not permission.

As to whether those in category (3) would still be subject to the restrictions of the entry quota after 1997, those who opposed category (3) in that form, opposed it because they recognised it as being inconsistent with the provision governing entry into the HKSAR from other parts of China. Clearly, the issue should have been resolved within the Basic Law itself as any legislation made by the HKSAR legislature would have to be consistent with the Basic Law.

The Preparatory Committee Opinions

These Opinions were adopted at the 4th Plenary Meeting of the Preparatory Committee for the HKSAR on 10 August 1996 and are described as being opinions on the implementation of Article 24(2) of the Basic Law. Whatever their status, the Opinions did not purport to be interpretations of the Basic Law; indeed, interpreting the Basic Law was

not one of the express tasks delegated to the Preparatory Committee under the Basic Law. The Preparatory Committee was established in 1996 by the National People's Congress in accordance with the Decision on the Method for the Formation of the First Government and the First Legislative Council of the HKSAR. Under the Chinese Constitution, it is the Standing Committee of the National People's Congress and not the National People's Congress itself which exercises the function of interpretation of laws.

The purpose of providing the opinions was stated to be for the HKSAR to formulate the details of the implementation rules but the Preparatory Committee ventured no opinion on restrictions on mainland-born children in category (3). Such opinions as they have ventured on implementing rules for the various categories in Article 24(2) have been used as a basis for amendments to the Immigration Ordinance with some bizarre results.

The Court of Final Appeal judgments of 29 January 1999

Oh frabjous day! Children born before a permanent resident parent became a permanent resident and children born out of wedlock are all within category (3) said the Court of Final Appeal. On the issue of whether Article 24 was subject to Article 22(4), the Court said

> " The right of abode is aptly described by Mr. Chang S.C. for the applicants as a core right. ... Article 24(3) confers the right of abode in unqualified terms on permanent residents. If the argument that art. 22(4) qualifies the right of abode in art. 24(3)

is correct, the right of abode of persons who are undoubtedly permanent residents but who are residing on the Mainland is a most precarious one. The Region's constitution, whilst conferring the constitutional right of abode in the Region on the one hand, would have with the other hand subjected that right to the discretionary control of the Mainland authorities, that discretionary control being beyond the authority of the Region. The control by one way permits would relate to the determination of both the quota as well as allocation within the quota. Further, on this argument, there would be a difference in the constitutional right of abode between on the one hand those in the third category of permanent residents in art. 24(2) who are resident in the Mainland whose right would be qualified by art. 22(4) and those in the same category who are resident outside the Mainland whose right would not be so qualified on the other hand. We cannot accept this argument. "[7]

The Interpretation by the Standing Committee

As we now know, the result was wrong. According to the Interpretation, article 22(4) means that the "people from other parts of China" includes those persons of Chinese nationality born outside Hong Kong of Hong Kong permanent residents so that they must apply to the relevant authorities of their residential districts for approval and must hold valid documents issued by those authorities before they can enter the HKSAR.

In interpreting category (3) of Article 24(2), the Standing Committee stated:

> " The legislative intent as stated by this Interpretation, together with the legislative intent of all other categories of Article 24(2) of the Basic Law...have been reflected in the " *Opinions on the Implementation of Article 24(2)* ..." adopted at the Fourth Plenary Meeting of the Preparatory Committee...on 10 August 1996. "

The Preamble to the Interpretation refers to the Motion of the State Council requesting an interpretation of Articles 22(4) and 24(2)(3) of the Basic law and the fact that the motion was submitted upon the report furnished by the HKSAR Chief Executive. It also states that the interpretation of the Court of Final Appeal (in its judgment dated 29 January 1999) was not consistent with the legislative intent.

From the constitutional and legal perspective, the Courts are bound to follow those parts of the Interpretation which are interpretations of the articles referred to the Standing Committee. But how the Court is supposed to derive the legislative intent other than by applying common law principles of interpretation which under the Basic Law they are bound to apply is not explained.

The Chief Executive's Report emphasises that the effect of the CFA's interpretation would be to place unbearable pressure on the HKSAR giving some of the figures derived from the statistical surveys conducted by the Government. These are said to show that under the CFA rulings, the

number of mainland people who are eligible for right of abode in Hong Kong would be increased by at least 1.67 million about 690,000 of whom are in the first generation and after they have ordinarily resided in Hong Kong for a continuous period of at least 7 years, a second generation of about 980,000. The assertion that the admission of these additional people would create enormous pressure on Hong Kong's land and social resources which would not be able to cope with the demands on education, housing, medical and health services, social welfare and other needs which in turn would trigger social problems and lead to consequences which would have a serious and adverse effect on the stability and prosperity of Hong Kong which we would not be able to bear is buttressed by the contents of Appendix 2, the Government's Assessment of Service Implications.

Under common law principles, no-one would suggest that the later assessed social consequences (even if correct) could be of any relevance in discerning the legislative intent of Article 24(2)(3). The Chief Executive's Report talks of the effect of the CFA's interpretation which included the ruling that persons born of Hong Kong residents in category (3) included persons born out of wedlock. According to the same Government survey, the numbers of children born out of registered marriage numbered 1,165,000 who became eligible as a result of the CFA's ruling. Clearly, if numbers are the determining factor of whether Article 24(2)(3) has been interpreted according to its legislative intent, it should have been the CFA's ruling on persons "born out of wedlock" which was reinterpreted. Nor can it possibly be the case that if the huge number in the born out of wedlock group was to be excused reinterpretation, the much smaller number of persons born before should get it in the neck by

attributing to them the consequences of the interpretation on persons born out of wedlock. Applying common sense principles of interpretation, there could be no logical basis for determining the meaning of an article of the Basic Law in such a way.

Legislative intent to be derived from the *"travaux preparatoires"*? The Courts have been prepared to look at these in principle at least where there is ambiguity but again applying common law principles, so far nothing recognisably falls within the description of such material. The closest we get are the drafts of the Basic Law and judging from the opinions expressed on those drafts, what we can infer the Basic Law drafters and therefore the National People's Congress must have addressed in the Basic Law as promulgated. This material does not suggest that the legislative intent of the Basic Law i.e. the Basic Law as properly construed was as it is now stated to be. Ours not to reason why; ours but to apply.

The casualty list

Some casualties are too obvious to mention. Certainty and security has gone out of the window; one has only to look at the number of amendments made to the Immigration Ordinance since 1 July 1997 which relate to permanent residence. Given that so far only categories (1), (3) and (4) have been through the courts and with cases on a Chinese national born in Hong Kong (category 1) and mainland adopted children (category 3) due to be heard in the Court of Final Appeal within the next few months, the casualty list may grow. Issues which will be explored in those cases include the status of the Preparatory Committee Opinions and the

effect of the Standing Committee's statement that the legislative intent of all other categories of Art. 24(2) have been reflected in these Opinions. The Courts are asked to interpret not just the Basic Law but the Interpretation of the Basic Law and the Opinions of the Preparatory Committee. We then have to apply the Courts' interpretation of the Interpretation and may have to apply the Courts' interpretation of the parts of the Interpretation which are not binding interpretations but which indicate the way in which the Standing Committee might interpret the Basic Law based on their statement that a body which is not given the task of interpreting laws has reflected the legislative intent of those laws in giving opinions on rules for implementation of those laws.

The wounded definitely includes the core right itself. None of the reasoning of the Court of Final Appeal in the above-quoted passage can be faulted. Professor Albert Chen has doubted whether the right of abode (" *the most precious right that anyone can have* " per Lord Denning) should be elevated to a level as high as well-established basic human rights such as the right not to be tortured, the right of freedom from arbitrary arrest and detention, the right to a fair trial, or the right to freedom of speech and association. His view is that the right of persons born and settled in mainland China to migrate to Hong Kong cannot be regarded as a core human right unless one makes the assumption that basic human rights do not exist in mainland China and hence they have to come to Hong Kong if they are to enjoy these human rights.[8] This rather misses the point that the Basic Law defines the persons who have the right of abode which includes but is not limited to the right to stay as long as one wishes in the place where one has right of abode. The assumption which underlies Professor Chen's view and the Government's Assessment

of Service Implications is that every mainlander who has the right wants to settle in Hong Kong. For Chinese nationals born outside Hong Kong of HKSARPRs and who are not mainland residents, the Government is indifferent to the manner in which they may choose to exercise or enjoy their right of abode. But for the mainlanders, they are compelled by the one-way permit system to choose between never enjoying the right or applying to settle in Hong Kong. Thus persons in the same category cannot enjoy their right in the same way. Is the right not to be discriminated against not a core right?

Which is where we came in. " I am a PR because I was born in England and my father was in category (1) at the time of my birth. You are not a PR because you were born on the mainland and though your father was in category (1) at the time of your birth, you do not have a one-way permit and are not eligible for one. " Of course, when the time comes for the reissue of permanent identity cards, many of us may find ourselves on the wrong side of the conjugation if common law and common sense cease to apply to the interpretation of Article 24.

Gladys Li, S.C.

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1 Annex I Section I
2 Annex I Section III
3 Annex I Section XIII
4 Para. 24
5 [1976] 1 Q.B. 606 at 615
6 Per Lord Diplock in *R.* v. *Bhagwan* [1972] A.C. 60 at 74B-C
7 Ng Ka Ling v. Director of Immigration (1999) 2 HKCFAR 4 at 34 F-35A
8 Professor Albert H.Y. Chen " The Interpretation of the Basic Law_ Common Law and Mainland Chinese Perspectives" Vol. 30 HKLJ Part. 3, 380 at 429.

Quota System and One Way Permit

Mr Ho Hei Wah

單程證政策問題

香港社區組織協會主任
何喜華

香港由四、五十年代的空寂小港，發展成今日近七百萬人口的繁華國際都會，其中一個關鍵在於內地移民來港。 過去幾十年來，香港經歷過不同的移民潮（註一）。 八十年代以前來的大多是年青力壯的一輩，迫於政治環境或經濟困難逃難來港謀生。 八十年代，內地實施開放政策，陸續有香港男士回鄉娶妻，所以九十年代的移民大都是婦孺來港團聚。 現時本港每日有一百五十名內地居民來港定居，每年約五萬四千，大都是婦女及兒童來港與丈夫或父親團聚。

八十年代之前，內地居民來港，中港雙方政府都有出入境控制權，中方發出單程證，港府則發出入境許可證。 但到了麥理浩年代，麥理浩與中方私下協議，於一九八零年十月正式取消抵壘政策，所有內地居民來港必須經過合法手續入境，非法入境者會被即捕即戒；並由中方全面控制來港申請及審批，所以內地居民來港必須向內地公安部門申請單程證，持有單程證便可來港定居，至於港方則只能就入境名額提出意見。 一九八三年的每日名額是七十五個，後於一九九三年增至一百零五個，至一九九五年再增至一百五十個，名額分予五類人士（註二）。 名額分散各省市，並非全國統一申請，名額申請條件及輪候時間不一。以個人爲單位的審批準則更令不少母子不能同時來港； 而且審批機制亦缺乏透明度及公眾監察，負責審批的公安部門往往以權謀私，貪污枉法，令有需要團聚的人士未能如期來港，沒有親人在港的人士卻因賄賂而得到居港權，這樣令香港一直面對沒完沒了的分離家庭問題，亦深深影響新移民家庭在港的發展。 問題分述如下：

1. 政策缺乏清晰的目標或優先次序

雖然單程通行證目的是協助中港分隔的家庭團聚，但政策開始以來，兩地政府一直未有明確表示具體的政策目標。事實上，在分隔家庭當中有不同的種類和背景，例如居港年期、分隔時間等。這些家庭對團聚的必要性亦不一，但政府一方面缺乏詳細的資料掌握去訂定優先次序，更談不上訂明任何政策目標，或制訂任何時間表，策略性地評估政府須投放多少資源去解決家庭團聚的問題。

直至 1995 年人口普查，政府才初次粗略計算港人在內地配偶及子女的數目，但對這些家庭狀況的深入分析便欠奉。 政府對申請來港家庭的資料毫無掌握，亦沒有深入研究，因而引申新的問題，例如：政府批准港人在內地已婚子女來港團聚，其實變相是分離另一個家庭，增加家庭團聚需求。

2. 單程證缺乏覆核制度

現時單程證的申請全部由中方處理，所有資料只呈送內地公安局，資料真僞或申請資格任憑公安局決定，香港入境處無權過問，也無制度覆核入境者資料真僞，所以過往單程證名額大量被公安局隨意濫用，例如：用來輸出華僑，或公務人員來港部署回歸及營商，這些人沒有親人在港，但批准了來港，又可以申請國內親友來港，既佔用單程證名額，又增加家庭團聚的需求。

3. 單程證政策非全國統一申請，又缺乏透明度

單程證非中央統一申請，而是分散各省市鎮申請，名額分配予各省市，各省市名額分配的數目及準則從不公開，但普遍的批准結果是來自外省的申請人較廣東省的申請人快來港，亦有一些同是廣東省的申請人，但有家庭可以快至一年便來港，有的卻分離二十年才可來港。 當中原因不明，而入境處向立法會提供資料時，亦隱瞞這些問題，只表示平均需輪候多少年。

4. 單程證申請程序本末倒置

單程證申請並非以團聚目的地的親人爲申請者。 世界各地居民欲申請在外地親人回國團聚，都是向當地政府處理申請及審批，政府才按情況批准其外地親人回國團聚。但中港家庭團聚申請卻相反，內地親人欲來港，非向香港申請，也不必經香港審批，而是向內地公安局申請，只要公安局批准便可來港。而作爲團聚目的地，香港政府不但無權審批，更要承擔各種不符合本地居民團聚需要的問題。

5. 單程證非以家庭爲審批單位

單程證的申請資格分爲五類，但全部類別皆以個人爲審批單位，不少母子審批時間不一，被迫分隔來港，形成子女照顧問題。 另一方面，由於政策規定申請子女來港的數目，因此有兄弟姐妹在港者，便被剝奪了團聚權利。

6. 計分制度太簡化

內地於 1997 年 5 月正式公佈成立計分制度，但計算太簡化，例如：夫妻團聚純粹以分離長短計算，造成一些上一代分隔幾十年，現時沒有迫切團聚需要的年老配偶忽然可以來港，但一些年幼子女因居留權已批准來港的母親卻遲遲未能批准來港。

7. 貪污舞弊，缺乏投訴機制

很多申請人反映內地單程證審批官員貪污舞弊，由索取申請表以至獲批來港，申請人要逐級賄賂才可以如願來港。 沒有錢作賄賂的申請人，其申請便會如石沈大海，當中出現很不公平情況，但中港均沒有投訴機制，申請人投訴無門。

由於長期分離，引致新移民家庭夫妻感情及親子關係大受影響，家庭慘劇頻生。 此外，母子分開審批，引致子女先來港或母親先來港的現象。 自一九九五年增加名額予擁有居留權的適齡學童來港後，由於母親不獲同時來港，在港父親要一邊工作一邊照顧子女，影響經濟收入，有些更要被迫放棄工作在家照顧子女，被迫領取綜援，因而遭受社會歧視。 另一方面，有些母親先批准來港，獨留年幼子女在內地，這些婦女都不能即時投入香港勞動市場，而要奔波中港兩地照顧子女。 在這種家庭環境下，新移民子女的成長更爲艱難。

香港社會需要重新建立一個公平、公正的入境政策，一方面爲新移民提供平等的發展機會，一方面有助社會人口政策規劃。 港府應爭取審批團聚，統一申請及輪候，以家庭爲審批單位。

註一：歷年入境數字

年　份	人　數
1977	6,600
1978	28,100
1979	107,700
1980	69,500
1981	54,000
1982	54,000
1983	27,000
1984	27,700
1985	27,300
1986	27,100
1987	27,300
1988	28,000
1989	27,300
1990	27,976
1991	26,782
1992	28,366
1993	32,909
1994	38,218
1995	45,986
1996	61,179
1997	50,287
1998	56,039
1999	54,625
2000	57,530

資料摘自香港年報及入境事務處。

入境政策演變

日期	事項
七十年代及以前	採取抵壘政策，即只要能成功避過拘捕範圍，即可被接納爲香港合法居民。
1980 年 10 月 23 日	取消抵壘政策
1982 年 12 月	政府禁止持有雙程証的合法入境者申請延期居留。
1983 年 9 月	中港雙方達成協議，每日派發單程証 75 個，但沒有決定分配方法
1993 年 11 月	單程證限額由 75 個增至 105 個。新增的 30 個名額中，15 個給予合資格的二十一歲以下兒童，其次 15 個則給予合資格的配偶
1995 年 7 月	名額再由 105 個增至 150 個。新增的 45 個名額中，30 個會平均分配零至五歲及十六至廿歲的子女，另 15 個則分配予分隔超過十年的配偶。
1996 年 5 月	從中國持單程通行証來港人士，在抵港時可獲給予七年居留期限，以代替需申請四次延期居留才可獲無限期居留的政策。
1996 年 7 月	名額仍維持 150 個，但其中預留給予子女的 30 個將無年齡限制。
1997 年 7 月 10 日	頒布＜＜1997 入境（修訂）（第三號）條例＞＞，制定甄別計劃，以審定根據＜＜基本法＞＞第二十四條第（二）及（三）項聲稱有居留權的兒童的身份，只有出生前父母一方已爲永久居民的婚生子女方擁有居留權，居留權申請與單程證掛鉤。
1998 年 1 月 1 日	在每日 150 名名額中，60 名爲非指定名額，其中八成（即每天 48 個）分配予夫妻團聚的申請人（獲准來港的配偶可偕同一名 14 歲以下的子女來港）；另外 30 名名額分配給長期分開 10 年以上的配偶；其餘 60 名名額則分配給擁有居留權的兒童。
1999 年 1 月 29 日	終審法院判決，港人內地子女不論出生時父或母親是否香港永久居民，婚生或婚非生，均享有居港權，居留權申請與單程證脫鉤。
1999 年 6 月 26 日	人大常委解釋＜＜基本法＞＞，港人內地子女必須在出生時，其父或母已成爲香港永久居民，及須申請單程証來港。
1999 年 7 月 7 日	政府公佈居留權証明書申請方法，居住在內地的申請人，必須向他們戶口的所在地的公安機關出入境管理部門，提出申請，港人非婚生子女需透過 DNA 的測試，鑑証申請人與其在港父母的直系關係。

註二：單程證五類申請計分及名額

	分　　類	計　　分	名　額

			(共 150)
一	夫妻團聚	以分開日期計算，分開日數 X 0.1 = 分	30 指定予分開 10 年以上配偶， 48 予配偶及帶一名 14 歲以下子女
二	照顧無依靠父母	1. 申請人年齡：18 至 30 歲……10 分 31 至 50 歲…….20 分 50 至 59 歲……..5 分 2. 香港需照顧父母歲數 – 58 = 總得分：1 + 2	* 資料不詳
三	無依無靠老人投靠親屬	1. 申請人歲數 – 59 = 分 2. 來港投靠的親屬 直屬……..15 分 近親(兄弟姐妹……..5 分 總得分：1+2	* 資料不詳
四	無依無靠兒童投靠親屬	1. 15 – 申請人歲數 = 分 2. 投靠的親屬 直屬……..15 分 近親(兄弟姐妹……..5 分 總得分：1+2	60 指定予居留權
五	其他(例如：繼承產業)	遺囑第一繼承人……..10 分 第二繼承人…….. 9 分 第三繼承人…….. 8 分 (如此類推)	* 資料不詳

*五類申請如何分配一百五十個名額，政府並沒有正式公佈，但第一類及第四類佔了 138 個名額，剩下 12 個名額分配予第二、三、五類，如何分配資料不詳。

AFFIRMATION OF HO HEI WAH

I, HO HEI WAH, social worker of 3/F., 52 Princess Margaret Road, Kowloon, Hong Kong, do solemnly sincerely and truly affirm and say as follows:-

1. I am the director of the Society for Community Organization. Save as otherwise stated, all matters deposed to herein are true to the best of my personal knowledge, information and belief.
2. The Society for Community Organization is a non-profit-making organization registered in Hong Kong in 1972. We are regarded by the Hong Kong Government as 'pressure group' and our main jobs is to tackle the social problems in Hong Kong, in particular, the human right, housing and immigration matters. I joined the Society in 1981 and have been working there since then.
3. During the past 7 years, I have spent most of my time in helping the Chinese illegal immigrant mothers. In 1985, the Hong Kong Government wanted to repatriate 14 boat brides to China. I helped those 14 boat brides to liaise with the New China News Agency and the Hong Kong Government in the hope that they could be allowed to stay. The Hong Kong Government, however, rejected our application and alleged that these boat brides could have applied for one-way exit permits in China. Their husbands complained that their wives could not obtain the one-way exit permits in China because the quotas allocated to their native counties were very limited and for some, they could not even obtain the application forms.
4. Later on, due to public pressure, both the China and Hong Kong Government adopted a special policy towards the boat brides and their applications for one-way exit permits were expedited. Up to 1990, all the boat brides (a total of 1300) were granted with one-way exit permits to come to Hong Kong.
5. In 1987, 70 Chinese illegal immigrant mothers were discovered by the Immigration Department when their children registered with the Immigration Department during an amnesty granted to illegal child immigrants in April that year.
6. Our Society contacted 56 families and helped them to liaise with the New China News Agency and the Hong Kong Government. The Hong Kong Government, however, insisted on repatriating them to China. Mr. Jeaffreson, the then Secretary for Security announced that they could apply for one-way exit permits in China and

he believed that they would not have special problems in such application. He further declared that most of the Chinese immigrants who came to Hong Kong by obtaining the one-way exit permits could get the permit within 3 years time. There is now produced and shown to me as exhibit marked 'HHW-1'copy of the minutes of the Hong Kong Legislative Council sitting on 13th January, 1988 recording the statements addressed by Mr. Jeaffreson to the Legislative Council.

7. The 70 illegal immigrant mothers were repatriated to China on 25th January 1988 and 26th January 1988. At that time, I was the organizer-in-charge of this matter in our Society and I accompanied some illegal immigrant mothers to return to Haifeng.

8. I together with some newspaper reporters visited the Director of the Administrative Office of the Haifeng Public Security Bureau Mr. Wong Jiwing. Mr. Wong told me and I verily believe that:

   (a) there was a severe shortage of quotas for one-way exit permits in Haifeng;

   (b) their monthly quotas were 8. However, there were approximately 2,000 approved applications waiting for the quota;

   (c) the illegal immigrant mothers repatriated to Haifeng might have to wait for 20 years before they could return to Hong Kong; and

   (d) as the queue was too long and the quota too little, their administrative office had already ceased to accept new applications for one-way exit permits. There is now produced and shown to me as exhibit marked 'HHW-2' a newspaper cutting of the South China Morning Post reporting the issue on 28th January, 1988.

9. Apart from Haifeng, I had also visited numerous counties to find out the problems faced by Chinese illegal immigrant mothers in their applications for one-way exit permit.

   (a) On 9th April 1988, I visited the Administrative Office of the Waichow Public Security Bureau. I was informed by the officer of the Administrative office and verily believed that they no longer accepted application for one-way exit permit. However, they refused to disclose the reasons for such policy.

   (b) On 11th April 1988, I visited the Tungkun Public Security Bureau. I was informed by the Director of the Visa Department Mr. Chan and verily believed that their Bureau had ceased to accept applications in 1987. In April 1988, the

Tungkun City office obtained the power to approve applications. Due to insufficient manpower, there were already approximately 6,000 applications waiting to be processed. However, their monthly quotas were only 6. They did not know when would new applications be accepted again but generally it took more than 10 years to process and approve an application.

(c) On 12th April 1988, I visited the Pok-law Public Security Bureau. I was informed by Madam LO SIU YING of the Visa Department and verily believed that they had ceased to accept new applications in 1987. Applications on the list were more than 3,000 but their annual quotas were only 120.

(d) On 13th April 1988, I visited the Po-on Public Security Bureau. I was informed by the Director of the Visa Department Mr. CHUNG CHOI YAU and verily believed that they would not accept applications from illegal immigrants repatriated to China. There were approximately 3,000 applications on the waiting list but their annual quotas were only 30. They estimated that there were 12,000 persons eligible for application. Only those over 60 years old and who had been separated from their relatives for more than 20 years could apply.

10. On 23rd May 1990, the issue regarding illegal immigrant mothers was discussed in the Legislative Council again. Mr. Jeaffreson informed the Legislative Council that only 1 illegal immigrant mother from the group repatriated to China in 1988 had returned to Hong Kong. He further said that Hong Kong Government had discussed this matter with the Chinese authorities on many occasions to ensure the early return of those illegal immigrant mothers. There is now produced and shown to me exhibit marked 'HHW-3' copy of the minutes of the Legislative Council sitting on 23rd May 1990 with regard to such issue.

11. Even with the assistance of the Hong Kong Government, only 1 among those 70 illegal immigrant mothers could return to Hong Kong in two years' time. The difficulty in obtaining one-way exit permits in China can be clearly seen. The fact remains that those illegal immigrant mothers have no opportunity to join the queue. They risk their life or imprisonment by sneaking into Hong Kong unlawfully to join their husbands and children. There are now produced and shown to me as exhibit marked 'HHW-4' two newspaper cuttings in 1990 and reporting the imprisonment

punishment faced by two illegal immigrant mothers in Hong Kong.

12. The Hong Kong Government always announces that most of spouses who wish to come to Hong Kong for reunion only have to wait for 2 to 3 years for the issue of the one-way exit permits. There is now produced and shown to be as exhibit marked 'HHW-5' copy of a document prepared by the Security Branch with regard to the Entry of Spouse from China for Family Reunion for the reference of Legislative Councilors. The statistics reported there were misleading because it only reflected the waiting time of those who could get the application form and approval to come to Hong Kong. Mass of spouses in China cannot even get the application forms or join the queue.
13. Since 1986, I have been receiving on an average of 3 inquiries per week from those husbands in Hong Kong about the application of one-way exit permits. All of them complained that their wives could not even get the application form.
14. I was informed by those husbands and verily believe that in some counties in the Guangdong province, local policies stipulated that only those who had been separated from their spouses for more than 10 years were eligible to apply for the application forms. After lodgment of the application forms, they still have to wait for a very long time for investigation and approval. Unless you can pay a huge sum of money of have good connection with the Chinese authorities, i.e. by going through the 'back door', it is nearly impossible for the spouses to get the one-way exit permit within several years.

AFFIRMED at

On this day of
1992

Before me,

This Affirmation is filed on behalf of the Applicants.

Discretion and Immigration Control

Mr Philip Dykes SC

Discretion and Immigration Control

Overview

This paper has three purposes. The first is to identify the key discretionary powers that the Chief Executive, the Director of Immigration and other public officers enjoy when admitting and afterwards, controlling, persons who do not have the right to live in the HKSAR. The second is to identify the limits that the courts have placed upon those powers. The third is to suggest that the *Immigration Ordinance, Cap. 115* should be amended so as to provide a review of some immigration decisions by an independent tribunal and also to ensure that there would be more transparency respecting the criteria used by immigration officers when deciding whether to admit persons to the HKSAR and, when they do, on what conditions.

This paper does not address the functions of the Director of Immigration in the context of ascertaining who has the right of abode under *Article 24 Basic Law* and therefore permanent residents. It is at least arguable that as regards one class of permanent residents the Director of Immigration in truth exercises discretionary powers[1]. In all other right of abode cases he has no discretionary powers.

Powers and Duties

The staff of the Director of Immigration has a duty to admit people enjoying the right of abode in the HKSAR[2] or who have the right to land in the HKSAR[3]. All other categories of entrant (save aircrew and servicemen[4]) require permission to land from either an immigration officer or an immigration assistant[5]. A person who requires permission to land and who lands without obtaining permission commits an offence punishable with a fine and imprisonment for up to 3 years.[6]

In this context it is important to note that even though a person may have been granted permission to remain in Hong Kong for a fixed period and he leaves but he later returns within that time he requires fresh permission to enter. This is on account of a

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[1] *Paragraph 3(1)(c)* of *Schedule I* to the *Immigration Ordinance, Cap. 115* ('Cap. 115') requires a person who is not a Chinese national claiming the right of abode on the basis of having lived in Hong Kong for a continuous period of not less than 7 years and to have taken it as his place of permanent residence to first be 'settled" in the HKSAR before seeking confirmation of his status as a permanent resident. Under *Paragraph 1(5)* of *Schedule I,* a person is "settled" when he is ordinarily resident in Hong Kong and not subject to any limit of stay. As appears in the paper, the enlargement of a limit of stay is at the discretion of an immigration officer or a chief immigration assistant: *s.11 (5) Cap. 115.* No requirement of "settlement" appears in the relevant provision of the *Basic Law* [*Article 24(4)*] dealing with persons not of Chinese nationality claiming the right of abode. The constitutionality of this provision is likely to be dealt with by the Court of Final Appeal later this year.

[2] A person enjoying the right of abode has the right to land: *s.2A (1)(a) Immigration Ordinance, Cap. 115.* Not all persons who have the right of abode enjoy the right: see *Part IB Cap. 115* dealing with permanent residents under *Paragraph 2(c), Schedule 1* of *Cap. 115.* This class comprises persons of Chinese nationality born outside the HKSAR to a Chinese citizen with the right of abode in Hong Kong. The vast majority of this class of persons comprises persons born in the Mainland.

[3] *S. 2AAA(1) Cap. 115* confers the right to land in the HKSAR on former permanent residents.

[4] See *ss.9* and *10, Cap. 115* provide that aircraft crew and servicemen do not need permission to enter but, if their status changes, they are liable to immigration control.

[5] See *s.7(1) Cap. 115.*

[6] See *s.38(1)(a) Cap. 115.*

provision of the ordinance that says that permission to land or remain lapses on the day the person leaves Hong Kong.[7]

This provision appears at odds with *Article 31 Basic Law* which guarantees all residents, permanent and non-permanent alike, *freedom to travel and to enter and leave the region.* Residency status is acquired relatively quickly by immigrants by virtue of them being required to register under the *Registration of Persons Ordinance, Cap.177* within a relatively short period of time.[8] However, the courts have held that a returning resident requires permission to re-enter and, accordingly, can be refused entry even though his limit of stay has not expired. See Gurung Kesh Bahadur v. Director of Immigration HCAL 83/1999 (May 2000).

When a person is admitted an immigration officer or an immigration assistant may impose a limit of stay and *such other conditions of stay as [he] thinks fit, being conditions of stay authorized by the Director, either generally or in a particular case.*[9] Where conditions are imposed under this sub-section then the person's stay is deemed to be subject to those conditions[10]. It is a criminal offence to breach a condition of stay punishable with a fine and imprisonment for up to 5 years.[11]

Although the discretion vouchsafed an immigration officer or an immigration assistant is broad it has been limited to an extent by subsidiary legislation. The Chief Executive in Council is empowered to make regulations under the ordinance *providing for any matter or thing which is or may be prescribed under this Ordinance.*[12] That power has been used to make the *Immigration Regulations. Regulation 2* makes provision for standard conditions to be applied in certain cases. For example, under *Regulation 2(1)* says that any person granted permission to stay as a visitor must not take up any employment, whether paid or unpaid; must not join any business; and must not become a student at a school, university or other educational establishment.

After entry an immigration officer or chief immigration assistant may cancel a limit of stay, or vary a condition of stay or vary a limit of stay by enlarging it.[13] However, only the Chief Executive may curtail a limit of stay in force.[14]

If a person lands in Hong Kong without first obtaining permission when permission was required or, having landed with permission, contravenes or is contravening a condition of stay, the Director of Immigration may make a removal order against

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[7] See *s.11(10) Cap. 115.*
[8] See *s.3 Cap. 177* and *Regulation 3 Registration of Persons Regulations* which require registration, unless exempted or excluded, within 30 days of entering Hong Kong. Persons who are required to register are entitled to identity cards. These cards appear to implement *Article 24 Basic Law* which states that non-permanent residents of the HKSAR are qualified to hold Hong Kong identity cards. A person appears to become a resident of the HKSAR therefore by virtue of having to be registered under *Cap. 177.*
[9] See *s.11(2) Cap. 115.*
[10] See *s.11(3) Cap. 115.*
[11] See *s.41 Cap. 115*
[12] See *S. 59(a) Cap. 115*
[13] See *s.11(5)*
[14] See *s.11(6).*

him.[15] If a person remains in Hong Kong without permission a removal order may also be made against him.[16]

However, where a person has landed in Hong Kong unlawfully the Director of Immigration may authorize him to stay and the provisions of the ordinance respecting conditions and length of stay will apply.[17]

The Chief Executive may make a removal order against a person *if it appears to him that that person is an undesirable immigrant who has not been ordinarily resident in Hong Kong for 3 years or more* [18]

The Chief Executive may make a deportation order against an immigrant found guilty in Hong Kong of an offence punishable with imprisonment for not less than 2 years or if he deems it to be conducive to the public good.[19]

The Chief Executive has the power to give directions to public officers with powers, duties and functions under *Cap. 115* respecting their exercise of those powers duties and functions.[20] This power to give directions has not been exercised by the Chief Executive.[21]

Review of the Exercise of Discretion under the Ordinance

A person who is "aggrieved" by the decision, act or omission of any public officer under the ordinance has the right to object to that decision and seek a review by the Chief Executive or the Chief Executive in Council depending on the type of decision.[22] However, there is no right to seek a review by the Chief Executive or the Chief Executive in Council of removal orders.[23] (There is probably no right of objection to a deportation order made under *s.20(1)* of the ordinance. This is because the Chief Executive[24] makes the deportation order and he is probably not a "public officer' for the purpose of the ordinance. It would be, in any event, unusual to make his decision subject to review by a body of which he is a member.)

It is possible to appeal against the making of a removal order to the Immigration Tribunal.[25] However, the Immigration Tribunal may only allow an appeal against the making of a removal order if the appellant is able to establish facts that show that a removal order could not have been lawfully made in the first place such as that he has the right of abode or the right to land or had permission to remain in Hong Kong at

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[15] See *s.19(1)(b)(ii).*
[16] See *s.19(1))(b)(iii)*
[17] See *s.13.*
[18] See *s.19 (1)(a)*
[19] See *s.20 (1).*
[20] See *s.51 (1)*
[21] Letter from Director of Immigration to author dated 18.1.2001. A similar power exists in the U.K. which is used in order to make exceptions from the Immigration Rules that otherwise govern entry and stay in the majority of cases.
[22] See *s.53(1)* and *(4)*
[23] See *s.53(8)(b)*
[24] This power has been delegated to the Secretary for Security.
[25] See *s.53A.*

the time the order was made.[26] If an appellant cannot do this then his appeal must be dismissed.[27]

Not many individuals know of the right to seek a review under *s.53 Immigration Ordinance, Cap. 115*. Unlike many other government departments whose officers have the power to make decisions that can be appealed to a board or tribunal, the practice of the Immigration Department appears to be that it does not advise people in writing that adverse decisions may be objected to. (On the other hand, other provisions of the ordinance positively require persons against whom removal orders have been made are told of their right of appeal to the Immigration Tribunal.[28])

Extra-Statutory Legal Constraints on Discretionary Powers

Constraints on the exercise of discretionary powers may be self-imposed because of a change of policy. If the new policy is communicated to persons who may be affected by the change such changes may give rise to a legitimate expectation that a person will be dealt with in a particular manner. The courts may require the decision-maker to adhere to that new policy unless there are compelling reasons for him departing from it.[29]

Constraints may arise because of the operation of a superior source of law that would require immigration decisions to be taken in a particular way. The *Basic Law* is a superior source of law. At least one of its provisions (*Article 37)* dealing with a Hong Kong resident's right to freedom of marriage and the right to raise a family arguably may have an impact on decision-making by immigration staff.[30] Another is *Article 39* which requires the implementation of the *United Nations International Covenant on Civil and Political Rights* and the *United Nations International Covenant on Economic, Social and Cultural Rights* as they both apply to Hong Kong. The article goes on to require that limitations placed on rights must be prescribed by law and not contravene the two covenants. The significance of treaties generally is discussed in the next paragraph.

Constraints also may arise on account of treaty obligations, which even though not incorporated in domestic law, obligate a country to act in a particular way in a particular situation. The High Court of Australia has held that Australia's accession to the *UN Convention on the Rights of the Child* gave rise to a legitimate expectation that immigration officials would, in accordance with the Convention, give primary consideration to the best interests of a child when making a decision whether to deport the father of a child.[31]

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[26] See *s.53A(1)*

[27] See *s.53D(1)*

[28] See *s.19(5)*.

[29] In Attorney General of Hong Kong v. Ng Yuen Shiu [1983] 2 AC 629 the Privy Council held that the Director of Immigration was bound to honour a promise made to illegal entrants that his staff would entertain applications to remain in Hong Kong on their merits. (The applicant in that case had asked for a hearing into his personal circumstances and was refused.)

[30] *Article 37 BL* states: *The freedom of marriage of Hong Kong residents and their right to raise a family shall be protected by law.*

[31] Minister of State for Immigration and Ethnic Affairs v. Teoh (1994-95) 183 CLR 273.

The courts in Hong Kong have recognized the principle that unincorporated treaty obligations may give rise to constraints like this. However they have held that the nature and the extent of the reservations to relevant treaties may negative any argument that a legitimate expectation of an immigration decision being taken in a particular way in fact arises.[32]

Finally, there is the constraint of judicial review by the Court of First Instance exercising a common law based jurisdiction of great constitutional significance. This works on the basis that where powers have been conferred by statute it is the intention of the legislature that decision-makers should be accountable to the courts if their decisions were unreasonable, or procedurally unfair or tainted with illegality. This is simply the rule of law in action.[33]

The essence of unreasonableness in the administrative law context is that a decision is outside the range of decisions open to the decision-maker having regard to the policy and objects of the enactment that confers the authority to make the decision. There is therefore no such thing as an 'unfettered discretion' in administrative law in the sense that decision-makers cannot be called to account for their decisions in the courts.[34] If the intention of the legislature really is to give a decision-maker a blank cheque when it comes to decision-making it must make the decision immune from review by the courts by enacting a provision that ousts the supervisory jurisdiction of the court.[35]

Although there is no such thing as an unfettered discretion some discretionary powers are wider than others. In administrative law terms the problem is finding where to draw the line. In immigration matters, the Hong Kong courts have appeared to have drawn the line so close to the outer limits of the discretionary power so that interventions by the court in decision making by the Director of Immigration and his staff on the grounds of unreasonableness are very rare.

I personally think that the courts have been too deferential to the Director of Immigration. The problem lies in them having applied a different public law principle regarding the rights of aliens to a fair hearing when seeking to be admitted. The courts have held that aliens had no right to be heard when seeking entry or when seeking to remain after overstaying by adopting and applying an English case that dealt with

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[32] See Chan Mei Yee v. Director of Immigration HCAL 77 of 1999 (July 2000).

[33] *Unless there is the clearest provision to the contrary, Parliament must be presumed not to legislate contrary to the rule of law. And the rule of law enforces minimum standards of fairness, both substantive and procedural.* Lord Steyn in R v. Home Secretary ex p. Pierson [1998] AC 539 at 591.

[34] *Statutory power conferred for public purposes is conferred as it were upon trust, not absolutely-that is to say, it can validly be used only in the right and proper way which Parliament when conferring it is presumed to have intended. Administrative Law (8th edn.) Wade & Forsyth* pp 356-357

[35] "Ouster" clauses are not common and rarely survive close judicial scrutiny for they are construed narrowly on the basis that the legislature does not normally deprive individuals from access to the courts in order to seek redress where a wrong hs been done. See Anisminic Ltd. v. Foreign Compensation Commission [1969] 2 A.C. 147. It is arguable that under the Basic Law such clauses are unconstitutional for they run counter to *Article 35* which guarantees the right of residents to institute legal proceedings in the courts against the acts of the executive authorities and their personnel. Recently the CFI has held that *s.63 Interpretation and General Clauses Ordinance, Cap. 1,* which purports to preclude judicial review of appeal or review decisions of the Chief Executive in Council, is not wholly effective and that judicial review will lie where decisions are made in excess of jurisdiction. See Gurung Bhakta Bahadur v. Director of Immigration (HCAL 1579/2000) February 2001.

immigration powers made by the Queen in Council and not by statute.[36] The Hong Kong cases are: R v. Director of Immigration, ex p. Chan Heung Mui (1993) 3 HKPLR 533 and Ho Ming Sai v. Director of Immigration [1994] 1 HKLR 21. The Court of Final Appeal has approved the cases in Lau Kong Yung v. Director of Immigration [1999] 3 HKLRD 778.

From this recognition of the precarious position of an alien with no right to a hearing it has been a short step to say that the Director of Immigration's powers are basically unfettered[37] when an alien seeks the sympathetic exercise of his discretion. For example, where a person, (usually a mother) overstays in order to be with a close family member (usually a child with the right of abode) who is seriously handicapped or has a medical condition that warrants full time care the courts have held that the Director of Immigration may consider whether to grant that person leave to remain on humanitarian grounds but that he has no duty to consider humanitarian grounds at all if he chooses not to do so.[38]

It is difficult to reconcile this 'hands off' approach with the constitutional principle identified above that is supposed to underpin the idea of judicial review which is that the legislature intends that discretionary powers be exercised in a responsible way for the public good. If a set of facts exist that, on any view, give rise to a claim that the discretion could be exercised sympathetically on humanitarian grounds, how can it be in the public good to construe the statute in such a way that the Director of Immigration is entitled to ignore it?

Proposals for Change

The Director of Immigration, unlike a lot of other decision-makers, has a good record of defending court challenges alleging irrationality in decision-making. This is not, I think, because the Director of Immigration is blessed with exceptional public law talents. One reason is that most of his decisions do not determine rights. An alien[39]

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[36] . .. *When an alien approaching this country is refused leave to land, he has no right capable of being infringed. . . ..In such a situation the alien's desire to land can be rejected for good reason or bad, for sensible reason or fanciful or for no reason at all.* Schmidt v. Secretary of State for Home Affairs [1969] Ch 149 at 172. At the material time the U.K.'s immigration laws was the Aliens Order 1953 being an Order in Council made by the Queen in Council under the Aliens Restriction Acts 1914 and 1919.

[37] The limits were identified by Litton JA in R v. Director of Immigration, ex p. Chan Heung Mui (1993) HKPLR 533 at 545 where he said in respect of a statutory power to grant leave to remain to persons who had landed unlawfully: *Section 13 of the Ordinance imposes no statutory duty of any kind upon the Director, beyond the broad duty falling upon him to administer the scheme of immigration control embodied in the Ordinance fairly and properly.* However, nowhere in the case is it remarked upon that the "scheme" of the Ordinance is that decisions on entry and stay are in the discretion of immigration officers who are not guided by statutory or other published guidelines and whose decisions, except in removal cases, are not capable of review by any independent tribunal.

[38] See Lau Kong Yung v. Director of Immigration [1999] 3 HKLRD 778 at 806. A recent case where the Director of Immigration refused to permit a mother to remain to look after her sick child is Chan Mei Yee v. Deirector of Immigration (HCAL 77 of 1999) (July 2000)

[39] An "alien" is defined in *s.6, Schedule 8 Hong Kong Reunification Ordinance* as being someone other than a citizen of the People's Republic of China. Many permanent residents are therefore 'aliens'. The word has lost its original immigration law connotations of a person with no right to enter or remain in Hong Kong.

has no right to enter Hong Kong and so a decision to refuse entry, technically, takes nothing away from him. Courts are more prepared to intervene when a benefit, like a licence or permit, may be taken away by administrative action. Another reason for his success is that he rarely gives reasons for a decision. (The same is true also of the Chief-Executive in Council on a review.) Without the giving of reasons, it is difficult to make out a case based on unreasonableness. Finally, he does not generally publish the policies that guide him (or, more accurately, his officers) in decision-making. If the policies were published it would be easy to see if the policy was unreasonable or was being applied in a partial or discriminatory way.

Immigration policy seems to me to be something that people should know more about for a number of reasons. The discretion that has been granted to the Director of Immigration and his officers to admit and exclude aliens is one that must be exercised for the public good. It is a good discipline the Director of Immigration to devise policies so as to ensure uniformity and consistency in decision-making. It would be even better if such policies were published so that people could be confident that the public good was being served by the application of sensible policies in a fair manner.

I believe that there is a strong case for the Director of Immigration being required to publish guidelines that would be laid before Legco for its approval. These would explain how his wide discretionary powers over aliens are used in classes of cases. For example, if a person wished to come to Hong Kong to set up a business, the guidelines would spell out in some detail the criteria that will normally result in a successful application.

Such guidelines exist in the United Kingdom. They are made by the Home Secretary under the Immigration Act 1971 and are laid before Parliament for approval.[40] If an immigration official fails to follow one of the rules then an appeal to an immigration adjudicator must be allowed.[41] The courts will intervene too if immigration officers misapply or miscontrue the rules.[42]

I also believe that the Chief-Executive in Council has better things to do than consider whether Mr. Jones should be permitted to come to live in Hong Kong to establish a new business or whether Miss Smith should be allowed to have conditions of stay lifted. There is a strong case for establishing a system of appeals to independent adjudicators or tribunals against the exclusion of aliens. When a Committee reported in the U.K. in 1967[43] that there was a case for having such a system it identified three benefits. First, such a system would ensure that restrictions on entry were fairly applied. Secondly, such a system would reassure immigrants that their cases would not be dealt with arbitrarily. Thirdly, it would improve the quality and consistency of decision-making because immigration officers would know that their decisions could be scrutinized by an appellate body and so would be that much more careful when

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[40] The rules are not a statutory instrument and so lack legal force. The current rules were published in 1994 and are HC 395 (1994).

[41] See *s.19 Immigration Act 1971*. In the UK independent adjudicators and appeal tribunals may hear appeals against immigration decisions.

[42] See R v. Immigration Appeal Tribunal, ex p. Shah [1981] 1 WLR 1107.

[43] 1967 (Cmnd.) 3387

making decisions [44] (One judge in the Hong Kong Court of Appeal has recognized that there is a strong case for having at least one kind of immigration decision reviewed by another decision-making body [45])

Conclusion

The Director of Immigration and his staff wield discretionary powers that are not in any way limited or controlled by the *Immigration Ordinance, Cap. 115* The consequences of adverse decisions can be devastating to individuals and their families Employers too can be seriously affected by decisions that deprive them of valuable staff The courts have acknowledged that constraints on the exercise of these powers exist but have only very rarely identified transgressions There are good general and also legal policy reasons for change in the form of requiring the Director of Immigration to publish guidelines subject to approval by the Legislative Council and having professional and dedicated bodies dealing with appeals from decisions by immigration officers

[44] See Chapter 18 *MacDonald's Immigration Law and Practice (4th edn)* for background to the UK appeals system.

[45] Godfrey JA in R v. Director of Immigration, ex p. Ho Ming Sai (1993) 3 HKPLR 533 said at p 551 that requiring the Director of Immigration to make decisions in 'exceptional humanitarian circumstances' cases placed hin in a "difficult position' and that the solution might be to amend the Immigration Ordinance, Cap. 115 so as to provide a right of appeal to the Governor in Council. His suggestion has not been taken up

Immigration Law and Discretionary Powers

Mr T K Lai

Immigration Law and Discretionary Powers

Background

The application of immigration control on the entry into, stay in and departure from Hong Kong by persons not having a right of abode in Hong Kong is a matter of significant public and social concern. Our land resources are limited. We have the highest population density in the world. We must have regard to the rights of our labour force. The mandatory requirement to carry proof of identity, the creation of strict liability against illegal remaining and breach of conditions of stay and the establishment of a quick and effective removal procedure all reflect the legislative intent to discourage illegal entry into Hong Kong and of illegal stay here in contravention of conditions of stay as well as preventing influx of cheap labour.

Power to grant permission to land and/or remain

The legislature has entrusted to the Director of Immigration a power to grant persons who do not have the right of abode in Hong Kong permission to enter into and remain in Hong Kong or to remove them from Hong Kong. Section 11 of the Immigration Ordinance, Cap. 115 confers power on the Director and his officers to grant permission to land and remain in Hong Kong, while section 13 empowers only the Director to authorize an illegal entrant to remain who would otherwise be removed from Hong Kong.

Section 11

The discretion under section 11 is exercised in the light of prevailing immigration policy. The relevant policies and general criteria of consideration for entry are published and available to the general public in the Department's website at http://www.info.gov.hk/immd. These policies are subject to review from time to time taking into account the changing needs of the community.

Guided by the relevant policy, each application is assessed on its own merits. The Director looks into all relevant information made available by the applicant, conduct enquiries and if necessary, consult relevant parties. He will then make a decision after careful consideration of the relevant facts and, in the event of disputes over facts, an evaluation of relevant parties' credibility.

The exercise of discretion under section 11 is subject to scrutiny by the Chief Executive-in-Council by way of appeal under section 53 of the Immigration Ordinance by any person aggrieved by the Director's decision. The Chief Executive-in-Council can confirm, vary or reverse the decision. In addition, the aggrieved person may challenge the decision in court by way of judicial review. When a decision is challenged, the Director will present to the Chief Executive-in-Council or court the relevant facts including the procedure and criteria adopted and the Director's consideration of the original application, for the Council or court to assess whether there is any procedural impropriety, irrationality or unfairness over his decision.

In the year 2000, there were about 140 appeals and 44 applications for judicial review of the Director's decisions under section 11.

Section 13

Section 13 is the provision which empowers the Director to authorize a person to remain even if he entered illegally and is liable to be removed from Hong Kong.

To curb illegal immigration, the Government has, since 1980, been enforcing a policy of returning all illegal immigrants directly and quickly to the place from where they came. This in itself is a deterrent and, like our compulsory identity card system, makes it difficult for illegal immigrants to live or work in Hong Kong. As Hong Kong's prosperity remains to be a great temptation for illegal immigrants, there is a need to maintain this effective means of removal.

In administering the policy, the Director removes all illegal immigrants expeditiously according to the law unless he is prepared to exercise his discretion in exceptional cases involving strong humanitarian factors. While he has no duty to consider humanitarian grounds in the exercise of his discretion whether or not to make a removal order, he takes such grounds into account if he thinks it appropriate in the case in question. The Director faces thousands of removal cases a year. He is fully aware of the problems involved and will distinguish between those who deserve exceptional

consideration from those who should be removed expeditiously.

In the year 2000, 73 illegally immigrants from the Mainland and 19 from other countries were authorized under section 13 to stay on humanitarian reasons.

Power to make removal orders

Removal of persons not having the right of abode in Hong Kong is governed by section 19 of the Immigration Ordinance and can be ordered by the Director in circumstances prescribed under the said provision. The Immigration Ordinance also safeguards the interest of potential removees by requiring that when the Director orders the removal of a person, a written notice must be served on the person in question stating the facts of the case and the grounds for removal.

The Director has discretion under section 19 as to whether or not a removal order should be made. But it is his policy to make the order unless he considers that there are valid grounds to do otherwise. These vary from the situation that the removee agrees to leave voluntarily without resorting to an order under section 19 to the situation that the basis of the removal consideration is a technical contravention of the relevant provision (e.g. a visitor who forgot to apply for extension of stay before expiry of his current limit of stay).

Though it is not the Director's duty to consider humanitarian factors,

he takes those factors into account in the consideration of whether or not to make a removal order. While there is established procedure to handle these cases, the question as to when humanitarian factors will be strong enough for exceptional consideration involves a value judgment which can only be determined on a case-by-case basis. No test can be cast in stone. It remains the discretion of the Director on account of the merits of each individual case.

The Immigration Ordinance provides that a person against whom a removal order is made by the Director may appeal to the Immigration Tribunal on grounds that:

(i) he enjoys the right of abode;

(ii) he, as a former permanent resident, has the right to land;

(iii) he had at the time when the removal order was made the permission of the Director to remain in Hong Kong.

Currently, the Chairman and Deputy Chairman of the Immigration Tribunal are a retired High Court Judge and a retired District Court Judge respectively. 28% of the adjudicators appointed to the Tribunal are legal professionals. In practice, where an appeal involves legal issues or the appellant is legally represented, at least one adjudicator from the legal field will be assigned to hear the case. The Tribunal and any adjudicator may in discharge of his statutory function consult legal advisors appointed to the Tribunal.

Outside the Tribunal mechanism, potential removees may also petition to the Chief Executive. The Chief Executive (or his delegated officer)

will request the Director to provide him with the relevant facts for consideration. Any person against whom a removal order is made may also seek remedy from the court by way of judicial review to challenge the Director's decision.

In the year 2000, about 25,000 persons were repatriated from Hong Kong either on a voluntary basis or by removal order. In the same year, about 4,300 removal orders were made against which 2,300 appeals to the Immigration Tribunal were lodged. There were also 50 non-statutory petitions and 12 applications for judicial review, excluding those relevant to the right of abode issues.

Power to make deportation orders

The power to make deportation orders is rested with the Chief Executive and not the Director. In practice, the Chief Executive has delegated the power to the Secretary for Security (S for S).

Cases put up to S for S for consideration are assessed and determined on their own merits including humanitarian factors. Procedurally, there are adequate safeguards to the interest of potential deportees which include:

(a) the service of a Notice of Consideration of Deportation on every person for whom deportation is intended, inviting him to make representations as to why a deportation order should not be made against him/her. Grounds put forth by the potential

deportee will be considered to decide whether a recommendation for deportation should be made: and if such a recommendation is made. the grounds will be included in the case submitted to S for S for her consideration:

(b) for cases involving prosecutions instituted by other law enforcement agencies, their views will be sought and included in the applications for deportation;

(c) all applications for deportation must be vetted and endorsed by a Directorate Officer of the Immigration Department before submitted to S for S;

(d) a statutory appeal which is considered by the Chief Executive-in-Council;

(e) a non-statutory petition channel to the Chief Executive; and

(f) judicial remedy by way of an application to the court for judicial review.

For the year 2000, 504 deportation orders were issued. In the same year, 22 applications for rescission of deportation order, 4 requests for suspension of deportation order and 5 non-statutory petitions were received. Of these cases, 3 deportation orders were rescinded, 7 suspended and 15 applications/petitions rejected. There is also an application for judicial review

that will be heard before the Court of First Instance soon.

Exercise of the discretion

The Director administers his discretionary powers with the understanding that he should act diligently, fairly and reasonably without abusing the power conferred on him under the law. He also bears in mind that the discretion must not be exercised in bad faith, arbitrarily, or perversely and the policy which he has adopted is one which must not be exercised without considering the circumstances of each individual case. Where the policy requirement and/or general criteria are not met, the Director may look further into the case to see whether strong humanitarian circumstances are available for exceptional consideration.

Ample appeal channels are available for persons aggrieved by the decisions of the Director to seek remedy. Relevant statistics also illustrate that these channels are widely used. Given the difference in circumstances, a comparison of the system of different countries is not appropriate. For example, unlike the case in the United Kingdom, a person who arrives in Hong Kong as a visitor may subsequently seek a change in status without leaving the jurisdiction. That leads to increasing abuse by foreigners who use appeals to delay departure despite the fact there are no merits in their cases at all. Another issue is the abuse of dependant visas in Hong Kong. An increasing number of persons of working age are seeking to enter or remain in Hong Kong as dependants when it is apparent that their primary objective or one of their primary objectives is to work in Hong Kong. There is a need to retain the existing provision empowering the immigration officers to enforce departure

even an applicant has lodged an appeal to the Chief Executive-in-Council

There is suggestion to set up an appeal tribunal to determine an appeal against the Director's exercise of section 13 discretion. To do so simply shifts this discretionary power from one party to another when the test remains a subjective evaluation of individual circumstances with the party making the final decision being less likely to be familiar with the problems involved. Experience from other jurisdictions suggests that these appeal systems would defer a final determination of cases and create an incentive to appeal if only to delay removal. As far as resources are concerned, it will double the efforts without inspiring additional confidence in the system. This is similar to the situation where many appellants of unfavourable section 11 decisions would continue to seek judicial review after failure in the petition to the Chief Executive-in-Council.

There is also suggestion to set out definitive criteria for the Director to follow in considering illegal immigrants' pleas to remain here. While each of these pleas, if considered, is assessed on its own merits; it is inappropriate to generalize on a set of fixed criteria. To do so will kindle unwarranted expectations that the person would, as of right, be allowed to remain once the criteria are met and irrespective of how they are met, through artificial construction. This will in turn encourage illegal immigration. We should not lose sight of the original intention of the policy to have a straightforward removal system. It is therefore necessary to ensure that the procedure will not be abused by people who may tailor their cases to seek permission to remain, and worse still, by syndicates which may spread rumors to trigger off waves of

illegal immigration.

Conclusion

On immigration matters, the special circumstances of a particular country or region must be born in mind. There is hardly a perfect immigration system which is applicable to all societies irrespective of their social, economic and demographic situation. Even for a continental-sized nation like the USA, its appeal system is undergoing continuous changes targeting at the enhancement of efficiency. Changes included:-

(a) the creation in 1980s of three-member panels to decide appeals against decisions of the Immigration Judges filed to the Board of Immigration Appeal in view of the increased caseload and the inefficiency in deciding all cases en banc by the five-member Board. Today, panel consideration is the norm;

(b) the issue of regulations in 1988 to empower the Board of Immigration Appeal to summarily dismiss an appeal if it lacks an arguable basis in law or fact – the reasons being "the lengthy process, combined with the automatic stay of removal while the appeal is pending, can create an incentive for an alien to appeal solely to delay deportation"; and

(c) the enactment of the Illegal Immigration Reform and Immigration Responsibility Act in 1996 which "eliminates or

> restricts the power of the Federal courts and Immigration Judges to review many types of enforcement decisions", "requires the Immigration and Naturalization Service to exclude aliens at the border summarily and without judicial review if they seem to lack proper documentation", and "bars judicial review of Immigration and Naturalization Service decisions to deport aliens".

Given Hong Kong's unique situation, the present system remains effective in achieving the objectives of the legislation. While rooms for improvement may exist, any attempt to revise the present system should be well considered and deliberated to prevent disturbance of the prevailing equilibrium.

At the close of my speech, I wish to share with you a passage from the Hon. Mr. Justice Litton quoted in "Civil Justice Reform in Hong Kong". He said, "Imagine a scenario whereby a proposal is put to a company to erect a building. No time limit is set. No ceiling is put on cost. There is no assurance that, when finished, the building will serve its purpose – or any purpose. The directors accept the proposal and authorize to commence, at the company's expense.... In the building field, it would be unthinkable that a project could start without time and cost limits – and perhaps penalties for time overrun. And yet, in the field of litigation, this is a commonplace occurrence. Why? Is there need in Hong Kong for creating an entirely new 'landscape'?" I submit that this question is equally applicable to the exercise of discretionary powers conferred on the Director of Immigration.

Inherent Contradictions and Inconsistencies in the Immigration Ordinance

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"Inherent Contradictions and Inconsistencies in the Immigration Ordinance"

S. H. Kwok

1. Hong Kong has always been part of China but it became a British colony after the opium war. China enacted its nationality law in 1909 and Britain in 1949. However, Hong Kong has never had its own nationality law. Nationality of the Hong Kong people was a sensitive topic. Perhaps this was the reason why an ordinance providing for naturalization in Hong Kong in 1845 was disallowed by Britain[i].
2. Although there was no nationality law for Hong Kong, a large number of legislation have been made at various times for the deportation of persons from Hong Kong and for preventing the entry and stay of persons whom the administrators of Hong Kong regarded as undesirable or unbeneficial to the territory and for regulating the period of stay and the conditions of stay of persons who have been permitted to enter and remain in Hong Kong.
3. Legislation was necessary because of the doctrine that a natural person is free to do what he wishes to do unless restrained by law.
4. The earliest legislation was all concerned with the deportation of persons from Hong Kong. Different categories of persons have been defined in the legislation and could be deported under different conditions and with different procedures. From the very beginning, British subjects enjoyed a far higher degree of security

regarding their stay in Hong Kong. Conditions under which British subjects could be deported were very limited and a fuller procedure meeting the natural justice requirements was provided for them. However, even a British subject could be deported from Hong Kong if the relevant statutory condition had been satisfied and the relevant procedure had been complied with.[ii]

5. It was in 1936 that a statute was passed to confer immunity from deportation to British subjects who "belongs to the Colony". Persons would belong to the Colony if they met the requirements as set out in the 1936 Ordinance. Broadly speaking, the requirements were connection with Hong Kong such as birth, sufficient length of residence or having a parent or spouse who belonged to Hong Kong.

6. British subject who met the requirements under the 1936 Ordinance could not be deported from Hong Kong. The Ordinance therefore provided for security of presence in Hong Kong for persons who had satisfied the statutory conditions. They could not be removed from Hong Kong. That was the earliest class of persons reckoned to be "belonging to Hong Kong".

7. Under the common law, according to an eminent English judge speaking in a judgment in 1970[iii], a British subject has the right "*to enter the United Kingdom without let or hindrance when and where he pleased and to remain here as long as he listed.*"

8. In the following year, the United Kingdom Parliament invented a new word for its citizens. It called him "partial". Another eminent English judge in a judgment in 1975[iv] said: "*Parliament gave this new man a fine set of clothes. It invested him*

with a new right. It called it 'the right of abode in the United Kingdom'. It is the most precious right that anyone can have. At least I so regard it. It is declared in simple but expressive words. Every partial 'shall be free to live in, and to come and go into and from, the United Kingdom without let or hindrance'.".

9. The judge described the right of abode as a new right. However, when the content of the right is being examined, it merely encapsulates the previous common law rights.

10. At that time, British citizenship was defined under the Nationality Act which provided for acquisition, deprivation and renunciation of citizenship[v]. The 1971 Immigration Act, though dealing with the immigration law, stated the rights of those who had the right of abode and the rights of those who did not.[vi]

11. Apart from defining the "right of abode", the 1971 Immigration Act also provided the statutory definition for the important term: "settled". It was stated at s.33(2A) that "*.... References to a person being settled in the United Kingdom are references to his being ordinarily resident there without being subject under the immigration laws to any restriction on the period for which he may remain.*". A person who was at the time of coming into force of the 1971 Act "settled" in the United Kingdom was treated as having been granted indefinite leave to enter or remain in the United Kingdom: s.1(2) of the Act.

12. The 1971 Immigration Act also dealt with the concept of being "ordinarily resident". According to the Privy Council the term is to be given its usual and ordinary meaning.[vii] The 1971 Immigration Act clarified one aspect of the term. For the purpose of exemption from deportation under the Act it was provided at s.

7(2) that: "*A person who has at any time become ordinarily resident in the United Kingdom or in any of the Islands shall not be treated for the purposes of this section as having ceased to be so by reason only of his having remained there in breach of the immigration laws.*".

13. The British administrators in Hong Kong followed in the footsteps of their counterparts at home at the same time. They enacted the 1971 Immigration Ordinance. They created the "Hong Kong belonger". According to the 1971 Ordinance, a Hong Kong belonger was given the right to land in Hong Kong [s.8(1)]; provided with the protection that he could not be removed from Hong Kong [s.19(2)] and any condition of stay imposed on him had no effect [s.8(2)]. Persons who qualified as Hong Kong belongers under the 1971 Ordinance were broadly speaking, British subjects.

14. However, unlike the British counterparts, the right of a Hong Kong belonger was not seen as one core right deriving from the person's status. Rather, it was described in terms of exceptions to the measures of immigration control. These measures of immigration control therefore acquired a more prominent position than the status of the person.

15. That was because, I think, Hong Kong, unlike Britain, did not have its own nationality law. What Hong Kong had was legislation for immigration control.

16. Immigration control in Hong Kong began in 1923.[viii] Regulations were made in 1923 which required persons other than Chinese and children to possess travel documents when coming to Hong Kong. For non-British subjects, visas were also required. In 1934, legislation was enacted to define categories of "undesirable

immigrants" who might be refused permission to land.[ix] In 1940 legislation was made to empower immigration officers to refuse any person, including Chinese, permission to land, enter or remain in Hong Kong without travel documents.[x] After the second world war, full immigration control for all persons coming to Hong Kong was in place. In 1949 the Immigration Control Ordinance[xi] was enacted. Every one entering Hong Kong was required to enter at an authorized entry point and with permission. A person entering without permission committed an offence. The Immigration Control Ordinance was refined in 1958[xii] by providing for the imposition of limits and conditions of stay on immigrants. By 1958 the full set of statutory immigration control has been put in place.

17. The 1971 Immigration Ordinance[xiii] put together all the previous legislation for immigration control and deportation into one single ordinance. As mentioned before, the Ordinance also created new categories of persons. Apart from Hong Kong belongers, there were two other categories of persons: the resident United Kingdom belongers and the Chinese residents. These latter two categories of persons had the right to land in Hong Kong and any condition of stay imposed on them did not have effect. However, they were liable to deportation.

18. The 1971 Immigration Ordinance defined the term "ordinarily resident" which is a very important element for the determination of a person's immigration status.

19. "Ordinarily resident" has been defined by s.1(4) of the 1971 Ordinance as: "*For the purposes of this Ordinance, a person shall not be treated as ordinarily resident in Hong Kong – (a) during any period after the commencement of this Ordinance in which he remains in Hong Kong – (i) without the authority of the*

Director, after landing unlawfully, or (ii) in contravention of a limit of stay, or (b) during any period, whether before or after the commencement of this Ordinance, of imprisonment or detention pursuant to the sentence or order of any court". "Landing unlawfully" has been defined, in s. 1(2), as "*Reference in this Ordinance to landing in Hong Kong unlawfully are reference to landing or entering Hong Kong in contravention of this Ordinance, the repealed Immigration (Control and Offence) Ordinance or the repealed Immigrants Control Ordinance.*"

20. In 1981 the United Kingdom enacted the British Nationality Act 1981 which took effect since 1983. It, among other things, defined those whose British nationality was derived from their connection with the dependent territories as citizens of a different category from those whose nationality came from a connection with the United Kingdom itself. People in Hong Kong became "BDTC", that is, British dependent territories citizens.

21. The 1981 British Nationality Act also made reference to two important terms for the purpose of the Act. These terms are "settled" and "ordinarily resident".

22. S.50(2) of the 1981 Act provides that : "... *references in this Act to a person being settled in the United Kingdom or in a dependent territory are references to his being ordinarily resident in the United Kingdom or, as the case may be, in that territory without being subject under the immigration laws to any restriction on the period for which he may remain.*"

23. S.50(5) of the 1981 Act provides that: "*It is declared that a person is not to be treated for the purpose of any provision of this Act as ordinarily resident in the*

United Kingdom or in a dependent territory at a time when he is in the United Kingdom or, as the case may be, in that territory in breach of the immigration laws"

24. Again, Hong Kong followed Britain. The category of Hong Kong belonger was redefined by an amendment ordinance to the Immigration Ordinance in 1982[xiv]. The definition relied heavily on the provisions of the British Nationality Act 1981, which included that of "settled". It simply stated in s.2 that *"settled" has the same meaning as it has in the 1981 Act"*.

25. Therefore, it can be seen that the immigration status of a person in Hong Kong was not defined in terms of a core right, but was being determined by reference to immigration control measures imposed from time to time. These measures have changed over the years, often in response to the immigration control policy in force at the time.

26. For example, the Immigration Control Ordinance 1940 did not make immigration offence for those who arrived by air. For those who arrived by sea it was provided that [s. 7] "*Every person who arrives in the Colony shall, if so ordered by the Immigration Officer, proceed as directed from the vessel on which he has arrived, or from the point of entry on the frontier at which he has entered, to a depot and shall remain at such depot until permitted to leave by the Immigration Officer.*". It appears that if the vessel arrived undetected by the Immigration Officer, there would not be any obligation on the part of the person who had arrived. For those who arrived by land, it was provided that [s.8] : "*No person shall enter the Colony across its northern frontier, between Sha-tau-kok and the estuary of the Sham*

Chun River inclusive, except at such entry points as the Governor may appoint by notification in the Gazette." It was only the northern frontier that was guarded. Furthermore, it was not an offence to remain in Hong Kong without permission. The absence of the permission merely made the person liable to deportation. All the immigration control measures were applicable only at the time of the arrival.

27. The Immigration Control Ordinance 1949 made illegal entry to Hong Kong an offence. S.4 of it provided that "*No person may enter the Colony save – (a) at an authorized landing place or point of entry; and (b) under and in accordance with a permit of the Immigration Officer.*". S.15 provided that "*The Immigration Officer may by order, notice or otherwise impose such conditions either general or special in or upon the occasion of or subsequent to any permit granted to an immigrant to enter, whether for the purpose of residence, sojourn or transit visit or for transshipment at a port in the Colony and may at any time vary or add to these conditions as he thinks fit.*". S.23 provided that "*The Immigration Officer shall, at all times, have discretion to limit the stay of any immigrant entering the Colony*". "Immigrants" were those who were not born in Hong Kong [s.2]. A wide discretionary power for permitting entry and imposing conditions of stay was conferred on the Immigration Officer. Whether a person was permitted to enter and remain depended entirely on how the Immigration Officer exercised his discretion. However, the application of the immigration control measures again was confined to the time of the arrival.

28. The Immigration (Control and Offences) Ordinance 1958 was passed to enable immigration control measures to be imposed on those who were already inside Hong Kong.

29. As mentioned previously, the Immigration Ordinance 1971 cut down the power to refuse entry, impose limits and conditions of stay, to deport and to remove certain categories of persons. These immunities or exceptions conferred on the specified categories of persons were similar to those under the right of abode but the formulation was a different one. They were provided as exceptions to immigration control measures rather than the rights of the persons who had the status. Therefore, it is not clear whether it should be the status of the person that makes him not subject to immigration control measures or it should be the immigration control measure that create the status of the person.

30. The wide discretionary power to grant permission to enter and remain conferred under the statutes has been applied according to policy, rather than law. For example, between 1967 to 1974 illegal immigrants from the Mainland were not repatriated but were permitted to regularize their stay in Hong Kong.[xv] From 1974 to 1980 there was in force the "touch-base" policy where illegal immigrants from the Mainland who had reached the urban area were permitted to remain in Hong Kong when they applied to the Immigration Department for such permission.[xvi]

31. Those illegal immigrants would have been in breach of various immigration laws[xvii] in force at the relevant time. Were they "ordinarily resident" in Hong Kong?

32. The nationality convulsion for the Hong Kong people went on. After the signing of the Joint Declaration between China and the United Kingdom; preparation had to be made for the change in the nationality of the Hong Kong people after 1997. The Queen in Council made an order in 1986 to change the status of the BDTC in Hong Kong to "BNO", British national (overseas)[xviii].

33. In Hong Kong, the Immigration Ordinance was amended by an amendment ordinance in 1987.[xix] It created a class of persons who were in effect citizens of Hong Kong and called them "Hong Kong permanent residents". S.2A stated that: "*Hong Kong permanent resident enjoys the right of abode in Hong Kong, that is to say he has the right – (a) to land in Hong Kong; (b) not to have imposed upon him any condition of stay in Hong Kong, and any condition of stay imposed shall have no effect; (c) not to have a deportation order made against him; and (d) not to have a removal order made against him.*" The amendment ordinance added a schedule to the Immigration Ordinance: the First Schedule. The First Schedule provided the definition for Hong Kong permanent residents. These were: "*1. Any person who is wholly or partly of Chinese race and has at any time been ordinarily resident in Hong Kong for a continuous period of not less than 7 years. 2. Any person who is a British dependent territories citizen and who – (a) belongs to a class or description of persons specified in article 2 of the Hong Kong (British Nationality) Order 1986 as having a connexion with Hong Kong; or (b) is such a citizen by virtue of his having a connexion with any of the British dependent territories (other than Hong Kong) mentioned in schedule 6 of the British Nationality Act 1981 and has at any time been married to a person*

specified in sub-paragraph (a). 3. Any person who is a Commonwealth citizen and who immediately before 1 January 1983 had the right to land in Hong Kong by virtue of section 8(1)(a) as then in force."

34. It is apparent from the definition provided that the definition for de facto Hong Kong citizens was couched in terms of British nationality law even though the provision was meant to cater for the return of Hong Kong to China.

35. The Basic Law for the Hong Kong Special Administrative Region of the People's Republic of China was promulgated in 1990. Article 24(2) of the Basic Law defined the categories of permanent residents of the Region. Article 24(3) stipulated that the permanent residents have the right of abode in the Region. Article 24(2) and (3) of the Basic Law is in fact paraphrasing Paragraph 14 of Annex 1 of the Joint Declaration.

36. Despite the fact that the Joint Declaration was signed in 1984 and the Basic Law promulgated in 1990, it was only on the day of the reunification that the Immigration Ordinance was amended so as to cater for the reunification of Hong Kong with the Mainland.[xx]

37. Schedule 1 to the Immigration Ordinance has been replaced by the amendment ordinance. Paragraph 2 of Schedule 1 defines the categories of permanent residents of the Region.

38. The category of persons provided for under paragraph 2(a): "*A Chinese citizen born in Hong Kong before or after the establishment of the Hong Kong Special Administrative Region if his father or mother was settled or had the right of abode in Hong Kong at the time of the birth of the person or at any later time.*".

Paragraph 2(a) has been amended by a Resolution of the Legislative Council on 16 July 1999. Paragraph 2(a) after the amendment reads: "*A Chinese citizen born in Hong Kong – (i) before 1 July 1987; or (ii) on or after 1 July 1987 if his father or mother was settled or had the right of abode in Hong Kong at the time of his birth or any later time*"

39. The Resolution does not have retrospective effect. As a result of the amendment, those who were born before the amendment would still have to prove the status or the right of their parents even when they were born before 1 July 1987.

40. "Settled" is defined under Paragraph 1(5) of Schedule 1 as "*A person is settled in Hong Kong if – (a) he is ordinarily resident in Hong Kong; and (b) he is not subject to any limit of stay in Hong Kong.*"

41. "Ordinarily resident" is qualified by s.2(4) to (6) of the Immigration Ordinance. It reads: "*(4) For the purposes of this Ordinance, a person shall not be treated as ordinarily resident in Hong Kong – (a) during any period in which he remains in Hong Kong – (i) with or without the authority of the Director, after landing unlawfully; or (ii) in contravention of any condition of stay; or (iii) as a refugee under section 13A; or (iv) while detained in Hong Kong under section 13D; or (v) while employed as a contract worker, who is from outside Hong Kong, under a Government importation of labour scheme; or (vi) while employed as a domestic helper who is from outside Hong Kong; or (vii) as a member of a consular post within the meaning of the Consular Relations Ordinance (Cap. 259); or (viii) as a member of the Hong Kong Garrison; or (b) during any period, whether before or after the commencement of this Ordinance, of imprisonment or detention pursuant*

to the sentence or order of any court. (5) Subsection (4)(a) does not apply to a person – (a) who acquired the right of abode in Hong Kong before 1 July 1997; or (b) who remains in Hong Kong with the authority of the Director during the period from 1 July 1990 to 30 June 1997 inclusive after landing unlawfully and whom the Director may exclude from the application of subsection 4(a). (6) For the purposes of this Ordinance, a person does not cease to be ordinarily resident in Hong Kong if he is temporarily absent from Hong Kong. The circumstances of the person and the absence are relevant in determining whether a person has ceased to be ordinarily resident in Hong Kong. The circumstances may include – (a) the reason, duration and frequency of any absence from Hong Kong; (b) whether he has habitual residence in Hong Kong; employment by a Hong Kong based company; and the whereabouts of the principal members of his family (spouse and minor children)."

42. S.2(2) of the Immigration Ordinance provides that: "*Reference in this Ordinance to landing in Hong Kong unlawfully are reference to landing in or entering Hong Kong in contravention of this Ordinance, the repealed Immigration (Control and Offences) Ordinance or the repealed Immigrants Control Ordinance, and for the avoidance of doubt it is hereby declared that no person shall be held not to have landed unlawfully – (a) by reason only of any presumption, conclusive or rebuttable, that he cannot be guilty of an offence or is incapable of committing a crime; or (b) on the ground only that he is not guilty of an offence under subsection (1) of section 38 in respect of paragraph (a) of that subsection.*"

43. Acts of unlawful landing has been traced back to 1940, which has been the case since 1971. Furthermore, persons under disability are expressly included, when it was not so previously. Therefore, children and those unintended entrants who have entered in contravention of immigration laws are regarded as landed unlawfully even these persons cannot be found guilty of an offence. Owing to the scope and period of time covered, a huge number of persons would have been landed unlawfully.

44. "Settled" which includes the status of "ordinarily resident", not subject to "limit of stay" and the "right of abode", are important conditions for permanent resident status in the Region for many categories of persons.

45. The bundle of rights of a citizen has been provided for under the common law, the term "right of abode" only came into existence in 1971 for the United Kingdom and in 1987 for Hong Kong. Before 1987 no one in Hong Kong had the "right of abode" in its statutory form. Under the 1987 Ordinance Hong Kong permanent resident "*enjoys the right of abode*". It is not understood why the right of abode has been used in paragraph 2(a) and not the status of Hong Kong permanent resident. Persons in the category of Hong Kong permanent resident can be dated back at least to 1971 and possibly to 1936 thereby including a far larger number of persons into the category. Furthermore, s. 2AA(2) of the Immigration Ordinance provides that "*A person's right of abode in Hong Kong by virtue of his being a permanent resident of the Hong Kong Special Administrative Region under paragraph 2(c) of Schedule 1 can only be exercised upon the establishment of his status as such a permanent resident in accordance with subsection (1) and,*

accordingly, where his status as such a permanent resident is not so established, he shall, for the purposes of this Ordinance, be regarded as not enjoying the right of abode in Hong Kong.". Is a person under paragraph to be regarded as "having" or having not the right of abode while he is being regarded as "not enjoying" the right of abode? Would his child born in Hong Kong a permanent resident? The bar on the exercise of the right of abode is on paragraph 2(c) permanent residents only, and not on other categories of permanent residents. It is highly discriminatory not to treat all categories of permanent residents as the same.

46. A person could become "settled" in Hong Kong much faster than acquiring the right of abode (which means that he has to become a permanent resident). For those who have entered Hong Kong legally what is required is that no limit of stay is imposed on him. If that is the case, he could become "settled" within a relatively short period of time by satisfying the "ordinarily resident" condition. On the other hand, if the person is to earn his right of abode he would have to reside in Hong Kong for at least 7 continuous years before he could acquire that right unless he was born in Hong Kong to a qualified parent.

47. The alternative qualifying route be settlement also results in the anomaly that a child born to a person who has been settled in Hong Kong but who has not yet qualified as a permanent resident is a permanent resident of the Region when the parent is not.

48. The meaning of "ordinarily resident" has changed over time. The Privy Council in 1922 was of the view that the term bore its usual and ordinary meaning. The United Kingdom in its 1971 Act stated that " *having remained there in breach of*

the immigration laws" do not disqualify a person from being an ordinarily resident. Then in its 1981 Act it provided that: "*at a time when he is ... in that territory in breach of the immigration laws.*" he is not an ordinarily resident. The qualification on ordinarily resident in the 1981 Act has been adopted in Hong Kong by the 1982 Ordinance. Now the list has grown to the one in s.2(4) to (6) of the Ordinance. Changes have also been made to the reference for "unlawful landing". Persons who come to Hong Kong to settle at various times were confronted with different, and sometimes contradictory requirements.

49. In practical terms the present qualifications on "ordinarily resident" would cause problems to children born to parents who have come to Hong Kong illegally. These illegal immigrants were in breach of immigration laws. They had also landed unlawfully. They would accordingly not qualify as persons who were ordinarily residents. For those who were permitted to stay under the "touch-base" policy, because of the unlawful landing, the permission to remain from the Immigration Department would not assist them. The exceptions provided for under s.2(5) might not assist everyone of them, in particular those who did not have the right of abode before 1 July 1997, those who had remained before 1 July 1990 and those who had been imprisoned. The disqualification from ordinarily resident status for imprisonment under s.2(4)(b) also has the effect of rendering a child who is born to a parent who is in prison not a permanent resident at the time of the child's birth as at that time the parent is not "settled".

50. The other requirement for "settled" is not to be subject to any limit of stay in Hong Kong. The Immigration Authority has since 1949 the power to impose a

limit of stay on any person entering Hong Kong. It was until 1971 that such general power was cut down in respect of those who were Hong Kong belongers. Whether a limit of stay is imposed or not and if imposed, for how long, is a matter entirely in the discretion of the Immigration authority. There is nothing to control how the discretion is exercised. It is surprising that a status as important as the equivalent to citizenship is made to depend on such a discretion.

51. The category of persons specified under paragraph 2(b) of Schedule 1: "*A Chinese citizen who has ordinarily resided in Hong Kong for a continuous period of not less than 7 years before or after the establishment of the Hong Kong Special Administrative Region.*"

52. The ordinarily residence under paragraph 2(b) has to be a continuous one. If the ordinarily residence ceases before the expiry of the continuous period of 7 years, the time has to run again. S.2(6) provides for some indicators for deciding whether an ordinarily residence has ceased or not. S.2(6)(b) refers to "habitual residence". It is not clear what does "habitual residence" mean. Does it require a person to form a habit as to his residence? S.2(6)(c) refers to "employment by a Hong Kong based company". It is not clear as to how one should determine whether a company is Hong Kong based or not. It discriminates against those who work for international companies which in practice is much more likely to require their employees to work overseas. S.2(6)(d) refers to "the whereabouts of the principal members of his family (spouse and minor children)". This consideration puts a single person in a disadvantageous position.

53. Paragraph 2(c) of Schedule 1 refers to the category of persons who is: "*A person of Chinese nationality born outside Hong Kong before or after the establishment of the Hong Kong Special Administrative Region to a parent who, at the time of birth of that person, was a Chinese citizen falling within category (a) or (b).*"

54. For paragraph 2(c) persons, his status as a permanent resident is dependent on the parent's qualification as a permanent resident. For the category 2(a) persons, the qualification of the parent refers to the status of being settled or having the right of abode in Hong Kong. It is unclear that why there should be such a difference. Furthermore, a person born in Hong Kong can become a permanent resident later if the person's parent is able to satisfy the requirements at a later time whereas for those born outside Hong Kong, they would have to meet the requirements at the time of the person's birth. This would have unfortunate consequences to those who otherwise do not have a citizenship status in the place of his birth.

55. The 7 years continuous ordinarily residence is also relevant for qualification under paragraph 2(d) of Schedule 1. Paragraph 2(d) reads: "*A person not of Chinese nationality who has entered Hong Kong with a valid travel document, has ordinarily resided in Hong Kong for a continuous period of not less than 7 years and has taken Hong Kong as his place of permanent residence before or after the establishment of the Hong Kong Special Administrative Region.*"

56. Paragraph 3 of Schedule 1 provides the mechanism for establishing permanent residence under paragraph 2(d). It requires the person, among other things, to "*furnish information that the Director reasonably requires to satisfy him that the person has taken Hong Kong as his place of permanent residence. The*

information may include the following – (i) whether he has habitual residence in Hong Kong: (ii) whether the principal members of his family (spouse and minor children) are in Hong Kong; (iii) whether he has a reasonable means of income to support himself and his family; (iv) whether he has paid his taxes in accordance with the law". When comparing the considerations for the purposes of "permanent resident" with those for "ordinarily resident", it appears that to be a "permanent" resident there is a requirement that he has to fulfil his obligation to pay tax while it does not appear to be important that he is frequently absent from Hong Kong, even for lengthy period of time.

57. For paragraph 2(d) permanent residents, similar but not the same as the paragraph 2(c) permanent residents, they are subject to the restriction that they cannot enjoy the status of a permanent resident before the establishment of it. Paragraph 3(2) Schedule 1 provides that "*A person claiming to have the status of a permanent resident of the Hong Kong Special Administrative Region under paragraph 2(d) does not have the status of a permanent resident in the Hong Kong Special Administration Region until he has applied to the Director and the application has been approved by the Director.*". For paragraph 2(c) permanent residents it is the exercise of their right of abode that is being separated from their status of permanent residents; while for paragraph 2(d) permanent residents paragraph 3(2) requires the application for, and the approval of, the status. It is difficult to understand why it was necessary to put in such a provision for this particular categories of permanent residents. It is trite law that nothing is established by claiming. The status or the right has to be established. Does paragraph 3(2)

implies that, for other categories of permanent residents. it would not be necessary for them to apply for and have their status approved?

58. Paragraph 3(3)(a) Schedule 1 provides that: "*For the purposes of paragraph 2(d), a person is taken to have entered Hong Kong on a valid travel document – (a) if he entered Hong Kong before 1 July 1997 with an expired travel document or with a travel document that was not a valid travel document but was permitted to remain by an immigration officer or an immigration assistant*". "Valid travel document" is defined in s.2 of the Immigration Ordinance[xxi]. When a travel document is not valid the permission to remain could also become invalid due to fraud, mistake or misrepresentation. Furthermore, using invalid travel document could be in breach of immigration laws at various times[xxii]. As mentioned before. a person who had landed unlawfully in breach of immigration legislation would not be an ordinarily resident. Paragraph (3)(a) is confined to "for the purposes of paragraph 2(d) only. It could not resolve the difficulty with the unlawful landing.

59. Paragraph 2(e) of Schedule 1 provides that: "*A person under 21 years of age born in Hong Kong to a parent who is a permanent resident of the Hong Kong Special Administrative Region in category (d) before or after the establishment of the Hong Kong Special Administrative Region if at the time of his birth or at any later time before he attains 21 years of age, one of his parents has the right of abode in Hong Kong.*".

60. For paragraph 2(e) permanent residents, there is no qualifying route by the person's parent being settled in Hong Kong. The parent would have to have the right of abode in Hong Kong. However, similar to the case of paragraph 2(a)

permanent residents, and different from paragraph 2(c) permanent residents, the right of abode could be acquired at a later time, but it would have to be before the person attains the age of 21. Furthermore, a person cannot acquire paragraph 2(e) permanent resident status by the person's parent being settled in Hong Kong.

61. The Immigration Ordinance has been taking on, changing, and repealing provisions, which were highly specific and complex, from its predecessors and from nationality and immigration legislation in Britain in the course of its history. In so doing, the drafters of it face the almost impossible task of reconciling all the provisions. The difficulty is compounded by the different policies adopted by the Immigration Authority at different times. When the Basic Law of Hong Kong Special Administrative Region was promulgated in 1990 and provided a clean slate for citizenship for Hong Kong, that should be a very good opportunity for Hong Kong to enact its citizenship and immigration law and to get rid of the burden inherited from history. Unfortunately, the opportunity has been missed and the Immigration Ordinance remains a patchwork.

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[i] Ordinance No. 10 of 1845, disallowed on 1 January 1948.
[ii] See: Deportation and Conditional Pardons Consolidation Ordinance 1876 (No. 8 of 1876); Banishment and Conditional Pardons Ordinance 1882 (No. 1 of 1882); Deportation Ordinance 1912 (No. 14 of 1012); Deportation Ordinance 1917 (No. 25 of 1917) and Deportation of Aliens Ordinance 1935 (No. 39 of 1935).
[iii] Lord Diplock in Reg v Bhagwan [1972] AC 60 at 74.
[iv] Lord Denning MR in Reg v Home Secretary, ex p Phansopkar [1976] 1QB 606 at 615.
[v] British Nationality Act 1948.
[vi] Immigration Act 1971 s. 1.
[vii] *Gout v Cimitian* [1922] 1 AC 105.
[viii] Passport Ordinance 1923 (No. 35 of 1923).
[ix] Immigration and Passport Ordinance 1934 (No. 8 of 1934).
[x] Immigration Control Ordinance 1940 (No. 32 of 1940).
[xi] No. 4 of 1949.
[xii] Immigration (Control and Offences) Ordinance 1958 (No. 34 of 1958).
[xiii] Immigration Ordinance 1971 (No. 55 of 1971) (now Cap. 115).
[xiv] Immigration (Amendment)(No.2) Ordinance 1982 Ord. No. 78/82.
[xv] Podmore *The Population of Hong Kong* in *Hong Kong: The Industrial Colony* page 38.
[xvi] *Hong Kong 1981* page 145.

[xvii] The words "when he is there in breach of the immigration laws" in s.33(2) of the Immigration Act 1971 do not require that there should be subsisting a breach in respect of which sanctions may be imposed but cover the case of a person whose presence arises from a breach, e.g. any case of illegal entry: *Azam v Secretary of State for Home Department* [1973] 2 WLR 1058 at 1066 per Lord Wilberforce.

[xviii] The Hong Kong (British Nationality) Order 1986 LN 233 of 1986.

[xix] Immigration (Amendment)(No. 2) Ordinance 1987 Ord. No. 31/87

[xx] Immigration (Amendment)(No.2) Ordinance 1997 Ord No. 122/97

[xxi] The conditions are complex and they could be dated back to as early as 1940. See Immigration Control Ordinance 1940 s.10.

[xxii] Eg: Immigration Control Ordinance 1940 s.22; Immigration Control Ordinance 1949 s.18; Immigration (Control and Offences) Ordinance 1958 s. 18.

Due Process and Aliens

Mr Paul Harris

DUE PROCESS AND ALIENS

Paper for seminar on Immigration Law and Policies to be held at Hong Kong University on Saturday 24 February 2001

" The common law has not proved a great source of procedural protection for aliens". So states the current (1999) 4th edition of Craig's Administrative Law (p.443).

The theme of this paper is that the common law's inadequacies in this respect have led to it being superseded in most common law jurisdictions by statutory systems of immigration control which are very much subject to due process requirements, while at the same time the development of the field of judicial review has made traditional common law approaches to due process and aliens increasingly anomalous and obsolete.

From the time of the Act of Union between England and Scotland in 1707, which created the concept of a British subject, anyone who was not a British subject was an alien. "Alien" is thus a nationality law concept, and sits uneasily with the law of immigration control in the Hong Kong Special Administrative Region, which is not a country, does not confer a nationality, and is concerned as one of the main aims of its immigration control to control entry from the Mainland by persons who share their Chinese nationality with most Hong Kong. At the same time the Hong Kong courts in recent years have in dealing with immigration cases placed heavy reliance on English cases which denied procedural protection to applicants because they were aliens. Stock J. went so far as to in Thapa Indra Bahadur v Secretary of Security (unrep. HCAL 18/99: 21 October 1999) as to describe the term "alien" as a label which he did not consider important. That approach overlooks the fact that the lack of procedural protection for aliens in the UK was based on the fact that they were not subjects. It was not based on practical issues relating to the desirability of effective immigration control. This is apparent from the fact that, while immigration control for many years only applied to aliens, it was when immigration control was extended to persons who were not aliens that procedural safeguards began to be found by the courts to be necessary, even though the scale of immigration by such non-aliens was vastly greater than the scale of immigration by aliens had been in earlier years

The first system of immigration control in the UK was introduced by the Aliens Act 1905. It was aimed largely at reducing immigration of Russian Jews, large numbers of whom had emigrated to the UK as a result of persecution in Russia between 1880 and 1905. It forbade aliens to land except at certain authorised ports and gave immigration officers power to refuse leave to land to "undesirable aliens". The principal test of undesirability was defined as not being in a position to obtain a means of decently supporting themselves and their dependents, or appearing likely from disease or infirmity to be a charge on the rates. The power only applied to passengers who travelled steerage class (the lowest class) on immigrant ships (defined as ships carrying more than 20 aliens apart from crew members). It was not without procedural safeguards, in that it provided for the right of appeal to an Immigration Appeal Board. Despite this it was described by

the leading English constitutional lawyer of the day, Professor A.V. Dicey, as one of the greatest inroads on individual liberty.

The powers under the 1905 Act were extended on the outbreak of World War 1 in 1914. This Act enabled the King in Council to make Orders prohibiting or restricting the landing or embarkation of aliens, to deport them, to require them to live in specified areas, to make them comply with any provisions as to registration, to prohibit or require them to change their abode, or to restrict their travel. Almost immediately after the passage of the Act severe restriction orders were brought into force. These were largely continued at the end of World War 1 by the Aliens Restriction (Amendment) Act of 1919, which repealed the 1905 Act and ended the right of appeal which that Act had provided.

This was the background to the first leading case on due process and aliens R v Leman Street Police Inspector ex parte Venicoff [1920] 3 KB 72, where it was held that an alien had no right to be in the UK and so had no right to make representations before a deportation order was made against him.

The system of control of aliens as provided by the 1919 Aliens Restriction Amendment Act remained in force until 1971, when the Immigration Act 1971 introduced the basis of the present system of immigration control in the UK.

The decision in Venicoff was followed in R v Governor of Brixton Prison ex parte Soblen [1963] 2 QB 242. Soblen was convicted in the United States of spying for the Soviet Union and was sentenced to life imprisonment. He was released on bail pending an application for a new trial, and fled to Israel, from which he was forcibly expelled to be returned to the USA. When his plane landed in London he inflicted knife wounds on himself which necessitated his hospitalisation. He was formally refused leave to land and the Home Secretary then a deportation order on him. Upholding the validity of the deportation order, the Court of Appeal held that deportation was an act of an executive and not a judicial or quasi judicial character, and that accordingly an alien was not entitled to an opportunity to submit representations against the making of the order.

Soblen indicated that nothing had changed in terms of provision of due process protection for alients over the 43 years since Venicoff was decided. However at about the same time two events occurred which would in due course lead to the introduction of full due process for aliens both in the UK and in other Commonwealth countries.

Firstly, in Ridge v Baldwin 1964 AC 40 the House of Lords struck down the distinction between adminstrative and judicial or quasi-judicial decision which had been relied on by the Court of Appeal in Soblen.

Secondly, immigration control was extended for the first time to persons who were not aliens.
It should be remembered that at the time Venicoff was decided, about a quarter of the world's population were British subjects, did not fall within the scope of the aliens

legislation, and were entirely free to enter the UK and settle there without restriction. This applied for example to most of the inhabitants of what are now India, Pakistan and Bangladesh, Burma, Sri Lanka, and Malaysia, large parts of Africa and the Caribbean, Australia, Canada and New Zealand, to Ireland, and to persons born in Hong Kong.

As former British colonies became independent most of them remained members of the British Commonwealth. Under Section 1(2) of the British Nationality Act 1948 the terms British subject and Commonwealth citizen were declared to be synonymous, and Commonwealth citizens, being British subjects remained outside the scope of the Aliens Orders and free of immigration control. Although the Republic of Ireland after securing independence in 1922 did not join the British Commonwealth its citizens were expressly declared by the 1948 Act not to be aliens.

In the 1960s large scale Commonwealth immigration to Britain, on a much larger scale than the Russian Jewish immigration half a century earlier, led to introduction of immigration control on Commonwealth citizens by the Commonwealth Immigrants Act 1962.

The scope of due process under the Commonwealth Immigrants Act was examined in Re HK (an infant) 1967 2 QB 617. The English Court of Appeal held that the rules of natural justice applied to decisions taken by immigration officers under that Act. It is worth quoting the two relevant parts of the two substantive judgments. Lord Salmon said that:-
" When Parliament passed the Commonwealth Immigrants Act 1962, it deprived Commonwealth citizens of their right of unrestricted entry into the UK. It laid down conditions under which they might enter and left it to the immigration officers to decide whether such conditions existed. Their decision is of vital importance to the immigrants since their whole future may depend upon it. In my judgment it is implicit in the statute that the authorities in exercising these powers and making decisions must act in accordance with the principles of natural justice."

Salmon LJ therefore appears to be basing his decision both on the fact that the enabling legislation took away a pre-existing right of Commonwealth citizens to enter the UK freely, and on the vital importance of the decision to the immigrant affected.

It might be thought that Salmon LJ's second reason for finding that the rules of natural justice applied was more logical and compelling than the first. The importance of the decision for their futures would suggest that the decision on whether to admit them entry should be taken fairly, allowing them a hearing, and without bias. To base this purely on the theoretical existence of a previous right could only realistically be applied as a basis for the application of natural justice in the years immediately after the right was removed by the 1962 Act. Thereafter increasingly large numbers of Commowealth citizens would have been born after the passage of that Act and would therefore never personally have had a right which was taken away. Moreover membership of the Commonwealth is not static. Both South Africa and Pakistan have left the Commonwealth and then re-entered it after a period of years. In 1995 Mozambique was admitted to the Commonwealth although it was never a British territory and its citizens never had a right to enter the UK

as British subjects. Also admitted in 1995 was Cameroon, most of which was once a French colony, but about one third of which was once a British colony. To decide whether immigration officers examining would-be immigrants are required to be fair based solely on the historical accident of whether an examinee, who may never previously have been in the UK, might once have had a right to enter it – so that if not they can be as unfair as they like – would seem bizarre.

Lord Parker CJ, unlike Salmon LJ, did not base his decision on the removal of a previous right. He said:-

" .. I myself think that even if an immigration officer is not in a judicial or quasi-judicial capacity, he must at any rate give the immigrant an opportunity of satisfying him of the matters in the subsection, and for that purpose let the immigrant know what his immediate impression is so that the immigrant can disabuse him. That is not,as I see it, a question of acting or being required to act judicially, but of being required to act fairly. Good administration and an honest or bona fide decision must, as it seems to me, require not merely impartiality, nore merely bringing one's mind to bear on the problem, but acting fairly; and to the limited that the circumstances of any particular case allow, and within the legislative framework under which the administrator is working, only to that limited extent do the so-called rules of natural justice apply, which in a case such as this is merely a duty to act fairly".

Although Lord Parker CJ in this passage refers to the legislative framework, the reasoning in his decision does not link the need to act fairly to the existence of a previous right, and so logically applies to all immigration decisions and not only those involving Commonwealth citizens.

Regrettably it appears that Lord Parker did not follow the logic of the passage quoted above in his later decision in R v Home Secretary ex parte Avtar Singh (Divisional Court, unreported, 25 July 1967), when he held that a Commonwealth citizen who wanted to enter the UK for marriage was not entitled to be told why he was refused admission or given an opportunity to make representations.

Avtar Singh was relied on by Lord Denning M.R. in Schmidt v Home Secretary [1969] 2 Ch. 149, a case where an American student was prohibited from remaining the UK to study at an institution run by the Church of Scientology, and challenged his deportation on the ground that he had not been given an opportunity to make representations first. Lord Denning expressly stated that the distinction between administrative and quasi-judicial decisions relied on in Soblen could no longer stand since Ridge v Baldwin. He went on however to hold that aliens were not entitled to a hearing in accordance with natural justice. After citing Avtar Singh Lord Denning said:-

"If such be the law for a commonwealth citizen, it is all the more so for a foreign alien. He has no right to enter this country except by leave; and , if he is given leave he has no right to stay for a day longer than the permitted time. If his permit is revoked before the time limit expires he ought, I think, to be given an opportunity of making representations,

for he would have a legitimate expectation of being allowed to stay for the permitted time Except in such a case, a foreign alien has no right – and, I would add, no legitimate expectation – of being allowed to stay. He can be refused without reasons given and without a hearing. Once his time has expired he has to go. In point of practice however I am glad to say that the Home Secretary does not act arbitrarily. He is always ready to consider any representations that are put before him: as indeed we are told he is ready to do in these very cases. We know too that Sir Roy Wilson and his colleagues have recommended (in Command Paper 3387) a system of appeals against exclusion of aliens. This may soon become law. But it is not so yet".

The position was very soon changed in the UK by the implementation of Sir Roy Wilson's recommendations for a system of immigration appeals, first against exclusion of Commonwealth citizens by the Immigration Appeals Act 1969, and then extended to aliens also by the Immigration Act 1971.

The 1971 Act ended for most immigration purposes the previous rigid distinction between Commonwealth citizens and aliens and dealt with both groups, although the two were not completely assimilated. There remain some categories of admission to the UK restricted to Commonwealth citizens, and there remains a residual prerogative power in relation to aliens, although its scope is unclear. The main area where it may still deprive an alien of due process is where national security is involved. R v Home Secretary ex parte Hosenball [1977] 3 All ER 452 held that the interests of national security can override a normally applicable immigration rule. Where national security is invoked the court cannot review the evidence to see if it justifies the Home Secretary's conclusion, but they can still quash a decision if it is irrational or perverse or based on a misdirection.

Since the enactment of the Immigration Act 1971 there has been complete acceptance in the UK that due process safeguards apply to immigration officers carrying out their duties under the Act. It was established that they are required to be fair in R v Home Secretary ex parte Moghul 1974 1 QB 313. Like Schmidt ,this was a Court of Appeal decision where judgment on the point was given by Lord Denning. This is what he said about fairness:-

" An immigration officer is not a judge or a judicial officer. He has not to obey set rules of procedure. He is engaged in administering the control of immigrants into this country. It is a most responsible and delicate task. He is of course bound to act honestly and fairly.".

Lord Denning does not attempt to reconcile or distinguish his own earlier judgment in Schmidt, which was not cited to him. Since it was held in O'Reilly v Mackman [1983] 2 AC 237 that the rules of natural justice " mean no more than the duty to act fairly", it appears that Lord Denning's rulings in Schmidt and in Mughal are inconsistent.

It has been argued in Hong Kong (where Schmidt is much cited in immigration cases) that the distinction between Schmidt and Mughal arises because in the latter the court was

operating under the new system of immigration control introduced by the Immigration Act 1971. However there is nothing in the judgments to show that the court regarded this as a significant distinction, nor is there any express provision in the Immigration Act 1971 which applies the rules of natural justice or procedural fairness where they did not exist before.

Nor can it be argued that a distinction arises because since the Immigration Act 1971 came into force (on 1 January 1973) immigration control of aliens has been based on a statute, whereas before that date refusal of entry of aliens took place under prerogative powers. While refusal of entry to aliens took place under prerogative powers, deportation of aliens (with which Schmidt was directly concerned, as he had already been permitted to enter the UK) took place under the Aliens Order 1953, a statutory instrument made under the Restriction of Aliens Act 1914.

It appears therefore that Mughal in fact extended the law in respect of due process for aliens from the position taken earlier in Schmidt.

In the years since Mughal the English courts have regularly proceeded on the basis that immigration decisions are subject to the requirements of procedural fairness, and the point is no longer an issue.

The extent of the requirements of procedural fairness in more recent UK law is illustrated by Home Secretary v Thirukumar [1989] Imm.AR 402, a Court of Appeal cases concerning asylum seekers where Bingham LJ said , dismissing an appeal by the Home Secretary:-

" Fairness

I have not found this an easy or straightforward issue. There was in these cases no oppression or over-reaching of the applicant and the procedure adopted had, as I infer, been regularly used without attracting criticism. It is however plain that asylum decisions are of such moment that only the highest standards of fairness will suffice. I am in the end persuaded.

1. that if an opportunity to make representations is to be meaningful the mind of the applicant must be directed to the considerations which will, as matters stand, defeat his application; and

2. that if an opportunity to supplement previous answers is to meaningful the applicant must be reminded of or (preferably) shown the answers which he gave before: this is most obviously so where (as in two of these cases) a year had elapsed since the previous interview, but given the difficulties which can occur when questions are asked through an interpreter and the strain to which the applicant may well be subject at the time of the first interview I think it necessary even where the interval has been much shorter.

I am not seeking to make any general statement about natural justice or procedural propriety but simply to indicate what, in the peculiar circumstances of cases such as these, fairness seems to me to require."

Returning to my opening quote from Craig's administrative law, the author's statement that the common law has not provided a great source of procedural protection for aliens is now highly misleading in relation to the UK, since the position of aliens has in most respects been governed for many years not by the common law but by statute, and the courts have applied and continue to apply strict due process criteria in reviewing immigration decisions relating to aliens.

Aliens from the 13 other countries (apart from the UK and Ireland) of the European Union are in some respects now afforded greater protection than Commonwealth citizens, due to the freedom of movement provisions of the Treaty of Rome which have since 1974 been applied in the UK. However that is another story.

What of the rest of the common law world?

In Canada, it is well-established that due process applies to immigration decisions. In the leading case of Singh v Minister of Employment and Immigration (1984) 1 S.C.C. 177 the Supreme Court of Canada struck down as unconstitutional a procedure in Section 71 (1) of the Immigration Act 1976 which permitted an administrative decision as to whether a full hearing was required in refugee cases. It held that the provision in Section 2 of the Canadian Bill of Rights (1960), that no one be deprived of a right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations, meant that the Immigration Appeal Board was required in all circumstances to apply the rules of natural justice to an application filed by a person claiming refugee status by holding a full hearing in each case.

In Australia the law relating to procedural fairness in immigration matters was dramatically altered by Kioa v West (1985) 159 CLR 550. Before Kioa, the High Court of Australia had held in Salemi v Mackellar (No. 2) 1977 that the exercise of the Minister of Immigration's deportation powers were not subject to requirements of natural justice. In Kioa, however, the court held that the Minister's delegate denied procedural fairness in failing to put prejudicial allegations to two Tongan citizens before deciding to deport them as prohibited immigrants. The majority in Kioa went to great lengths to distinguish Salemi. However in subsequent decisions[1] it has become clear that Mason CJ set a new and wide-reaching standard in Kioa when he said:-

" The law has now developed to a point where it may be accepted that there is a common law duty to act fairly, in the sense of according procedural fairness, in the making of

[1] eg. Ainsworth v Criminal Justice Commission (1992) 175 CLR 564; Johns v Australian Securities Commission (1993) 178 CLR 408; Annetts v McCann (1990) 170 CLR 408.

administrative decisions which affect rights, interests and legitimate expectations, subject only to the clear manifestation of a contrary statutory intention."

The wording of Mason J's judgment might at first glance be thought to add little to the due process protection of immigrants, since in other jurisdictions – notably Hong Kong to which I turn shortly – it has been held that immigrants do not generally have a legitimate expectation of a fair hearing. However the test was applied in Minister for Immigration and Ethnic Affairs v Teoh 1995 183 CLR 273 not merely to impose a duty to observe procedural fairness but to give that duty some specific content by requiring that the applicant be invited to address a particular issue. All of the judges in Teoh assumed that procedural fairness was required. A deportation order had been made against the applicant following the rejection of his application for resident status. The Minister's delegate noted that the applicant's wife and children faced a " very bleak and difficult future" as a result, but concluded that this was not compelling enough to justify the grant of resident status given the applicant's criminal record and his undoubted failure to meet the "good character" requirement of the Department's policy manual. The High Court held that the delegate had not treated the best interests of the children as " a primary consideration" as required under the United Nations Convention on the Rights of the Child. The delegate was under no express legal obligation to observe the Convention since it had not been incorporated into Australian law. However 3 of the majority judges held that Australia's ratification of the Convention gave rise to a legitimate expectation that administrative decision makers would comply with its terms. Before giving a decision inconsistent with that expectation, the Minister's delegate was required to give the applicant notice and an adequate opportunity to argue against that course. This was required despite the fact that the applicant had already had " opportunity to provide whatever material he wished" in support of his applications.

In this case the court applied a particular objective meaning to legitimate expectation. As Toohey J said:-

" Legitimate expectation in this context does not depend upon the knowledge and state of mind of the individual concerned. The matter is to be assessed objectively, in terms of what expectation might reasonably be engendered by any undertaking that the authority has given."

This approach makes it clear that actual expectation is not necessarily required.

In New Zealand the Immigration Act 1964 provides a statutory framework governing all immigration decisions,providing a system of administrative appeals. In addition in the leading case of Daganayasi v Minister of Immigration 1980 2 NZLR 130 the New Zealand Court of Appeal held unanimously that the Minister's decision to deport the applicant was invalid on the ground of procedural unfairness because the report and memoranda of a medical referee, who had reported on the ability to provide treatment in the applicant's native Fiji for a rare metabolic disorder suffered from by his New Zealand-born children, or at least the substance of any prejudicial comments in those

documents, should have been disclosed to the appellant or her advisers before a decision was made, to allow her a reasonable opportunity of answering them.

In Hong Kong, in contrast with the statutory and case law extensions of due process to aliens which have occurred in the UK, , Canada, Australia and New Zealand, the cases about due process for immigrants show a steadfast reluctance by the courts to intervene, a widespread abdication of responsibility, and increasingly sweeping statements about the non-applicability of basic procedural fairness.

Contrast, for example, the concern of the High Court of Australia with the bleak future of the Teoh family, with the words of Godfrey J.A. in the leading Hong Kong immigration case of Ho Ming Sai v Director of Immigration [1994] 1 HKLR 21.

The case concerned two sisters aged 22 and 19 who were the children of Hong Kong residents but were themselves illegal immigrants from China. Their parents were separated, and the daughters lived with and cared for their father, who was a paranoid schizophrenic who required his daughters' care if he was to remain in the community.

Godfrey J.A., in dismissing the applicants appeal from the refusal of judicial review of the Director of Immigration's decision to remove them both to China, said:-

" The Director of Immigration's power to allow an illegal immigrant to stay here is administrative rather than judicial in character. Of course, those on whom administrative powers are conferred are not altogether immune from judicial review. On the contrary. It behoves every civil servant entrusted with administrative powers always to remember the judge at his elbow. But the grounds on which the exercise of such administrative powers will be judicially reviewed are, in my judgment, necessarily, much more limited than the grounds on which the court will review the exercise of a power of a judicial, or quasi-judicial, character. Certainly the court would be prepared to intervene in the event of any misuse by the Director of Immigration of his power under s. 13. If he were to abuse his power illegally (e.g. by refusing to consider an exercise of his powers in favour of an illegal immigrant unless bribed to do so) or irrationally (e.g. by refusing to consider an exercise of his powers in favour of any illegal immigrant of Chinese race or nationality) the court would intervene. But further than that I do not believe the court would or should go.".

This passage, still frequently cited, was anachronistic and wrong when it was written , resurrecting as it does the distinction between quasi-judicial and administrative functions which was quashed in Ridge v Baldwin in 1964. Even more seriously it completely excludes procedural unfairness as a ground of judicial review of immigration decisions.

In making that exclusion the Court of Appeal in Ho Ming Sai was following its own earlier decision in Ng Yuen Shiu v Attorney-General 1981 HKLR 352. In that case the court, after considering Venicoff, Soblen and Schmidt, as well as Salemi, which was then still the leading Australian case, held that the appellant, an illegal immigrant who had

come forward to take advantage of a undertaking by the Director of Immigration that illegal entrants from Macau who came forward would not necessarily be removed but that each case would be considered on its merits, was not entitled to rely on any general duty on the Director of Immigration to act fairly, although in view of the particular facts of the Director's announcement he was entitled to a hearing before being removed. Ex parte Mughal was not cited, and consequently there was no focus on the apparent conflict between Schmidt and Mughal.

Ng Yuen-Shiu was appealed further to the Privy Council, where it is reported at 1983 2 A.C. 629. The Privy Council dealt with the issue of a general right to fairness as follows:-

" The argument for the Attorney-General raised two questions – one of wide general importance, the other of more limited scope. The general question, which both the High Court and the Court of Appeal decided in favour of the Attorney-General, is whether an alien who enters Hong Kong illegally has, as a general rule, a right to a hearing, conducted fairly and in accordance with the rules of natural justice, before a removal order is made against him. The narrower question is whether, assuming the answer to the general question is in the negative, nevertheless the applicant has a right to such a hearing in the particular circumstances of this case. The Court of Appeal answered the latter question in favour of the applicant and therefore made the limited order of prohibition now under appeal. Having regard to the view which their Lordships have formed on the narrower question, it is unnecessary for them to decide the general question. They will therefore assume, without deciding, that the Court of Appeal rightly decided that there was no general right in an alien to have a hearing in accordance with the rules of natural justice before a removal order is made against him."

This unusual situation, where the highest judicial authority for Hong Kong had formally assumed but not decided a matter, effectively left the decision of the Court of Appeal as the authority on the subject. Ironically, in the very same case, the Hong Kong Court of Appeal on another point decided that it was bound by its own decisions, in accordance with the principles laid down in Young v Bristol Aeroplane Company. 1944 L.R.K.B. 718

Ng Yuen-Shiu and Ho Ming – Sai were followed by the Court of Appeal in R v Director of Immigration ex parte Chan Heung Mui (1993) 3 HKPLR 533. This was another case with strong humanitarian aspects. The applicant mother was a resident of the Mainland who had married a Hong Kong resident. She then entered Hong Kong illegally, and had given birth there to two daughters who were aged 22 months and 7 months at the time of the decision. Her husband was mentally retarded. The Director refused to allow her to stay in Hong Kong. In refusing to quash the decision the Court held that the Government's stated policy on illegal immigrants that they should all be returned unless there were considered to be strong humanitarian reasons for doing otherwise, did not create a legitimate expectation that the Director is bound to consider each case on humanitarian grounds before deciding to repatriate the illegal immigrants to China; and that an illegal immigrant did not have, as a general rule, a right to hearing, conducted

fairly and in accordance with the rules of natural justice, before a removal order was made against him.

The issue reached Hong Kong's Court of Final Appeal in Lau Kong Yung v Director of Immigration 1999 3 HKLR 778. The main issue in this case was the legality of the re-interpretation of the court previous judgment on the right of abode under Article 24 of the Basic Law, by the Standing Committee of the People's National Congress. Having upheld the legality of the re-interpretation, the court had to consider whether those affected might then have any right to make representations before their removal. It held(Bokhary PJ dissenting) that , applying Chan Heung-Mui, the director was not bound to take into account humanitarian grounds in considering the making of a removal order. Bokhary J. in his dissenting judgment expressly relied on " the general notions of fairness that may reside in the common law"(quoting Professor Jeffrey Jowell), as well as the general requirement that Hong Kong should remain a humane society, as requiring the Director to consider humanitarian considerations. The court however did not decide whether procedural fairness applied to immigration decisions.

Since that decision, the courts have taken divergent views as to whether fairness applies to immigration decisions.

Stock J. held in Thapa Indra Bahadur (citation above), after reviewing the authorities, that the rules of natural justice did not apply to refusal of entry to those with no right of entry, to removal of illegal immigrants, or of those without the right of abode and whose permission to remain had expired, nor so as to give a proposed deportee the right to make representations before the making of a deportation order. He held however that:-

" under the Immigration Ordinance the rules of natural justice are not as a general rule excluded in the case of those against whom a deportation order has been made, particularly where the deportee has been lawfully landed and such permission as he has to remain in Hong Kong has not expired at the date the deportation order is made. However what the content of the rule will require or what fairness will require in a particular case will depend upon the statutory limb under the order is made, the status of the person in respect of whom the order is made, and the facts of the case".

In adopting this view Stock J. was following Singh v Secretary for Security [1996] 6 HKPLR 440, where Keith J. ruled that the making of a deportation order required the striking of a balance between the threat posed by the potential deportee's presence in Hong Kong and the hardship which deportation would cause him and innocent third parties. That case in effect assumed the application of the rules of natural justice in relation to making of deportation orders.

Thapa was the subject of both an appeal to the Court of Appeal, and a cross appeal by the Secretary for Security arguing that the judge was wrong to find that the rules of natural justice applied at all in the situation of the case. However the Court of Appeal expressly declined to consider this issue when that case came before it, dealing with the appeal on other points.

More recently Hartman J. held in Gurung Kesh Bahadur (unrep. HCAL 11/2000, 30 May 2000) that immigration officers were " of course required to be fair". This case therefore assumes that the law in Hong Kong is the same as in England since Mughal . The case was decided against the applicant on other grounds, and is the subject of appeal on 11 May, 2001, so it may be that the issue of fairness will be reconsidered at that hearing, although the case turns primarily on other issues.

In marked contrast to the previous 2 cases Yeung J. excluded fairness as a basis for judicial review in immigration cases in Krishna & Hema Debi Rai (unrep. HCAL 145/99, 15 February 2000), a case involving refusal of an application to stay in Hong Kong on the basis of marriage. He said :-

" It is well –established that the discretion to allow a change of status to enable a visitor to stay in Hong Kong is purely an administrative decision. It is entirely a matter for the Director to decide how the discretion should be exercised, and the Courts will not assume any supervisory jurisdiction, not those in accordance with Wednesbury principles, and would only interfere if there had been bad faith or equivalent thereof".

This goes beyond any previous Hong Kong case in abdicating supervisory responsibility for immigration decisions. It resurrects, in 2001, the distinction between administrative and judicial decisions which was overruled in Ridge v Baldwin in 1964, and draws heavily on Godfrey J's judgement in Ho Ming-Sai, quoted above, which was given in ignorance of the decision in Mughal.

It might be thought that that judgment cried out for an appeal. As Counsel for the Applicants I would very much like to have appealed, but could not do so because after the hearing the marriage of the parties broke up for quite unconnected reasons. Such are the vagaries of a system based on precedents.

I hope I have shown that the negative attitude to due process in immigration decisions shown by the Hong Kong courts is both out of step with developments elsewhere in the common law world and based on a serious misunderstand of the way in which the law in this field developed in England between 1969 and 1974 and has developed since.

As a believer in rationality in the law I would like to suggest that the second of the two reasons given by Lord Salmon in Re HK (an infant) should be the guiding principle for judicial review of immigration decisions in Hong Kong. These are very important decisions for the individuals affected and it is therefore right that they should be taken fairly, and that the courts should intervene if they are not.

Hong Kong is also out of step with the other common law jurisdictions in having no published immigration rules and no immigration appeals system. At present the courts hear many judicial review cases brought because there is no other avenue of appeal for a

person dissatisfied by an Immigration Department decision These cases are extremely expensive and time-consuming, and much time is spent in the hearings establishing what the Immigration Department's relevant policy is, since this must be extracted from affirmation evidence by the Department's officers, which inevitably do not deal with all the points which arise in argument during the hearing as different cases are compared for the purpose of evaluating precedents.

In 1996 in a detailed report written by Philip Dykes, Hong Kong Human Rights Monitor recommended that Hong Kong should have published immigration rules and an immigration appeal system. That report was ignored by Government. A similar report has been published this year by the Law Society. The need for Hong Kong's archaic system of immigration control to be overhauled and replaced by a modern system reflecting current standards of due process is urgent, and it is to be hoped that the Government will not ignore it for much longer.

Struggling with the Right to Family Life

Dr Athena Liu

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Struggling with the right to family life

The paper examines the extent to which the right to family life is recognised in HK both pre and post 97. It concludes that, legal remedies apart, more immediate practical options could be explored to facilitate family reunion.

1. Meaning of right to family life in international human rights law (International Covenant on Civil and Political Rights - ICCPR)

Article 17 ICCPR

'(1) No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home....
(2) Everyone has the right to the protection of the law against such interference or attacks.'

Article 23 ICCPR

'(1) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.'

- Covering traditional (marriage and adoption) as well as de facto family (extended family, step-parenting, single parenting, foster-parenting)
- Protected right: common residence of family members – mutual companionship of parent-child
- Obligations created:

Positive and negative obligations on society and the State
(i) Refrain from interfering with family relationships
(ii) Protect family's continuous existence and viability
(iii) When family members are separated for political, economic or similar reasons – co-operation amongst States to ensure family reunification

The purpose of these provisions is to 'shield the family as the cornerstone of the entire social order from trends towards disintegration'

1. Pre 1997 – right to family life given little meaning for two reasons

(a) Reservation in s11 Bill of Rights Ordinance –

'As regards persons not having the right to enter and remain in HK, this ordinance does not affect any immigration legislation governing entry into, stay in and departure from HK, or the application of any such legislation.'

Hai Ho-tak [1994] 2 HKLR 202 Court of Appeal held that not only the deportee could not appeal to the right to family life but the HK family members who are so affected could not rely on it.

-absurdity if a less affected HK family members could challenge the deportation order
-right to family life viewed as not an individual right but a group right

NB: Judicial statements conceding that deportation resulting in the separation of family members raise a question of infringement of the right to family life (cf. some of the more recent judicial statements in right of abode cases).

(b) Judicial reluctance to closely scrutinise the manner in which s13 discretion is exercised

Godfrey JA in Hai Ho-tak said (obiter) that even absent s11, he would have been prepared to uphold a lawful deportation order even if it might separate family members as it was the duty of the court to strike a balance between the individual and society as a whole. It would be unreasonable to 'impose *unrealistic standards* on the Hong Kong Government's attempts to resolve the difficult and intransigent problems which Hong Kong faces.' at p. 210 (italic supplied)

2. Post 1997 – status quo maintained

Apart from quota system (OWP), right of abode has been used as a means to achieve family reunion

A. Meaning of family life narrowed

- Chan Kam Nga – CFA held that purpose of Article 24(2) of the Basic Law was to secure family reunion (parent-child relationship could not be qualified by time of birth)
- Ng Ka Ling - CFA held that the principle of equality and protection of family unit meant that all children (whether born in or out of wedlock) have parent-child relationship
- However, Lui Sheung-kwan excluded all step relationship and Xie Xiao-yi excluded all adopted children – narrow approach to family relationship inconsistent with family law and practice, as well as international approach to family life
- Impact on how parent-child relationship will be defined in areas such as housing/social/tax benefits, inheritance, succession remains to be seen

B. Implications on right to family life - gratuitous judicial statements against family reunion (interpreting parent-child relationship in general, no reason to attend to the particular)

Whose responsibility is it? You make the bed and you lie on it!

- ❖ 'families are split because HKPR choose to acquire a family outside Hong Kong' - foreknowledge
- ❖ 'families are split because HKPR migrating to Hong Kong without his family (leaving family behind)' – accepting family disruption
- ❖ HKPR has 'a choice to return to China to re-unite with his family' –no obstacle to family life elsewhere (4 HKPR and 1 family member in HK? family life in a 3rd place?)
- ❖ in the context of inter-jurisdictional (PRC) adoption: foreknowledge of inability to care for an adopted child yet choose to adopt; no family life in existence to be infringement unless parties were permitted to live together in HK or have lived together in another jurisdiction

May be perceived to be suggesting family reunion (accepted by the government) not needed

C. Back to judicial review - on going matter – Chan Mee-yi; Mok Chi-hung

3. Conclusion

- Position on right to family life post 1997 same as pre 1997 – little substance to be found in right to family life; narrowed perception of family life + lack of judicial sympathy towards the claim
- Unless HK recognises such a right by re-examining or lifting reservation – likely for there to be progress (but cannot lift reservation unless HK has immigration control on who has what priority for family reunion + family reunion policy capable of impacting on OWP)
- In light of legal obstacles + length of queuing: practical options facilitating the enjoyment of family life?

➢ government providing financial incentive to those willing to set up family in Shenzhen whilst queuing?
➢ transport subsidy?
➢ Greater use of TWP?

The Cultural Politics of Mainland Chinese Migration to Hong Kong

Dr Khun Eng Kuah-Pearce

The Cultural Politics of Mainland Chinese Migration to Hong Kong
(DRAFT ONLY)

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Introduction

Throughout human civilisation, the movement of people from one place to another has become an accepted part of living. Historically, groups of people migrate in search of land and better opportunity. The formation of empire states during the 16th and 17th centuries and the subsequent development of the world capitalist system had brought about large-scale migration of people from the less developed periphery to the core industrialised nations. From the 18th century onwards, the emergence of nation-state has resulted in the retardation of migration flow, especially from the periphery to the developed countries where political boundaries were no longer as permeable as before. The migration of the Chinese people has long been a recognised fact. There were numerous waves of migration throughout Chinese, out of China as well as internal migration. Today, this continues to be so.

Today, many countries implement and enforce immigration policy aimed at keeping people out of the nation states for a variety of reasons. Some policies are aimed at attracting people into the countries while most are aimed at keeping people out of the countries. The criteria used for admitting or rejecting would-be immigrants constitute an important aspect of the immigration policy. Increasingly, immigration

policy has become an important instrument to mark out the following: race and ethnic composition of the host country, the talent makeup of its population, contribution to the wealth and economic progress of the host country, labour needs, sex ratio of the population, to name some of the more important ones. In the case of Hong Kong, the immigration policy is also formulated for specific purposes. One main aspect of it is to deal with the influx of Mainland Chinese into Hong Kong.

This paper will explore the cultural politics of migration and immigration policy in the context of Mainland Chinese and the needs of the Hong Kong society. It will explore the attempts of the Mainland Chinese to arrive in Hong Kong prior to the 1997 return of sovereignty, Basic Law and immigration policy as a policy of criminalisation and the social and economic considerations of migration.

The Historical Origin of Immigration Control

Historically Hong Kong was part of the wider Chinese State and so movements of Chinese to and from Hong Kong was considered part of internal migration and not subjected to any form of restriction. Indeed, even as Hong Kong was ceded and became part of the British Empire, the colony during the early years of colonial rule continued to receive Mainland Chinese freely. This was clearly seen with the various waves of mass migration as a result of political and economic upheaval in the Mainland. For example, during the Taiping Rebellion from 1850-64 and the 1911 Revolution, Mainland Chinese migrated to Hong Kong in large number. Migration of these kinds resulted in a large increase in the population of Hong Kong. From 1901 to 1921, population increased from 300,000 to 600,000.

Since then, the colonial government had implemented measures to curb the Mainland Chinese from flowing freely into Hong Kong. The first measure was the passing of the Passports Ordinance in 1923 that restricted entry of all persons not holding a passport. But Chinese nationals continued to be allowed entry freely (Chen, 1988:635). The second measure implemented was the introduction of the Immigration Control Ordinance in 1940 after a rapid influx of Chinese migrants, estimated at over 800,000 as a result of the Japanese Occupation in the 1930s (ibid: 637). Under this policy, Chinese nationals without the appropriate visa, entry permits, frontier passes or certificates of residence issued by the British colonial government would be refused entry. Those caught without the relevant documents would be deported. However, this policy was not strictly upheld by the immigration officers who continued to use their own discretionary powers to allow Mainland Chinese to enter the colony.

However, after World War 2 and Communist victory in 1949, the colonial policy of immigration had tightened to specifically restrict Chinese nationals from entering Hong Kong for fear of another massive influx as a result of Chinese wanting to escape Communist rule. In 1949, it introduced the Immigrants Control Ordinance 1949. Under this policy, migrants could only enter Hong Kong in accordance with a permit given by the Immigration Officer and with valid travel document, entry permit, certificate of residence or frontier pass issued under the ordinance. With this new policy, Chinese nationals were not given exceptional treatment. The Ordinance also stipulated that those who entered without valid documents would be treated as illegal immigrants and dealt with according to the new law. For the first time, the

immigration policy criminalised and made it an offence for people entering Hong Kong as illegal migrants. This was coupled with compulsory registration of new migrants into the colony under the Registration of Persons Ordinance 1949 (ibid: 639). Under this system, all registered persons had to carry an identity card, with recording of fingerprints and photographs. Failure to do so would land the illegal migrants into jail.

A further move to restrict Mainland Chinese was the imposition of a daily quota in 1950s, using again the Immigrants Control Ordinance 1949 to actualise the move. Under this daily quota system, only those issued with permits by the Hong Kong immigration officers could enter Hong Kong legally, although residents of Guangdong continued to move to Hong Kong freely. From the 1950s onwards, stringent exit controls by Mainland Chinese government also prevented large scale migration of Chinese into Hong Kong.

In 1971, the Hong Kong government introduced the Immigration Ordinance 1971 which categorised Hong Kong residents into three distinguishable groups: (1) Hong Kong belongers, (2) Chinese residents and (3) Resident Untied Kingdom belongers. Hong Kong belongers referred to those British subjects born in Hong Kong. They had "the right to land in Hong Kong and could not be refused entry by the immigration authorities and they could not be removed or deported from the colony (ibid: 643-644). Chinese residents were those born outside Hong Kong but had emigrated to Hong Kong and stayed for seven years or more (ibid: 644). They had earned the right to live in Hong Kong but could be deported when found guilty of various seditious or criminal activities (ibid: 644). The resident United Kingdom

Belongers referred to those who were born, adopted or naturalised in the United Kingdom and who had been residents in Hong Kong for seven years or more (644-645). A fourth category is the Others who did not have the right to enter Hong Kong unless given permission by the immigration authorities.

One of the characteristics of the Immigration Ordinance 1971 was the issuing of "one-way permits" to Mainland Chinese. Those entering from this period onwards with a one-way permit would be regarded as legal immigrants and were permitted to live and work in Hong Kong. Others entering without a one-way permit would thus be branded as illegal immigrants and subjected to deportation. The immigration authorities also issued "two way permits" for Mainland Chinese to visit and stay in Hong Kong for a short period of time, after which they were expected to leave Hong Kong. Failure to do so, they would also be branded as illegal immigrants and treated as thus (ibid: 648). However, this ordinance did not stop the flow of migrants from the mainland but what it did was to create a large category of illegal immigrants. As such, there was a need to revise such a policy in order to eliminate the large number of illegal immigrants.

In 1974, another policy was introduced. This became known as the "touch-base" or "reach-base" policy. Under this policy, those migrants without one-way permit but who managed to enter the urban areas and given housing by the relatives or managed to find some sort of permanent accommodation would be considered to have "reached base" and thus permitted to live in Hong Kong. However, those who were caught at the border or in the surrounding seas would be repatriated to the mainland.

From the 1980s, the political climate in the Mainland became more relaxed as a result of the open door policy. Many mainland Chinese attempted and successfully "touched base" in Hong Kong, leading to a surge in the number of Mainland immigrants from 6,000 in 1977 to 108,000 in 1979 (ibid: 653). Thus, the Immigration (Amendment) (N0. 2) Ordinance 1980 was introduced where it abolished the "touch base" policy and where all illegal immigrants would be repatriated (ibid: 654). It also stipulated the maximum number of legal migrants to Hong Kong be restricted to 150 persons per day. This policy remained until shortly before July 1 1997 when China resumed sovereignty of Hong Kong.

The Basic Law and Immigration Policies as a Policy of Criminalization

Under the Basic Law drafted between the PRC and UK governments, the law gave provision to children who were born of Hong Kong parents, to live in Hong Kong. The result of this was a sudden influx of illegal children migrants from across the borders in the two to three years leading to the changeover of sovereignty. This has prompted the immigration authorities to reassess its immigration policy towards these children. Under the Basic Law Article 24, a person of Chinese nationality born in Hong Kong will automatically get the right of abode. However, the proposed revised immigration bill, Immigration (Amendment) (No. 3) Bill 1997, reaffirmed that mainland children of Hong Kong residents will be granted the right of abode (Hu-bao, 6/6/1997: 10). However, it also stipulated that illegal immigrants would not be allowed to stay in Hong Kong even if the immigration authorities had allowed them to stay for seven years. It further stipulated that a person of Chinese nationality born in Hong Kong would only be eligible for the right of abode when one parent became a

permanent resident (Hu-bao, 7/6,1997: 15). This bill was passed into law on 21 June 1997 (SCMP, 22/6/1997: 52).

Of particular concern here is the issue of the mainland children born of Hong Kong parents and of the new immigrants who are not yet permanent residents of Hong Kong. In another proposal, citing Section 2a of the Immigration (Amendment) Bill, it was suggested that children of new immigrant parents would be given rights of abode while their parents would have to fulfill the seven year residence before granted permanent residence status (SCMP, 9/6/1997: 11). However, the status of these immigrant children remained somewhat confused as a result of various interpretations given to the clause within the Basic Law. This confusion was further compounded by the fact that various groups of people, ranging from the legislators, welfare workers to the media personnel, who had offered their public comments on the issue, as well as the various actions taken by the immigration authorities. In the run-up to the changeover and the immediate period after the changeover, some legislators have argued that under the Basic Law, the children of new immigrants, either one of the parents is a permanent resident, would be entitled to right of abode. Any action by the immigration authorities to deny the right of abode to these children would be subjected to legal challenges. A second confusion arises over the fact that, as a result of public pressure, the immigration authorities have decided to grant more than 1,000 mainland Chinese temporary reprieve based on humanitarian grounds (Hu-bao, 6/7/97: 42). This has created a false hope among the hopeful migrants and led to substantial number of children illegally crossing the border through various means. These illegal immigrant children are commonly known as the "small snake people", *xiao-ren-she*

(小 人 蛇) (Ming Pao, 5/4/1997: 56; 10/4/97:61; Xin-bao, 8/4/97: 61; Shin Bao, 9/4/97: 58).

After the changeover, with the new immigration policies in place, the immigration authorities have encouraged the illegal immigrant children to report to the immigration department. The parents of those children who had crossed the borders prior to the changeover brought their children to report to the immigration department. The large number of these illegal children shocked the immigrant officers who were given the task of deciding the fate of these children.

Within two weeks of the changeover, the Provisional Legislative Council passed the Immigration (Amendment) (No 5) Bill on 9 July 1997. It empowered the SAR government to repatriate mainland-born children who were eligible for right of abode but arriving without proper documents in Hong Kong from July 1 (SCMP, 10/7/1997: 34). This bill has the support of the Central Government in Beijing. The Public Security Ministry stated that "this requirement will be conducive to the correct implementation of right of abode under the Basic Law" (SCMP, 15/7/1997: 37).

Under this bill, over 1,000 people, including 424 children, who were entitled the right of abode under the Basic Law and who have surrendered to the immigration department, would be returned to China and they have to apply formally to live in Hong Kong (ibid). This bill was backdated to 1 July and those who entered Hong Kong from 1 July must carry a "certificate of entitlement" issued by the Department of Immigration. It was estimated that a total of about 2,000 children have illegally entered Hong Kong prior to the changeover.

It was estimated that there are about 66,000 mainland children waiting to be settled in Hong Kong. Among the legislators, some suggested that if the quota of one-way permits for the children is raised from 66 to 90 out of the 150 quota a day, then, they could all be settled in Hong Kong within the next two years (SCMP, 10/7/1997: 37). This quota was finally approved by the Beijing government.

The implementation of such a bill created anger and anxiety among various sectors of the population. Foremost is the Society for Community Organisation (SOCO) who mounted a legal challenge against this law claiming that it violated human rights and the rights of illegal minors who were given the right of abode in Hong Kong (Hua-bao, 10/7/1997: 35). Furthermore, the director of Hong Kong Human Rights argued that "such an abrogation of these children's rights is particularly serious because it sets a precedent... of denying by administrative measures the constitutional rights of Hong Kong people guaranteed in the Basic Law (ibid).

Apart from the challenges mounted by the various community groups in Hong Kong, individuals take to the court to challenge the legality of the deported under the Basic Law. In a test case of legal challenge, a nine year old mainland Chinese girl her right as a permanent resident that is enshrined in the Basic Law and argued that new legislation cannot change that status (SCMP, 10/7/97: 36). The girl's father has right of abode in Hong Kong and she has arrived in Hong Kong half a year prior to the changeover under a two-way permit.

In the fight against deportation, the Hong Kong Legal Aid Department has approved of providing legal aid to these children. After its announcement, 194 applications were filed (SCMP, 13/7/1997: 27). Likewise, over 100 lawyers from the Bar Association and Law Society have also joined in this legal battle against the SAR government if the children's Legal Aid applications failed (Hu-bao, 14/7/1997: 36).

The plight of these illegal immigrant children has shed lights on wider issues pertaining to the immigration policies that have been questioned by some of the human rights groups. They see this as a violation of the basic rights of these children. It is often argued that these Mainland Chinese children were treated unfairly compared to other groups such as the spouses and children of Hong Kong residents who are Mainland Chinese and those who are non-Chinese nationals. The present policy allows the spouses and children of Hong Kong residents who are non-Chinese nationals to apply for resident visas for entry to the SAR and it usually takes about four to six weeks for approval to take place. This short waiting time is possible because there is no quota system applied to them. The same arrangement is also accorded to the spouses and children of foreign nationals who entered under employment visa to work here (SCMP, 17/7/1997: 38).

Both the mainland spouses and children of Hong Kong residents need to apply to the Chinese government for permission to emigrate to Hong Kong. They are also subjected to a quota system that differed from province to province and county to county (ibid). Furthermore, the quotas for spouses and children are separate, resulting in a situation where the children become separated from their mothers. It is also commonly known that corrupt officials would demand payments before issuing the

exit permit. The result of which is that those who have the resources and money and political connections could literally buy their way out while those without would be locked into an indefinite queue, with many waiting over 7 or more years before getting the exit permit (ibid).

Those who desired to go to Hong Kong for family reunion, but yet are able to gain official entry, often seek the help of snake-heads (蛇头). These snake-heads are often members of powerful triad groups operating in the South China region and they have close links with the ports in Guangdong, Fujian and Hong Kong. Many of them now also have close links with other triad members in the European and American ports and cities. The criminalisation of the migration process for the Mainland Chinese has encouraged the proliferation of the snake-heads as "illegal" or "pseudo" travel agents, who for an extraordinary sum of money could get one across the border. Sometimes, they even forged documents to enable the person to live in Hong Kong or as transit point to a third location.

In an earlier article (Kuah, 1999), I argued that the social implications for this immigration policy have been the spilt-family structure, affecting the lifestyles of the members who through no fault of their own were not permitted to live under the same roof with their parents and spouse. In the split family structure, there are three scenarios where the family members are scattered in both Hong Kong and mainland:

(1) In Hong Kong, there is usually a father-dominated household. A small number of the fathers are Hong Kong born but most fathers are Hong Kong residents born in China. He usually lived with one or two of his children who are either Hong Kong

born or having obtained a one-way permit to join the father. They usually lived in cramped housing, either in public housing, rented apartment or room. In majority cases, the father holds low skill job and has low wage. Many of these fathers work a full day and have little time to spend with their children. Many of these children were left alone to look after themselves and for the girls, they have to do additional household duties including cooking and sometimes, looking after their younger siblings.

(2) In mainland, it is usually a female mother-dominated household. Here, the mother is mainland born and either marries a Hong Kong born husband or a Hong Kong resident born in mainland. She is able to obtain a two-way permit to visit and stay in Hong Kong on a temporary basis from one to three months. She may go over to Hong Kong to give birth in order that their child becomes Hong Kong born resident. It was not uncommon for women in advanced pregnancy to smuggle themselves into Hong Kong (Ming Pao, 17/3/97: 57 and 58; Kuai Pao, 11/2/97: 52). If this is the case, the children will remain behind with the father. Some of these women might choose to become illegal immigrants and continue to live in Hong Kong especially if the couple has no other children in the mainland. Many, however, return to the mainland to look after their children that have been left behind in the care of the grandparents or relatives while the mother was away visiting Hong Kong. The mother would also have applied for a one-way permit to join the husband. Likewise, the mainland born children would also have applied for a one-way permit to join their father.

(3) In Hong Kong, there are families where the mother has joined the husband after obtaining a one-way permit. However, the mainland born children continue to wait for their one-way permit in the village. The result was that the children were left to the care of the grandparents or other relatives (Kuah, 1999: 212-214).

As a result of the immigration policies, a normal family has become split into two sub-family structures, each living across the border of the other. This has become even more common today as a result of greater integration between the Hong Kong and the mainland and especially in the Guangdong region. It is estimated that 70% of the immigrants come from Guangdong alone (Ming Pao, 24/4/97: 56).

The Cultural Politics of Immigration

The question to ask here is "why should the Mainland Chinese be treated differently from other migrants?" The relationship between Mainland Chinese and Hong Kong Chinese is a complicated one. One the one hand, both groups of Chinese shared a common history, common ancestry, common culture and language. On the other hand, the colonial divide had served to separate the two groups. Through the 150 years of colonial rule, Hong Kong Chinese have developed a different way of life and a different set of value system, and a different outlook, propelled by the capitalist system. Hong Kong Chinese has also developed a distinctive Hong Kong identity with an expanding middle class endowed with material sufficiency. This is in contrast the Mainland Chinese who are considered as "backward", experiencing material poverty and lack the sophistication of a modern metropolis. Although today, this perception is gradually changing as a result of the influx of highly educated,

technological literate Mainland Chinese into the Hong Kong workforce, many Hong Kong Chinese continued to view those who desired one-way permit to enter Hong Kong with negative assets.

It is possible to argue that Hong Kong's immigration policy is an instrumental and functional policy aimed at fulfilling the long term and short term needs of the economy and establishing a status quo for its present 6 million Hong Kongers. The immigration policy serves several purposes: (1) to encourage desirable people, i.e. professionals and highly educated ones, into the city by giving them permanent resident status when they have resided in Hong Kong continuously for seven years. (2) as a stop gap policy by permitting guest workers to come and work but not giving them permanent resident status, so that they will be required to leave when the economy no longer needs them, i.e. the domestic helpers and construction workers and (3) to deal with the inevitable liminal status of the Mainland Chinese, who are considered as in "between and betwixt". The Mainland Chinese are both insiders and outsiders at the same time. The fact that Hong Kong was a British colony for the last 150 years until recently spelled out the fact that the two groups of Chinese, although linked culturally, would not be treated equally as the Hong Kong Chinese was the subject of the imperial rule of United Kingdom. Therefore Mainland Chinese were the outsiders. As Hong Kong was reverted to Chinese rule in 1997, Mainland Chinese should theoretically be able to claim rightful access to Hong Kong as it now is part of Chinese soil. However, the cultural politics of Hong Kong has dictated otherwise. As a result of this, the immigration policy continued to be as restrictive as it was before and with painful consequences for those caught in between.

As mentioned earlier on, under the existing immigration policy, mainland spouse and children are treated differently from other groups of migrants. They are a special group, singled out to be given the so-called one-way permit, albeit with a daily quota on the number of one-way permits to be issued. Only those who have obtained one-way permit can legally lived in Hong Kong, even though they do not have the professional qualifications or the wealth. There are several reasons that account for this treatment.

(1) **Continuation of the Colonial mentality** – Under British colonial rule, one main consideration is the notion of family reunion. Like the immigration policy of many western countries, the moral dictum is to allow a family to be reunited in a more or less humanitarian manner. Yet, a full family reunion immigration policy was seen as unacceptable for fear of a large influx of Mainland Chinese. So, a daily quota system was set in place. This has created problems to the run up of the 1997 return of sovereignty where the fear among the Mainland Chinese was the abandonment of such a mentality, thereby jeopardising the migration process.

(2) **Economic consideration** – As Hong Kong gradually come out of the Asian economic crisis, the main consideration in immigration is to encourage the professionals with a variety of skills, knowledge and resources to enter and settle in the Hong Kong society. They are seen as valuable asset. Recently, a new suggestion of giving preferential immigration treatment to those with IT skill has been put forward, resulting in a new set of immigration policy. Many of those targeted are also Mainland Chinese because of similar cultural value, but with

higher educational degrees from a western university. This group of Mainland Chinese is seen differently from those who seek abode for family reunion reasons.

(3) **Resource Allocation** – While those with skills are seen as positive assets, Mainland Chinese seeking family reunion are regarded as negative assets. This view is shared by some government officials and a sector of the general public who feared that the coming of the Mainland Chinese would take up much valuable resources that could be given to the local Hong Kong population. There were fears that the Mainland Chinese would snatch up jobs and thereby deprived the Hong Kong Chinese of a valuable source of employment, particularly during economic crisis situation. Second, there were also fears that the Mainland Chinese would take up scarce housing while the mainland children will take up scarce educational resources. Furthermore, they were worried that resources would also be needed to put in infrastructure to help these migrants to adapt to a new environment such as centre for language learning, social welfare services to help the women and children adjust to the Hong Kong society.

(4) **Moral Consideration - Mainland Women as "Husband-snatchers"**

It is now an accepted knowledge that with the opening up of South China and the easy access to Shenzhen and other parts of Guangdong, there is an increasing number of Chinese men setting up a domestic or second domestic hearth across the border. Most of them have found it easier to find a wife or to keep a "mistress", *bao-er-nai* (包 二 奶) in South China. Several villages in Southern China have now become known as the "lovers' nest" where most of the women are mistresses to Hong Kong men. Included among the Hong Kong men are not only

businessmen and professional but also those from the lower socio-economic stratum including truck drivers and workers.

There are different reasons as to why the men have opted to get a wife in South China. One main reason given is that Hong Kong women are very demanding and choosy and many do not want to marry blue collar workers. Demographically, there is a slight sex imbalance with female to male ratio as 1:1.5, with more men to women. Some Hong Kong men found that they were missing out in marriage. Looking for a wife in Shenzhen or other parts of Guangdong is an attractive alternative. Likewise, the frequency of visits to South China by businessmen, truck drivers, workers and others have also encouraged married men to acquire a "mistress". For those men with wealth, acquiring a mistress across the border is relatively inexpensive. However for those at the lower socio-economic ladder, this has created substantial problems for the families in Hong Kong.

It is interesting to note that while in traditional Chinese society, having a mistress was confined to the upper social stratum, often among the elite, in present Hong Kong, the fact that those from the lower socio-economic groups have access to it points to a changing social environment. There are two considerations here. First, the Hong Kong men, even those from the lower socio-economic groups, are wealthier than their counterparts in Guangdong. Socially, the women from Guangdong are seen to be marrying up the social and economic ladder. They could therefore lead a life of leisure and material richness. Second, by marrying Hong Kong men, these women hope that it will provide them with an opportunity to become eligible to apply for a one-way permit to migrate and live in Hong

Kong, a much preferred place than mainland China. Here, the ability to migrate to Hong Kong serves as an important consideration for those willing to become wife or mistress of Hong Kong Chinese men. Even though most of the mistresses probably have knowledge that their Hong Kong men are lawfully wedded to other women, they are waiting in line in the hope that one day they, too, might become the lawful wives of their Hong Kong men. For the time being, they are contended with a life of material well-being. There were also cases where married Hong Kong men practised bigamy by marrying a second wife in Guangdong.

The effects of having a wife or mistress across the border have led to several problems among the family in Hong Kong. Foremost is the effect on the wives of these Hong Kong men with mainland mistress. Many became emotional disturbed and quarrels become the norm rather than exception within the household. The social welfare department and other welfare groups have set up special service to cater and counsel this group of distressed wives. A second effect is that when the men have to maintain two households, it becomes inevitable that the financial resources are divided between the two households. Often quarrels centre around insufficient money for the household and for expenses of the children. A third effect is that these men spend very little time with the Hong Kong households, especially during the weekend where they would travel up north to visit their mistress and their mainland children.

Some of the marriages in Hong Kong end in divorce because of men having a second family in the Mainland. Others experience marital discord within the Hong Kong families and many wives suffer from depression. The social welfare

department and Caritas Family Service provide counseling for these wives. Apart from these, the Hong Kong government is powerless to do anything to stop men from going across the border and having mistresses or concubines. As long as they do not legally marry the mainland wives, they cannot be accused of bigamy. This second wives' phenomenon has been a concern of many welfare groups in Hong Kong who regard it as a primary problem for many family breakdown and divorce (Sing Tao, 18/4/1997: 65). In a recent move, the Guangdong Provincial Women's Federation has provided a radical formula to stem out Hong Kong men and others from other parts of China having mistresses and second homes in Guangdong. They have suggested that the men guilty of bigamous relationships be sentenced to re-education camp, a move supported by some Hong Kong wives but condemned by some welfare groups in Hong Kong who see such moves as counterproductive (SCMP, 4/10/1998: 4).

Allowing women and mistresses to migrate to Hong Kong will have severe repercussion on the social and family structure. As statistics have shown, there has been an increase in divorce rate as a result of men having mainland mistresses. By permitting easy migration for these women (even those with two-way permits), such actions would have further disrupt the social and moral order of the Hong Kong society and this is seen as unacceptable in present day situation.

Comments and Suggestions

Although it is understandable that all countries implemented immigration policy with an instrumental aim of curbing unwarranted immigrants into the country

and Hong Kong is no exception to this, immigration policy needs to take into account of the needs of the people in a non discriminative way. In the case of the Mainland Chinese immigrants, one can say that the policy is discriminatory and impacted greatly on the welfare of the migrants (including pregnant women, wives and children) as it seeks to criminalise those who arrived without the one-way permit. Family reunion and resettling of these people need to be given priority under the existing one-way permit system. The time frame for resettling into Hong Kong is an important issue to consider here. Otherwise, they would be no different from the Vietnamese refugees who came to Hong Kong as boatpeople in the 1970s. Many of these refugees remained in a refugee camp for a decade or more, given little civil liberty and treated more or less like criminals before finally given resettlement and those who remained in Hong Kong in the late 1990s were sent back to Vietnam. What is needed is the establishment of an overall immigration framework to deal with these would be new immigrants in order that they know exactly how long the waiting period is. This would allow both the men in Hong Kong and their wives and children in mainland to plan their resettlement and adjustment process. Furthermore, it would also stop them from taking risks by illegally entering Hong Kong or entrusting their children to the triads who operate smuggling ring to smuggle their children into Hong Kong on an illegal basis.

Hong Kong, as a modern society, prides itself on efficiency and champions various rights such as human rights and freedom. The government therefore has a moral obligation to ensure that these mainland wives and children are given the type of protection necessary before and after their arrival in Hong Kong. One of these is to make sure that they do not take unnecessary risks to come into Hong Kong. The

policies for issuing one-way permits, the waiting period, information on Hong Kong, employment, education and welfare facilities should be given to these would be new immigrants long before hand in order that they can better prepare themselves for a new life in Hong Kong.

Immigration officers in Hong Kong will need to work with immigration officers in the Mainland to step out queue jumping as a result of corrupt practices and bribery which resulted in legitimate migrants having to wait for an extended period of time for their one-way permit. Here, it is important to establish a workable and realistic framework.

Finally, it is important to provide sufficient initial assistance especially in the areas of housing, language learning, social networking, and education for the new migrants. Many of the new immigrants live in cramped housing and when the other mainland members join them, it becomes impossible to live in such housing. Often tensions and domestic violence is the result of living in cramped housing. It is pointless in accepting these new immigrants if they cannot have a decent living condition and a fair standard of living in Hong Kong.

There is also a need to provide a coordinated language programme so that these new immigrants can learn the Cantonese language within a reasonable period of time after arrival. After all, language is one important area in helping integration into the community that they are in. At present, there are some forms of language courses planned for the new immigrants. However, they are not readily accessible to them and the courses are often held in distance places from the homes of these new immigrants.

One way to ensure that the new migrants benefit most from the language programme is to conduct Cantonese language classes in the neighbourhood associations, kaifong associations, close to where the immigrants live. Another possible venue to conduct Cantonese language course is in the clan and dialect associations, *tongxianghui*, where many of the new immigrants visit on a regular basis.

One main problem faced by the mainland wives and children is their inability to integrate into the wider Hong Kong society. As such, many of the new immigrants, especially the wives feel socially dislocated when they move to Hong Kong. Such anomie has resulted in the wives suffering from ill heath and depression. There is a need to assist them in establishing a new social network. One possible way is to tap into the existing social networks especially the tongxianghui which have been a meeting place for many of these new immigrants. However, there is a need to encourage these tongxianghui to structure some of their activities to cater for wives and children as these associations continue to cater largely for the male immigrants. Neighbourhood associations could organise social activities and encourage the new immigrants to participate and help them to integrate into the wider community.

Education for the mainland children has been one of the hottest debated topics in Hong Kong, especially in the immediate days after 1 July. While the public has expressed apprehension over the amount of resources spent on these mainland children, it is nevertheless important to recognise that these children are now part of Hong Kong society and should be given all the assistance and adequate resources to help them become full-fledged Hong Kong residents. They, like the Hong Kong born children will grow up in Hong Kong and will eventually contribute to the Hong Kong

society. With adequate educational training, they would eventually become fully integrated into the wider Hong Kong society and be able to contribute fully to the social, economic and political life of the Hong Kong society (Kuah, 1999: 224-226).

Conclusion

As a Special Administrative Region, Hong Kong still has to power to implement its own rule of law. In this regard, the immigration policy should continue to be based not only solely on economic and political consideration, but also on humanitarian grounds. In the case of the Mainland Chinese migrants, arguably, many of those who desire to come for family reunion purposes come from the lower socio-economic status. But this does not make them lesser beings in comparison with the other migrant groups. Indeed, given support and nurturing, many of these migrant children have attained success and have become useful assets to the Hong Kong society.

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Integration or Segregation: The Political Attitude of New Arrivals

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Integration or Segregation: The Political Attitude of New Arrivals

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PREABMLE

For decades, immigration and emigration has been a salient feature of Hong Kong society. Some even describe Hong Kong as a refugee society – a "borrowed place living on borrowed time"[1]. Yet, despite the fluidity of its people, Hong Kong has by and large remained a very stable society, both socially and politically.

Many concepts have been put forward by scholars to explain Hong Kong's political stability amidst destabilizing forces. Ambrose King (1975), for example, explained it by the process of 'administrative absorption of politics'[2], while Lau Siu-kai (1981) constructed the concept of 'utilitarian familism'[3]. Lau argues that utilitarian familism and the social accommodation of politics, coupled by the non-interventionist and minimal 'state' not conducive to mass mobilisation, the outcome is political stability amidst destabilizing factors like cultural heterogeneity, political identification, unequal distribution of income, and the intrinsic problems of colonial rule.

Lau's framework, however, was criticized by Wong and Lui (1992:13) as inconsistent and flawed by 'protean' use of key concepts like 'boundary consciousness' and 'non-interventionism'[4]. The relations between state and society was also criticized for not having

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[1] Richard Hughes (1968). Hong Kong: Borrowed Place – Borrowed Time. Andre Deutsch Ltd. London.

[2] King, Ambrose Yeo-chi (1975). Administrative Absorption of Politics in Hong Kong: Emphasis on the Grass Roots Level. *Asian Survey*, 15:5 (May 1975), 422-439.

[3] Lau, Siu-kai (1981). Utilitarianistic Familism: the Basis of Political Stability. In King, Ambrose Y.C. and Lee, Rance P. L. (Eds.), *Social Life and Development in Hong Kong*. Hong Kong: Chinese University Press.

[4] Wong, Thomas W.P., and Lui, Tai-lok (1992). *From One Brand of Politics to One Brand of Political Culture*. Hong Kong: Hong Kong Institute of Asia-Pacific Studies, the Chinese University of Hong Kong.

been conceptualized in structural terms with empirical support. After examining two alternative theses of political stability, namely, that of political apathy hinted by John Rear (1971)[5], and that of legitimacy of the government by Ian Scott (1989)[6], Wong and Lui (1992) proposed to restore the structural context of stability, and political mobilisation, from the vantage point of social class.

In fact, the emergence of social tension and political conflicts due to political development starting from the 1980s has also prompted Lau and his colleagues to speak of declining 'familism' and the fast fading of norms which emphasized self-help and the avoidance of governmental contacts (Lau and Kuan 1986). Likewise, Scott (1989) also spoke of the legitimacy crisis of the colonial government, and Wong and Lui (1992) of political mobilisation. Lau (1991) even gave warning of the onset of an 'ungovernability crisis' because the government was unable to honour the 'social contract' between the 'minimally-integrated' polity and society[7].

It is not the purpose of this paper to discuss the different theses of political stability as they apply to Hong Kong, but to begin our discussion of the political attitude of new arrivals with a brief review on the basic fabric of Hong Kong's political culture underscores the importance of appraising whether new arrivals is a destabilizer of Hong Kong society. In view of many collective actions taken by, or for, new arrivals after July 1997, it is easy to perceive them as a harmful element to the political order of Hong Kong under the 'one country, two systems'.

RESEARCH DESIGN

The data sets used in this paper belong to the Public Opinion Programme (POP) directed by the author at the University of Hong Kong. The POP was set up in June 1991 to monitor public opinion over major social and political issues. It operated under the Social Sciences

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[5] Rear, John. (1971). One Brand of Politics. In Hopkins, H. (Ed.), *Hong Kong: the Industrial Colony*. Hong Kong: Oxford University Press.

[6] Scott, Ian (1989). *Political Change and the Crisis of Legitimacy in Hong Kong*. Hong Kong: Oxford University Press.

[7] Lau Siu-kai (1991). An article in Chinese: 劉兆佳，「後過渡期中英分享權力的趨勢：殖民地統治末期之「難以管治」問題與出路」，《廣角鏡》，222 期，50-66。香港。(The Trend of Power Sharing Between China and Britain in the Late Transitional Period: The Problem of Ungovernability and The End of British Colonial Rule in Hong Kong, *Wide Angle Magazine*, 222:50-66, Hong Kong.)

Research Centre of the University of Hong Kong until May 2000, when it was transferred to the Media and Studies Centre of the same university. Shortly after POP was set up, a series of tracking surveys was constructed to regularly monitor Hong Kong people's opinion on local political leaders and organizations, their perception of the society's development, their confidence in different governments, their sense of ethnic identity, among many other areas. The frequency of these surveys generally ranges from twice a month, to once every four months, and they work on a rotary system with different combinations.

For the purpose of studying the political attitude of new arrivals, 22 POP's tracking surveys covering eight wide areas could be picked in order to study the different perceptions held by new arrivals and the general population. This draft paper concentrates on a small number of them. Table 1 gives a summary of the 22 surveys selected. It can be seen from Table 1 that each of these tracking surveys has a sample size of over 1,000 successful cases. All 22 tracking surveys together contribute 23,390 cases for our analysis in this paper.

Table 1 Major POP surveys used in this paper

Code	Date of survey	Major topics	Sample size	Response rate
A	5- 9, 17-18 May 00	CE, PFCCL, SI	1,060	50.0%
B	18–22 May 00	GP	1,040	51.2%
C	23–25 May 00	CE	1,053	46.9%
D	2, 5 June 00	CE, GP	1,055	44.8%
E	7, 8 June 00	TG, EI	1,074	49.0%
F	9, 12 June 00	CE, MCI	1,103	54.6%
G	13–14 June 00	TTI	1,088	50.9%
H	6–11 July 00	CE, GP, SI	1,058	53.3%
I	26–28 July 00	CE, PFCCL	1,152	55.8%
J	8–12 August 00	CE, GP	1,059	52.8%
K	25, 28–30 August 00	CE, TG	1,097	59.1%
L	14, 15, 18 September 00	CE, GP, MCI	1,062	60.7%
M	21–22, 25 September 00	CE, EI, TI	1,087	59.2%
N	3–5, 9 October 00	CE, GP, SI	1,067	59.8%

O	9–17 October 00	CE, TG	1,032	61.0%
P	23–25 October 00	CE	1,031	60.3%
Q	14–16 November 00	CE, GP	1,038	47.2%
R	23–24, 27 November 00	CE	1,056	49.5%
S	6–8, 11–12 December 00	CE, GP, EI, MCI	1,040	52.7%
T	18–22, 27 December 00	CE, TG, TI	1,016	48.4%
U	17–19 January 01	CE, GP, SI	1,046	53.7%
V	29–31 January 01	CE, TG	1,076	49.9%

Abbreviations:
CE: Chief Executive ratings
EI: Ethnic identity questions
GP: HKSAR Government performance questions
MCI: Most concern issues
PFCCL: People's feeling about contemporary Chinese leaders
SI: Social indicators
TG: Trust government and questions on confidence in the future
TI: Taiwan issues

All POP surveys are conducted by closely supervised telephone interviewers using a computer assisted telephone interview (CATI) system. The target population is Cantonese speaking residents of Hong Kong aged 18 or above. To sample respondents for telephone surveys, the following procedures are normally followed:

Telephone numbers are first drawn randomly from the residential telephone directories as 'seed numbers', from which another set of numbers was generated using the 'plus/minus one/two' method, in order to capture the unlisted numbers. Duplicate numbers are then filtered and the remaining numbers mixed in a random order to produce the final telephone sample. When contact is successfully made with a target household, one respondent of age 18 or above is drawn from all those present using the "next birthday" rule. The response rates as recorded in Table 1 are calculated as:

number of successful cases / (successful cases + refusals + incomplete cases)

On trouble in studying new arrivals is their scanty number when random samples are

drawn from the general population. Our experience shows that only about 2-3% of a random sample of Hong Kong population of age 18 and above are 'new arrivals' – being technically defined here as those born in China, but has stayed in Hong Kong for 7 years or less. Thus, for a tracking survey of 1,000 subjects, only 20-30 of them are new arrivals. This small number does not warrant any meaningful statistical analysis.

To resolve this problem, we can conduct separate surveys of new arrivals using the same questions, or we use stratified quota sample and boost the sample size of new arrivals, both methods being very costly. In this paper, we have used another simple method – merging surveys together to increase their sub-sample size. Thus, for an aggregate of 22 surveys with 23,390 subjects, we can expect to capture about 600 of new arrivals for comparative analysis.

The major problem of the last method is that time sensitivity might be overlooked, because the 22 surveys used have a time span of 10 months. Another problem is that not all questions are repeated in all surveys, so the effective sub-sample size of most study modules are still small in number. These problems are, however, avoidable. On the former issue, one might argue that since the effect of time sensitivity affects both the new arrivals and the regular population, it would not affect overall comparison. The latter issue could only be resolved if we could pump in more resources on such studies.

ANALYSIS OF FINDINGS

In the following analysis, we have basically separated four groups of people for comparison. Group 1 is sub-sample of new immigrants who was born in China, and have come to Hong Kong for seven years or less. Group 2 is the sub-sample comprising those born in China but have lived in Hong Kong for more than seven years. Group 3 comprise those born in Hong Kong, and Group 4 comprise those in Hong Kong not under Group 1, i.e., the general population minus the new arrivals. Under this classification, Groups 2 and 3 are sub-groups of Group 4 which also comprise of those born outside Hong Kong and China. Goups 1 plus 4 together gives the entire population of Cantonese speakers in Hong Kong. In the data tables, wherever categorical data are used, chi square tests have been performed, and the level of significance is given below the table. Where continuous data are used, mean square tests have been performed, and the level of significance given.

(I) PERCEPTIOI OF GOVERNMENTS

The degree of one's trust or confidence in different governments are important indicators

of one's faith in the political system. Such indicators have been used widely by many scholars on Hong Kong's political development.

Tables 2 shows that 55.5% of the new arrivals interviewed said they trusted the Hong Kong SAR Government (collapsing "very much" and "somewhat"). However, only 31.3% of the local born express this trust. For those born in China but has lived in Hong Kong for more than seven years, 47.0% expressed this trust. The figure for non-new-arrivals is 35.8%. Such differences are tested to statistically significant at $p<0.001$.

Table 2: People's Trust in the HKSAR Government

		China Born (>7 yrs)	New Arrivals	Hong Kong Born	Hong Kong Permanent Citizens
Very Much	Count	96	9	83	187
	Group	9.1%	7.6%	3.0%	4.7%
Somewhat	Count	398	57	781	1,225
	Group	37.9%	47.9%	28.3%	31.1%
Half-half	Count	233	20	896	1,154
	Group	22.2%	16.8%	32.5%	29.3%
Not much	Count	165	12	692	892
	Group	15.7%	10.1%	25.1%	22.6%
Not at all	Count	48	2	191	247
	Group	4.6%	1.7%	6.9%	6.3%
Don't know/Hard to say	Count	111	19	116	240
	Group	10.6%	16.0%	4.2%	6.1%
Total	Count	1,051	119	2,759	3,945
	Group	100.0%	100.0%	100.0%	100.0%

For the first three columns, chi sq=245, p<0.01; for Columns 2 and 4, chi sq=48, p<0.01

These findings show that the new arrivals have much more faith in the local government than those locally born. Those who have arrived long ago fit in between. This seems to contradict the layman's view that most new arrivals are dissatisfied with the conditions they

are in, and therefore have more aggression towards the government.

Table 3: People's Trust in the Beijing Central Government

		China Born (>7 yrs)	New Arrivals	Hong Kong Born	Hong Kong Permanent Citizens
Very Much	Count	87	11	65	156
	Group	8.3%	9.2%	2.4%	4.0%
Somewhat	Count	334	37	602	967
	Group	31.9%	30.8%	21.9%	24.6%
Half-half	Count	177	24	791	995
	Group	16.9%	20.0%	28.8%	25.3%
Not much	Count	174	15	736	938
	Group	16.6%	12.5%	26.8%	23.9%
Not at all	Count	78	6	245	333
	Group	7.4%	5.0%	8.9%	8.5%
Don't know/Hard to say	Count	198	27	311	541
	Group	18.9%	22.5%	11.3%	13.8%
Total	Count	1,048	120	2,750	3,930
	Group	100.0%	100.0%	100.0%	100.0%

For the first three columns, chi sq=230, p<0.01; for Columns 2 and 4, chi sq=25, p<0.01

Contrary to one's expectation, Table 3 shows that new arrivals have more faith in the Beijing central government than the local born. Finding shows that 40.0% of the new arrivals interviewed said they trusted the Beijing Government (again collapsing "very much" and "somewhat"), but only 24.3% of the local born said the same. The figure for those born in China but has lived in Hong Kong for more than seven years is 40.2%, which is practically the same as that of the newly arrived. These findings make us ponder why the new arrivals ever left China. One way of looking at it is that although they have not lost their trust in the Chinese government, they have nonetheless prefer to live under the HKSAR Government, which they trust more (55.5% as against 40.0%, see Table 2). Another way of looking at it is that new arrivals are less critical of governments and current conditions than the local borns.

Let's see if this observation holds in other areas.

Table 4: People's Trust in the Taiwan Government

		China Born (>7 yrs)	New Arrivals	Hong Kong Born	Hong Kong Permanent Citizens
Very Much	Count	15	1	11	27
	Group	1.4%	0.8%	0.4%	0.7%
Somewhat	Count	100	7	236	351
	Group	9.6%	5.8%	8.7%	9.0%
Half-half	Count	116	20	527	659
	Group	11.2%	16.7%	19.4%	16.9%
Not much	Count	282	21	849	1,162
	Group	27.1%	17.5%	31.2%	29.8%
Not at all	Count	114	11	297	424
	Group	11.0%	9.2%	10.9%	10.9%
Don't know/Hard to say	Count	412	60	800	1,270
	Group	39.7%	50.0%	29.4%	32.6%
Total	Count	1,039	120	2,720	3,893
	Group	100.0%	100.0%	100.0%	100.0%

For the first three columns, chi sq=89, p<0.01; for Columns 2 and 4, chi sq=18, p<0.01

With regard to the Taiwan government, the situation is slightly different. Here, only 6.4% of the new arrivals said they trusted the Taiwan government, whereas 9.1% of the local borns, and 11.0% of those having come for a long time said the same. However, if we look at the other end of the scale, the observation that local borns are more critical is holds, as 42.1% of them said they distrusted the Taiwanese government. Only 26.7% of the new arrivals said the same, 50.0% answered "don't know". Probably because of political censorship in Mainland China on cross-strait news, many new arrivals were not able to come up with a judgement on the Taiwan government. Subsequent analysis in this paper also shows that new arrivals tend to agree more with Beijing's views on the Taiwan issue.

In line with the previous observation on people's trust in governments, the new arrivals seem to be much less critical on the performance of the local government. Table 5 shows that 31.5% of the new arrivals interviewed said they were satisfied with the performance of the government, 18.9% said they were dissatisfied. The figures for the local borns are 17.3% satisfied and 43.6% dissatisfied. Those for the 'old arrivals' are 26.4% and 36.3%, again fitting in between.

Table 5: Satisfaction with the overall performance of the SAR Government

		China Born (>7 yrs)	New Arrivals	Hong Kong Born	Hong Kong Permanent Citizens
Very satisfied	Count	51	6	44	102
	Group	2.2%	2.3%	0.7%	1.2%
Quite satisfied	Count	550	76	1,022	1,646
	Group	24.2%	29.2%	16.6%	18.8%
Half-half	Count	678	100	2,204	2,960
	Group	29.8%	38.5%	35.8%	33.9%
Not-quite satisfied	Count	626	40	2,036	2759
	Group	27.5%	15.4%	33.0%	31.6%
Very dissatisfied	Count	200	9	652	886
	Group	8.8%	3.5%	10.6%	10.1%
Don't know/Hard to say	Count	171	29	203	391
	Group	7.5%	11.2%	3.3%	4.5%
Total	Count	2,276	260	6,161	8,744
	Group	100.0%	100.0%	100.0%	100.0%

For the first three columns, chi sq=263, p<0.01; for Columns 2 and 4, chi sq=75, p<0.01

Respondents in these surveys were also asked to comment on very specific areas of government performance, like maintaining economic prosperity, social conditions, freedom, democratic development, central-local government relationship, and so on. It was found that

new arrivals were more satisfied with every item then their counterparts. All differences are tested to be statistically significant. The only conclusion one can draw is that new arrivals are not at all aggressive towards the local government, in spite of media stories portraying them as an exploited group.

(II) PERCEPTION OF POLITICAL LEADERS

Because the question on people's support rating of the SAR Chief Executive have been repeated in almost every tracking survey, we were able to obtain a large sub-sample size for this particular analysis. Because of this, we are able to break down average rating figures by demographic groups, as shown in Table 6.

Table 6: Rating of the Chief Executive

			New Arrivals	China Born (>7 yrs)	Hong Kong Born	Hong Kong Permanent Citizens
Total	Count		473	4,439	12,614	17,652
	Mean		62.6	55.5	49.1	50.9
Gender	Male	Mean	58.0	55.3	47.8	49.9
	Female	Mean	64.4	55.8	50.3	51.6
Age	18 – 20	Mean	58.6	52.2	51.1	51.2
	21 – 29	Mean	58.2	50.1	48.5	48.7
	30 – 39	Mean	60.1	53.1	47.1	48.0
	40 – 49	Mean	73.1	53.2	49.3	50.3
	50 – 59	Mean	78.0	56.8	50.5	53.7
	60 or above	Mean	76.8	59.9	58.4	59.5
Education	Primary or below	Mean	68.9	58.1	52.6	55.5
	Secondary	Mean	60.4	54.5	49.3	50.5
	Tertiary	Mean	63.6	53.2	47.3	48.1

For sub-totals of the first three groups, $f=252$, $p<0.01$; for the sub-totals of Group 1 and 4, $f=156$, $p<0.01$

Table 6 again shows the consistent picture that local borns are much more critical than the new arrivals on the political situation. The Chief Executive's average rating for the local borns is only 49.1 marks, while the new arrivals gave him an average of 62.6. The old arrivals gave him 55.5 marks.

Because of the large sample size, the validity of sub-group analysis used in other parts of this paper can be tested. As shown in Table 6, across all demographic variables tested, namely, gender, age, and education, local borns consistently gave the lowest mark to the Chief Executive, while new arrivals consistently gave the highest mark. This shows that sub-group differences cannot be accounted by demographic differences, which arises from the difference in demographic composition of the sub-groups.

Other than measuring people' perception of local leaders, we have also mapped their perception of Chinese national leaders. The key questions used was: "Would you say [a certain Chinese leader] has accrues more merit or demerits in the development of China?" The national leaders used include Deng Xiaoping, Mao Zedong, Zhou Enlai, and Chiang Kai-shek. Tables 7 to 10 show the results.

Table 7: Question asked: Would you say Deng Xiaoping has accrues more merit or demerits in the development of China?

		China Born (>7 yrs)	New Arrivals	Hong Kong Born	Hong Kong Permanent Citizens
More merit	Count	525	77	1,433	2,033
	Group	70.2%	71.3%	68.3%	68.9%
Half-half	Count	91	12	347	449
	Group	12.2%	11.1%	16.5%	15.2%
More demerits	Count	28	7	94	126
	Group	3.7%	6.5%	4.5%	4.3%
Don't know/Hard to say	Count	104	12	224	344
	Group	13.9%	11.1%	10.7%	11.7%
Total	Count	748	108	2,098	2,952
	Group	100.0%	100.0%	100.0%	100.0%

For the first three columns, chi sq=15, p=0.02; for Columns 2 and 4, chi sq=2, p=0.48

Table 8: Question asked: Would you say Mao Zedong has accrues more merit or demerits in the development of China?

		China Born (>7 yrs)	New Arrivals	Hong Kong Born	Hong Kong Permanent Citizens
More merit	Count	199	39	497	723
	Group	26.7%	36.4%	23.8%	24.6%
Half-half	Count	174	28	434	625
	Group	23.4%	26.2%	20.8%	21.3%
More demerits	Count	210	20	643	891
	Group	28.2%	18.7%	30.8%	30.3%
Don't know/Hard to say	Count	162	20	517	702
	Group	21.7%	18.7%	24.7%	23.9%
Total	Count	745	107	2,091	2,941
	Group	100.0%	100.0%	100.0%	100.0%

For the first three columns, chi sq=19, p<0.01; for Columns 2 and 4, chi sq=13, p<0.01

Table 9: Question asked: Would you say Zhou Enlai has accrues more merit or demerits in the development of China?

		China Born (>7 yrs)	New Arrivals	Hong Kong Born	Hong Kong Permanent Citizens
More merit	Count	511	69	1,218	1,803
	Group	68.3%	63.9%	58.4%	61.3%
Half-half	Count	59	10	181	245
	Group	7.9%	9.3%	8.7%	8.3%
More demerits	Count	23	2	73	98
	Group	3.1%	1.9%	3.5%	3.3%
Don't know/Hard to say	Count	155	27	614	793
	Group	20.7%	25.0%	29.4%	27.0%
Total	Count	748	108	2,086	2,939
	Group	100.0%	100.0%	100.0%	100.0%

For the first three columns, chi sq=26, p<0.01; for Columns 2 and 4, chi sq=1, p=0.79

Table 10: Question asked: Would you say Chiang Kai-shek has accrues more merit or demerits in the development of China?

		China Born (>7 yrs)	New Arrivals	Hong Kong Born	Hong Kong Permanent Citizens
More merit	Count	118	10	489	634
	Group	15.8%	9.3%	23.6%	21.7%
Half-half	Count	121	14	387	526
	Group	16.2%	13.0%	18.7%	18.0%
More demerits	Count	134	22	347	495
	Group	17.9%	20.4%	16.7%	16.9%
Don't know/Hard to say	Count	375	62	851	1273
	Group	50.1%	57.4%	41.0%	43.5%
Total	Count	748	108	2,074	2,928
	Group	100.0%	100.0%	100.0%	100.0%

For the first three columns, chi sq=43, p<0.01; for Columns 2 and 4, chi sq=14, p<0.01

From Table 8 to 10, it can be seen that new arrivals were much more negative than local borns in appraising Chiang Kai-shek's position in the history of China, slightly more positive with Mao Zedong and Zhou Enlai, and share very similar views with local borns regarding Deng Xiaopin's contribution. The difference between local borns and new arrivals regardning Cheung Kai-shek's appraisal can be readily understandable when viewed together different groups' opinion towards some Taiwan issues.

Arsing from the same series of tracking studies, 76.9% of the new arrvals objected to Taiwan becoming independent, while 65.7% of local borns objected. On whether 'one country, two systems' should be practices in Taiwan, 47.4% of the new arrivals said yes, but only 41.1% of the local borns said the same. It thus seems that in terms of national issues, the new arrivals are more in line with the Beijing central government's position than those born in Hong Kong.

(III) ETHNIC IDENTITY

The difference in attitude towards national issues between new arrivals and the local borns are probably related to their self-perception of ethnic identity. As shown in Table 11,

there is a big gap between new arrivals and local borns in this aspect.

Table 11: Ethnic Identity

		China Born (>7 yrs)	New Arrivals	Hong Kong Born	Hong Kong Permanent Citizens
Hong Kong Citizen	Count	148	14	955	1,135
	Group	18.5%	14.1%	45.2%	37.4%
Chinese Hong Kong Citizen	Count	258	38	344	624
	Group	32.2%	38.4%	16.3%	20.6%
Chinese Citizen	Count	117	3	318	450
	Group	14.6%	3.0%	15.1%	14.8%
Hong Kong Chinese Citizen	Count	235	33	426	690
	Group	29.3%	33.3%	20.2%	22.7%
Others	Count	1	1	10	18
	Group	0.1%	1.0%	0.5%	0.6%
Don't know/Hard to say	Count	43	10	58	117
	Group	5.4%	10.1%	2.7%	3.9%
Total	Count	802	99	2,111	3,034
	Group	100.0%	100.0%	100.0%	100.0%

For the first three columns, chi sq=270, p<0.01; for Columns 2 and 4, chi sq=51, p<0.01

For the new arrivals, 38.4% perceived themselves as "Chinese", while only 14.1% perceived themselves as "Hongkonger". The figure for the local borns are 16.3% and 45.2% respectively. It might be argued that the two concepts are not mutually exclusive, and respondents should not be forced to make such a choice. To cater for that argument, we have also measured respondents' ethnic identity using a 0-10 absolute rating scale.

Tables 12 and 13 shows that the average score that new arrivals give themselves as "Hongkongers" was 7.2, much lower than the local borns' 8.0. In terms of being a "Chinese", the new arrivals' score was 8.0, whereas that for local borns was 7.2. Both the

magnitude and the direction of identification has been clearly demonstrated with these figures. The old arrivals are again fitting in between.

Table 12: Identification with being "Hongkonger"

Identification with being "Hongkonger"		China Born (>7 yrs)	New Arrivals	Hong Kong Born	Hong Kong Permanent Citizens
Total	Count	668	81	2,001	2,771
	Group	7.73	7.20	7.97	7.90

F=7.9, p<0.01

Table 13: Identity with being "Chinese"

		China Born (>7 yrs)	New Arrivals	Hong Kong Born	Hong Kong Permanent Citizens
Total	Count	664	81	2,000	2,766
	Group	8.20	8.00	7.23	7.46

F=41.6, p<0.01

DISCUSSION

The opinion questions used in this draft paper is far from comprehensive. They only comprise about one-fifth of all available questions asked in our tracking surveys which could be used to map the political attitude of new arrivals, and compared them with the rest of the Hong Kong population. The analyses performed so far, however, should be sufficient to demonstrate that new arrivals are, in fact, quite complacent with the local and central government, and are more satisfied with the current situation than those locally born. This is probably contrary to the layman's view, and should have important implication on formulating social policies specially catered for new arrivals. Resolving the problem of cultural identity is probably an important issue which our community needs to be attended to in handling the problem of new arrivals.

Housing and Welfare Services for New Arrivals from China: Inclusion or Exclusion?

Dr Ernest Chui

Housing and Welfare Services for New Arrivals from China : Inclusion or Exclusion ?

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Summary

1. According to Sino-British Joint Declaration and Basic Law, Hong Kong has to admit the inflow of New Arrivals from China (NACs).

2. There is a host of various kinds of needs and/or problems faced by the NACs in their process of integrating into the mainstream society of Hong Kong.

3. Housing and welfare (income maintenance and personal welfare) are the two basic kinds of social services much needed by the NACs.

4. The HK Government – through the Housing Authority and its executive Housing Department – has long devised mechanisms to allocate public housing, by stipulating eligibility criteria for public housing application.

5. Such an allocation mechanism is essentially divisive in inducing a kind of sectoral competition within the society in competing for the scarce resource of public housing.

6. The scarcity of public housing is deliberately created by the government, in view of buttressing the property-led economy.

7. A critical analysis of HK's public housing policy can reveal that it evolves originally as a welfare provision (in the 1950s after the fire), to become a political stabilizer (after the 1960s riots), to an economic tool (to clear squatters to resume land for industries and public housing estates (in the 1960s), and then to an economic buffer or supplement to the private property market.

8. The NACs have to meet the 7-year residence requirement before accessing the public housing. The restriction for NACs to access public housing serves to

deny their competition against the local people, and to indirectly encourage an 'upward filtering' of housing to boost the private housing market.

9. Income maintenance through social assistance (Comprehensive Social Security Assistance CSSA) serves a 'safety net' function in lack of a comprehensive contributory social security system. NACs have to meet the 1-year residence requirement for such benefit, though the Social Welfare Department (SWD) can exercise discretionary exemption for individual cases.

10. NACs who are employable have to face up with exploitation (being offered unfair unemployment terms) or stark discrimination in the local labor market, and are thus marginalized or excluded. The Employee Retraining Board (ERB) originally held up a discriminatory stance in delimiting the NACs from enrolling for its courses.

11. Personal welfare offered by the SWD and NGOs include family services, children and youth services and community services. These can provide support to the NACs in their adjustment in daily living, in terms of language, knowledge of local conditions, and daily interaction with people in the neighborhood. New projects like 'New Arrival Project' (NAP) and 'Integrated Neighborhood Project' (INP) also provide support and counseling to NACs at individual and community levels.

12. Yet, the local people have resentment against such services for the NACs, taking the view that expenses for these services consume their share in the government's public revenue. As a result, such services originally intended to serve integrative functions turn out ironically to be divisive.

13. A critical review of the socio-economic and political context of Hong Kong people's resentment or hostility against the NACs reveals a host of factors. The HK people, though being ethnic Chinese and immigrants from the mainland themselves, have settled in HK and enjoyed the prosperity and stability in the last few decades. They have developed a distinct 'HongKong identity', distinguishable from Mainland Chinese. The awareness of China's social and economic backwardness induced a sense of superiority amongst the local HK people as compared to mainlanders. The inflow of Vietnamese boat people and Chinese immigrants has heightened the local people's parochialism and defensiveness. The 1997 return to Chinese sovereignty also added to people's

skepticism against China. The 1996 Asian Financial Crisis hard hit the local people, and they displaced their anger to the NACs who readily served as scapegoats.

14. Theoretical tenets from labeling theory and discrimination also inspire on why the local HK people develop such resentment and exclusionary stance against the NACs.

15. An examination of the HK government's welfare philosophy reveals that it has adopted a conservative, residual approach in welfare provision. The economic imperative of buttressing a favorable business environment through low tax rate also renders a minimal commitment to welfare funded from public revenue. The restrictive stance or lukewarm commitment of the HK government in welfare provision for the NACs is distinguished from other countries adopting more active policies for immigrants' integration.

16. Such a stance of the government is perhaps grounded upon the consideration of avoiding agitating the local people. But it results in inflicting or reinforcing an exclusionary sentiment amongst the local people against the NACs.

17. Reference should be made to other countries in helping integrate their immigrants (like USA, France, Germany, Canada and Australia). Positive discrimination measures may help the NACs to avoid being unfavorably excluded or rejected. Public education may help to reduce or eradicate the misunderstanding or labels attached to the NACs.

18. The fundamental issue in question lies in how the government and the local people conceptualize the issue of citizenship, and whether the NACs are regarded as equals in their social entitlements.

Housing and Welfare Services for New Arrivals from China: Inclusion or Exclusion ?

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1. Introduction

The population of Hong Kong has long been constituted by immigrants from Mainland China. However, in the aftermath of the 1997 hand-over, the issue of inflow of new arrivals from China (NACs) has aroused heated public concern and has become highly controversial and socially divisive. There arises a widespread discontentment against the coming of those NACs. The resentment has a variety of roots, and is tinted with an element of parochial despise of the NACs and even carries with it discriminatory sentiment.

The Hong Kong Special Administrative Region (SAR) government is apparently hand-tied in handling this immense problem of immigrant inflow from China. On the one hand, upon reunification with the Mainland, it is logical that Chinese citizens can enter and stay in Hong Kong since it is part and parcel of China's territory. Indeed, the Sino-British Joint Declaration and Basic Law have also laid down provisions for a regulated inflow of Chinese people having right of abode in Hong Kong. On the other hand, however, the SAR government is also wary of the possible burden of providing various social services[1] to these new immigrants and providing them with employment.

There is a multitude of needs and problems faced by immigrants in adjusting themselves in a host community. Such needs pertain to the basic livelihood necessities of having shelter, food, warmth, and the like. Furthermore, if immigrants are really to integrate well in the host community and lead a normal life, they have to enter into positive social relationship with people around, and participate in the social, economic and even political arena of the society at large. Amongst others, housing, income maintenance and personal welfare services are seen to be of prime significance in enabling the NACs to adjust well in Hong Kong. In

fact, all these relate to the fundamental issue of 'social inclusion' or 'citizenship'. This paper attempts to provide an account of the existing provisions in these three aspects, and to analyze the underlying dynamics pertinent to the present pattern of provision. Furthermore, it also tries to investigate whether and how these services serve to include or exclude the NACs in the Hong Kong society.

To begin with, perhaps the first most problem confronting the NACs in Hong Kong, not dissimilar to immigrants in other societies, lies in the area of having accommodation. There is a common Chinese saying which puts emphasis on 'a safe residence and enjoyable job' (安居樂業) for people . Thus, we depart by examining housing services for the NACs.

2. Housing services for NACs

The title of this section is perhaps a misnomer. The Hong Kong government has indeed done 'dis-service' to the NACs in terms of restricting their access to public housing, rather than providing them with positive services. In fact, the public housing policy in Hong Kong has long been divisive in terms of segregating different sectors of people in the allocation process. The Housing Authority (HA) and its executive arm, Housing Department (HD), have devised various eligibility criteria to allocate public housing resources to different categories of people. In order to critically review whether and how the present housing policies discriminate against the NACs, it warrants a historical review of public housing allocation policy for the past decades.

The Hong Kong government's (the British colonial regime) public housing program was started merely because of a historical incident of a squatter fire in 1953. The Resettlement Department was set up to build emergency shelter for the 35,000 fire victims in short period of time. In fact, in the post-WWII period, faced with the continued inflow of refugees from the Mainland, the government resorted to instigate selective allocation of resettlement estate units to those squatter area residents who managed to build their huts on Crown land. However, in view of the voluminous amount of squatters, the government had to revise its resettlement policy. Thus, the Hong Kong government in 1964 formulated new policies on the

provision of housing to squatters and victims of fire and natural disasters. The 1964 Working Party proposed to establish 'Permitted Areas' to allow for 'legalized' erection of temporary structures by people who were genuinely homeless but not yet eligible for resettlement housing estates (Hong Kong Government, 1964). Government documents in the 1960s and 70s had not specifically and explicitly mentioned the residence requirement as an eligibility criterion for access to public housing. Instead public housing at that time was basically catered for a list of 'compulsory categories' of people, ranging from victims of fire or natural disasters, people affected by redevelopment or clearance, residents of dangerous structures, etc. In this way, the government could maintain control over the allocation of public housing units at its discretion. In fact, Smart's (1988) analysis of the colonial government's squatter control and clearance policy has pointed out that it was actually the economic need of clearing land occupied by the squatters for the budding industrial development in the 1960s, that had provided the impetus for the squatter clearance and the concomitant public housing provision.

In 1973, the new Housing Authority (房屋委員會) was established to oversee the various sections of public housing provision provided previously by the Resettlement Department and its predecessor Housing Authority (屋宇建設委員會). Albeit commencing with an ambitious '10-Year Plan', given the fact that public housing supply is inelastic in a fixed period of time, the HD has long upheld that there must be a mechanism of rationing amongst the various competing groups, since there is shortage of resource. For instance, in its inaugural years, the Housing Authority only provided housing to 'families of three or above', thus disregarding the housing need of the couples and singletons. Besides, from 1973 onwards, those affected by clearance of 'licensed areas' would be eligible for permanent public housing, whilst those ineligible ones would only be relocated to other re-site areas. In 1974, the HD replaced the 'licensed area' and 're-site area' with 'temporary housing area' (THA), which served to provide temporary accommodation for those who were not yet eligible for permanent housing estates. In January 1981, the HD announced to apply the 15-year residence requirement to those THA residents being affected by clearance. But upon heated resentment by the residents and pressure groups, the HD conceded to change to 10-year requirement in December the same year. In 1982, there was also discrepant treatment to people affected by demolition

of squatters or THA. For families, they could have 'in-situ' relocation, while the singleton and 2-person households would only be relocated to the New Territories. In 1984, the government proposed to lower the 10-year Hong Kong residence requirement from 10 to 7 years, for these people affected by squatter/THA clearance. Yet, it was only until 1989 that residents of THA with 7-year residence could be provided with permanent housing when their THAs were to be demolished, while squatter residents similarly affected would still have to meet the 10-year requirement. On the other hand, singletons were denied access to permanent housing before 1985.[2] All these reflect that the HD had persistently resorted to various means of allocation, laying down discretionary restrictions or eligibility criteria, in coping with the ever-increasing demand for public housing.

As at today, the HD stipulates the following criteria for application of public rental housing:

> *The applicant must be 18 years of age or over.... The applicant and his/her family members must be residing in Hong Kong and have the right to land in Hong Kong without any conditions of stay (except a limit of stay). Family members not living in Hong Kong cannot be included in the application. ... At the time of allocation,* ***at least half*** *of the family members (including the applicant) must have lived in Hong Kong for* ***seven years*** *and are still living in Hong Kong. All children under the age of 18, regardless of their place of birth, will be* ***deemed as having satisfied the seven-year residence rule*** *provided that one of their parents has lived in Hong Kong for seven years*
> (Housing Department http:// ww.info.gov.hk/hd/eng/hd/public/ordinary.htm)
> (emphasis added)

In fact, this present version of eligibility criteria was revised only in 1999. Originally, the HD required that the family should have more than half of its members having met the 7-years residence requirement. Yet, as one legislator (Law, 2001 http://web.hku.hk/~hrnwlck/migrat03.html) pointed out, this measure apparently encouraged those families to give birth to more children in order to meet with such a requirement, thus worsening the problem of population increase. The HD's concession was perhaps grounded upon the consideration of this adverse impact, or pressures from the concern groups and some legislators.

When we trace the origin of this 7-year requirement, we can find that it arose in particular socio-historical juncture. This requirement only came in 1980, when the Housing Authority apparently became aware of the possible incidence of injustice in public housing allocation. There had been cases where victims of clearance for redevelopment or public works were re-housed while those on the waiting list had been 'over-taken' or figuratively there had been 'queue-jumping'. Thus the Authority devised new allocation policy in 1980.

> *"The Authority was concerned that a few families with a comparatively short residence in Hong Kong were securing permanent public housing through the various compulsory categories ahead of families on the waiting list who had lived in Hong Kong for many year. As a result, the Authority introduced a residential qualification for permanent housing so that only persons with at least seven years' residence in Hong Kong are entitled in permanent public housing in any category."* (Hong Kong Housing Authority, 1980: 46-7).

It seems that the HA was watchful of the large influx of Chinese immigrants in the years preceding 1980, coupled with the public uproar of the coming of Vietnamese Boat People (though they are not entitled to public housing), that it introduced such a residency requirement to 'gate-keep' the provision of permanent public housing. Indeed, it is noteworthy to reckon the coincidence of the colonial administration's abolition of the 'touch/reach-base' policy in the same year of 1980 that debarred illegal immigrants from China from obtaining the right of residence. In 1980, the government, having informed and probably obtained the blessing of the Chinese Government, granted an amnesty (of 3 days) to those who had arrived at Hong Kong on or before 23rd October that year, to have 'permanent residence' in Hong Kong (Hong Kong Government, 1981). Furthermore, in 1987, in line with the Sino-British Joint Declaration and the annex documents regarding the issue of 'right of abode' in Hong Kong, the government amended the Immigration Ordinance (Cap 115)[3] and Registration of Persons Ordinance (Cap 177) to define, the first time ever, 'Hong Kong permanent residents' (Davies and Roberts, 1990) and to provide for the issue of 'permanent identity card' to

these people (Hong Kong Government, 1988). In this connection, the 7-year residence requirement has since 1987 become the symbol or official seal for defining Hong Kong citizenship and social entitlement.

It is insightful to quote from Freeman that *"[a]ccess to the regular social housing that serves the indigenous population has normally been severely restricted either by requiring migrants to queue up behind nationals already on the waiting lists or by imposing quotas on migrant concentrations in housing projects in order to avoid crossing what has been called the threshold of tolerance."* (1986; cited in Cohen and Layton-Henry, 1997:22-3). The stipulation of a considerably long period of residence requirement effectively poses a hurdle delimiting the immigrants' access to the much-demanded public service, i.e. housing. This prevents public resentment against the government administration.

Similar to experiences in other countries, housing provision for immigrants is an omnipresent problem. As Freeman contended, *"lack of adequate housing has perhaps been the single most persistent and controversial problem related to the issue of social services of migrants"* (1986, cited in Cohen and Layton-Henry, 1997:22). However, Hong Kong presents a peculiar case which has to be understood in the context of its land development and the burgeoning of the property-led economy.

It is perhaps due to the fact that housing in Hong Kong is particularly pivotal in sustaining the economy, which makes it untenable for the government to provide it on a large scale and indiscriminately to anyone staying in the territory, claiming residency or citizenship. According to Staley (1994:27), 45% of Hong Kong's capitalization of the stock market, 60% of the territory's investment expenditure, and about 40% of the bank lending are constituted by the property sector. Lee and Yu (1987), Davies and Roberts (1990) and Staley (1994) invariably contended that land sales have constituted a substantial proportion of government revenue throughout the years, ranging from 5 to 27 per cent of the government's annual revenue. Yu (1995) even opined that the Hong Kong government had implemented a 're-commodification' policy in its public housing policies from 1980s onwards. The government has digressed from its ambitious public (rental) housing plan, to one emphasizing on encouraging home ownership. Furthermore, with the wave of

privatization, which emanates from the world-wide trend of 'rolling back of the welfare state', housing policy has further moved towards encouraging home purchase in the private sector. It seems that the government has to buttress a viable property market in order to sustain Hong Kong's economy which has already been structurally ingrained with real estate development. By instituting limits to the public housing supply and demand, the public will then be encouraged or urged to shift to the private sector to satisfy their housing needs. The denial of the NAC's access to public rental housing may indirectly serve the policy objective of shrinking the demand and pressure on public housing. In another respect, it could be regarded as the government's attempt to induce (or force) the citizens to engage in 'upward filtering' in housing consumption. The analysis follows like this: the lower rungs of the private housing sector (low rent/price flats) are already occupied by the NACs (due to their being denied of public housing), the local people have to turn to upper rungs of private housing (for rent or purchase).

A critical review of the evolution of the public housing policy from its 1950s inception to its recent development reveals that the nature and function have undergone significant wax and wane. In the very beginning, public (rental) housing served primarily welfare functions of immediate relief. Later, it served social and political functions of appeasing the public upon the ending of the 1960s social disturbances. This echoes the neo-Marxist perspective expounded by the French sociologist Manuel Castells (1977, 1983), that welfare services serve the essential function of 'social reproduction of labor'. Castells theorized on the concept of 'collective consumption' which states that welfare services help to shift the burden of provision from the capitalists to the state. Social policy provisions serve to appease the governed and reduce the working class' resentment and demand for wage rise. They also serve stabilizing and regime legitimation functions. This is particularly crucial for the colonial regime at that historical juncture. Eventually, it also took up the economic function of firstly, diversifying population distribution and providing labor for the budding manufacturing industries, and secondly, lowering the production costs of the capitalists, and finally, serving as a buffer for the territory's burgeoning property-led economy. In this regard, public housing policy is understood in the wider context of Hong Kong's political economy in terms of regime legitimation and economic development (Yeh and Wong, 1984; Keung, 1985; Kwitko, 1988; Ho, 1989). This also

explains the administration's deliberate policy to instigate exclusionary measures in allocating public housing, to result in the detrimental effects upon the NACs.

As a result of such allocation mechanism which effectively limits the NACs from gaining access to permanent housing, there arises the phenomenon of spatial and social segregation of the NACs. There is high concentration of the NACs in low-income districts, e.g. Shamshuipo, Tai Kok Tsui, Tsuen Wan (Yip, 1999) in which they can afford the lower rents charged on those old private tenement buildings. Very often, the NACs have to bear co-tenancy, shared household amenities, and lack of privacy. More worrying still, the NAC children are possibly susceptible to harassment by co-tenants or crime within the neighborhood in those dilapidated urban areas. Worse still, some of the NACs are even so helpless to rent or purchase roof-top illegal structures. In closer examination, there exist a host of unjust administrative measures regarding the rights of roof-top huts residents. On the one hand, these rooftop huts are regarded as illegal structures according to the Buildings Ordinance and Fire Safety Ordinance, and so they are subject to the government's frequent threat of demolition. However, the Water Supplies Department and Rating and Evaluation Department respectively provide water to such illegal structures and charge the residents rates. Moreover, the Housing Department would disqualify these rooftop residents in applying for public housing, since they are regarded as having owned a 'property' (i.e. the rooftop structure), which contravenes one of the criteria for eligibility for public housing. The new arrivals are basically uninformed of the illegality of the rooftop structure nor the improper transaction therein. In fact, the legal professionals involved in such transactions of purchase or rental should have the professional responsibility to advise the new arrivals not to engage in such transactions. However, it is disappointing to see that the government only becomes aware of such anomalies in 2000 by proposing to band transaction of illegal structures and to stop charging rooftop structures of rates, and stop providing water to those households. The NACs are therefore doubly penalized in paying a handsome amount of money (out of their meager income or savings) to buy or rent such illegal structures but as a result they are denied access to public housing when their rooftop huts are demolished by the government authority. That is why there arose a number of fierce struggles staged by those rooftop dwellers when they were confronted with the Building Department's demolition orders and actions.

In other instances, when these NACs are forced to evict from their squatter areas or are affected by redevelopment of those private tenement buildings in which they live, they may be relocated to the THA, or more recently 'Interim Housing'. The THAs are temporary structures built by the HD, usually in some government land temporarily unused by the concerned departments. The living condition is poor in general, and residents there have to bear the summer heat given that THAs are wooden structures. Besides, residents have to share communal toilets and have no bathrooms nor kitchen attached to each household. As for the Interim Housing, they are either re-furnished old public estates or purpose-built buildings, thus having better conditions as compared to the THAs.

All in all, the NACs are usually faced with the problem of unfavorable living environment, or are even denied equal access to the housing resources provided by the government.

3. Income maintenance – social security and employment service

Having analyzed the problem of housing for the NAC, the second major issue faced by them is income maintenance or making a living. This relates to the financial need of securing stable income either derived from waged employment or welfare benefits. In this instance, it is noteworthy to examine the profile of Hong Kong's new immigrants, which is characterized by a large portion of women and children who come to Hong Kong for family reunion. However, a considerable number of these NAC families are living in poor conditions, due to the fact that their breadwinners are middle-aged men who have low education and thus low-wage jobs (Census and Statistics Department, 2000).[4] There are also cases whereby the mother cannot get the entry permit from China, while the children can join their father in Hong Kong, thus making a 'pseudo-single-parent' family. The father may therefore face the dilemma of whether leaving their children alone at home while going to work, or quit his job to take care of them. In the latter case, it renders them fall into the socially despised status of a welfare recipient. Here, social security serves as a buffer for them to maintain their living at a minimum subsistence level. In Hong Kong, social security is provided by the government on a non-contributory basis, i.e. the government provides such services out of the public revenue.

The social security system is administered on a selective basis with means tests on the applicants' eligibility. The Hong Kong government, including both the foregone British colonial administration and the incumbent SAR government, have long resisted the setting up of a contributory social security system, not until 2000 that a Mandatory Provident Fund is set up. Thus, there has been a widespread public conception that living on the government's social assistance carries a negative stigma of failure or incompetence. In this connection, NACs receiving social assistance are doubly despised by the local people. Nonetheless, there is indeed still one hurdle for the NACs to obtain such assistance. Presently, applicants for Comprehensive Social Security Assistance (CSSA) must meet the one-year residence eligibility requirement. However, the Director of Social Welfare can exercise discretionary power to approve applications of those whose situation is of urgent need. This 1-year residence eligibility criterion again illustrates the SAR government's policy intent of delimiting public expenditure on the one hand; while on the other hand, it also precipitates into fostering the public's resentment against the NACs by making reference to the government policy of making such a divisive distinction. The local people are holding the perception that the NACs are unproductive economically, given their lower educational attainment, and the majority of them are women and children, and therefore the NACs are having welfare dependency. This precipitates into the local people's discontent as they relate this perception to the draining of general revenue of which they share a part in contributing taxes. Yet, in reality, according to the statistics of the Social Welfare Department (SWD) (cited from Hong Kong Social Security Society, Oct.99), there had been 13,900 and 19,400 cases of NAC CSSA recipients in December 1997 and September 1998 respectively. The volume of NAC CSSA recipients only constituted 9.6 per cent of the total 202,000 cases in 1998. Thus, the public's perception against the NACs is actually not warranted.[5]

For those NACs who are at their working age (above 15), they may have the need to look for waged employment. Here, there is a need for job placement services. The government's Labor Department and some NGOs provide job placement service. Besides, the Employees Retraining Board (ERB) also provides training courses for job-seekers in general, and the unemployed in particular, to enhance their chance of entering into employment. However, there seems to be some unfairness found in the ERB's original service

provision. In its initial efforts of launching retraining programs, the ERB originally delimited the NACs from participating in its retraining programs. Again, this was supposed to give priority to local people who were equally faced with the unemployment problem. It was only upon pressures from labor unions and political parties that the ERB revised its policy in 1999 to enlarge its beneficiary to accommodate the NACs.

On the other hand, even if the NACs are willing and capable of having full- or part-time employment, there is discrimination prevailing in the labor market whereby the new arrivals are exploited, being offered lower wages, or adverse working conditions, e.g. longer working hours. It is very common for migrants to take up unfavorable jobs in the local job market, which apparently is a worldwide phenomenon for migrants. As a consequence, the NACs are marginalized, if not entirely excluded, from the local labor market.

4. Personal welfare at individual and community level

Apart from housing and income maintenance through welfare or waged employment, the NACs have various types of adjustment problems to face with (Hong Kong Federation of Youth Groups, 1994; Chan, 1996; Mak, 1996; Chow and Ho, 1996; Ho, 1999). Although they are ethnic Chinese, given that China encompasses a wide variety of dialects from different localities, the NACs coming from different parts of Mainland China are not well versed in Cantonese that the local Hong Kong people use. In this regard, they may easily be identified as recent immigrants and are thereby being subject to subtle or overt discriminatory treatment in their daily interaction with the local people. In addition, since the Chinese government has promulgated the use of simplified Chinese character in the Mainland, the NACs are also not familiar with the 'complicated' characters used in Hong Kong. This poses some difficulties in their daily living, like reading road signs, notices, or even menus in restaurants. On the other hand, the NACs are nevertheless unfamiliar with the social systems, policies, formal and informal institutions, and even the fundamental information related to their daily living, like transport, postage, banking services, etc. All these create various types of inconvenience, or even induce misunderstanding or conflict with other people, thus igniting other tensions between the locals and the NACs. Taking cognizance of all these, the government and NGOs have provided various types of 'adjustment courses' or programs, to facilitate a more smooth integration of the

NACs into the Hong Kong society. Such programs may include language courses (both written and spoken Chinese and English), and 'round-HongKong tours' to enable the NACs to familiarize with the transportation system, emergency services, basic rights, and information about various kinds of services.

However, apart from tackling the routines of daily activities, there can be problems related to the NACs' emotions and psychological stress. Besides facing with overt or covert discriminatory treatment by the local people, some NACs may not be 'willing migrants'. As revealed in the author's interviews with some NACs, some of the youth NACs are found to be not particularly keen to come to Hong Kong. They prefer to remain in the mainland, given that they dislike being regarded as 'second-class' citizens and the experience of being discriminated in Hong Kong. As for the NAC women, some of them may experience marital discord with their husbands whom they might have been separated for quite some time. Furthermore, NAC families are found to be in the lower rung of household income. Financial problem is also a pertinent one for these NAC families. As a result of the blending of the stresses or psychological pressure borne by the various family members, there may be the danger of precipitating into family problems, ranging from parent-child and spousal disharmony, to family violence. In this connection, there is the pressing need to provide personal counseling and family support to these NAC families.

Under the auspice of the SWD, there is indeed a wide coverage of different services provided for the Hong Kong citizens in general. With reference to the SWD's *Five-Year Plan for Social Welfare Development in Hong Kong Review 1998*, there are namely, social security, family and child service, children and youth service, services for offenders, rehabilitation services, and community development services. All these domains can basically provide appropriate services to the NACs should they fall within the service boundary as defined by the SWD. Indeed, the government also provide funds through its 'subvention system' to NGOs to share the responsibility of welfare provision. As the incoming NACs are mostly of younger ages and few of them have serious problems in physical and/or mental disability, the elderly and rehabilitation services are not their major area of service consumption. Instead, the NACs mostly consume the family services, children-and-youth services and community development services. Family services

include the conventional services like counseling, nursery, home help, etc. As for young persons, there are children and youth centres which provide recreational and developmental programs; school social work service which assist students in the school setting; outreaching service which serves a preventive function in helping the youngsters to refrain from being led astray by triads or committing deviance. As the NACs are living in specific communities in which they come into contact with local people, there is the need to help them integrate well in their neighborhood. In this regard, the government and other NGOs have become aware of the need to enhance community services for the NACs. In order to facilitate more efficient and targeted delivery of appropriate services to the NACs, the Home Affairs Department, in collaboration with the Immigration Department, collate data of the NACs and disseminate to the relevant social service agencies. The International Social Services, which is an agency specialized in migration services, has obtained the mandate from the government to provide information and services to the NAC immediately upon their arrival at the various border checkpoints. Furthermore, the Jockey Club commenced to fund 4 projects specially tailored for the NACs, i.e. the 'New Arrival Project' (NAP). From 1999 onwards, the SWD also started to subvent 6 agencies to provide 'Integrated Neighborhood Projects' (INP) which serve the NAC as one of the three targeted clients (the other two being low-income families and elderly aged 65 or above). These two specifically designed service projects provide assistance to the NACs at either individual (casework counseling) or community level (by building up mutual support networks and enhancing the NACs' knowledge and utilization of community resources).

However, although these tailor-made services provided for the NACs are well-intended, they are taken by the local people as the NACs' 'privilege' which are provided at the expense of local HongKongers. Such a perception is perhaps precipitated by the government's publicity of the need to shrink public expenditure and the public is thus led to conceive welfare expenditure as a 'zero-sum' game whereby funds allocated to NACs come from those originally allocated to the local people. As a result, these special services which originally aim at integrating the NACs turn out to be encouraging the local people's rejection against them, which ironically is perhaps an unintended consequence for both the government and the NGOs.

5. Why is there rejection and discrimination against NACs amongst Hong Kong people ?

Although there is apparently an array of welfare services for the NACs in assisting them to adjust better in the Hong Kong community, the housing policy presents a formidable hurdle for them to secure decent living. Moreover, even with the various types of personal services and financial assistance, the NACs are faced with social stigmatization, rejection and even discrimination by the local people. In this regard, it warrants a critical examination the social and historical roots pertaining to the development of such a phenomenon whereby local Chinese put up rejection against their Chinese fellow countrymen.

Rejection against immigrants by host population is in fact prevalent around the world. Actually, it is one variant of discrimination or prejudice existing amongst people. Latting (1990) provided the explanations for the existence and prevalence of various types of discrimination. It can be due to intergenerational socialization which transmits misconceptions. Besides, discrimination provides psychological satisfaction for one to feel superior at the expense of and exclusion of another group, thus serving 'ego-enhancing function'. Furthermore, it also serves macro, political-economic function by instigating systematic denial of benefits and opportunities in detriment to minority or weak groups. On the other hand, with relevance to 'Labeling Theory' (Becker, 1968), it is suggested that there exists a difference in power between the labeler and labeled; and that the labeler derives benefits from the act of labeling others. They would strive to preserve or advance their interests by suppressing the rights of another, probably weaker, group in society. Through the process of attaching negative or socially undesirable labels, like laziness, inferiority in intelligence or culture, etc. to another group, the labeler mobilizes the larger community to disrepute the stigmatized group and to deny their access to social resources.

The phenomenon of rejection and discrimination is more significant where there is difference in the ethnic backgrounds between the two groups of people. Thus, from the 1980s onwards, especially after the crumble of the Eastern European Communist bloc when the Western European countries have increasingly experienced large influx of immigrants, there have been more incidence of racial discrimination, segregation

and even violence. However, the Hong Kong people and the NACs are having the same ethnic background of being Chinese. It is therefore not a question of ethnic distinction, but some other factors, that have come into play in breeding resentment against NACs amongst the local populace.

In fact, there can be a multitude of roots precipitating the local people's parochialism and defensiveness. The author would suggest that they fall into three major categories. The first relates to the local people's distinct Hong Kong identity; the second being an anti-China sentiment, and finally the third touches upon the local people's defensiveness against 'outsiders'.

Although the Hong Kong population is constituted largely by immigrants from the Mainland, post-war development has provided the ground for the breeding of a distinct Hong Kong identity and a particular culture of their own, distinguishable from the mainland Chinese. As early as 1970s, Lau Siu-kai (1977) has coined the notion 'utilitarianistic familism' in describing Hong Kong people's parochial concern on ones' own (familial) material welfare. Such a mentality has mutated from the original 'refugee sentiment' (Hoadley, 1970; Shivley, 1972). More recently, as noted by local sociologists Wong and Lui (1994), the Hong Kong people's emphasis on immediate economic returns and pragmatic concerns predispose them to refrain from concerning some ultimate values nor principles, not to mention ideological precepts. Thus, they coined the local civic culture as being 'amoral'. It is such materialistic and economistic concerns which take resemblance to the neo-Marxist, Harvey's (1989) connotation of 'capitalistic consciousness'. In a sense, the Hong Kong people can be seen as a prototype of *homo economicus* . Put in this light, when confronted with pragmatic concerns of competing for (scarce)resources, the local people would not take heed to nationalistic appeals, to consider the plight of the Chinese immigrants coming from the motherland. Instead, given that these newcomers pose a threat to their vested interests, they would put up fierce resentment or rejection against the NACs.

Apart from such materialistic basis of Hong Kong culture, there is also a brand of Hong Kong identity nurtured especially amongst the second or third generation of locally-born 'HongKongers'. From the 1960s

onwards, Hong Kong's economy has burgeoned, producing a remarkable world record of growth and prosperity (as measured by government reserves and per capita GDP), and thereby bestowing a admirable standard of living to the Hong Kong citizens. Furthermore, the foregone colonial administration had basically developed an efficient administration, especially after the turbulent 1960s and 1970s (curbing massive corruption and introducing administrative reforms). In addition, the government had since the 1970s played the role of a benevolent (city)state in providing social services. Regime legitimacy and sense of belonging have therefore been bolstered. Finally, as incisively pointed out by Leung (1993), the colonial regime had deliberately carried out 'de-ethnicization' in its education policies, to desensitize the locally born students of nationalistic sentiments. Here, it also touches upon the second major category of anti-China sentiments, which helps to explain the local people's resentment against NACs.

Originally, being ethnic Chinese, the local Hong Kong people should have some basic identification to China or the Chinese collectivity, albeit not necessarily the regime in power (on either the Mainland or Taiwan). However, given the growing local Hong Kong identity, there is indeed some tearing apart between the two targets of identification: Hong Kong and China. Indeed, as a local historian, Steve Tsang, remarked, *"[T]he people of Hong Kong were somewhat confused regarding their dual identity of being Hong Kong residents and Chinese at the same time"* (Tsang, 1995:259). In corollary, Leung Sai-wing also argued that there is a 'floating identity' (Leung, 1986:21) prevailing in Hong Kong people's mind, which depicts people's inherent ambivalence between identifying themselves as ethnic Chinese but geographically or pragmatically HongKongers. Thus, it is also insightful to note Tsang's comment that as one brand of nationalism had faded, the persistence of sub-terrain, pragmatic concern of 'earning for a living' had crept in as the dominant normative paradigm of the Hong Kong people. In addition to the local people's distancing from the Chinese identity, other factors also came in to further accentuate Hong Kong people's resentment against China. Before the 1980s, when China was still economically less developed than Hong Kong, the local people had to support their mainland relatives through remittance and postage of daily necessities. When the HongKongers happened to travel in the mainland, their sense of (HongKong)superiority predisposed them to despise the mainlanders. With the fall of the Gang-of-Four, there are increasing

exposures of massive corruption and political struggles in China, adding Hong Kong people's distaste against the mainland. Worse still, the 1989 June-Fourth Incident sank the local Hong Kong Chinese' hope of a reasonable and admirable regime to which they have to rejoin as a SAR. Thus, a local political analyst pointed out that "*a sense of Hong Kong identity indicates a strong feeling of distinctiveness among the people in Hong Kong who become more conscious of keeping Hong Kong as a separate entity of Mainland China*" (Lee, 1993:81). This also explained the sub-terrain reservation of some Hong Kong people in reunifying with the People's Republic of China in 1997. All these predispose the local Hong Kong people to distance themselves from China or its subjects, the NACs.

The third major category of factors leading to Hong Kong people's parochialism and defensiveness can be traced back to some historical incidents and social development. Commencing from 1979 onwards, Hong Kong has been troubled by the problem of Vietnamese boat people. The local people have been agitated both of the large amount of revenue put onto building camps for the Vietnamese, as well as by the occasional disorder aroused within the camp or even in the community in the vicinity of open camps. This sowed the seeds for a kind of parochialism and 'defensive neighborhood' (Suttles, 1968). At around the same period of time, there was also a large influx of illegal immigrants coming from across the border. The direct consequence was the government's abolition in 1980 of the 'touch/reach-base' policy of giving residence right to immigrants who could manage to evade from being caught by the police. The administration also announced that due to such a large influx of immigrants, the ambitious 10-year Housing Program (originally commenced in 1973) had to be postponed. This added to the Hong Kong people's bitterness against the Chinese immigrants whom were viewed as the culprit of forestalling social service provision in Hong Kong. Another separate development in Hong Kong society also added to the local people's parochialism and anti-foreigners sentiment. With greater prosperity, Hong Kong families have become more affluent to afford shifting the household chores to a secondary labor market, that constituted by imported labor.[6] This has apparently given the local HongKongers an escalated status of being 'superior' to these non-HongKongers. All these precipitate into an exclusionary sentiment of fending off threats from some identified 'aliens' who are perceived to be inferior or trouble-making.

The local people's dissent against the Chinese immigrants has increasingly escalated since the issue of 1997 transition was put on the social and political agenda in the 1980s. Upon the agreement between China and Britain, there has been gradual increase in the number of legal immigrants from 75 to 105, and eventually to 150 per day. Such a figure has admittedly added to the overall population pressure on Hong Kong in all aspects pertaining to social services, employment and social order. Nevertheless, it was perhaps due to several critical incidents that sparked off the widespread dislike against the NACs. The first of such issues dated back to pre-1997 when the government reviewed the social security system. The SWD's review stirred up public outcry of the possible abuse of the social security system, which in turn also aroused the local people's skepticism against the NACs in obtaining welfare benefit, although such accusation is not warranted as aforementioned. The second of such critical incident was the Asian Financial Crisis erupted in 1996, which incidentally coincided with the political transition in 1997, that provided the immediate impetus for the Hong Kong people to manifest their parochialism and defensiveness to its fullest extent. The Hong Kong people had perhaps been too familiarized with economic booms since the 1970s and are therefore inexperienced to handle the various problems of economic downturn. They are hard hit by the economic downturn never experienced in the last decades. Some middle class suffer from 'negative equity', while the lower class even lose their 'rice bowl' altogether. As pointed out by Weiner (1996), there should be some preconditions for successful integration of immigrants, one of which is the availability of sufficient employment opportunities during an economic boom. This can readily absorb immigrants into its labor market, without causing intense competition and thus hostility between the local people and the immigrants. The financial downturn, on the contrary, deprived Hong Kong an opportunity to have a 'soft-landing' in absorbing the NACs. The local people displaced their anger, on the one hand, to the inefficient government administration in rescuing the economy and their jobs. On the other hand, such blaming or victimization spill over to the non-locals, the incidence of which falls mainly upon the NACs whom they think have not yet contributed enough to the Hong Kong society at large. The NACs are even seen as sapping the tight budgets of the government revenue which in the final analysis is funded by the local taxpayers.

The local people's rejection of NACs actually heightened to its peak in 1998, when the Court of Final Appeal (CFA) ruled the constitutionality of granting right of abode to children of Hong Kong people who are currently living in China. The Hong Kong SAR government, anticipating the immense financial burden of catering for the large influx of NACs, staged a high-profile publicity to estimate the horrifying number of eligible immigrants, and appealed to the National People's Congress Standing Committee for (re)interpreting the Basic Law stipulation on residence right. This had precipitated into an intense atmosphere of hostility and social cleavage centered around various issues pertaining to constitutional position of the CFA, the preservation of Hong Kong's 'high level of autonomy' and not least, the government's (and Hong Kong society's) fiscal burden.

All these substantiate the social, economic and political contexts which give rise to labeling and discrimination mentioned above, which in consequence brings about social exclusion against the NACs.

6. Concluding remarks – social policies as mechanisms for inclusion

Social welfare policies are by and large funded by public revenue. However, any government would have to face with the problem of stringent revenues. Given the plurality of competing claims for government revenues on various policy domains, the administration has nonetheless to devise some mechanisms for allocating the scarce resources. Priorities will be set to tackle the society's most urgent problems or pressing needs. From the vantage point of public administration, selectivity is nonetheless a technical imperative for a government to distribute societal resources. However, there can be different perspectives in conceiving the government's propensity to devise which particular allocation mechanism. Political science literature provides a multitude of theories, ranging from elitist, pluralist, structuralist to corporatist (Ham and Hill, 1993). The 'elitist' view, tracing back to the writings of the founding father of sociology, Max Weber and the more contemporary elitist theorist C. Wright Mills, puts forward that decision-making in government is essentially centralized in a group of elites. The 'pluralists', represented by such scholars as Robert Dahl, on the other hand, would conceive the state to be subject to multiple competing political forces, thus allocation decisions are couched upon the dominant force in power. The Marxist perspective, both its

'structuralist' and 'instrumentalist' variants put forward by Poulantzas and Miliband, propounds that the state is essentially serving the ruling class' interests, and thus its decisions are basically confined by the structural imperatives of preserving the ruling class' hegemony. The corporatist view, proposed by such scholars as Schmitter and Lawson, would contend that state decision making is characterized by representation of sectoral interests within and outside the state machinery. All in all, different theories would make varying propositions as to the basis of allocation of scarce resources to the advantage of specific sectors in society. Notwithstanding such variance in stances, the state, vested with the monopolistic use of legitimate force over a community, can implement its resource allocation policies to buttress its regime legitimacy by attending to the interests which it attempts to protect. Thus, selectivity in social policy conceived in such a way reflects the varying stances of interest being represented or articulated by the state or its incumbent political force(s).

The Hong Kong SAR government, being juxtaposed in a capitalist social order (albeit under the 'socialist' Mainland Chinese regime), has to preserve the capitalistic economy. It is commonplace to acknowledge that Hong Kong's tax rate is one of the lowest by world standard. The government has practiced, ever since its colonial era and carried over to the incumbent SAR administration, a prudent financial management of public revenue. In this connection, it is understandable for the government to adopt a conservative welfare ideology. It therefore refrains from providing a very generous coverage of welfare to the Hong Kong people. Besides, the government has long adopted the welfare philosophy of a 'residual model' which places the individual and their family, or even the community, as the major actors in catering for people's welfare. Moreover, it has been widely believed, and well supported by the business sector, that generous welfare provision would breed dependence and jeopardize people's work incentive. This strikes resemblance to the neo-conservatism tenets of 'moral hazard' (George and Wilding, 1994; George, 1997; Barry, 1999). In fact, there is intellectual lineage between the neo-conservatism and neo-liberalism, since both renounce the proliferation of state welfare. Neo-liberal welfare ideology puts emphasis on individual's responsibility for one's own welfare, the state should only play a residual role when individuals and their natural support systems (family and community) cannot fulfill their original functions. Neo-conservatism also strikes a similar tone in putting emphasis on family's, instead of the state's,

responsibility. Both neo-liberals and neo-conservatives concur to emphasize the function of the market in resource allocation and satisfaction of the insatiable human need. Both would despise the notion of putting the state as the rational mechanism for planning and arbitrary allocation of resources. The state is viewed as characterized by inefficiency. What distinguishes neo-conservatism is its aversion to the socialist position of emphasizing the state's role. The neo-conservatists would strike a moralistic tone that state provision would result in the evasion of one's (and the family's) role in taking care of his/her own welfare. The neo-Right's emphasis on individual's worth for welfare is apparently a reinstatement of the industrial achievement model of welfare. In similar vein, it takes a more contemporary terminology of 'workfare', where one's welfare is basically linked with his/her performance in work (Tomlinson,1995 ; Pratt,1997). In a nutshell, welfare policies based upon a residual or achievement model is marked by selectivism, which bestows the welfare recipients a social stigma which in turn would bring about social exclusion by the larger society.

Apart from the government's economic policy and its derivative welfare ideology, there is also a political consideration in instigating a selectivist and exclusionary welfare policy. The Hong Kong government has, grounded upon the imperative of gaining public legitimacy, to attend to the interests of the majority in society, at the expense of minority communities. Such a majority, in Hong Kong's context, is represented in terms of numbers and of the degree of political visibility and articulation, by the 'local' people who have settled earlier or are locally born. The minority, nonetheless, is constituted by the NACs, who are non-vocal, stigmatized and un-represented. Here, the issue actually boils down to that of the government's and the Hong Kong people's conception of citizenship and social entitlements. Although Hong Kong itself is an 'immigrant community' whose population has long been constituted by immigrants, more than by natural growth, there is a peculiar phenomenon whereby those who managed to settle down earlier tend to reject those latecomers to join in the Hong Kong community. Perhaps it is rendered by a host of historical, economic and social factors, as revealed above. The fragility of Hong Kong's economy, characterized by its being subject to economic influences in its environment, predisposes the people to a sense of insecurity. Those who have secured their living eventually develop a sense of fending off threats upon their vested

interests which they have strove through laborious work. Inspired by Lau's (1977) concept of 'familism', and the writings of the Chinese anthropologist Fei Xiao-tung (1947), the Chinese people are essentially characterized by a parochial sentiment of caring only of their own immediate familial interests. Such a sub-terrain cultural predisposition is further aggravated by more recent historical incidents of inflow of Vietnamese boat people and Chinese immigrants, coupled with unprecedented economic setback upon the 1997 hand-over which itself is also marred with political uneasiness. A sentiment of social exclusion is thus precipitated.

In the domain of citizenship, reference can be made to Bradshaw's (1981) four-fold framework for conceptualizing social needs. Amongst the four different types of needs, it is the 'comparative need', which concerns us here. This kind of need is justified on the ground that if one person is not having a particular kind of provision (of goods and/or services) while another one of comparable situation enjoys such provision, then he/she would be entitled to have such a provision. The kernel of this concept is the comparability of the identical situation or characteristics of the two entities (of individual or collectivity of people) being compared. The fundamental issue is whether Hong Kong (the government and its people) should regard the NACs as different, thus denying the ground for establishing equal par with local people in access to citizenship and thus social entitlements. As contended by Brubaker (1989), welfare state is a closed system, i.e. welfare is provided only for citizens of a state, migrants are therefore excluded from enjoying welfare. Vertovec also postulated that *"the dismantling of the welfare state and other pressures put on the public purse by neo-liberal political restructuring has led to increasing concerns over 'our' common resources posed by 'them', the immigrants"* (1997:xx). Although Hong Kong is not a welfare state per se, the government and the local people are apparently unanimous in regarding the NACs as non-citizens. The collective 'we' of local Hongkongers would not readily bestow 'them' -- the NACs, full citizenship.

Housing and welfare are undeniably essential provisions which serve to help migrants to settle down in the host society and to integrate into the normal way of life of the community. Notwithstanding the government's and the local people's reservation or even resentment against recognizing the NACs' citizenship, there is indeed the inescapable need to provide them with needed services in housing and welfare.

Reference can be made to other countries which receive huge amount of immigrants, like the United States. Canada, Australia and Western European countries after the fall of the Communist Bloc in late 1980s. As revealed in the literature on international migration, there can be various strategies found in different countries in integrating their respective immigrants into the mainstream host society (Castles, 1995). The United States can be regarded as adopting a *laissez faire* policy in leaving to the market forces to absorb the immigrants into the labor market (and the corresponding livelihood). France adopts an 'assimilation' approach in deliberately absorbing its immigrants into the French mainstream culture and institutions. Australia and Canada, claiming to herald 'multi-culturalism', allow the immigrants to retain their ethnic distinctiveness. Their divergences apart, these various strategies are intended to help integrate the migrants to prevent social problems arising from the migrants' maladjustment or the hostility evolved amongst the host community.

In fact, even if there is the provision of social services available to the general public, the NACs are disadvantaged in accessing welfare provisions. As pointed out by Brubaker (1989), formal eligibility for social services does not guarantee that the immigrants can thus be benefited. There are a host of factors restraining the immigrants from enjoying such services, namely, lack of information, distrust of bureaucracy, difficulties in providing documents for proving eligibility, the social service employees' impatience, indifference, misunderstanding and hostility, etc. Perhaps there is the need to devise 'positive discrimination' to enable the NACs to better integrate into the local community. Reference is made to the Greece government which provided incentives, like tax exemptions, for Greek migrants to return to Greece (Glytsos, 1995).[7] In another instance, Germany is another country which provides privileged access to ethnic German immigrants from other parts of the world to reunite into the German nation-state (Castles, 1995).

However, genuine social inclusion involves not only the provision of social services. It boils down to the fundamental issue of social acceptance of the immigrants by the host community. Here, it touches upon the elimination of the problem of discrimination caused by misunderstanding or social exclusion. Solutions can perhaps be found by making reference to the tenets of the Labeling Theory. As the theory states, the

solution lies eradicating the label itself. In this regard, the government should not impose extra limits to deny immigrants' access to various kinds of social services, nor should the government create special identity labels on the immigrants to differentiate from the local population (Weiner, 1996). On the other hand, there should be changes in the social definition of deviance through public education. The government and relevant organizations should promote public education on such aspects as emphasizing the ethnic commonality between the local people and the NACs, the possible contribution of the young NACs whose untapped talent can turn to be viable labor force for Hong Kong's future economic prosperity. Besides, education should also aim at reducing the public's misunderstanding on the excessive drain of public revenue by the NACs in terms of housing, welfare and other social policies. As pointed out by Schmalz-Jacobsen (1995:176), integration should be a bilateral process which involves viable communication between the host community and the immigrants. Welfare services should not merely aim at helping the NACs to understand local situations and way of life; they should also bring the local people to recognize the NAC's cultural background and even to appreciate their possible strengths. The nationalistic sentiment found amongst the NACs, given their being nurtured in the Mainland with civic education in this regard, should be commended. The local Hong Kong people's relative lack of civic identification to society and sense of civic responsibility should indeed be complemented by the NACs' better national and civic mindedness. Finally, there should be efforts made to eliminate or reduce benefits derived from labeling, and diminishing the power inequality between labeler and labeled. Here, resources should be invested into creating more jobs opportunities and social services for the entire population, so as to lessen the competition of such resources between the locals and NACs.

It is to be reckoned that the inflow of NACs is an irreversible social and political trend, as destined by Hong Kong's return to China's sovereignty. The Hong Kong people and the government should perhaps admit the dire fact of the need to expedite social inclusion soonest possible, rather than putting up exclusionary hurdles against the NACs. Should Hong Kong forego the opportunity to integrate the immigrants and tap their potentials, there might be the threat to breed hostility and social cleavage within the society.

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Notes:

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[1] In Hong Kong, dating back to the British colonial administration, social services include education, housing, medical and health, and welfare, which were regarded as the 'four pillars' of social policies since the 'MacLehose Era'. In the government's accounts on public expenditure, these four policy domains, in addition to that of labor services, constitute the government's expenditure on 'social services'. In this article, it will only focus on the three aspects of housing, welfare and labor services, since there will be other speakers deliberating on education and medical and health service.

[2] Extracted from the People's Council on Public Housing Policy publications and the Housing Authority's annual reports in various years.

[3] In the government's 1981 White Paper "District Administration in Hong Kong", it reported the then public concern on delimiting the residence requirement for electoral franchise (which was much enlarged from the original Urban Council election). The White Paper noted that the then Immigration Ordinance (Cap.115) stipulated the 7-year residence period qualifying certain categories of people for the right to land (White Paper, p. 12). It is apparent that the government opted to follow this statutory precedence and

reckoned the social norm of believing that a sufficient period (7 years) should enable a person to have sufficient knowledge of local conditions and candidates (ibid.), in defining this 7-year requirement.

[4] According to the Census and Statistics Department's projection based on its sample study of the General Household Survey (carried out during June to August 1999), 72.5% of the 274,500 NACs of less than 7 years' Hong Kong residence were women, whose median age was 33, of whom 81.1% were married. 28.5% and 58.8% of these 274,500 NACs had had primary and secondary level of education respectively. Amongst those 70,800 employed, 84.5% had monthly income less than 10,000 (i.e. the then median monthly employment earning for the total employed population).

[5] It is also insightful to note the profile of social welfare expenditure. According to the SWD (http://www.info.gov.hk/swd/html_eng/ser_sec/soc_secu/index.html), social security occupied 72% of the entire 6,411 million of total welfare expenditure in 2000/2001 financial year. It is therefore understandable that the government is keen to curb further increase in this burden.

[6] Upon closer examination, such a phenomenon has some other social implications. The hiring of domestic helper from the South Eastern Asian countries has enabled the housewives to go out for gainful employment. This is, on the one hand, a reflection of the heightened status of women in strive of gender equality; and the urge of the family to finance their home mortgage by having dual earners from within the same household.

[7] The Greek government, after the fall of the dictatorship regime in the 1970s, devised policies to attract political emigrants to return to Greece or economic reconstruction. Such policies include offering tax exemptions for automobiles, household utensils, etc. for returnees.

Immigration and Health Care

Dr Chow Chun Bong

IMMIGRATION AND HEALTH CARE

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Introduction

From July 1, 1995 the daily quota of one-way permits for Mainland residents to come to Hong Kong was set to 150. In past 5 years, each year some 50,000-60,000 Mainland residents came to settle in Hong Kong under this scheme. Most of them came to Hong Kong for family re-union. Amongst these, about 40-50% were children under 18 years of age and the median age was around 23 years of age. During the same period, the crude birth rate in Hong Kong has dropped from 11.2 in 1995 to 7.4 per 1000 population in 1999. The total birth dropped from 68,375 in 1995 to 51,500 in 1999.[1]

The 1999 survey on Hong Kong residents with spouses/children in the Mainland of China[2] showed that the number of children born to Hong Kong residents staying in China were quite considerable:-

Nature / Age	Total no.	< 12 yr	12-19 yr	>=20 yr
The no. of Mainland children born within registered marriage to HK resident	256,300	18%	12%	70%
The no. of Mainland children born to Mainland children born within registered marriage to HK residents	329,100	19.4%	42.3%%	38.3%
The number of Mainland children born out of registered marriage to HK residents	505,000	NA	NA	NA

Hence considerable number of Hong Kong residents have part of their childhood living in Mainland and at least a third of children of Hong Kong are new arrivals from China.

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[1] *Hong Kong Annual Report 1995-1999*

[2] *Hong Kong Residents with spouses/children in the Mainland of China. Special Topics Report No.22. Social data collected via the General Household Survey. Census and Statistic Department, HKSAR 1999*

Physical health

Many studies have looked into how the newly arrived children adapted to social and school environment. Little studies have looked into the physical health status and their impact on our health care system.

During the period 8 July to 10 October 1998, 457 new immigrant children from China were recruited mainly within 2 weeks of their arrival to Hong Kong to undergo an examination on their physical health status. Their mean age was 8.8 years with 58.2% between 8 and 13 years of age. Overall, one in two children had a medical condition that may require medical attention. The nutritional status was generally good though they tended to be lighter in weight, shorter in stature than the Hong Kong counterpart. Obesity was found in 11.5% and 7.0% of boys and girls respectively using weight-for-height of > 120% of median. But using body mass index (BMI) obesity occurred in only 1% of children. Information on the vaccination status was unavailable in about half of the cases. Blood testing revealed that 9%, 50% and 20% of them were susceptible to measles, rubella and mumps respectively. No children under 7 years of age carried hepatitis B surface antigen but 13.2% of those older than 7 years had the antigen. About 75% had antibodies against hepatitis B surface antigen. Tuberculosis was uncommon. Two had history of TB infection and 13% had positive skin test against tuberculosis. 18.1% and 2.6% of children had a blood lead level of >0,47μmol/L and > 0.71μmol/L respectively. Over 93% showed a decrease in blood lead level 2-3 months after coming to Hong Kong. None required medical treatment except for counselling on avoidance of risk factors. Severe anaemia was found in two children and both needed urgent treatment. About 15% of children were infested with worms. This was particularly common in children aged between 4 and 9 years. About half of the children needed referral for medical management. However, about 20% of the children returned to China soon after their arrival in Hong Kong.

Health Care Implications

Basically, the physical health status of the new Chinese arrivals and their need for health care services are quite similar to that of Hong Kong children but they need more health education to improve on their general knowledge on hygiene and health. The fact that they tended to be less obese and smaller in size may reflect their more active life style and having a more healthy diet. This should be promoted as most children after arriving in Hong Kong will be staying in much smaller houses with little space for activity. Many quickly acquire a more sedentary life style and taking in

high-calorie and high-fat diet.

Mumps, rubella and hepatitis B vaccinations are not given routinely in China. That 50%, 9% and 20% did not have antibodies against rubella, measles and mumps respectively is of concern. In the past decade Hong Kong has strengthened vaccination strategies to ensure a very low susceptibility rate to mumps, measles and rubella. It will usually require over 95% sero-positivity rate to prevent outbreaks. With the influx of new immigrants, a pool of susceptible people will accumulate over the years culminating in an outbreak. Thus it is advisable to vaccinate or re-vaccinate all new immigrant children against MMR. The best time would be at their first entry to Hong Kong.

The very high prevalence of hepatitis B carriage rate in youths of new arrivals is of concern and they have high risk of developing liver diseases and will also serves as a potential source of infection through horizontal transmission in school or through sexual transmission later on in adulthood. Tuberculosis is not a problem in the newly arrivals and their incidence is similar to that of Hong Kong. Worm infestations occur in about 10% of children and will require treatment but will not pose a public health issue.

That 18% of children had high blood lead level of over 0.47 μmol/L is a community health concern. Persistently high serum levels will affect the intellectual development of the children, our next generation. It has been consistently found that young children with blood lead level of around 0.72 μmol/L had an average loss of 2-3 IQ points compared with children with blood lead level of around 0.47 μmol/L. The fact that 93% of children initially having high blood lead level showed a decrease in blood lead level after coming to Hong Kong without intervention indicates that environmental risk factors are most important. Though none had high lead level requiring medical treatment, as the number of children studied is small, it would be helpful to screen for blood lead level in high risk infants.

Physical health needs

Basing on a referral criteria of high lead levels, anaemia, abnormal red cell indices, HBsAg positive, worm infestation, growth parameter (head circumference, height or weight) < 3rd or > 97th centile, history of enuresis after 4 years old and other medical conditions about half will need referral for further investigation or management. However, if these health problems are not screened and tackled at their first entry to

Hong Kong the opportunity for early detection will be lost. Also some 20% of children after getting their identity cards would return to China for residence. They might come to Hong Kong for good at any time. It will then be very difficult to trace these groups of children. For public health purpose and for the health of this significant portion of future Hong Kong population, it would seem prudent to ensure all new immigrant children to a) receive full vaccination, b) have complete physical check up c) receive appropriate health education d) obtain information on health care services at their first entry to Hong Kong.

Recommendations:-

1. MMR vaccines and mop up for hepatitis B should be given to all new immigrant children soon after their arrival in Hong Kong.
2. All new immigrant children need be advised to have physical check-up after coming to Hong Kong to look for medical and psycho-social problems. It would be desirable to screen for blood lead level, haemoglobin, MCV, and ova and cyst in stool.
3. General health information and guidance should be provided especially on personal hygiene, diet and ingestion of herbal medicine.
4. Information on health services should be provided.
5. Medical professionals should be informed of the results of the study and should provide opportunity screening and guidance whenever newly immigrant children are encountered.

Mental health

The social, educational and psychological adaptation of newly arrived children have been studied by many workers. Suicides have been reported in several new arrivals who failed to adapt to stresses however, large scale studies are not available to identify the total problems faced by these children.

Classroom behaviour problems [3]

It has been found that new arrivals from China were:-

1. Having more behavioural problems in classroom as rated by teachers and were

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[3] *Leung Jin-Pang, Ho Chung-lim in Psychological adaptation of children and youth newly arrived in Hong Kong from mainland China – research, theory and practice. Edited by Dr. Jimmy Chan. Published by Aberdeen Kai-fong Welfare Association Social Service Centre 1998 pp 124-142*

more disruptive

2. Having lower scores in relationship with parents
3. Having lower score in academic self-concept
4. All measures of classroom disruptiveness were negatively related to both relationship with parents and academic self-concept

It was recommended that they:-

1. Need to enhance parent-teacher-student relationship
2. Need to special training on English to improve their academic self-concept

Family Functioning of newly arrived families in Hong Kong [4]

It was found that:-

1. Families functioned quite well overall;
2. Agreed less to sharing troubles and hearing other's opinion;
3. Financial situation and the living environment did not influence significantly both mothers' and childrens' perceptions of family functioning;
4. Children with fewer siblings perceived their family less well functioned;
5. Less educated mothers perceived their family as less harmonious.

The needs required were:-

1. Parental skills training on
   a. Conflict resolution skills
   b. Communication skills
   c. Emotional expression skills
   d. Knowledge of child's development
2. Comprehensive services on
   a. Family life education
   b. Socialization programmes
   c. Self help and parallel groups
   d. More organized family activities
   e. Empowerment and enhancement of their strength

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[4] *Wong Chun-yip, Tommy. Hong Kong Family Welfare Society. February 2000*

Adaptation to Hong Kong [5]

Family Support system

1. Most had feelings of uncertainty, anxiety or sadness about separating from friends and relatives in China
2. Majority of parents had high expectations regarding education of their children, yet not many were sensitive to their emotional needs
3. Most parents had to work long hours and were unable to help them adapt to new environment. Basic living provisions were adequate.
4. Children were reluctant to turn to their parents when they felt frustrated or anxious.
5. Relatives in Hong Kong do not function as support system for these young people.
6. Most of parents were unable to be supportive to their children.

Adapting to school

1. Most had a positive attitude and eager to be integrated into new society and were prepared to try hard to achieve it.
2. Most were put to lower grades because of English. Age and language were barriers to friendship.
3. Care and concerns from teachers – acceptance, recognition and encouragement were important for them to adapt.
4. Most greatly appreciated going to school

Peer support system

1. Peer support was essential for their adaptation.
2. Most expressed hope and confidence in the future.

Community resources

1. Most were passive and reluctant to use existing social resources.
2. Most were very strongly motivated to make a success.
3. Most had encountered very little discrimination.

Conclusions

While adapting to new environment can be difficult, most studies have found that

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[5] *The population poser: How do young new arrivals from Mainland China adapt? The Hong Kong Federation of Youth Groups. Youth Study Series No. 7. September 1995*

psychological attributes of the Chinese new immigrants to Hong Kong are basically the same as those of the local children. There are certain educational, social and cultural differences and these can be resolved comparatively easily. These issues need to be tackled promptly, comprehensively and systematically through joint multi-disciplinary (social, educational, community, media, housing and health care etc.) efforts at community level so that these significant future pillars can be integrated into the Hong Kong society and become our new human resources instead of burdens to our educational and social system.

Conference on Immigration Law and Policies

Host:	Department of Law, HKU
Date:	Saturday, 24 February 2001
Venue:	Council Chamber, 8/F Meng Wah Complex, University of Hong Kong
Presenter:	CHEUNG, Kwok Wah Department of Education, HKU
Topic:	Immigration and Education

1. Introduction

- Issues of educational relationship among students coming from different ethnic background common in different countries
  - US: Black, Hispanic, UK: Afro-Caribbean, Australia: Aboriginal
  - China: education of ethnic minorities
  - Taiwan: education of the aboriginals. E.g. mother tongue language education an important issue for the new administration

- Hong Kong
  - Traditional setting: Local students attending local schools, expatriate students attending international schools
  - Trends:
    - More and more local students going to international schools
    - Chinese immigrant children
    - A small group of students from different ethnic backgrounds are educated in local schools

2 Some Conceptual Clarifications

2.1 Accommodation-assimilation

- Schools seen as the primary site for successful assimilation
- The school system aims to absorb students from other cultures into the dominant cultures
  - students seen as the problematic
  - students making the adjustment, not the system
  - different values of the immigrant groups seen as incompatible with that of the dominant groups in the society.

2.2 From Assimilation to Multi-cultural Education

- Celebration of cultural diversity instead of absorbing students from a particular culture into the dominant culture

  - Extend learners' knowledge of the customs of their own cultures, but also of the customs, habits and characteristics of other cultures in a multicultural community
  - Mutual respect, acceptance and a change of attitudes are essential so that prejudice in the form of racism, sexism and stereotyping will disappear
  - to prepare learners for the realities of a multicultural society, in order to enable them to realise ,as adults, a full partnership in economic, political and social spheres.

- To be more specific, schools are to promote:
  - students learning from each other
  - cultural awareness and sensitivity
  - addressing the needs of learners from diverse cultural, language and socio-economic groups

3. Hong Kong situation

- Overall
  - In 1999, around 23900 students studying in 44 international schools
  - A small number of students from other ethnic minority are studying in local schools
  - Everyday a designated number of children come to Hong Kong from China:
    - ➢Nov, 93 - July, 95: 15 (out of 105)
    - ➢July, 95 - Jan, 98: 45 (out of 150)
    - ➢Jan, 98 - to-date: 60 (out of 150)
  - What we do not know:
    - ➢Education of adult Chinese immigrant
    - ➢Cross border schooling for Hong Kong children staying in Shenzheng

4. Educating Chinese Immigrant Children

- **4.1 Number of Pupils from the Mainland Newly Admitted to Day School by level, 1995-1998**

	Primary	Secondary	Total
94-95	8801	1186	9987
95-96	12966	1962	14928
96-97	12112	2484	14596
97-98	17799	3141	20940

4.2 Percentage of Schools and NAC by District Apr 97/Mar 98 - Primary Level

Hong Kong Island			Kowloon			New territories		
District	No. of Schools	% of NAC	District	No. of Schools	% of NAC	District	No. of Schools	% of NAC
Central & Western	8	2.73%	Yau Tsim Mong	25	9.61%	Tsuen Wan	18	6.41%
Wan Chai	9	2.52%	Sham Shui Po	21	10.54%	Tuen Mun	27	3.60%
Eastern	17	4.22%	Kowloon City	19	5.73%	Yuen Long	34	7.23%
Southern	10	1.54%	Wong Tai Sin	27	7.18%	North	29	5.63%
			Kwun Tong	30	9.32%	Tai Po	18	4.34%
						Sai Kung	15	2.45%
						Sha Tin	28	5.75%
						Kwai Tsing	39	10.81%
						Island	7	0.38%
Total	**44**	**11.01%**	**Total**	**122**	**42.38%**	**Total**	**215**	**46.6%**

4.3 Percentage of Schools and NAC by district Apr 97/Mar 98 - Secondary Level

Hong Kong Island			Kowloon			New territories		
District	No. of Schools	% of NAC	District	No. of Schools	% of NAC	District	No. of Schools	% of NAC
Central & Western	3	5.03%	Yau Tsim Mong	6	5.74%	Tsuen Wan	4	3.76%
Wan Chai	6	3.21%	Sham Shui Po	10	22.88%	Tuen Mun	9	2.46%
Eastern	9	6.41%	Kowloon City	7	6.97%	Yuen Long	7	5.93%
Southern	4	1.64%	Wong Tai Sin	9	5.40%	North	5	2.80%
			Kwun Tong	10	17.14%	Tai Po	6	1.90%
						Sai Kung	3	1.16%
						Sha Tin	11	2.09%
						Kwai Tsing	16	5.44%
						Island	1	0.04%
Total	**22**	**16.29 %**	**Total**	**42**	**58.13 %**	**Total**	**62**	**25.58 %**

5. A Case Study of Shum Shui Po (1996)

Age Distribution of NAC respondents

Age Group	%	No.
6-8	17.98	185
9-11	27.5	283
12-14	27.99	288
15-17	22.64	233
18 or above	3.89	40
Total	100	1029

Types of School

	%
Primary	76.97
Secondary	23.03

Promotion and Demotion for NAC When Admitted to Schools in Sham Shui Po (1996)

Go up or Down by Number of Years	%
Go up by two levels	0.72
Go up by one level	4.55
No change	17.32
Go down by one level	37.71
Go down by two levels	28.13
Go down by three levels	10.32
Go down by four levels	1.25

- Suggested Reasons:
  - The children were unable to pass the admission tests for a particular level and hence recommended by the schools to be demoted
  - Failed in the English test
  - Not enough places in the appropriate levels but agreed to except demotion in order to be admitted
  - Could not find a place in the secondary level and did not mind going to primary schools
  - Deliberate to find a place in a primary school or lower level to maximise the chance of going to a good secondary school or the next level

How the NAC Learn to Adapt to Hong Kong Student Lives? (1996)

- Social Welfare Agencies to organise "adaptation courses"
  - 25.8%of NAC children reported to have participate these courses
  - Community participation
  - Interest groups
  - Courses related to schooling
- Schools to offer
  - Special parents nights (46.9% of schools)
  - Special Interest groups of NAC (46.9% of schools)
  - Guidance on Homework (46.8% of schools)
  - Invite other students to help their NAC classmates (32.3%)
  - Special Orientation meeting for NAC (19.1%)

Difficulties reported by Schools

- Half Day Primary Schools
- Schools already very busy in other works
- Variations of NAC in the levels of achievement and the time of joining the schools
- Schools did not know enough about NAC
- Schools felt that there were other priorities
  - For example, parents would expect schools to pay equal attention to other students

- Other research studies mainly follow the same research paradigm
- 1995 Hong Kong Federation of Youth
- 1996 Hong Kong Boys and Girls Association
- 1997 Shum Shui Po District Board
- 1999 Commission of Youth
  Aberdeen Kai Fong Welfare Association

- Core issue: to find ways to help NAC to adapt to Hong Kong system

6. Government Policies

- First phase: Finding Schools for NAC

- Feb 96: Central School Places Referring Group
- Leaflets distributed to help NAC parents to find schools
- Achievement measured in terms of the time NAC parents to take to find permanent schooling places for their children

- Second phase: Helping NAC to adapt to the Hong Kong educational system
  - Since 97, Education Department to provide four types of adaptation courses
    - ➢60-hr short term adaptation course
    - ➢English extension course
    - ➢School based support programme
    - ➢Short term whole day school
    - ➢Teaching packages developed to help teachers to understand more about NAC children
  - No special policy for student over the age of 15 except to allow them sitting for school certificate exam (1998) and Advanced level examination as private candidates (2000)

Current Debate

- Whether there is a need to establish more whole day short term schools to prepare NAC for formal schooling in Hong Kong
  - More preparatory schools in places like Shengzhen?
  - "Special schools" in Hong Kong?
- Alternative Voice
  - Hong Kong people is part of the problem.
  - There is a need to teach Hong Kong to learn to live together with NAC
  - Not in the agenda of public debate

Overall Situation

- NAC are expected to adapt to our own educational system
- Most efforts are to help them to be assimilated into our own educational system
- However, the educational system is not flexible enough to take care of students from diverse background
- No effort to think of what types of educational experience the NAC can bring to Hong Kong
- Conclusion: Inclusion under the paradigm of assimilation