

# **LEGAL INTERFLOW TOUR TO TAIWAN**

**21<sup>st</sup> ~ 30<sup>th</sup> MAY, 1995.**

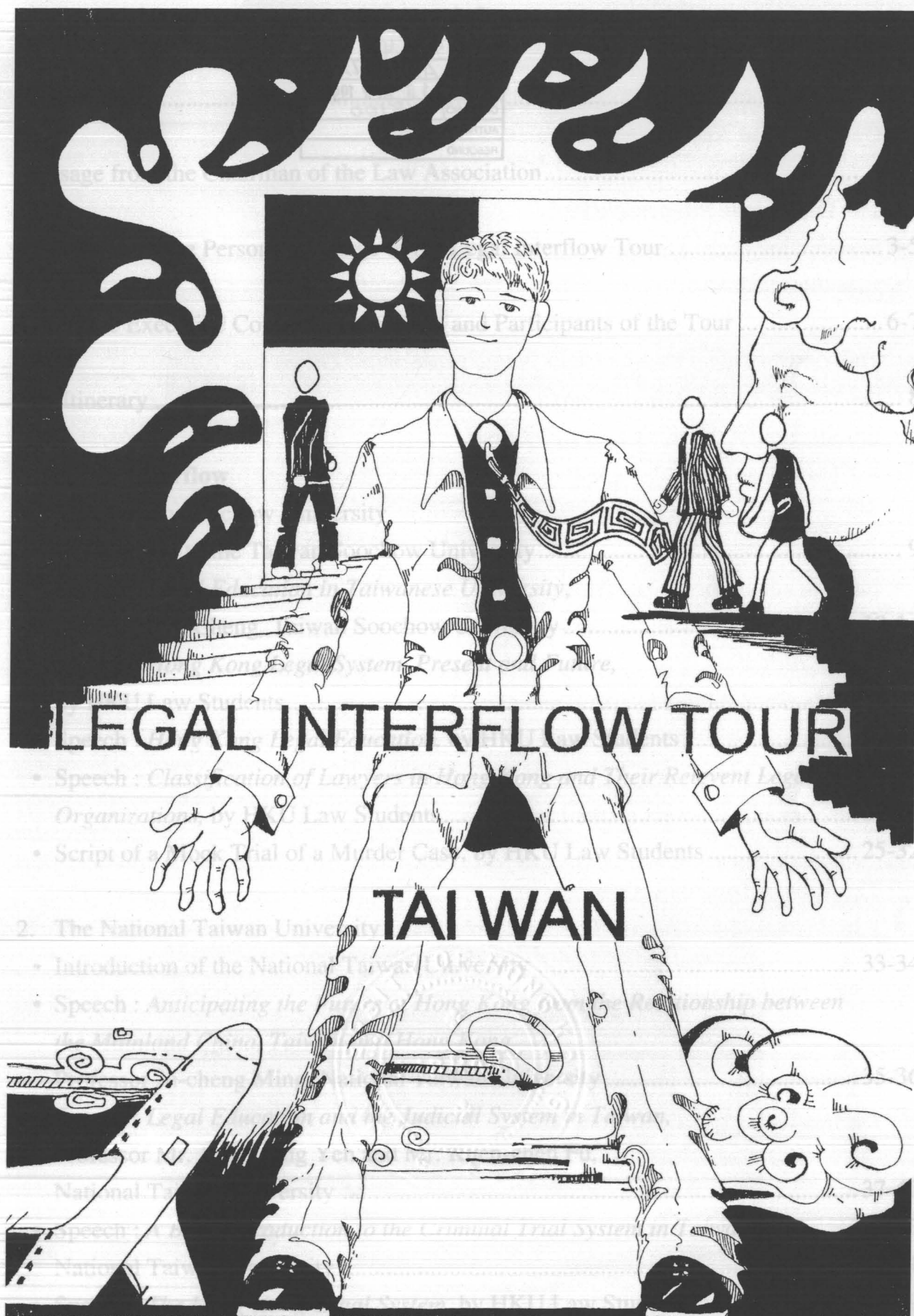
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**LAW ASSOCIATION  
UNIVERSITY OF HONG KONG**







# LEGAL INTERFLOW TOUR

## TAI WAN

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# Foreword

The Law Association has been organizing Legal Interflow Tours in the past three years; Beijing in 1988 and 1994, in 1993, Shanghai. Each shouldered the aim of enhancing a mutual understanding of the legal systems of Hong Kong and of our future sovereign master.

As law students of the University of Hong Kong, we are proud and most ready to introduce to others the comprehensive effective legal system of Hong Kong. Yet, in order to reflect the changing needs of society and make improvements to our legal system, we need to exchange and learn from our neighbours, whose legal systems may be different from ours, yet are pursuing the same ideals of upholding justice and maintaining stability. Thus, we treasure opportunities to expose ourselves to different horizons so as to enrich our knowledge.

This year, we chose to visit Taiwan, Republic of China (R.O.C.). Taiwan adopts a continental legal system, which serves as a contrast to the common law jurisdiction in Hong Kong and also to the socialist and communist ideologies of the People's Republic of China. Moreover, there is a close link between Taiwan, the People's Republic of China and Hong Kong terms of trade and commerce, culture, politics and legal influences. Therefore, it is our hope that after the tour, we can draw a clearer relationship between these different areas.

This publication records the speeches of prominent Taiwanese scholars, reports on the visits with the Taiwanese politicians and government officials, texts of researched topics done by our colleagues and gives an accounts of our travels. In order to maintain the originality of the speeches given by the speakers, we have compiled the speeches in the languages as they were given. We hope to share our memorable experiences and substantial gains with those who could not take part in the tour. Neither the tour nor this publication is itself our final goal. We aspire to draw from what we have acquired in Taiwan and then discover what is conclusive to the future development of ourselves, our studies and our society.





# Words from the Chairman of the Law Association

## Taiwan in Retrospect

During the ten days in Taiwan, apart from visiting the law schools of the Taiwan Soochow University and the National Taiwan University, which involved exchanging lectures and having discussions, we visited political parties such as the Kuomintang and the Democratic Progressive Party, as well as courts, prisons and other government institutions. This opportunity not only exposed us to the academic side of the Taiwan legal system, but the practical side of it. Through discussions with the prosecutors and judges, we learned much about how their legal system operated, the heavy workload of the legal profession and their aspirations towards society. And after visiting other government institutions, a clearer and more complete picture of how the legal system was networking within the whole region. The legal system cannot work without the co-operation of the people and the government.

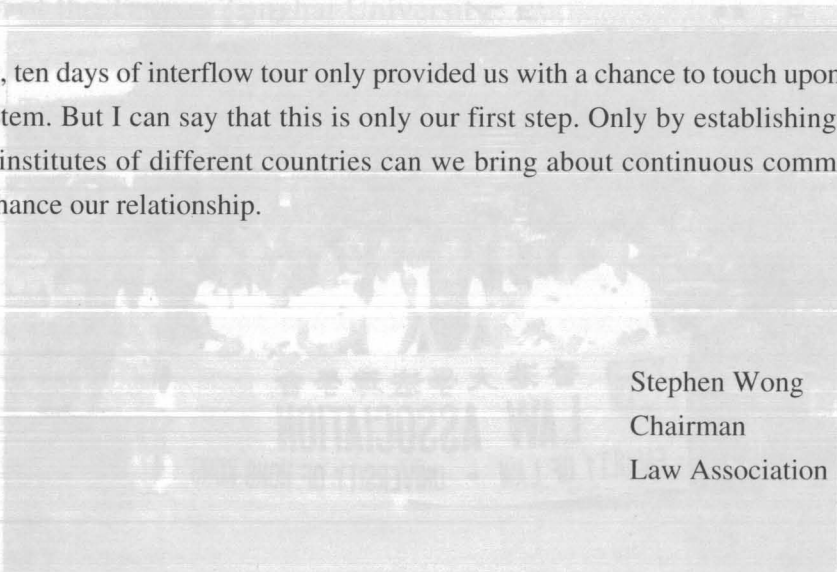
Despite the low attendance of Taiwan students due to clashes with their examinations, we all treasured the chance of visiting the two universities. The hospitality of the professors and students made us feel at home. Their willingness to answer our questions and their openness in sharing their views within us stimulated fruitful discussions. On the other hand, some of our students also gave lectures and performed mock trials as ways of explaining our own legal system to them.

Cultural exchange was an important aspect of our tour, thus, we grasped the chance to tour around Taiwan. Now, we got to know more about the history of Taiwan and the way and nature of living there. In addition, we were delighted to have students from the Soochow University to accompany us on some of our visits.

I would like to take this opportunity to extend my heartiest thanks to all who welcomed us.

## Afterthoughts

Frankly speaking, ten days of interflow tour only provided us with a chance to touch upon the surface of the Taiwan legal system. But I can say that this is only our first step. Only by establishing connections with universities and institutes of different countries can we bring about continuous communication and co-operation and enhance our relationship.



Stephen Wong  
Chairman  
Law Association



# Words from the Person-in-Charge of the Legal Interflow Tour

Fostering the Legal Interflow Tour to Taiwan from a vision into reality backdates to the past year of tedious preparation. Inexperience in organization left us with a path of hindrances to tackle. However, we are contented to present to you a Tour which embodied an opportunity of legal exchange, academic interflow, cultural enlightenment and sweet memories.

We hope to transcend time and lay in front of your eyes the fruits of our experience during the ten-day itinerary, which included visits to *Taiwan Soochow University, National Taiwan University, Taiwan Tunghai University* and various legal and political institutions, namely the *Kuomintang, the Democratic Progressive Party, the District Court of Taipei, the Taipei District Court Public Prosecutors' Office, the Taipei Prison and the Mainland Affairs Council Executive Yuan*. We hope to present this to you via the lectures by the Taiwan professors and Hong Kong students, discussions with the chairpersons and officials of the institutions and afterthoughts from Taiwan and Hong Kong students. The Taiwan legal system, its legal education system, issues concerning relationship between the Mainland China and Taiwan and the pursuits of Taiwan independence, are topics now grasped with a greater apprehension.

What cannot be left unmentioned is the warmest hospitality we were endowed with wherever we went. Being student visitors, it was truly impressionable to be so well received by the many officials who bear important posts in the Taiwan legal and political arena. We also cherished the acquaintance and friendship with students in Taiwan. Through discussions and visits to the Taipei District Court and Prison together, our general outlook on legal, political, social and academic issues were shared and exchanged. More unforgettable were the excursions we had together to downtown food-stalls, disco, shopping malls and dinner. As such, our lifestyles and cultures were truly "exchanged".

However, before I get carried away by the reminiscences of the Tour, I must extend my heartiest thanks to all those who have contributed to make this dream come true. Without your dedication, support and patience, the Tour would remain a dream forever!

## Acknowledgements

First of all, greatest thanks must be extended to the various Taiwan universities and institutions for their academic enlightenment, for the exchange of ideas and for endowing us with the learning experience of legal-related issues:

*Taiwan Soochow University*

*National Taiwan University*

*Taiwan Tunghai University*



*The Kuomintang*

*The Democratic Progressive Party*

*The Taiwan Taipei District Court*

*The Taiwan Taipei District Court Public Prosecutors' Office*

*The Taipei Prison*

*The Mainland Affairs Council Executive Yuan*

I would like to thank:

*Chung Hwa Travel Service*

*Sir Roberts Black Trust Fund* (Training Grants for Youths Organization 94/95)

*Law Faculty Alumni Association*

*Office of Students' Affairs of the University of Hong Kong*

*Mr. and Mrs. Melvin Wong*

*Miss Annie Chiu*

for their financial support.

I must, on behalf of all tour members, also express our heartiest thanks to the prominent officials and personnel whose presence brought lustre to our Tour, and for the precious time they spared in rendering us the warmest hospitality which made us feel at home away from home.

There are many others who have contributed to actualize this Tour and this publication.

Many thanks to:

*Hwang Hwa Cultural and News Agency* - for the generosity in sharing with us information on Taiwan.

*Mr. Chau Ching Wai* - for his advice on the overall organization of the Tour and for the various helpful reminders and suggestions along the way.

*Mr. Richard Hwang* - for his immense assistance in paving the way for the visits of the Taiwan universities and institutions... and for his unceasing support and encouragement.

*Miss Linda Jian* - for her forbearance and arduous effort in administration and communication with the Taiwan institutions.

*Faculty of Law, University of Hong Kong* - for support in resources and the donation of books.

*Professor Peter Wesley Smith* - for his invaluable advice and for being immeasurably helpful in raising funds from the Law Faculty Alumni Association.

*Mr. Albert Chen* - for his constant support, encouragement and tolerance (always)... and for his precious time spared for editing our scripts.

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*Miss Anne Cheung* - for her comments on our papers.

*The Editorial Board of the Hong Kong Student Law Review* - for donation of copies of the Student Law Review.

*Mr. Eric Yung, Mr. Lawrence Wong, Mr. Alex Lok, Miss Janine Cheng and Miss Patricia Yung* - for their endurance and enthusiasm in proofreading our scripts and for tolerating with our "rush".

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**Mr. Eric Chiu, Mr. James Ding, Miss. Jennifer Lau and Mr. Michael Fung** - for their charm and wisdom in standing in front of the Taiwan students in presenting our legal system and legal education.

**Mr. Stephen Wong** - for preparing the mock trial and utmost thanks to all the performers.

**Mr. Davy Wu** - for sparing time to proofread the script of the mock trial.

**Mr. Stephen Chan** - for capturing sweet memories down on film.

**Miss Anita Chiu** - for her assistance during the Tour and for the solicitation of funds which made this Tour possible.

**Miss Deborah Poon and Miss Lucia Sun** - for their artistic designs for the "Overview of the Taiwan Cultural and Scenic Attractions Visited".

Greatest indebtedness to the Exco members for their constant support and encouragement which has sustained me through, long after my energy ceased to exist in me. They have strived hard to make my task less arduous than what it would have been. Thanks especially to **Agnes, Christina, Patricia and Simon** for grinding away incessantly for this publication without a word of complaint. Last but not least, one big hug to all the participants of the Tour who have each contributed to make this Tour a REALITY!

P.S. Anything that can be conceived and believed can be achieved!

Jimmy Fong (I)

方家俊

Michael Fung (I)

馮國權

James Fong (I)

方文傑

Jenny Lim (I)

林燕玲

Alan Lin (I)

連凱斌

Yvonne Kwok (I)

External Secretary

LAW ASSOCIATION

Christina Ng (I)

吳小梅

Deborah Poon (I)

潘潔儀

Richard Lo (I)

羅永健

Cici Wong (I)

黃詩慧

Kennis She (I)

余麗群

Jimmy Tse (I)

謝家駒

Lucia Sun (I)

孫思菁



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Sports Captain : Michael Fung 馮澤偉

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Jennifer Lau (III) 劉潔冰	Yvonne Kwok (I) 郭意楓	Davy Wu (M. PHIL.) 胡家慈
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Stephen Chan (II) 陳瑞奇	James Ding (III) 丁國榮	Anita Chiu (I) 招雁翹
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Cici Wong (I) 黃詩慧	Kennis She (I) 余麗群	Jimmy Tse (I) 謝家駒
	Lucia Sun (I) 孫思蕾	

# Itinerary of the Legal Interflow Tour to Taiwan

21st May	- Departure from Kai Tak Airport - National Revolutionary Martyrs' Shrine - Chiang Kai-Shek Memorial Hall	Group 1 Stephen Wong (II) 黃國豪
22nd May	- Kuomintang - Democratic Progressive Party - South Chung-Hing Boulevard	Jennifer Lau (III) 劉潔冰
23rd May	- Soochow University	Jimmy Chan (II) 陳國豪
24th May	- National Taiwan University	Stephen Chan (II) 陳國豪
25th May	- Taiwan Taipei District Court Public Prosecutors' Office - Taiwan Taipei District Court - Taipei Prison	Agnes Chan (I) 招致英
26th May	- Sun Yat-Sen Memorial Hall - Mainland Affairs Council Executive Yuan - Yehliu (Wild Willows)	Jimmy Fong (I) 方家俊
27th May	- Tunghai University - National Science Museum	Joan Lim (I) 林燕玲
28th May	- Shitou Forest Recreation Area - Shanling Stream Recreation Area	Christina Ng (I) 吳小琳
29th May	- Sun Moon Lake - Fomosan Cultural Village - Tao-Yuan	Cici Wong (I) 黃詩慧
30th May	- National Taiwan Museum - Taipei City Zoo (Mucha Zoological Garden) - Departure from Tao-Yuan Airport	



# Introduction to the Taiwan Soochow University

The Soochow University was established in Soochow in 1900. Later in 1915, the Soochow University Law School was established in Shanghai. It was the first comparative law school established in China and its academic status was widely recognized. After a period of wars in mainland China, Soochow University was re-established in Taiwan in 1954.



The Soochow University Law School has a Law Faculty and a Law Research Department. Its main aim is to train a group of educational, judicial, legal and commercial professionals for the community. The law students in Soochow University normally have to study a five-year Bachelor of Laws (LL.B.) degree. As the law school is a school of comparative law, apart from local laws, their syllabus also includes Anglo-American comparative law, international law and commercial law.

In order to cultivate students' independent thinking and analytical minds, the faculty has the following characteristics:

- Apart from English, students can enroll in a foreign language programme of either French, German, Japanese and Spanish.
- Through the teaching on Anglo-American Law, students are equipped with knowledge on comparative law. They learn to think independently, to analyze, compare and solve legal problems.
- The syllabus, divided into three categories: 1. public law, 2. civil and commercial law, 3. international law (particularly on the financial aspect) was designed with respect to students' interests. After finishing their compulsory subjects, law students can choose one of several categories as their major.
- Encourage and assist law students in planning their future.

Graduates from the Soochow University Law School are high achievers around the world and enjoy high praises. Their achievements are supported by a strong and outstanding Chinese culture background. Moreover, their study of comparative law helps them to think and analyze problems more thoroughly and to enhance their language abilities. Finally, by the tradition of the University, a spirit of responsibility towards society is encouraged and this makes the students eager to contribute to the world at large.

# Legal Education in Taiwanese Universities

Speaker : Mr. Yong-Yu Cheng\*

## I) The Present System of Legal Education in Taiwanese Universities

### A) Fundamental Education

In Taiwan, legal education is only provided in universities. The duration of studies for a Bachelor of Laws degree is four years, with the exception of the Soochow University School of Law which provides a five-year law degree.

According to the Education Department, it is compulsory for every university student to

study Chinese, English, a second foreign language<sup>1</sup>, Constitutional Law and Ideology of the Republic of China<sup>2</sup>, History, Chinese History, Contemporary Chinese History and liberal studies. Apart from these subjects, law schools also set guidelines concerning the following compulsory subjects:

#### a) Substantial Law

This includes Martial Law, Constitutional Law and Administrative Law.

#### b) Civil Law

According to the civil code, civil law is divided into 6 parts, which are: General Clauses, Civil Debt Liability (General Clauses), Civil Debt Liability (Sub-Clauses), Property Law, Family Law and Succession Law. Apart from these subjects on civil substantial law, there are also subjects on civil procedural law like Civil Litigation which gives students a fuller picture of civil law.

#### c) Criminal Law

This is also divided into procedural and substantial law. Criminal substantial law includes General Clauses, which is about some abstract philosophy, and Subdivision Clauses, which is on the analysis of different kinds of crime.

#### d) Commercial Law

This includes Company Law, Law on Negotiable Instrument (commercial papers), Insurance Law, Admiralty Law (Maritime Law), Public International Law and Private International Law.

#### e) Local Law, Civil and Criminal Litigation Practice

In addition to the above, students of the Soochow University School of Law have to take a compulsory

1 Foreign languages available include Spanish, French, Japanese and German; the Soochow University School of Law only provides two of them: Japanese and German.

2 This subject was previously called the Ideology of Dr. Sun which was a study of Dr. Sun Sen-Yet's ideology on the Refined Principles on State Foundation (Thoughts of the Father of China).





subject on Anglo-American Law each year.

- a) Year 1 - Introduction Anglo-American Law
- b) Year 2 - Law of Torts
- c) Year 3 - Law of Contracts
- d) Year 4 - Criminal Law
- e) Final year - US Constitution.

Law schools also provide a variety of subjects like Intellectual Property Law, Copyright Law, Trademark Law, Tax Law, Land Law, and also

courses on some new issues concerning conflicts of medical practice with the law, environmental law, etc.

In Taiwan, not every university has a law school, and not every university with a law school provides postgraduate studies. Examples of such public schools are National Taiwan University (國立台灣大學), Chungcheng University (國立中正大學) and Chunghsing University (國立中興大學). Tunghai University (東海大學), Soochow University (東吳大學), Chinese Culture University (中國文化大學) and Fuyen University (輔仁大學) are the private ones. The National Defence Administration University (國防管理大學) is a further establishment offering legal studies. Although there are different types of university providing legal studies, they have the common aim of training senior high school graduates or people with similar standard into legally and socially talented individuals.

As to the future of law graduates, they can join the judiciary as judges through a Central Judiciary Examination. Among the 3000 to 5000 candidates, only 5% can pass the exam and become judges. After that, these judges-to-be have to enter the Judicial Training Center to undergo one-and-a-half years training and practice in court. The remaining law graduates can choose to be professional lawyers. Firstly, they have to pass a Professional Lawyers' Examination, followed by articles in a law firm for half a year. The law firm will then write a report on their performance, and if the report suggests a satisfactory performance, they can then receive training in the Judicial Personnel Training Center. After all these steps, they can register as practicing lawyer. However, law graduates' future is not restricted to these two options, and some become executives in judicial departments and in private companies. Some also work in the mass media.

#### B) Postgraduate Education

Another choice for law graduates is to further their studies. Postgraduate legal education in Taiwan includes the Master of Laws degree (LL.M.), Master of Philosophy (M.Phil) etc. LL.B. graduates have to pass an examination in order to get into a Department of Postgraduate Studies. Postgraduate studies usually put focus on several particular topics, such as administrative law, civil law or commercial law. These postgraduate studies usually adopt a "small-class and seminar-style" teaching method, so that students can be more involved in discussion.

Normally, students need to study at least two years for the LL.M. degree. They may extend their period of study to four years in order to finish their subjects as required.



### C) Special Teaching Methods

Apart from the above legal education commonly adopted, several universities have also adopted some special teaching methods and ideas. The Soochow University School of Law, for example, has adopted the following methods:

This School of Law also includes Anglo-American Law in its syllabus, and some of the subjects use a small class teaching method to enhance quality. In teaching Anglo-American Law, the University also adopts a "Case Study Method". Students have to prepare their work before each lesson, and during the lesson, they need to write "Case Notes" in English under the direction of the lecturers. These reports should include the issues, court decision, reasoning, legal principles and rules of the cases. The reports will be discussed during the lesson to train students' creativity in thinking and fluency in expressing their points.

In some law schools, law students were divided into two groups, Comparative Legal Studies and Judicial Practice Studies, when they registered in the school. Since 1992, however, the Soochow University School of Law has abandoned this system, and students have been divided into groups A and B. In designing the syllabus, this new system has utilized the advantages of the old system, and has added comparative legal studies to it. In order to broaden the horizon of law students, the School of Law also includes optional social topics related to law.

The Law School also encourages law students to take subjects from other faculties or to take a double major course.

## II) Evaluation of the Legal Education of Taiwanese Universities

The above legal education system provides an opportunity for legal training and research. However, the present system is still far from satisfactory. The following 14 points are the main discrepancies and problems underlying the present education system:

1. A discrepancy of teaching objectives.
2. Ambiguous teaching ideology.
3. Admission Procedures which are not comprehensive and unified.
4. Length of time of study for LL.B. is too short.
5. Unsatisfactory design of the syllabus.
6. Old fashioned teaching methods.
7. Unsatisfactory assessment of students' ability in interpretation and argument.
8. Legal education in university only gives a narrow legal knowledge to the students.
9. Insufficient knowledge of students on topics other than legal issues.
10. Law students' basic legal knowledge is not deep enough.
11. The examination system is not efficient in assessing students' standard.
12. Ignorance of professional ethics and responsibility.
13. Imbalance between theory and practice.
14. Law schools' ignorance of law graduates' future.





There is also a problem when examinations form too important a part in law schools, that is to say when law students' study becomes exam-oriented. This twists the main aim of legal education and gives people the impression that examinations decide a law graduate's future. This is not a very healthy phenomenon, and requires a change in the present system.

### **III) Policies to Improve Legal Education in Taiwan.**

In order to improve the present legal education system, several suggestions have been made hoping to address the above problems.

1. As Taiwan is developing rapidly, there is an urgent need for different kinds of legal professionals. Therefore, the first thing to do should be to re-assert the aims of legal education. Legal education should not be exam-oriented, and should not aim to train simply judges and lawyers. It should also aim to cultivate an educated group with all-rounded characters fit to serve society.
2. To clarify teaching perspectives. Apart from legal knowledge, moral education is also important for law students. A model and respected legal professional should be a person of commendable and noble character, extensively educated and with a broad outlook, so as to uphold fair judgment and morally sound reasoning.
3. To adjust the period of study for a law student. As one should study law step by step and build a strong foundation of basic legal knowledge, four years of undergraduate study is not enough. If a law student is to study his/her subjects thoroughly, four years are only sufficient to study all the compulsory subjects and not the optional courses. Even in Soochow University School of Law, five years of study is still not really enough.
4. To improve the effectiveness of legal education, two points should be emphasized
  - Basic legal knowledge like how to study law and legal theory should be incorporated in designing the syllabus.
  - Law students' application of their legal knowledge and the teaching of subjects other than law should be enhanced. Subjects on science and technology which are related to law should be developed, e.g. environmental law, international economic law etc. More discussion should be encouraged among the students.
5. To modify the system of examination so students' studies should not be exam-oriented.
6. The school and teachers should put in more effort to help students plan their future so that they can grasp the whole picture of their pursuits, needs and choices.

### **IV) New Tendencies and Developments in Legal Education in Taiwanese Universities**

As the unsatisfactory result of the old legal education system have become obvious, university law schools have started to modify and improve their system to keep pace with Taiwan's changing society. These modifications and improvement can be summarized as follows:

1. Diversification of the system. Five years of undergraduate studies would be a better choice than four.
2. Non-law graduates who want to study law or take law as a second degree would be advised to study the LL.B. degree for three years.

3. Combined degrees have been introduced which allow a law student to take an additional non-law subject as minor, i.e. a double degree in law and a non-law subject.
4. An In-Work Studying Credit System has been introduced.
5. Legal professionals and law related personnel like judges and attorneys have begun to be encouraged to take continuing education.
6. Diversification and international affairs have begun to be considered in designing syllabi.

The following suggestions on teaching methods have been implemented in order to complement the above improvements:

- A small class system should be encouraged so that students have more opportunity for discussion.
- Active and passive education should be balanced.
- There should be more communication between teachers and students so that teachers will know about the students' needs via feedback from their studies, and students can grasp their teachers' way of teaching.
- Both learning and thinking should be emphasized to enhance students' ability in debating their viewpoints.
- Theory should not be over-emphasized.
- Knowledge from a full range of subjects should be integrated and utilized.
- The examination system should be improved.

## V) Conclusion of the Legal Education of Taiwanese Universities

Legal education is an important part of an university and is vital to the Rule of Law in a society. A good legal education system can train people to protect and enhance the idea of the Rule of Law. However, there is no perfect system in the world, and any system must undergo changes, improvements and experiments in order to progress towards an ideal system. Taiwan and Hong Kong alike, have to undergo the same progress in order to achieve the best possible system.





# 香港法律制度的現況與前景

## 1. 香港法制簡介

### A. 法律的淵源

### B. 司法體制

### C. 審訊程序

### D. 法律專業

## 2. 普通法系的特色

## 3. 法律的淵源

### a) 成文法：

#### i) 英國國會法令

#### ii) 皇室特權立法

#### iii) 本地立法 -- 法例

#### -- 附屬條例

### b) 判例法：

#### i) 本地判例法

#### ii) 英倫判例法

### c) 中國傳統習俗和法律

## 4. 司法體制

### a) 法院制度

### b) 陪審團制度

### c) 終審權

### d) 司法獨立

### e) 公開審訊原則

## 5. 審訊程序

### a) 刑事和民事審訊程序

### b) 兩者異同之處

## 6. 法律專業

### a) 大律師

### b) 律師

### c) 律師行業的獨立性

## 7. 總結 -- 維持現存法制的前景

## 香港法律制度與一九九七

現今世界上最主要的法系包括普通法系，歐陸法系和社會主義法系；香港的法制是屬於普通法系。普通法系源於英格蘭，當香港在十九世紀成為英國殖民地後，英式法制便在香港建立起來。由於此制法度優良，尤其是英倫法律傳統的法治精神，非常受人推崇，所以根據中英聯合聲明和基本法的規定<sup>1</sup>，1997年香港回歸中國後，香港現行的法律基本不變，香港的法制將予以保留。

要了解香港的法制，我們可以從四方面來探討：

- 一. 法律淵源
- 二. 司法體制
- 三. 審訊程序
- 四. 法律專業

討論這四方面以先，應先介紹一些普通法系和其他法系的差異。首先，普通法系有所謂判例約束性的概念。即是說，當法院判決一件案件時，必須依從較高級法院在類似案件中的判例。這有別於其他法系，判例只有參考價值卻沒有約束力。第二，在普通法系中，審訊的程序是「辯論式」的。審訊被看成一場比賽，參賽者是訴訟的雙方，法官是一個公證人，不會積極參與，以保持中立。審訊結果大致上基於控辯（或原告、被告）雙方的陳詞而決定。

如決定傳召哪些證人，提出哪些證據，及盤問證人的策略等，法官皆不能直接干預，他只可提出哪一些輔助問題。大致上，法官擔任一個監察者的角色，監察整個程序，使它合乎訴訟法和證據法的規定，在刑事案件中，被告更有保持緘默的權利，無論是控方或法官都不能強逼被告接受盤問，作出解釋，及提出證供。判決之前假定被告是清白的，證明他有罪的責任在於控方。相反，在其他法系中，法官擔任一個較積極和主動的角色，可以直接調查事件真相，採用一個「調查式」的審訊程序。最後，在普通法系中，法官通常曾為經驗豐富的執業律師。然於其他法系中，一個法學院的畢業生，通常可以直接投身司法界，當見習法官，跟著成為正式的法官，而不用先累積豐富的律師經驗。<sup>2</sup>

現在讓我們具體探討香港的法制，先從第一方面，香港法律的來源說起。香港法律包括成文法，判例法及中國傳統習俗和法律三種。目前香港成文法可分為三大類：

- 一. 英國國會法令
- 二. 英皇特權立法
- 三. 香港本地的成文法

英國國會法令是由英國國會所立的法令，只在下列情況下適用於香港。第一，就是法例本身有明文規定它適用於香港或所有英國屬土；第二，如果從法例的性質和內容上，可以推想得到該法例的立法者有意把它應用於所有英國屬土；第三，該法例由英皇特權立法或由本地立法從而引用至香港。例如香港的英國法律應用條例便列明了某些適用於香港的英國國會法令。這種法令只佔香港法律的小部份，大部份的英國國會法令，都不符合以上的三個條件，所以不適用於香港。

1 陳弘毅著《香港的憲法及法律制度》，錄於鄭宇碩編《香港政制及政治》鄭宇碩編，〔天地圖書有限公司，一九八七年七月〕第44頁。聯合聲明附錄〔1〕〔四〕；基本法第十八條。

2 陳弘毅著《香港法制與基本法》，〔廣角鏡出版社有限公司，一九八六年〕，第9-10頁。



九七後，英國國會將失去對香港立法的權力，而且由英皇特權立法引用於香港的英國國會法令也會失效，所以除非這些法令經本地立法機關再以本地立法形式通過，否則便會失去法律效力。<sup>3</sup>

皇室特權立法理論上由英皇頒佈，實制上由英國政府的行政機關制定。香港的憲法性文件英皇制誥及皇室訓令便屬於這一類。另一常見的皇室特權立法，是由英皇會同樞密院所頒佈的命令(樞密院頒令)。九七後，英皇替香港立法的權力將會廢除，所有的皇室特權立法也不會得到保留。基本法將會成為香港的憲法文件，取代了英皇制誥和皇室訓令的地位。<sup>4</sup>

香港適用的絕大部分成文法均由香港本地立法，包括所有條例(Ordinance)和附屬法例(Subsidiary Legislation)條例是由香港總督會同立法局(香港最高的立法機關)制定的。一個法律草案，經過立法程序，三讀通過之後，又得到港督同意，便會在香港政府憲報刊登，成為有效的法律條例。附屬法例是立法局通過條例授權其他機關或個人在特許權限內制定的法律。獲得授權的機關受制於特許的立法權力，不可踰越，否則，該附屬法例便是越權的，無效的<sup>5</sup>。九七後，立法局(將改稱為立法會)仍能為香港立法。<sup>6</sup>

判例法是香港法律的第二個主要來源，就數量而言，它們比香港的成立法多出數以萬倍。香港的判例法包括香港本地的判例法及英倫判例法。(本地的判例法是指香港法院所定下的判例。判例中所創立及應用的法律原則和規範，對低級的法院均具有約束力。英倫判法包括過去數百年英格蘭法院的判例，這些判例的數量十分驚人，單在一九五一年，英倫判例已有超過三十一萬二千多宗，相信到了現在，數目已多得不能估計。)<sup>7</sup> 九七年之後，根據中英聯合聲明和基本法的規定，香港原有法律包括了判例法得以保留，而英國的判例法將來仍有參考價值<sup>8</sup>。

香港法律的第三個來源是來自中國傳統習俗和法律。在一八四一年，當英國接管香港的時候，英政府代表宣佈中國社會習俗不會被干擾。

所以，當英國法律未能配合香港情況時，香港法庭可引用中國傳統習俗和法律，包括大清律例作出判決。但是這種法律在香港的適用範圍很少，通常只用於家庭法，例如婚姻和土地繼承問題等，尤其是一九七一年後，香港廢除容許納妾的法例應用層面更為狹窄。現在，除了在新界，(新界是滿清政府按1898年拓展界址專條租讓給英國的一片土地)有關土地的某些問題(如「祖」、「堂」的問題)，仍按這種法律辦理以外，已經不再應用<sup>9</sup>。根據中英聯合聲明和基本法的規定，這種法律亦會得到保留<sup>10</sup>。

3 陳弘毅著《香港的憲法及法律制度》，〔同上〕，頁48。

4 同上，頁44。

5 同註(4)

6 基本法第十八條。

7 陳弘毅著《香港的憲法及法律制度》，(同上)，頁56-57。

8 基本法第八十四條。

9 梁定邦著《香港法制簡介》，錄於《香港法律十八講》，港人協會編，(商務印書館，一九九三年十二月)頁46。

10 基本法第八條。

除了法律的淵源外，另一個價值得探討的問題，便是香港的司法體制。司法機構肩負司法的責任，裁決一切檢控事宜、民事訴訟及市民與政府之間的紛爭。目前的法院體制中，較低級的司法機關包括勞資審裁處、死因裁判法院、土地審裁處、兒童法庭和裁判司署。較高級的法院包括地方法院、高等法院和上訴法院。高等法院和上訴法院合稱為最高法院。目前最高的上訴庭是設於倫敦的樞密院司法委員會。高低級法院的分別，是案件可從較低級的法院，上訴至更高級的法院而高級法院的審判權範圍和判罰的權力，亦比低級法院大。還有一點值得注意的是陪審團制度<sup>11</sup>。陪審團是由七至九人組成的，這些人應身體健全，年齡介乎二十一至六十五歲之間，居住香港，懂英語，因為高等法院的審判是英語進行的。（陪審員是從所有合資格當陪審員的市民中，隨意抽選的非法律界人士）陪審團的主要功能是衡量雙方證人的證供可信性，考慮各方面的證據，然後在法官的法律指引基礎上，裁決被告是否有罪。低級法院不設陪審團，陪審團只會在高等法院的刑事案件和極少數的民事案件出現。由於陪審團只決定事實問題，而上訴法院則負責判定法律原則的運用是否正確，所以上訴法院並無設有陪審團。上訴法院的案件通常由三位大法官組成的合議庭審理。而交樞密院司法委員會審理的案件，則通常由五位全英國最資深，最具威望的法官負責<sup>12</sup>。九七年後，香港法院將享有終審權，案件不可再上訴至樞密院，取而代之的，便是香港終審法院<sup>13</sup>。關於法官任命，現在一般由一個獨立的委員會向港督提出建議，然後由港督委任。如需要罷免法官，英皇制誥給予地方法院及以上各級法院的法官特別的保障，罷免的程序非常嚴謹，在香港的法律史上，從來沒有法官通過以上的程序被罷免。九七後，基本法也提供類似的嚴謹程序<sup>14</sup>，並更清楚列明香港法院將會繼續奉行司法獨立的原則<sup>15</sup>。最後值得一提的是，香港正如其他普通法地區一樣，除了某些例外情況，如涉及家庭私事或政府機密，法院公開進行審訊的原則例必貫徹執行<sup>16</sup>。一位著名的法官曾經說：「公義不是隱藏在寺院中的美德，它必須接受人民大眾的監察和善意的，即使是率直的批評。」<sup>17</sup>

在香港，審訊過程可分為刑事和民事兩種。刑事程序方面，首先由法庭書記宣讀被告的控罪，然後由法官詢問被告是否認罪，如果承認控罪，法庭書記將會向他讀出案情撮要，如果他同意該案情撮要屬實，法官便正式接納他的認罪並宣告他罪名成立，然後法官會容許被告或他的代表律師求情，控方也能於此時提出被告以往的犯罪紀錄供法官參考，之後法官便可判刑。如果被告否認控罪，控方便會作開案陳詞，然後傳召控方證人。控方會向證人提出主要詰問，再由辯方盤問證人，有需要的話，控方會作出補問，此時，如果控方根本未能提出表面證據，使人相信被告可能有罪，辯方則可以「無需答辯」為理由，要求法官把被告當庭釋放。但如法官認為有案需辯，審訊將會繼續，被告可保持緘默或親自作供，並可傳召證人，由辯方律師作主要詰問，然後讓控方盤問證人和作出補問。然後，控方和辯方分別作結案陳詞，如果有陪審團的話，法官將會引導陪審團判決；如沒有陪審團，法官自行裁決。如判被告有罪，之後的程序跟被告認罪時一樣；如判被告無罪，被告便可獲得釋放。民事案的審訊程序跟刑事案大致相同，不同之處在於審訊之前，民事案有「提起訴訟」和「交換訴狀」等階段，正式審訊前有很多預備工作。而且，法庭對兩種審訊，證據要求的標

11 按基本法第八十六條，香港的陪審團制度將得到保留。

12 陳弘毅著《香港的憲法及法律制度》，（同上），頁65-66。

13 基本法第八十二條。

14 基本法第八十九條。

15 基本法第八十五條。

16 陳弘毅著《香港的憲法及法律制度》（同上），頁68。

17 Lord Atkin，在以下的判例：*Ambard v AG for Trinidad and Tobago* (1936) AC323,325。



準也有不同。在刑事案中，必須在沒有任何「合理疑點」(Beyond Reasonable Doubt) 的情況下法庭才可定被告的罪。在民事案中，標準則較低，法庭像一座天秤，雙方提出的證據都放在這天秤上，份量較重的一方將會在訴訟中獲勝<sup>18</sup>。由於中英聯合聲明和基本法都保證香港法制維持不變，以上所提及的程序，在九七後也不會有所變動<sup>19</sup>。

最後，讓我們簡單探討香港的法律專業，特別是律師制度。香港的律師制度，與英國的制度十分相似，分為律師和大律師。兩者的區別在於兩點，第一律師不能在高等法院或以上的法院代表其委託人出庭應訊。第二，大律師不能直接受當事人的委託，所以，如果市民需要法律服務，應先找律師，但如果案件涉及高等法院的訴訟，便需通過律師，轉聘大律師代表出庭。大律師的主要工作是出庭辯論，而律師的工作則比較廣泛，包括土地買賣，遺產繼承，為公司企業起草法律文件，提供法律顧問服務等<sup>20</sup>。律師行業的獨立自主性是香港法制結構中的一個重要因素。律師不應受政府機關和政治勢力控制。所以即使是一些涉嫌進行反政府活動的市民，也可以聘請律師，為他們提供法律服務，保障他們的權益。關於香港律師制度的前途，聯合聲明和基本法均有明文規定，香港特別行政區政府可參照原在香港實行的辦法，作出有關當地和外來的律師在香港特別行政區工作和執業的規定<sup>21</sup>。

以上簡略的介紹了香港現存的法制，正如以上一再強調，除憲法性法律之外，香港原有的法律和法治精神在九七後，將維持不變。現行憲法性法律將會由基本法取替，一切和基本法相牴觸的法律也會宣告無效。總括來說，正如一些亞洲和非洲前英國屬土一樣，香港要面對在英國管治結束後維持普通法法制的難處。從他們的經驗，我們可以知道，但是只要堅守聯合聲明，貫徹執行基本法，靠著法律界人士及全體市民的努力，要維持香港原有法制和法治精神應是絕對可以的。如此，香港繁榮和安定便能繼續維持。<sup>22</sup>



18 梁定邦著《香港法制簡介》(同上) 頁21。

19 基本法第八十七條。

20 陳弘毅著《香港的憲法及法律制度》(同上) 頁69。

21 基本法第八十七條。

22 陳弘毅著《香港的憲法及法律制度》(同上)，頁82-83。

# 香港法律教育

## (I) 如何成為律師 (Solicitor)

在現行制度下，大致有三種成為師的途徑：(a) 香港途徑 (b) 英國途徑 (c) 混合途徑。

### (a) 本港大學法學學位途徑

傳統的方法就是通過三年制的法學學士課程。目前，香港只有香港大學及香港城市大學開辦此項課程。

除經高級程度會考進入大學外，另一途徑是修讀香港大學專業進修學院<sup>1</sup>的法學文憑課程。<sup>2</sup> 這個課程並沒有特定的收生標準。然而，基本上，學生必須精通英語，比方說，學生中學會考英文科必須合格。而且，成功取得此文憑對日後申請大學法律學士全日制學位課程大有幫助。而選擇這個途徑以滿足大學入學資格的同学必須年滿二十五歲。

法學學士課程是一個三年全日制課程。內容包括侵權法、合約法、刑事法、衡平法及財產法等範疇。此外，同學亦可選擇其他非必修科目例如：中國法制介紹、人權法、家事法等。

成功取得學士學位<sup>3</sup> 而欲成為律師者必須繼續修讀法學深造文憑<sup>4</sup> 課程。現時該課程均由香港大學法律學院、香港大學專業進修學院以及城市大學專業法律教育學系所舉辦，三所機構開設的一年制PCLL 課程十分相似，完成該課程而通過考試的同學亦同樣會獲得法學深造文憑。

### (b) 英國及CPE, CPEC等途徑

基本上，英國途徑與香港途徑非常相似。修讀學位課程的同學必須通過三年制學位課程以及律師專業訓練。

另外，其他持有非法律學位的大學畢業學生，亦可以申請在香港或英國修讀英國及威爾斯共同專業文憑(CPE)(兩年制)<sup>5</sup>，或在香港修讀香港共同專業法學文憑(CPE)(一年制)<sup>6</sup>。取得以上任何一種文憑的同學皆可自動獲得進修上述法學深造文憑的資格。英國及威爾斯共同專業文憑涉及一系列考試，專為非法學畢業生而設。成功完成這個半日制課程的同學均符合法學深造文憑的收生要求。CPE獨特之處在於能提供法學課程予非法學畢業生，他們無須另外完成三年全日制的法學學士課程。事實上，每年均有許多同學報讀此課程，因此收生資格非常嚴謹。一般來說，申請人必須在已完成的學位課程中考取優良的成績。

成功考取CPE或CPEC的同學必須在暑假期間額外修讀香港大學專業進修學院(SPACE)所提供的証據法及商業組織法課程，以便符合法學深造文憑課程的收生條件。

1 SPACE School of Professional and Continuing Education.

2 Diploma in Legal Studies.

3 LL.B. Bachelor in Laws.

4 PCLL Hong Kong Postgraduate Certificate in Laws

5 CPE Common Professional Examination of England and Wales.

6 CPEC H.K. Common Professional Examination Certificates in Laws



### (c) 混合途徑

此途徑適合那些在其他奉行普通法的地區畢業的法律學生。該等同學可以通過取得上述法學深造文憑而獲得在港執業資格。此外已在外國取得律師資格及有執業經驗的律師，則可以參加香港律師會主辦的外國律師在港執業資格考試，從而獲取香港律師資格。

#### 法學深造文憑課程 (PCLL)

申請攻讀法學深造文憑課程，必須符合以下要求：

- (一) 須持有法學學士學位或同等學歷。申請人的學士學位，必須由奉行普通法的地區所頒發，且要包括六科重點科目：憲法、合同法、刑事法、土地法、侵權法、信託法。此外，申請人的商業組織法及證據法的成績亦須令人滿意；或
- (二) 持有香港以外其他地區合格專業律師資格，並得到香港的有關大學的承認；或
- (三) 取得英國及威爾斯共同專業文憑 (CPE) 或香港共同專業法學文憑 (CPEC)，其中商業法及證據法成績滿意。

### (II) 如何成為大律師 (Barrister)

成為大律師的途徑有三種 (a) 香港途徑 (b) 英國途徑 (c) 混合途徑。

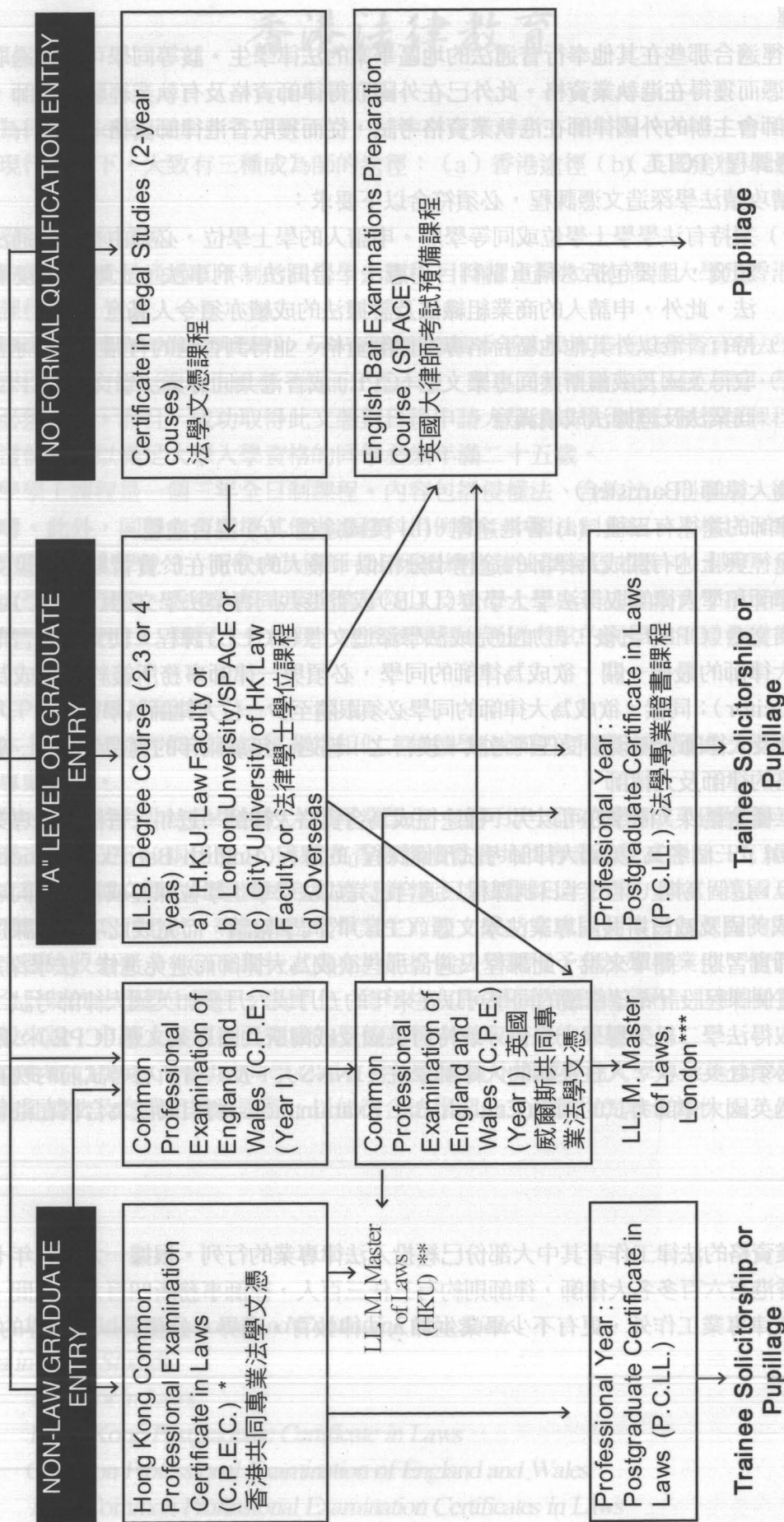
此三種途徑與上述有關成為律師的途徑十分相似。最大的分別在於實習期間所接受的專業訓練。一位準律師和準大律師取得法學士學位 (LLB) 或香港共同專業法學文憑 (CPEC) 或英國及威爾斯共同專業文憑 (CPE) 之後，再加上完成法學深造文憑 (PCLL) 課程，便到達實習期，此亦是成為律師或大律師的最後一關，欲成為律師的同學，必須與一律師事務所簽約兩年成為見習律師 (Trainee Solicitor)；同樣，欲成為大律師的同學必須跟隨至少一位大律師為學徒至少一年。於實習期間無論律師及大律師皆無須接受任何考試。換言之，經過一年或兩年的實習生涯，一般來說，已可成為合資格的律師及大律師。

除上述三種途徑外，同學亦可以另一種途徑成為合資格大律師。近年，香港大學專業進修學院 (SPACE) 開辦了一個名為「英國大律師考試預備課程」的課程 (English Bar Examinations Preparation Course)。這個為期一年的半日制課程只適合已完成法學學士學位課程或香港共同專業法學文憑 (CPEC) 或英國及威爾斯共同專業法學文憑 (CPE) 的同學報讀。而完成此項預備課程的同學便可進入大律師實習期。簡單來說，此課程只適合那些欲成為大律師而避免進修「法學深造文憑」課程的同學。這個課程設計希望修讀的同學可以在來年的五月或六月參加英國大律師考試。入讀的同學最低必須取得法學二級榮譽學士學位，或持有英國及威爾斯共同專業文憑 (CPE)，所有修讀此課程的同學必須赴英三次，入住英國的大律師學院 (INNS)，及共晉所有考試前的晚宴。總括來說，所有通過英國大律師考試的同學 (English Bar Examinations) 將自動成為合格在港執業的大律師。

### 結論

在港取得執業資格的法律工作者其中大部份已經投入法律專業的行列。根據一九九五年七月最新的資料，目前香港有六百多名大律師，律師則約有三仟三百人，律師事務所四百六十九間。法學畢業生除了投身法律專業工作外，更有不少畢業生加入法律教育、商界、公務員以至政界的行列。

# How to Become a Lawyer in Hong Kong



\* One-year full-time course offered at HKU Law Faculty/SPACE

\*\* Two-year full-time course offered at HKU Law Faculty

\*\*\* London University LL.M. – two-year Part-time course offered at SPACE

**Law Association, HKU.**



# 律師的分類和有關機構

法律是一門專業知識，所以一般市民遇到有關法律問題時，通常需要尋求律師的協助。進行訴訟，面對繁複的法律程序，更加需要律師作代表，以專業角度研究法律觀點，善用審訊制度，達致公平公正的結果。在香港，執業律師依其身份有官方律師及私人律師之分。

## I 官方律師

官方律師是香港立法局、律政署和法律援助署等由當局僱用的律師，他們一般在香港、英國或英聯邦國家的大學畢業，取得律師資格，精通英國及香港法律。他們支取香港政府的薪俸，成為當局的法律顧問執行法律任務。例如，律政署的律師會就起草法律，對各政府部門的工作提供法律諮詢服務；律政署刑事檢控科的律師，經律政司同意和安排，受該署委派，可以代表香港政府執行檢控的職務，對被告人進行檢察起訴。

## II 私人律師

私人律師當然要取得律師資格。他們可以個人形式執業、合夥營業，或受僱於律師事務所。私人律師不是香港政府的公職人員。私人律師，包括兩個不同的分支：律師（Solicitors）和大律師（Barristers），他們都有專業法律工作者的地位，只是工作性質有所不同。

### (a) 律師 (Solicitor) (又稱事務律師)

事務律師從事廣泛的法律業務，包括給予市民或商業機構一般法律輔助，例如直接為當事人辦理財產交易(如轉讓、按揭、租務)、代辦遺產繼承、起草各種契約、制作法律文書、參加糾紛的調解或仲裁、處理稅務或充當當事人在訴訟上的代理人，負責草擬訴訟程序所需的訴訟和其他文件。事務律師也能在地方法院和裁判法院擔任出庭律師。但高等法院或其他更高級法院審理案件時，事務律師不能充當法庭辯護律師，而需要轉聘大律師出庭。由於事務律師業務範圍甚廣，因此事務律師多專長於某種範圍，大規模的事務所分工更加精細。事務律師可以與其他事務律師以合夥形式合組事務所，並聘請其他事務律師為僱員。

### (b) 大律師 (Barrister) (又稱訟務律師)

原則上，大律師專職負責出庭辯論的訴訟工作。程序上，當事人要聘請律師進行訴訟時，先由事務律師研究案情、準備文件。當事人如無特別指示，事務律師即將案件事實及有關要點制成摘要交予大律師，此文件稱為「案情摘要及委任聘請書(brief)」。大律師接受這個“brief”後即負有處理一切事務之權責，例如使用證據，就庭外和解及和解條款提供法律意見等。

除代表當事人上庭辯論及盤問證人外，大律師亦可以口頭或書面的形式為律師提供法律意見或起草法律文件，這也是接受律師之委託的工作的一部份。非經律師引介，大律師本身不得對當事人提供任何法律服務或接見當事人。另外，大律師參與法庭訴訟工作時有豁免責任之特權。

大律師只能單獨執業，不能同時兼任事務律師，亦不得從事其他有害其專業獨立 (PROFESSIONAL INDEPENDENCE) 及大律師名譽之職業。資深大律師能被任命為高等法院法官。大律師執業時，不可利用廣告推銷，不得招攬業務，更不能因種族、信仰、政治等原因拒絕接受聘請。有關大律師費用，則由其書記與律師洽商。

根據有關專業守則的規定，大律師執業十五至二十年，就可以提出申請為御用大律師。經首席大法官徵詢其他法官和法律界資深人士的意見後，首席大法官會把委任人選的建議呈交總督，並請求在倫敦的外交事務大臣正式批准。如批准作實，總督會簽署作出委任。這種資格是

一種相當崇高的榮譽，一旦獲得此種榮譽，在大律師同業中的地位就會大大提高。

劃分御用大律師和其他大律師的一個特色，是“兩級大律師規則”\*。該規則禁止御用大律師在沒有另一位大律師（作為他的助理）陪同下在任何法院或審裁處出庭作為訟務律師。此外，雖然御用大律師可自行提供法律意見，但必須與上述當助理的大律師商議後，才可擬備狀書。

其實香港服務業聯盟法律服務工作小組曾建議廢除“兩級大律師規則”，但於1993年10月21日香港大律師公會一次特別會員大會中，一項廢除這規則的動議以微多數票遭否決。

### (III) 律師組織

香港的律師組織有兩個，即香港律師會(Law Society) 和香港大律師公會(Bar Association)

#### (a) 香港律師會

香港律師會是香港法定的專業律師團體。該會負責管理註冊專業律師有關的職業道德，安排專業考試和會員登記等。該會正式會員必須是根據上述制度正式取得律師資格的人士。該會會員經香港法院批准，再向律師公會申請發給執業證書，方可在香港開設或加入律師事務所，執行律師業務。

#### (b) 香港大律師公會

香港大律師公會是管理大律師的專業組織。該會設有執行委員會，處理日常業務。律師會和大律師公會的執行委員會除了負責日常事務之外，亦會就律師和大律師的職業道德問題和違紀行為進行研究、審查及懲處。輕的予以譴責，重的會被除名。除名分兩種：一種是有期的，除名期間，不能執行律師業務；另一種是永久除名，即永遠不能在港執業。

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\*該規則將於一九九五年一月取消，以後御用大律師出庭時，不會被硬性規定由另一位大律師陪同協助。然而因為御用大律師所受理的案件通常非常複雜，他們仍然會要求負責該案的律師多聘大律師從旁協助。



# A Mock Trial of a Murder<sup>1</sup> Case

This mock trial was presented to the teachers and students of the Soochow University and the National Taiwan University. Although this scene is only a simplistic version of a real trial, it did achieve the aim of portraying a vivid picture of our court proceedings to our counterparts studying in a different legal system.

(Before the mock Trial, we performed a Chinese drama introducing the background. The script is provided on page 32.)



*In this court scene, there are:*

*The Judge, 7 Jurors, 2 Court Clerks, 3 Witnesses (Sergeant Lo, Fiona and Ding), the Prosecutor, the Defence Counsel, the Accused and 2 Court Policemen (18 actors and actresses altogether)*

*At the beginning, there are the 2 court clerks, the counsels and the defendant guarded by the court policemen in the court. When the court clerk shouts, "Court!", the Judge comes in.*

Judge : Michael Fung, you are charged by the Crown for murdering your wife Jenny Lim on the 14th February, 1995 at 3:00 p.m. in the apartment of the Lim's Family in Wan Chai. Do you plead guilty or not guilty?

Fung : Not guilty.

Judge : The jury shall now be empanelled.

*( The jury enters the courtroom. The Judge writes down some notes and nods at the prosecution, Miss Poon.)*

*(The Judge then looks at the defence counsel)*

Crown : Yes, My Lord. On 14th February, 1995, the defendant went to the apartment of the Lim's Family where his wife, Jenny had been living since she left him. He hoped to reconcile with her and asked her to come back to him. During the discussion, the defendant pulled out a pistol. After the coroner's inquest, the victim's death was proved to be caused by a gunshot. Here, the Crown is charging the defendant of murder. Murder is a serious crime. It involves the killing of a human being. In order to prove that one is guilty of murder, it is necessary to show that the defendant actually performed the act of killing with malice aforethought, that is an intention to kill or to cause grievous bodily harm. The burden of proof lies on the prosecution and that means the Crown has to prove to the jury beyond reasonable doubt that the defendant is guilty of murder. If the jury has any doubts or is not sure about the prosecution's case, then they should decide in favour of the defendant, either to convict him of manslaughter or to acquit him totally. Now, two witnesses will be submitted by the Crown to prove: (1) the defendant did actually kill the victim, and (2) that he had the malice aforethought.

<sup>1</sup> Based on *Woolmington v DPP* [1935] AC 462

Now, May I call upon the first witness, Sergeant Lo.  
*(Lo steps up and sits at the witness box. The court clerk gives him a piece of paper to read.)*

Clerk : Are you a Christian?

Lo : No, I'm not. *(Lifting his right hand)*  
 I hereby swear that I will speak the whole truth and nothing but the truth.

Crown : What is your name, address and occupation?

Lo : My name is Richard Lo. I live in 12/F Kowloon Police Matrimonial Quarters. I am a policeman stationed at the Mong Kok Police Station.

Crown : Sergeant, can you briefly describe what you saw by the time you arrived at the scene on 14th February, 1995?

Lo : By the time I arrived at the spot, I saw the defendant sitting on the floor holding a pistol tightly, saying, " I killed Jenny, I killed Jenny!" repeatedly.

Crown : Apart from those of the accused, were there any other finger prints found on the pistol?

Lo : No, there were not.

Crown : Why are you so sure?

Lo : It is because I was responsible for collecting the fingerprints on the pistol and I was able to find only the fingerprints of the defendant.

Crown : My Lord, I have no further questions.

Judge : *(looking at the defense counsel, Mr. Yu.)*

Def : Yes, my Lord. Sergeant Lo, did the defendant struggle when you arrested him or resist arrest?

Lo : No, he didn't. He showed much co-operation instead.

Def : Was he shocked at that moment?

Lo : Yes, he was.

Def : So, do you think that the accused was shocked because he killed his beloved wife by accident?



Crown : Objection, my Lord.

Judge : Mr. Yu, you cannot ask for an opinion.

Def : I am obliged, my Lord. I have no further questions.

Crown : Now, may I call upon the 2nd witness. (*Fiona steps up and takes the oath.*) Please state your name, address and occupation.

Fiona : My name is Fiona Chow. I live in Lim's apartment in Wan Chai and I am a university tutor.

Crown : Miss Chow, where were you on the 14th February, 1995 at 2:55 p.m.?

Fiona : I had just come back from the university and was about to go into Lim's apartment.

Crown : What happened then?

Fiona : I heard someone quarreling inside and I realized that it was Michael and Jenny. I heard Michael say that he'd kill Jenny. Then I heard a gunshot. I opened the door immediately and I saw Jenny lying on the ground and Michael holding a gun shivering.

Def : Why did you go to the Lim's apartment?

Crown : What actually did you hear the accused say just before the gunshot?

Fiona : Michael said, "I'm going to kill you, Jenny."

Crown : I have no further questions, my Lord.

(*The Judge then looks at the defence counsel.*)

Def : In your testimony, you said you were listening to a walkman on the way back from school. Is that true?

Fiona : Yes, but I did stop listening when I heard the quarreling.

Def : What was the time when you heard the gunshot? Ah! In your testimony you said it was 3:00 p.m. sharp, right?

Fiona : Yes.

Def : But why are you so sure?

Fiona : For I heard the gunshot right at the moment when the radio told the time. I believe the radio

can't be wrong.

Def : I do believe so, but in my respect, I submit that you are inconsistent in your testimony. You stopped listening to the walkman only after you heard the gunshot. You're not at all sure about what Michael actually said, am I right?

Fiona : ...but I think Michael did killed Jenny!

Def : I have no further questions, my Lord.

Judge : Is the defense going to call upon any witnesses?

Def : Yes, my Lord. And may your Lordship allow me to give a short address before calling upon the first witness of the defence.

Judge : Yes, you may.

Def : Now, I am going to present to you the defence's case. May I remind the jury that if you believe in the defense's case or you are not sure which case is true, the benefit of the doubt should be given to the defendant. And that is either to convict him of manslaughter or to acquit him completely.

Lo : Now may I call upon the first witness, Mr. James Ding. *(Ding steps up and takes the oath.)* Please state your name, address and occupation.

Ding : My name is James Ding and I live in L.A. Mansion in Pokfulam. I work as an executive in the L&A Co. Ltd.

Def : What were you doing on the 14th February, 1995 at 2:00p.m.?

Ding : I was going to Michael's home where I saw him leave hurriedly, so hurried that he didn't even lock the door. I was afraid that he was going to commit suicide again, so I immediately phoned his family, and right beside the phone, I found a note.

Def : What was the note about?

Ding : It was something like a will, which stated that he'd leave forever and asked us to take care of his mother.

Def : *(He holds up an exhibit from the clerk's table and shows it to Ding.)* Is this the note you were referring to?

Ding : Yes, it is. *(The clerk then takes it to the Judge.)*



Def : Recently, did the defendant ever mention anything about committing suicide?

Ding : Yes, he did. Since Jenny left him, he had attempted to commit suicide for over three times.

Def : Had he ever left such a will before when he tried to commit suicide?

Ding : No, he hadn't. That's why I believed that he was really serious this time and thus, I called the police right after I read the note.

Def : I have no further questions, my Lord.

*(The Judge nods at the Crown.)*

Judge : Mr. Yu.

Crown : I have no questions, my Lord.

Def : Living under agony and torture, Michael lost all his hope. He begged for his wife to come back.

Def : Now, may I called upon the defendant to give evidence.

*(Michael steps up and takes the oath.)* Please state your name, address and occupation.

Fung : My name is Michael Fung, I live in Causeway Bay and I am a lawyer.

Def : Why did you go to the Lim's apartment?

Fung : I went there in hope of getting Jenny back.

Judge : Members of the jury, in a trial for murder, the Crown must prove death as the result of

Def : But why did you bring along a pistol?

Fung : I knew that I had little hope in getting Jenny back, so I hoped to win her back by threatening

Fung : I knew that I had little hope in getting Jenny back, so I hoped to win her back by threatening that I would commit suicide. That's why there was only one bullet in the pistol. Just enough for me to commit suicide.

Def : Have you ever thought of killing Jenny?

Fung : Never, for I love Jenny so much!

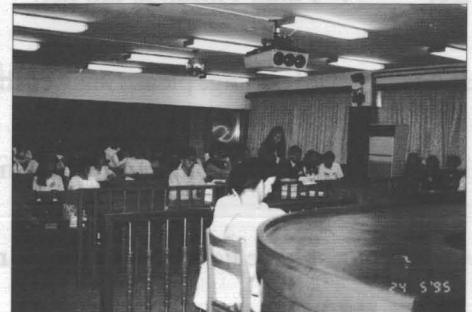
Def : I have no more questions, my Lord.

*(The Judge nods at the Crown.)*

Crown : Mr. Fung, do you really love Miss Jenny Lim?

Fung : Yes, I do.

*(The court policemen takes Michael Fung away after hearing the sentencing and Fung calls out the judge and the jury.)*



Crown : Even when she dumped you?

Def : The Prosecution is traveling out of scope, my Lord.

Judge : Miss Poon, please rephrase your question.

Crown : I am obliged, my Lord. Will you try your best to win her back?

Fung : Yes, of course!

Crown : Even if the method may inflict harm on her?

Def : The question is misleading, my Lord.

Judge : Overruled, the accused has to answer the question.

Fung : If the harm is negligible, YES.

Crown : What about shooting at her and let her be yours forever?

Def : Objections

Judge : Overruled

Fung : I didn't mean to kill her! I just wanted to shoot her in the arm and that's all! I didn't know that the bullet would pierce through her heart! I just wanted her to know how much I loved her and how painful I was.

Crown : So can I possibly say that you intended to shoot the victim at her arm when you fired the pistol?

Def : I didn't mean to kill her.

Judge : Mr. Fung, please answer the question.

Fung : Yes, I did intend to shoot her at her arm.

Crown : I have no more questions, my Lord.

Def : My Lord, the defense has no more witness to call and unless I can be of further assistance, the defense will rest the case.

Judge : Miss Poon, you may deliver your closing speech.



Crown : Members of the jury, murder is a serious crime. As I have submitted in the opening speech, the Crown has to prove that there was the actual act of killing by the accused and malice aforethought. It is undisputed that the victim was killed by the deliberate shot fired by the accused. And the intention to frighten his wife into obedience by pointing the gun at her or shooting at her arm is sufficient evidence of malice aforethought. As in the case of *Hyam v DPP*, it is said that "if a man, in full knowledge of the danger involved, and without lawful excuse, deliberately does that which exposes a victim to the risk of the probable grievous bodily harm or death, and the victim dies, the perpetrator of the crime is guilty of murder..." Here, if you are sure that the defendant knew his shot is probable to cause the victim grievous bodily harm and still he went on to do it, then you can convict him of murder. My Lord, I shall rest my case unless I can be of further assistance to the court.

Judge : Mr. Yu

Def : Living under agony and torture, Michael lost all his hope. He begged for his wife to come back of his wife but she refused time and time again. His only way out was to threaten his wife by committing suicide, hoping to win her back. From the will, he wrote about the only bullet her has. All these show that he had one and only one intention when he went to see the victim and that is to commit suicide when he was refused again. He had neither the intention to kill nor the intention to inflict grievous bodily harm on his wife. Michael is also a righteous lawyer. And most important of all, he loved Jenny. It was an accident, a tragedy, which nobody want to happen. And here I rest my case.

Judge : Members of the jury, in a trial for murder, the Crown must prove death as the result of a voluntary act of the accused and malice of the accused. When evidence of death and malice have been given, the defendant is entitled to show by evidence or by examination of the circumstances adduced by the Crown that the act on his part which caused death was either unintentional or provoked. If you are either satisfied with his explanation or upon a review of all the evidence, are left in reasonable doubt or are not sure whether the act was unintentional or provoked, even if his explanation is not acceptable, the defendant is entitled to be acquitted. Now you may retire and decide the verdict.

*(Court clerk shouts "Court", everybody rises and then sits down.)*

Judge : Ladies and gentlemen of the Jury, what is your verdict? Guilty or not guilty?

Foreman : Guilty.

Judge : Since the verdict is guilty, the accused, Michael Fung is convicted of murder and shall be sentenced to life imprisonment. The sentence shall be implemented immediately.

*(The court policemen takes Michael Fung away after hearing the sentencing and Fung yells all the way.)*

序幕：Members of the jury, murder is a serious crime. As I have submitted in the opening speech...

FUNG：(拿起手槍，上一枚子彈，並把遺書放在桌上)

(他上街之際，DING突然出現。DING見FUNG面色古怪，便問)

DING：FUNG，你沒事吧？看你的臉色不好，為甚麼行色匆匆呀？

FUNG：少管我吧！(看著DING) 你管不到，再也管不到！

(推開DING，跑出去)

DING：FUNG！FUNG！(突然發現桌上有一份遺書，遂讀出來)



(FUNG到達JENNY的外家)

FUNG：JENNY，求求你回來吧。我知道我待你不好，我知錯了！回家吧！

JENNY：算了吧！我們的感情告吹了。

FUNG：如果我失去了你，我又有甚麼生存的意義呢？(掏出手槍)

JENNY：FUNG，不要這麼傻吧！

FUNG：那麼你回來吧！

JENNY：難道你還不明白嗎？我不再愛你了！走吧！

(FIONA聽著Walkman正步向門口)

FUNG：若今生做不了夫妻，那麼便盼望來世吧！(向JENNY射了一槍)

(FIONA隨之掉下了耳筒跑進屋內)(FUNG呆站不語)



# Introduction to the National Taiwan University

The predecessor of the National Taiwan University was Taipei Imperial University, founded by the Japanese in 1928. Following Taiwan's retrocession to Chinese sovereignty, on November 15, 1945, the government of the Republic of China assumed the administration of Taipei University, which was recognized and renamed the National Taiwan University, with Dr. Lo Tsung-lo serving as its first principal. As of the academic year 1994-1995, the University consists of eight colleges, namely the Colleges of Law, Liberal Arts, Science,

Medicine, Engineering, Agriculture, Management and Public Health; and the number of students has grown to 23,092.



The College of Law was established in 1947. It comprises of four departments and six graduate institutions. The four departments are Law, Political Science, Economics and Sociology. The six graduate institutes are Law, Political Science, Economics, Sociology, San-Min-Chu-I (The Three Principles of the People) and Journalism. All graduate institutions offer the Master's and Ph.D. degree. The College has a total full-time teaching faculty of 163 and an enrollment of 2,891 students in the regular daytime classes.

The undergraduate level of the Law Department, teaching is designed to meet the needs of national development. The focus of teaching has been on the training of professionals in the legal field. At the graduate level, teaching is designed to facilitate academic research in the field of social science and to train advanced researchers.

There are three divisions in the Department of Law, namely the Legal Science Division, the Judicial

Administration Division and the Division of Economics and Financial Law. Every student must complete at least 148 credits before being awarded the Bachelor of Laws degree. Students in the Legal Science Division must study, in addition, Anglo-American Law, including an Introduction to Anglo-American Law, the Law of Torts and the Law of Contracts. Students in the Judicial Administrative Division must study Civil Procedure Practices, Criminal Procedure Practices and the Law Governing the Nature of Non-Litigation. Students in the Economic



Financial Law Division must also study Integrated Mathematics, Economics, Accounting, Public Financing, Economic Law, Industrial Property Law and International Trade Law or International Economic Law.

The Graduate Institute of Law offers two programmes leading to the Master of Laws and Doctor of Laws. A graduate student should choose one of the following specialized areas of study as his major at the beginning of the first semester: 1) Fundamental Legal Study, 2)

Public Law, 3) Civil Law, or 4) Criminal Law. The purpose of the Graduate Institute of Law is to provide programmes of advanced study and independent research in the field of legal science. In addition to the thesis requirement, a graduate student must complete at least twelve seminar courses. Furthermore, apart from courses of legal writing in German, Japanese or French, each student may take an intensive course in either of the three languages to ensure competence in reading legal materials of foreign languages.

Lectures and seminars are frequently given by prominent foreign as well as domestic scholars. A series of books and periodicals are also published by faculty members. Furthermore, there are academic cooperation and exchange plans for both professors and students between the law school of National Taiwan University and other universities.



*National Taiwan University, College of Law*



# 從大陸、台灣、香港三地關係之發展 看香港的未來

台灣大學法律學院政治系教授明居正博士主講

各位同學：

要探討大陸、台灣、香港兩岸三地關係的發展，我們可以先從大陸與台灣兩岸關係發展的歷史講起。

一九九四年，國民政府播遷台灣，大陸礙於美國援台的客觀形勢，無法對台行使主權。且中共建國之初，內部矛盾激烈，大陸政府不得不全力處理內部問題，力圖恢復國內秩序。自中共第一個五年計劃以後，直至鄧小平接替華國鋒執掌政權，大陸不斷發生政治運動，對外事務，根本無裕全面兼顧。這時期，台灣本島，相對地能夠發展得比較放任自由，較少受外來干涉所影響。

反觀中共執政四十多年以來，對香港的影響，都比對台灣的來得更直接、更鉅大。無論韓戰對香港經濟的打擊，抑或文革對香港政治的震盪，對於香港社會而言，都是既沉重且深遠的。

自從大陸改革開放以後，兩岸透過不同形式建立聯繫，批准兩岸人民互訪，更掀起兩岸民間直接交流的浪潮。近年，台灣經濟經過多年高速蓬勃發展之後，基本上已呈衰退的跡象。而台灣經濟之所以仍然能夠保持穩定增長，主要由於台灣商家投資大陸，利用大陸的美國配額，藉大陸市場，維持台灣的經濟。正因台灣日趨依賴大陸市場，大陸因素對於台灣內部政治的影響，亦日見重要。

近來，人們最關注的問題，莫過於預測鄧小平身後大陸的政局形勢。當鄧小平去世之後，權力繼承問題大可能激發派系鬥爭，直接影響大陸的改革開放，從而嚴重妨礙大陸的經濟發展。而台灣本身業見頹象的經濟，亦必大受打擊。相信屆時香港的情況，亦會跟台灣相差不遠。

八十年代初期，中英開始就香港前途問題展開討論，移民潮亦在香港應時而起。經過八六、八七年之高峰期，移民潮稍為緩和，香港人對自身前途的信心，亦慢慢穩定下來。港商投資內地的意欲亦漸漸恢復，投資額不斷增加。然而，一九八九年天安門事件，大大削弱外商投資內地的信心。而香港的資金，大都隨著各大外資而撤離大陸。惟有台商逆國際大勢，非但沒有撤走資金，更不斷投入大量資本，積極拓展大陸市場。這時期，台商成了大陸最主要的投資者，對大陸經濟舉足輕重。結果，大陸經濟不但未有動搖，相反，更有穩定增長。

一九九二年，國際形勢轉變。中共與世界各國的外交關係逐漸恢復正常。外資、港資大舉重投大陸市場。香港人移民回流的人數，亦逐年增加。可見國際社會對大陸前途抱有信心；香港人亦能接受自己的未來，對前途抱著審慎樂觀的態度。

從以上數十年三地關係發展的歷史來分析香港未來前景，我們可以知道香港與大陸是血脈相連的。大陸的政策，大陸內部調控經濟的方向，都會直接影響香港。在香港踏入後過渡期這兩三年中，北京對香港的政策明顯收緊，認為英國政府連同港英殖民地政府，皆缺乏與北京衷誠合作的誠意。北京甚至將香港定位為西方和平演變中國的前線基地，我預期於一九九六年，北京很可能半公開進駐香港，甚至公開干預香港事務。大陸、英國、香港之間的關係快將產生微妙變化。

至於大陸內部的變化對香港的影響，大致有二：一為改革開放的持續發展，一為政治繼承問題。回顧中共實行改革開放的十多年以來，遇到的保守勢力非常強大。八十年代初期，農村改革大體完成，中共著手開展城市改革。然而，由於共產政治心態的局限，就城市改革帶出的問題，特別是對社會主義經濟及市場改革的承輔關係，皆缺乏具體經驗及理論基礎。

其實，大陸的改革開放，很多地方可以向台灣借鑒。譬如土地改革，農業改革等。台灣土地改革實行「耕者有其田」的政策，然時日一遠，土地兼併益烈，導致經濟惡化，形成新興的地主階層。地主憑藉雄厚財力，入主政治。加上非法勢力干政，造成台灣政權、金權、黑權相互勾結的不良局面。至於農業改革，台灣減租補貼過度，影響台灣經濟，使國家財政負擔沉重。這些都是台灣的經驗，大陸改革應該汲取台灣的教訓。

具體而言，大陸必須著力培養良好的中產階級，藉他們促進社會經濟的發展，從而推動政治改革。如此不但能避免激烈的政治變動，還能對社會起穩定作用。而共產黨內自由化，以民主方式解決政治繼承問題為改革開放及經濟發展提供穩定的政治環境。目前，大陸經過十多年改革開放之後，無論政治、經濟、社會各方面都出現失衡失向的不良現象。要解決這些問題，大陸必須接受社會主義與市場經濟互不相容的事實，努力改革下層的經濟架構，從而推動上層政治制度的改革，穩步邁向真正的民主。

事實上，近年大陸舉行的基層選舉實在十分成功。在村級、鄉級的首長選舉中，民主成份極高，過程相當自由開放。其中以河南、福建最為特出。可惜宣傳低調，不為各界所知。而大陸的基層幹部亦曾組團訪美，向共和黨汲取組織地方選舉的經驗。然而，雖然美國的選舉經驗非常豐富，但是台灣的經驗我想較為配合中國的發展。最後值得一提的，就是面對近期大陸的基層選舉，雖然共產黨的干預減至最低，選舉非由共黨把持，成功當選者亦非以黨員居多，然而，我們仍然需要探討當中存在的震盪，避免民主進程發展太急，造成過度衝擊。因時間所限，就此作結。謝謝。

本文未經講者覆核，由筆者按隨行筆記敘要成篇。





# Legal Education and the Judicial System in Taiwan

**Speakers : Professor Jiunn-rong Yeh and Mr. Kuen-chen Fu**

## **A. Legal Education**

### **1. Introduction**

#### **a) A Historical Review**

Before 1945, Taiwan had been under Japanese rule for around 100 years. After the defeat of Japan in 1945, which marked the end of the Second World War, Taiwan began to establish her own government, including that of her legal system. During the colonization period, only the elite had the opportunity to go to Japan to receive legal education. Thus, in the post-war period, Taiwan experienced a transformation of her legal system from a system modeled on the Japanese to a system of her own.

#### **b) The Existing System and Practice**

Taiwan is the only place practicing the Law of ROC (the Republic of China). Having been a colony of Japan, Taiwan's present legal system is influenced by the Japanese. Thus, it is similar in many ways to the continental system where the courts always look to codes and statutes in deciding cases. Nowadays, the Taiwan legal system also shows some features of the American system.

#### **c) The National Taiwan University as an example**

In Taiwan, most law students enter universities through the Central Examination after high school. As law is a very popular choice among high school students, only those with outstanding results will be able to enter law school.

The National Taiwan University Law School provides a four years' Bachelor of Laws (LL.B.) programme. In the first year of the course, law students study some general subjects: General Introduction to Civil and Criminal Codes, Use of English and Chinese, History etc. In the second year, they study more advanced courses like Property Law, Administrative Law and Anglo-American Law, etc. These courses can be classified into two categories: mandatory and selective courses. Problems arise when there are too many mandatory courses and too little room for law students to choose other subjects of their own interests. Therefore, a reform on the course syllabus is necessary for the benefit of law students.

After graduating from law school, law graduates can choose to enter post-graduate institutions for further studies. Among the 700~800 law graduates, only around 35 of them can succeed to do so. Others will take the judicial examination, after which they have to finish one and a half year of training in the judicial training center before they can join the judiciary.

## **2. Conflicts in Legal Education in Taiwan**

### **a) Practitioners vs. Researchers**

There have always been conflicts of whether the education system is to train legal practitioners or researchers. Both are equally important, since lawyers constitute one of the vital features of the legal system while researchers help to improve the legal system. A balance must be struck.

### **b) Legal Technicians vs. Decision-makers**

For a legal technician, legal education should focus more on the traditional law courses like contract law and tort law, while a decision-maker needs a broader legal training.

### **c) Continental vs. Anglo-American**

As Taiwan had been influenced by Japan, its modern legal system tends to follow the Continental system. However, as aforesaid, recent developments are that the Taiwan legal system is resembling the American system in particular areas. Thus, in some law schools, Anglo-American Law has been newly added to their original syllabus. This somehow creates conflicts between the two systems when they are practised.

### **d) Comparative Studies vs. Local Studies**

Comparative Law had once been an important subject in law schools. However, it is not as popular now in the past. People tend to identify themselves as Taiwan people and Taiwan law as their own law. It may be because more Taiwan people want their country to be independent.

## **3. Legal Research, Legal Education and Institutional Settings**

Some law departments have attempted to transform into law schools. In this way, they can be independent from other departments like the department of economics, social studies etc. In terms of curriculum, a syllabus resembling the style of a pure graduate law school is sought.

Besides institutional reforms, competition between law schools and degradation in some is an unhealthy sign leading to deadlocks in the legal education.

The teaching personnel of Comparative Law receives training from different countries, and thus favourable diversity and variety is thus added to the syllabus. However, conflict of interests may also arise in setting the syllabus as there may be different points of view.



## 4. Challenges

### a) Diplomatic Relations and Economic Development

In 1971, Taiwan was excluded from the United Nations and was thus diplomatically isolated. The defective diplomatic tie affects her relations with other countries. However, Taiwan's economic and industrial development has led to successful trading relationships with other countries. Thus, trade serves as a lubricant in building diplomatic ties.

### b) Democratization

As economic development had been successful, Taiwan began to democratize the country. Democratization started from public protest and civil disobedience when people started to protest against things they believed to be unjust. Therefore, laws regarding to referendum, freedom of speech and others were drafted. This marked the beginning of a democratic government.

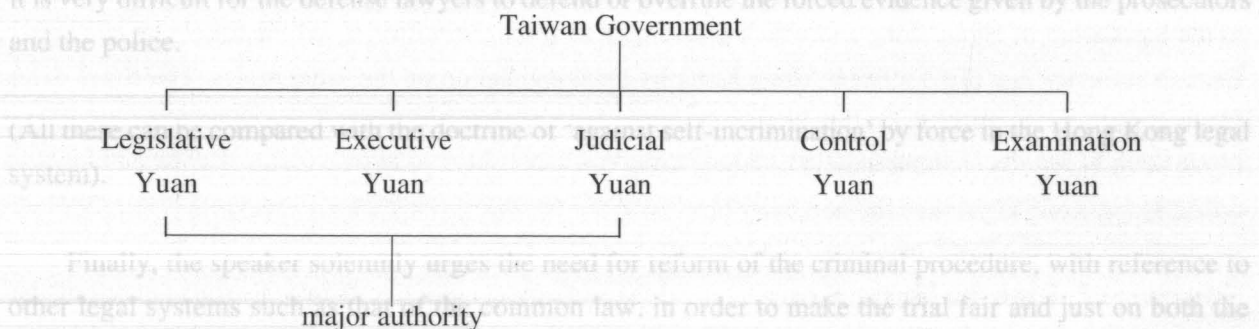
### c) Internationalization

As Taiwan has been diplomatically isolated after being excluded from the United Nations in 1971, she had to do a lot to prevent total isolation. Therefore, she has actively participated in international activities like cultural, economic and other such activities. It is now a recognized neighbor in the Asia Pacific region.

## B. Judicial System

### 1. Position of the Judiciary in the Constitutional Framework of Taiwan

Constitutionally, the Taiwan government consists of five "Yuans" (branches) shown in the following diagram:



The establishment of the five "Yuans" are important for the operation of checks and balances where each branch is to balance the use of power of the others so that no one branch can have more power over the others.

## 2. Conflicts in Legal Education in Taiwan

## 4. Challenges

### 2. The Role of the Judiciary in the Government

#### a) Practitioners vs. Academic Development

##### a) Authority of Interpretation

The Judiciary is called the "Conference of Grand Justice". It has the highest authority in interpreting the Constitution and statutes when disputes or conflicts arise. It is also one of the country's law-making body.

##### b) Adjudication vs. Decision-makers

##### i) Ordinary Courts

- ~ district courts
- ~ Court of Appeal of the Supreme Court

##### ii) Administrative Courts

- ~ these courts were established for the purpose of making petitions to the administrative agent.
- ~ petitions can also be directed to a higher level: the supervisory agent.
- ~ people making such petitions usually seek for remedies for interests.

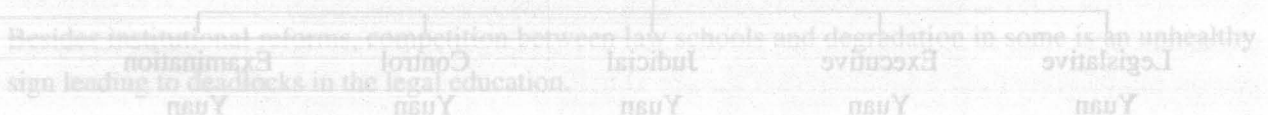
##### c) Application of law

- ~ applying domestic law, like constitutional and administrative law, criminal and civil law.
- ~ international laws can also be applied by the judiciary.
- ~ international customary law is also applicable to local courts; for example, the Letter of Credit system in international transactions.

## 1. Position of the Judiciary in the Constitutional Framework of Taiwan

### 3. Legal Research, Legal Education and Institutional Settings

Constitutionally, the Taiwan government consists of five "Yuan" (branches) shown in the following diagram. Some law departments have attempted to transform into law schools. In this way, they can be independent from other departments like the department of economics, social studies etc. In terms of curriculum, a syllabus resembling the style of a pure graduation is highly recommended.



The traditional research in Law receives training from different countries, and thus favourable diversity and variety is added to the syllabus. However, conflict of interests may arise in setting the syllabus as there may be different points of view.

The establishment of the five "Yuan" are important for the operation of checks and balances where each branch is to balance the use of power of the others so that no one branch can have more power over the others.



# A Brief Introduction to the Criminal Trial System in Taiwan

Unlike the situation in Hong Kong, Taiwan has adopted the Continental System rather than the Common Law System. The prosecution is empowered not only to decide whether to indict the suspects, but also whether to arrest. They can also take active roles in looking into the cases so as to dig up evidence for the indictments.

One problem is that, the Taiwanese Police Department is often complained of collaborating with the Prosecutors to force confessions of crimes by torturing the suspects. This gives rise to the issue of infringement upon human rights, and thus a need for a reform in the system. In general, a criminal suspect, after being arrested by the police officers, is sent to the Police Department, and can be detained by the Department for a maximum of 24 hours. It is always claimed that within these 24 hours violation of human rights occurs: self-incrimination of the suspect coerced by police officers. After 24 hours, the suspect is sent to the public prosecutor who will exercise his/her 'arbitrary power' to decide whether to continue detaining the suspect, to release him/her on bail or let the suspect 'off the hook' (i.e. not to indict the suspect); without the need to give any reason, the case goes to the District Court or High Court for open hearing, and the investigation of the prosecutors persists throughout the trial, with the assistance of the Police Department.

The findings of the investigation are never disclosed to the public. At the hearing, one judge decides the case at the District Court level. Appeals of the judgments from those courts go to the Supreme Court which is comprised of five judges to deal with the legal issues of the case only.

As stated earlier, the Police Department often resorts to the torturing of suspects in order to acquire their confession or other information of their crimes. This is especially true in drug trafficking cases when police officers desperately want to know the sources of the drugs. Most of the evidence are heavily relied upon by the Prosecutions and any evidence of torture is very difficult to be proven in court. Consequently, it is very difficult for the defense lawyers to defend or overrule the forced evidence given by the prosecutors and the police.

(All these can be compared with the doctrine of 'against self-incrimination' by force in the Hong Kong legal system).

Finally, the speaker solemnly urges the need for reform of the criminal procedure, with reference to other legal systems such as that of the common law, in order to make the trial fair and just on both the Prosecution and the Defense.

# The Hong Kong Legal System

## Introduction

Generally, the law of Hong Kong follows that of England and Wales. The Application of English Law Ordinance was enacted in 1966 to declare the extent to which English law is in force in the territory, and provides that the common law of England and the rules of equity shall be in force in Hong Kong so far as they are applicable to the circumstances of Hong Kong or its inhabitants, subject to such modifications as circumstances may require.

Additionally, the ordinance applies some English Acts to Hong Kong, such as the Justices of Peace Act of 1361 and the Habeas Corpus Act of 1679.

On occasions, English legislation is applied to Hong Kong either directly or by Order of Her Majesty in Council. The power to make all such laws as may appear necessary for the peace, order and good government of the territory is expressly reserved by Article IX of the Letters Patent. In practice, this power is largely confined to matters which have a bearing on Hong Kong's international position.

Most statutory laws in force in Hong Kong are, however, made locally and is contained in the Laws of Hong Kong. Chinese customary law is also applicable in Hong Kong in certain cases.

This body of law, under which all persons are subject to, is administered by courts which are independent of the government.

The 1984 Sino-British Joint Declaration provides that the essential features of Hong Kong's legal system, including the independence of the judiciary and the obligation of the executive authorities to abide by the law, will continue beyond 1997.

In order to ensure that by 1997 Hong Kong possesses a comprehensive body of law which owes its authority to the legislature of Hong Kong and which can remain in force thereafter, it will be necessary to replace English statutory law that applies in Hong Kong by local legislation on the same topics. The Hong Kong Government's plan, therefore, is that English statutory laws applying in Hong Kong should be applied and replaced by Hong Kong enactments. The Hong Kong Act 1985 gives power by Order in Council to confer on the Hong Kong legislature the necessary powers.

## Sources of Law in Hong Kong

There are mainly four sources of law in Hong Kong: statute law, common law and equity as well as customary law.



## **2.1 The Common Law and Rules of Equity**

The English common law and rules of equity are to be found primarily in the judgments of the superior courts in England, Hong Kong and other common law jurisdictions. In historical terms, reports of judgments handed down by judges have, since at least the 15th century, established in detail the legal principles regulating the relationship between the state and citizen, and between citizen and citizen.

There are now some hundreds of thousands of reported English, Canadian, Australian, Hong Kong and other Commonwealth cases relating to freedom of speech, freedom of assembly, and freedom from arbitrary arrest or imprisonment have been spelt out in cases reaching back more than three centuries ago.

## **2.2 Statutory Law**

What are statutory laws? They are rules and principles specifically laid down in accordance with a formal procedure by an institution whose privilege of making law is recognized and accepted by the community at large. The primary legislature in Hong Kong is the Governor acting with the consent of the Legislative Council, and the law which it enacts is contained in ordinances. However, because today's society is so complex, Legislative Council is not able to deal directly or specifically with all of the details of its statutes. It is also unable to ensure that its statutes are implemented properly and effectively. To deal with this, the Legislative Council authorizes or delegates other bodies or persons to act on its behalf. This delegated legislation is designed to provide for details and to make sure that statutes can be effectively implemented. Examples are by-laws made by a local authority such as a country council, and by-laws made by a local authority such as Gas Boards and Electricity Boards.

## **Chinese Customary Law**

Examples of Chinese customary law applicable in Hong Kong include: under the New Territories Ordinance in relation to land in the New Territories, the courts may recognize and enforce Chinese customs or customary rights. It is also recognized in the Intestates' Estates Ordinance that land in the New Territories devolves upon intestacy according to Chinese custom.

## **The Courts**

Judicial institutions in HK consist of the Judicial Committee of the Privy Council, the Court of Appeal and the High Court (together forming the Supreme Court), the District Court, the Magistracy, the Coroner's Court, the Juvenile Court and also the Lands Tribunal, the Labor Tribunal, the Small Claims Tribunal and the Obscene Articles Tribunal.

## **Judicial Committee of the Privy Council**

The Judicial Committee of the Privy Council, which sits in London, is the final court of appeal for Hong Kong and certain Commonwealth countries, such as New Zealand. If either of the parties of the Court of

Appeal are dissatisfied with the judgment, they can appeal to the Privy Council.

However, before a civil appeal may be brought, 'leave' must be granted, either by the Court of Appeal or by the Judicial Committee, and will only be allowed to appeal if permission is given. The grant of leave to appeal is governed by strict rules, and is not granted to all parties who apply for it.

The Judicial Committee is not part of the English Court system. It is not even a court, strictly speaking, for it does not make judgments. Rather, it advises the Queen to act on its findings on a particular case by issuing an Order in Council. A sitting of the Judicial Committee consists of any five members drawn from the Lord Chancellor, members of the Privy Council who hold or have held high judicial office, and other judges from Commonwealth countries.

Nonetheless, all of the courts in Hong Kong are bound by the decisions of the Judicial Committee of the Privy Council when it is sitting in its capacity as the final court of appeal for Hong Kong, even though it is situated in England. Moreover, it is likely that the result of an appeal to the Judicial Committee from a Commonwealth country would also be binding on Hong Kong courts.

### **The Court of Appeal**

The Court of Appeal is the highest court in Hong Kong. It hears appeals in all matters, civil and criminal, from the High Court and the District Court, as well as appeals from the Lands Tribunal. It also makes rulings on questions of law referred to it by the lower courts. It is not bound by its own previous decisions. The Chief Justice is the ex-officio president of this court. As I have mentioned, if either of the parties to a case is not satisfied with the decision of the Court Of Appeal, an appeal can be made to the Judicial Committee of the Privy Council, under certain circumstances.

### **The High Court**

The jurisdiction of the High Court is unlimited in both civil and criminal matters. It also exercises jurisdiction in bankruptcy, company winding-up, adoption, probate and insanity matters. The most serious criminal offences, such as murder, manslaughter, rape, armed robbery and drug offences involving large quantities, are tried by a judge of the High Court citizens. It is the jury which decides whether the accused is guilty or not.

The High Court also has an appellate function from decisions of the magistrates' courts and the Labor and Small Claims Tribunals.

### **The District Court**

The District Court was established in 1953, and has a limited jurisdiction in both civil and criminal matters. Its civil jurisdiction is in general limited to actions in contract or tort where the debt, demand, or damage claimed is not more than HK\$120,000; actions for the recovery of land where the ratable value does not



exceed HK\$100,000. Its criminal jurisdiction covers charges relating to indictable offences which have been transferred by magistrates on application by the Attorney General. A district judge sits alone, without jury, and may not sentence a convicted offender to a term of imprisonment longer than 7 years. Certain serious offences (for example, murder, rape) may not be tried in the District Court.

## **The Magistrates' Court**

Magistrates exercise criminal jurisdiction over a wide range of indictable and summary offences. The maximum sentence they can generally impose is two years' imprisonment, or a fine of \$10,000. However, for two or more offences tried together, magistrates' courts are empowered to impose a cumulative sentence of up to three years' imprisonment.

All indictable offences come before the magistracy initially. They may, however, according to how serious the offence is, on the application of the Attorney-General, be transferred to the District Court or be committed to the High Court.

There are several special Cantonese-speaking magistrates, who are not legally qualified but experienced in judicial work who have been appointed to deal with cases of a more routine nature, such as hawking and minor traffic cases. Their powers of punishment, however, do not include the power of imprisonment.

## **Criminal proceedings**

Generally, a criminal proceeding can be divided into three parts: prosecution, trial and defence.

### **Prosecution**

In Hong Kong, the Attorney General has overall responsibility for the conduct of prosecutions. It is for him alone to decide whether or not a prosecution should be instituted in any particular case or class of cases.

In practice, the vast majority of prosecutions are routine matters which are dealt with by the Police or other law enforcement agencies without reference to the Attorney General.

### **Defence**

In determining whether or not to prosecute, the Attorney General takes into account the sufficiency of evidence and other relevant matters, including those affecting public policy, but in making that decision, he is not subject to any instructions or directions from the Executive.

The law has developed a strong bias/inclination in favor of the personal liberties of the individual. This has been done by means of the writ of habeas corpus and the civil remedies for false imprisonment. For instance, an arrested person in custody must normally be brought before the justices within 24 hours or, if the offence is serious, as soon as is reasonably practicable.

## At trial

In Hong Kong, trials are conducted according to the adversary principle. This means that the person accused is guaranteed an opportunity to confront his accuser in court, so that he can defend himself. Both parties can engage lawyers to represent them.

They may call witnesses and present evidence to support their arguments. Unlike the inquisitorial system which operates in some countries, the judge is not the prosecutor nor a party to a case. Instead, he must listen impartially to the evidence of all parties and witnesses. The judge decides a case only after hearing and examining all the evidence put before him. He has no power to interrogate the accused, and should normally not ask questions except to clear up some ambiguity left unanswered by counsel's questions. If the accused is not guilty of the offence charged, he must be acquitted and the court cannot find him guilty of another offence on its own initiative or investigation.

The rule in criminal law is that the accused is presumed to be innocent until proven guilty beyond reasonable doubt. The practical consequence of this is that the prosecution bears the onus of proving the accused's guilt in every case. The defence is not obliged to offer any evidence to prove the innocence, and the judge must direct that the case against the accused be dismissed if he considers that the prosecution has offered insufficient evidence.

## Summary trial

Whilst the bulk of the work of a magistrates' court concerns minor offences, magistrates' courts deal with offences triable either summarily or on indictment. The first formal step is for the magistrates' clerk to read the charge to the accused or the defendant, and secure a plea. The charge is the formal document containing the allegations against the accused. A plea is usually sought to the general issue only, and the accused is asked to plead guilty or not guilty.

If the accused enters a guilty plea, the court can proceed to hear the facts of the case from the prosecution. In certain circumstances, social inquiry reports are required, and it is normal for a case to be adjourned if such a report is necessary or desirable. With or without a report, the bench will listen to anything that may be said by the defence by way of mitigation of sentence.

A plea of not guilty normally results in an immediate adjournment to an agreed date so that the prosecution and defence can assemble their witnesses and court time can be allocated. At the adjourned hearing the procedure will follow the normal adversarial lines. The prosecution is entitled to address the court through an opening speech and will then lead evidence through witnesses who will be subject to examination-in-chief, cross-examination and perhaps, re-examination. At the close of the prosecution's case, the defence may submit that there is no case to answer. The magistrate may stop the hearing if he finds that no reasonable tribunal could convict on the prosecution's evidence. If the submission is accepted, the accused is charged. If it is rejected, the right of the defence to call witnesses and build a defence is not prejudiced. At the close of the defence's case, the defence is entitled to make a closing speech to the bench. The magistrate normally



retires to consider his/her decision. It must be satisfied beyond reasonable doubt that the charge is proved before a magistrate can convict. Magistrates decide questions of both fact and law. Where an accused is convicted, magistrates will impose a sentence upon the offender. Sentences are laid down in respect of each offence, involving a maximum term of imprisonment and/or a maximum fine.

## **Trial on indictment**

The accused is brought to the court and the indictment is read out and a plea in respect of each count is sought. That plea may be to the general issue, that is a plea of guilty or not guilty. If a plea of not guilty is entered, a jury of eleven people will be empanelled and sworn. The indictment will be read over to the jury which will be told of its obligation to listen to the evidence and to determine guilt or innocence.

Counsel for the prosecution addresses the jury first. The function of the opening is to explain to the jury the basic elements of the prosecution's case, the evidence that is to be called and the burden and standard of proof. Witnesses called by the prosecution give their evidence in turn and may be subject to questioning by the defence. Counsel for the defence may ask the trial judge to direct the jury to acquit the accused because there is no case to answer. If this submission is accepted, the trial ends and the accused is acquitted.

Defence counsel is only entitled to make an opening speech to the jury if at least one witness is to be called as to the facts of the case. Witnesses called by the defence are examined. They may be cross-examined by prosecution counsel and re-examined by defence counsel. Both counsels may address the jury at the closing of the evidence. The prosecution goes first and the defence has the last word. The jury is likely to be reminded once again of the burden and standard of proof.

The trial judge must sum up the evidence to the jury, directing it as to the law and explaining the function of the jury and the judge himself. The jury retires to consider its verdict. The verdict of the jury is announced by the person known as the 'foreman' in open court. As in summary trial, since not all the necessary information is provided during the trial to enable an appropriate sentence to be imposed, an information gathering exercise is often undertaken after conviction, which includes the possibility of a plea in mitigation being made by either defence counsel or the accused in person. Finally, the judge passes sentence on the accused.

## **Defence**

Some principles of defence, which are in accordance with Article 14 of the International Covenant on Civil and Political Rights, have been incorporated in the Hong Kong Bill of Rights Ordinance. For instance, equality before the court; the right to a fair and public trial by a competent, independent and impartial tribunal established by law; the right to trial by jury in the most serious cases; adequate time for preparation of one's defence; the right to legal assistance; the right to remain silent in court; the right to appeal against conviction or sentence; the right not to be tried or punished for an offence for which one has previously been convicted or acquitted; and the right to bail pending trial or appeal. Such rights are protected by law accordingly.

## The Civil Proceedings

The main difference between criminal and civil proceedings is that the former are instituted in the name of the Crown to suppress crime and to punish criminals, while the latter are taken to protect and to recover property and to enforce obligations.

While civil proceedings may be often taken by the Crown against individuals, including corporations, and vice versa, such proceedings are more commonly instituted by individuals against other individuals.

The burden of proof is easier to discharge in a civil case than in a criminal case, the standard of proof being one based on the balance of probabilities.

The principal branches of the civil law include contract, tort, property, administrative, family and revenue law. There is, of course, an infinite variety of agreements into which persons, including corporations, enter into. One important function of a lawyer is to set out clearly such contracts in an endeavour to prevent disputes arising.

At the beginning of a trial, an opening speech is made on behalf of the plaintiff. The object of the opening speech is to outline the case with reference to the evidence that is to be called. At the conclusion of the opening speech for the plaintiff, the first witness is called.

Normally, there are witnesses for the plaintiff and witnesses for the defendant. Counsel for the plaintiff will call each witness in turn. A witness is questioned to extract testimony which is expected to be favourable to the plaintiff. The questioning of a witness by the Counsel on the same side is termed 'examination-in-chief'. At the conclusion of the examination-in-chief of each witness for the plaintiff, counsel for the defendant is given the opportunity to cross-examine in an attempt to shake the testimony of the witness or the defendant's case.

The case for the defendant is put in exactly the same way with an opening speech and the examination of witnesses. After the defence's evidence has been heard, counsel for the defendant may make a closing speech summarising his or her view on the evidence and the law, to which counsel for the plaintiff may reply.

Ultimately, the judge is required to give a reasoned judgement stating the conclusions on the factual issues in dispute and the legal implications of those findings of fact.

## The Private Profession

The legal profession in Hong Kong is divided into two distinct branches - barristers and solicitors. Solicitors have limited rights of audience before the courts, while barristers have an unlimited right.



## **Barristers**

The Bar Association is the governing body for barristers. Barristers can only be employed or briefed upon the instructions of a firm of solicitors. The point of contact for members of the public is the solicitor who gathers the evidence of a case and interviews witnesses.

When a barrister has attained a substantial level of accomplishment and recognition, and has been in practice for at least 10 years, he can apply to become a Queen's Counsel. The expertise of a Queen's Counsel is usually sought in the more complex cases. A Queen's Counsel must be accompanied by a junior barrister when appearing in court.

Barristers must practice singly whereas solicitors are allowed to practice together in a partnership. There are around 500 practising barristers in Hong Kong at present.

## **Solicitors**

The Law Society is the governing body of the solicitor's profession which is largely self-regulatory. As I have said before, solicitors have limited right of audience. In other words, they cannot litigate for their clients in the superior courts. On the other hand, their work is more diverse than that of the barristers. They can handle matters relating to conveyance of properties, commercial drafting, probate and wills, as well as matrimonial matters. There are at present, around 2700 solicitors and 425 local law firms in Hong Kong.

## **2. Development of Human Rights in Hong Kong Hong Kong Beyond 1997**

The following is a brief account of the development of human rights in Hong Kong. The Sino-British Joint Declaration on the Question of Hong Kong and the Basic Law of the HKSAR of the PRC provide that the present judicial system will be maintained after 1997, except for those changes consequent upon the establishment of the Court of Final Appeal. After the 20th meeting of the Sino-British Joint Liaison Group of the CFA, action is in hand to establish the CFA before 1997 to replace the Judicial Committee of the Privy Council as Hong Kong's highest appellate body.

The ICCPR was formally ratified by UK in 1976 and, at the same time, its application was extended to Hong Kong. As a signatory state, UK was required to submit annual reports to the United Nations Human Rights Committee on the human rights situation in its own country and its dependent territories. The first report on Hong Kong's human rights situation was submitted in 1978.

### **2.2 The Sino-British Joint Declaration**

The Joint Declaration was signed between the British and Chinese governments in 1984. Article 13 of Annex I of the Joint Declaration, provides that the ICCPR and the International Covenant on Economic, Social and Cultural Rights (ICESCR) "as applied to Hong Kong shall remain in force".

# Human Rights in Hong Kong and 1997

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## **1 Background**

Certain basic rights of the individual, such as the right to silence, rights to peaceful assembly and association, and the right to a fair trial are all provided to Hong Kong citizens by the common law. Under the doctrine of the Supremacy of the Parliament, the Legislative Council (Legco, Hong Kong's legislative body) can, however, deprive Hong Kong people of such rights simply by legislation.

This was what actually happened in the 1950s and 1960s when the government passed draconian legislation (e.g. the Public Order Ordinance in 1967) which deprived many basic rights and civil liberties of Hong Kong citizens. Though such laws were only meant to be temporary, they have been left untouched for 30 years.

With Hong Kong's social and economic improvement in the 70s and 80s leading to better education, social awareness was aroused and such restrictions on individuals' rights by the government were attacked. The signing of the Sino-British Joint Declaration in 1984 and the drafting of the Basic Law in 1985 raised public concern for the protection of their basic rights. The disappointment and worries of Hong Kong citizens over their future rights and freedoms created by the Tiananmen Incident and the subsequent changes and promulgation of the Basic Law provided further impetus pushing the Hong Kong government to take steps to better guarantee individual rights and freedoms in Hong Kong.

## **2 Development of Human Rights in Hong Kong**

The following is a brief account of the development of human rights in Hong Kong from 1976 when UK became a signatory party to the United Nations International Bill of Rights to the enactment of the Hong Kong Bill of Rights, of which its impact will be addressed in the later part of this article.

### **2.1 The International Covenant on Civil and Political Rights (ICCPR)**

The ICCPR was formally ratified by UK in 1976 and, at the same time,, its application was extended to Hong Kong. As a signatory state, UK was required to submit annual reports to the United Nations Human Rights Committee on the human rights situation in its own country and its dependent territories. The first report on Hong Kong's human rights situation was submitted in 1978.

### **2.2 The Sino-British Joint Declaration**

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## 2.3 The Basic Law

The Basic Law, the future HKSAR's mini-constitution which elaborates the Joint Declaration, was promulgated in 1990. Article 39 specifically provides for the continuation of the ICCPR in Hong Kong and states that Hong Kong residents can enjoy all rights and freedoms unless restricted by law.

Though the ICCPR is incorporated in both the Joint Declaration and the Basic Law, whether this provides sufficient safeguards for the civil rights and liberties of Hong Kong citizens is another question. For one thing, the ICCPR's application in Hong Kong before and after 1997 can only be effected if it is built into the domestic law of Hong Kong. This was part of the considerations for introducing a Bill of Rights for Hong Kong.

## 2.4 The Hong Kong Bill of Rights Ordinance (BORO)

Calls for a Bill of Rights in Hong Kong were expressed soon after the Joint Declaration provided for the continuation of the ICCPR in the HKSAR. Apart from 1997 considerations, the fact that the ICCPR was not legally enforceable in Hong Kong (and thus a lack of safeguards) had been put forward as reasons for the enactment.

In 1987, the Attorney General formed a working group examining the possibility of introducing a Hong Kong Bill of Rights. A draft was produced in March 1988, but the matter did not proceed any further from there. The explanation given by the British government was that the incorporation of the ICCPR into domestic law was a very complex matter and that there were many other methods to apply the International Bill of Rights in Hong Kong. The Chinese government was also against the bill for it argued that human rights in the HKSAR were adequately protected by the Basic Law which was then in its drafting stage. It was also pointed out that the Chinese opposed the bill for it was seen as an attempt by the British government to intervene in the drafting of the Basic Law, a matter in the sole jurisdiction of the Chinese sovereign power.

With the Tiananmen Massacre in 1989, worries were aroused among the public on the guarantee of personal rights and freedoms after 1997. Under public pressure, the government introduced the Bill of Rights in 1989 which was passed in 1991.

## 3 The Status of the BORO

The Hong Kong BORO came into effect on 8th June, 1991. It faithfully reproduces most of the provisions of the ICCPR. Should any inconsistencies arise and the BORO needs to be amended, only the domestic BORO will be affected and not the ICCPR. Apart from introducing international standards of human rights into Hong Kong, the reproduction of the ICCPR into Hong Kong through the BORO is also an attempt to ensure the BORO's survival after 1997: Since Article 39 of the Basic Law expressly provides for the continued application of the ICCPR in the HKSAR by implementation through local laws, the BORO which incorporated the ICCPR will be consistent with the BL.



Section 3 of the BORO provides that any pre-existing legislation inconsistent with the BORO shall be repealed; s 4 provides that all subsequent legislation shall be construed as being consistent with the ICCPR. Notwithstanding these provisions, the BORO is a piece of ordinary legislation of equal status with other legislation passed by Legco. However, bearing in mind that the BORO mirrors the ICCPR, the BORO is entrenched by an amendment to the Letters Patent (one of the constitutional documents of Hong Kong) which states that any laws subsequent to the amendment would become null and void if inconsistent with the ICCPR (an amendment closely modeled on Article 39 of the Basic Law).

Such complicated procedural entrenchment is necessary in the context of the common law. By the doctrine of the Supremacy of the Parliament, any legislation which is found to be inconsistent with subsequent legislation will be repealed by the new legislation. Since this doctrine threatens the existence of the BORO, methods were devised to entrench the status of the BORO. Insofar as substantial entrenchment is concerned, an Act of Parliament applying directly to Hong Kong could be made. Yet such prerogative legislation would cease to apply in Hong Kong after the change of sovereignty; substantial entrenchment could also be made by means of local legislation, but the dangers of it being overturned or repealed by later legislation remains. Procedural entrenchment could be made by enacting provisions for amendments to the BORO to require universal franchise or at least two-thirds of the members of Legco to amend the BORO.

The method of amending the Letters Patent in a way that closely follows Article 39 of the Basic Law was finally adopted (as previously discussed), since procedural amendments would be inconsistent with Annex II of Part II (on the voting procedures) of the Basic Law which states that “(the) passage of bills introduced by the government shall require at least a simple majority vote of the members of the Legislative Council”, implying that all laws in the HKSAR will enjoy equal status. (Actually, all the laws of Hong Kong cannot be of equal status due to the hierarchical structure of legislation: UK Acts of Parliament enjoy a higher status than local Hong Kong ordinances, while subsidiary legislation is lower, and customs and conventions lowest in the hierarchy; in the constitutional hierarchy, the Letters Patent and Royal Instructions are superior to Hong Kong ordinances and conventions and customs.)

## **4 The Impact of the BORO**

Apart from introducing international standards of human rights into Hong Kong, the implementation of the BORO has mainly had an impact on the local legislative process and the judicial process. Outside these areas, impact has been insignificant, the main reason being the inapplicability of the BORO to private citizens' rights.

### **4.1 The Legislative Process**

As far as legislation is concerned, under s 4 of the ordinance, compatibility with the BORO, or with the ICCPR as applied in Hong Kong, has become almost a routine issue to be considered by the legislators whenever a new bill is introduced into the Legco. This has increased awareness of human rights and new legislation is now subject to closer scrutiny.

Whereas under s 3(2) of the BORO, ordinances, such as the Public Order Ordinance and the Summary Offences Ordinance, have been reviewed and repealed if found inconsistent with the BORO. Areas concerning freedoms of speech, peaceful assembly and association have been looked into and relevant legislation amended where necessary. Other political rights such as the right to stand as a candidate for election (ex parte Lau Shan-ching) and the equal right to vote (Re Lee Miu-ling) have also been subjects of challenge against the government.

With greater social awareness of civil rights and liberties, legislators have initiated legislation aiming at the protection of such rights. Bills for the equal treatment and the protection of women and equal opportunities have been initiated and will continue to be human rights concerns in Hong Kong.

## **4.2 The Judicial Process**

Since the BORO came into effect, developments in case law in the past few years have brought about major repercussions in civil and especially criminal cases. Certain statutory presumptions in various ordinances have been ruled as inconsistent with the BORO (Art 11(1)) (R v Sin Yau-ming). Reverse onus provisions need to satisfy the tests of rationality and proportionality in order to comply with the BORO (AG of HK v Lee Kwong-kut); yet such developments raise serious problems of reopening all the convictions that have taken place since the operation date of the BORO. Undue delay in prosecution has also been a point of attack for the violation of the right to speedy trial as stated in the BORO.

Though the courts (especially the higher courts) are still hesitant of adopting a more liberal approach in the application of the BORO, further developments brought about by the BORO is bound to occur and shall prove the dynamic and the extensive impact of the BORO.

## **4.3 Other Areas of Interest**

As far as law enforcement agencies are concerned, the impact of the BORO has not been significant. The conflicting nature between protecting human rights and preserving public order has not been great. Although under Part III of the BORO, six certain ordinances (e.g. the Immigration Ordinance, the Police Force Ordinance, the Prevention of Bribery Ordinance, etc.) have been excluded from the scrutiny of the BORO so that they can prepare for necessary amendments within a year's time, it turned out that some of these amendments were only of a cosmetic nature and did not have any substantial significance.

The main problem created by the enactment of the BORO on law enforcement agencies is the feeling of uncertainty since the law enforcers cannot be certain about the exact powers they have, or the validity of statutes from which they derive their powers.

## **5 Human Rights in the HKSAR**

Chinese criticism of the BORO poses a question on the continuity of the BORO after 1997 and thus the



guarantee of human rights and freedoms after the change of sovereignty. The main considerations for the guarantee of human rights lies in the provisions of the Basic Law, the status of the BORO and the necessary reforms in the legal system to ensure the protection of civil liberties and freedoms.

### **5.1 Safeguards in the Basic Law**

The Chinese government has pointed out on a number of occasions that the Basic Law already provides the necessary safeguards for human rights and thus the BORO is unnecessary. It has also commented that incorporating the ICCPR into the BORO is a gesture of seeking the independence of Hong Kong, thus it vehemently objects to such legislation. Such comments reflect the inadequacy of the Chinese government in understanding human rights and public international law.

Though the fact that the Joint Declaration and the Basic Law have expressly provided for the continuance of the ICCPR and thus prevents the People's Republic of China (PRC) from denying human rights in Hong Kong, this does not provide sufficient safeguards for the rights and freedoms of the citizens in the HKSAR. This is mainly because the PRC is not a signatory state of the International Bill of Rights and thus she is not compelled to submit a report on the human rights record in Hong Kong. Thus, apart from domestic protection, international supervision is also necessary for human rights to be safeguarded in the HKSAR.

### **5.2 Continuity of the BORO?**

The amendment to the Letters Patent was made in an attempt to entrench the BORO and to ensure the survival of the ordinance after 1997 at the same time (see section 3, "The Status of the BORO"). However, such an amendment has also been criticized by the Chinese government with allegations that the role of Legco is only in legislating for the peace, order and good government of Hong Kong.

The creation of a Bill of Rights in Hong Kong has been, ever since, raised to the level of political debate. Top Chinese officials have even vowed that the BORO will be struck down after June 1997 as it shall be construed as in violation with the Basic Law. But even if it so happens, the minimum safeguards for human rights in Hong Kong will not disappear completely as they will still be upheld through the common law.

### **5.3 Safeguards and Reforms?**

Protection for citizens' freedoms and rights is inadequate in Hong Kong even at present. To remedy the situation, it is important that sufficient safeguards for human rights are established now which can be extended after 1997. As recommended by the Amnesty International in 1994, many reforms to existing legislation are required.

One of the areas requiring reform is legal aid. Hong Kong citizens should not be deterred from bringing a civil action against the government due to unaffordable expenses for litigation. While the present scope of legal aid is wide enough to cover Bill of Rights actions, the applicant has to meet a stringent means test. It is suggested that the Director of Legal Aid should be given discretion to grant legal aid to an applicant with a

meritorious Bill of Rights civil case against the government, even though he does not meet the means test. The government should also ensure that citizens who bring a meritorious Bill of Rights case do not have to pay the government's legal costs even if they lose the case.

Another recommendation is the establishment of an independent human rights commission. Such an independent body should provide an accessible, affordable, speedy and effective human rights complaints system complementary to the judicial system. It should also develop a more proactive, forward-looking and effective approach to human rights implementation; and to enhance human rights awareness, and to provide education and training programmes. The independence of the commission can also ensure impartiality in its operation. Moreover, the commission can supervise related matters such as the eligibility of persons applying for legal aid in suing the government under the Bill of Rights.

The independence of the judiciary needs to be maintained and further strengthened so that judges in deciding on cases involving a Hong Kong citizen against the government should not be subject to any government interference or pressure.

Given that China has not yet ratified the Covenants, the British government should also take the initiative in seeking agreement with the government of China, the UN Human Rights Committee and the UN Committee on Economic, Social and Cultural Rights, on the method of reporting to those committees on the implementation of those International Covenants in Hong Kong after June 1997. To ensure that the system of reporting is to be enforced in Hong Kong after 1997, China or Hong Kong should make an agreement or China should be pressed to become a party to the Covenants as soon as possible.

Only if such reforms are made can the rights of individuals in Hong Kong be guaranteed now and after China resumes sovereignty over Hong Kong.

#### 4.3 Other Areas of Interest

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# Introduction of the Taiwan Nationalist Party (The Kuomintang, KMT)

The Nationalist Party, also known as the Kuomintang (KMT), is the ruling party of Taiwan, R.O.C. It was founded by Dr. Sun Yat-sen in 1919. The KMT was initially revolutionary in nature. In 1949, the government and the Party retreated to Taiwan and took up its leading role there.

The KMT aims to carry the Three Principles of the People and to adhere to a national policy of anti-Communism in order to realize the goals of democratization, equitable distribution of wealth and national reunification. In promoting constitutional democracy, the KMT cooperated with other political parties under the rule of law to ensure national security as well as enhancing people's well being.

The Central Standing Committee (CSC) is the major decision making body of the Party. In recent years, the number of Taiwanese members in the CSC gradually increased. During the 1980's, the membership of the Party increased with an average growth rate exceeding 20%. There are over 2 million members in the KMT. People from all walks of life are recruited, including those living overseas.

Q: What is your opinion

The 13th Party Congress (1988) was a turning point in the Party's near century-long history. Dr. Lee Teng-hui was elected as Party Chairman. In addition, various new policies were adopted:

- New Mainland Policy: To localize democracy, allowing more meaningful contacts with the Mainland. To promote economic ties and understandings across the Taiwan Strait, supporting political modernization on the Mainland while publicizing the Taiwan experience.
- Economic Policy: Infrastructure improvement and a national transition to capital and knowledge intense production were stressed. Further, privatization, balanced foreign trade and a more equitable distribution of wealth were suggested. A Ministry of Cultural Affairs was established in order to accelerate environmental protection work, fund a higher level of public health, social services and increase consumer protection.

The revised Civic Organization Law was passed by the Legislative Yuan on the 20th January, 1989. It legalized inter-party competition which is a major step in the transition of the R.O.C.'s political system to a fully democratic and competitive party system. The KMT's policy towards political opposition has gradually changed from that of repression to toleration. For instance, instead of banning the largest opposition party (the Democratic Progressive Party) or arresting opposition leaders, the KMT has speeded up political reforms, including legalizing the formation of new parties and has held regular meetings with the DPP leaders to facilitate communication.

The KMT adopted a unification policy concerning its relationship with the PRC government. The basic goals of that policy are:

- to uphold the Constitution of Taiwan R.O.C.
- to oppose Marxist-Leninist-Communism
- to ensure security of national revival
- to support the struggle of the mainland compatriots for freedom, democracy and human rights
- to intensify the campaign for reunifying China under the Three Principles of the People

In future, the KMT will have to face different domestic and foreign challenges. The Party has reform itself alongside democratic political development in Taiwan. The direct election of President in March 1996 will be an opportunity for the Party to show its competence to the rest of the world.



*We were received by the Vice Secretary-General, Mr. James Chu & officials of the Kuomintang and the representative of the Chung Hwa Travel Service Hong Kong. Mr. Lai Cheung-Yee.*



# Questions and Answers on the Issues Discussed with the Nationalist Party (Kuomintang) of Taiwan

**Q: Law Association, the University of Hong Kong**

**A: The Nationalist Party (Kuomintang) of Taiwan**

**Q: As Taiwan's first presidential election is coming, what will be the likely effect if the candidates appeal to make Taiwan independent in their campaign?**

**A:** The notion of making Taiwan independent is the appeal of the Democratic Progressive Party and its support from the public is rather low. However, due to the importance of freedom of speech and information, no one could prohibit a candidate from appealing to make Taiwan independent after he wins the election. On the other hand, no candidate should cheat the voters by appealing for re-unification with China while operating the other way round after being elected.



**Q: What is your opinion on the future development of the Mainland?**

**A:** It is rather difficult to predict what the Mainland will be like in the future as there are always changes in the Mainland and its government does not always do their job according to formal procedure. As to Taiwan's relationship with the Mainland in the future: we will view Hong Kong as a model, if her system of "One country, two systems" works without much problem and Hong Kong remains stable, then there may be the possibility of negotiation with China on the point of unification.



**Q: How would you describe your relationship with the Democratic Progressive Party?**

**A:** A very simple phrase describes our relationship perfectly, "cooperation with competition".

**Q: What do you think will be the issue of public concern in the forthcoming first presidential election?**

**A:** First of all, we predict that there may be a high voting rate as this is the first presidential election since 1949. As everyone will know, the main and important issue will be about Taiwan's unification with the Mainland. Voters will be particularly concerned about the candidate's attitude and policy regarding the issue if they are elected. Voters are also noting the welfare policies suggested by the candidates. The health insurance policy effected recently will also be of public concern.



# An Introduction to the Democratic Progressive Party

The Democratic Progressive Party (DPP) of Taiwan, the island's largest opposition party, was formed in 28 September 1986. It is dedicated to the pursuit of Taiwanese interest as reflected by the will of the people. It was not until 1987 when the martial law ban imposed on its activities was lifted that the party became tolerated legally.

In just seven short years the DPP has grown from an outlawed organization to a party with over 70,000 members island-wide and representatively controlling nearly a third of the seats in the Legislative Yuan. In the 1992 elections

for the Legislative Yuan, the party received 31% of the popular vote; in the 1993 city and county magistrate elections, it received 41% of the popular vote. It was an encouraging result for such a young party. It no longer hides its opposition to the government, but challenges the system in open, legal, and fair forums. It is also the single largest organization advocating political change on the island.

The Democratic Progressive Party is governed by the National Party Congress (NPC) that consists of every elected DPP official, and an equal number of specially elected delegates sent from the Party's 28 branches. The National Party Congress meets once a year, or more often when emergency circumstances arise. Party membership is open to all Taiwanese individuals of legal voting age (20 in Taiwan).

The main difference between the DPP and the ruling Kuomintang (KMT) is in its foreign policies. The DPP seeks self-determination and recognition of the right to self-determination of the people of Taiwan. The following are some of the party's policies:

## Foreign Policies

- Taiwan is an independent sovereign state
- Taiwan should seek membership in the United Nations
- Taiwan should seek membership in international organizations like GATT, APEC, ASEAN, etc.
- Peaceful relations should be maintained across the Taiwan Straits

## Domestic Policies

The formulation of domestic policy is not only designed to attract a wider range of voters, but also to make



*We were received by the Chairman, Mr. Shih Ming-teh, and officials of the Democratic Progressive Party.*



the party a more well-rounded and capable governing institution. There should be:

- Universal social service
- Economic reform
- Privatization of KMT and Government Assets
- Protection of indigenous peoples and their culture
- Constitutional reform -- the present constitution was originally written in 1937 in Mainland China. Although it was amended several times, the party still thinks that a new constitution is needed to serve the changing circumstances in Taiwan today.
- Policies on women's rights
- Supervision against election and campaign fraud

The future of Taiwan still requires substantial changes in the political, economic, and social landscapes. The above framework is what the DPP thinks fit for facing the problems in Taiwan and the party is working hard to achieve the goals it has set for itself.

Q: As Taiwan is practically independent and prospering, why should it insist in joining the United Nations which gives the PRC government a chance to interfere?

A: A person seeks needs above basic necessities, it is also true for a country. We believe that dignity is what every country would fight for. Just because Taiwan is practically independent, the United Nations should not refuse our membership. We do not have this as a good excuse to refuse our membership. We do not have this as a good excuse to refuse our membership. We do not have this as a good excuse to refuse our membership.

Q: How can you help the development of democracy in Hong Kong?

A: We give our full support towards those fighting for democracy in Hong Kong. However, we think that political reform in a country can only be achieved by that country and not people. It is not really possible that an outsider can give any valuable assistance. We strongly believe that in carrying out political reform, a good leader should have the spirit to resist temptation.

Q: What do you think about the relationship between Taiwan and Hong Kong in the future?

A: We hope we can maintain the present friendly relationship with Hong Kong after 1997, but this is not up to the decision of the government. As we do not know what will happen in Hong Kong after 1997, we shall have to wait and see. However, we will believe that the democratic tradition of Hong Kong and the notion "Hong Kong people ruling Hong Kong" will continue after 1997.

# Questions and Answers on the Issues Discussed with the Democratic Progressive Party of Taiwan

**Q: Law Association, the University of Hong Kong**

**A: The Democratic Progressive Party of Taiwan**

**Q: What is your opinion on the political prospects of Taiwan?**

**A:** Concerning our diplomatic relations with the People's Republic of China (PRC), we will be adopting the policy: "PRC is PRC, Taiwan is Taiwan". Taiwan is not a part of the PRC, but rather its "brother". From the 17th century onwards, Taiwan had variously been occupied by Holland, Spain, the Qing Government in China and Japan until the Kuomintang gained its control here in 1949. This diverse historic background created a political and cultural environment different from China after all these years of separation. Moreover, in the last 40 years, the rule of the Communist Party in PRC has never extended into Taiwan. Thus, Taiwan is practically independent from China. Internally, we believe that as the economy has developed so rapidly, there will be uneven wealth distribution. Therefore, we suggest establishment of a welfare state in Taiwan so that people in need can receive assistance from the government.

**Q: As Taiwan is practically independent and prospering, why should it insist in joining the United Nations which gives the PRC government a chance to intervene?**

**A:** A person seeks needs above basic necessities, it is also true for a country. We believe that dignity is what every country would fight for. Just because Taiwan is practically independent, the United Nations should not refuse our membership. We do not believe this would give the PRC government a good excuse to use force against us because it would arouse international concern. Even if they use force against us, they may not be successful because Taiwan is a coastal territory and is not easily defeated.

**Q: How would you help the development of democracy in PRC?**

**A:** We give great concern and support towards those fighting for democracy in the PRC. However, we think that political reform in a country can only be achieved by that country and her people. It is not really possible that an outsider can give any valuable assistance. We strongly believe that in carrying out political reform, a good leader should have the spirit to resist temptation.

**Q: What do you think about the relationship between Taiwan and Hong Kong in the future?**

**A:** We hope we can maintain the present friendly relationship with Hong Kong after 1997, but this is not up to the decision of the government. As we do not know what will happen in Hong Kong after 1997, we shall have to wait and see. However, we truly believe that the democratization of Hong Kong and the notion "Hong Kong people ruling Hong Kong" will function after 1997.





# Introduction to the Taipei District Court

## Public Prosecutors' Office<sup>1</sup>

The territorial jurisdiction of the office includes the seven administrative districts of Taipei City and nine townships in Taipei County. The office is headed by the Prosecutor General. Under him are 77 public prosecutors, 12 Division Chief Prosecutors and the Deputy Prosecutor General. The main responsibility of the Office is to investigate crime and to initiate prosecution.

When conducting an investigation session, the public prosecutor is required to go through every detail in the dossier. The investigation sessions are held behind closed-doors. The public prosecutor then decides whether or not to indict by considering whether there is a probable cause in the case.

In cases of battery and assault or interference with the family, experienced public prosecutors will direct and supervise mediation sessions in order to encourage the parties concerned to settle the conflict out of court for the sake of domestic harmony. There is also a "Convenient Service Center" offering legal aid to ordinary citizens as well as publishing and promoting laws to the general public.



*Prosecutor General Lu, Ren-Fa*



<sup>1</sup> With reference to "A Profile of the Taipei District Court Public Prosecutors Office" published by the Taipei District Court Public Prosecutors' Office.

# Introduction to Taiwan Taipei District Court<sup>2</sup>

The Taiwan Taipei District Court assumes jurisdiction over the seven administrative districts of Taipei City and twenty nine towns of Taipei County. The Taipei District Court takes charge of civil, criminal, as well as other contentious and non-contentious cases as the court of first instance with the power vested in Article 9 of the Law of the Organization of the Courts. This court also acts as an appellate court dealing with civil and criminal cases subject to summary proceedings.

Judges of the Taipei District Court hold trials independently in accordance with article eighty of the Constitution. General cases of the first instance are tried by one judge only, under the "single-judge trial system". Summary cases of the second instance or serious cases are tried by a three-judge panel with a presiding judge, a commissioned judge, and an associate judge. This is called the "penal trial system".

There are civil, criminal, and various specialized divisions within the court system. Each has a division-chief supervising the division's administrative affairs. The President of the Court (who is also a judge), oversees all personnel and administrative affairs of the Court. Under the president, there is the Clerical Department, a Personnel Office, an Accounting Office, a Statistics Office, an Information Office, and an Integrity Office. There are six record sections under the Clerical Department, namely, Civil, Criminal, Traffic, Juvenile, and Civil Execution Affairs. In addition, the department also includes General Affairs, Document, Research & Examination, Information, and Legal Assistance sections and a judicial Police Office. All twelve above-mentioned units work together to make the court function efficiently.



Q: What do you think about the relationship between Taiwan and Hong Kong in the future?

A: We hope we can maintain the present friendly relationship with Hong Kong after 1997, but this is not up to the decision of the government. As we do not know what will happen in Hong Kong after 1997, we

<sup>2</sup> With reference to "A Brief Introduction of District Court of Taipei" published by the Taiwan Taipei District Court



# The Taiwan Taipei District Court and Public Prosecutors' Office

Early in the morning of 25th May 1995, we visited the Taipei District Court and Public Prosecutors' Office which, as the two limbs of the judiciary of Taipei, are situated in the same building.

We were first met by the Prosecutor General, Mr. Lu Ren-fa, who kindly briefed us on the organization and functions of the Public Prosecutors' Office. We then had the privilege of touring around the court building under the helpful guidance of two other prosecutors who took us to the different court rooms and explained to us the roles of the prosecutor and the particular aspects of the court-room. The tour was soon taken over by some judges from the Taipei District Court, the offices of which are adjacent to those of the Public Prosecutors' Office. We visited several special rooms in the court building with particular functions, amongst which were an unusual marriage registry and an auction room specially for the property of intestates. One interesting point which one may be able to observe is that the roles women play in the judicial system of Taiwan is rather significant as many judges (both senior and junior) and prosecutors are females. Efficiency of Taiwan courts can be achieved, computerization has boosted the efficiency of the Taiwan courts --- a matter where attention needs to be paid by the courts of Hong Kong. After the tour, the Chief Justice of the Taipei District Court held a tea reception during which we acquired with his help a deeper understanding of the Taipei District Court.

The Taipei District Court and Public Prosecutors' Office together form the judiciary of Taipei District. It is in many respects different from the judiciary in Hong Kong since the Taiwan courts adopt the continental law system whereas the Hong Kong courts across the Straits practise under the common law.

The Taiwan courts bear the usual responsibility of arbitration and settling of disputes among individuals or bodies, both private and public, though mediation among the parties where possible is encouraged. Being computerized, efficiency of the Taiwan courts can be achieved -- a matter where attention needs to be paid by the courts of Hong Kong.

The Taiwan judiciary comprises the courts and the public prosecutors' office. Unlike Hong Kong, where the judiciary usually refers to the various independent courts of different hierarchy and jurisdiction, the Taiwan



ese court includes a department that deals with criminal prosecution i.e. the Taiwan Public Prosecutors' Offices. Instead our Legal Department (or Attorney General's Chambers) covers this area of public prosecution work with the assistance of the Royal Hong Kong Police Force.

The Taiwan Public Prosecutors' Office is independent of the Government and the courts with relatively large powers of investigation and criminal prosecution. Members of the general public can directly report crimes to the Public Prosecutors' Office in addition to other law enforcement agencies. One important feature of the Taiwan court system, which seems to be inadequate in Hong Kong, is the provision of constitutional protection of human rights to prevent the abuse of such wide powers. Due respect to these provisions are paid by the public prosecutors who are only servants of the law.



*District Court Public Prosecutors' Office*



*District Court of Taipei*



# TAIPEI PRISON

The Taipei Prison was formerly situated in Taipei until October, 1961, when the Ministry of Justice decided that the facilities were inadequate and constructed a new prison in Taoyuan County. The new prison, which opened in 1963, covers 59,326 hectares and accommodates 5,500 inmates.

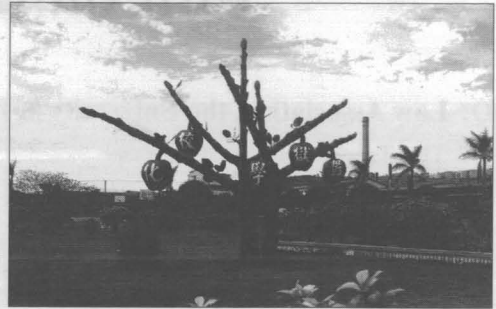
The main purpose of the prison is rehabilitation. The administration employs scientific and technological methods to help develop the moral character of prisoners and to teach them useful skills so that inmates can realize their mistakes and become productive members of society.

To meet inmates' needs and aid rehabilitation, the motives for and nature of their crime are investigated upon admission. Inmates are also tested for aptitude, IQ, personality and psychological development. These tests provide a foundation for scientific rehabilitation and individualized treatment.

The rehabilitation programme puts emphasis on education. The Hung-Teh Extension School of Taoyuan County provides seven classes including primary school, junior high and vocational training. Classes are conducted in the conventional manner by teachers from local high schools. Vocational training is also emphasized so that each inmate will be able to secure employment upon their return to society. Training is divided into general and specific skills. To encourage the inmates to become productive members of society, there are seventeen workshops in the prison which produce high quality goods for the market.

To enhance the outcome of the rehabilitation programme, there are facilities to maintain the physical and psychological health of inmates. The Catering Service, which is supported by farms and ranches operated by the inmates themselves, provides high quality nutrition for prisoners. The Medical Centre is operated by resident doctors and houses the latest medical equipment. A chaplain stays at the prison permanently to organize religious activities and provide personal counselling. Each month, a monk and a secular Buddhist devotee from the Chinese Buddhist Society come to instruct in Buddhist doctrine. Outdoor recreation activities are organized at least once a week so that the inmates can maintain their physical fitness. Each quarter inmates hold competitive activities such as ball games which are designed to promote team work and hence help them to better adapt to society in future.

The prison adopts a self-discipline approach to encourage inmates to govern themselves and obey prison rules. Good Conduct Awards are awarded to inmates who perform well in the prison. These awards supplement the sentence shortening system for an early release of the inmates.



# Questions and Answers on the Issues Discussed with the Taipei Prison Officers

**Q: Law Association, the University of Hong Kong**

**A: The Taipei Prison Officers**

**Q: Are there any voting rights for prisoners?**

**A: At present, no.**



**Q: How would you face the problem of chaos or disobedience in the prison?**

**A:** Usually the ratio of prison officers to prisoners is 1 to 20 (or up to 27) which we think is sufficient in administration. We also have military and emergency training for the officers each year so that they will know what to do if there is chaos or escaping prisoners. Luckily, we have not come across such problems.

**Q: How are the human rights of prisoners protected?**

**A:** When the new Minister of the Judiciary took position recently, we had a reform on the policy regarding prisons. Humanity, transparency, reasonableness and education are new policies of the prisons. Prisons are more open nowadays than in the past, for example, prisoners can smoke under certain limitations; they can also order newspapers and magazines.

**Q: Is a retrial possible once a death penalty is imposed?**

**A:** Usually, the power to grant a retrial is vested in the Minister of the Judiciary who is limited by procedural guidelines.

**Q: Are there any parole applications upon previous refusals?**

**A:** Yes, according to the Criminal Code section 77, if there are improvements in the prisoner's behaviour, his application for parole may be reconsidered.





# Introduction to the Mainland Affairs Council

## Executive Yuan

The Mainland Affairs Council (MAC) was set up in order to improve the relationship between the Mainland and Taiwan and to promote the unification plan of China. Under the instruction of the President of the Executive Yuan, the MAC is responsible for the overall planning of Mainland affairs.



*Director of the Department of Hong Kong & Macao Affairs, Mr. Cheng An-Kwo*

The MAC has one chairman and three vice-chairmen. There are 17 - 27 executive committee members who are usually chosen among the department heads of various departments (such as the Educational Department). Moreover, there is a group of 23 advisors who are ready to give advice to the MAC.

### **(b) The future of Hong Kong**

#### **The functions of the MAC are as follows:**

- Investigate and plan the Mainland affairs by collecting and analyzing various information (e.g. conducting surveys to find out public opinions).
- Develop and refine the laws to promote a legal and systematic exchange procedure across the Strait.
- Encourage and promote cultural and economic interflow between the people of the PRC and Taiwan.
- Cope with conflicts among the general public and deal with sudden incidents, such as hijacking.
- Consolidate the policy regarding Hong Kong and Macau.
- Publicize the policy in relation to the Mainland affairs.

# *A Summary of the Speech by the President of MAC*

The unification of China can help China develop into a strong and prosperous country. As a result, both sides (Taiwan and PRC) need to achieve a sincere cooperation and negotiation upon the principles of sensibility, peace, equality and beneficial exchange. The details of the unification plan are as follows:

## **A. Principles**

Both Mainland and Taiwan is a part of China's territory. It is the responsibility for all Chinese to establish a unified China.

The purpose of the unification is to provide more welfare to all Chinese but not for the purpose of party struggles.

The aim of the unification is to promote Chinese culture and to protect human rights and dignity.

The format and timetable of the unification must respect the rights and will of the Taiwanese.

## **B. Proposed unification plan**

**Preliminary stage: Reciprocal cultural and economic exchange**

Cultural and economic exchange can improve relationships between the Mainland and Taiwan. Although there is a carefully set schedule for these exchanges to protect the rights of people, the confined schedule may be loosened gradually to encourage more exchanges so as to promote prosperity of the Two Sides. Under the principle of "One China", the Two Sides need to seek peaceful reconciliation and mutual respect on an international level.

## **Intermediate stage: Cooperation**

The Two Sides must establish equal-status governmental channels. Communication and transportation networks should be opened up so as to stimulate economic exchange to improve the living standards of the people. In addition, the PRC and Taiwan need to cooperate and participate in international activities. Most importantly, formal and informal visits should be promoted between high-ranking governmental figures from both sides. This can pave the way for substantial negotiations.



## Final stage: Negotiation for unification

A negotiation body will be set up to construct a unified China which can pursue democracy, economic freedoms as well as to develop a nationalized army.

### (a) The obstacles of unification

The Democratic Progressive Party (DPP), which has a considerable supporters, provoke strong opposition to the unification plan. The DPP believes the governments of PRC and Taiwan are actually two separate political powers. It also considers the PRC's claims that Taiwan is part of its territory is unfounded in history and international law. As a result, it tries to encourage the independence of Taiwan.

Most Taiwanese want to witness the unification of China. However, as the authorities of the PRC continuously block Taiwan attempts of recognition in the international arena (e.g. in objecting to being one of the members of United Nations), hostilities and fears is stirred up towards the PRC's leaders. Therefore, more and more people think twice on whether unification may destroy the just-established democracy in Taiwan.

### (b) The future of Hong Kong

Hong Kong is widely recognized as an "economic miracle". The two most important factors for her success are her economic freedom and well-developed legal system. The future of Hong Kong depends heavily on whether her PRC can respect the will of Hong Kong people (that is to maintain existing economic and legal system)



# Questions and Answers on the Issues Discussed with the President of the MAC

**Q: How influential is the DPP in the decision-making of the unification plan?**

A: The Kuomintang was the only party in Taiwan before the establishment of the DPP. As Taiwan is now practising a multi-party system, the people's choice of the governing party will be reflected by the coming elections. The DPP seems to be winning more support from the people. Therefore, the influence of DPP towards the unification plan would be significant if many Taiwanese support the DPP.

**Q: What will happen if PRC and Taiwan have different interpretation of the meaning of "One China"?**

A: Both PRC and Taiwan accept the principle of "One China". Unfortunately, they have different interpretations of this principle. PRC thinks that "One China" should be ruled by the PRC alone. After the unification, Taiwan will become a Special Administrative Region under the power of the PRC. We regard "One China" to have already been established in 1912.

Taiwan cannot accept the PRC's interpretation as it does not respect the status of Taiwan. Even a married couple need to respect the other in order to have a happy marriage. Imagine that the PRC and Taiwan is a separated couple but has not gone through a legal divorce. Then, Taiwan would be the mother who brings a child with her and run away from the father (PRC). During these years, the mother works hard to bring up her child but she also misses her husband and the children she left when she ran away. Both father and mother want to live together again because this can give the children a healthy family. Unfortunately, the father still cannot change his bad temper and it makes the mother to consider carefully the issue of reunion. Most importantly, the other enjoys a different life style from the father's. As a result, the mother has to make a very careful decision. The father needs to win the mother's heart so as to fulfill his dream of reunion.

This illustration can be used to describe the situation between the PRC and Taiwan now. After such a long separation, both of them have developed two entirely different political systems. Like the father, if the PRC does not try to gain support of the Taiwanese, unification will not succeed even if it uses armed force to threaten Taiwan.



**Q: What is the policy of Taiwan towards Hong Kong?**

A: First, Taiwan will continue to develop a good relationship with Hong Kong. Secondly, Taiwan will assist Hong Kong whenever it faces problems. Thirdly, Taiwan will strive to protect democracy and freedom in Hong Kong through constructive exchanges. Fourthly, Taiwan will monitor the future of Hong Kong (after 1997) and check how the PRC is treating the Hong Kong people, that is, whether the promise that "Hong Kong people rule Hong Kong" will be kept.

**Q: What can Taiwan learn from the unification of Germany?**

A: It seems that there was no detailed unification plan before the unification which created lots of complicated problems afterwards. As a result, we hope to practise a systematic and carefully drafted unification plan.

**Q: When will the unification be achieved?**

A: It depends very much on the attitude of the party leaders of the PRC. If they can respect the will of people and try to reflect the people's will in its policy, it can make the Taiwanese to believe that the leaders of PRC can be reasonable and willing to cooperate with the government of Taiwan.

# Introduction to Tunghai University

The Tung Hai University was established in 1955 by the Board of American Christian Asian High Level Education Association and some Taiwan Christians. In 39 years, over 33,000 students have graduated from the University. The aim of the University is to promote general education and to educate students with high standards of teaching qualities. The general educational policy is to train students how research and analytical skills as well as develop a balanced personality to serve the community through the spirit of Christianity.



The University is situated in the countryside of Taichung with a 345 -hectare campus. Part of the school building was designed in ancient Chinese style which adds a sense of elegance to the pastoral campus. One of the features of the campus is a farm and a milk production factory which produces fresh milk for the market. As the University is a Christian school, students are encouraged to join religious activities; the Chapel on campus is a famous scenic spot in Taiwan.

The University has 6 faculties and an evening class department, comprising include the faculty of Arts, Science, Engineering, Business Administration, Social Sciences and Agriculture. There is a Department of Law offering Bachelor of Laws degree. The Department of Social Works and the Department of Public Administration also confer law degrees. Each student is required to take liberal studies like music, philosophy, religion, arts etc. One of the characteristic of a Tung Hai education is that every first year student is required to do 3 hours of work in cleaning the school campus and their on-campus living area each week to train the students to be responsible and cooperative as well as develop independence and learn how to live with others in a community.

Tung Hai University also actively participates in the international interflow scheme. It has a close relationship with more than 40 school overseas. The University is a member of the Asian Christian University Association and maintains close relationship with other Christian Universities.





# Overview of the Taiwan Cultural and Scenic Attractions Visited



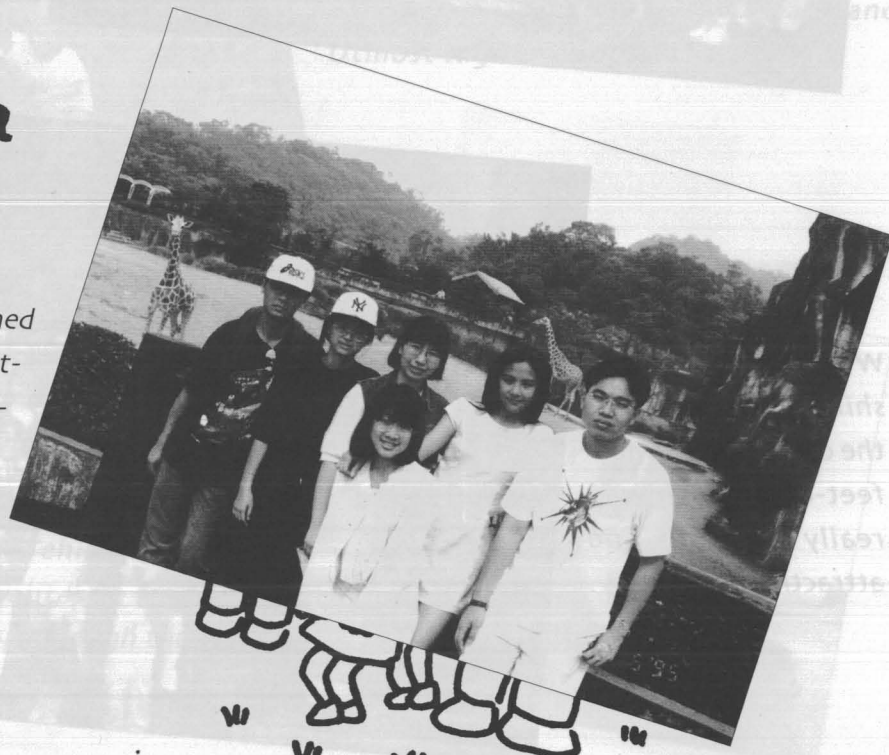
Some attractive women would 'lift you upstairs' as soon as they saw a single guy passing by and did the things one can imagine...



## MUCHA

### Zoological Garden

The zoo's animals are assigned to thirteen designated categories such as farm animals, desert animals, cuddly animals, night animals and the butterfly family.



## HWAHSI

### TOURIST NIGHT MARKET

# NATIONAL REVOLUTIONARY MARTYRS SHRINE



*The National Revolutionary Martyrs' Shrine was built in the name of soldiers who have died for the country. There are military guards on duty who change shifts every hour.*

*When they change shifts, they perform the ceremonial armed feet-drill which was really amazing and attractive to us.*







# CHIANG KAI SHEK

## *Memorial Hall*

*At the entrance to the Chiang Kai Shek Memorial Park, there is a ceremonial arch inscribed with four Chinese characters with the meaning of: "Great Means and Utmost Righteousness"*



## *Yehliu*

*A fantastic field trip...*

*A golden opportunity to revise Geography in a vivid way, Yehliu (Wide Willow) is rated for its fantastic rock formation, made by erosion through the ages.*



# Shitou Forest Recreation Area



As the experimental forest area of the National Taiwan University, the Shitou Forest has various different kinds of valuable trees such as the red cypress, silver apricot and Japan cypress. It is an area of fresh air, good weather and scenic sights.



Shitou was a scenic resort in the suburbs surrounded by mountains & trees. As it was high in attitude & was engulfed by the mist zone, one would feel cool & refreshed. We looked down from the edge of the cliff & saw a gigantic sea of clouds reaching to the horizon.







Visitors enjoys complete relaxation in the serenity, either laying themselves on the grass or hammocks hung between trees, a rare leisure for the city-dwellers.

# UNIVERSITY Pool

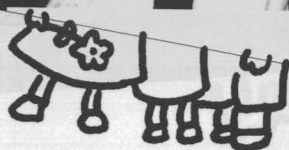



Benjamin Disraeli (1804-1881) English Prime Minister



The most interesting part of the museum is the Exhibition which consists of vivid, enlarged insect models. It makes you think you are in the **JURASSIC PARK!**

# national SCIENCE museum





# Afterthoughts

## 國立台灣大學黃佳雯同學

一般而言臺灣社會對香港之認識，大部分僅限於影視資訊與娛樂消息層面，臺灣之影視娛樂圈幾乎可以說是相互地重疊。臺灣這一代之青少年自十年前港劇逐漸風行於臺灣至今，深深地受到香港文化之影響，但是如果將焦點轉移至影視娛樂之外領域，諸如法律，政治，社會……等各個不同層面，臺灣社會人民對香港的了解認知相形之下便顯的非常地無知貧乏。

身為一個在臺灣土生土長的法律系學生，或許是因為這個社會之法制架構本身已是問題叢生而自顧不暇，鮮少再有餘力去深索其他社會所面臨之問題。

這次很榮幸得以擔任接待香港大學法律系同學之工作，在短暫的時間內除了將臺灣法制之過去，現在，未來對來自香港之同學做一個簡單的介紹外，在另一方面，或是借由正式的會談，或是借由私底下之相互討論，使得我對於香港之法律，政治面臨之難題萌生初步的認識，實感穫益良多。

## James Ding

What an unforgettable journey! During the tour, we were treated as VIPs everywhere! At every organization we visited, we received the greatest hospitality from the respectable celebrities, namely, the President of the Taipei District Court, the Chairman of the Democratic Progressive Party, and the prominent members of the Executive Yuan. We also had the opportunity to discuss various issues with eminent professors and exchange our views with local students in the top universities in Taiwan. The exciting and interesting periods of sightseeing should not be overlooked either. But on top of all these, what we value most are the friendships we have struck with the Taiwan students as well as among the participants of the Tour. In short, I quote Earl Disraeli<sup>1</sup>, "Like all great travellers, I have seen more that I remember, and remember more than I have seen."

## Jenny Lim

It's just so unforgettable...

The talks that were full of gimmicks and tactics...

The spots that were filled with fascination and glamour...

The cuisine that comprise of excellence and peculiarity...

and most importantly one frenzy fellow satiated with joy and guffaws...

It's just... that unforgettable!

<sup>1</sup> Benjamin Disraeli (1804-1881) English Prime Minister

## Deborah Poon

An old Chinese idiom says, "One learns more from exploring ten thousand miles than reading ten thousand books." I found this statement to be particularly true during our 10-day trip to Taiwan, thanks to the well-organized arrangements by our Taiwan hosts - the law students at the National Taiwan University, Taiwan Soochow University and Tunghai University.

During our sojourn on this lovely island, we had the opportunity of getting acquainted with our hosting counterparts, exchanging between us our views and ideas. We had the honour of meeting Congressmen from both the Kuomintang and the Democratic Progressive Party in a tutorial session, who elaborated their respective political stances during our exchanges. We also had the privilege of attending their Court proceedings where we witnessed the operation of the Continental Law under the inquisitorial system. We visited one of their prisons to see their treatments and correctional devices for inmates.

These experiences were invaluable and instructive. Apart from the above, our 10-day visit also gave us ample time to tour many scenic spots with magnificent landscapes that made our trip most enjoyable.

Taiwan is the last Chinese territories on earth isolated from the Communist regime by the Taiwan Strait. She has undergone rapid economic development during the last two decades. Will she continue to prosper in the next century despite the political uncertainties developed both internally and externally? As to the younger generation of Taiwanese, do they regard themselves members of the vast Chinese population or just "Taiwanese" to whom the Mainland folks are merely people with the same ethnic origin? Will the pattern of peaceful reunification of East and West Germany take place in Asia for the powers in Beijing and Taipei, to the good of the nation and the welfare of the people?

We do not have the answers and only time can tell.

## Lucia Sun

Apart from the souvenirs, we arrived in Hong Kong with joy-laden hearts. Gone are the days, but the friendship and experiences are enduring and long-lasting. Without our participation, the EXCO's efforts would have gone down the drain. Without the L.A. members' support, the trip would not have been so successful.

Are the ten fruitful days of the Taiwan Tour over? NO!!! The exciting and joyful scenes still remain and will be deeply entrenched in the minds of every devoted participant.





## Michael Fung



*It was an ordinary Sunday morning, but to me, it was the beginning of a marvellous trip which brought me wonderful reminiscences.*



*This Taiwan Interflow Tour comprised of visits to Taipei and Taichung. In the ten-day tour, we visited two law schools and some legal institutions, through which we gained a clearer and more thorough understanding of the legal system in Taiwan. In addition, our sight-seeing and window-shopping tours around the scenic spots and downtown area brought us into close contact with the Taiwanese mode of living. Most of all, I remember their great appreciation of tea which impressed me deeply when I visited a local tea house.*



*The seminars organized by the Taiwan students in the two law schools were specially tailored to suit our tight schedule and proved to be useful for widening my scope of knowledge.*



*Besides, the opportunity to visit the famous political celebrity of the Democratic Progressive Party, Mr Shih Ming-teh, Chairman, turned out to be one of the climaxes of the Tour. In a short and friendly chat, his unique thoughts on his tumultuous life and his perspective of a bright future for Taiwan left me with a great deal to think about and a sense of enlightenment.*



*Even now, I still cannot help thinking about all the meaningful and memorable events of the Tour. I deeply cherish the consolidated friendships between my fellow tour-mates as well as the Taiwanese students. I shall always treasure this chance to visit Taiwan which allowed me to broaden my horizons, to get to understand a different culture, and above all, to know more about myself and others.*

## 陳國豪 (Jimmy Chan)

今次台灣之旅基本上可算是完滿。香港大學法律學會的安排也很妥善。可以改善的地方是：

1. 各團友出發前應看一些有關台灣法律制度的書籍，可藉此加強同學參與研討會的主動性。
2. 今次行程最可惜的是時間上太接近台灣各大學考試的時間，下次再有同類活動時應對此作出考慮。
3. 在各研討會中，應以大家也能聽得懂的語言主講。
4. 出席各場合時，應全體以同一服裝出席(即是不應一些人穿西裝，其他人穿波恤牛仔褲)。



*With the Compliments  
of  
Mr. & Mrs. Melvin Wong*

*With the Compliments*

*of* 陳國豪 (Jimmy Chan)

*Miss Annie Chiu*