

THE CANADIAN CHAMBER
OF COMMERCE IN HONG KONG
AND
THE FACULTY OF LAW OF THE
UNIVERSITY OF HONG KONG

LEGAL FORUM
ON
NATIONALITY
PASSPORTS
& 1997

Editor
J. Arthur McInnis





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Thank-you

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P R E F A C E

It has been the practice of the Canadian Chamber to select for discussion, topics which are thought provoking and of interest to people in Hong Kong and which also concern Canada and the interests of the Canadian community. By any definition the words "Nationality", "Passports" and "1997" meet our criteria.

From the Hong Kong point of view, no issues are of greater concern. For example, it is estimated that there are presently in Hong Kong, 45,000 Canadian passport holders who were born in Hong Kong. This group represents the second largest group of foreign passport holders in the Territory. During the last three years alone, the Canadian Commission issued 66,000 immigrant visas to Hong Kong people. It is contemplated that 75,000 immigrant visas will be issued to Hong Kong people by the Canadian Commission next year.

This Forum will seek to examine the rights and obligations conferred upon those granted passports or citizenship not only by Canada, but by Britain and the United States as well.

It is interesting to note or to perhaps consider whether and in what respects the wave of immigration to Canada and the United States from Hong Kong differs from the wave of immigration from Europe during the early part of this century. In one sense there is a significant difference. Immigrants escaping the holocaust or fleeing disagreeable events or circumstances in Europe had little opportunity to read the small print contained in the back of the passports which were issued to them at Ellis Island. Immigrants from Hong Kong are escaping not from the unpleasantries of the moment, but largely because they have a vision of the future which is unclear or is one which they consider may not be tolerable. They thus have the time and the opportunity to ponder and consider the rights and obligations implicit in assuming citizenship of another land and to consider the small print in the back of passports issued to them. As any buyer, ought, they should consider carefully what they are buying. Unlike their predecessors from Europe, in the process of immigrating, they have the time to choose wisely and carefully.

Eliza C.H. Chan

INTRODUCTION

It is for each State to determine under its own law who are its nationals. This law shall be recognized by other States in so far as it is consistent with international conventions, international custom, and the principles of law generally recognized with regard to nationality.

1930 Hague Convention Concerning Certain Questions Relating to the Conflict of Nationality Law.

Great Britain, Australia, China and Canada are all signatories to this Convention. Thus begins the dilemma confronting those viewed as dual nationals by these countries. The antithesis between a country's autonomy and the limited duty of recognition by other countries is apparent. The clear national interest in defining who shall be obligated to perform the duties associated with citizenship must be weighed against the wishes of countries at large to avoid potential conflicts arising from instances of dual nationality.

This Forum, entitled "Nationality, Passports and 1997," is misleading in its simplicity. If we take the topic of nationality first and seek to legally define it we would be able to say little more than it is a connecting factor of an individual to a country and yet while other factors may be put forward; for instance domicile, none of these factors grips the imagination as nationality does. The result is that the preoccupation of the debate by the topic of nationality seems preordained.

Nationality per se may be determined in various ways, for instance; birthplace, parentage or naturalization. The fact that there are a variety of ways to designate a nationality gives rise to conflicts in practice when different countries determine who their nationals are using these ways. Thus we have the dilemma referred to above and framed by the Hague Convention.

Apart from individual country's perspectives on nationality, international law has a role to play. The role of international law is implicit in looking at issues surrounding implications of naturalization, statelessness and dual nationality.

Chinese nationality law is complex; to answer a question in relation to it may necessitate forays into any one of four different nationality laws in force prior to the current law, The Nationality Law of 1980, coming into force. Even if one were to try and answer the question on the basis of these laws, in the context of Hong Kong, the answer may be incomplete. Completeness may only be found after reference as well to the Joint Declaration, accompanying memoranda and even official Chinese pronouncements on the subject.

Apart from nationality, this Forum will look at the topic of passports. In the context of Hong Kong, the sheer abundance and variety of passports is bewildering. The majority of passports are designated British Dependent Territories Citizens (BDTC) or British National (Overseas) (BNO) as well as a universal system of Certificates of Identity. These passports stand in addition to those of the United Kingdom and other countries. Paradoxically, whether or not the BDTC and BNO varieties are even passports has been questioned at times by the Chinese authorities. While passports historically had very modest beginnings, such as to provide safe conducts for merchants from trading nations, most countries view them today as an incident if not the best evidence of nationality. How then is this conflict to be resolved and what will be the effect on the holders of these documents?

The last topic in the Forum, that of 1997 is all encompassing. If it were not for the transition of sovereignty over Hong Kong at that time the issues surrounding matters of nationality, dual nationality, or holding any number of passports would be far less immediate than they are currently.

J.Arthur McInnis

THE LEGAL STATUS OF CANADIAN AND OTHER FOREIGN NATIONALS IN HONG KONG AFTER 1997



W.S. Clarke

A. Introduction

The question of the legal status of Canadian and other foreign nationals in Hong Kong after 1997 is one which will become increasingly important as the resumption of Chinese sovereignty over the British colony approaches. There are at least two reasons why this is so.

First, as is widely known, increasing numbers of Hong Kong residents are acquiring new nationalities and passports, and some of them may wish to remain in or return to post-1997 Hong Kong. What will their rights be? Will they be treated any differently as a result of having acquired a new nationality? Will they be considered Chinese or foreign?

Secondly, long-term expatriate residents of Hong Kong and the businesses and institutions in which they work will want to know whether they will still be welcome in Hong Kong under Chinese sovereignty. Will they be permitted to continue to live and work in Hong Kong? If so, will it be on less favourable terms? If they depart will others be permitted to come from overseas to replace them?

These are questions which this paper aspires to address, though, of course, no full answers can be given in anticipation of an event which has political as well as legal dimensions.

B. Rights of Residence in Post-1997 Hong Kong

The Basic Law which has been enacted by the Chinese National People's Congress for what will be the Hong Kong Special Administrative Region (HKSAR) of the People's Republic of China stipulates

in Article 24 that six enumerated categories of people will have the right of abode in post-1997 Hong Kong.

“Right of abode” is a legal concept which derives from United Kingdom immigration legislation defining which British nationals have the right to come and go from the United Kingdom as they please, and whilst there take any employment or start any business. The concept found its way into Hong Kong law with the addition to the Immigration Ordinance¹ in 1987, of section 2A. Subsection (1) of that section usefully defines the right of abode in the following terms:

- (1) A Hong Kong permanent resident enjoys the right of abode in Hong Kong, that is to say he has the right—
 - (a) to land in Hong Kong;
 - (b) not to have imposed upon him any condition of stay in Hong Kong, and any condition of stay that is imposed shall have no effect;
 - (c) not to have a deportation order made against him; and
 - (d) not to have a removal order made against him.

Most legal systems do not have a discrete concept of right of abode because the right is one which is inherent in their citizenship laws. In the 1971 Immigration Act the British Parliament found it necessary to create such a concept because it wished to restrict immigration of British nationals from overseas. In post-1997 Hong Kong the concept will be used similarly to define precisely which of the people of China shall be entitled to live in the territory.

The status of “Hong Kong permanent resident”, which is conferred on those who enjoy the right of abode, is and will continue to be the closest thing Hong Kong has to a citizenship or nationality of its own.

It is significant that the right of abode is conferred by positive grant of law - the Immigration Ordinance at present; the Basic Law in future. This is what makes it a right, as opposed to permission, to live in Hong Kong, and this means that it is not something which need be applied for, or is within the grant of, the Director of Immigration and his officers. All the Immigration Department can do is provide evidence of the right deriving from law.

The six categories of person who will enjoy the right of abode in post-1997 Hong Kong, as enumerated in Article 24 of the Basic Law, are the following:

- (1) Chinese citizens born in Hong Kong before or after the establishment of the Hong Kong Special Administrative Region;
- (2) Chinese citizens who have ordinarily resided in Hong Kong for a continuous period of not less than seven years before or after the establishment of the Hong Kong Special Administrative Region;
- (3) Persons of Chinese nationality born outside Hong Kong of those residents listed in categories (1) and (2);
- (4) Persons not of Chinese nationality who have entered Hong Kong with valid travel documents, have ordinarily resided in Hong Kong for a continuous period of not less than seven years and have taken Hong Kong as their place of permanent residence before or after the establishment of the Hong Kong Special Administrative Region;
- (5) Persons under 21 years of age born in Hong Kong of those residents listed in category (4) before or after the establishment of the Hong Kong Special Administrative Region; and
- (6) Persons other than those residents listed in categories (1) to (5), who, before the establishment of the Hong Kong Special Administrative Region, had the right of abode in Hong Kong only.

The effect of the above provision will be to preserve the right of abode in Hong Kong for the vast majority of people who today enjoy it. However, there will be changes, with some gaining the right of abode and others losing it.

1. Those Who Gain the Right of Abode

(a) Children of illegal immigrants. On July 1, 1997, when the Basic Law comes into operation, the children of some illegal immigrants will acquire the right of abode in Hong Kong. These are children born in Hong Kong between December 31, 1982 and July 1, 1997, to illegal immigrants from China.

Under the present law such children have no right to remain in the Territory. The British Nationality Act 1981 and consequential amendments to Hong Kong legislation, principally the Immigration Ordinance, repealed in part the ancient concept of *jus soli* under which any person born in Hong Kong acquired British nationality and the right to live in the Territory. From January 1, 1983 only those having either parent (or in the case of illegitimate children, their mother) lawfully settled in Hong Kong have acquired the right to live in Hong Kong by birth.²

Under Article 24(1) of the Basic Law, any Chinese citizen born in Hong Kong before or after the establishment of the HKSAR will enjoy the right of abode. There is no qualification in respect of the immigration status of such a person's parents, and it follows that a number of children who have been removed from Hong Kong along with their mothers since the beginning of 1983, will have the legal right to take up residence in their birthplace.

It would therefore appear to make little sense for the Immigration Department to continue to fight lengthy legal battles in respect of such children. Success in such a case can only keep the child out of the Territory during the few years that remain before the transfer of sovereignty to China. Moreover, it might even be argued that any decision to remove such a child from Hong Kong in the run up to 1997 is liable to be set aside as unreasonable in the *Wednesbury* sense.³

(b) Expatriates. Article 24(4) of the Basic Law extends to long-term non-Chinese residents of Hong Kong the right to acquire the status of Hong Kong permanent resident and thus the right of abode in the HKSAR.

Insofar as this applies to all non-Chinese equally, it represents a considerable improvement on the existing law. At present there are special provisions in the Immigration Ordinance whereby United Kingdom expatriates can acquire a quasi-right of abode through seven years' residence,⁴ but this applies to no other members of the non-Chinese community.⁵

The present policy of the Immigration Department with respect to long-term residents who are neither British nor Chinese is to permit them, after nine years' residence in the colony, to remain indefinitely, provided that they never remain outside the Territory for longer than one year at any time. This remains a matter of permission which, unlike a legal right, can be withheld or withdrawn. As a matter of law, residents of Hong Kong who are neither Chinese nor British remain liable to be removed no matter how long they have lived here. The only way for them to acquire a genuine right of abode is to apply to be naturalized as British Dependent Territories citizens under the British Nationality Act 1981, a process which again is within the purview of the Immigration Department. The position of these people will be considerably improved when the Basic Law comes into operation.

In addition to seven years' residence, it will be necessary for expatriates who wish to qualify for permanent residence under the Basic Law to demonstrate that they have "taken Hong Kong as their place of permanent residence." At this stage it is a matter of speculation as to how this requirement will be implemented by the Hong Kong legislature. At the time of the Joint Declaration there was speculation in the press that in order to qualify, long-term expatriate residents would need only to sign a simple declaration that Hong Kong was their place of permanent residence. It would be possible, however, to interpret the provision restrictively so as to exclude expatriates who are employed on "overseas" terms, or those who maintain homes abroad.

The Hong Kong government has chosen to delay implementation of this aspect of the right of abode package in the Basic Law, though other parts were enacted in 1987.⁶ Some, perhaps many, expatriates in Hong Kong might choose to leave Hong Kong in the run up to 1997 unless they are assured the legal right to remain thereafter. In order to end this uncertainty, the Hong Kong government should amend the Immigration Ordinance to implement this part of Article 24 as soon as possible. Further delay can only give rise to suspicion. Could it be, for example, that the Chinese government now wishes the implementing legislation to be much stricter than was initially the case? Or could it be that the Immigration Department simply wishes to retain control over as many people as possible for as long as possible?

In the meantime, pending implementation of this aspect of the Basic Law, the Director of Immigration continues to exercise his power to curtail the stay in Hong Kong of long-time non-Chinese residents. This seems oddly mean when done to persons who will acquire the right of abode when the Basic Law comes into force, and thus be able to return to Hong Kong as a matter of right in less than seven years' time. The case of Raj Golay is a case in point. According to the press,⁷ Mr Golay was the 20 year old son of a Gurkha soldier, who had lived in Hong Kong since the age of two. When his father retired from the British army, Mr Golay was denied permission to continue living and working in Hong Kong.⁸ This was within the power of the Director of Immigration because, under the present law, Mr Golay, being neither Chinese nor British, could not acquire any legal right of residence in Hong Kong by effluxion of time. However under Article 24(4) of the Basic Law he will be eligible for the right of abode whether or not he is now removed: the paragraph specifically permits the twin qualifications thereunder to accrue before or after the establishment of the HKSAR.

Again, it is arguable that the Director of Immigration may even be acting unreasonably in the *Wednesbury* sense, and therefore unlawfully, in continuing to curtail the stay of such persons in Hong Kong.

2. *Those Who Lose the Right of Abode*

(a) *Minority groups.* Several tens of thousands of Hong Kong-born non-Chinese who have the right of abode in Hong Kong at present will lose it under the terms of Article 24 of the Basic Law.

Many of these people trace their ancestral roots to the Indian sub-continent, but they could be of any non-Chinese ethnic group. Under Article 24 of the Basic Law any such person who acquired the right of abode in Hong Kong by birth, and has a right of abode elsewhere, perhaps India, Israel or the UK, will lose it from the transfer of sovereignty. This can be seen with a detailed examination of these people's situation.

It is probable, though not absolutely certain, that these people are not considered Chinese nationals, as the Chinese nationality law uses the *jus sanguinis*, or law of the bloodline, as its starting principle. Accord-

ingly, these people do not qualify under paragraphs (1), (2) or (3) of Article 24. Paragraph (4) does not assist them as it is restricted to those who come to Hong Kong from elsewhere, and thus does not extend to those who have lived here all of their lives. Paragraph (5), which is really an addendum to paragraph (4), is similarly of no assistance. It is only under paragraph (6) that these people might find some comfort, and then only if they have no right of abode anywhere else.

Thus many thousands of Indians and Pakistanis born in Hong Kong, who have the right to return to their ancestral homelands, will lose the right of abode. So will all non-Chinese Jews born in the Territory, since they all have the right to live in Israel pursuant to that country's Law of Return.

It would appear possible for such persons to preserve their right of abode by seeking naturalization under the Chinese Nationality Law of 1980,⁹ but this will undoubtedly be unacceptable to most: renunciation of one's other right of abode would likely be required, as China does not recognize dual nationality in any of its citizens.¹⁰

(b) Children of expatriates. There are many thousands of people who enjoy the right of abode in Hong Kong at present by virtue of being born here whilst their parents were working here. Any such person born before the beginning of 1983 has the right of abode, and for those born thereafter, they will have it if either parent (or, in the case of an illegitimate child, its mother) was at the time of birth free of conditions of stay in Hong Kong.¹¹

Article 24(5) of the Basic Law appears to say that such persons will enjoy the right of abode until the age of 21 only. If that is so, it is really inappropriate to use the term "right of abode" with respect to them at all, as the term clearly embodies a sense of permanence.

(c) British expatriates with the right to land. As mentioned above, at present there are special provisions in the Immigration Ordinance whereby United Kingdom expatriates (and they alone among Hong Kong's non-Chinese community) can acquire a quasi-right of abode through seven years' residence.¹² This is known as the "right to land"

in the terms of the Immigration Ordinance as it now stands. When the Basic Law comes into force, this legislation, which after all has a colonial flavour, will give way to the broader provisions of Article 24(4) and (5) which apply equally to all non-Chinese. The result is that British expatriates who now enjoy the right to land will lose their right of residence in Hong Kong unless they can be said to have taken Hong Kong as their place of permanent residence, and thus come within the provisions of the Basic Law.

(d) Spouses. Prior to January 1, 1983, Commonwealth citizens who married "Hong Kong belongers", as they were then called, acquired that status for themselves. Such acquisition of status by marriage is no longer possible, but the rights of persons who did acquire the status under the previous law are preserved in the Immigration Ordinance. Along with all other Hong Kong belongers, the people concerned are now Hong Kong Permanent Residents under the Ordinance. The right of abode provisions in the Basic Law contain nothing about acquisition of status by marriage, and only preserve pre-existing rights for people who have no right of abode anywhere else in the world. Virtually all of the people concerned, being Commonwealth citizens who were not Hong Kong belongers by other means, will have the right of abode in another Commonwealth jurisdiction. Accordingly, the bulk of spouses who have the right of abode in Hong Kong by marriage will lose their right unless they qualify under one of the other paragraphs within Article 24 of the Basic Law.

(e) Returned emigrants. There have been statements emanating from mainland China which suggest that Hong Kong Chinese who obtain foreign passports after residing abroad will thereby lose their right of abode in Hong Kong, and will require permission to return. The legal basis for such assertions is not known, but it is in fact possible to construe Article 24 of the Basic Law as having such an effect.

Emigrants who settle permanently abroad and acquire a foreign nationality automatically lose their Chinese nationality (see topic C3 below), and thus will cease to qualify under the first three paragraphs of Article 24, which apply only to "Chinese citizens". The fourth

paragraph, which is somewhat loosely worded, is open to interpretation on this point. The paragraph confers right of abode on persons who meet three criteria: (i) entry into Hong Kong with valid travel documents, (ii) residence in Hong Kong for a continuous period of seven years, and (iii) having taken Hong Kong as one's place of permanent residence, but it does not specifically require that those three criteria be met in any particular sequence. Thus on a liberal interpretation returning emigrants will have their right of abode preserved, but if a requirement that the three criteria be met in the order laid down in the paragraph is to be read into it, then returned emigrants would be excluded.

3. *Those Who Remain Excluded*

Under the present law of Hong Kong, an illegal immigrant who manages to remain in the territory undetected for seven years does not thereby acquire the right of abode. This is because the seven year residence provision in the Immigration Ordinance refers to seven years of "ordinary" residence, a legal concept which presupposes that one's presence in the place of residence is lawful.¹³

Similarly Article 24 of the Basic Law refers to seven years of ordinary residence, and it is to be hoped that this will be interpreted as intending to continue the existing law of Hong Kong. That, however, is open to question, as it is not at all clear that common law concepts may be used in interpreting the Basic Law, an instrument which emanates from a very different type of legal system, and whose provisions concerning interpretation (Art. 158) are silent on this point.

Immigration of non-Chinese who seek to resort to Hong Kong will almost certainly continue to be a matter within the discretion of the Director of Immigration unless and until they qualify for permanent residence on completion of seven years in the Territory. This discretion is exercised in accordance with guidelines adopted by the government from time to time, to which the public, sadly, has no general access. It is to be hoped that as a minimum improvement of the system, such guidelines will be published in their entirety.

C. Who will be Foreign in Post-1997 Hong Kong?

The word “foreign” is capable of many different meanings. Here it is used in a very precise way: to denote those persons in respect of whom the People’s Republic of China will permit another state to offer consular protection.

This is not a matter so simple as ascertaining whether a person is a citizen of another country, or holds a travel document issued by some other government. China is entitled to, and has made it clear that it will, refuse to recognize the non-Chinese nationality of some Hong Kong Chinese persons after 1997. Hong Kong Chinese are, in the view of the PRC, Chinese nationals,¹⁴ unless and until they lose that nationality in accordance with the provisions of the Chinese Nationality Law of 1980.

1. *British Nationals (Overseas)*

China has made it clear from the outset that it regards the British National (Overseas), or BNO status as nothing more than a facility for overseas travel, and that its holders will not be entitled to consular protection by the United Kingdom Government while in Hong Kong or any other part of China after 1997.¹⁵

The BNO passport, it will be recalled, is a creature of the Sino-British Joint Declaration of 1984, whereby the Hong Kong British will be permitted, if they register prior to the transfer of sovereignty, to carry British passports for the remainder of their lives. The status is not transmissible to descendants, and carries with it no right of abode anywhere in the world¹⁶ (though all eligible for it now have the right of abode in Hong Kong and most will continue to enjoy such a right under the Basic Law after 1997).

It is clear that acquisition of a BNO passport will in no way render a person foreign in the sense given above. However, it is possible that in post-1997 Hong Kong such persons would be treated as less than Chinese, or at least less than patriotic Chinese, for having voluntarily come within the allegiance of Hong Kong’s former colonial power. In

other words, holders of the BNO status may find themselves in a situation where they have none of the advantages of being foreign, yet suffer the disadvantages.

2. *British Citizens under the 1990 Nationality Act*

Britain's nationality package for Hong Kong, a response to the Beijing massacre and the brain drain, has now become law despite vociferous opposition from the PRC.

China regards the package as an infringement of the Joint Declaration and an attempt to perpetuate British influence in Hong Kong after 1997.

Not surprisingly, therefore, the PRC Government has announced that it will not recognize British nationality conferred under the 1990 Nationality Act, which sets up the framework of the package. China will not receive intercession by the British Government on behalf of Hong Kong Chinese who benefit from the package, moreover, as a response, it introduced restrictions on the political rights of these and others who acquire the right of abode offshore.

It is uncertain how China will be able, in practice, to differentiate between those who acquire British citizenship under the 1990 legislation and those who have acquired it in other ways — there are many thousands of Hong Kong Chinese who hold full British citizenship by other means. If records of applicants under the 1990 measure were kept by the Hong Kong Immigration Department, the task should be easy. Otherwise it would prove difficult in practice to differentiate between the two groups, and the very real danger exists that all British citizens with Chinese faces will be denied British consular protection in Hong Kong and China.

3. *Returned Emigrés*

Under the Chinese Nationality Law of 1980, a Chinese person who settles abroad and acquires the citizenship of a foreign state thereby loses his Chinese nationality. Article 9 of the law states:

Any Chinese national who has settled abroad and who has been naturalized there or has acquired foreign nationality of his own free will automatically loses Chinese nationality.

The law goes on to make it clear that no formalities of application need be followed to lose Chinese nationality under Article 9.

Article 9 represents a departure from the *jus sanguinis*, the principle under which China has traditionally maintained that all overseas Chinese were its nationals, no matter how many generations had elapsed since departure from China.

In post-1997 Hong Kong such persons should be considered “foreign” in the sense used in this paper, and thus entitled to consular protection by the countries of their new nationality when in post-1997 Hong Kong.

It is understood that China has already made it clear to the Canadian government that Hong Kong Chinese who become naturalized Canadian citizens will not be considered Chinese. The same should apply to other countries in which settlement is required as a precondition to naturalization, but not to passports of convenience purchased without settlement abroad.

4. *Holders of Passports of Convenience*

Many thousands of Hong Kong residents, concerned about the future, but unwilling or unable to emigrate just yet, have been purchasing nationality and passports from countries as diverse as Tonga and what was formerly East Germany. Such passports are available from some countries without even a visit; hence the appellation “passports of convenience”.

Possession of such passports by Hong Kong Chinese in no way affects their Chinese nationality: although such persons may have “acquired foreign nationality of [their] own free will” within Article 9 of the PRC Nationality Law, China interprets the article in such a way that the words “settled abroad” therein set up a *sine qua non*. In

other words, acquisition of a foreign nationality will only result in loss of Chinese nationality when the foreign nationality has been acquired after settling abroad.

As China does not recognize dual nationality, Hong Kong Chinese holding passports of convenience will not be entitled to consular protection in post-1997 Hong Kong at the behest of the issuing countries.

The situation of Hong Kong Chinese who have acquired Canadian citizenship is different because they have ipso facto settled abroad, a consequence of Canada's Citizenship Act which requires at least three years' residence in the four year period preceding an application for naturalization. Such settlement abroad, together with acquisition of Canadian citizenship, severs the nationality link with China, and gives rise to an entitlement to consular protection by Canadian diplomatic missions whilst in China.

Could holders of passports of convenience renounce their Chinese nationality? Theoretically yes, but it is not likely to be permitted. There is provision in the Chinese Nationality Law for renunciation of Chinese nationality (Art. 10), but this requires an application and approval by the appropriate authorities in the PRC (Arts. 14, 15 and 16), and although settlement abroad is a ground on which such an application may be granted, mere acquisition of a foreign nationality is not mentioned.

5. *Does Race make any Difference?*

Yes, race does make a difference, for both legal and practical reasons.

As mentioned above, the first principle of the Chinese Nationality Law is the *jus sanguinis* or law of the bloodline. In other words, it is a racially based nationality law. In 1997, when the Chinese Nationality Law comes into force in Hong Kong de facto as well as de jure, it will operate primarily on the basis of race. Chinese officials have indicated that they regard the situation of Hong Kong's racial minorities a British problem, suggesting that on account of race, these people are not regarded as Chinese nationals. There are provisions in the

Chinese Nationality law for reducing statelessness and providing for naturalization, and non-Chinese minorities in Hong Kong could conceivably acquire Chinese nationality thereunder. But in general, and crudely put, those with Chinese faces in post-1997 will be treated as Chinese nationals, whereas others will not. Hong Kong Chinese are not to be given a choice whether they wish to become Chinese nationals. In the view of the Mainland government, they already are.

6. *The Significance of the “3 stars” Identity Card*

Although the Immigration Department has been somewhat coy on the issue, there is little question but that the 3 stars identity cards now being issued to Hong Kong Chinese are connected with the transfer of sovereignty and have the effect of designating those Hong Kong residents who are considered Chinese nationals.

In the early 1980s the Hong Kong government embarked on a long and expensive programme of re-registering the entire population of the Territory and issuing new identity cards with specific expiry dates to everyone. Then in 1987, after the Joint Declaration had been signed and the first part of the nationality and right of abode provisions thereof had been implemented in Hong Kong legislation, an early and unexpected second re-registration was embarked upon. Most of the population of the Territory has now been re-re-registered and issued with new, new identity cards, even though the ones they were carrying bore expiry dates extending well into the future.

It is these new, new identity cards which, in the case of ethnic Chinese, bear the infamous 3 stars. The holders of such cards may travel between Hong Kong, mainland China and Macao using these cards alone, i.e. without any other travel documents, and officials of the Immigration Department maintain that the 3 stars merely indicate that the holder is eligible for a Hong Kong re-entry permit, the red passport-like document which Hong Kong residents used to use for such journeys. What the immigration officials are omitting to say is that it was only ever Hong Kong Chinese who were issued with the old re-entry permits.

There can be little doubt that part of this re-re-registration process has been to designate those amongst Hong Kong's population who are to be regarded as Chinese nationals in post-1997. Individual interviews are required in the process of re-re-registration, and there can be little doubt that part of the interviewing officer's function is to decide whether the interviewee is Chinese. This is a subjective judgment which will be made on the basis of physical appearance, apparent cultural attributes, such as name and linguistic ability, as well as evidence of nationality. It is known that Hong Kong Chinese who at such interviews demonstrate a nationality other than Chinese or Hong Kong British may be issued with identity cards not bearing the 3 stars.

Providing evidence of Chinese nationality is not objectionable in itself; indeed many Hong Kong residents may wish it to benefit from the easy travel plan within the three jurisdictions of the South China Coast which is possible only with the new 3 star cards. What is highly objectionable about this whole process is that it has been done without ever informing the public of one of its central purposes, and that repeated questioning in the press has resulted in nothing more than evasive bureaucratic answers. To foist this on a largely unsuspecting public, without providing information or giving a choice is really quite unacceptable. For it seems reasonable to assume that the end result of the process is that well before the transfer of sovereignty every Hong Kong resident will be carrying, and legally obliged to carry, a little plastic card indicating whether he is to be treated as a Chinese national, based on no more than a superficial judgment of a minor bureaucrat in the Immigration Department, following a cursory examination, the purpose of which was never explained to the subject.

The significance of the 3 star identity card is that it separates the sheep, who will be entitled to the protection of a foreign government in post-1997 Hong Kong, from the goats who will not.

The organizers of this conference invited the Director of Immigration to come, or send a deputy in his place, but the invitation was declined. This is unfortunate, for I would have liked to give the Director an opportunity to refute my allegations on this subject if he can.

D. Conclusion

Nationality, like marriage, is a question of status. Both are easier to get into than to get out of, and acquisition of either has a profound impact on one's life. The many thousands of Hong Kong people who are now shopping in the nationality market should perhaps bear this analogy in mind, and be advised to choose their nationality as carefully as they would choose a spouse.

ENDNOTES

1. LHK cap 115.
2. See Clarke, "Hong Kong Immigration Control: The Law and the Bureaucratic Maze" (1986) 16 HKLJ 342, 343-4.
3. *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223.
4. Immigration Ordinance, s 8. See Clarke, n 2 above.
5. Persons "wholly or partly of Chinese race" are also entitled to the benefit of the seven year rule under the present law: Immigration Ordinance, sched 1, para 1, and see Clarke, note, (1988) 18 HKLJ 84.
6. Immigration (Amendment) Ordinance 1987. See Clarke, note, (1988) 18 HKLJ 84.
7. *South China Morning Post*, 5 & 8 Oct, 1990.
8. At the time of writing it appears that the Director of immigration may have backed down in this case, almost certainly a result of the wide publicity given it in the press.
9. Articles 7, 14, 15 & 16 of China's Nationality Law contemplate acquisition of Chinese nationality by a process akin to naturalization. An English translation of the Nationality Law may be found in the Chinese Society of International Law's *Selected Articles from Chinese Yearbook of International Law* (Beijing: China Translation & Publishing Corp, 1983) 267. See also the Appendix to this book.
10. Nationality Law of the PRC, Art. 3.
11. Clarke, n 2 above, 344.
12. See the text accompanying notes 4 and 5 above.
13. *AG v Cheung Kam-ping* [1980] HKLR 602: Clarke, n 2 above, 353-4.
14. This the PRC government made clear in its memorandum on nationality annexed to the 1984 Sino-British Joint Declaration on Hong Kong.
15. *Ibid.*
16. Hong Kong (British Nationality) Order 1986, an order-in-council made pursuant to the Hong Kong Act 1985.

THE PROBLEMS RELATING TO CHINESE NATIONALITY



Martin Lee

A. Introduction

In recent years, more and more people have emigrated from Hong Kong to countries such as Canada, Australia, the U.S.A. and New Zealand because of uncertainty over the future. And most of these people are ethnic Chinese holding British Dependent Territories Citizen (BDTC) or British National (Overseas) (BNO) passports or Certificates of Identity (CI). This trend is likely to continue and become even worse as 1997 draws nearer. No doubt the Chinese, British and Hong Kong Governments are all extremely concerned, if not worried, about this trend of emigration. But none of the governments has any effective plan of persuading the people of Hong Kong to stay. Indeed any measure aimed at preventing the people from leaving is bound to create panic and utter chaos in Hong Kong and will immediately shatter Hong Kong's economy, prosperity and stability. So, apart from trying very hard to play down the problem (though not successfully), all that these governments can do is to try to lure some immigrants back from abroad as soon as they have acquired their foreign passports.

As the business sector is hit the hardest by this brain drain, more and more large overseas corporations are trying to keep their senior staff by transferring them to their headquarters, so that they can acquire their foreign passports and return to work in Hong Kong.

Indeed, the governments of some countries have co-operated with some of their largest corporations trading in Hong Kong by offering citizenship and passports to some Hong Kong ethnic Chinese residents (HKECR) holding important positions in these corporations without requiring them to reside in their countries at all. And very recently the French government is reported to be openly supporting such a scheme.

Many people therefore think that the acquisition of a foreign passport is the answer.

But the question is: How safe is such an insurance policy after Hong Kong is returned to China and becomes the Hong Kong Special Administrative Region (HKSAR) on July 1, 1997?

This article seeks to examine this problem as well as other problems concerning the status of BDTCs, BNOs and CIs in the light of the Nationality Law of the People's Republic of China (PRC) (Hereinafter referred to as "the Nationality Law") both before and after 1997.

Questions

It seems to me that the following questions are relevant:

- (a) Who is a Chinese national?
- (b) Is an HKECR holding a BDTC passport a Chinese national?
- (c) Is an HKECR holding a BNO passport a Chinese national?
- (d) Is an HKECR holding a foreign passport a Chinese national?

B. British Nationality

Before I give the answers to these questions, it may be helpful if I first give a brief summary of the changes of status affecting those born in Hong Kong over the years.

Prior to 1949, every person born in Hong Kong was a British subject; and as such they were entitled to enter and reside in the United Kingdom (U.K.).

Under the British Nationality Act 1948, every person born in Hong Kong became a Citizen of the United Kingdom and Colonies (CUKCs). CUKCs were still British subjects and therefore continued to have the right to enter and reside in the U.K.

But this right was taken away by the Commonwealth Immigrants Act 1962 for CUKCs not born in the U.K. or holding U.K. passports, and this covered the great majority of people born in Hong Kong. And pursuant to the 1962 Act, the Hong Kong Government issued British (as opposed to U.K.) passports to CUKC applicants in Hong Kong.

Further changes were brought about by the Immigration Act 1971, which introduced the concept of “right of abode” and which provided that only a “patrial” had it. A CUKC could only be a patrial if he or she had come from the U.K. (and not a colony) or, failing that, had a parent or grandparent who had come from the U.K., or had resided in the U.K. for 5 years, or, in the case of a woman, had been married to a patrial.

A patrial was “free to live in and to come and go into and from the U.K. without let or hindrance ...” whereas a non-patrial CUKC (which included most people born in Hong Kong) could only enter and “live, work and settle in the U.K. by permission and subject to such regulation and control ... as imposed by this Act.”

The final blow came on January 1, 1983 when the British Nationality Act 1981 came into effect. This Act introduced the concept of “citizenship”, and divided CUKCs into three categories according to geographical placing: British Citizens (i.e., patrial CUKCs with the right of abode in the U.K.); Citizens of British Dependent Territories (BDTCs, i.e., non-patrial CUKCs without the right of abode in the U.K., and covering the great majority of people born in Hong Kong); and British Overseas Citizens (i.e., non-patrial CUKCs not connected with a colony). Under this Act, all persons born in Hong Kong (and not being British Citizens) become BDTCs and have no right of abode in the U.K. And by virtue of the Hong Kong (British Nationality) Order 1986, any person who, immediately before July 1, 1997 is a BDTC and but for his having a connection with Hong Kong would not be a BDTC shall on that date cease to be such a citizen. Further, on and after July 1, 1987, a Hong Kong BDTC shall be entitled to register as a British National (Overseas) and to hold a passport appropriate to that status, but again without the right of abode in the U.K.

As a result of this series of Acts, the great majority of the ethnic Chinese born in Hong Kong have been deprived of their birth right of entering and residing in the U.K.

C. Consular Protection

As to consular protection, both BDTCs and BNOs have the right to seek consular protection from the British Government while in a foreign country. However, the position is quite different in relation to a BDTC or BNO who has another nationality and is present in the country of which he is a national. The practice adopted by the British Government in relation to a British citizen who has another nationality is as follows. If such a person is in the U.K., he will be treated exclusively as a British citizen, so that he will be subject to all her laws. But when such a person is in the other country (for example, China) of which he is also a national, the British Government will not afford consular protection to him. (See *Nationality and Statelessness in International Law* by P. Weis, 2nd Edition.) In this connection, it is pertinent to refer to paragraph 7 of the Notes appearing at the back inside page of all British Passports which says:

Dual Nationality: British nationals who are also nationals of another country, cannot be protected by Her Majesty's Representatives against the authorities of that country. If, under the law of that country, they are liable for any obligation (such as military service), the fact that they are British nationals does not exempt them from it. A person having some connection with a Commonwealth or foreign country (eg by birth, by descent through either parent, by marriage or by residence) may be a national of that country, in addition to being a British national. Acquisition of British nationality or citizenship by a foreigner does not necessarily cause the loss of nationality of origin.

D. Chinese Nationals

The four questions posed above can be answered mainly by reference to the Nationality Law (Nationality Law) of the People's Republic of China (PRC), though some of the answers also involve public international law.

Article 4 of the Nationality Law provides:

Any person born in China whose parents are both Chinese nationals or one of whose parents is a Chinese national has Chinese nationality.

Two conditions have to be satisfied before a Hong Kong born ethnic Chinese can be legitimately regarded as a Chinese national:

(1) He is born in China; and (2) at least one of his parents is a Chinese national.

1. *Is Hong Kong part of China?*

Condition (1) is satisfied if Hong Kong is considered to be part of China. As to this, the PRC has always claimed that Hong Kong is part of China and has always been so since ancient times; and that it was not “ceded to” but has only been “occupied by” Great Britain after the Opium War in 1840. Therefore *a person born in Hong Kong, whether before or after 1997, is regarded by the PRC as a person born in China*. Whether such a claim is legally justifiable in public international law is not free from doubt. For the Vienna Convention on the Law of Treaties 1969 which recognizes that treaties may be void if they are procured by force does not have retrospective effect, and so could not affect the legality of the “three unequal treaties”.

And yet when the PRC joined the United Nations in 1972 and specifically requested Hong Kong to be removed from the category of Colonies, there was no objection whatsoever from the British Government.

This stance taken by the U.K. as well as the passage of successive Immigration and Nationality Acts has caused some people in Hong Kong to criticize the British Government for being inconsistent and for having taken away their birth right to enter and reside in the U.K.

2. *Chinese Nationality before 1980*

As to condition (b), one must examine the nationality of the parent(s) of the person in question, and such parent(s) would clearly have been born before September 10, 1980 (the day of the promulgation of the Nationality Law).

Article 17 of the Nationality Law provides as follows:

The nationality status of persons who have acquired or lost Chinese nationality before the promulgation of this Law shall remain valid.

The question therefore turns on whether the parent(s) of the person under consideration had acquired or lost Chinese nationality under *previous* nationality laws or regulations.

Before 1980, there were four nationality laws promulgated respectively in 1909, 1912, 1914 and 1929. The 1929 statute is still in force in Taiwan. In 1949, the 1929 statute was annulled in the PRC. From 1949 to 1980, certain internal regulations were issued by the PRC to regulate matters concerning nationality and it therefore becomes necessary to know the dates of birth of the parents of the person in question and then apply the relevant law or regulation accordingly. Needless to say, this is a cumbersome task.

3. *Under the Joint Declaration*

Unfortunately, this has not been made clear by the Chinese Memorandum accompanying the Joint Declaration which stipulates:

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

The above Chinese nationals will not be entitled to British consular protection in the Hong Kong Special Administrative Region and other parts of the People's Republic of China on account of their holding the above-mentioned British travel documents.

The word "compatriot" clearly means no more than "persons" though with a heavy nationalistic overtone. But this formulation begs the question as to who is a Chinese compatriot or a Chinese person, neither of which expression is defined in the Nationality Law.

But the Chinese Memorandum was never intended to clarify the Chinese law on nationality. It was meant to balance the United Kingdom Memorandum which preceded it as an accompanying document to the Joint Declaration. It was the Chinese way of saying: "You can call the document a passport, but under our law, it is nothing more than a travel document." And the Chinese Memorandum makes it quite plain that the position is the same in relation to the holder of a BDTC passport as well as the holder of a BNO passport (which was non-existent at the date of the Joint Declaration) both before and after 1997; and that so long as the holder of either of such passports is a Chinese national, he will not be entitled to British consular protection in the PRC, including the HKSAR.

4. *Holders of BDTC passports*

It follows that under the laws of the PRC, an HKECR holding a BDTC passport will be regarded as a Chinese national. As far as the Chinese Government is concerned, such a person has no right to seek consular protection from the British Embassy while in Mainland China. But I am told by the Office of the Political Adviser here that in practice in response to requests for assistance, the British Embassy in the PRC or the Office of the Political Adviser in Hong Kong will approach the Chinese authorities in order to render assistance.

As to whether it is legitimate to look at the status of an HKECR holding a BDTC passport from the point of view of Chinese law alone, there is a school of thought among legal experts in international law which holds the view that the conferment of Chinese nationality by the PRC on an HKECR will not be lawful unless it is made at the request or with the consent of the person concerned, or unless "by both parentage and permanent domicile, he has a genuine connection with the state", that is, the PRC. (See *A British Digest of International Law*, Part VI, Chapter 15, at page. 25, edited by Clive Parry.) But even according to this principle, an HKECR who holds a BDTC passport and who does not wish to accept Chinese nationality may still have a genuine connection with the PRC by virtue of the fact that he is born in Hong Kong of parents who are Chinese

nationals, and has been permanently domiciled in Hong Kong, which is part of China. In the circumstances, such a person will not lose his Chinese nationality unless and until he has successfully renounced it.

5. *Renunciation of Chinese nationality*

According to Article 14 of the Nationality Law, any person who wishes to renounce Chinese nationality must go through the formality of an application.

Article 15 provides that such an application, if made “at home” (that is, in the HKSAR after 1997 or possibly even in Hong Kong before 1997), shall be handled by the public security bureaus of the municipalities or countries where the applicant resides. But if before 1997 Hong Kong is treated for such purposes as “abroad”, then the same article provides that the application shall be handled by “China’s diplomatic representative agencies and consular offices” in Hong Kong, presumably, the New China News Agency.

Article 11 provides that a person will lose his Chinese nationality upon approval of his application.

And Article 10 provides that Chinese nationals may only renounce their Chinese nationality if they meet one of the following conditions:

- (1) they are near relatives of foreign nationals; or
- (2) they have settled abroad; or
- (3) they have other legitimate reasons.

Sub-paragraph (1) is clear enough. But the word “settled” in sub-paragraph (2) and the question as to what will constitute “legitimate reasons” in sub-paragraph (3) do pose some difficulties which will be addressed later.

6. *Holders of BNO passports*

As mentioned above, BNOs belong to a new category of British nationals which was created by the Hong Kong (British Nationality) Order 1986.

However, it is doubtful whether the holder of a BNO passport can really claim to be a British national after June 30, 1997 because of the following considerations:

- (a) International customary law and many municipal laws do not recognize a passport as conclusive proof of nationality.
- (b) According to the principles enunciated in the famous *Nottebohm Case* by the International Court of Justice, it could be argued that the holder of a BNO passport is not entitled to British consular protection while in a third country because his British nationality is not “real or effective” in that there is no “substantial link” between the U.K. and the BNO passport holder because:
 - (i) The holder has no rights of abode in the U.K.; and
 - (ii) The habitual residence of the holder after 1997 will be in the HKSAR, which is not a British territory.

If the BNO passport does not confer a real or effective British nationality, the government of any foreign country (including China) may not allow the British Embassy to offer consular protection to its holder. For a state only has the power to grant protection to its own nationals, and a Hong Kong BNO passport holder may not be recognized as a British national after 1997.

Again, the only way for an HKECR holding a BNO passport to lose his Chinese nationality is to apply for renunciation. However, such a person will become stateless once his application is approved if he has no other nationality.

7. *Holders of CIs*

A CI is “a document, other than a document of identity, which is issued by the Director of Immigration for the purpose of international travel to a person who is not the holder of, and is unable to obtain, a valid travel document”. (See section 2 of the Immigration Ordinance, Cap.115, Laws of Hong Kong). CIs are in practice issued mainly to persons who are of Chinese race not born in Hong Kong

and who have at any time been ordinarily resident in Hong Kong for a continuous period of not less than 7 years and who do not hold any passport of any country. Most of the holders of CIs are immigrants from Mainland China. Although under section 8 of the Immigration Ordinance, such people have a right of abode in Hong Kong, they are not British nationals in that they are not born in Hong Kong and have not gone through the naturalization procedures under British nationality laws. And for the reasons given above, CI holders will be regarded as Chinese nationals both before and after 1997.

8. *Holders of Foreign Passports*

As explained above, an HKECR is considered to be a Chinese national. The crucial question is: Will such a person lose his Chinese nationality on acquiring a foreign nationality?

Article 9 of the Nationality Law provides as follows:

Any Chinese national who has *settled* abroad *and* who has been naturalized as a foreign national or has acquired foreign nationality of his own free will shall automatically lose Chinese nationality. (Emphasis supplied.)

HKECRs will therefore lose their Chinese nationality automatically by settling abroad and naturalizing or acquiring foreign nationality of their own free will.

The meaning of “settled” is not defined in the Nationality Law. But, it is defined in both the Immigration Act 1971 and the British Nationality Act 1981 as “being ordinarily resident (in a territory) without being subject ... to any restriction on the period for which he may remain”. But the statutory definition of the word in the English Acts clearly does not assist in the construction of the same word in a Chinese statute.

Under the common law, it may mean “being ordinarily resident” or “being domiciled”. And according to the Concise Oxford Dictionary, “settled” means “established or become established in more or less permanent abode or place ...”

The domicile of a person is established by two elements:

- (a) Having a country of residence (and residence is the habitual physical presence in a place during a limited or unlimited period); and (b) the intention to remain permanently, or at least indefinitely, in the country of residence.

In practice, therefore, domicile requires a more fixed intention than ordinary residence. On balance, I am of the view that “settled” comes closer to domicile than ordinary residence, that is, it requires a fixed intention to remain in the country of residence with some degree of permanence.

If so, an HKECR who has emigrated to a foreign country with a view to residing there for the minimum period of time so as to acquire a foreign passport and then immediately return to Hong Kong would not be regarded as having “settled” abroad for the purposes of Article 9 because the requisite intention is lacking. Therefore, such a person will not be considered as having lost his Chinese nationality even though he has acquired a foreign nationality. The result is that after such a person has returned to the HKSAR, he may be denied any consular protection from that foreign government.

For the same reason, if an HKECR has been given a foreign nationality without having to leave Hong Kong and therefore without having “settled” in that foreign country (for example, if he has obtained a foreign passport through the help of his foreign employer in Hong Kong), he will not lose his Chinese nationality and will not therefore be entitled to consular protection.

I find some support for the above view from an article entitled: “Basic Principles of the Nationality Law of the People's Republic of China,” published in the *Chinese Year Book on International Law* 1982, 216 at 226, where Mr. Wang Keju, a researcher at the Institute of Law under the Chinese Academy of Social Sciences, wrote:

As regards those Chinese citizens *domiciled* in China who had acquired foreign nationality ... through naturalization of their own free will, China does not recognize their foreign

nationality, and still regards them as Chinese citizens having the same rights and duties as other Chinese citizens. If such a person wishes to renounce Chinese nationality, he or she has to go through all the necessary formalities and loses Chinese nationality only upon the approval of his or her application. (Emphasis supplied.)

Enquiries with the consulates or commissions of the U.S.A., Canada, Australia and New Zealand have revealed that all these governments will seek to give consular protection to their citizens who are ethnic Chinese holding their passports while in the PRC, and that none of these governments would make any distinction between a person who has acquired his nationality by birth, and one who was acquired it by residence or by naturalization. It seems therefore that the embassy or consulate of any one of these four countries in the PRC will not decline to offer consular protection to an ethnic Chinese holding its passport regardless of whether he has or has not “settled” in its country before acquiring his foreign nationality.

But if the HKSAR government should ever challenge such a person’s entitlement to consular protection, it is likely that the Courts of the HKSAR will apply Article 9 of the Nationality Law as part of the Laws of the HKSAR by virtue of the provisions of the recent draft of the Basic Law. (See Article 18 and Annex III.). And the Courts will determine the question as one of fact and will take into account all relevant matters.

For example, if such a person had sold his house and car and returned to Hong Kong or the HKSAR with his family immediately after acquiring his foreign nationality and passport and had not returned to that foreign country thereafter, then it is more than likely that the Courts would find that he had not settled in that foreign country and that he was still a Chinese national and that he was therefore not entitled to consular protection.

But it would lead to a totally different result if another HKECR had emigrated to a foreign country with the intention of residing there permanently, or at least indefinitely, but having acquired his foreign

nationality, then changed his mind and returned to Hong Kong or the HKSAR but keeping his house and allowing his children to continue their studies in the foreign country, and frequently returning there to visit them. The line of distinction may be fine, but it is clear. For in the first case, there was never an intention to reside in the foreign country permanently so that the first person had not “settled” there; whereas in the second case, there had been such an intention though there was a subsequent change of mind after the second person had “settled” there.

The above analysis also applies to persons in similar circumstances wishing to be the Chief Executive or other principal officials of the HKSAR who are required to be Chinese nationals under the provisions of the recent draft of the Basic Law. If he holds a foreign passport but can prove that he has not “settled” in that foreign country before returning to Hong Kong or the HKSAR, then he may well succeed in arguing that he has not lost his Chinese nationality under Article 9 of the Nationality Law, and is therefore eligible to hold such an office.

What I have analysed above relates to Article 9 in relation to the person himself, the question being whether he has automatically lost his Chinese nationality upon acquiring a foreign nationality and thereafter a foreign passport.

But what about the person born in a foreign country of parents who are HKECRs and was given his foreign nationality at birth? Article 5 of the Nationality Law provides that:

Any person born abroad whose parents are both Chinese nationals or one of whose parents is a Chinese national shall have Chinese nationality. But a person whose parents are both Chinese nationals and have *settled* abroad or one of whose parents is a Chinese national and has *settled* abroad and who has acquired foreign nationality at birth shall not have Chinese nationality. (Emphasis supplied.)

So again, it all depends on whether his parents (or one of them) have (or has) “settled” in the foreign country before his birth. And again, that is a question of fact to be determined by the Courts of the HKSAR.

Of course, if any person wishes to lose his Chinese nationality, the only sure way is to renounce it under the Articles mentioned above. But there are difficulties. If such a person is married to or is a near relative of a foreign national, there is no problem - see Article 10(1). But if he has to rely on Article 10(2), he will have to prove that he has already “settled abroad”, and this begs the very question. As to Article 10(3), one simply cannot tell with any degree of certainty what will constitute a “legitimate reason”. It is extremely doubtful whether it will be recognized to be a legitimate reason if the applicant were to say that he had no confidence in the HKSAR Government and would like to be protected by a foreign government.

9. *Dual Nationality*

The problem of dual nationality is dealt with in Article 3 of the Nationality Law which stipulates:

The People’s Republic of China does not recognize dual nationality for any Chinese national.

Recently, many people in Hong Kong have suggested that the Chinese Government should change its Nationality Law by giving recognition to dual nationality, so that the interests of those who hold foreign passports would be sufficiently safeguarded. But it seems that the mere recognition of dual nationality by the Chinese Government may not be sufficient. For unless those Chinese nationals holding foreign passports had “settled” in the foreign countries concerned before acquiring their foreign nationality, or were born of such parent(s), they would still be considered to be Chinese nationals. And indeed this view is consistent with the Hague Convention on the Conflict of Nationality Laws of 1930:

Article 3: Subject to the provisions of the present Convention, a person having two or more nationalities may be regarded as its national by each of the states whose nationality he possesses.

Article 4: A state may not afford diplomatic protection to one of its nationals against a state whose nationality such person also possesses.

Therefore, even if China were to recognize dual nationality, so long as the person having two nationalities is a Chinese national, he would still not be entitled to consular protection from the other government while he is in the HKSAR.

E. Conclusion

In summary, the key points may be summarized as follows:

- (a) Under the laws of PRC, an HKECR holding a BDTC passport will be regarded as a Chinese national.
- (b) Such a person has no right to seek consular protection from the British Embassy while in Mainland China.
- (c) Such a person will only lose his Chinese nationality by renunciation.

CHINA'S LAW AND POLICY ON
NATIONALITY:
IMPLICATIONS FOR RESIDENT
HONG KONG CHINESE



Edward J. Epstein

A. Introduction

Superficial correspondence between terms used in the Nationality Law of the People's Republic of China¹ and in Western literature should not tempt us to assume that Chinese and Western concepts of nationality are in fact the same. Although promulgated in 1980, the Nationality Law is a product of thinking in the early part of this century which was shaped by a long history of Chinese attitudes towards the outside world. The legal formula for nationality adopted by China during its early periods of legal westernization² set an important precedent for codification in socialist China, but traditional attitudes live on.

B. The Chinese Concept of Nationality

The existence of communities of Arab traders in China since the Tang dynasty prompted the Chinese to exert legal jurisdiction over foreigners but only when their offences concerned Chinese.³ In later dynasties, however, the Chinese authorities were prepared to leave to foreigners even the punishment of less serious offences by foreigners against Chinese. This practice continued in the Ming and Qing dynasties despite express assertions of unlimited territorial jurisdiction in the Chinese penal codes. When Europeans first came to trade with China in the seventeenth century they refused to bring tribute according to a system which recognized the superiority of Chinese culture. Increasing contacts with large numbers of hopeful European traders brought about conflicts between foreigners and Chinese over which the central Chinese authorities felt pressed to claim jurisdiction. Be-

ginning in Macao, however, a practice soon emerged whereby crimes committed by Europeans against Chinese were settled by the payment of reparations and bribes.

As European traders, especially the English, sought to open up China in the late eighteenth century conflict of jurisdiction became acute and was ultimately resolved by the grant of extraterritorial jurisdiction to foreigners after the Opium War.⁴ Most importantly, extraterritoriality gave foreigners immunity from Chinese legal jurisdiction and completely frustrated Chinese control over foreigners in their own land. Ultimately, the price China had to pay for the relinquishment of extraterritorial rights by the foreign powers was the replacement of the existing traditional legal system with a system which was thoroughly Western and therefore acceptable to foreigners.

In the West, political and legal distinctions on the basis of nationality have become increasingly insignificant or extinct. Within the British Commonwealth nationality has become largely an immigration concept. Within the European Community economic, social and political qualifications based on nationality are rapidly being abolished. In the United States of America comparatively few alien permanent residents can be attracted by the limited advantages of citizenship to become naturalized U.S. citizens. In China, however, history has dictated a different course and nationality remains an important means of dealing with the foreign world economically and politically. The legacy of extraterritoriality has created a conflict in today's China between the desire to attract foreign trade and investment and Chinese fear of Western hegemony. Infringement of sovereignty has become the catchcry for keeping foreign activities in China within acceptable bounds. And just as qualifications on the basis of nationality can circumscribe the foreign world so too can they serve as a control over Chinese citizens in or out of China.

Nationality is still a qualification for many rights and activities in China. Almost the entire system of trade and investment is based on the distinction between foreign and domestic interests. There is one law for domestic economic contracts and another for foreign ones. There is one regime of corporate legislation for domestic enterprises

and another for foreign joint ventures or wholly foreign enterprises. Taxation, labour, banking and finance, and so on are similarly bifurcated. This bifurcation is necessary because China wishes to take advantage of foreign trade and investment without integrating it into the domestic economic system. (This explains why the “foreign” system is also applicable to Taiwan, Hong Kong and Macao compatriots who do business with or invest in China.)

Examples of legal discrimination on the basis of nationality are not restricted to economic matters. In criminal cases, arrest or detention of a foreign national in China must first be approved by the Supreme People’s Procuracy.⁵ The first hearing must be held at no lower level than the Intermediate People’s Court.⁶ Civil cases involving a foreign party are also governed by special provisions⁷ and like criminal cases must first be heard by the Intermediate People’s Court or above.⁸ Foreign nationals cannot qualify to practise law in China⁹ and although tolerated in other forms, foreign law firms are still prohibited from practising law in China whether in their own right or in cooperation with Chinese lawyers.¹⁰ China’s new Copyright Law is also governed by a “nationality principle” which gives only works of Chinese nationals automatic copyright protection.¹¹

The Hong Kong Chinese are very familiar with these distinctions. Sometimes they enjoy the best of both possible worlds, such as cheaper hotels and travel while doing business according to foreign economic legislation. At other times, however, the Hong Kong Chinese suffer the worst of possible worlds. They can be detained, arrested and punished without supervision by central authorities. In civil cases too, Hong Kong Chinese do not enjoy the procedural privileges afforded to foreign litigants.¹² In principle, Hong Kong Chinese could qualify as PRC lawyers but in practice, except for some who fall through the cracks, they are not yet permitted to take the exams with their Mainland cousins.

Of course, bifurcation goes beyond legislation and is more than a means of interfacing China’s planned economy with foreign market forces. Political control is a very important factor in the way China treats foreign visitors and residents differently from Chinese nation-

als. Anyone who has lived in China knows that foreigners always get “special” treatment. Foreigners in China, be they travellers, business people, diplomats or students, are isolated from the ordinary Chinese people by “friendship”. They are privileged to live in special housing, perhaps a “friendship guesthouse”, eat in special restaurants and shop in special “friendship stores”. And they get special money to do it with. The social division this type of discriminatory treatment creates between Chinese and foreigners, the vociferousness with which it is enforced by Chinese officials against their own people and the equanimity with which the Chinese have hitherto accepted it is saddening. What is done in the name of hospitality is in fact simply a means of social control.

C. The Effect of Chinese Nationality Law and Policy on the People of Hong Kong

The Nationality Law has a wide reach because it is based on three fundamental principles: *jus sanguinis* or nationality of a parent, *jus soli* or nationality of place of birth, and the refusal to recognize dual nationality.¹³ Whilst none of these principles is peculiarly Chinese, the manner in which they have been arranged, interpreted and applied then allows China to claim that most of Hong Kong, Macao and Taiwan citizens are Chinese nationals.

Jus sanguinis is a well established principle¹⁴ for determining a child’s nationality by reference to the nationality of his father, or in more recent times, of either parent. The Nationality Law provides that any person born in China (§4) or abroad (§5) whose parent(s) is a Chinese national has Chinese nationality, except where his parents had settled abroad.¹⁵ Although the effect of its application in what is an ethnically Han dominated country appears racially biased, this principle is not simply racially or culturally motivated because China recognizes fifty-five ethnic minorities who share PRC nationality.

The *jus soli* is nationality based on the place of birth¹⁶ and this is the secondary principle in the Nationality Law which provides that any person born in China acquires Chinese nationality if his parents are stateless or of uncertain nationality but have settled in China.

Finally, dual nationality is not recognized. This principle is also in accordance with international law.¹⁷ It was designed to harmonize China's relations with its South-East and West Asian neighbours where growing communities of Chinese caused domestic and regional tensions in the post-war political and economic environment.¹⁸ The non-recognition of dual nationality was established as policy since at least 1955 when China concluded a treaty with Indonesia which required potential dual nationals to choose between Chinese and Indonesian nationality.¹⁹ The practical application of the no-dual-nationality rule to Chinese nationals, however, makes it very difficult, if not impossible, for Chinese to acquire foreign nationality except by settling abroad. This is a problem we will further consider below.

Applied to Hong Kong, the effect of these principles should become very clear. First, the vast majority of Hong Kong Chinese residents were born in China. For the purposes of the application of the *jus soli*, China means what is now the Mainland, Hong Kong, Macao or Taiwan. China does not recognize a transfer of sovereignty in Hong Kong and Macao as having taken place. The fact that the two territories have been under foreign administration does not give those nations the power to confer their own nationality.²⁰ Even if it did, it would first require a valid renunciation of Chinese nationality which, as we will see, is approved only in limited circumstances. Second, one or both parents of the vast majority of Hong Kong residents also acquired Chinese nationality through a parent or by birth in China, Hong Kong or Macao.

1. *The British Dependent Territory Citizen*

There are about 3.28 million persons who are entitled to British Dependent Territory Citizenship (BDTC). These persons are entitled to and many already hold a BDT Passport.²¹ On July 1, 1997, ethnic Chinese BDTCs will be considered Chinese citizens only and their BDT Passports will no longer be valid travel documents. Therefore, unless ethnic Chinese wish to travel on a PRC passport from July 1997 they must choose a British National Overseas passport, another type of travel document which is issued by the Hong Kong authorities. (I shall return to this type of travel document below.) From July 1997, a non-

ethnic Chinese who might otherwise become stateless will become a British Overseas Citizen (BOC) and will be entitled to hold a BOC passport which will be transmissible two generations, that is, to children and grandchildren. There are about 10,000 persons in this predicament, for example, ethnic Indians who were born in Hong Kong or who have settled here and lost or never acquired another nationality. Note that ethnic Chinese Hong Kong residents cannot become BOCs because they are not at risk of becoming stateless.

As mentioned above, existing BDTCs may acquire a new type of travel document issued in Hong Kong rather than travelling on a PRC passport after 1997. This is the British National (Overseas) (BNO) Passport. Existing BDTCs must acquire a BNO passport before they cease to be BDTCs, that is by June 30, 1997. Holders of the BNO passport will be entitled to renew this travel document for life but unlike the BOC passport, the right to hold it cannot be transmitted to the next generation.

Whether or not the ethnic Chinese BDTC chooses a BNO passport he will be treated by China as a Chinese national in Hong Kong as in the rest of China and in third countries. A recent example from the Gulf should suffice to show this point and the rare facility of travelling as a Chinese national. At least one Hong Kong resident detained in Iraq before the outbreak of war was allowed to leave for Jordan on the basis of his Chinese citizenship rather than his BDTC passport. Mr. Lam Boon Ning could not leave Iraq on his BDTC passport because British nationals were prohibited exit visas. However, Chinese nationals were being issued exit visas and Mr. Lam acquired one on the basis of a letter of Chinese patriality issued to him by the Chinese Embassy in Baghdad.²²

2. *The Hong Kong Certificate of Identification Holder*

There are approximately two million holders of a Hong Kong Certificate of Identity (HKCID).²³ These are mostly (in fact, probably all) Chinese citizens who have not applied for naturalization as a BDTC. They are entitled to apply for naturalization at any time before July 1997 providing they have been in continuous residence in HK for at

least seven years. Of course, children born or other persons who become resident in Hong Kong after July 1990 will not be eligible for naturalization because they will not be able to satisfy the seven-year residence requirement.

Naturalized HKCID holders will then be entitled to apply for either BDTC or BNO passports as outlined above. Alternatively they will have to travel on Chinese passports after 1997.

3. *Other Choices*

(a) Settlement in a Third Country

The Nationality Law provides that where a Chinese national settles [*dingju*] in a third country and voluntarily acquires foreign nationality she/he will automatically forfeit Chinese nationality (§9). This was recently repeated by the Deputy of the State Council's Office for Hong Kong and Macao Affairs, Lü Ping, who is, however, attributed with adding to "settlement abroad" the words "for a long time".²⁴ The meaning of settlement abroad does not appear to have been subject to interpretation in China. It is a vague concept and the facts of each case will always be open to interpretation. Moreover, the varying periods of residence necessary to acquire foreign nationality in some countries would not even necessarily satisfy the test of settlement abroad in the Chinese sense. This is because the original meaning of "settlement abroad", as it is codified in the Nationality Law, was designed to deal with the post-war position of overseas Chinese [*huaqiao*] who had become economically and often even culturally and linguistically assimilated or at least integrated into their country of adoption. In the post-coldwar world, however, one could easily imagine many Hong Kong families satisfying the three-year residency requirement for Canadian nationality without effectively moving the economic and social centre of their lives from Hong Kong.

It is easy to see how China could manipulate this ambiguity for political purposes after 1997. At present, there are large numbers of resident Hong Kong Chinese who hold passports of foreign countries after satisfying their various residency requirements. Technically, they

have forfeited their Chinese nationality which cannot be revived unless an application is made to the PRC authorities (§13). Nevertheless, these people continue to travel to China on PRC-issued Re-entry Permits [*huixiang zheng*]. There can be no doubt that in so doing they forfeit their right to consular protection in China during each such journey. The larger question is whether or not the Chinese Government would at some future time treat them as foreign nationals. The answer must surely be that this question will be decided case-by-case at China's political convenience.

(b) Passports of Convenience

In recent years many Hong Kong Chinese residents have acquired foreign nationality by making modest investments in or outright payments to foreign countries, such as, Tonga, Panama and more recently, to the government of what was formerly East Germany. The legality of these transactions has in some cases been challenged but we are not concerned with this here. Legal or not, the acquisition of a passport of convenience will not result in the forfeiture of Chinese nationality because it does not involve any settlement abroad. In China, therefore, these persons are in danger of having their foreign passports confiscated.²⁵

The same could happen to holders of passports acquired without settlement abroad, such as, persons who have acquired foreign nationality by virtue of family relationships or, as we will see below, by birth in a third country, by marriage, or by the British nationality scheme.

(c) Birth in a Third Country

Without at least one parent settled abroad, the fact that a Chinese national gives birth in a third country does not result in forfeiture of the child's Chinese nationality which is acquired by the principle of *jus sanguinis* (§5). From the third country's perspective, the child may be a dual national but from China's standpoint it is Chinese. There is a growing practice of affluent Hong Kong women travelling to the United States simply to give birth so that their children will acquire U.S. nationality and pave the way for family emigration in the future. Although as a practical matter it may facilitate immigra-

tion, this practice does not ensure these children will be treated as U.S. nationals in China. This is because their parents are not settled (and have no intention of settling in the U.S.) so that they have not forfeited their Chinese nationality. They too are in danger of having their foreign passports confiscated in China.²⁶

(d) Marriage to a Foreign National

By marrying a foreign national a Chinese national does not forfeit his/her Chinese nationality. If the acquisition of foreign nationality results from marriage it will therefore create dual nationality only from that country's (not China's) standpoint. However, marriage can be grounds to seek to renounce Chinese nationality. The Nationality Law provides that "Chinese nationals may renounce Chinese nationality upon approval of their application provided that: (1) they are close relatives of aliens;" (§10). This does not require settlement abroad but it should be noted that the applicant has no right to renunciation, his application must first be approved by China's Public Security organs. According to provisions issued by the Ministry of Public Security, approval is given to resident Chinese nationals only in very limited circumstances.²⁷

(e) Special Schemes

In 1990, the British Government announced a scheme to issue to 50,000 selected Hong Kong Chinese families British passports with the right of abode in the United Kingdom. The scheme caters to middle to higher level government servants and to others who have long records of public service. The hope is that the "escape route" provided by a right of abode in the United Kingdom may persuade them to remain in Hong Kong after 1997. Despite the scheme's intention to confer full British nationality, successful applicants will not forfeit their Chinese nationality. As in the case of all passports of convenience, this is simply because the foreign nationality has not been acquired by "settlement abroad" (§9). As we saw above, this may again create dual nationality from the British point of view but for China's purposes, Hong Kong Chinese who acquire British passports of any kind while resident in Hong Kong remain solely Chinese nationals.

The same conclusion must apply to other recently announced schemes whereby foreign employers in Hong Kong assist their key local employees to acquire foreign nationality or residence rights.

As we will see below, China is powerless to prevent other countries from granting Hong Kong resident Chinese nationals the right of abode and has resorted to disqualifying them from holding certain high offices in Hong Kong after 1997.

D. China's Attitudes to the Acquisition of Nationality or Foreign Residence Rights by Hong Kong Chinese

We have already seen that the desire to preserve political and social control is a dominant factor behind China's policy of discrimination based on nationality. In Hong Kong, however, China is faced with the dilemma that in administering the Territory, Chinese and foreign aspects are far more difficult to separate from each other than on the Mainland. The PRC Constitution applies to Hong Kong except for those provisions incompatible with the Joint Declaration and Basic Law, for example, the provisions on the socialist road. The Preamble provides for the leadership of the Chinese Communist Party and this cannot be said to be inapplicable to Hong Kong. In concrete terms, Party leadership takes many forms but it is centralized by central and local *nomenklatura*, that is, a system whereby the Party vets the appointment of key personnel in all organs of state power: the government, legislatures, courts and procuracies as well as economic, social, educational and cultural institutions.²⁸ In other words, the Party enjoys a very direct means of intervention into all aspects of life. This intervention is not mentioned anywhere in China's Constitution or laws but this does not make it unconstitutional or illegal. The *nomenklatura*, like the Party itself is a supra-legal, political concept.

I have mentioned this, not because I think the Party can or even intends to transplant its political system into Hong Kong. Rather, it serves as a salutary reminder of the degree of political control the Party enjoys and has come to expect on the Mainland. Here in Hong Kong, however, economic and social life is not subject to the same

degree of centralized control. Economic life has thrived here for lack of such control. Moreover, China knows this control simply cannot be exercised over people who can pack up and leave at any time. This helps to explain why in 1990 China most vehemently condemned²⁹ the British scheme to give British passports with the right of abode to people in public service who could then more easily resist Party control after 1997. This was clearly spelt out in one PRC controlled Chinese-language publication in Hong Kong which accused the scheme of attempting to perpetuate British rule in Hong Kong after 1997.³⁰ From the Chinese point of view, having foreign nationals in positions of political power is the same as having a foreign government and is a violation of China's sovereignty and the Joint Declaration.³¹ In reality, holders of passports of convenience have no allegiance to a foreign power and China's real concern is that it will be much harder to exert political control over them.

China also purports that the British right of abode scheme is an attempt to plunder Chinese resources.

This plan has only two real goals. The first is to take advantage of the outflow of talent from Hong Kong and nab both people and money while saying sweet-sounding things like it is all in order to 'stabilize Hong Kong' and 'persuade the talented people to remain.' In reality, they just want to monopolize Hong Kong talent and wealth and yet dare not to admit it. The second goal is to benefit the English themselves. During the next six years, the English are prepared to scoop up profits [from] Hong Kong.³²

This sounds very similar to arguments used by the Chinese Government in response to the U.S. and Canadian decisions to grant indefinite extension of stay or immigrant visas to Chinese students after the Tian'anmen massacre.³³

It would not be accurate to say that China's opposition to dual nationality in Hong Kong is based solely on political grounds. There is a concern over economic continuity in the Territory and the flight of Hong Kong capital and of Hong Kong capital managers. But the

equanimity with which China treats announcements of increased immigration quotas tends to suggest that China will tolerate orderly departure. In the light of China's accusations that Britain is plundering Hong Kong's human resources, how can we explain the lack of strong opposition to increased immigration quotas? Recently, China welcomed the relaxation of Hong Kong's immigration rules to admit Chinese nationals who have studied or worked overseas for two years. This seems to suggest that China prefers to replace potentially resistant Hong Kong Chinese with their Mainland counterparts. The prospect of high paying jobs in Hong Kong may also lure non-returning Chinese students back from the West although this would still represent a net loss of human resources for the whole of China.

China's denunciation of the selective British nationality scheme should be contrasted with China's expression of "no objection" in April 1989 to the possibility of Britain's granting right of abode to all of Hong Kong's 3.28 million BDTs.³⁴ The difference is, whilst China was certain Britain would never grant all BDTs the right of abode and therefore did not object, the selection of key personnel poses a far more real and difficult political question. China's response was fast but it remains to be seen if it will be effective. First, China has warned successful applicants for the right of abode in the United Kingdom that they will not be entitled to be treated as foreign nationals in Hong Kong after 1997. For example, they will not be entitled to British consular protection in Hong Kong.³⁵ Secondly, and most dramatically, in the final stages of drafting Hong Kong's Basic Law, China amended key provisions on the qualifications to hold high office in Hong Kong so as to exclude even Chinese nationals who have a right of abode in a third country. The offices affected are those of the Chief Executive (§44), principal officials in the Executive (§61), legislative councillors (§67), the Chief Justices of the High Court and the Final Court of Appeal (§90) as well as senior civil servants (§101).

China's condemnation of the British right of abode scheme should be considered together with her opposition to the draft Hong Kong Bill of Rights. Indeed, both are frequently criticized as a package by pro-Beijing commentators.³⁶ Although not a party to the International

Human Rights Covenant, China is a party to the International Convention on the Elimination of Racial Discrimination and the Torture Convention and participates actively in the United Nations Human Rights Commission. In principle, therefore, China should have no objection to Hong Kong entrenching the provisions of the International Covenant in local law. In practice, however, China sees the Hong Kong Bill of Rights as a potential for Hong Kong to challenge political *diktat* from Beijing.

Although not strictly a constitution, the Basic Law will nevertheless be the ultimate source of the validity of Hong Kong laws. Of course, China has always insisted that the National People's Congress should have the right of final interpretation of the Basic Law, or in simple terms, the right to say which Hong Kong laws are valid or invalid (§158). The Bill of Rights, however, circumvents the Basic Law by giving the Hong Kong courts power to invalidate a Hong Kong law which is contrary to any of the enumerated rights. Needless to say, on such matters the views of the National People's Congress and the Hong Kong courts are likely to be very different. This is an obvious source of potential resistance to China's political control over Hong Kong and China has therefore expressed her opposition.³⁷

E. Conclusion

China maintains a complex system for distinguishing between Chinese and foreign worlds and the underlying reasons which explain it are historical and cultural as well as political and economic. The Nationality Law is but one device for maintaining the distinction. For Hong Kong, this law is important because it is one of the few Chinese laws which will apply directly to Hong Kong after 1997 and the effect of which is already being felt. The interpretation of the Nationality Law is motivated primarily by questions of political control. It effectively denies Hong Kong residents dual nationality to prevent Hong Kong Chinese from using nationality as a challenge to PRC political control over life in Hong Kong.

This explains why China condemned the British scheme to give the right of abode to families of persons in high level public life in Hong Kong. Of course, the Nationality Law is not the only example of China's political self-interest taking precedence over Hong Kong's autonomy. The Basic Law is replete with examples, such as the amendments which disqualify Hong Kong Chinese residents with a right of abode in a third country from holding high office in Hong Kong after 1997. Political self-interest also explains China's attitude to the draft Bill of Rights. Ultimately, China's laws and policies concerning the nationality of its citizens will be interpreted so as to create the least possible resistance to China's political control over Hong Kong.

ENDNOTES

1. Hereinafter, "Nationality Law". Adopted and promulgated at the Third Session of the Fifth National People's Congress on September 10, 1980 and in force from the same day. Chinese text in *Zhonghua Renmin Gongheguo Fagui Huibian* 3 (1980) (hereinafter, "Collected Laws and Regulations of the People's Republic of China"). An English translation appears in the Appendix.
2. Nationality laws were promulgated during the legal reforms in the late Qing (1909) and in the early (1912) and late (1929) Republican period. On the 1990 law see Tsai, "The Chinese Nationality Law, 1990" 4 *Am. J. Int'l L.* 404 (1990).
3. Edwards, "Ch'ing Legal Jurisdiction over Foreigners" in *Essays in China's Legal Tradition* 224 (J. Cohen ed. 1980). My account of legal jurisdiction in traditional China is based on this work.
4. The first provision on extraterritoriality was contained in Art. XII of the *General Regulations of Trade* formulated by the British Government in the light of the Treaty of Nanking (1842) and then incorporated into the Treaty of the Bogue (1843). For the full text of this and equivalent treaty provisions on extraterritoriality in respect of other foreign countries see W.Fishel, *The End of Extraterritoriality in China* 225-232 (1952).
5. "Gong'anbu zhuanfa zuigao renmin jianchayuan yi ting guanyu daibu waiguoji anfan yilü cengbao zuigao renmin jianchayuan shenpi de tongzhi" ("Notice of the Ministry of Public Security Copied to office One of the Supreme People's Procuracy That Arrests of Suspects with Foreign Nationality Must Always Be Reported to the Supreme People's Court for Approval") Sept. 15, 1979 (on file with author).
6. "Criminal Procedure Law" §15(3) in *The Criminal Law and the Criminal Procedure Law of China* (bilingual editon) (1984).
7. See Cap.5 "Civil Procedure Law of the PRC" *Collected Laws and Regulations of the PRC* 133, 173-174 (1982).
8. "Civil Procedure Law" §17 supra note 7.
9. "Provisional Lawyers Regulations of the PRC" §8 in *Collected Laws and Regulations of the PRC* 44, 46 (1980).
10. "Sifabu, waijiaobu, waiguo zhuanjiaju, guanyu waiguo lüshi bude zai woguo kaiye de lianhe tongzhi" (Joint notice of the Ministry of Justice, Ministry of Education, Foreign Experts Bureau that for-

- eign lawyers are not permitted to practice in our country) October 20, 1981.
11. "The works of Chinese citizens, legal persons and non-legal person work units shall enjoy copyrights under this Law regardless of whether they are published" §2(1) 9 *China L. & Prac*, 26 (1990).
 12. *Zuigao renmin fayuan guanyu gang'ao tongbao chiyou 'yingguo shutu gongmin buzhaol' he aopu dangju suofa shenfenzheng zai neidi renmin fayuan qisu, yingsu de minshi anjian, shifou zuowei shewai anjin wenti de pifu.*
 13. On the application of these principles see generally, Ginsburgs, "The 1980 Nationality Law of the People's Republic of China" 30 *Am. J. Comp. L.* 459-498 (1982).
 14. Cf Hague Convention on the Conflict of Nationality Laws (1930) §2.
 15. §5. This exception is a recognition of the secondary principle of *jus soli*, cf. *infra*.
 16. Hague Convention on the Conflict of Nationality Laws (1930) §4.
 17. *Ibid.*
 18. See Ginsburgs, *supra* note 13 at 461-463 esp. his quotation from Peng Zhen's report on the policies behind the Nationality Law at 462. See also Chen, "The Nationality Law of the PRC and the Overseas Chinese in Hong Kong, Macao and Southeast Asia" 5 *N.Y. L. Sch. J. Int'l & Comp. L.* 281 (1984) at 304-311 esp. his quotation from Zhou Enlai's comments to an Indonesian official in 1957 at 306. See further Gong, "On the Nationality Law" 45 *Beijing Review* (1980) 24 at 25.
 19. Sino-Indonesia Treaty on Dual Nationality, see Chen, *supra* note 18 at 307.
 20. This is spelled out clearly in provisions drafted by the Ministry of Public Security which makes clear that §9 of the Nationality Law is not applicable to Hong Kong or Macao: *Gong'anbu guanyu shishi guojifa de neibu guiding (shixing cao'an)* (Ministry of Public Security internal provisions on the implementation of the Nationality Law (trial draft) April 7, 1981, §7(3); hereinafter Public Security Nationality Provisions.
 21. For a concise discussion of the history of British nationality law and its application to Hong Kong up to the present day, see Chan, "Nationality" in *Civil Liberties in Hong Kong* (R. Wacks ed. 2nd ed. forthcoming in 1991).

22. "Zhongguo shiguan zhengming shi Zhongguoren Lin Benning qigong Ying huzhao tuoxian" ("Chinese embassy certifies Chinese national Lam Boon Ning does without his British passport to escape danger") *Ming Pao* Aug. 15, 1990 at 2.
23. See Chan supra note 21.
24. "Gangren dingju waiguo ruji Zhongguo guoji zidong mieshi" ("Hong kong persons settling abroad [and] acquiring [foreign] nationality automatically lose Chinese nationality") *Ming Pao* Mar. 13, 1990.
25. "Guoren suogou waiguo huzhao Beijing shengyan gai bu chengren" ("Beijing declares it will not recognise any foreign passports purchased by Chinese citizens") *Ming Pao* Feb. 4, 1990. The danger of confiscation was already clear in 1981 in the Public Security Nationality Law Provisions §9(2) supra note 20.
26. Public Security Nationality Law Provisions §9(2) supra note 20.
27. See Ibid. §8.
28. J. Burns, *The Chinese Communist Party's Nomenklatura System: A Documentary Study of Party Control of Leadership Selection, 1979-1984* (1989).
29. "Ying danfang jue ding gaibian bufen Xianggang jumin guoji woguo zhengfu yaoqiu yingfu gaibian cuowu zuofa" ("British unilaterally decide to change the nationality of some Hong Kong residents; our country's government requests British government to amend this mistaken method") *Renmin Ribao* Jan. 1, 1990. The condemnation of the British nationality package continued in the PRC controlled Hong Kong press until the enabling legislation was passed by the British Parliament on July 23, 1990.
30. "China firmly opposed to the granting of the right of abode in the United Kingdom" *Baixing* May 16, 1990 at 60-61 translated in *JPRS Hong Kong, Macao* Aug. 6, 1990 at 87. See also, *Ying wuquan danfang gai gangren guoji* ("Britain has no right unilaterally to change Hong Kong people's nationality") *Wen Hui Bao* Apr.21, 1990.
31. <Juyingquan> *fang'an buli yu Xianggang de pingwen guodu* ("British nationality scheme is not good for Hong Kong's stable transition") *Wen Hui Bao* June 15, 1990.
32. "British 'Right of Abode' Package Denounced," *Ta Kung Pao* (Hong Kong) Apr. 9, 1990 translated in *JPRS Hong Kong, Macao* June 29, at 112.

33. "Such rude interference by the American and Canadian Governments in our country's internal affairs, their rampant act of plundering our human talents...have made an enormous impact on the changes of the thinking of..." (on file with author).
34. "China says UK free to grant right of abode" (*South China Morning Post*) Apr. 26, 1990. See also, "Ying ru yu gangren juliuquan beijing dangju bu hui fandui" ("If Britain gives Hong Kong people right of abode Beijing authorities will not object") *Wen Hui Bao* Apr. 26, 1990.
35. "British Nationality Act Called 'Unacceptable'" *Renmin Ribao* July 29, 1990 translated in *FBIS China* July 30, 1990 at 1.
36. "Dui <juliuquan> he <renquan fa'an> Zhongfang de lichang he guandian" ("China's position and views on the right of abode and "draft Bill of Rights") *Wen Hui Bao* Apr. 24, 1990.
37. Ibid. See also, "Ying danfang gao renquan fa'an Zhongfang baoliu fanying quanli" ("China reserves the right to respond to Britain's unilateral action in draft Bill of Rights") *Wen Hui Bao* Apr. 27, 1990.

DUAL NATIONALITY: CANADIAN CITIZENS IN HONG KONG



Robert Desjardins

A. Introduction

On the inner cover of a Canadian passport, it is written that :

Canadians may have dual nationality through birth, descent, marriage or naturalization. They are advised that while in the country of their other nationality they may be subject to all its laws and obligations, including military service.

B. A Canadian Perspective

From a Canadian perspective, dual or plural citizens are persons who acquire :

- (a) Canadian citizenship by naturalization while retaining the citizenship of one or more other countries;
- (b) The citizenship of one or more countries by naturalization while retaining their Canadian citizenship;
- (c) At birth more than one citizenship, either from parents having different citizenship or (and sometimes in addition to) by virtue of the law of the country of their birth.

While the expressions “nationality” and “citizenship” are often used synonymously, their meaning is different. Hong Kong provides the best illustration of this fact; a large number of local residents have British nationality, but are not British citizens.

Under the current Canadian Citizenship Act, which came into force February 15, 1977, there is only one provision related to the automatic loss of citizenship: a citizen who is a second generation Canadian

born outside the country to a Canadian derivative parent at age twenty eight – unless before that date he or she makes an application to retain and register citizenship. Other than this automatic loss provision, there are only two other ways to lose Canadian citizenship: (1) loss by voluntary renunciation; and (2) loss by revocation through action by the Governor in Council.

By way of definition, multiple or dual nationality is a status whereby a person is simultaneously a national or a citizen of two or more independent sovereign states. In principle, that person is subject to all rights, powers and privileges, and all obligations, duties and liabilities that each independent sovereign state which recognizes that person to be its national or citizen, may grant to him or may impose upon him.

C. Multiple or Dual Nationality

International law recognizes the existence of multiple or dual nationals and, generally regards a person who possesses multiple or dual nationality or citizenship to be essentially a national or citizen of the country or jurisdiction in which that person is present. Therefore, with respect to a Canadian citizen who possesses the nationality or citizenship of a country other than Canada, if that person is in the country of his/her other nationality or citizenship, he/she will be treated as a national or citizen of that country and, as such, be subject to any obligation that country may impose upon him or her. In these circumstances, in the absence of a particular treaty obligation or formal agreement, the Canadian government can do little to free that citizen of such obligations.

Canada, as a party to the 1930 Convention on Conflict of Nationality Laws, is bound by Article 4 of that Convention, which states:

A State may not afford diplomatic (i.e. consular) protection to one of its nationals against a State whose nationality such person also possesses.

The United Kingdom and China are also parties to this Convention. Canada is thus under treaty obligation not to attempt to provide consular protection in such situations.

The principal arguments against a person possessing dual or plural citizenship are that it makes for administrative or legal complications and that it produces conflicts of allegiance that may threaten the national interest and security of the state. Individuals however may derive several benefits from being a national of two or several countries, such as being able to avail themselves of different immigration rules when visiting, residing or working in a third country, usually choosing the nationality that allows for the use of the most convenient rules.

1. *Consular Protection*

When travelling abroad, Canadian citizens are entitled to protection from Canadian diplomatic and consular personnel. A prime function of Canadian missions abroad is to protect the lives, rights, interests, and property of Canadian citizens, when these are endangered or ignored in the territory of a foreign state. The basis of protection is a compromise between two conflicting principles, the territorial sovereignty of states, and the jurisdiction of states over persons. The former upholds that a State has full jurisdiction over all persons and things physically within its territory while the latter asserts that a State has jurisdiction over all persons who are its nationals, wherever they may be. Consular protection most often takes the shape of representations to local authorities by the consular officer. It must be stated that in Canadian law, most consular services are provided as a matter of discretion by virtue of the royal prerogative; except as provided by statute, no one is entitled to claim such services as a matter of right.

The right of a consular officer to intervene with local authorities on behalf of a Canadian who appears to have been the victim of unlawful (under domestic or international law) discrimination or denial of justice is well established in international law. Consistent with Canada's commitment to fundamental human rights, consular officers do what they can to protect Canadians against violation of these rights.

2. *Dual and Multiple Citizenship*

Different countries have different nationality laws. Some recognize dual citizenship, some others do not. Canada has recognized dual citizenship since 1977. Many countries, including the People's Republic of China do not recognize dual citizenship. Those countries will only recognize one citizenship amongst its nationals, or amongst foreigners travelling within their boundaries.

The long history of immigration between Canada and Hong Kong over a period of several decades has resulted in the creation of a large number of Canadians with dual citizenship, British or British Hong Kong, and Canadian in this case. Thousands of British Hong Kong citizens have emigrated to Canada and, after fulfilling the necessary residency requirements have acquired Canadian citizenship, without having to renounce or being automatically stripped of their British or British Hong Kong citizenship.

The past decades have also seen tens of thousands of Hong Kong-born Canadians returning to the territory for short or long term and sometimes permanent residence. As dual nationals, these persons have the choice of using either their British or Hong Kong travel documents.

In the case of Hong Kong people, the question of nationality is complicated by the fact that while the British sovereignty over Hong Kong is recognized internationally, practice has demonstrated that the People's Republic of China considers most of Hong Kong persons of Chinese race to be Chinese nationals. In official documents of the Government of the People's Republic of China, reference is often made to the "compatriots" of Hong Kong and Macau. While we are not aware of any precise definition of "Chinese compatriots", it seems that persons of Chinese descent who are born in Hong Kong or Macau are considered as Chinese nationals. This presents us with questions that are not easy to answer.

The simplest and most common circumstance demonstrating how the notion of multiple citizenship may affect Hong Kong-born Canadians is as follows: A Hong Kong-born person of Chinese descent emigrates

to Canada, and, after fulfilling the necessary residency requirements acquires Canadian citizenship, obtains a Canadian passport; that person then comes back to reside in Hong Kong, and obtains a Hong Kong Identity Card, which states that the bearer has the right of abode in Hong Kong; that person then applies for a “Hui Xiang Zheng”, the travel document issued by the authorities of the People’s Republic of China which recognizes him as a PRC national. This person could then be claimed by three countries as one of its nationals.

The consequence of this situation is that Canadian nationals returning to Hong Kong could find themselves, knowingly or not, with three nationalities. Therefore, the protection some people sought in obtaining a foreign passport may not be as strong as they may think, and, in some cases nil.

Many Canadian nationals of Hong Kong origin who are now residing in the Territory are enquiring about their status now and after 1997. As it stands now, and as explained earlier, Canadian citizens of Hong Kong origin may, in many cases, have the choice to travel back to Hong Kong using either their Canadian or their British Hong Kong travel documents, if they have retained them. However, their status in Hong Kong is determined by the local authorities.

We are not aware of any circumstance here in Hong Kong where Canadian nationals who have the right of abode in Hong Kong have received discriminatory treatment because of their Canadian citizenship.

Problems however can and do occur when Hong Kong-born Canadians apply for a “Hui Xiang Zheng”, in order to freely travel to and from Hong Kong to China. By doing so, these people recognize themselves as Chinese nationals and are treated as such by the authorities of the People’s Republic of China, when they are in Chinese territory. As China does not recognize dual citizenship, these persons find themselves in a situation where they cannot seek consular protection. It would appear that the PRC would regard an application for a Hui Xiang Zheng as a renunciation of this person’s Canadian citizenship.

Therefore, Canadian citizens must be aware of the fact that applying for and obtaining a Hui Xiang Zheng from the PRC authorities has important nationality implications. While such documents do indeed facilitate travel between Hong Kong and mainland China, they may prevent the bearer from requesting or being allowed consular access.

We have also been asked by our nationals of Hong Kong origin currently residing in the Territory about their nationality status after China becomes the sovereign power over the Hong Kong Special Administrative Region. Article 3 of the Nationality Law of China states that "The People's Republic of China does not recognize dual nationality for any Chinese national". Based on this Article, China would not recognize the foreign nationality of any person who, in their view, would be a Chinese national.

3. *Canadian Action*

In the past year, the Government of Canada has, on two separate occasions, sought clarifications from the PRC authorities on the status of its nationals in Hong Kong in and after 1997. On these two occasions, we have received verbal assurances by officials of the Hong Kong and Macau Affairs Office of the State Council and of the Ministry of Foreign Affairs that Canadian citizens of Hong Kong origin would indeed be treated as foreign nationals. This would be in compliance with Article 9 of the PRC Nationality Law, which states that:

Any Chinese national who has settled abroad and who has been naturalized there or has acquired foreign nationality of his own free will automatically loses Chinese nationality.

Before 1997, Canada will be seeking further assurances, which could take the form of either an exchange of diplomatic notes, amendments to the Consular Agreement between Canada and the PRC, or another formal exchange between the two governments to clarify the issue.

C. Conclusion

In conclusion, may I suggest that one's Canadian nationality is precious and that when travelling abroad as a Canadian, every attempt should be made to satisfy oneself that one is recognized as Canadian by the local authorities.

THE
U.S. IMMIGRATION ACT
OF 1990 AND ITS HONG KONG
PROVISIONS



Chin Kim

A. Introduction

On November 29, 1990, President George Bush signed the U.S. congressional bill entitled "Immigration Act of 1990."¹ The Act is the first major reform effort made by the U.S. Congress since the enactment of the Immigration Reform and Control Act of 1986.² The 1986 Act was a comprehensive measure, dealing primarily with sections setting up responsibilities of employers in hiring and with the legalization of the status of long-term illegal residents.³

Family unification versus skills represent the two sides of the recent legislative debate posing a possible shift in U.S. immigration policy. The 1965 Immigration and Naturalization Act abolished the racially exclusionary policies of the 1920s Act, which was oriented toward European immigrants.⁴ However, the Immigration Act of 1965 allocated only 20% of available visas to skilled immigrants and their families.⁵ The 1965 Act focused almost entirely on so-called family preferences.⁶ Of the approximately 650,000 people granted immigration status in 1988, fewer than 6% were admitted on the basis of their skills.⁷

The deepening of the American federal budget deficit, as well as the increasing competitiveness among business enterprises, on a global scale, has caused the U.S. Congress to throw its weight on the skills side of U.S. immigration policy; thus advocating the allowance of more quotas to prospective immigrants with needed skills.⁸ The 1990 Act attempts to balance humanitarian and economic concerns in formulating American legal immigration policy.⁹

The congressional debate on the 1990 Immigration Bill endured many stormy sessions before reaching the final stage. The U.S. Senate inserted the issue of three state-piloted programs for drivers' licensing, which could lead to discrimination against anyone who looked alien.¹⁰ A dramatic procedural move in the House caused the elimination of the possibility of establishing the drivers' licenses as comprehensive identification cards.¹¹ In emotionally charged speeches, some members of the House of Representatives stated that the drivers' licenses program would be similar to Nazi tattoos or South American passbooks.¹² The Senate agreed to drop that section from the Bill, although it claimed that it had no desire to set up an I.D. card, but simply wished to make it easier for employers to verify the identity of prospective employees.¹³

The unique features of the 1990 Immigration Act are the legal provisions dealing with Hong Kong residents.¹⁴ The objectives of my submission are: first, to discuss the origins of the Hong Kong provisions in the legislative process; secondly, to outline the contents of the provisions; thirdly, to identify the forces behind the writing of the Hong Kong provisions; fourthly, to discuss some problems which arise in the implementation of the provisions, with reference to the 1980 People's Republic of China (PRC) Nationality Law; and finally, to draw a conclusion.

B. The Origins of the Hong Kong Provisions

Chronologically, on June 19, 1989, when the U.S. Senate Judiciary Committee acted on s.358, there was no provision dealing with Hong Kong residents.¹⁵ However, when the full Senate acted on the Bill on July 13, 1989, section 111 of the Bill carried the title of "Treatment of Hong Kong as a Separate Foreign State for the Purpose of Immigrant Quotas", and stated that quotas made available to natives of Hong Kong in any fiscal year may not exceed 35% of the total number of visas made available.¹⁶

On the House side, Congressman Morrison of Connecticut introduced H.R. 4300 on March 19, 1990. His Bill restated the Senate

Bill, treating Hong Kong as a separate foreign state for numerical limitation purposes.¹⁷ However, the matter dealing with the allocation of quotas was silent.¹⁸

However, when the final version, reported by the House Judiciary Committee,¹⁹ was adopted by the U.S. House of Representatives on October 3, 1990, the House Bill included three separate sections concerning Hong Kong.²⁰ In addition to Section 207, dealing with the treatment of Hong Kong as a separate foreign state for numerical limitation purposes,²¹ two other sections carried the following titles:²²

Section 206: Transition for Employees of Certain United States Businesses Operating in Hong Kong.

Section 206 permitted extension of the valid period for immigrant visas for certain residents of Hong Kong. This section contained parts dealing with additional visas, petitions, allocations, fees and definitions.²³

Section 208: Permitting Extension of Period of Validity of Immigrant Visas for Certain Residents of Hong Kong.

Section 208 authorizes the use of immigrant visas until January 1, 2002. This section also noted “treatment of certain employees in Hong Kong”, which included employees of the Central Intelligence Agency and the Foreign Broadcast Information Service in Hong Kong.²⁴

C. Contents of Hong Kong Provisions

As signed by President Bush, under the 1990 Act, Hong Kong will be treated as a sovereign state and will be given an immigration quota of 10,000 for each of the next three years.²⁵ Historically, there has been a steady increase of Hong Kong immigration quotas.²⁶ Prior to the passage of the 1986 Immigration Reform and Control Act,²⁷ Hong Kong’s immigration quota ceiling was set at just 600 persons;²⁸ however, the 1986 Act provided a quota of 5,000 persons per year for Hong Kong.²⁹ Thus, under the 1990 Act there is an increase of 5,000 persons per year for the next three years.³⁰

The 1990 Act also provides for American companies in Hong Kong to sponsor a special quota of 12,000 visas per year for the next three years,³¹ and beneficiaries would be allowed up to ten years in which to use the visas.³² This allows them the leeway of staying in Hong Kong beyond 1997, so that American companies in Hong Kong can operate there. It is estimated that approximately 900 American companies employ up to 200,000 staff in Hong Kong, with local assets of sixteen billion U.S. dollars.³³

Also included is the business visa category. Under the 1990 Act, 10,000 immigrant visas per year are provided for investors who will commit to create jobs by spending at least one million dollars in the United States.³⁴ However, if the investment is made in “targeted employment areas” under the Act, then the amount of the investment could be reduced to 0.5 million U.S. dollars.³⁵ This measure would allow Hong Kong residents to settle in the United States.

D. Lobbying Activities

There were at least two discernible forces which engaged in lobbying activities in writing the Hong Kong provisions into the law. The first was the American Chamber of Commerce in Hong Kong, which had been lobbying for a scheme known as a “defensive measure”, to counteract competition from foreign firms.³⁶ According to the business sector representation, critical labor shortages among highly skilled workers would undermine the competitiveness of American industry in this decade and the next century.³⁷ The second group was the Organization of Chinese Americans.³⁸ It also lobbied to insert the Hong Kong resident clause into the Bill.³⁹

The views and position taken by the American Chamber of Commerce were reflected in the statement prepared by Congressman Stephen J. Solarz, of the House Foreign Affairs Committee, who chairs the sub-committee on Asian and Pacific Affairs. His statement reads as follows:⁴⁰

I am writing in regard to the forthcoming Immigration Subcommittee mark-up of the Legal Immigration legislation, and in particular, in support of an amendment on Hong Kong that Rep. Frank may be offering. The amendment would extend until 2002 the time period during which Hong Kong residents who receive visas must exercise their right to emigrate. Current regulations require that visas be used within four months of their issuance.

At the outset, it is important to note that the amendment would not change or add any new categories of visa beneficiaries, and would not add to the number of people coming to the United States from Hong Kong. In fact, its purpose, as explained below, would be to encourage people to stay in Hong Kong ...

With about \$6 billion in investment and \$16 billion in bilateral trade with Hong Kong, the U.S. has a strong interest in helping to ensure that the Territory is stable and prosperous after 1997. This would seem to require U.S. efforts to discourage an exodus from the Territory that might deprive Hong Kong of much-needed talent and encourage greater uncertainty about the future. At the same time, our humanitarian values, our support of the principle of family unification, and the increasing numbers of Hong Kong residents who wish to immigrate justify higher immigration ceilings as proposed in Rep. Morrison's Legal Immigration Bill.

The amendment that Rep. Frank may offer, which has the strong support of the Chinese American community, attempts to reconcile these two competing goals by enabling residents of Hong Kong who receive visas between now and 2002 to elect not to use them until 2002 without forfeiting the right to immigrate. The amendment would thus provide Hong Kong residents with assurance that they could leave should the situation deteriorate after reversion of sovereignty to China, without requiring that they emigrate immediately.

I should also note that this proposal is similar to immigration provisions that a number of other governments – including Great Britain and Singapore – have implemented or are considering to encourage confidence among residents of Hong Kong.

As I mentioned, the amendment, which would not apply to employment visas (i.e., where the alien is coming to the U.S. to take a particular job that is waiting to be filled), would not change the categories of visa beneficiaries or result in any increase in the numbers of people emigrating from Hong Kong.

It is reported that French, German and Italian-based companies were able to offer right of abode packages, because of steps taken by their governments; thus making it difficult for American firms to retain key staff.⁴¹ To meet challenges given by Hong Kong-based foreign companies, Hong Kong residents who hold U.S. immigrant visas will be allowed to stay on until 2002, to insure that qualified American companies in Hong Kong will be able to operate with adequate staff. At the same time, this measure could promote confidence among the people of Hong Kong. This measure is intended to reassure immigrant visa holders of their ability to immigrate to the United States, while allowing them to remain and provide stability in Hong Kong during the transition to Chinese rule in 1997.

As mentioned earlier, another noteworthy lobbying force, which made an effort to write-in the Hong Kong provisions, was the Organization of Chinese Americans.⁴² This organization spearheaded the inclusion of the Hong Kong Visa Allotment in the 1990 Immigration Act, and advocated the offering of an inducement to Hong Kong investors to create businesses and jobs in the United States.⁴³ Their lobbying activities were acknowledged by the above cited Congressman Solarz' statement.⁴⁴

Recently Asian Americans, which include Chinese Americans, have increasingly become vocal regarding the civil rights of ethnic minorities in the United States.⁴⁵ One of the important areas of concern has been the immigration issue.⁴⁶ Asian immigrants brought with them to the United States a cultural heritage in which the concept of civil

rights was basically foreign.⁴⁷ They bore the ethnic stereotype of a submissive, self-reliant people, whose ways were strange, and whose feelings were “inscrutable” to Anglo Americans.⁴⁸ This image of Asian Americans has been changing recently.⁴⁹ The enduring legal issue which confronted Asian Americans was the Chinese Exclusion Act of 1882 and the 1952 Immigration and Naturalization Act, which enforced the discriminatory National Origins Quota System, resulting in the restriction of immigration from Asia to the United States.⁵⁰ This was changed only in 1965, when the 1965 Act removed the remainder of the provisions which required that an Asian person be charged to the quota of his/her place of birth, rather than his/her ancestry, and instead the preference system based on family unification was initiated.⁵¹ Since 1965, Asians have immigrated to the United States on an equal footing with other nationalities and ethnic groups.⁵²

E. Effects of Hong Kong Provisions

As the foregoing discussion indicates, the 1990 Immigration Act contains a number of legal provisions on Hong Kong immigration visas, based upon the principle of family unification, employer sponsored immigration, needed skills and other ways to seek immigration visas. Under ordinary circumstances, any Hong Kong resident with a U.S. immigration visa would leave Hong Kong for the United States, where the immigrant would settle permanently, and eventually become a naturalized citizen by meeting the legal requirements.⁵³ However, if the Hong Kong immigrant with a U.S. passport wishes to return to Hong Kong after 1997, according to the 1980 PRC Nationality Law, the expatriate would have to restore PRC citizenship⁵⁴ by renouncing U.S. citizenship,⁵⁵ since the Chinese Law repudiates the dual nationality principle.⁵⁶ The Chinese Nationality Law, while encouraging overseas Chinese to acquire their citizenship wherever they may be residing, still leaves the door open for those overseas Chinese to return to China (and Hong Kong after 1997) by renouncing the citizenship of their resident country.⁵⁷ On the other hand, U.S. law does not repudiate the dual nationality principle.⁵⁸

Major compounding issues arise with respect to a Hong Kong resident who receives a U.S. immigration visa under the 1990 Immigration Act, which authorizes the right of abode beginning in 1997. As discussed above, the 1990 Act allows certain Hong Kong residents with U.S. immigration visas to reside in Hong Kong beyond 1997. This applies to Hong Kong residents who are under family or priority employee visa categories, as well as certain employees of U.S. businesses in Hong Kong, and extends the validity of the visas until September 1, 2001. In other words, the standard four month period of visa validity under the existing law can be waived.⁵⁹

In the event an American employer in Hong Kong decides he no longer wishes to act as a sponsor for the Hong Kong resident employee and his family, who received immigration visas starting November 29, 1990, the resident could lose the right to immigrate to the United States. Furthermore, if, after 1997, Hong Kong should lose its prosperity, there will be the possibility that American firms in the Hong Kong Administrative Region might find that they would not be in a position to sponsor their staff to move to the United States. Has the employee any legal recourse under U.S. law, since Hong Kong would then be under the control of the PRC? Again, in the event that a Hong Kong resident (with immigration visas for himself and his family), who was working for a U.S. company should die, what will be the immigration status of his family, since the visas were issued on an employee based status? It is assumed that children born during the period of extension, and children who become 21 during that period, would still be eligible for entry into the United States as dependent children.⁶⁰

As discussed earlier, the right of abode package in Hong Kong, which extends to the holders of American immigration visas, has its origin in European countries, and was initiated to entice employees of Hong Kong-based enterprises to carry on business activities beyond 1997, and ostensibly tempers the anxiety level of employees.

F. Conclusion

In light of the planned 1997 return of Hong Kong to PRC control, as mandated by the 1984 PRC - United Kingdom Agreement on the future of Hong Kong; the June 1989 PRC suppression of the pro-democracy demonstrations in the PRC; and past, current and future U.S. economic activities which are centered in Hong Kong, the U.S. Congress incorporated the Hong Kong provisions into the Immigration Act of 1990.

As discussed earlier, there were two forces which were effective in lobbying for the Hong Kong provisions of the 1990 Act. The first force was the civil rights organization known as the Organization of Chinese Americans, which represented the Chinese communities in the United States. The second force was identified as organizations representing the American business sector, notably the American Chamber of Commerce in Hong Kong.

The Tian'anmen Square incident stimulated Chinese Americans, who were concerned about the future plight of Hong Kong residents, to act on their behalf by initiating legal measures so that Hong Kong residents could immigrate to the United States. However, it should be noted here that not only Chinese American human rights organizations, but also several powerful human rights organizations in the United States, will be watching the treatment of Vietnamese refugees in Hong Kong. Hong Kong's human rights record was soiled last winter when the Hong Kong government forcibly shipped 51 Vietnamese boat people back to Vietnam.⁶¹ This action earned universal condemnation throughout the world. Another similar move by Hong Kong could bring about political and economic sanctions. Human rights movements in the United States would put pressure on the U.S. government to enforce sanctions.

As discussed earlier, the so-called right of abode scheme was incorporated into the 1990 Act, thus enabling U.S. immigration visa holders to stay in the Hong Kong Administrative Region to work for American firms. It will serve as a kind of insurance policy and will help reassure them to stay. In the eyes of the Beijing authorities, these

people are still considered Chinese citizens. On the other hand, in the eyes of the Washington authorities, they are considered permanent residents of the United States, but not U.S. citizens. The foregoing discussion pointed out that there are problems in administering the right of abode scheme, which originated to keep American businesses operating in Hong Kong. It was shown earlier that this scheme is inherently incompatible with the 1980 Chinese Nationality Law. As long as the Hong Kong Administrative Region brings economic benefits to the PRC, the scheme will probably be tolerated. However, this arrangement could be tentative. The scheme has to be reconciled by a joint multinational initiative, in order to come to terms with the PRC as soon as possible, since 1997 is not too far away. Time is of the essence, in order to give reassurance to visa holders, so that their anxiety level will be controlled.

ENDNOTES

1. 104 STAT. 4978, PL 101-649 (s.358), November 29, 1990 (hereinafter the Act). This is 1990 Slip Copy derived from Westlaw data base. The legislation revamps the legal immigration system while maintaining family reunification as its cornerstone. The Act also makes significant progress in reducing the negative effects of the 1986 Immigration Reform and Control Act. Improvements include an expanded "family unity" policy providing protection from deportation for the spouses and children of newly legalized immigrants. See Sections 301, 302, 602, the Act. In addition, the legislation extends the application period for the second stage of legalization by a year. See Section 703, the Act.
2. As to the legislative history of the Act, see *House Comm. on Judiciary, Family Unity and Employment Opportunity Immigration Act of 1990*, H.R., 101-723 Part 1, 101st Cong., 2d Sess. 31-141 (1990).
3. *Ibid.*
4. Paul Houston, "Panel Votes to Open Door to Immigration," *Los Angeles Times*, August 2, 1990, at A24, col. 1.
5. *Ibid.*
6. *Ibid.*
7. Statistics Division, U.S. Department of Justice, Immigration and Naturalization Service, "New Immigrant Data for 1989," *Bulletin* #4, issued March 1990.
8. *House Comm. on Judiciary*, supra note 2, at 32-58.
9. *Ibid.*
10. "Reform Bill Would Allow Increase in Immigrants," *San Diego Union* Oct.23, 1990, at A6, col. 1.
11. *Ibid.*
12. "House Boosts Visas by 40%; Drops Pilot Plan for Tamper-Proof IDs," *San Diego Union*, Oct. 28, 1990, at A5, col. 1.
13. *Ibid.*
14. See Sections 103,124, 152, 153, the Act.
15. See *Senate Comm. on Judiciary, Immigration Act of 1989*, S.R., 101-55, 101st Cong., 1st Sess. (1989).
16. 135 *Cong. Rec.* S 8639, 8646-7 (daily ed. July 24, 1989).
17. 136 *Cong. Rec.* H 903 (daily ed. March 19, 1990). As to the text of the Morrison bill, see Immigration Act of 1989 (part 3): Joint

hearings before the Subcommittee on Immigration, Refugees, and International Law of the House Committee on the Judiciary and the Immigration Task Force of the House Committee on Education and Labor, 101st Cong., 2nd Sess. 687-773 (1989).

18. Ibid.
19. *House Comm. on Judiciary*, supra note 2 at 23-25.
20. 136 *Cong. Rec.* H 8721, 8731-2 (daily ed. October 3, 1990).
21. Ibid.
22. Ibid.
23. Ibid.
24. Ibid.
25. Section 103, the Act. According to “ Immigration Overhaul Bill Signed,” *San Diego Union*, November 30, 1990, at A1, Col. 1, the 1990 Act will increase overall immigration from 540,000 in 1989 to 700,000 people a year for the next three years, and stabilize the annual total at 675,000 after that.
26. Fragomen, Del Rey & Bernsen, 1 *Immigration Law and Business*, Chap. 1.7, 1-12 (1990-).
27. Ibid.
28. Ibid.
29. Ibid.
30. Section 103, the Act.
31. Section 124, the Act.
32. Section 154, the Act.
33. *House Comm. on Judiciary*, supra note 2, at 47; 136 *Cong. Rec.* H 12363 (daily ed. October 27, 1990).
34. Section 121, the Act.
35. Ibid.
36. As to the position taken by the U.S. Chamber of Commerce, see Immigration Act of 1989 (Part 1): Hearings before the Subcommittee on Immigration, Refugees, and International Law of the House Comm. on the Judiciary, 101st Cong., 1st Sess. 432-470 (1989). As to U.S. Chamber of Commerce’s Position papers on Business-Sponsored Immigration, see Immigration Act of 1989 (part 3), supra note 17, at 917-27.
37. Ibid.
38. As to Organization of Chinese American Views, see Immigration Act of 1989 (Part 1) supra note 36, at 239-253.
39. Ibid.

40. Immigration Act of 1989 (part 3), supra note 17, at 964-5.
41. "HK staff may Lose U.S. Visa Rights," *South China Morning Post*, October 26, 1990, at 1, col. 2.
42. Immigration Act of 1989 (part 1), supra note 36, 239-253.
43. Ibid.
44. Immigration Act of 1989 (part 1), supra note 36, 239-253.
45. At least six organizations made joint statements concerning immigration law reform. As to their statements, see Immigration Act of 1989 (part 1), supra note 36, at 589-620.
46. Ibid.
47. Kim, *Selected Writings in Asian Law*, 526 (1982).
48. Ibid.
49. As to the changing attitudes of Asian Americans, see Immigration Act of 1989 (part 1), supra note 36, at 589-620.
50. Kim, supra note 47, at 527-531, 542-548.
51. Ibid.
52. Ibid.
53. Subject to incorporation of the text of the 1990 Immigration Act, procedures involved to become U.S. citizens are outlined in Fragomen, Del Rey & Bernsen, supra note 26, Chapter 5, Naturalization and Citizenship (5, 1-50).
54. As to the general discussion of Hong Kong residents after 1997, see White, "Hong Kong, Nationality, Immigration and the Agreement with China," 36 *International and Comparative Law Quarterly* 483 (1987).
55. According to Article 13 of the 1980 law, aliens who were once of Chinese nationality may apply for restoration of Chinese nationality provided that they have legitimate reasons; those whose applications for restoration of Chinese nationality are approved shall not retain foreign nationality. As to the English text of the PRC Nationality Law, see *China Official Annual Report* 297 (1981); *Beijing Review*, No. 40, at 17-18 (1980) and the Appendix here.
56. Article 3 of the Law prescribes that the People's Republic of China does not recognize dual nationality for any Chinese national.
57. On this issue see Chen, "The Nationality Law of the People's Republic of China and the Overseas Chinese in Hong Kong, Macao and Southeast China," 5 *N.Y.L.Sch. J. Int'l & Comp. L.* 281, 299 (1984).
58. Fragomen, Del Rey & Bernsen, supra note 26, at 5-50.

59. *House Comm. on Judiciary, Family Unity and Employment Opportunity Immigration Act of 1990*, supra note 2, at 73-4.
60. As to the discussion of this issue, see *ibid.*
61. Hanson, "Hong Kong's Screen Door Policy: An Analysis of Hong Kong's Screening Procedures in the Context of International Law," 16 *Brooklyn J. Int'l L.* 617 (1990) argues that Hong Kong's means of assessing refugee status do not meet international legal standards.

THE RIGHT TO A NATIONALITY: ITS APPLICATION TO HONG KONG



Nihal Jayawickrama

A. Introduction

“Nationality”, the International Court of Justice tells us, “is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments”. The Court explains that nationality constitutes “the juridical expression of the fact that the individual upon whom it is conferred . . . is in fact more closely connected with the population of the State conferring nationality than with that of any other State”.¹ But in the South Asian, tropical island of Ceylon, washed by the warm waters of the Indian Ocean, I was born a British subject. That was one of the incidents of birth on colonial territory. It was a nationality I shared with the inhabitants of Hong Kong.

B. The Changing Nationality of the Hong Kong Inhabitant

1. *British Subject*

“British subject” was a concept defined originally by common law, and later by statute. The British Nationality and Status of Aliens Act 1914 defined a natural born British subject as “any person born within His Majesty’s dominions and allegiance”. In the then far flung British empire, the test of nationality was not parentage or race or even choice; it was simply the place of birth. Birth on British territory rendered a person a British subject. It did not, of course, mean that he was a subject of Great Britain. It denoted him as one who owed allegiance to His Majesty the King.² But by virtue of that status he enjoyed, in common with millions of other ostensibly loyal colonial subjects born elsewhere within the dominions of the Crown, complete freedom of entry into Britain.

2. *Citizen of United Kingdom and Colonies*

By 1948, a substantial part of the British Empire had attained statehood and independence. This included the territories of Canada, Australia, New Zealand, South Africa, India, Pakistan, and Ceylon. Of them, India chose to become a republic owing no allegiance to the Crown, while each of the others proclaimed the person for the time being occupying the British throne as its own head of state. This desire among former British colonies to maintain a continuing link not only with Britain but also among themselves, while not necessarily owing allegiance to the Crown, led to the birth and expansion of the British Commonwealth of Nations. Soon to be known simply as "The Commonwealth", this loose association of sovereign states acknowledged the British monarch as its titular head.

Following the decision of Canada, in 1946, to create the status of "Canadian citizen",³ it was agreed among Commonwealth states that each independent country would enact its own citizenship law and determine who its citizens would be. Accordingly, by the Australian Nationality and Citizenship Act 1948, the British Nationality and New Zealand Citizenship Act 1948, the Citizenship Act of Ceylon 1948, the South African Citizenship Act 1948, the Constitution of India 1959, and the Pakistan Citizenship Act 1951, there was created the status of "Australian citizen", "New Zealand citizen", "citizen of Ceylon", "South African citizen", "citizen of India", and "citizen of Pakistan", respectively. The British Nationality Act 1948 accorded the status of "Citizen of the United Kingdom and Colonies" to every person who immediately prior to its enactment was a "British subject", but had not acquired a separate citizenship in any of the self-governing countries of the Commonwealth, as well as to all persons born thereafter, or naturalized, within the United Kingdom or any of its colonies. Accordingly, the inhabitants of Hong Kong were redesignated as "Citizens of the United Kingdom and Colonies". By virtue of that status, they continued to enjoy the right of entry and abode not only in Hong Kong, but also in the United Kingdom.

So far, the rationale of British nationality law was quite clear. The recently adopted Charter of the United Nations had outlawed colonialism and required colonial powers to progressively develop self-

government within their colonies.⁴ Until that was achieved, the inhabitants of the colonies would share and enjoy a common citizenship with the inhabitants of Britain. Once independent, the former colony would be competent to establish its own citizenship. The scheme of British nationality law, therefore, appeared to be designed to phase people out of the category of “Citizens of the United Kingdom and Colonies” when they achieved self-government and independence. As MacDonald and Blake have observed, “it was envisaged that as each colony became an independent state, persons who had acquired citizenship of the United Kingdom and Colonies solely as a result of a connection with a particular colony, would become citizens of that independent state”.⁵ In 1948, according to the records of the United Nations, Hong Kong was on the path to independence.

3. *Commonwealth Citizen*

In the talks that preceded the advent of the citizenship laws referred to above, it was agreed that, in recognition of the special relationship that existed between the member states of the Commonwealth, the citizens of those states would also enjoy the common status of “Commonwealth Citizen” (or “British subject”, if any preferred that term). This was a derivative status which was capable of being enjoyed only by virtue of the possession of the citizenship of a country within the Commonwealth. The citizenship laws enacted thereafter in most independent countries of the Commonwealth included this “common clause” which recognized the special status accorded to each other’s citizens.⁶ Section 1 of the British Nationality Act 1948, which stated that every Citizen of the United Kingdom and Colonies shall have the status of a Commonwealth Citizen (or British subject), resulted in the inhabitants of Hong Kong acquiring this new designation as well.

The status of “Commonwealth Citizen” had little significance outside Britain. It did not, for instance, enable the citizen of one Commonwealth country to automatically acquire citizenship in another. In most countries it constituted a symbolic gesture, denoting at most a status different from that of an alien.⁷ In Britain, however, a Commonwealth Citizen enjoyed the right of entry and abode. Under the British Nationality Act 1948, he also had the right, after 12 months residence,⁸ to acquire Citizenship of United Kingdom and Colonies

by registration. Not being an alien, he was eligible to vote, be elected to Parliament, or be appointed a Queen's Counsel.⁹ But as Britain began replacing Commonwealth ties with European links, Commonwealth Citizens not only lost their right to acquire British citizenship, but were even denied the previously accorded convenience of a separate immigration counter at London's Heathrow airport.

4. *Restriction of Entry into Britain*

Although the movement for decolonization had begun with the end of the Second World War, it was only in 1960 that the United Nations insisted that immediate steps be taken to hand the colonies back to the people who lived in them.¹⁰ Britain accelerated the process of dismantling its empire, and new nations emerged in rapid succession, often within the artificial boundaries drawn by colonial powers on the soil of Asia and Africa. As the colonial empire shrank, and a shaky independent Commonwealth expanded, Britain decided to close its doors. According to the then Home Secretary, the realization suddenly dawned that "a sizeable part of the entire population of the Earth is at present legally entitled to come and stay in this already densely populated country".¹¹ The Commonwealth Immigrants Act 1962 restricted unconditional entry into Britain to those born in the United Kingdom and to those who held a United Kingdom passport, i.e. a passport issued by the United Kingdom Government. A Hong Kong inhabitant who held a British, rather than a United Kingdom, passport, in common with all other Commonwealth Citizens who held passports issued by their respective governments, was now subject to immigration control if he attempted to enter Britain. The British Government had obviously decided that since the process of decolonization was proceeding at an accelerated pace, the umbilical cord that joined the colonies to the mother country could be cut in anticipation of imminent self-government and independence.

At about this time, there occurred an event that may have some relevance to Hong Kong. When the independence of the East African colonies of Kenya and Uganda was being negotiated, the British Government guaranteed the security of the Asian minority in those territories by permitting them, if they so desired, to retain Citizenship of

the United Kingdom and Colonies and by offering them United Kingdom passports. This immigration package would secure them entry into, and right of abode in, the United Kingdom should black African majority rule ever become intolerable. It was an insurance policy designed to provide security to a section of the community whose continued presence was vital to the economic life of these two territories. About 200,000 persons of Asian origin accepted this offer, and were granted United Kingdom citizenship and issued passports, thereby guaranteeing them the right of entry into, and residence in, Britain in the unlikely event of that need ever arising.

Before the decade was over, these newly independent East African states introduced a policy of "Africanization" which deprived the Asians of their livelihood and rendered them destitute, and made their continued residence in East Africa illegal. The British Government responded by hastily introducing the Commonwealth Immigrants Act 1968. Under that new law, a holder of a United Kingdom passport could enter Britain only if he, or at least one of his parents or grandparents, had been born in the United Kingdom. It was a condition that no East African Asian could fulfil. It was a barrier that effectively shut out the East African Asians at a moment of despair and crisis, violating a pledge that had previously been given. In the view of the European Commission of Human Rights, the new law was racially motivated in that it was clearly directed at the Asians and sought to exclude them from entry into Britain.¹² The Commonwealth Immigration Act 1971, which soon followed and which granted "patrials"¹³ a right of abode in Britain, whether or not they were citizens of the United Kingdom and Colonies, led the European Commission to conclude that Britain appeared to be adopting a deliberate policy of permitting only white Commonwealth citizens to enter and reside in the country.

5. *British Dependent Territory Citizen*

In 1983, the Hong Kong inhabitant metamorphosed into a "British Dependent Territory Citizen" (BDTC). The British Nationality Act 1981 sought to separate the United Kingdom from its 15 colonies in order to distinguish those Citizens of the United Kingdom and

Colonies who had the right of abode in the United Kingdom from those who were denied it. The former would be known as “British Citizens”, while the latter would share the common designation of “British Dependent Territory Citizens” enjoying a right of entry into, and abode in, only the colony in which they resided. They would all continue to be Commonwealth Citizens. However, among the BDTCs themselves, an exception was made in favour of the predominantly white caucasian inhabitants of Gibraltar and the Falkland Islands. They were granted the facility of obtaining the right of abode in the United Kingdom,¹⁴ a privilege denied to other BDTCs who were mainly negroid or mongoloid in origin. For the Hong Kong inhabitant, therefore, all that occurred was a change in nomenclature; a new epithet that served to distance him even further from Britain and identify him specifically with the territory in which he lived.

6. *British National (Overseas)*

The Hong Kong (British Nationality) Order 1986, made in pursuance of the Joint Declaration,¹⁵ seeks to withdraw from Hong Kong inhabitants, with effect from July 1, 1997, the status of British Dependent Territory Citizen. On that day, Hong Kong would, in terms of the Hong Kong Act 1985, cease to be a British dependent territory. As recompense, the 1986 Order offers all BDTCs in Hong Kong an opportunity to register, between July 1, 1987 and June 30, 1997, as British Nationals (Overseas) and thereby obtain a passport appropriate to that status. This new status will not guarantee the right of entry into, or abode in, Hong Kong on and after July 1, 1997 since Hong Kong would then be subject to the sovereignty of the People’s Republic of China. All it provides is a travel document bearing the British insignia.

7. *Chinese National*

In a memorandum attached to the Joint Declaration, the Chinese government asserted that:

Under the Nationality Law of the People’s Republic of China, all Hong Kong Chinese compatriots, whether they are holders of the British Dependent Territories Citizens’ passport or not, are Chinese nationals....

Consequently,

the competent authorities of the Government of the People's Republic of China will, with effect, from July 1, 1997, permit Chinese nationals in Hong Kong who were previously called "British Dependent Territories Citizens" to use travel documents issued by the Government of the United Kingdom for the purpose of travelling to other states and regions. The above Chinese nationals will not be entitled to British consular protection in the Hong Kong Special Administrative Region and other parts of the People's Republic of China on account of their holding the above-mentioned British travel documents.

This assertion suggests that in and after 1997, all Hong Kong inhabitants of Chinese origin will become Chinese nationals. This is in accord with the Nationality Law of the People's Republic of China 1980 which states that every person whose parents are Chinese nationals or one of whose parents is a Chinese national has, subject to limited exceptions, Chinese nationality. Hong Kong inhabitants who are not of Chinese origin will presumably remain British Nationals (Overseas), while their descendants born on and after July 1, 1997 will be British Overseas Citizens. Both such BNOs and BOCs will be stateless in the sense that they will not, by virtue of such status, enjoy a right of entry into, or abode in, any country in the world.

C. The International Law relating to Nationality

The classical doctrinal position saw nationality simply as an attribute granted by a sovereign state to its subjects. That position was reflected in the 1930 Hague Convention on Nationality which declares in Article 1 that "It is for each state to determine under its law who are its nationals." But that Article immediately adds that such law shall be recognized by other states "in so far as it is consistent with international conventions, international custom, and the principles of law generally recognized with regard to nationality". The implication is clear. The power of a state to confer nationality is subject to the constraints of international law.

One branch of international law that regulates nationality is human rights law. The Inter-American Court of Human Rights expressed this contemporary view in its 1984 advisory opinion in *Proposed Amendments to the Naturalization Provisions of the Political Constitution of Costa Rica*¹⁶ in the following terms:

It is generally accepted today that nationality is an inherent right of all human beings. Not only is nationality the basic requirement for the exercise of political rights, it also has an important bearing on the individual's legal capacity. Thus, despite the fact that it is traditionally accepted that the conferral and regulation of nationality are matters for each state to decide, contemporary developments indicate that international law does impose certain limits on the broad powers enjoyed by the states in that area, and that the manner in which states regulate matters bearing on nationality cannot today be deemed within their sole jurisdiction; the powers of the state are also circumscribed by their obligations to ensure the full protection of human rights.

The human right to a nationality is expressed in Article 15 of the Universal Declaration of Human Rights in the following terms:

1. Everyone has the right to a nationality.
2. No one shall be arbitrarily deprived of his nationality, nor denied the right to change his nationality.

The right to a nationality was not included in the International Covenant on Civil and Political Rights and may, therefore, appear not to have assumed through that instrument, the force of a binding treaty obligation. But the right to a nationality is implied in several provisions of that Covenant; e.g. Article 2 which makes the covenant applicable to *all individuals subject to the jurisdiction of a state party*; Article 12 which states that no one shall be arbitrarily deprived of the right to *enter his own country*; and Article 25 which asserts the right of *every citizen* to participate in the conduct of public affairs. Before an individual can enjoy the rights recognized in Articles 12 and 25, he needs to be the national of a particular country. If human rights are regarded

as inherent and inalienable, it can hardly be suggested that some human beings may be denied, upon no rational basis, the enjoyment of certain rights. Therefore, it would appear that possession of a nationality by every human being is recognized by the Covenant as an essential pre-requisite.

This view is affirmed by the Convention on the Reduction of Statelessness 1961, which contains provisions designed to ensure that no person is rendered, or remains, stateless. Similarly, the Convention on the Nationality of Married Women 1957 seeks to prevent the loss of nationality consequent on marriage, dissolution of marriage, or the unilateral act of a spouse. While these two treaties imply a right to a nationality, both the American Declaration of the Rights and Duties of Man 1948 and the American Convention on Human Rights 1969 expressly recognize the existence of such right.

In the circumstances, the view of the Inter-American Court of Human Rights that “it is generally accepted today that nationality is an inherent right of all human beings” may be accepted as an accurate statement of international law. Four important attributes of this right appear to be:

- (1) The right not to be arbitrarily deprived of one’s nationality;
- (2) The right to change one’s nationality and its corollary;
- (3) The right not to be compulsorily naturalized;
- (4) The right not to be rendered stateless.

It is now proposed to examine the extent to which the treatment accorded to the Hong Kong inhabitant in recent years conforms to the requirements of international law.

D. The Application of International Law to Hong Kong

1. The Right to a Nationality

Article 5 of the 1930 Hague Convention states that within a third state, a person having more than one nationality shall be treated as if he had only one. In determining what that nationality shall be,

Article 5 requires the third state to recognize exclusively in its territory either the nationality of the country in which such person is “habitually and principally resident”, or the nationality of the country with which in the circumstances he appears to be in fact “most closely connected”. In determining cases of dual nationality, international arbitrators have given their preference to “the real and effective nationality, that which accorded with the facts, that based on stronger factual ties between the person concerned and one of the states whose nationality is involved”¹⁷. They have considered “habitual residence” as an important factor, while also taking into account the centre of an individual’s interests, his family ties, his participation in public life, attachment shown by him for a given country and inculcated in his children. Similarly, courts of third states have, in determining such cases, preferred “the real and effective nationality”; national laws often reflect this tendency when they make naturalization dependent on conditions indicating the existence of “a link”.¹⁸

The International Court of Justice took all these factors into account when, in its judgment in the *Nottebohm Case*, it observed that

Nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties. It may be said to constitute the juridical expression of the fact that the individual upon whom it is conferred, either directly by the law or as the result of an act of the authorities, is in fact more closely connected with the population of the state conferring nationality than with that of any other state.¹⁹

In that case, the Court held that Guatemala was under no obligation to recognize the naturalization by Liechtenstein of Nottebohm, a German by birth who was settled in Guatemala. The Court found that:

Naturalization was asked for not so much for the purpose of obtaining a legal recognition of Nottebohm’s membership in fact in the population of Liechtenstein, as it was to enable him to substitute for his status as a national of a belligerent state

that of a national of a neutral state, with the sole aim of thus coming within the protection of Liechtenstein but not of becoming wedded to its traditions, its interests, its way of life, or of assuming the obligations – other than fiscal obligations – and exercising the rights pertaining to the status thus acquired.²⁰

In the case of the Hong Kong inhabitant, the territory in which he is “habitually and principally resident”; to which he is “most closely connected”; and with which, through family, business and other ties, he has developed an “attachment” or a “link”, is indisputably Hong Kong. It is a territory with clearly defined boundaries, with a population of nearly six million people constituting a cohesive national group, with its own economic and social system, and a unique cultural identity, and which has for over a century and a half existed as a separate legal entity. It is, in every respect, a nation. It has been, and still is, administered by Britain under a colonial system which now stands condemned by international law. The colonial power is obliged to restore the territory to its inhabitants, and its inhabitants are entitled to exercise their right of self-determination.²¹ In the exercise of that right, they may decide to freely associate or integrate with another state, or they may decide to emerge as a sovereign independent state. Therefore, the nationality to which the Hong Kong inhabitant may under international law lay claim is a Hong Kong nationality. His right to a nationality is a right to have and to enjoy the status of citizen of Hong Kong.

2. *The Right not to be Arbitrarily Deprived of One's Nationality*

It is a principle of international law that a colony has a status distinct and separate from the colonial power, and that separate and distinct status exists until the people of the colony have exercised their right of self-determination.²² Since the adoption of this principle in the mid-twentieth century, the scheme of British nationality law has been to phase out its colonial subjects into nationalities of their own, simultaneously with their exercise of the right of self-determination. As Britain's most recent report to the UN Human Rights Committee states,

Successive British Governments have since 1945 consistently promoted self-government and independence in the dependent territories of the United Kingdom in accordance with the wishes of the inhabitants and the provisions of the United Nations Charter. The United Kingdom's policy towards the dependent territories for which the United Kingdom is still responsible continues to be founded on respect for the inalienable right of [peoples] to determine their own future. The vast majority of the dependent territories for which the United Kingdom was previously responsible have chosen, and now enjoy, independence. A small number, however, prefer to remain in close association with the United Kingdom, although they are able to modify their choice at any time.²³

Pending their exercise of this right and, in most cases, emergence into statehood, the inhabitants of the colonies were to share the nationality of the colonial power, i.e. British nationality. It was an essentially transient status.

Nationality is not an empty shell. It demands obligations to the state concerned, and it confers rights and privileges on the individual. One such right is that recognized in Article 12 of the International Covenant on Civil and Political Rights: the right to enter one's own country; to choose one's residence within that country; and the right to leave that country. Denial of that right may constitute deprivation of one's nationality. But the restriction of unconditional entry into Britain, imposed on the Hong Kong inhabitant by the Commonwealth Immigrants Act 1962 and affirmed by the Commonwealth Immigration Act 1971, the British Nationality Act 1981, and the Hong Kong (British Nationality) Order 1986, may not produce that effect since none of those statutes or statutory instruments have in any way prejudiced the exercise of that right by the Hong Kong inhabitant in respect of the territory with which he is "most closely connected", namely, Hong Kong. Recent British legislation only limited the attributes of an essentially transient status.

As noted above, the nationality to which the Hong Kong inhabitant appears to be entitled as of right is a Hong Kong nationality. It is that nationality, then, of which he may not be arbitrarily deprived. But the Joint Declaration between Britain and China, by which sovereignty is transferred by the former to the latter without seeking or obtaining the consent of the inhabitants of the territory, appears to do precisely that, namely, to deprive them of that quiescent nationality. The Joint Declaration seeks to nullify the right which the inhabitants of Hong Kong have acquired under contemporary international law to freely determine their political status and, therefore, their nationality. In that respect, the Joint Declaration appears to constitute a violation of the right of the Hong Kong inhabitant not to be arbitrarily deprived of his nationality.

3. *The Right to Change One's Nationality*

This right was expressed by Socrates in the following terms:

We further proclaim to any Athenian by the liberty which we allow him, that if he does not like us when he has come of age and has seen the ways of the city, and made our acquaintance, he may go where he please and take his goods with him. None of our laws will forbid him, or interfere with him. Anyone who does not like us and the city, and who wants to emigrate to a colony or to any other city may go where he likes, retaining his property.²⁴

It is a right which has been invoked by millions of people who have crossed not only national borders, but also continents and oceans, and thereby participated in creating, or enriching, nations such as Canada and the United States, and, to a lesser extent, Australia. As the Inter-American Court of Human Rights observed in the *Costa Rican Case*,

Nationality no longer depends on the fortuity of birth in a given territory or on parents having that nationality; it is based rather on a voluntary act aimed at establishing a relationship with a given political society, its culture, its way of life, and its values.²⁵

In most cases, the right to change one's nationality cannot be exercised without first renouncing an existing nationality. Therefore, the right to renounce one's nationality is an indispensable component of the right to change it.²⁶ While some states still claim the right to withhold consent to the renunciation of nationality, such claims may no longer be consistent with modern developments in human rights. This was the view expressed in the 1968 *Iranian Naturalization Case*²⁷ by the Administrative Court of Frankfurt, in the Federal Republic of Germany.

The plaintiff in that case was an Iranian national who had lived in Germany since 1950, studying and working as a physician. He was married to a German national by whom he had four children. For almost 3 years he tried to obtain the consent of the Iranian Embassy in Germany to an application made by him for change of nationality. Such consent was required under the 1929 Convention on Establishment between the German Reich and the Persian Empire which stated, inter alia, that:

The governments of the contracting states undertake not to naturalize any citizen of the other state without the prior consent of his government.

Plaintiff's requests for consent, however, remained unanswered. Thereupon, he instituted proceedings against the German authorities contesting their decision not to approve his application for naturalization. The Court held that:

The right enjoyed by the contracting states to consent to the naturalization of their nationals involves a corresponding obligation upon them to declare themselves when one of their nationals seeks such consent in the process of applying for naturalization within the other state. . . . If the state concerned fails to respond one may assume that that state is no longer interested in exercising its right to grant the requested permission. Such behaviour might be explained by the fact that the right of a state to withhold its consent is no longer consistent with modern developments in human rights according to which

no restriction may be placed upon the individual's right to choose a nationality of his preference. This principle has been expressed in Article 15 of the United Nations Declaration of Human Rights 1948. Under this Article, no one shall be prevented from changing his nationality.

While the Court preferred to proceed on the basis that silence on the part of the Iranian Embassy ought to be construed as a renunciation of its right under the Convention to grant or withhold permission, the Court did express the view that even in the event of the Iranian Government claiming the right to refuse permission, it was doubtful whether, on that ground alone, the plaintiff could have been denied his application for naturalization. This view of the Court is supported by the rule of international law that it is for each state to determine under its own law who its nationals are.²⁸

There is no law in Hong Kong which prevents anyone from renouncing his present nationality. But the Nationality Law of the People's Republic of China, which will, in terms of the Basic Law, apply in the Hong Kong Special Administrative Region, specifies three grounds upon which alone an application for the renunciation of Chinese nationality may be made, and makes renunciation conditional upon the approval of the Ministry of Public Security.²⁹ This procedure appears to be in conflict with contemporary international law.

4. *The Right not to be Compulsorily Naturalized*

The right not to be compulsorily naturalized appears to be a corollary of the right to change one's nationality since the concept of choice is an essential element of the latter. The pre-eminence of the element of choice is affirmed in the 1957 UN Convention on the Nationality of Married Women which states that:

Neither the celebration nor the dissolution of marriage between one of its nationals and an alien, nor the change of nationality by the husband during marriage, shall automatically affect the nationality of the wife;³⁰

and that:

neither the voluntary acquisition of the nationality of another state nor the renunciation of its nationality by one of its nationals shall prevent the retention of its nationality by the wife of such national.³¹

As MacDougal, Lasswell and Chen point out, “the general principle underlying naturalization is the voluntary choice by an individual of a particular nationality. To impose naturalization upon individual persons against their will, individually or collectively, is incompatible with the commonly accepted principles of international law”.³²

In a 1960 judgment, the Court of Appeal of Cologne, in the Federal Republic of Germany, observed that:³³

One of the generally recognized rules of international law in the matter of nationality is the rule that, apart from cession of territory, persons of full age cannot be naturalized without their consent.

The petitioner in that case was a German woman who had married a Czechoslovak national and thereupon acquired Czechoslovak nationality. A 1945 Czechoslovak Decree provided for the loss of Czechoslovak nationality by all persons of “German ethnic origin”, and by virtue of that Decree she became stateless. A 1953 Czechoslovak law provided that persons of “German ethnic origin” then resident in Czechoslovakia who had lost their Czechoslovak nationality by virtue of the 1945 Decree re-acquired their previous Czechoslovak nationality. The petitioner, who had never applied for re-naturalization as a Czechoslovak citizen, argued that the 1953 Decree was contrary to the recognized rule of international law that no person of full age could be granted a nationality without her consent. The Court upheld the petitioner’s contention noting that the 1953 Decree did not accord with the rules of international law “because it confers neither a right of option nor a right to object to naturalization”.³⁴

The case referred to above suggests that in the event of a cession of territory, involuntary naturalization may lawfully occur. Perhaps a more accurate formulation of that rule would be that, in the absence

of an agreement to the contrary, when a sovereign power ceded a territory by treaty to another state, the inhabitants of the ceded territory acquired the nationality of their new ruler. This rule was applied in the 1961 decision of the Supreme Court of Japan in *Kanda v. The State*.³⁵ In that case, the Court held that when, under Article 2 of the 1951 Treaty of Peace,³⁶ Japan renounced sovereignty over Korea, the inhabitants of Korea were divested of Japanese nationality. As the Court observed:

A state is composed of people, territory, and a government as its essential requisites for existence, and if it lacks any one of these it cannot exist as a state. Recognition of the independence of Korea is recognition of Korea as an independent state; it is none other than the recognition that Korea possesses the people, territory, and government appertaining to it. Accordingly, by the Peace Treaty Japan has renounced sovereignty over the people belonging to Korea. This means that the people belonging to Korea have been divested of Japanese nationality. The people belonging to a country are the people who possess the nationality of that country and who are subject to the sovereignty of that country. Put conversely, the people who possess the nationality of a country are subject to its sovereignty. Thus, renunciation by Japan of sovereignty over the people belonging to Korea constitutes the divestment of these people of their Japanese nationality.³⁷

On the other hand, there are instances when instruments of cession have made special provision for the retention of the original nationality by the inhabitants of the ceded territories.³⁸ For instance, the 1890 agreement whereby Britain ceded the island of Heligoland to Germany provided that:

The German Government will allow to all persons native of the territory thus ceded the right of opting for British nationality by means of a declaration to be made by themselves, and in the case of children under age by their parents or guardians, which must be sent in before the 1st of January 1892.³⁹

Similarly, the 1934 agreement by which Britain transferred to the State of Perak sovereignty over the territory known as the Dindings also provided that:

Nothing in this agreement shall operate to affect the nationality of any person domiciled or ordinarily resident in the territory of the Dindings at the date of the entry into force of this agreement.⁴⁰

Indeed, the 1933 Inter-American Convention on Nationality contains the following provision:

In case of the transfer of a portion of the territory on the part of one of the States signatory hereof to another of the States, the inhabitants of such transferred territory must not consider themselves as nationals of the State to which they are transferred, unless they expressly opt to change their original nationality.⁴¹

International law has been radically transformed in the second half of the twentieth century. As Judge Dillard of the International Court of Justice stressed in his separate opinion in the *Western Sahara Case*,⁴² today “it is for the people to determine the destiny of the territory and not the territory the destiny of the people”. Under contemporary international law, consultation with the people is a *sine qua non* for any change in their political status. The ceding of territories, without the express consent of the people living in them, was outlawed by the United Nations in terms of its own Charter nearly 45 years ago. Thereafter, the UN resolutions on decolonization and the international covenants on human rights have created a new legal system based upon the principle of self-determination, and that principle confers upon the inhabitants of Hong Kong the right to decide what their future political status should be.

Yet, the Joint Declaration seeks to impose Chinese nationality on all ethnic Chinese inhabitants of Hong Kong as a natural consequence of the transfer of sovereignty over Hong Kong by Britain to China. If the transfer of sovereignty is in the nature of a cession of territory, it

may be argued that the conferment of Chinese nationality on “all Hong Kong compatriots” is a valid exercise of sovereign power under international law. But since international law no longer permits territory to be ceded in that manner, the benefit of that consequence can hardly be availed of. In the result, the attempt to compulsorily naturalize all ethnic Chinese inhabitants of Hong Kong appears to be in direct conflict with contemporary international law.

5. *The Right not to be Rendered Stateless*

In recent decades the international community has increasingly focused its attention on the problem of statelessness. The 1954 Convention Relating to the Status of Stateless Persons, and the 1961 Convention on the Reduction of Statelessness, are but two attempts at the international level to eradicate this problem. In the early years of decolonization, the policy of British nationality legislation also appeared to be designed to avoid statelessness. For example, when Burma opted for independence outside the Commonwealth, the Burma Independence Act 1947 provided that a certain category of persons (i.e. all persons born in Burma, or whose fathers or paternal grandfathers were born in Burma, and women who were aliens at birth but had become British subjects by marriage to such persons) would cease to be British subjects. But the Act also provided that any person within that category who was domiciled or ordinarily resident in the United Kingdom or a colony, or who while ceasing to be a British subject neither became, nor became qualified to become, a citizen of Burma, shall have the right to elect, by making a declaration within 2 years, to remain a British subject.

In contrast, neither the Joint Declaration nor the Hong Kong Act 1986 makes any reference to the approximately 11,000 non-Chinese British Dependent Territory Citizens who are permanent residents in Hong Kong. These persons, who are mainly of Indian, Pakistani or Portuguese origin, have the option to seek, under the Hong Kong (British Nationality) Order 1986, the status of British National (Overseas). If they do so, they will, after 1997, live on Chinese territory as aliens, but without any country which they could call their own and to which they could return should the need ever arise. They

will possess a travel document, and may have a permanent home, but they will be stateless. Under the Basic Law of the Hong Kong SAR, they will be discriminated against in respect of employment and access to public office.⁴³ This unfortunate situation appears also to be in conflict with Britain's treaty obligations under the Convention on the Reduction of Statelessness, which applies to Hong Kong, and which states quite explicitly that every treaty providing for the transfer of territory shall include provisions designed to secure that no person shall become stateless as a result of the transfer. It requires a contracting state to grant its own nationality to a person who would otherwise be stateless.

E. Conclusion

To summarize, therefore, the application of international human rights law to Hong Kong appears to lead to the following conclusions: that the Hong Kong inhabitant has been denied his right to a nationality; that he will shortly be arbitrarily deprived of the nationality to which he is entitled, namely, a Hong Kong nationality; and that he will eventually be denied the right to change his nationality. While the large majority of Hong Kong inhabitants will be subjected, in 1997, to compulsory naturalization, a small minority will probably be rendered stateless. Preoccupied with attempts to secure, or qualify for, other nationalities, the educated, articulate middle class in Hong Kong does not appear to have concerned themselves with this serious violation of the human rights of those less privileged who must necessarily remain behind.

What they appear to have failed to recognize is that this spectacle of a colonial power attempting to distance itself from its colonial subjects by offering deceptive designations devoid of any substance must surely degrade both the giver and the taker. On the one hand, at least one obligation that must arise from long colonial rule over a foreign territory which has nourished the ruler in more ways than one, is responsibility for the welfare of its inhabitants, whatever their racial stock may be; a responsibility that can logically and legally end, not by handing them over to an authoritarian Marxist regime, but upon

the granting of the right of self-determination. On the other, it is hardly consonant with the dignity and self-respect of a proud Asian people that they should have submitted, from time to time, to barren classifying epithets, conferred on them without their consent, and then proceed to roam the world in search of more substantial epithets, when what they should have sought and, indeed, are entitled to have, is an identity and a nationality uniquely their own.

ENDNOTES

1. The *Nottebohm Case*, ICJ Reports 1955, p.4 at 23.
2. Cmd 5482, p.24. At the Imperial Conference of 1937, it was agreed that "British subject does not mean subject of Great Britain, but is one of long standing as denoting generally all subjects of Her Majesty, to whatever part of the British Commonwealth they belong". Noted by Roberts-Wray, *Commonwealth and Colonial Law* (London: Stevens & Sons, 1966) at p.4.
3. Canadian Citizenship Act 1946. For previous attempts at distinguishing Canadian nationality from immigration and other purposes, see Arthur Berriedale Keith, *Constitutional Law of British Dominions* (London: MacMillan & Co Ltd, 1933), pp.120-121.
4. Article 73.
5. Ian MacDonald and Nicholas Blake, *The New Nationality Law* (London: Butterworths, 1982) p.5.
6. The Citizenship Acts of Ceylon and South Africa did not contain this common clause, but distinguished the citizen of a Commonwealth country from an alien.
7. For example, the Pakistan Citizenship Act 1951, s.2, defined an "alien" as a person who is not a Pakistani citizen or a Commonwealth citizen.
8. Increased to 5 years by the Commonwealth Immigrants Act 1962, s.12.
9. See Sir William Dale, *The Modern Commonwealth* (London: Butterworths, 1983) p.189.
10. United Nations General Assembly Resolution 1514 (XV) of 14 December 1960 required that immediate steps be taken in colonial territories to transfer all powers to the people of those territories, without any conditions or reservations, in accordance with their freely expressed will and desire, in order to enable them to enjoy complete independence and freedom. It expressed the view that inadequacy of political, economic, social or educational preparedness should not serve as a pretext for delay. This decision of the General Assembly, which was adopted with no dissenting vote, in effect, superseded the relevant provisions in the UN Charter.
11. Statement made by the Home Secretary when moving the second reading of the Commonwealth Immigrants Bill on 16 November 1961, quoted by Mr.J.E.S. Fawcett in his separate opinion in *East African Asians v. United Kingdom*, 3 EHRR 76 at 93.

12. *East African Asians v. United Kingdom* 3 EHRR 76.
13. A “patrial” was a Citizen of the United Kingdom and Colonies who had that citizenship by birth, adoption, naturalization, or registration in the United Kingdom, or had been ordinarily resident in the United Kingdom for at least 5 years immediately preceding that Act, or was a Commonwealth Citizen born to or adopted by a parent who at the time of the birth or adoption had Citizenship of the United Kingdom and Colonies by birth in the United Kingdom.
14. British Nationality Act 1981, s.5; British Nationality (Falkland Islands) Act 1983.
15. Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People’s Republic of China on the Question of Hong Kong, 26 September 1984, 23 *ILM* (1984)
16. *ILR*, Vol. 79 (1989), p.283 at 294.
17. *Nottebohm Case*, ICJ Reports 1955 p.4 at 22.
18. *Ibid.*
19. *Ibid.* at 23.
20. *Ibid.* at 26.
21. The question whether the inhabitants of Hong Kong are entitled to exercise the right of self-determination is more fully discussed in Nihal Jayawickrama, “Hong Kong: The Gathering Storm; A non-self-governing territory denied the right of self-determination”, a paper presented to the Study Group on Internal Conflicts and their Resolution, convened by the Peace Research Institute of Oslo, at the 25th Anniversary Conference of the International Peace Research Association, at Groningen, The Netherlands, on 4 July 1990. The paper is due to be published in *Bulletin of Peace Proposals*, Vol.22, No.2, June 1991.
22. United Nations General Assembly Resolution 2625 (XXV) of 14 October 1970.
23. Third Periodic Report of the United Kingdom of Great Britain and Northern Ireland submitted under Article 40 of the International Covenant on Civil and Political Rights, 30 October 1989, CCPR/C/58/Add.6 of 6 March 1990.
24. Dialogue with Crito, quoted by Krishna Iyer J in *Maneka Gandhi v. Union of India* [1978] 2 SCR 621, at 715.
25. *ILR*, Vol.79 (1989), p.295.

26. Myres McDougal, Harold D. Lasswell, & Lung-chu Chen, "Nationality and Human Rights: The Protection of the Individual in External Arenas", *Yale Law Journal*, Vol.83 (1974), p.900 at 929.
27. ILR, Vol.60 (1981), p.204 at 207.
28. 1930 Hague Convention on Certain Questions Relating to the Conflict of Nationality Laws, Article 1.
29. A Chinese national may renounce Chinese nationality upon approval of his application provided that he is a close relative of an alien, he has settled abroad, or he has other legitimate reasons (Article 10).
30. Article 1.
31. Article 2. See also the 1933 Montevideo Convention on Nationality which provides that "neither matrimony nor its dissolution affects the nationality of the husband or wife".
32. *op.cit.*, at 920.
33. *Compulsory Acquisition of Nationality Case*, ILR, Vol.32 (1966), p.166.
34. *Ibid.*, at 167.
35. ILR, Vol.32 (1966), p.171.
36. 8 September 1951, 136 UNTS 45.
37. *Ibid.*, p.174. See also *Khalil Ahmed v. State (judgment of the High Court of Allahabad, India)* (1976) ILR, Vol.49, p.504.
38. The instances referred to below are cited by Clive Parry, *Nationality and Citizenship Laws of the Commonwealth* (London: Stevens & Sons Ltd, 1957), pp.204-205.
39. Article XII(2), annexed to the Anglo-German Agreement Act 1890.
40. Article 2, annexed to the Dindings Agreement (Approval) Act 1934.
41. Cited by MacDougal, Lasswell and Chen, at p.925.
42. ICJ Reports 1975, p.122.
43. See Basic Law, Articles 44, 55, 61, 71, 90, and 101.

CLOSING

Nationality cannot be forcefully imposed upon people. No state should be able to positively determine the conditions upon which a person becomes a national of a state and it does not follow that the rules for one state as to its nationals must always be recognized abroad. The Hague Convention recognizes this and allows non-recognition insofar as the rules are inconsistent with “international convention, international custom or principles of law generally recognized with regard to nationality”.

In Hong Kong there appears little discussion about how to address the problem of what will be large numbers of people being potentially viewed as dual nationals. This Forum raised some of the problems. Now what of the answers as to how dual nationals can be reassured? Of the suggestions that may be canvassed the most likely to enjoy the widest support is that of negotiated bilateral agreements between respective states.

Two options for such negotiated agreements may be given as follows: (1) universal free choice on the part of the dual nationals concerned; or (2) a standard rule of election based on agreed and accepted facts such as domicile or habitual residence.

The Hague Convention utilizes habitual residence and that of effectiveness. This has been critiqued by the Chinese in the past as disregarding the principle of national self-determination and as being unilaterally compulsory in nature. However, the Chinese have accepted the notion of choice in other bilateral agreements, for instance in the Sino-Indonesian Dual Nationality Treaty of 1955. Article I of the Treaty gives a dual national the right to choose.

The High Contracting Parties agree that all persons who hold simultaneously the nationality of the People’s Republic of China and the nationality of the Republic of Indonesia shall choose, in accordance with their own will, between the nationality of the People’s Republic of China and the nationality of the Republic of Indonesia...

In the end, a balance must be struck between the different approaches to dual nationality. This Treaty is one example of striking a balance. It respects the country's independence as a signatory to the agreement. In the same way respect is accorded to the individuals who are the ultimate subjects of its provisions by enshrining the right of election. The people of Hong Kong have demonstrated their commitment to Hong Kong again and again. It seems that allowing them to elect and thereafter act in accordance with conscience will pose no risk for either country to which they have owed or owe allegiance. It is an honourable solution.

J. Arthur McInnis

THANK YOU

Today's Forum on "Nationality, Passports and 1997" is part of a continuing commitment by the Faculty of Law at the University of Hong Kong to provide for informed public discussion on matters of legal concern to Hong Kong. Aside from today's Forum on the Basic Law and the Hong Kong Bill of Rights, seminars will shortly be held to discuss the issues of Tax Treaties for Hong Kong, and the Legal Interaction between Hong Kong and China.

The Faculty of Law today has a full time teaching staff of over 50 highly qualified lecturers. They have a wealth of experience not only as teachers but as lawyers, researchers, government officials and as consultants to government and non government organizations. Our seminar series is designed to share this expertise with the community. We do not claim to be the repository of all legal knowledge in Hong Kong and are particularly pleased to invite outside speakers to take part in our seminars.

I believe that a legitimate part of our academic enterprise is to inform and educate, not just through the print medium, but in public forums such as this where ideas can be tested and challenged and broadly disseminated. I hope today that we have gone someway towards dispelling the notion that we simply function in the ivory tower of the legal academy.

An event such as this seminar is the final product of a lot of hard work. In particular I would like to thank the seminar organizer Art McInnis who wore two hats as a member of the Law Faculty and as Vice-President of our co-sponsor, The Canadian Chamber of Commerce in Hong Kong. I would also like to thank Eliza Chan, Chairperson of the Chamber's Legal Policy and Government Relations Committee for her support and opening address. I hope that this is the start of many more co-operative ventures between the Law Faculty and the Canadian Chamber of Commerce in Hong Kong and other similar organizations. Our distinguished group of speakers both informed and stimulated us and to them I extend my grateful thanks. Last but not least I would like to thank Betty Lam from the Faculty of Law for attending to administrative matters for this seminar.

Peter Rhodes
Dean

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Ms. Eliza Chan is a Canadian Solicitor with the firm of Jewkes & Partners in association with Mallesons Stephen Jacques. Ms. Chan holds degrees from the University of Victoria and the University of British Columbia. She chairs the Legal, Policy and Government Relations Committee of the Canadian Chamber of Commerce.

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Mr. Desjardins is the First Secretary at the Commission for Canada in Hong Kong where he serves as Consular Officer. He was posted to Hong Kong from 1981 to 1984 and now since 1986. Mr. Desjardins has also served in Beijing.

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Dr. Jayawickrama is a Sr. Lecturer at the Faculty, a graduate of the University of Ceylon he received his Doctorate from the University of London for research on international human rights law.

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He has served on the legal staff of the International Commission of Jurists, Geneva and the Commonwealth Secretariat, London being engaged in research into various aspects of human rights at both national and international levels. He has written on the judicial protection of human rights and other aspects of constitutional and administrative law.

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Mr. Williams is Chief of Consular Services at the American Consulate in Hong Kong. Mr. Williams is a lawyer by training and a member of the Bar of the State of Utah. He has 25 years of experience in the United States Foreign Service and has specialized in consular and immigration affairs.

■ **Mr. Peter Rhodes**

Mr. Peter Rhodes is a Sr. Lecturer and Dean of the Faculty of Law. He studied law at the Universities of Auckland, Alberta and Harvard. He is a Barrister and Solicitor in New Zealand and Canada.

NATIONALITY LAW OF THE
PEOPLE'S REPUBLIC OF CHINA
(Adopted at the Third Session of the Fifth National People's
Congress on September 10, 1980)

- Article 1 This law is applicable to the acquisition, renunciation and restoration of the nationality of the People's Republic of China.
- Article 2 The People's Republic of China is a unified, multi-national country; Persons belonging to any of the nationalities of China have Chinese nationality.
- Article 3 The People's Republic of China does not recognize dual nationality for any Chinese national.
- Article 4 Any person born in China whose parents are Chinese nationals or one of whose parents is a Chinese national has Chinese nationality.
- Article 5 Any person born abroad whose parents are Chinese nationals or one of whose parents is a Chinese national has Chinese nationality. But a person whose parents are Chinese nationals and have settled abroad or one of whose parents is a Chinese national and has settled abroad and who has acquired foreign nationality on birth does not have Chinese nationality.
- Article 6 Any person born in China whose parents are stateless or of uncertain nationality but have settled in China has Chinese nationality.
- Article 7 Aliens or stateless persons who are willing to abide by China's Constitution and laws may acquire Chinese nationality upon approval of their applications provided that:
- 1) they are close relatives of Chinese nationals; or
 - 2) they have settled in China; or
 - 3) they have other legitimate reasons.

- Article 8 Any person who applies for naturalization in China acquires Chinese nationality upon approval of his or her application; no person whose application for naturalization in China has been approved is permitted to retain foreign nationality.
- Article 9 Any Chinese national who has settled abroad and who has been naturalized there or has acquired foreign nationality of his own free will automatically loses Chinese nationality.
- Article 10 Chinese nationals may renounce Chinese nationality upon approval of their applications provided that:
1) they are close relatives of aliens; or
2) they have settled abroad; or
3) they have other legitimate reasons.
- Article 11 Any person whose application for renunciation of Chinese nationality has been approved loses Chinese nationality.
- Article 12 State functionaries and army men on active service shall not renounce Chinese nationality.
- Article 13 Aliens who were once of Chinese nationality may apply for restoration of Chinese nationality provided that they have legitimate reasons; those whose applications for restoration of Chinese nationality are approved shall not retain foreign nationality.
- Article 14 The acquisition, renunciation and restoration of Chinese nationality, with the exception of cases provided for in Article 9, shall go through the formalities of application. Applications for those under the age of 18 may be filed by the minors' parents or other legal representatives.
- Article 15 The organs handling nationality applications are local, municipal and county public security bureaus at home and China's diplomatic representations and consular offices abroad.

- Article 16 Applications for naturalization and for renunciation or restoration of Chinese nationality are subject to examination and approval by the Ministry of Public Security of the People's Republic of China. The Ministry of Public Security issues a certificate to any person whose application is approved.
- Article 17 The nationality status of persons who have acquired or lost Chinese nationality before the promulgation of this law remains valid.
- Article 18 This law comes into force from the day of promulgation.

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