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香港學生法律評論

With Forewords by

The Honourable Secretary for Justice, Ms Elsie Leung
The Honourable Chief Justice, Mr Andrew Li

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CONTENTS

ANALYSES

ARTICLES

FOREWORD

MESSAGE FROM THE SECRETARY FOR JUSTICE

I am honoured and delighted to write this foreword to the tenth volume of the Hong Kong Student Law Review. Past and present law students at the University of Hong Kong are to be congratulated on their ability to sustain the quality of this publication over the last decade.

The contents of this volume reflect many contemporary legal issues in Hong Kong. These include the development of electoral arrangements, same-sex marriages, the protection of genetic research, involuntary manslaughter and prostitution. It is heartening to see that contributors are tackling difficult issues that are of great relevance to the people of Hong Kong.

Every society needs to develop its laws in accordance with the changing aspirations of its people. But the process of reform can be difficult, particularly when there are opposing views on controversial issues. The community often looks to lawyers and academics to analyse those issues fairly and dispassionately. Law students must develop the ability to do this themselves. Happily, this volume indicates that such an ability is being well nurtured in the Law Faculty.

I would encourage all law students to have a keen interest in current legal issues and to participate in the public debate of them, both now and in their future careers.

THE HONOURABLE ELSIE OI-SIE LEUNG, GBM, JP
Secretary for Justice
Hong Kong Special Administrative Region

FOREWORD

MESSAGE FROM THE CHIEF JUSTICE

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

The rule of law is a cornerstone of our society. For the rule of law to maintain its vigour, it is important that there must continue to be widespread discussion and debate on the many challenging legal issues facing the community.

The Student Law Review makes a significant contribution to discussion and debate on these issues. It covers a range of interesting issues and reflects favourably on the students' willingness to explore, analyse and articulate their views on various issues. I congratulate the efforts and achievements of the editors and the contributors in publishing the Review.

May I take this opportunity to wish you every success in your future endeavours.

THE HONOURABLE MR ANDREW KWOK-NANG LI
Chief Justice
Hong Kong Special Administrative Region

MESSAGE FROM THE DEAN

This is the tenth anniversary of *Hong Kong Student Law Review*, and I would like to send my sincere congratulations to our students for the publication of this volume. For a publication, a decade is a long period of time. The tenth anniversary should be a good time to review and to look forward. Over the past decade, the *Hong Kong Student Law Review* has established a fine reputation of quality. Not only does it provide a forum for publication of students' research, it is also a testimony of the high quality and originality of our students. As in the past, the articles collected in this volume cover a wide range of areas, including theoretical, topical, technical and ethical issues. Looking forward, how could the quality of the *Student Law Review* be further enhanced? Until recently, most of the essays in the *Student Law Review* are originally assignments or essays in a particular course. Maybe it is time to consider publishing, in addition, research work other than term essays or assignments. The Editorial team may also wish to consider conducting empirical research, which is singularly lacking in Hong Kong. At the same time, what role should the *Student Law Review* play in the academic world? Should it remain a publication of mainly students' work, or should it develop along the same direction as many North American law reviews that it becomes a student-run academic journal? Should there be commissioned work? More practically, how could the good work of the students in the *Student Law Review* be better publicized and marketed? These are some of the issues that the *Student Law Review* may wish to ponder. Whatever be its future direction, I am sure that this is another volume that both law students and law teachers can take pride of, and let me once again congratulate every student who has contributed to make this publication a great success.

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

PREFACE

It is with trepid delight we present to you this 10th volume of the Hong Kong Student Law Review. We have come a long way from the 5-man-band in 1994 to the 22 staff today.

Over the years the Editorial Board has undergone major restructuring. While the Review remains a relatively close-knit, friendly working unit, editors now have a more clearly defined area of work. This year, we have further streamlined the hierarchy of the Editorial Board in hope of achieving greater efficiency in editing.

The editorial process has changed substantially. A system for recruiting, screening and editing articles was set up. Following the footsteps of our predecessors, we have launched a number of reforms this year in hope of publishing a journal with higher quality. The first change is to enlist submissions not only from undergraduate students but also postgraduate students. Apart from intellectual rigor of the articles, we also emphasize the importance in clarity of expression and academic merits. Second is to work more closely with our authors. Authors' opinion is sought at an earlier stage. Editors are encouraged to communicate with authors at regular intervals and keep authors informed throughout the editing process.

For the past 11 years the Editorial Board has worked hard to promote the Review locally and internationally. Slowly but steadily, we are expanding our establishing a name for ourselves. We are circulated in all local universities libraries, selected institutional libraries and public libraries. The Review has exchange partnerships with renowned international journals such as the Harvard Women's Law Journal, Deakin Law Review, University of Toronto Faculty of Law Review, University of New South Wales Law Journal, Australian Journal of Law and Society and Macquarie Law Journal. We also have associations with international law student associations online. This year, the Review has focused on expanding our presence in Asia. We are circulated in selected Asian university law libraries in Japan, Korea, Singapore, Thai and Indonesia.

It has taken the Hong Kong Student Law Review 11 years to evolve and fledge into what it is today. Despite all the changes, what has not changed is the vision the first Editorial Board has in 1994: to set up a forum for law students to express their opinion on legal issues. This, we shall continue to do with increasing maturity and strength. At this juncture, we would like to thank our sponsors and every member of our editorial team for his or her devotion and display of team spirit.

Special notes of thanks go to Ms Elsie Leung, our Secretary for Justice, and Mr Andrew Li, our Chief Justice, who kindly wrote us the Forewords for this edition. We echo everything they say and feel sincerely grateful for their words of encouragement. We wish them every success in their terms of office. We would also like to express our deepest gratitude to our Dean, Professor Johannes Chan, for his foreword, and the Faculty of Law for its unfailing assistance and guidance, and last but not least, to the Friends of the Faculty for their generous support, without which we would not have gone this far.

We wish all readers would enjoy this latest edition!

VIVIEN HUI
DORA YING
Editors-in-Chief

RIGHT TO SAME-SEX MARRIAGE IN HONG KONG?

LEONA CHEUNG*

The major argument advanced by proponents of same-sex marriage is that the law's refusal to recognise same-sex marriage is an instance of discrimination based on sexual orientation. In this article, the author critically examines the validity of this seemingly convincing argument. She first introduces the origin of this argument and sets out possible challenges brought about by same-sex unions and marriages to local courts and the legislature in future. The argument is then analysed, with uncertainties and unresolved issues highlighted and thoroughly discussed. The author concludes that the way forward for Hong Kong is not to blind follow global trends, but rather to resolve underlying uncertainties with reference to local values and culture before the decision of legalising same-sex marriage can be made.

I. Introduction

Marriage, always considered as one of the most fundamental institutions of society, has been undergoing drastic changes in modern times. From the ban on polygamous marriages, the shift of balance of powers between the two sexes in the domestic context and the increase in availability of divorce, old concepts such as concubinage, the wife's subservient role and the permanence of marriage vows have been intensely challenged and scrutinised. The time has now come for yet another concept to be put under the spotlight: the essence of marriage as a relationship between individuals of the opposite sex – the heterosexuality of marriage.

The catalyst for refrom comes from gay rights activists. During the 16th century, the notion of gay rights protection was sparked by the arrest and execution of homosexuals after King Henry VIII initiated the English common law tradition of sodomy laws.[1] The first stage of gay rights movement focused on the removal of sodomy laws. During the 18th and 19th centuries, some countries[2] decriminalised sexual acts between men and some[3] reduced the penalty for sodomy. In 1957, the Wolfenden Committee published its report[4] recommending the decriminalisation of consensual homosexual behaviour between adults.[5] In 1962, as the first in the United States of America, sodomy law was removed from the Illinois criminal code. During the 70s, the fight for homosexual rights became more organised and conspicuous.[6] This led to the repealing of sodomy laws and the lowering of the age of consent in some western countries.[7] In 1991, Hong Kong followed suit and decriminalised homosexuality.[8] Next, gay activists shifted their attention to equal rights, which include the purported equal right to marriage. Since 1898, Denmark[9] and other jurisdictions have enacted civil union or domestic partnership laws. With the accumulative successes in their battle for

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* The author would like to express her deepest gratitude to Mr Bart Rwezaura for his enlightening advice and patient guidance during the preparation of this article.

1 *Buggery Act 1533.*

2 For example, France in 1972 and Bavaria in 1813.

3 Including England, where the penalty was reduced from hanging to imprisonment in 1861.

4 Committee on Homosexual Offenses and Prostitution, *The Wolfenden Report: Report of the Committee on Homosexual Offenses and Prostitution* (New York: Stein and Day, 1957).

5 This led to the passage of the *Sexual Offences Act 1967* (see s 12) to replace the *Offences Against the Person Act 1861* (see s 61).

6 For example, in 1970, the first USA gay parade was held in New York City.

7 For example, the Netherlands changed its age of consent for homosexual sexual intercourse from 21 to 16 in 1971; Oregon repeals its sodomy law in 1972; and the *Homosexual Law Reform Act* was passed in New Zealand, legalising sex between males over 16.

8 Section 118, *Crimes Ordinance* (Cap 200).

9 *The Registered Partnership Act*, Denmark.

legal and social reform, local activists are now sharpening their weapons, in preparation for yet a further mission – the legalisation of "same-sex marriage" (SSM) in Hong Kong.
The major argument of proponents for SSM (the Argument) is that the right to marry a person of one's choice is a fundamental human right which should be equally protected for homosexuals and heterosexuals alike; and unless there are compelling reasons to justify the ban on SSM, the current marriage law in Hong Kong[10] which restricts civil marriage to heterosexual couples is discriminatory on the ground of sexual orientation and should be reformed to allow SSM.[11] Thus, it has been claimed that:

> "Homosexual rights claimants are asking for recognition and protection of their rights one at a time and, until the package of rights is protected in full, they will continue to have a valid claim of discrimination."[12]

The objective of this paper is to show that there are some hidden question marks in this Argument. Unless these fundamental questions are addressed, there cannot be any rational conclusion on the issue of whether SSM should be legalised in Hong Kong.

This paper seeks to achieve the abovementioned objective by, firstly, in order to set out the context in which the Argument emerged, outline the conundrum which Hong Kong courts and the Hong Kong Legislative Council (LegCo) will face if, for the former, the validity of an overseas same-sex union is tested in Hong Kong; or if, for the latter, the issue of SSM appears on its agenda (Section 2). Next, the Argument will be logically analysed and the premises that deserve further attention will be singled out (Section 3). After that, the uncertainties and underlying unresolved issues in these premises will be discussed (Section 4). Lastly, a number of unanswered fundamental questions so raised will be consolidated; however, since to answer them would necessitate complex moral, social and philosophical discussion which are outside the scope of this paper, these fundamental questions will only be briefly discussed (Section 5).

It would be pertinent to point out, at the outset, that this paper is only concerned with the argument against the ban on SSM as an instance of alleged violation of the right to be free from sexual orientation discrimination. The writer does not express any view on the issue of protection from discrimination on the ground of sexual orientation in general. Rather, it is submitted that the Argument for SSM is to be distinguished from and considered separately with other arguments under the umbrella of the "right to be free from sexual orientation discrimination"[13]. This distinction is due to the involvement of the delicate notion of marriage in the Argument, which is intrinsically linked with people's values and daily lives, and any alteration of the definiton of which is prone to touch the nerves and arouse the sentiments of homosexuals and heterosexuals alike.

II. The Conundrum

A. The Courts

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10 Section 1(d), *Matrimonial Causes Ordinance* (Cap 179) provides that marriage between parties who are not "respectively male and female" a nullity.

11 See, for example, Mr. Roddy Shaw's argument in *Same-Sex Marriage and Religious Tolerance* at http://www.hkci.org.hk/181a.htm.

12 Arsenault, J G, "'Family' but not 'Parent': The Same-Sex Coupling Jurisprudence of the New York Court of Appeals", 58 *Albany Law Review* 813.

13 Such as employment, regulation of sexual conduct etc.

Two possible kinds of foreign same-sex unions may appear before a Hong Kong court: a same-sex marriage or a same-sex registered partnership[14]. For a marriage obtained overseas to be recognised, two critical elements are required:

- it must satisfy the test of formal validity, i.e. it must meet the requirements as to formalities in the place of celebration[15]; and
- it must pass the essential validity test which requires both parties to have the capacity to marry.

Even where these two elements are satisfied, the court retains discretion to refuse recognition if the marriage is considered to be contrary to public policy.[16]

Assuming that the formal validity of an overseas SSM is unproblematic, the first hurdle a same-sex couple has to overcome would be to have the capacity to marry. If the parties are domiciled in Hong Kong, they are unlikely to fulfil this requirement under the current legal position[17], which is a matter for the legislature. The second hurdle would be to persuade the court to exercise its policy-based discretion.

The main issue for the court, therefore, is whether it should exercise its policy-based discretion and recognise the SSM. Cumming-Bruce J pointed out in *Radwan v Radwan (No 2)*[18] that:

> "[I]t is an over-simplification of the common law to assume that the same test... applies in every kind of incapacity... Different public and social factors are relevant to each case."

The question of whether to afford recognition should be sub-divided into categories according to the nature of the marriage in question, and the test of public policy should be applied to each category separately.[19] In relation to SSM, we must consider whether there are any legitimate policy concerns which would justify the courts' refusal to grant recognition. This question will be further explored in the sections below.

If the union is a registered partnership, according to John Murphy[20], there are two broad problems that the courts must resolve:

- whether registered same-sex partnerships are dealt with on the basis of "contract" or on the basis of "status"; and
- how to deal with the fact that there are many different forms of such partnerships.

However, regardless of how these partnerships are to be recognised, the issue this paper is concerned with is whether to recognise these unions at all.

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14 There are various similar forms of such partnerships, such as "domestic union", "civil union" and "domestic partnership" etc.

15 *Simonin v Mallac* [1860] 2 Sw and Tr 67.

16 *Cheni v Cheni* [1965], [1962] 3 All ER 873 *per* Simon P.

17 Section 1(d), *Matrimonial Causes Ordinance* (Cap 179) provides that marriage between parties who are not "respectively male and female" a nullity.

18 *Radwan v Radwan (No 2)* [1972] 3 All ER 1026.

19 *Apt v Apt* [1947] 2 All E.R. 677, *per* Lord Merriman P.

20 John Murphy, "The Recognition of Same-Sex Families in Britain: The Role of Private International Law", *International Journal of Law, Policy and the Family* 16 [2002] 181-201.

B. The Legislative Council (LegCo)

The first question is whether any legislation is to be passed to recognise the existence of unions between homosexuals. If it is decided that such a law should be made, the LegCo has a number of models to choose from:[21]

- The "Gay Marriage" Model: to "simply declare that marriage, in the traditional sense of the word, may be contracted between members of the same sex"[22];
- The General Registered Partnerships Model: to "enact a general law applying to all partners, whether of the same-sex or of different sexes, who are not and, in the case of heterosexuals, presumably do not wish to be married – yet who may submit to a state-authorized procedure falling short of marriage for recognizing their partnership"[23];
- The Same-Sex Registered Partnerships Model: to "enact a law similar to that outlined [above], but restrict to same-sex partners only"[24];
- The Multi-Person Variant: to "choose any of the above options, but open registration to groups of more than two people";
- The Full *De Facto* Model: to "dispense with registration... and instead associate rights and duties similar to those of marriage with the factual existence of a partnership";
- The Partial *De Facto* Model: to "entirely dispense with the idea of recognizing partnerships as such (apart from marriage), but to change other laws so that some of the benefits available to married couples are also available to those actually living together in a partnership"; and
- A mixed model[25].

This paper is concerned only with the first question.

III. Analysis of the Major Argument for Same-Sex Marriage

From the previous section, it can be seen that the essential question to be answered is whether same-sex unions should be legally recognised at all. In advocating that the answer to this question should be positive, proponents of SSM invariably adopt the following tenor:

> "What is wrong with two men or two women choosing to love each other, to express physically their love for each other, to live together, to raise children together? Is it not discrimination against gay, lesbian and bisexual individuals because of their sexual orientation, rather than same-sex love, that is wrong? Should the right to be free from sexual orientation discrimination be recognised as a human right?"[26]

The major drive behind the movement for the legalisation of SSM is the demand for the protection of a right to be free from sexual orientation discrimination. A person may be

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21 Taylor G, "Same-Sex Unions and the Law: The New Gay and Lesbian Partnerships Law in Germany", 41 *Alberta Law Review*,p 573.

22 Holland has adopted this model.

23 Some form of the general registered partnerships model was adopted in France and Belgium.

24 For example, the Scandinavian countries and Germany have adopted the same-sex registered partnerships model.

25 For example, Alberta has chosen a model mixed between the general registered partnership model and the full *de facto* model.

26 Wintemute R, *Sexual Orientation and Human Rights: The United States Constitution, the European Convention, and the Canadian Charter* (Oxford: Clarendon Press, 1995), p 1.

indirectly discriminated against by another who applies an apparently neutral requirement (one other than being of a particular sexual orientation) with which a disproportionate number of people of the former's sexual orientation are unable to comply, and which cannot be justified.[27] The existing legal limitation of civil marriage to heterosexual couples is seen as an instance of such discrimination.

A typical Argument for SSM thus runs as follows:

> "In the scrutiny of discrimination cases, there is a three-stage process of examining (1) whether the act is done towards a specific group, (2) whether there is differential treatment and (3) whether justification for the treatment is beyond reasonable limits of achieving a legitimate purpose, such as public health and interest... If the right to a family is a universal right available to all human beings and if the family that a homosexual person would desire to create is one consisting of two members of the same sex, then depriving same-sex couples of the same family rights is discriminatory. A right is not given by someone else; rather, it is inherent in the fact that one is human, considering the dignity, respect and equality inherent in every human being... Equal rights to the institution of marriage for same-sex couples [are] becoming an international norm and very probably customary law. Whether one likes it or not, there is a right to marriage and a family that is available to every human being, including those in a same-sex relationship."[28]

If one looks at the Argument closely, the conclusion that there should be "equal rights to the institution of marriage for same-sex couples" is based on three premises:

- Premise 1: access to legal marriage is a fundamental human right;
- Premise 2: legitimate justifications are needed to disregard a right, and the degree of legitimacy required depending on how fundamental that right is; and
- Premise 3: there is no such legitimate justification.

Premise 1 assumes that the right to legal marriage is a fundamental human right. Indeed, some support for this proposition can be found in art 37 of the *Basic Law*[29], art 19 (2) of the *Hong Kong Bill of Rights*[30] and art 23 (2) of the *International Covenant on Civil and Political Rights*[31] (hereinafter "*ICCPR*"). However, when one looks closely into what civil marriage entails, one would start to doubt how fundamental the right to marriage really is.

Premise 2 postulates that legitimate reasons are needed to justify the purported violation of the right to marriage by existing marriage law. Support for this postulation can be found both in cases and human rights instruments. In *HKSAR v Lau San Ching & Ors*[32], Lugar-Mawson J held that when the laws of a particular jurisdiction, properly applied, encroached upon rights of an individual, such encroachment was permissible provided that it was proportionate. He also quoted Lord Bingham's speech in *Brown v Scott*[33] where Lord Bingham held that limited qualifications of rights are acceptable if they are reasonably directed by national authority towards a clear and proper public objective, and if such qualifications are no greater than that

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27 Wintemute R, *Sexual Orientation and Human Rights: The United States Constitution, the European Convention, and the Canadian Charter* (Oxford: Clarendon Press, 1995), p 10.

28 Shaw R, *Same-Sex Marriage and Religious Tolerance*, at http://www.hkci.org.hk/181a.htm.

29 Art 37 of *The Basic Law of the Hong Kong Special Administrative Region* provides that, *inter alia*, the freedom of marriage of Hong Kong residents shall be protected by law.

30 Art 19(2) of the *Hong Kong Bill of Rights* provides that "the right of men and women of marriageable age to marry and to found a family shall be recognised".

31 Art 23(2) of the *ICCPR* has the same wording as art 19(2) of the *Hong Kong Bill of Rights*.

32 *HKSAR v Lau San Ching & Ors* [2003] 2 HKC 378.

33 *Brown v Scott* [2001] 2 WLR 817.

the situation calls for. Support from human rights instruments can be found in the *Preamble* of the *ICCPR* where it is stated that the individual has duties to other individuals and to the community to which he or she belongs. It is further submitted that, even disregarding these authorities, the proposition that a right is not to be absolutely protected and is to be balanced with the interests and rights of other individuals and that of society is obvious when one ponders the role of law in the context of marriage. Besides protecting the rights of citizens, the law serves other functions such as being a guide to human behaviour, protecting society as a whole, and reflecting social norms or the general will.

Premise 3 asserts that there exists no reason legitimate enough to justify the existing marriage law's encroachment of the right to marriage. Although the courts of some foreign jurisdictions have made findings to this effect,[34] it is submitted that this assertion is questionable; at least, no such assertion can be made before some fundamental philosophical questions are answered satisfactorily for Hong Kong.

To sum up, both Premise 1 and Premise 3 raise issues that have not been properly addressed, and it is impossible to ensure the conclusion that homosexuals' right to marriage should be legally protected is rational before the hidden questions are answered. It is not until then that the premises are sound. These questions will be considered in the following section.

IV. The Hidden Question Marks

A. The First Premise

Premise 1 assumes that the right to legal marriage is a fundamental human right. As mentioned in the previous section, there is some support for this proposition in the *Basic Law*, the *Hong Kong Bill of Rights* and the *ICCPR*. However, when one looks closely into what legal marriage entails, one would doubt how fundamental the right to marriage really is.

It is submitted that the notion of "legal marriage" entails three elements. The first is the relationship in question is subject to legal regulation. The second is the parties will be entitled to social benefits which are available only to married couples. The third is the relationship in question is being socially and legally recognised. The hidden question is how each of these can meaningfully be protected as part of a "right".

The first element, legal regulation of the relationship, can hardly be classified as a "right" as all, since it would be a paradox to claim that a person or a relationship has a right to be regulated by law.

Pro-SSM argument relating to the second element goes like this: legal marriage entails a wide range of entitlements which are unavailable to unmarried couples, restricting legal recognition to opposite-sex couples excludes same-sex couples from gaining legal access to these benefits and this denial of rights contradicts the *Basic Law*.[35] That the second element, the entitlement to social benefits, can be the subject of protection as part of a right is uncontroversial. What is controversial about it is that the distribution of social benefits is always subject to conflicting notions of distributive justice. Therefore, whether a married couple's entitlement to social benefits is a "fundamental human right" is uncertain until the underlying notion of distributive

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34 See, for example, *Baehr v Anderson* 852 P.2d 44 (Haw 1993).

35 Articles 25 and 37, *The Basic Law of the Hong Kong Special Administrative Region*.

justice of the society in question (ie Hong Kong) is known.

The third element, the social and legal recognition of the couple's relationship, is a very understandable human psychological need.[36] However, equally human are the objections of other citizens who feel that their moral values are offended by the social endorsement of same-sex relationships through legalisation of SSM. Therefore, the question is how the interests between homosexuals, who want their relationships socially recognised, and some other citizens, who oppose to the legalisation of SSM on moral grounds, are to be balanced.

To conclude, it is highly doubtful whether "the right to marriage" is as *fundamental* a human right as it is sometimes claimed to be. How absolutely it is to be protected depends on two things: which notion of distributive justice Hong Kong endorses; and the strength and importance of public sentiments towards homosexual marriages.

B. The Third Premise

> "One needs not hold a moral belief against homosexuality in order to oppose the gay rights movement.. Other factors that rightly carry weight include public health and safety, demands on the public treasury, the well-being of institutions that are essential to society, and respect for established custom and the wishes of the majority, even when one personally believes those wishes to be ill-founded."[37]

Premise 3 asserts that there exists no reason legitimate or compelling enough to justify the existing marriage law's encroachment of the right to marriage. The doubt that inevitably arises in response to this assertion is whether there is indeed no such legitimate justification. It is submitted that at least four considerations can be raised which *might* legitimately justify the current ban of SSM. As mentioned above, although the courts of some foreign jurisdictions have made findings to this effect,[38] no such assertion can be made before these considerations are dealt with satisfactorily according to Hong Kong values and circumstances. The four considerations will be elaborated in the following four subsections in this part, to be followed by a brief summing up.

1. Integrity of the Concept of "Marriage"

The first consideration is the integrity of the concept of "marriage". The family based upon heterosexual marriage has always been considered to be the building block of society. This is evidenced by provisions in both the *Bill of Rights* and the *ICCPR* which state that "[t]he family is the natural and fundamental group unit of society and is entitled to protection".[39] Concern has been expressed as to whether an alteration of the term's legal definition would undermine its real meaning. However one is tolerant towards the sexual orientation and conduct of others, a very compelling reason is needed to introduce such dramatic alteration to society's conception of marriage and family.

There are two dimensions to this concern. The first is to give homosexuality the same sort of legitimacy as heterosexuality under the flag of "marriage" would probably destroy the

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36 Norrie, K, "Marriage is for Heterosexuals: May the Rest of Us Be Saved from It" (2000) *Child and Family Law Quarterly* 363.

37 Bradshaw D, "A Reply to Corvino", in Corvino, *Same Sex: Debating the Ethics, Science, and Culture of Homosexuality* (USA: Rouman & Littlefield Publishers, 1997), p 18.

38 See, for example, *Baehr v Anderson* 852 P.2d 44 (Haw 1993).

39 Art 19(1) of *Bill of Rights* and Art 23(1) of *ICCPR*.

delicate web of sanctions and incentives through which society channels sexual impulse and procreative power in a constructive direction.[40] In particular, some opponents view that an important function of marriage, the formation of procreative partnerships, cannot be fulfilled by SSM.[41]

The other dimension involved is the view that legalisation of SSM would re-open the door to the legalisation of polygamous marriage, marriage between family members, bestiality, marriages of convenience contracted for tax or other reasons "improper" for the formation of marriage. This argument has been criticized as one of a "slippery slope" nature, and that "it was a bad argument [in the 1960s], and it is a bad argument now"[42]. However, it is submitted that this argument is not "bad" in itself. It was rejected only because it was weak when compared with the arguments against antimiscegenation laws. An illustration may be helpful to undersand why this argument is not unsound in itself. For instance, there is no logical distinction between a relationship between a man and his pet, and a homosexual union – on what ground can one deny a man the "right" to "marry" his pet if he genuinely wants to, desires social recognition of his relationship and wishes to be entitled to social benefits based on his "marriage"? The real issue is therefore how important this concern is when weighed against benefits of homosexuals' right to marriage and social recognition of their relationships.

On the other hand, it is possible to argue that same-sex romance or sexual desire have existed from ancient times and urge that the law should honor this historical fact.[43] It can be argued that since traditional concepts of marriage have already given way to liberalisation in other areas, further broadening the scope of legal marriage to incorporate same-sex couples should not be a problem. Moreover, it has been argued that past reluctance of the courts to recognise homosexual relationships could not justify an exclusionary marriage law.[44]

2. *Policy Interest to Encourage Procreation*

> "When Darwin used the term survival of the fittest... he was counting your children. If you raised babies that have babies, you are what nature calls fit. You have passed your genes to the next generation and in terms of survival you have won. So the sexes are locked in a mating dance . . . Only in tandem can either men or women reproduce and pass on the beat of human life."[45]

The second consideration that can possibly legitimately justify the ban of SSM is the need to encourage procreation. It is of interest to society that procreation is encouraged. This is especially true as Hong Kong's fertility rate has reached its historical low in recent years.[46] It is therefore arguable that heterosexual unions, being procreative in nature, should be *encouraged* by conferring a special status and social benefits on heterosexual couples. This policy interest would be undermined if marriage were extended to same-sex couples, whose unions are inherently sterile.

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40 Bradshaw D, "A Reply to Corvino", in Corvino, *Same Sex: Debating the Ethics, Science, and Culture of Homosexuality* (USA: Rouman & Littlefield Publishers, Inc., 1997), p 19.

41 See, for example, *Baker v. State of Vermont* 744 A.2d 864 (Vt. 1999).

42 *Loving v Virginia* 388 US 1967.

43 Fisher H E, *Anatomy of Love: The Natural History of Monogamy, Adultery and Divorce* (USA: WW Norton & Company, 1992), pp 166-167.

44 *Brause v. Bureau of Vital Statistics* No. 3AN-95-6562, 1998 WL 88743 (Ak. Sup. Ct. Feb. 27, 1998).

45 *Supra* note 43, p 59.

46 See, for example, African Network for Health Research and Development, *Population Growth – Population Decline*, at http://www.afronets.org/archive/199810/msg00041.php.

When confronted by the argument that "the purpose of marriage is procreative", SSM proponents often note that sterile heterosexual couples are not prevented from marrying, and that they can use various medical or legal means to acquire offsprings. This observation is sound and relevant, but it does not diminish the essence of this consideration, which is the public interest in the *encouragement* of the formation of unions that are usually naturally procreative.

3. Suitability of Heterosexual Regime for Same-Sex Couples

The third possible legitimate consideration that may justify the ban of SSM is that the existing heterosexual marriage regime may not be suitable for same-sex couples. This is because the uniqueness of homosexual relationships may not be duly recognised by subsuming them in the heterosexual regime. As Norrie has pointed out, SSM fails to take into account of important difference between same-sex and opposite-sex couples. The emphasis of the "gay lifestyle" is on individualisation and sexual freedom. Marriage is seen as a typical heterosexual, repressive institution.[47] Firstly, marriage is premised on the assumptions about procreation which is irrelevant to same-sex couples.[48] Secondly, it has been observed that homosexual unions tend not to be sexually exclusive in nature; to artificially incorporate them into the heterosexual regime in which monogamy in the form of sexual exclusivity is an essential ingredient is undesirable and may lead to further deteriorating of the institution of marriage because such an artificial incorporation is likely to increase divorce rate.[49]

If same-sex unions were to be legally recognised, widening the scope of traditional marriage to include homosexual couples may not be the only, nor best, means to do so. The question is not "whether or not to provide homosexuals the same level of protection as is provided to heterosexuals", but is rather "*how* to provide homosexuals the necessary level of protection".

4. Public Opinion, Values and Morality

The fourth possible legitimate ground for the encroachment of homosexuals' right to marriage is that public opinion, values and morality are against the legalisation of SSM. Of course, the validity of this ground depends on whether the values or opinions of Hong Kong's general public are actually against SSM.

The reason public opinions are relevant is that marriage has important social functions. Since the legal definition of marriage is intimately related to the lives of Hong Kong citizens, any change in the law should accord with their values. Some people and organisations publicly support SSM.[50] Yet, not everyone agrees with them. A survey conducted in 1996[51] revealed that public acceptance of homosexuality and bisexuality in Hong Kong was on the low side.

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47 For example, in 1990 Anja Kooten-Niekerk, the then-director of the Dutch Gay Movement COC, said she thought it was sad that gay and lesbian couples demanded the right to marry and that it actually annoyed her.

48 Norrie, K, "Marriage is for Heterosexuals: May the Rest of Us Be Saved from It", (2000) *Child and Family Law Quarterly* 363.

49 Bolte A, *Do Weddings Dresses Come in Lavender? The Prospect and Implications of Same-Sex Marriage*, in Lehmann J M, *The Gay & Lesbian Marriage & Family Reader* (New York: Gordian Knot Books, 2001), p 31.

50 See, for example, a list of Hong Kong gay and lesbian organizations at http://sqzm14.ust.hk/hkgay/Gay_and_Lesbian_Organizations.

51 Equal Opportunities: A Study on Discrimination on the ground of Sexual Orientation - A Consultative Paper, at http://www.qrd.org/qrd/world/asia/hongkong/legislative.report.on.discrimination-96, para 51.

The acceptance level for homosexuality/bisexuality scored 3.4 on a rating scale of 0 (totally unacceptable) to 10 (totally acceptable); and the lowest level of acceptance was found when respondents were asked about issues relating to homosexuals / bisexuals forming a family unit, with the average acceptance level scoring around 3.[52]

There is another issue related to the factor of social values. Hong Kong, a previous colony of the UK, is influenced by western cultures. Influences manifest themselves in the prevalence of concepts such as individualism and equality under the law. Christian notions of marriage are also shared by some Hong Kong locals. On the other hand, it must not be overlooked that, as an integral part of China, Hong Kong is also strongly influenced by Chinese traditions. All major traditonal philosophies in China have some sort of codex which have been interpreted as being against homosexuality. For example, Confucius taught that a man should behave as a man and a woman as a woman. To get children, especially sons, was a very important duty for a man.[53] Homosexuality, sterile in nature, was not dutiful. Admittedly, traditional Chinese culture is not absolutely against homosexuality.[54] None of the major Chinese philosophies condemn homosexuality as a sin as do many Christian churches. As long as a man does his duty and sired children, it is arguable that he was free to have male lovers. Hence, it is arguable that traditional Chinese culture is not entirely against homosexuality but is definitely against SSM. Another very important value in Hong Kong is collectivism. However the concept of "family" changes, heterosexual families are still regarded as the basic building block of society as well as the foundation of each person's identity. Wholesale incorporation of Western reforms that blindly follows global trends is not suitable. What is needed is a marriage law that respects Hong Kong's unique value system.

Moral conviction, if strong enough, of the general public may also consitute a legitimate ground for the ban of SSM. This point is admittedly highly controversial as it is difficult, if not impossible, to find any uniform standards of morality in Hong Kong. The issue is further complicated by the fact that, although there has been an increasing amount of research on the subject of the causes of homosexuality, no conclusive theory has been formulated on what determines a person's sexual orientation. Some academics claim that genetic or biological factors may play a part; others assert that environmental factors play a role in the development of homosexual and bisexual tendencies.[55] On the other hand, some opponents of homosexual behaviour argue that whether a person is heterosexually-oriented or homosexually-oriented is a matter of choice; and that sexual orientation is acquired rather than inborn.[56] Public sentiments regarding homosexuality are, to a certain extent, dependant on causes of a person's sexual orientation. The fact that the causes are uncertain indicates citizens' moral convictions on this issue are likely to be diverse as well.

Proponents for SSM argue that considersations of morality are irrelevant; that insistence on the heterosexuality of marriage is "merely" moral. They regard this as "a matter of belief" which "you can't really argue with", but which "is incompatible with the notion of equal rights".[57] They argue that the law's purpose is not to uphold the sacramentality of marriage.

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52 *Ibid*, table 3.3.

53 According to Mencius, not producing a male heir was the gravest among the major offenses against filial piety.

54 The Androphile Project, *Chinese Tradition of Male* Love, at http://www.androphile.org/preview/Culture/China/china.htm.

55 *Supra* note 51, para 37

56 *Ibid*, para 38.

57 "*The Basic Issues*", Arjan Schippers, *Radio Netherlands*, 15 August 2001, at http://www.rnw.nl/society/html/basics010815.html.

The question is how heavy factors of morality, social values and public opinion should weigh in reaching a decision as to whether SSM should be legalised in Hong Kong.

5. *Summing Up: Reasons to Doubt the Soundness of the Third Premise*

Under the third premise, proponents for SSM assert that, since the right to marriage should be equal regardless of sexual orientation, the alleged lack of an underlying cohesive and identifiable rationale to account for the ban on SSM is in itself a good reason to lift the ban. For instance, Babst suggests that the ban can best be made sense of in the light of the notion of a "shadow establishment", which is "an impermissible expression of sectarian preference in the law that is unreasonable in the light of the nation's constitutional commitments to all its citizens".[58] He believes that the government has no genuine interest compelling enough to override this "fundamental liberty interest", but that it is just merely protecting a substantially religious value, a sectarian understanding of the good of marriage, the constitutional weight of which merits serious challenge. He insists that no public policy consideration can provide the muscle necessary to overcome the liberty interest at stake.[59]

However, there are reasons to doubt the soundness of this premise. There are at least four possible considerations that may be able to override this "fundamental liberty interest": the integrity of the concept of marriage, public opinion, values and morality, the suitability of the heterosexual regime for same-sex unions and the public interest to encourage procreation. It is submitted that, in the end of the day, whether these considerations can justify the ban of SSM depends on how important these factors are in comparison with the right of homosexuals to marriage. Balance and proportionality are the keys.

V. Fundamental Questions yet to be Answered

From the previous section, it can be seen that there are various counter-arguments and invalidating counter-examples not fully dealt with by the Argument. To decide whether these counter-arguments or examples can overcome the Argument, such that it can be legitimately claimed that there are other concerns that are as important and relevant as human rights considerations, and hence to expand the scope of marriage to include same-sex unions based on merely the idea "homosexuals should have equal rights to marriage" is an overshooting of rights talk, a balancing exercise has to be done. In performing this balancing exercise, a number of fundamental questions will inevitably arise. It is submitted that these questions have not been sufficiently discussed and contemplated in Hong Kong such that it is premature at the current stage to reach any concrete conclusions. What follows is an outline of these unanswered questions. Since, to answer these questions, one has to embark upon reflections on philosophy, social science and politics which are beyond the scope of this paper, the writer does not seek to offer any definite answers.

A. What is "Marriage"?

The first question concerns the meaning of "marriage". Is "marriage" a freely malleable social concept or whether there exists some "universal core meaning" within the concept of "marriage" so that certain elements in its legal definition cannot be changed? If it is indeed a

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58 Babst, G A, *Liberal Constitutionalism, Marriage, and Sexual Orientation: A Contemporary Case for Dis-Establishment* (New York, Peter Lang Publishing, 2002), p 2.

59 *Ibid*, p 4.

freely malleable social construct, the consideration that the integrity of the concept of "marriage" is merely a moot point.

Proponents of SSM claim that it is. For example, Bolte argues that there should be no necessary condition for marriage, and that all requirements such as the existence of a sexual relationship and the "expectation of procreation" are merely "logically sufficient conditions" provided that there is a ceremonial event recognising the condition of marriage.[60] It is sometimes claimed that marriage, a perpetually evolving notion, is culturally defined, and that a society could define and redefine marriage as often as it chooses.[61]

To some others, however, despite the changes in the legal meaning of marriage that have taken place, the core meaning of "marriage" – a human relationship which has existed since antiquity and well before the emergence of civilization and law – remains. One of the core elements is heterosexuality. This is because heterosexuality makes natural reproduction possible. As aptly explained by Folkman and Clatworthy,

> "Sex and survival are allied instincts; hence, marriage and family are allied institutions... Reproduction is both a universal and historical function of family life. It is first in priority as it is in the history of the family... [H]uman families, like those of other species, came into being primarily for the fulfillment and enhancement of the reproductive function."[62]

According to this line of thought, marriage has always been considered to be heterosexual, "because the unique contributions of men and women to child rearing cannot be duplicated by any other contexts in which child rearing takes place."[63] Expanding legal marriage to same-sex couples would thus distort its meaning. Even if a new form of relationship equivalent to "marriage" in every way except heterosexuality emerged, such relationship cannot be called a "marriage" because it can never be one. A useful analogy can be drawn from the difference between mother-daughter relationship and sisterhood. They may be very similar but no one would suggest that since they are almost equivalent, we should subsume sisterhood into the categorization of mother-daughter relationship or vice-versa.

B. How are the Issues of Public Opinion, Value and Morality to be Reconciled with Conflicting Interests / Rights of Same-Sex Couples?

The second question relates to the balancing of interests between the general public and same-sex couples. On the one hand, same-sex couples purportedly should enjoy the right to marriage and not be deprived of such a right on the basis of their sexual orientation. On the other hand, public opinion, Chinese traditional values, as well as some notions of morality *may* be against the legal recognition of SSM. This question is relevant to how fundamental this right to marriage is (issue under Premise 1) and whether opposition based on public opinion, values and morality can constitute a legitmate ground for the ban of SSM (issue under Premise 3).

This question involves two complicated issues. The first is uniform public opinon or sentiments are very difficult, if not impossible, to gauge; and even if a uniform public

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60 Bolte, A, "Do Weddings Dresses Come in Lavender? The Prospect and Implications of Same-Sex Marriage", in Lehmann, J M, *The Gay & Lesbian Marriage & Family Reader*, p 30.

61 *Ibid*, p 28.

62 Folkman, J D, and Clatworthy N M, *Marriage Has Many Faces* (USA: Charles E. Merrill Publishing, 1970), pp 7 and 24.

63 *Yick Wo v Hopkins* 30 L. Ed 220, 227 (1886).

sentiment does exist and can be measured by the use of sophisticated scientific surveys, there is nothing to ensure that such a sentiment or opinion would change over time.

The second complicated issue is related to the weight to be given to public morality and opinion in the balancing exercise. As mentioned in the previous section, some SSM proponents claim that oppositions basing on public sentiments or morality are irrelevant. However, from an objective point of view, it is submitted that they cannot be right on this point. This is obvious if one takes the bar against marriage between people within the requisite degrees of affinity as an example: even if we allowed homosexuals to get married, a marriage between, say, a mother and her daughter would still be regarded as incest. Another example would be polygamy – even under the validated same-sex regime in those countries which have "legalised" such unions, polygamy is not allowed. Hence, from an objective analysis of existing norms, it is clear that public sentiments and values or notions of morality do play some part. The controversy should be on how large their parts should be. A paradox is involved in any attempt to legally enforce morality: while forcing someone to be "good" when he or she does not wish to do so does not improve his or her life, only the life of the community is improved. One way of looking at this controversy is to ask when this act of "forcing someone to be 'good'" is justified.

Jurists have suggested various theories. Mill suggested that legal coercion could only be justified for the purpose of preventing harm to others.[64] It was none of society's business how valuable an individual's activities were, so long as they do not harm third persons. This principle is adopted by the Wolfenden Committee in its *Report on Prostitution and Homosexuality*[65] in which it was observed that there was a realm of private life which was not the law's business.[66] If this theory is adopted, since there is no perceivable *direct* injury to any third parties, the role of public opinion and morality should be minimal.

A second theory espoused by Lord Devlin states that public morality provides the cement of any human society, and must be maintained by the law as its primary function. Conducts which arouse widespread feelings of reprobation and a mixture of "intolerance, indignation and disgust" deserve to be suppressed by legal coercion in the interests of the integrity of society. If vice were not suppressed, society would crumble.[67] If this theory is adopted in Hong Kong, public opinion, morality and Hong Kong values are highly relevant.

A third theory proposed by Hart provides that the law can be used to enforce morality where paternalism is in order and where harm to others is to be prevented. Paternalism may intervene to stop harm to oneself, not because of a wish to enforce conventional morality, but due to doubts as to be capacity of the victim himself to make a rational decision.[68] Rules essential for a particular society, "[a] central core of rules or principles which constitutes its pervasive and distinctive style of life"[69], might be enforced. Hence, the test becomes "an open and empirical question whether any particular moral rule is so organically connected with the central core that its preservation is required as a vital bastion".[70] If this theory is adopted in Hong Kong, morality and public sentiments are also relevant.

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64 Freeman, M D A, *Lloyd's Introduction to Jurisprudence* (London: Sweet & Maxwell Ltd, 2001, 7th ed), p 362.

65 *Wolfenden Report on Prostitution and Homosexuality* (1957) Cmnd. 247.

66 *Ibid*, para 62.

67 *The Enforcement of Morals* (1965) pp 13-14, cited in *supra* note 64, p 363.

68 *Ibid*, pp 364-365.

69 *Ibid*, p 265.

70 *Ibid*, p 365.

Hence, the solution to this fundamental question lies in which underlying theory for the legal enforcement of morality Hong Kong adopts.

C. What is the Role of Law in the Context of Marriage?

The third fundamental question relates to the role law plays in the context of marriage. This question is relevant when one performs the balancing exercise necessary to justify or disprove the third premise of the Argument, because a different role or focus of the law would render different weights to be attached to different considerations. There are a number of possibilities: law as a guide to human conduct; law as a reflection of the general will or social norm; law as a tool to balance the need to protect society on the one hand and to protect individual citizens' rights on the other.

If the proposition that law is a guide to human conduct is adopted in Hong Kong, when attempting to justify the ban of SSM, considerations of public opinion and morality would be paramount. Similarly, if the proposition that law is a reflection of social norms or the general will is to be followed, public opinion would be highly relevant. If the proposition that law is a tool to balance the need to protect the rights of citizens on the one hand and to protect society on the other is adopted in Hong Kong, public opinion and morality would be less important, instead the issue of the public interest in the encouragement of procreation would be more relevant.

The fundamental question that is yet to be answered is thus: which role prevails for Hong Kong marriage law?

D. Social Benefits for the Married – Distributive Justice Considerations

The fourth question is how to fairly distribute social benefits related to marriage. This question is relevant to the first premise, to determine how "fundamental" the "right to marriage" actually should be.

SSM proponents would claim that the current distribution which is restricted to married (i.e. heterosexual) couples is unjust; and that in society, there are numerous citizens who do not have equal access to social benefits and are forced to do without them and accept substandard treatment.[71] In Hong Kong, homosexual groups claim that the lack of recognition of legal rights for same-sex unions contributes to the difficulties of maintaining long-term relationships between same-sex partners. They also complain that same-sex partners are deprived of a number of rights such as the right to inherit the partner's estate in case of intestacy, to apply for public housing as married couples and to give consent for one's partner to undergo surgery.[72] On the other hand, it is submitted that a possible explanation for such apparently unfair distribution is that these benefits are conferred to heterosexual couples as incentives for them to get married and have children, in order to achieve the policy objectives of strengthening marriage, the building block of society, as well as of encouraging procreation.

In any event, it must be pointed out that the answer to this question only affects how fundamental the right to marriage is in the balancing exercise, and has no *direct* bearing on whether the ban on SSM should be lifted. Even if it is decided that more social benefits

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71 *Supra* note 49, p 28.

72 *Supra* note 51, para 100.

should be extended to unmarried persons (including same-sex couples), the legislature may do with using other means; there is no need to redefine marriage in order to address the concerns of unmarried persons.[73]

VI. Conclusion

The major argument in favor of the legalisation of SSM is a rights-based one which asserts that the refusal to allow same-sex couples to marry is an instance of discrimination on the ground of sexual orientation. Appealing as it appears, however, there exist various unaddressed issues underlying this Argument, and these issues may constitute counter-arguments against it, depending on how a number of fundamental questions are finally resolved (according to the unique culture and circumstances of Hong Kong). An argument relying solely on the notion of equal rights can be misleading because it limits our comprehension of the social reality and our acknowledgement of its numerous possibilities, which give the illusion that equality of rights is the only possible way to achieve justice.

Of course, although the right-based argument may not be as strong as it appears, it does not entail that SSM must not be allowed. If it transpires that the fundamental questions are to be answered in such a way that the argument still stands, or if there emerges another argument that justifies the legalisation of SSM, the legalisation of SSM should take place.

Finally, a note of caution must be given. Factors such as the introduction of no-fault divorce, the changing sexual mores that no longer view intimacy outside marriage as reprehensible, and the use of birth control which diminishes the procreative character of marital unions have combined to change both how society sees marriage and how couples see the law in relation to their union. Society has begun to perceive marriage as an "at-will" affiliation between two persons and child bearing is not longer a must in a marriage. This makes it increasingly difficult to withhold state recognition of marriage based on procreation and formation of a family unit. However, the answer may not lie in the further weakening of marriage by extending it to same-sex couples. Rather, we may need to take up the more difficult task of re-establishing formal recognition of the link between marriage and sexual restraint and procreation. Equating same-sex unions and marriage would probably be a move in exactly the opposite direction we need to take in order to cope with the difficulties we have with families and marriages nowadays.[74]

It is easy to follow global trends and to reflect social changes by expanding the umbrella of civil marriages to cover homosexual unions under the "holy flag" of human rights. The challenge is in knowing when to say "no" – to abstain from blindly following foreign examples or adopting over-expanded human rights arguments, and to rationally revisit the basic premises of regulating marriages by law so as to take measures which would be truly beneficial to Hong Kong.

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73 Coolidge, D O, "Marriage and Belonging: Reflections on Baker v Vermont", in Hawkins, A J, Wardle, L D, and Coolidge, D O (eds), *Revitalizing the Institution of Marriage for the Twenty-first Century: An Agenda for Strengthening Marriage* (Westport, Conn: Praeger, 2002), p 150.

74 "Marriage and Same-Sex Unions: One and the Same?", *Catholic Online*, at http://www.catholic.org/featured/headline.php?ID=520 (visited on 24 November 2003).

THE NATION BEHIND THE GREAT WALL OF SECRECY

AMANDA WAI-HUNG LAU

According to well-established international law principles, the right to freedom of expression and of information is not absolute, and indeed justifiable restraint on the availability of information on national security grounds is being implemented in most countries around the world by way of state secrets legislation. The case of China, however, is particularly unsatisfactory – its so-called "State Secrets Law" has been condemned as being utterly draconian, and its enforcement both abusive and intrusive, rendering China the most secretive nation in the world.

In this article, the author first takes the reader through the legal regime of the Chinese state secrets related legislation, with particular emphasis on the problematic expansiveness of the Chinese concept of "state secrets", and on the harshness of the criminal liabilities in connection with the law. A comparison between the Chinese position and the prevailing international standards will then be made, followed by an analysis of the criticisms directed at the Chinese law from an international law perspective. Lastly, the author concludes the article by citing examples of actual abuse of the Chinese state secrets law, in substantiation of the various above-mentioned criticisms.

I. Introduction

It is contended that behind the Great Wall lies a mysterious nation. The transformation from an impoverished country to an economic giant is miraculous. However, along with that inconceivable growth are questions yet to be answered, doubts yet to be resolved, and information yet to be revealed, since public information seems constantly inadequate to satisfy the seeking demands. Cumulative incidents tend to postulate that China is running against the international tide of open government and free information flow, which form the necessary elements of a successful market economy.

While the restraint on availability of information is commonly legitimized by a state secrets legislation worldwide, the so called "State Secrets Law" in China has particularly been condemned as an utterly draconian law, causing China to be crowned the most secretive nation of the world.[1] Such fierce discredit induces the writer to study the Chinese law in respect of state secrets to find out how the use of such law goes beyond national security and shrouds this country with secrecy.

In this paper, Part II will offer a periscope to the legal scheme of the Chinese state secrets related provisions. It seeks to comprehend the broadness of the Chinese concept of state secrets, which captures a wide range of issues well beyond the standard boundary of "threat to national security". Further, the harshness of the criminal liabilities of the law will be examined, where common defences for suspects are unavailable.

Part III is a comparison between China's state secrets law with international standards. A political explanation for the propensity of secrecy will be suggested, followed by an analysis on the legal criticisms from the international law perspective. UK's *Official Secrets Act* will serve as a benchmark to show that the Chinese law is not quite on a par with the minimum standards of western jurisdictions.

Lastly, in Part IV, examples of abuse of the state secrets law will be listed to substantiate the criticisms. It will be shown that the law has been imposed to repress political dissidence and

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The author would like to express her gratitude to Dr Fu Hualing for his guidance.

1 Gelatt, T A, "The New Chinese State Secrets Law", (1989) 22 *Cornell International Law Journal*, p 255.

ethnic activism, and to censor foreign dealings, media and academic work. State control on the internet for state secrets reasons will also be discussed. It appears that the enforcement of the law is both abusive and intrusive.

II. A Legalistic Dissection of the "State Secret Law"

While the notoriety of using ambiguous legal terms and insufficient legal analysis in China is no secret to the world, the PRC government has maintained to be one of the most secretive nations by adopting a complicated amalgamation of legislations and regulations to preserve its state secrets and thereby punish those who commit state secrets related crimes. Unlike other jurisdictions, China does not have a single legislation for state secret crimes. The so-called "State Secrets Law" is indeed a misleading concept that consists of a patchwork of intertwined legal provisions scattered in several legal codes, *viz.* the *PRC Constitution*, the *Criminal Code* and the *PRC Protection of State Secrets Law* ("*PSSL*")[2], supplemented by numerous regulations and implementation rules issued by different central and local government organs.[3] While the lack of common law authority might explain the need for a vast amount of secondary legislations to provide guidance for enforcing the law, such intricate structure of the "State Secrets Law" renders the relevant crimes and liabilities inscrutable to the mass public. This part aims at elucidating the legal concept of state secret in China and the liabilities for violations.

Despite a series of legal reforms, accelerated by increasing domestic and international pressure for transparency, the PRC government spares no effort in enforcing the stringent State Secrets Law, by containing a fundamental duty of citizens to preserve state secrets in art 53 of its current constitution.[4] *PSSL* also made it plain that protection of state secrets is not limited to state and party personnel, but also social organizations, enterprises, institutions and citizens.[5] Equipped with that high-profile status, violation of the PRC state secrets law may attract liabilities at three discrete levels, namely criminal liability, administrative liability as well as party disciplinary liability of the Communist Party.

The last category of liability demonstrates the significance of the Party's role in the enforcement of the State Secrets Law. Preservation of state secrets is not only a matter for the state but also a big deal for the Chinese Communist Party ("CCP") – the monopolistic ruler in the country since 1949. The linkage between the Communist Party and state secrets is no mere coincidence. Indeed, during the preparation of the *PSSL*, it was understood that sensitive issues such as the definition of state secrets pertained to the jurisdiction of the CCP and were only secondarily subject to the provisions of the *Criminal Code*.[6] Therefore an official of the

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2 Promulgated by the Standing Committee of the National People's Congress (NPCSC), on 9 May 1998, and came into effect on 5 January 1989.

3 The Tianjin State Secret Protection Authority has listed at least 92 national legislations and regulations that have relation to the protection of state secrets. See *Wo guo you guan bao shou guu jia mi mi de fa lu gui ding xuan bian*, (Beijing: Jin Cheng Chu Ban She, 2001).

4 *Constitution of the People's Republic of China* (1999) art 53 states, "Citizens of the People's Republic of China must abide by the Constitution and the law, keep state secrets, protect public property. . .". For more, read Van Alstyne, W W, "Civil Rights and Civil Liberties: Whose 'Rule of Law'?", (2003) 11 *William and Mary Bill of Rights Journal*, p 623.

5 Art 3, *PSSL*.

6 China Report Vol. 9 No. 4 (C), "Whose Security? 'State Security' in China's New Criminal Code", April 1997, at http://hrw.org/reports/1997/china5.

State Secrets Protection Bureau ("*SSPB*")[7] publicly declared in a radio education programme that the State Secrets Law is to be understood with the guidance of, *inter alia*, the Party's fundamental theory and party line.[8] Hence, the cognizance of the unusual and dogmatic equivalence between the state and the party is essential for understanding the embodiment of secrets of political parties in the legal definition of state secrets.[9]

Nonetheless, the discussion of this paper will focus on the criminal liabilities of the PRC state secret crimes, which alone have had widespread impacts on citizens, journalists, academics and foreigners.

A. The Concept of State Secrets

China's broad definition of state secrets has always been the cynosure of legal and human rights critics. Although the PRC government revised its state secrets law and issued the *PSSL* in 1988, unfortunately the criticism of over-breadth has not become a cliché. The writer is convinced that the broad definition of state secrets in the PRC law is still the root for its draconian disposition, although the arbitrary implementation of the law is also responsible. It seems appropriate to start the discussion by examining the dimensions of "state secret" in the PRC law.

1. Expansiveness of a Legal Definition

The definition of state secrets is stipulated in art 2 of the *PSSL*, for state secrets are determined by the four listed criteria. Firstly, state secrets refer to matters with "a vital bearing on state security and national interests", since state secret crimes are crimes of endangering national security under the *1997 Criminal Code*. Secondly, the secret matters must be determined in accordance with legally prescribed procedures. Therefore, among items of information which relate to national security, they have to be classified by various authorities according to separate procedures.[10] The last two criteria require restricted access to the matter and a limited duration for the secrecy.

The scope of state secrets is widened by the *Implementation Procedures of PSSL* ("*Implementation Procedures*")[11]. Article 4 of the *Implementation Procedures* seeks to interpret the "vital bearing on state security and national interests" clause by stating that if disclosure of information on certain matters would result in any of the suggested consequences, the information should be classified as a state secret. Eight consequences are listed:[12]

1) endangering the consolidation and defence of state sovereignty;

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7 *SSPB* is an organ derived from the State Council, and its statutory status is provided in art 2, *Implementation Procedures*.

8 State Secrets Protection Bureau Promotion and Education Department, *Legal Responsibilities of Violating Regulations on Preserving State Secrets* (*Wei fan bao mi fa lü fa gui ying cheng dan de fa lü ze ren*), (Beijing: Jin Cheng Chu Ban She, 1999), p 3. Besides Party line, state secret is to be determined based on the interests of national security, open-door policy, construction of socialist market economy and development of productivity.

9 Art 8, *PSSL*.

10 *Supra* note 1, p 259.

11 The *Implementing Procedures* was promulgated on 25 May 1990 by the State Secret Protection Bureau.

11 English translation adopted from Fu, H L and Cullen, R, *Media Law in the PRC*, (HK: Asia Law and Practice, 1996), p 115.

2) affecting the integrity of the State, national unity and social stability;
3) damaging the political and economic interests of the State in respect of its external affairs;
4) affecting the safety of state leaders and important foreign personnel;
5) obstructing the important work of safety and defence of the State;
6) lowering or invalidating the reliability of the measures for preserving state secrets;
7) weakening the economic, scientific and technological strength of the State; and
8) adversely affecting the capacity of state organs.

It must be remembered that art 4 does not provide an exhaustive list but only examples of the consequences that qualify the classification of state secrets. These consequences should still meet the guiding criterion of having "a vital bearing on state security and national interests" in art 2 of the *PSSL*.

Regarding the first consequence, the original Chinese version used the word *zhengquan* which can be more appropriately translated as political power, a concept different from *zuquan* which directly refers to sovereignty.[13] So question arises as to whether challenging or undermining the political power of the ruling party, viz. the Chinese Communist Party, is equivalent to endangering national security. Secondly, the list also refers to national unity and social stability. It is worried that this can potentially refer to information about any political and social issues.[14] Moreover, although an act that adversely affects the capacity of state organs can be serious, it does not necessarily have a vital bearing on state security and national interests. With the presence of these clauses, the *Implementation Procedures* effectively expand the scope of state secrets, by asserting the relevance of any disclosure that leads to the eight suggested consequences to national security and interests.

Article 8 of the *PSSL* provides a list which includes six specified categories of state secrets. A formal classification system with specified categories appears to be highly desirable, because it recognizes that the rubric of state secrets should be restricted to particular categories of information.[15] This *per se* demonstrates a clear legislative intent to narrow the scope of state secrets. In contrast, the *1951 Provisional Regulations on the Protection of State Secrets* ("*1951 Regulations*") had the draconian catch-all provisions.[16] It was said that the draft of the *PSSL* also contained a catch-all clause which stated that state secrets included all information which must be guarded. However, the clause caused the frown of some NPC deputies, who

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13 Sovereignty denotes the supreme authority of a state without interference from other states. Domestically, it means the supremacy of state over citizens. The difference between the concepts of sovereignty and political power is that sovereignty is perpetual and it exists as long as the state exists. Political power, or political authority in essence, is the right to govern. Sovereignty does not attach to a single political party, instead the political party which has acquired governing power will exercise the sovereignty. Therefore, since political power could be legitimate and illegitimate, protecting the political power is not the same as protecting the absolute and perpetual sovereignty of a state. See Lam, J T M, *Politics and Government: An introduction*, (HK: Writers & Publishers' Cooperative), pp 13-21 and 48-55.

14 Amnesty International, *People's Republic of China: State Secrets – A Pretext for Repression*, May 1996, (AI Index: ASA 17/42/96). This category can be used as a ground for suppressing the freedom of expression among ethnic groups, which simply advocate for rights and freedoms.

15 *Supra* note 1, p 257.

16 Under the *1951 Provisional Regulations on the Protection of State Secrets*, there were no procedures for determining whether or not a particular item was a state secret, and almost anything could be classified as a state secret. Timothy Gelatt has commented on the pervasiveness of the previous law. "Indeed, a presumption of secrecy might be said to pervade the PRC's approach to the flow of information. *Supra* note 1.

changed it by imposing the current procedural requirement of classification instead.[17]

On its face, the *PSSL* might appear to be less sweeping than its predecessor. This belief becomes but a wishful thinking when we take a closer examination of art 8. The six specified categories of state secrets are:

1) secrets concerning major policy decisions on state affairs;
2) secrets in the building of national defence and the activities of armed forces;
3) secrets concerning diplomatic activities, as well as activities and commitments related to foreign countries;
4) secrets concerning national economic and social development;
5) secrets concerning science and technology;
6) secrets concerning activities for safeguarding state security and investigation of criminal offences.

While national defence, diplomatic affairs and criminal investigation are common and obvious categories that can be found in the state secrets law of other jurisdictions, items such as major policy decisions on state affairs, matters concerning national economic and social development, science and technology are all questionable. Since state secrets must be determined in accordance with art 2, it is hard to reconcile that socio-economic development or government policy decisions that are not related to defence and diplomacy can have any relevance to the interests of national security. These matters are indeed more likely to be the subject matters of public debates, and classifying them as state secrets not only implies that any information can have the potential of being listed as state secrets, it is also empowering the government to restrict citizens' freedom to information and freedom of expression. This problem appears to be the seeds of the prosecutions of journalists, academics and other citizens who simply revealed social or administrative issues that were a far cry from national security concerns. Similarly, the reference to secrets of political parties also has the same consequence of intimidating public reporting on political issues disapproved by the CCP authorities.[18] This will be studied more thoroughly in Part IV.

In addition to the categorization, the wording of art 8 is also problematic. Circular reference to "secrets" is repeated in each of the six specific examples as well as the reference to political parties, making the interpretation of "state secret" in art 8 nothing more than a tautology. If a layman cannot see what sort of information relating to national economic and social development can become state secret, saying that "state secrets include secrets concerning national economic and social development" presents no assistance. The indiscernible wording traps people in a whirlpool of ambiguity, making them unable to ascertain the parameters of the restrictions imposed by the State Secrets Law.[19] This is indeed a violation of the rule of law.

If the above categories have not yet proven the enormous scope of China's state secrets, then a catch-all clause should. Article 8 retains a catch-all provision which included "other matters classified as state secrets by the state secrets guarding department". As mentioned above, the difference between this clause and the drafted clause is the procedural requirement of classification. A piece of information is not a state secret if it has not been classified. But given the pervasive interpretation of state secrets in China, the classification system is hardly a procedural safeguard to citizens. The preservation of this catch-all provision effectively

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17 *Supra* note 11.
18 *Supra* note 13, p 4.
19 *Supra* note 1, pp 259-260.

shows that the *PSSL* is not any less sweeping then the 1951 Regulations, since the scope of state secrets remains infinitely expandable.[20]

2. Delegated Power to Authorities

Different state organs at central and local levels can interfere with the State Secrets Law in two ways, by exercising the power of classification and making subsidiary regulations and corresponding procedures.

The *SSPB*[21] is the central authority responsible for the overall effort of protection of state secrets in the country,[22] and therefore, classification is under its jurisdiction. At the central level, the *SSPB*, in conjunction with the Ministry of Foreign Affairs, the Ministry of Public Security, the Ministry of National Security and other central organs concerned with protecting state secrets, issue guidelines relating to the specific scope and categories of state secrets.[23] State secrets in relation to national defence are classified by the Central Military Commission.[24] There are also authorities for protecting secrets ("*APSs*") at or above county level which carry functions similar to the SSPB within their respective jurisdictions.[25]

Confidential information will be classified into three categories, *juemi* (top secret), *jimi* (highly secret) and *mimi* (secret). The three-tier system is shared by the US and the UK, depending on how much harm their disclosure would cause to the national interest and national security. Top secrets can only be classified by *SSPB* while the other two categories can be classified by *APSs* at other levels. The classification of secrecy must be marked on the documents according to art12 of the *PSSL*. However, it shall be seen in the subsequent case studies that this statutory requirement is easily bypassed.

State organs at various levels will then classify state secrets produced in their units in accordance with the guidelines of the *SSPB* and the *APSs*. They may also make regulations and interpretations in order to clarify state secrets definition and provide guidance to people with access to potentially confidential information.[26] Each central organ can have its own rules on secrets classification and protection, and organs at lower levels have the same power except that they are under supervision of the superior level and the respective *APS*.[27] As a result, whether a document is a state secret and how it is classified are in fact a matter of executive decision. With such statutory powers, it is possible for state organs to "sweep everything it sees fit into the category of state secrets".[28]

The regulations issued by different authorities affirm the perception that the scope of what they consider as state secrets is infinitely wide. Information about the Strike Hard Anti-Crime Campaign (*Yanda*),[29] the number of people sentenced to death, the number of defenders for

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20 *Supra* note 1, p 258.
21 *Supra* note 7
22 Art 5, *PSSL*.
23 Art 10, *PSSL*.
24 Art 10, *PSSL*.
25 *Supra* note 11, p 110.
26 *Supra* note 1, p 259.
27 Art 7, *Implementation Procedures*.
28 *Supra* note 11, p 119.
29 The first Strike-Hard Campaign was launched in 1983 by the late Chinese leader Deng Xiaoping, to reassert government control over public order by speeding up arrests and imposing severe punishments on criminals. The Campaign has been waged again in 1996 and 2001.

counterrevolutionary crimes, and reports about cases of minority people were all classified as top secrets.[30] In regulations of both the Procuratorates and the Public Security Bureau, statistics on cases such as torture or drug smuggling are highly secret information.[31] Besides, information about the actual cost of commodities exported to earn foreign currency,[32] the quoted price of labour force,[33] accidents occurring in the course of industrial production, and even the curriculum of state secret related courses in universities are also state secrets. Furthermore, as will be shown in the case studies section, state secrets also include official speeches, structural reforms of state institutions, size of grain supply as well as social problems associated with property development.

Such manipulation of state secrets law by the authorities is preposterous. The above information would be publicly available in most countries, while the Chinese authorities classify them all as state secrets to prohibit access and public discussion. Sometimes, the pervasive concept of state secrets does not only restrict information flow, but can also cause catastrophic consequences. For example, the situation of epidemic diseases being a state secret in China caused delayed control of SARS and eventually led to the worldwide outbreak of the disease in 2003. As a result, the PRC government was inveighed against for its mishandling.

3. Trade Secrets

Another problem of the State Secrets Law appears to be the obscure distinction from trade secrets, which has been a major concern for foreign investors. In 1995, the then director of the SSPB, Shen Hongying, said, "as China's scientific, technological as well as economic strength grows rapidly nowadays, there are increasing cases involving the stealing of secret information or science, technology and economy by foreign companies."[34]

During the mid 1990s, many enterprises in China were still state-owned. Therefore, most economic secrets were essentially state secrets. As Fu Hualing puts it, "what are normally classed as trade secrets in the West are often upgraded into state secrets in the PRC".[35] Under this situation, banking secrets are also equivalent to state secrets because most banks are state-owned enterprises. For example, the renowned case of Xi Yang was related to the banking policies of the People's Bank of China.

The *Unfair Competition Law* defines economic secrets as "any technical information and business information unknown to the public, which can bring economic benefits to its owners, which are useful and have been subjected to precautionary measures."[36] In fact, a conceptual distinction could be found in the Examination Report of the Law Committee of the NPC on

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30 *Regulations on the Scope and Classification Level of State Secrets Concerning the Work of Procuratorates*, promulgated by the Supreme People's Procuratorate and the State Secrets Bureau, 23 October 1989.

31 This may conflict with China's obligation to make information about torture cases and its actions to combat them available to the UN Committee Against Torture, which monitors the *Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment*, of which China has been a member since 1986.

32 Art 2 Item 5, *The Practical Administration of Statistical Materials Concerning State Secrets*, 15 March 1995, State Statistical Bureau.

33 *Supra* note 13, p 14.

34 China News Agency, 24 April 1995, quoted by Amnesty International. *Supra* note 13, p 4.

35 *Supra* note 11, p 119.

36 Art 10, *Unfair Competition Law 1993*.

the *PSSL* draft in 1988, where Sun Yufeng from the Law Committee explained that state secrets must be concerned with the "national security interests", a distinguishing feature not shared by trade secrets.[37]

However, as the case studies will show, this distinction is easily disregarded in practice, because under the *PSSL*, national economic information can be classified as state secret, and therefore, an overlap between the two types of secrets is possible. It is true that in the majority of state secrets offences, people have been prosecuted for divulgence of information which is purely trade secret in nature.

4. Internal Materials and Foreigners

Notwithstanding that state secrets information can be classified into three categories, people have been prosecuted for circulating *neibu* (internal) documents which had not been classified accordingly. Although some publications have a restricted but broad domestic distribution, access to such information by foreigners and journalists tend to be refused by Chinese authorities, either because they contain "internal" information or "state secret" elements.

The distinction between internal information and state secret is precarious, and certain regulations have been found to conflate the terms "internal use only" and "domestic publication" with state secrets.[38] The term "internal information" has not been mentioned in the *PSSL*. However, art 37 of the *Implementation Procedures* clearly stipulates that internal information of a department is not covered by the *PSSL* if it is not classified.

Internal information is a vague concept. Generally, an internal document can only be disclosed to PRC citizens or a certain group thereof.[39] In practice, many documents and publications that are marked for restricted circulation are widely available, and thus disclosure of such information could not be considered as a criminal offence under international standards. For instance, some internal confidential material may be circulated to CCP members and cadres. Publications might be marked *neibu* simply because they contain information that is politically sensitive. In cases of major events or a change in leadership, the *neibu* information is actually made known to all citizens. Indeed, the official news organ, Xinhua News Agency, has a wide array of internal publications, including "top secrets" ones.[40]

The restriction on *neibu* information is a major concern for expatriates as well as people working for foreign entities, because history shows that a person can be sentenced for violation of the State Secrets Law by disclosing internal information. It also appears that the government may classify any information as internal to refuse public access. However, since the law requires a document to be labelled in advance as state secret in order to be kept confidential, disclosure to foreigners or non-Chinese citizens should not make a difference by way of the internal access claim.[41] Furthermore, the *PSSL* positively recognizes the necessity to provide information on state secrets when dealing with foreigners, and in such circumstances, approval may be obtained, although the procedures and the organs responsible

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37 *Supra* note 11, p 120.
38 *Supra* note 13, p 6.
39 *Supra* note 1, p 258.
40 *Supra* note 37.
41 *Supra* note 38.

for granting approval are both unspecified.[42] Nevertheless, refusing a foreigner to gain access to information simply on the ground that it is "internal" seems to be legally unjustified.

B. Criminal Liabilities

1. Divulgence of State Secrets

According to art 31 of the *PSSL*, persons who divulge state secrets intentionally or negligently will be investigated for criminal responsibility, unless the consequences are not serious, in which case, the person will be given disciplinary sanction. The *Implementation Procedures* define "divulgence" as making state secrets known to unauthorised persons against any law, regulations and rules, or making a state secret go beyond the designated limits, without being able to prove they have not become known to unauthorised persons.[43] Since practical harmful consequences are not sine qua non for this crime, in other words, any unauthorised disclosure would invoke liability under art 31.[44] This seems to contravene international standards, as demonstrated in comparison with the UK law, which only criminalizes damaging disclosure.

On contemplation, it is easy to be caught by this crime in China. For example, if the classified information is negligently communicated by non-confidential means or has been lost, the responsible party has the difficult onus of proof to show that it has not been accessed by unauthorised persons, which is almost impossible, and he could be convicted even though no evidence can be adduced to show that the state secret became known to unauthorised persons. The shift of burden of proof to the defender also violates the fundamental legal principle of presumption of innocence, which has been recognized in the *1997 Criminal Code*.

By virtue of art 398 of the *Criminal Code*, if the case is found to be serious, the offender will be sentenced to fixed-term imprisonment of not more than three years, and in an especially serious case, it can lead to a maximum of seven years of imprisonment. This seems unduly harsh given that the law neither makes a distinction between intentional and negligent divulgence, nor does it make public interests defence or prior publication defence available to defenders. Moreover, the law makes clear that people can be held legally responsible for any form of disclosure of state secrets, including "private conversation or communications"[45].

2. Stealing, Spying on, Buying or Illegally Providing State Secrets

Under the *PSSL* art 32, persons who steal, spy on, buy or illegally provide state secrets for institutions, organizations and people outside the country shall be investigated for criminal responsibility. The *SSPB* stressed that this crime will not apply to foreigners and individuals without nationalities.[46]

The scope of materials caught by this crime has been expanded by the *1997 Criminal Code*, with the addition of an ambiguous concept of *qingbao* (intelligence).[47] Intelligence is taken to

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42 Art 21, *PSSL* provides that "when state secrets have to be furnished for the benefits of contacts and cooperation with foreign countries, approval must be obtained beforehand in lines with the prescribed procedures".

43 *Supra* note 7, p 8.

44 *Supra* note 7, p 9.

45 Art 24, *PSSL*.

46 *Supra* note 7, p 12.

47 Art 111, *Criminal Code 1997*, "Whoever steals, spies on, buys or unlawfully provides State Secrets or intelligence ..."

have the property of state secret, which includes important information of politics, economics, military and technology etc. However, there is no clear definition of intelligence under the law.[48] The *SSPB* also admitted that it is sometimes uneasy to determine whether a piece of information is intelligence, and the lack of a clear legal definition has created difficulty in interpretation and enforcement of the law.[49] This attracts potential abuse of the law, because the *PSSL* stipulated that classification of state secrets must be marked on the documents concerned,[50] but there is no such procedural safeguard for items of intelligence. The *SSPB* is not treating this judicial ambiguity seriously, and decided that it is for the citizens to be conscious and careful of information capable of being regarded as intelligence. The Bureau's irresponsible view and the lack of procedural safeguard imply a "presumption of intelligence" when people are accused of this crime, and the lack of definition for the term deprives the accused of the chance to defend. It shows that people's freedoms to information and expression are haunted by the chilling effect.

The wording of the penalty is also vague and messy. Article 111 of the *Criminal Code* provides that in cases of especially serious circumstances, offenders will be sentenced to imprisonment of not less than 10 years or life imprisonment. But the *Supplementary Provisions* of the NPCSC[51] raised the maximum penalty to death penalty. While deprivation of political rights is an option of punishment for minor violation of the law, the *Supplementary Provisions* make it a mandatory punishment for especially serious cases in addition to imprisonment and death penalty. But of course, deprivation of political rights cannot be exercised concurrently with death penalty, which can only be treated as language inadvertence.

3. *Foreigners Unlawfully Obtaining or Holding State Secrets*

While the two previous crimes did not target foreigners, they can be charged with unlawfully obtaining state secrets by stealing, spying or buying.[52] This crime has been used to accuse foreign journalists and businessmen. It has a maximum penalty of seven years of imprisonment. A similar but less serious crime would be unlawfully holding the documents, materials or other objects classified as "strictly confidential or confidential" state secrets.[53] People who are found to unlawfully hold such materials and refuse to explain their sources and purposes will be subject to a maximum of three years of imprisonment, criminal detention or public surveillance.

The test for criminal liability is lower in circumstances involving disclosure to foreigners. But this is an irony. While foreigners are the primary concern of the state secrets law, and the *neibu* categorization aforementioned restricts foreigners' access to such information, they are not subject to punishment in the way that Chinese nationals are but given preferential treatment. The standard treatment for foreigners implicated in the unlawful disclosure of secrets has been expulsion from China.[54] However, the definition of foreigners, like that of enemy, has never been clear, especially when the person involved is a Chinese citizen who has immigrated to another country. In such cases, the defenders are usually detained for a

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48 *Supra* note 7, p 12.
49 *Supra* note 7, p 14.
50 Art 12, *PSSL*.
51 Standing Committee of the National People's Congress.
52 Art 282(1), *Criminal Code 1997*.
53 Art 282(2), *Criminal Code 1997*.
54 *Supra* note 11, p 127.

excessively long period, until the respective foreign government requests their release from China.

III. Worldwide Tension between National Security and Civil Liberties

A. Tension between National Security and Civil Liberties

The PRC State Secrets Law is an attempt to enhance national security by legal means of protecting state secrets from unlawful disclosure. In any state, national security law is deemed to be conspicuous and controversial not only because of its relevance to protection of a state and its people, but also due to its tendency to achieving the aims at the expense of civil liberties of individuals.[55] China is a vivid example, and the tension between the two concepts appears to be more rigorous. However, in China's case, the pendulum has always been biased towards national interests, because of the socialist nature of constitutional system and the political structure of the PRC. Therefore, the analysis of the State Secrets Law must be conducted in a context of government-imposed restrictions over individual freedoms, including freedoms of information, expression and press.[56]

With socialist constitutionalism, PRC's legal system has been shaped in favour of state domination, as well as supremacy and monopoly of the ruling party.[57] Moreover, the National People's Congress, being the law-making organ of the PRC, has long been perceived as a rubber stamp for the Communist Party. The CCP exerts its control through a party organization parallel to state institutions, and a significantly overlapping membership between party and state organs under the nomenklatura[58] system through which the Party appoints key positions in the government. As a result of the dominance of social doctrine and party line, it leads to an imbalance between national interests and civil liberties in China, and the State Secrets Law is an output of such system.

National security is a nebulous concept without definite meaning, and this is obvious in the case of China, where the term "state secret" alone has already demonstrated the infinite boundaries of subject matters. Preservation of such ambiguous state interest will likely harm individual interests, such as citizens' right to access information and freedom of expression.

Freedom of information is essential to ensure public scrutiny of government administration. James Maddison said, "people who mean to be their own governors must arm themselves with the power which knowledge gives."[59] While people in a democratic polity need freedom of information to check the performance of their chosen representatives, this freedom is indeed even more important in a communist state like China, where the government rules by monopolistic leadership, lacking a tradition of openness, transparency and accountability to people.

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55 Lau, A W H, "Official Secrets in the Context of One Country Two Systems", (2004) 9 *Hong Kong Student Law Review* 9, p 1.

56 *Supra* note 13, p 3.

57 Ghai,Y P, *Hong Kong's New Constitutional Order: the Resumption of Chinese Sovereignty and the Basic Law*, (Hong Kong: Hong Kong University Press, 1999), p 86.

58 Nomenklatura is a distinctive feature of most communist countries. A list of nomenklatura posts are filled with people pre-determined by the Party such that the Party can exert great control over the government and other institutions through its appointments. *Ibid*, p 111.

59 Lee, H P, Hanks, P J and Morabito, V, *In the name of National Security: The Legal Dimensions*, (North Ryde, New South Wales: LBC Information Services, 1995), p 92.

In contrast, a presumption of secrecy pervades China's traditional approach to the flow of information and this tradition stems from the first day of the communist regime.[60] The new-born regime was vulnerable, and Mao Zedong, the founding leader of the PRC, perceived that enemies were keen on stealing vital intelligence to sabotage the revolution. The sense of mistrust and insecurity continued through various political movements and still persists as at today.[61] Although China has embarked on the open-door policy since 1979, it is not yet ready to uncover itself from the shield of secrecy. The State Secrets Law is an instrument to protect both the fruits of China's economic reformation as well as the political power of the Communist.

China is very sceptical of being ripped off its economic success by the invisible hand, *viz.* market mechanism. Unfamiliar to an economic system oriented in interest maximization and market competition, all sorts of business strategies, economic information and technological advancement that should be under the realm of trade secrets are treated as the private property of the government and shielded as state secrets in China. For example, a Chinese company entered into a joint venture with a foreign entity to manufacture a high-tech product invented in China. The *APS* considered this a loss of state secret technology to foreign entities that harmed China's competitiveness in the international market.[62] However, while there are a large number of foreign investors setting up production plants and offices in China, transferring their production technology and business knowledge to the Chinese partners, these investors' home countries have not considered the transfer as divulgence of state secrets. As mentioned above, the mentality of equating trade secrets with state secrets originates from the state-owned enterprises. It seems the *SSPB* and the *APSs* need a better understanding of market economy in order to appreciate the dynamics of free competition and respect the decisions of private enterprises.

As for consolidating political power of the Communist Party, the case studies will show that some of the prosecutions are politically motivated. Not only do the people in China lack the legitimacy to monitor government acts, the government is high-handed in scrutinizing the acts of people, not only in what they say but also in what they read and hear. For example, during the 1987 trip to China, 17 segments of the late Ronald Regan's remarks were deleted from the telecast although the Chinese promised to broadcast in full. This could not be tolerated by foreign investors who are brushed in democracy and transparency.

Suppression of information does not come without costs.[63] AIDS and SARS both illustrate that when a government does not share information with its people, repressed or delayed information flow may prevent proper measures and exacerbate the situation. Therefore, it is important to safeguard civil liberties while enhancing national security. And when the State Secrets Law is intruding civil liberties, it may be working against national interests.

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60 *Supra* note 1.

61 See *A General Discussion on the State Secrets Law (Bao mi fa gai lun)*, Liu Zhicai ed., (Beijing: Jin Cheng Chu Ban She, 1999). The writers, officials from the Ninxia Huizu Autonomous Region State Secrets Protection Committee, have demonstrated the tremendous scepticism of global competition. It is believed that western powers are mischievous and their relentless effort in stealing "state secrets" is aimed at destroying China's economic reformation and construction. The hostile mindset and misconceived zero-sum understanding of world economy and market economy may explain the broad interpretation of state secrets that takes into account information of economic and social development.

62 *Ibid*, p 114.

63 Link P, "More Repression? Beijing's Response to the 21st Century", (paper presented at the Conference on Freedom and Nation Security: Has the Right Balance been Struck? 14-15 June 2003, Centre for Comparative and Public Law, Faculty of Law, University of Hong Kong), p 4.

B. Reconciliation in Theory of International Law

China, being a member of the United Nations, is bound to uphold the *Universal Declaration of Human Rights* ("*UDHR*"), which by virtue of its art 19 stipulates that:

> "everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers." [emphasis added]

China has also signed the *International Convention on Civil and Political Rights* ("*ICCPR*") in 1998.[64] Similarly its art 19 says:

> "Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, or in the form of art, or through any other media of his choice."

International law reckons that the right to freedom of expression is not absolute, and it may be subjected to certain restrictions. However, any restrictions shall only be such as provided by law and necessary for respect of the rights or reputations of others or for the protection of national security or of public order, health or morals.[65]

1. Restrictions provided by law

Under international law, as in the *Johannesburg Principles on National Security, Freedom of Expression and Access to Information, Freedom of Expression and Access to Information*,[66] restrictions on freedom of expression and information must be provided by law.[67] The legislation in place must set unambiguous parameters for the type of information or expression which is to be restricted. It must also be accessible and precise to enable individuals to foresee whether obtaining or releasing certain information, or otherwise exercising the freedom of expression is unlawful.

From the above discussion on the State Secrets Law which comprises the *PSSL* and the *Implementation Procedures*, state secret has an overbroad and vague definition, which in turn leaves a high degree of discretion to the authorities to decide in each case. In consequence, it is very difficult for citizens to anticipate in advance what types of information are state secrets, and in some cases, defenders suffer retrospective classification because the information in question has not been classified until trial. For journalists and others engaged in following, investigating and reporting on public affairs, the vague law undoubtedly carries a chilling effect, and the impregnable means of not running foul of state secrets crimes forces them to be extremely cautious in dealing with political and economic issues in China.

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64 China signed the *ICCPR* on 5 October 1998, but has not yet ratified the Convention.

65 *ICCPR* article 19(3). The *UDHR* also has a restriction clause in art 29(2), stating that "in the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society."

66 *The Johannesburg Principles on National Security, Freedom of Expression and Access to Information, Freedom of Expression and Access to Information* were adopted on 1 October 1995 by a group of experts in international law, national security and human rights that aimed at promoting a clear recognition of the limited scope of restrictions on freedom of expression and freedom of information that may be imposed in the interest of national security.

67 Principle 1.1, *The Johannesburg Principles on National Security, Freedom of Expression and Access to Information, Freedom of Expression and Access to Information.*

2. Necessary for Protection of Legitimate National Security Interest

National security lacks definite meaning, but international law does not empower states with unfettered discretion to define its ambit. In international law, the government must demonstrate that the restriction on freedom of expression or information is necessary for protection of a legitimate national security interest, in the sense that the expression or information at issue poses a serious threat to a legitimate national security interest and the restriction is imposed in accordance with the *de minimis* rule.

A legitimate national security interest is understood as "protection of a country's existence or its territorial integrity against the use or threat of force [or violence], or its capacity to respond to the use or threat of force, whether from an external source, such as military threat, or an internal source, such as incitement to violent overthrow of the government."[68] It is wondered whether categories of state secrets in the *PSSL* such as information related to major policy decisions, economic and social development and science and technology can meet this threshold of legitimate national security interest.

In what circumstances will a restriction on freedom of expression or information become necessary? According to the UN Special Rapporteur on freedom of opinion and expression, the right to freedoms of expression and information can be restricted only in the most serious cases of a direct political or military threat to the entire nation.[69] Moreover, it has been reiterated that only in highly exceptional cases can a nation's security be directly threatened by a person's exercise of the right to freedom of expression, such as by propagating or inciting the use of violence.[70]

In conclusion, international law has a high standard for legitimate national security interest, which suggests use or threat of using violence. But in the following case studies, we shall learn that prosecutions have not been justified by the necessity to protect national security, and people could be sentenced for non-violent and legitimate exercise of their freedom of expression and freedom of information. Some defendants have also encountered unfair judicial procedures.

C. Comparing with Contemporary Western Practice

In the past several decades, many western countries have undergone legal reforms to allow access to government information for public inspection. A shift from a closed system to a more open system has been observed in Australia, New Zealand, Canada and the United States, where freedom of information laws have been enacted to legalise public access to information. However, the United Kingdom serves to be an exception, and the government remains reluctant to recognize the freedom of information by legalisation. Thus it has earned the reputation of "the most secretive of Western democracies"[71] for failing to attain a greater degree of freedom of government information.

While expecting China to resemble the western pioneers of open governments seems

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68 Principle 2 (a), *The Johannesburg Principles on National Security, Freedom of Expression and Access to Information, Freedom of Expression and Access to Information.*

69 *Supra* note 13, p 8.

70 *Ibid. Supra* note 11. See also principle 6 of *The Johannesburg Principles on National Security, Freedom of Expression and Access to Information, Freedom of Expression and Access to Information.*

71 *Supra* note 58, p 111.

unrealistic, it might be worth to adopt UK as a yardstick, by comparing the most secret of the world with the most secretive of the west, to gauge the distance of China's State Secrets Law from the minimum of international standards.

1. The Most Secretive of the West

UK's *Official Secrets Act 1911* was viewed as extremely oppressive to a wide range of publications and communications of government information by its "catch-all' provision in section 2, which criminalized mere communication of official information in possession or control of government.[72] This section was repealed and replaced by the *Official Secrets Act 1989* ("*1989 Act*"), which redefined official secrets into six categories:

1) security or intelligence;
2) defence;
3) international relations;
4) crime and special investigation powers;
5) information resulting from unauthorised disclosures or entrusted in confidence;
6) information entrusted in confidence to other states or international organizations.

The six categories can prevent information not directly related to national security from being automatically usurped from public access and scrutiny, such as Cabinet documents and economic information. Although China has specified categories of secret information even earlier than the UK, it was not an exhaustive list in China's case and the catch-all clause has not been removed, which resulted in continuous abuse of the ambit of state secrets.

The *1989 Act* may appear to be less restrictive than the *1911 Act*, but critics believe that it is not less vague indeed.[73] However, if the six categories of the *1989 Act* are seen to be oppressive, then the categories in the *PSSL* will be unacceptable by international standards. The *UK Act* and the *PSSL* directly share four categories – defence, diplomatic activities or international relations, criminal investigation and state security (while the last two are combined into the 6th categories under the *PSSL*). As discussed in Part II, the categories of policy decisions and information on economic and social development are unusual and problematic.

The six specified areas in the *1989 Act* were to be protected against unauthorised disclosure where the disclosure was damaging, and the mere receipt of official information without authority was not to be a crime unless aiding and abetting, incitement or conspiracy could be charged.[74] The authority in *Lord Advocate v Scotman Publications*[75] required damaging disclosure with proof of a strong likelihood of specified harm or clear and present danger of harm brought about by the publications or disclosure. But in China's case, not only is damaging consequence not essential for the crime, people can be charged for unlawfully holding confidential documents.[76]

Moreover, in the *1989 Act*, the test of liability would depend upon the state of knowledge of

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72 Mathews, A S, *The Darker Reaches of Government: Access to Information about Public Administration in the United States, Britain and South Africa* (Berkeley, California: University of California Press, 1978), p 108.

73 *Supra* note 54.

74 Birkinshaw, P, *Reforming the Secret State* (Milton Keynes: Open University Press, 1990), p 8.

75 *Lord Advocate v Scotman Publications* [1990] 1 AC 812.

76 Art 282, *PSSL*.

the discloser.[77] For example, for a party who is not a civil servant or a government contractor, on top of the requirement of damaging disclosure, their unauthorised receipt and subsequent authorised disclosure is an offence only where that person knows, or has reasonable cause to believe that it is protected against disclosure.[78] Therefore, it is a defence for lack of knowledge that the information was classified.

The *1989 Act* is seen oppressive by legal academics due to the absence of public interest defence and prior publication defence, and it is feared that the *1989 Act* will be used as an additional instrument with which legal action can be used to regulate the dissemination of government information to the public. However, it has been argued that prior publication without government action to prevent publication may indicate that disclosure has been authorised, even though the information is still technically "secret".

None of these defences are available in China. In practice, defenders have been sentenced even though they were not aware that the information in question had been classified, and in some cases, information was classified after the defenders had been charged.

IV. Case Studies on the Arbitrary Application of Law

In the wake of free flow of information, the formerly closed-door state preserves its secrecy through a complicated and wide-catching legal mechanism. The following examples demonstrate that the State Secrets Law of China has been used in circumstances that might not be directly related to national security, but threaten people to unjustly surrender to the peremptory state control. It must be noted that these cases are just samples of a larger batch of disputable prosecutions and convictions which have unusually escaped the official whitewash to acquire press coverage. The continuous incidents of politically motivated cases are alarming. However, even if there is only one case, it implies that the law is capable of being abused to punish people against the legitimate purpose of national security, and therefore, is intrusive.

A. The Politics in State Secrets

Under the law, state secrets include the affairs of political parties, when they are deemed to affect the security and interests of the state. However, the qualifier of relevance to state interest and security is frequently ignored, such that the law has been used in a politically contemptuous fashion, especially after the 1989 democracy movement.[79]

One of the most astounding cases has been the sentence of Bao Tong, the highest ranking CCP official charged for leaking state secrets since 1989.[80] A close assistant to the former CCP Secretary General Zhao Ziyang, Bao was a member of the CCP Central Committee[81] and Director of its Research Centre for the Reform of Political Structure. His was charged for his private conversation on 17 May 1989 with Gao Shan, another senior CCP official who worked at the same research centre, relating to the impending declaration of martial law and the resignation of Zhao Zhiyang.[82] What made the case perilous was that both issues were

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77 *Supra* note 73, p 11.
78 *Supra* note 73, p 23. The provision concerned is in section 5.
79 *Supra* note 6, p 19.
80 Bao Tong was also charged with counter-revolutionary incitement at the same time.
81 Central Committee is the second highest level of leadership unit in the CCP.
82 *Supra* note 13, p 19.

publicised on 20 May 1989, but Bao and Gao still received the heavy sentences of seven years and four years of imprisonment respectively because the defence of prior publication was not available.

Li Hai, a student leader in the 1989 democracy movement, was originally accused of hooliganism but the charge was later changed to leaking state secrets for collecting information about people sentenced in connection with the Tiananmen crackdown. He made door-to-door visits to the families of the prisoners concerned, collecting statistics that included the name, age, family situation, crime, length of sentence, location and treatment of such prisoners.[83] His inculpation was disputable because the information was collected by Li Hai himself, not a government employee who had access to state secrets. Thus, the information had not been classified. Taking into account Li's defence, the Court did not convict Li of leaking state secrets, but he was no better off, being sentenced to nine years of imprisonment for prying into and collecting the information. The exorbitance of his penalty is flabbergasting, not only because the information had not been classified, but Li was merely collecting information that is general and public in other countries.

B. Ethnicity

Ethnic separatism is a highly sensitive issue to the PRC government, which renders the respective activists within the ambit of state secret criminals.

In 1993, Tibetans Gedun Rinchen and Lobsang Yonten prepared a letter for a delegation of European Community diplomats concerning human rights abuses in Tibet.[84] Gedun Rinchen was also accused of stealing state secrets, because he collected information on human rights violations over a period of years. Although both men were released due to international pressure, their accusations displayed the over-breadth of the state secret definition which could criminalize acts not related to national security but simply would have embarrassed the PRC government.

Rebiya Kadeer's prosecution has been a dramatic one that became an international controversy. A successful businesswoman in Xinjiang, Kadeer had been touted by Chinese government as a model Uighur and once served on the Xinjiang People's Political Consultative Conference. However, she was convicted of revealing state intelligence abroad in 2000, for sending newspapers to her exiled husband in the United States, including marked official speeches and articles concerning government's fight against ethnic separatism. Her husband, Sidik Rouzi, had criticized the PRC policy on the US sponsored Radio Free Asia, and had written on the oppression of the Uighurs in Xinjiang province.[85] It was contended that Kadeer had simply arranged to send her husband all issues of the official newspaper in the region for the month of May 1999. The package of mailed newspapers was intercepted by authorities and Kadeer was arrested in Urumqi as she was driving to meet staff members from the US Congress. Subsequently, her son and secretary were also detained in connection with her case, and Kadeer was sentenced to 8 years in prison.[86]

Another ethnic activist is Hada, an avid participant of the Inner Mongolian student movement

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83 *Supra* note 6, p 16.

84 *Supra* note 13, p 15.

85 Eckholm, E, China 'State Secret', *Chicago Tribute Internet Edition*, 27 April 2000, available at http://www.mail-archive.com/uighur-1@taklamakan.org/msg00368.html.

86 Human Rights in China, at http://iso.hrichina.org/iso/article.adp?article_id=417&category_id=26.

which helped preserve Mongolian ethnic identity. Hada and other fellow activists began publishing a periodical in 1994 to promote the principles of the Southern Mongolian Democratic Alliance. Hada's home was searched in December 1995 and numerous documents were confiscated. Among various crimes of endangering national security, he was convicted of stealing secrets for the enemy, but the state secret concerned was not specified.

These three cases demonstrate the menacing reality that discussing issues of human rights, ethnic policies or criticizing the PRC government will get on Beijing's nerves, and the State Secrets Law will be used to tranquilise the official discomfort.

C. Foreign Parties

Because of the paranoia of the *SSPB* and *APSs* of losing secrets to foreign entities, foreign nationals and people working for or merely dealing with foreign entities have to be very cautious, since their communications could be used as evidence of state secret crimes.

In 1992, 11 seamen were arbitrarily detained and three of them were charged with leaking state secrets. The seamen had a wage dispute with a Greek shipping company, and the International Transport Workers Federation ("*ITWF*") had helped them settle the dispute. The seamen had revealed the actual amount of their wages after a Chinese employment agency took its commission from the Greek employer. It was alleged that they had divulged state secrets by communicating their salaries to the *ITWF*. Wage can hardly be considered as a state secret in other countries. Not only do governments feel obligated to provide statistics about wages, similar information can be widely available in both private sectors and international organizations such as the World Bank. Therefore, such classification of wage information is apparently unjustified.

Chinese nationals working for foreign companies are especially vulnerable. In the 1980s, a Chinese employee of Shell International was sentenced to six and a half year for writing to a foreigner about the size of Shanghai's grain supply for a given year. And in 1997, another Chinese employee of Shell, Xiu Yichun, was detained for a year on a charge of stealing state secrets about a planned oil refinery plant in China.[87] Although she was not prosecuted in the end, she had been held incommunicado, a common tactic used by the government before the actual trial.

Fong Fuming, a Chinese-born American, was charged for illegally obtaining classified documents of China's energy industry and bribing government officials to help foreign investors bid on Chinese power projects. He was sentenced to five years in March 2002, but under the request of the US government, he was deported to the US in October 2003.[88] The detention of Fong for two years before trial appeared to be a violation of human rights, and it is believed that Fong's release was part of Chinese government's effort to answer US complaints about its human rights records.[89]

D. Journalists and Media

The media in China is heavily regulated and censored under the guise of state secrets. In early 1996, the CCP General Secretary Jiang Zemin was quoted to give the following message to

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87 *Supra* note 1, p 256.

88 "Beijing Releases Chinese-Born American", *New York Times*, 28 October 2003.

89 The Associated Press State & Local Wire, 27 October 2003, by Steve Strunsky.

newspapers in China, "the most important thing in running newspapers is to uphold the party and political line."[90] Since early 1990s, the majority of known cases of state secrets have involved Chinese journalists. It was said in 1989 that journalists were responsible for 50% of the cases of illegal disclosure of state secrets.[91] The prosecutions have been interpreted as an intimidation strategy of "killing the chicken to frighten the monkeys",[92] and Chinese journalists working for foreign publications have been a major target.

The couple of Bai Weiji and Zhao Lei, were sentenced to ten years and six years in prison respectively on the charge of leaking state secrets to foreigners, simply for translating "internal" materials from magazines for Washington Post correspondent Lena Sun. The documents comprised economic reports, foreign policy analysis and speeches by Chinese leaders which were believed to be accessible to many CCP members, and thus should not be classified as state secrets. It has also been suspected that the charge was politically motivated as Bai had participated in demonstrations during the 1989 pro-democracy movement.

The arrest of Xi Yang and Gao Yu were well known and caused heated controversies. Xi Yang, a reporter for Hong Kong newspaper Ming Pao, was charged with leaking state secrets for reporting on policies of the People's Bank of China concerning interest rates and international gold transactions. But according to Hong Kong sources, most of the information had already been publicised in Hong Kong in July 1993 when *Ming Pao* published a series of articles on China's economic affairs, including the plan to restructure the bank.[93] The comments made by Jia Chungwang, the State Security Minister, suggested that official source was the only legal source of information, which in fact had greatly restricted the gathering of information, contravening the right to seek information provided in the *ICCPR*.

Shortly after Xi Yang's detention, Gao Yu, a renowned Chinese journalist, was also detained for reporting the structural reforms of state institutions and the speech of Jiang Zemin. She was accused of having obtained the information from two classified documents shown to her by a friend and of writing articles about it for an unspecified Hong Kong magazine in early 1993. However, the documents of the structural reform had been publicised by the pro-communist newspaper *Wen Wei Po* in Hong Kong, while the speech of Jiang Zemin had become an established part of China's foreign policy over the years. In both Xi Yang and Gao Yu's cases, no evidence was adduced to show that the information concerned any matter of national security, but both defendants received harsh punishments.

In 2002, a research professor, Xu Zerong, of the Zhongshan University in China was sentenced to 10 years of imprisonment on a charge of leaking state secrets, because he photocopied four books published in the 1950s about China's role in the Korean War and sent them to his colleague in South Korea for his academic research.[94] The documents were subsequently classified as top secrets by Chinese authorities. However the findings of Hong Kong Human Rights Monitor concluded that the actual cause of Xu's conviction was an article he wrote for Chinese magazine *Yazhou Zhoukan* (Asia Weekly) in 2000 which showed that China had double standards in foreign policies, supporting revolutions abroad while

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90 The message was cited in China's official newspaper Liberation Army Daily. Quoted in *The independent (London)*, 5 January 1996. *Supra* note 13, p 3.

91 *Supra* note 6.

92 *Supra* note 13, p 3.

93 *Supra* note 13, p 17.

94 Attacks on the Press in 2002, "China", at http://www.cpj.org/attacks02/asia02/china.html.

berating critics of its human rights record for interfering with its internal affairs.[95] Anyhow, it seemed that the information and findings of Xu were for an academic research which deserved respect and appreciation in a free society, but China autocratically imposed the state secrets law to avoid criticisms or undesirable comments.

E. Revelation of Government 'Scandals'

Behind the great wall, the communist government has a tendency to cover up scandals, and reward anyone's effort to arouse domestic and international attention to social problems with severe criminal liabilities. The following cases are a few examples.

1. AIDS

It is no secret that Chinese government censors reporting on issues such as AIDS. Indeed, the health officials admitted that the AIDS epidemic is a state secret,[96] and journalists who investigate the topic have faced harassment or detention.

Wan Yanhai, a former doctor of the Ministry of Health, started AIDS Action Project in 1994. Together with several domestic and foreign journalists, he defied tight reporting restrictions and exposed the AIDS crisis in Henan province, where tens of thousands of villagers contracted HIV through unhygienic blood transfusions in official blood-collection stations. He had posted a government report online, documenting the spread of AIDS in Henan, which caused his detention in August 2002 on suspicion of leaking state secrets to overseas individuals, media sources and websites. It was alleged that the document was classified and it was illegally acquired. But he was released a month later due to the fact that Wan received the report anonymously as well as the huge international outcry in response to his accusation. However, in the following year, Ma Shiwen, a provincial health official, was accused of leaking confidential documents, by using his computer to send the AIDS report to AIDS activists in China, including Wan. Nonetheless, Wan had circulated an online appeal to all independent Web publishers asking them to join him in protesting against new regulations by giving themselves up to authorities for operating illegal websites.[97] He had also made use of internet chat rooms, discussion and email groups in his efforts to publicise his cause and promote freedom of opinion and expression in China.[98] We will discuss regulations on internet publication in further detail.

2. The SARS Hero

Dr Jiang Yanyong, 72, is the whistleblower on the Chinese government's efforts to keep secret of the spread of SARS. Engulfed between the official truth that Beijing had only a handful of SARS cases,[99] and the reality of alarming SARS outbreak in Beijing hospitals, where SARS patients were being driven around in ambulances to hide from the World Health Organization, Dr Jiang wrote a letter to Beijing TV Station and Time Magazine, exposing the lie behind the official assurance, saying "I felt I had to reveal what was happening not just to save China,

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95 "High Price for Baring War's Secret", *South China Morning Post*, 27 May 2002.

96 Guardian Newspapers, "Aids: China's State Secret", 1 July 2003, at http://www.buzzle.com/editorials/text1-7-2003-33212.asp.

97 The regulations concerning internet publication will be discussed in more detail in the internet part.

98 Amnesty International, "People's Republic of China State Control of the Internet in China", 26 November 2002, at http://web.amnesty.org/library/print/ENGASA170072002.

99 China's Health Minister held a press conference in April 2003. He was held responsible for the spread of SARS in China and was laid off.

but to save the world."

Dr Jiang admitted that health workers at military hospitals had been ordered by their superiors to keep the disease a secret, and reported that there were at least 170 known cases, forcing the ministry to publicly reveal the extent of the epidemic.[100] This had motivated the government's determined effort to combat the spread of SARS,[101] and Dr Jiang was praised in the official People's Daily for his truth telling.[102]

Despite Beijing's confession on the SARS outbreak, the country was still in mystery. In an internal meeting with Shanghai Communist Party officials, local official media was cautioned that Shanghai's SARS caseload was still a state secret, and the media should not report any SARS statistics higher than the government-sanctioned figures. Journalists were also forbidden to interview SARS patients or their families.[103]

In February 2004, Dr. Jiang wrote a letter to the NPC Chairman, detailing his experiences as a surgeon on 4 June 2003, calling for a reassessment of the incident.[104] In consequence, he and his wife were detained on 1 June 2004 during a police roundup of dissidents before the anniversary of the Tiananmen Square crackdown.[105] Dr. Jiang's wife and many others have been released not long afterwards, but Dr. Jiang remained in custody for seven weeks until 20 July 2004, after completing "indoctrination classes"[106].

3. Zheng Enchong

Zheng Enchong, a renowned property-lawyer, was charged for illegally obtaining state secrets in 2003. He was later tried for illegally providing state secrets to foreign entities outside China, a more serious offence, in relation to two documents.[107] It was said that the proceedings were monitored by the Shanghai municipal government.[108]
The first document was about evictions of residents for property development in Shanghai. Zheng allegedly violated the law by distributing it to the western group Human Rights in

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100 Geodog, "Dr. Jiang Yanyong, hero of the SARS epidemic, imprisoned in China", 29 June 2004, at http://www.thebishop.net/geodog/archives/2004/06/29/dr_jiang_yanyong_hero_of_the_sars_epidemic_imprisoned_in_china.html.

101 But two weeks after his letter to the Chinese media exposing the SARS cover-up was leaked to Time magazine, the party fired the health minister and the mayor of Beijing, dramatically raised its official count of SARS cases and launched a mass campaign to alert the public of the disease and stop it from spreading.

102 "SARS Whistle-blower Breathing Sigh of Relief", 21 May 2003, at http://english1.peopledaily.com.cn/200305/21/eng20030521_117004.shtml.

103 Hannah Beech, "Shanghai SARS Cases a State Secret", 24 April 2003, at http://www.time.com/time/asia/news/article/0,9754,446260,00.html.

104 http://journalism.berkeley.edu/projects/chinadn/en/archives/002276.html.

105 *Ibid.* According to Reuters, It was not immediately clear if Jiang would be charged with any crime. His California-based daughter, Jiang Rui, said earlier that a government investigation had focused on how Jiang Yanyong's politically sensitive letter was leaked to foreign media.

106 It is said that the authorities threatened to keep him until he "changes his thinking" and "raises his level of understanding" about the Tiananmen crackdown, said one of the sources, who described the classes as "brainwashing sessions." He was forced to write daily statements and watched videotapes as part of the indoctrinization process.

107 "Public Proceedings Initiated against Jailed Lawyer", 19 August 2003, at http://www.democracy.org.hk/EN/2003/aug/news_03.html.

108 Asian Human Rights Commission, "Update on human rights defender Mr. Zheng Enchong in Shanghai", 5 December 2003, at http://www.ahrchk.net/ua/mainfile.php/2003/571/?print=yes.

China ("HRIC").[109] Zheng had advised residents in more than 500 cases involving eviction to make ways for developments. Before his arrest, he was advising two groups of residents who complained of corrupt dealings between officials and wealthy developer Zhou Zhengyi in the allocation of land.[110] He said local courts were using the state secrets law to protect local business interests and he was sentenced for accusing the city government of collusion with businesses in evicting tenants.

The other document involved was the issue of Laborer's Rights, which provided information to overseas media about laid-off workers protesting on 9 May 2003 against their inadequate compensation from a Shanghainese factory. The Court said that Zheng took notes of the secrets of that situation, organized them and from his residence faxed a handwritten draft that included the aforementioned secrets to the HRIC. The Shanghai State Secrets Bureau has confirmed at the request of the Court that the information was classified as state secrets. But according to local sources, the strike was public knowledge.[111] Zheng further defended that he was not aware that the documents were state secrets.

According to international standards, since Zheng did not have the knowledge of state secrets, he could not have the intention to harm national security. Even if such attempt could be proved, there could not be any harmful consequence because the HRIC did not receive the materials. All these considerations were not taken into account, and Zheng was still sentenced to three years of imprisonment.

F. Tightened Control over Information Flow on Internet

1. Regulatory Control over Operators

Since China joined the global internet in 1994, the PRC government is aware of the startling growth of the internet industry, and has extended its control to this new form of media with administrative regulations governing telecommunications and the internet issued by different ministries within the State Council.[112] Under these regulations, all Internet Service Providers ("ISPs") and other enterprises accessing the internet are responsible to the Public Security Bureau, and they are required to provide information on the number of users, page views and user profiles.[113]

On 25 January 2000, the Bureau for the Protection of State Secrets issued the *State Secrets Protection Regulations for Computer Information Systems on the Internet*, which prohibited the release, discussion or dissemination of state secrets over the internet.[114] Moreover, information disseminated online became heavily regulated by requiring information released over the internet to be approved by the government in advance. In September, the *Measures for Managing Internet Information Services* were promulgated to regulate the internet services, under which all ISPs and Internet Content Providers have to keep records of all

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109 "Human rights group accuses China of misusing secrecy law", *Agence France Presse*, 19 December 2003.

110 "Shanghai Formally Charges Crusading Land Rights Lawyer", *South China Morning Post*, 21 August 2003.

111 *Ibid.*

112 Congressional – Executive Commission on China, "Information Control and Self-Censorship in the PRC and the Spread of SARS", at http://www.cecc.gov/pages/news/prcControl_SARS.php.

113 *Supra* note 98.

114 *Ibid.*

subscribers' access to the internet, account numbers, websites and telephone numbers.[115] The new law demanded companies and individuals to register encryption software details with the government, making it easier for the prying eyes of the government to keep track of electronic communications.[116]

In January 2001, the Supreme People's Court ruled that those who caused especially serious harm by providing state secrets to foreign entities or individuals over the internet may be sentenced to death. It is believed that such ruling was a reaction to the release of the Tiananmen Papers[117] in the United States, the extracts of which were translated and posted on the internet.

In 2002, the authorities introduced the Public Pledge on Self-Discipline for the China Internet Industry[118] as an attempt to reinforce existing regulations. The *Interim Regulations on Administration of Internet Publication* was also issued to forbid online contents that could endanger national security, disturb social order or damage social stability.[119] All China-based websites have to register with the government or they risk being closed down.[120] In the aftermath of the Beijing internet café fire in June 2002, the government closed more than 3000 internet cafes while those that remained were ordered to augment their software to filter out more than 500,000 banned sites with pornographic or subversive elements.[121] Those attempting to access these banned sites are automatically reported to the Public Security Bureau, and can be traced and monitored without their knowledge.[122]

2. *Restrictions on Internet Users*

While the Chinese cyberspace has observed vibrant growth in the past decade, the government has faced a formidable challenge in its information control efforts. Although the government is actively banning unwanted materials on the internet, they have no desire to hinder the growth of the internet industry that brings along economic benefits. Nevertheless, the government has devoted massive resources to blocking websites, filtering emails, bulletin boards, chat rooms or news groups, and monitoring all sorts of online activities.[123]

The government disguised internet censorship as anti-pornography and state secret protection efforts. However, it has been revealed that Chinese government is filtering much more than merely sexually explicit websites. According to the studies conducted by Harvard University, among the 203, 217 non-sexually explicit websites examined, an overwhelming 9.3% of these

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115 *Ibid.*

116 "China Vows to Shut Web Firms Leaking 'State Secrets'", *Wall Street Journal* (eastern edition), 27 January 2000.

117 *The Tiananmen Papers* was compiled by Zhang Liang and edited by Andrew Nathan and Perry Link. Professor Perry Link expressed that he has been on a PRC blacklist since 1996, and was detained at the Hong Kong airport for questioning when he visited Hong Kong in 2002. *Supra* note 62.

118 Issued in March 2002, the Pledge included obligation to "refrain from producing, posting or disseminating pernicious information that may jeopardise state security and disrupt social stability, contravene laws and regulations and spread superstition and obscenity." The US-based search engine Yahoo! was one of the signatories.

119 *Supra* note 112. The *Interim Regulations* were promulgated jointly by the State Administration of Press and Publishing and the Ministry of Information Industry.

120 *Supra* note 94.

121 *Supra* note 98.

122 *Ibid.*

123 *Supra* note 94.

websites were intentionally blocked in China.[124] The blocked pages included content related to:

1) dissident, democracy and human rights. Eg Amnesty International, Human Rights Watch and the Hong Kong Voice of Democracy;
2) heath issues such as famine, AIDS and diseases. Eg AIDS Healthcare Foundation, Health in China research project;
3) education information, including well-known western universities. Eg Columbia, MIT;
4) news. Eg. BBC News, CNN, Time Magazine, Washington Post;
5) governments in Asia and overseas, among which government sites of Taiwan and Tibet were specifically targeted. Eg US and UK's Court, US's Department of Defense, travel sites from Australia, Korea etc;
6) entertainment, including movies, music and the Taiwanese site of MTV channel;
7) religion - this category had the largest proportion among the blocked pages.

The above statistics shows that China is heavily manipulating information flow on the internet, which went far beyond the legitimate national security interest required by international law for imposing restriction on freedom of information. Although the internet is generally considered a breeding ground for greater access to information, this became mere wishful thinking as the PRC government has turned this new form of media into a new means of control.

V. Conclusion

From the above discussion, to say that Chinese people are in penury of information cannot be wrong. The PRC State Secrets Law risks becoming a legal travesty in law and in practice. Not only is the legal definition infinitely broad with a catch-all clause, the expandability at the discretion of authorities is deemed to be despotic. Journalists, academics and even businessmen are dreaded by the undesirable consequences in relation to unguarded use of trade secrets, *neibu* documents and intelligence.

The criminal liabilities are harsh and almost no defence could be afforded by the accused. Not only is the prosecutor exempted from demonstrating the damage or harmful consequences of disclosure, the onus of proof is unjustly passed to the accused to ascertain that disclosure did not result in unauthorised access. People are also convicted of spreading unclassified materials by retrospective classification.

The scope of national security is expanded to the prejudice of individual interests of people to access information. Under the legal scheme, it is not difficult for the Chinese government to exercise politically motivated inculpation. None of the sample incidents above related to national security, but prosecutions or convictions were justified by the *Implementation Procedures* which arguably protects the political power of the ruling party. As a result, people are charged for touching on issues such as political activities or discussing administration scandals that are found repugnant by the PRC leaders. While media has always been heavily regulated, high-handed control on the internet has also been observed.

Traditionally, China has been shrouded in secrecy. However, with its dramatic economic reform that has caught the eyes of the whole world, the veil of secrecy could hinder China's

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[124] Berkman Center for Internet & Society of Harvard Law School, "*Empirical Analysis of Internet Filtering in China*", December 2002, at http://cyber.law.havard.edu/filtering/china.

integration with the international economy. The uneasy access to essential legal, financial and economic information has been one of the most enduring bugaboos of making investments in China. Because free information flow has long been regarded as a pillar for the success of market mechanism, it is certainly in China's interest to revise its State Secrets Law, to uphold its obligations under the UDHR and the ICCPR, to catch up with the global trend and to move towards a more open and transparent system.

DIRECT ELECTION OF THE CHIEF EXECUTIVE IN 2007: MISSION IMPOSSIBLE?

JOJO CHI-KWAN FAN

"The Chief Executive of the Hong Kong Special Administrative Region shall be selected by election or through consultations held locally." Article 45 of the Basic Law *of the Hong Kong Special Administrative Region reads. But what is "election" and how to "elect"?*

This article examines the election of the Chief Executive of the Region. It first begins with an outline of the present electoral system and the author's own assessment of the performance of Mr Tung Chee-hwa, the Region's first and second Chief Executive. Expressing her disappointment over the administration, the author opts for a change of the selection method. She takes her readers through the provisions of the Basic Law *and within its framework, she suggests a few alternatives to the electoral system. Analysis of each option reveals each method has its pros and cons. While the true meanings of the provisions are yet to be explored, this article is for anyone who is concerned with the political appointment in the Region.*

I. Introduction

The Chief Executive (CE) of the Hong Kong Special Administrative Region (HKSAR), so far, is selected without an election of any competition. This has made Hong Kong a laughing stock internationally. With such an undemocratic and unrepresentative electoral system, it is difficult to expect anyone with serious political aspiration to be interested to take part in the election, in which the outcome precedes the election. In the 1 July demonstration we saw how Hong Kong people took to the streets for democracy and freedom. Although Beijing has been giving strong economic support to the HKSAR after the demonstration on 1 July in which 500,000 people took part, it has not given any political reform or real political power to the people. Under the principle of "Hong Kong people ruling Hong Kong", it is totally reasonable for Hong Kong citizens to expect to enjoy a high degree of autonomy and to have larger part to play in choosing its CE. The momentum triggered by the protests on 1 July 2003 and 2004 and 1 January 2004, and the pressure from electors, have called into question the legitimacy of our CE, as our leader of the HKSAR, and the possibility of changes in the method of the selection of the CE.

This essay will begin by briefly outlining the present electoral system in Hong Kong and assessing the performance of the HKSAR Government (the Government) under the Tung administration since 1997 in order to support the author's view that the present electoral system should not be retained. It will then attempt to explore the alternatives, problems and prospects concerning the direct election of the CE in 2007.

II. The Current Electoral System for the Chief Executive

At present, according to the *Basic Law*, the CE is the head of the HKSAR, who shall be selected by a "broadly representative" Election Committee (EC) and appointed by Beijing, serving a five-year term and for not more than two consecutive terms. In 1997, the 400-member Selection Committee (SC) selected the first CE whose term ended in June 2002. An 800-member EC which, again according to the Central People's Government (CPG),

* The author is deeply grateful to Ms Carole Petersen for the inspiring discussion on Article 45 of the Basic Law. The gratitude extends to the author's family for their unfailing guidance and support.

"broadly represents" the community selected the second term CE in March 2002.

The *Basic Law* provides that the EC shall be composed of 800 members from the following 4 sectors:[1]

(1) 200 from the industrial, commercial and financial sectors;
(2) 200 from the professions;
(3) 200 from labour, social services, religious and other sectors; and
(4) 200 from members of the Legislative Council (LegCo), representatives of district-based organizations, Hong Kong deputies to the National People's Congress (NPC), and representatives of Hong Kong members of the National Committee of the Chinese People's Political Consultative Conference (CPPCC).

If one examines the composition of the EC in 1998 carefully, one can see that it is a political caucus representing the privileged few in Hong Kong – business tycoons, professionals and people who are part of China's political institutions. In fact, it is widely believed that the EC would choose a CE that is supported by Beijing since its membership reflects business and professional interests which are more conservative in nature.

Furthermore, art 45 of the *Basic Law* states that changes and reforms to the method for selecting the CE for the terms subsequent to the year 2007 must be made with:

(1) the endorsement of a two-thirds majority of all the members of the LegCo; and
(2) the consent of the CE; and
(3) such changes are to be reported to the Standing Committee of the National People's Congress (NPCSC) for approval.

However, whether the words "subsequent to the year 2007" include 2007, which is the year when the third term of the CE commences, and whether the people of Hong Kong can initiate changes, are matters which have caused a lot of controversies recently. It is now settled that the method of the selection of the CE can be changed, starting from year 2007. Although I will argue that with regards to the poor performance of the Government under the Tung administration, it is time to increase the legitimacy of the leadership by allowing the people of Hong Kong to elect their own CE, it still remains to be seen how this is to be implemented.

III. Performance of the Government under the Tung Administration

Christine Loh described the first few years of the Tung administration as "troubled early years"[2] because the Government dealt with a number of challenges unsatisfactorily. These instances included the Government's ineffective and weak leadership in the crippled property and stock markets caused by the Asian Financial Crisis and the high unemployment in recent years.[3] The Government was also criticised in the avian flu outbreak in 1997 because of its late response, "devoid of coordination and proper planning, and lacking in transparency".[4] The short piling scandal was another controversy in which some public housings built by the

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1 Annex I, *The Basic Law of the Hong Kong Special Administrative Region.*

2 Loh, C, *Accountability Without Democracy: The Principal Officials Accountability System in Hong Kong* (Hong Kong: Civic Exchange, 2002), p 9.

3 *Ibid*, p 9.

4 Kwok, R, "From Administrative State to Ministerial System: The Quest for Accountability in Hong Kong", (2003) 41(1) *Commonwealth & Comparative Politics* 101, p 102.

Housing Authority failed to meet construction safety standards due to corruption and eventually led to the resignation of some housing officials. The opening crisis of the then new Hong Kong International Airport in Chek Lap Kok frustrated the public not only because it created chaos but it also exonerated all government officials after an official investigation into the fiasco.[5]

In response to heavy criticisms from the general public and the media that "public officials . . . were able to escape public blame and stay on their jobs",[6] Mr Tung Chee-hwa, our CE, decided to introduce the Principal Officials Accountability System (POAS) in July 2002, hoping to increase public confidence by enhancing quality of governance and accountability of the principal officials.[7] However, Cheung maintains that "increased accountability to the Chief Executive who has no popular mandate will only increase the power of the Chief Executive, not the political accountability of the decision makers."[8] In other words, the POAS is merely a system that provides accountability of principal officials to the CE, but neither to the LegCo nor to the electorate.

Besides, I am also of the view that political accountability cannot survive without democracy. It must be noted that the POAS does not grant any constitutional power to the elected LegCo members to sanction incompetent principal officials directly. The *Basic Law* does not have provision which allows the legislature to remove or oust a principal official through a vote of no confidence. The so-called "penny stocks fiasco"[9] clearly revealed the inherent inadequacies of the POAS. While the public was discussing who out of the economic and financial officials should shoulder the responsibility of failing to foresee market reactions, the Government did not make clear response. It can therefore be seen that accountability of principal officials to the LegCo and the public is greatly undermined.

The Tung administration is indeed facing a legitimacy crisis on an unprecedented scale. The dismantling of the ruling coalition may pose further difficulties for the administration in pushing policies through the legislature. Over the past six months, tens of thousands of Hong Kong citizens have taken to the streets twice and gone to the ballot box in an unprecedented display of political activism to air their profound displeasure with the Government's performance. Moreover, as Hong Kong's economy finally shows signs of life, the argument that unemployment or deflation is fuelling public anger simply cuts no ice.

The performance of the Government under Tung's leadership since 1997 has been disappointing. Both the CE and the principal officials assumed office without going through popular elections. Apparently, Hong Kong lacks a district-based constituency to govern, and our leaders do not govern in accordance to values and policies entrenched during an election campaign. Amid a growing sense of political agitation in society, I believe it is time to consider electoral reform in order to increase the mandate of the forthcoming CE in 2007.

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5 *Ibid.*

6 *Ibid.*

7 Cheung, C Y, "The Quest for Good Governance: Hong Kong's Principal Officials Accountability System", (2003), *China: An International Journal*, p 249.

8 *Ibid*, p 254.

9 A summary of this event can be found in Loh's "Accountability Without Democracy: the Principal Officials Accountability System in Hong Kong": The crisis began when the Stock Exchange announced proposals for consultation on the criteria for continuing listing eligibility of stocks, which led to a panic sell-off of micro-cap stocks the following day, taking HK$10 billion off the market. The Stock Exchange immediately announced that it would extend the consultation period to avoid confusion and then withdrew the proposals together.

IV. The Basic Law*: Some Legal Issues*

A. What Does the Basic Law *Say?*

The *Basic Law* provides a formula which, if followed, would ensure continued changes, which hopefully will pave the way to the ultimate objective of universal suffrage. It sets out a blueprint for Hong Kong's constitutional development for the decade following the establishment of the HKSAR in 1997. Beyond 2007, if we wish to change the system for electing the CE, then we need to have two-thirds majority support in the LegCo, the consent of the CE and the approval of the NPCSC. The specific methods for selecting the CE, as well as the procedures for changing them, have been set out in Annex I of the *Basic Law*. Although the ultimate aim is selection by universal suffrage "upon nomination by a broadly representative nominating committee",[10] art 45 of the *Basic Law* states that the progress towards universal suffrage "must be specified in light of the actual situation in Hong Kong" and "in accordance with the gradual and orderly progress".[11]

1. "In light of the actual situation"

With regards to the "actual situation", I am of the view that the current situation in Hong Kong does give rise to the need of change. Since the reversion of sovereignty to the People's Republic of China, the reputation of the Tung administration has been deteriorating. As mentioned above, we see how the Tung Government failed to react wisely to a number of scandals, from the bird flu crisis, Asian Economic Turmoil and short piling scandal to Anthony Leung's car scandal, the Penny Stock fiasco and the recent Equal Opportunities Commission incident. Secondly, the Government lacks support of the LegCo which makes it difficult for the administration to implement and pass policies. From this point of view, we can see the problems associated with a government that lacks legitimacy.

Thirdly, one of the demands aired out in the massive protests in 1 July and 1 January was that the CE be popularly elected. The demand for universal suffrage was indeed phenomenal, when compared to post-1997 in which political parties and interest groups calling for a popularly elected CE were still the minority. This serves as a clear signal to the CPG that the actual situation in Hong Kong *really* has changed.

In addition, the fact that Hong Kong people want democracy and are ready for it is borne out by the resignation of Mr Jasper Tsang Yok-shing as the chairman of Democratic Alliance for the Betterment of Hong Kong (DAB), DAB's loss of votes in the District Council elections and the massive record turnout for the District Council elections. Apparently, a more democratically elected CE is needed in order to accommodate the actual situation, which the public is crying out for changes concerning the method of the selection of the CE. Even the DAB, a pro-Beijing camp, now openly supports the election of the CE by universal suffrage.

2. "Universal suffrage upon nomination by a broadly representative nominating committee in accordance with the principles of gradual and orderly progress"

This is the most problematic area with regards to art 45. It is true that the ultimate aim is to have universal suffrage. However, while the CPG can argue Hong Kong still does not satisfy

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10 *Supra* note 1, art 45.

11 *Ibid.*

the conditions for full democracy or even universal suffrage, the nominating committee may also restrict the election of the CE which renders the whole mechanism not truly democratic. One possibility being suggested is that the so-called "broadly representative nominating committee" may exclude candidates of certain political convictions.[12] Therefore, what is crucial is that the nominating committee must not have the function of effectively screening out candidates, and the nomination procedure must not operate as one to screen out certain candidates, because this would run against the goal of election by universal suffrage.

B. Is Amendment Necessary?

There are also questions from the public of whether changes to the election procedures require an amendment to the *Basic Law* or to its annexes. With reference to a group of lawyers, the *Basic Law* does not need to be amended to enable the CE to be chosen by universal suffrage in 2007.[13] The basic principle of legal interpretation is to give priority to the plain meaning of the Basic Law text. Where the text is clear, it is simply inappropriate and unnecessary to resort to former mainland Basic Law drafters or other officials for their alleged intent.

On the face of it, the legal issues raised can be disposed of quickly. Article 45 sets out the conditions to be met before changes to the method of selecting the CE. The reason why the electoral method is not set out in art 45 is to ensure that any changes to the electoral method would not require an amendment of the *Basic Law*. If we give priority to the specific language in the text, it seems clear that no amendment is required. It is true that there are separate provisions in art 159 for amendment of the *Basic Law* but Annex I already provides specific provisions on the procedures to amend the method for selecting the CE. Even if the Government deemed amending the Annex to be procedurally preferable or necessary, it would still be bound to follow the procedures specified therein, but not those in art 159. In other words, art 45 of the *Basic Law* deals with matters of principle, while Annex I only speaks of the method of selection. Independent legislator Audrey Eu Yuet-mee further said that the "only principle in the Basic Law on electoral reform were for gradual change and change in accordance with the actual situation in Hong Kong."[14]

For the CE, the amendment provisions specify endorsement of "a two-thirds majority of all members of the Legislative Council and the consent of the Chief Executive, and they shall be reported to the Standing Committee of the National People's Congress for approval".[15] The break in the sentence signals that something is done locally before proceeding to report it to the NPC for approval. Meanwhile, the Government has long taken the view that the language in Annex I allowing amendment to the method for selecting the CE for the terms subsequent to the year 2007 includes the election in 2007, even Basic Law drafters at that time agreed with this position.

After understanding these sections of the *Basic Law*, it is not difficult to see that Beijing has an important role to play in Hong Kong's constitutional development. Therefore, what we ought to do is to come up with an electoral system which would be satisfactory to Hong Kong people, whose aspirations for democracy are growing as each day passes, and which Beijing could accept without worry.

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12 Pamphlet released by the Article 45 Concern Group, Opinion No 1.

13 "No Need to Amend the Basic Law", *South China Morning Post*, 15 January 2004.

14 *Ibid.*

15 *Supra* note 1.

In short, the *Basic Law* provides the legal basis for reviewing Hong Kong's political system beyond 2007. The bone of contention is thus not so much about the interpretation of the *Basic Law*. Rather, there exists a sharp divide between the Hong Kong people who aspire for democracy and the Beijing leaders who have deep-rooted fears about Hong Kong using democracy to oppose the Mainland. With this in mind, we now turn to examine the alternatives to direct election of the CE in 2007.

V. Exploring Possible Options to Elect the Chief Executive

The electoral system in Hong Kong does not represent popular will. Business and professional interests dominate the political system and the electoral system for the Functional Constituencies (FC). The EC was also designed to give them disproportionate influence. In any event, legislators have very limited power to initiate policy. For instance, we see a significant drop in Private Members' Bills, the only permissible channel to put forward their proposals on government policies which the executive officials are reluctant to consider,[16] and more restrictions imposed on the LegCo members in the voting procedures[17] after the handover. The promise of "Hong Kong people ruling Hong Kong" is yet to materialise.

A. Options

1. Alternative A: Converting the 800-member Election Committee into a nomination committee and universal suffrage

One option for 2007 would be to keep the 800-member EC as the body that makes the nominations. The function of the nomination committee – perhaps by using the current EC – would be to nominate several candidates who had obtained the endorsement of a certain percentage of its members. In fact, this minimalist reform approach has received strong support from both Mr Alan Hoo SC, a member of the Chinese People's Political Consultative Conference,[18] and the Article 45 Concern Group.[19] The Article 45 Concern Group has suggested the threshold to be 5 per cent[20] but I think this is open for discussion.

The two large-scale protests on 1 July and 1 January, and results of the one million-plus votes cast in November's District Council elections are solid testimonies to the common will of the Hong Kong people for greater political participation, which can only be achieved by full democracy entailing direct election. These altogether might force pro-Beijing parties and the FC candidates to back universal suffrage for the CE in 2007. In fact, the DAB chairman Mr Ma Lik has already highlighted DAB's support for universal suffrage for the election of the CE in 2007.[21] As dissatisfaction with the Tung administration grew during the economic downturn, a new idea came into being which suggested universal suffrage could be a cure for all Hong Kong's woes. Universal suffrage is a possible means to elect our CE due to pressure

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16 Wong, M, "The Meaning of 'Charge': Private Members' Bills in the Legislative Council", (1998) 28 *Hong Kong Law Journal* 230, pp 230-231.

17 After the handover, a new voting system – the divisional voting system is introduced in which the passage of any bill introduced by LegCo members now requires a simple majority vote by each of the two groups (ie the members returned by functional constituencies and members returned by geographical constituencies and the Election Committee) of members present. *Supra* note 1, annex II, item II.

18 "Gradual change our best chance of achieving aims, claims lawyers", *South China Morning Post*, 26 January 2004.

19 "Let reform debate begin, Ng urges", *The Standard*, 15 December 2003.

20 *Ibid.*

21 "Anti-reform views 'struck HK dead'", *South China Morning Post*, 18 January 2004.

from Hong Kong people, as seen from the 1 July and 1 January demonstrations, and the need to increase the Government's accountability. Using the power of the people to elect candidates whom they consider most apt for governance and are ready to make public interest their top priority, and to remove such officials from office when they fail the people, is the most effective way to safeguard the interests of Hong Kong.

In universal suffrage, it is essential that "political parties should not be prohibited from fielding their interests for the CE post" because "party affiliations may actually help to facilitate linkage with LegCo parties."[22] Essentially, this view advocates the restriction that CE cannot be a member of any political party should be lifted. This practice will not only facilitate linkage with LegCo parties, as suggested by Professor Cheung, but will also increase the variety of candidates coming from various political backgrounds.

Concerning the two key requirements to universal suffrage in art 45 (that is "in light of the actual situation" and "in accordance with the principle of gradual and orderly progress"),[23] Hong Kong's actual situation showed strong public demand for universal suffrage in 2007, and the three elections held since the handover and an increase in the number of directly elected seats in the LegCo showed there had been a gradual and orderly movement towards political reform in Hong Kong. The District Council elections in November 2003, resulting in a Democratic sweep, set the record for the highest voter turnout ever[24] may also serve as a hint that Hong Kong people are more aware of their voting power and thus, providing a condition for universal suffrage. Hence, it proves that there is a gradual increase in demand for democratic development in Hong Kong.

Furthermore, Ching observed that in the absence of leadership by the Government in the area of constitutional reform, "the third sector (such as the three think-tanks, the Article 45 Concern Group and two other NGOs – namely Power for Democracy and Hong Kong Democratic Foundation) has taken it upon itself to take the lead, providing information, stimulating discussion and collecting public opinion. Such a development underlines the political maturity of the Hong Kong community and its desires, and readiness, for greater democracy."[25]

Recent polls showed that Hong Kong people actually support universal suffrage. The survey, commissioned by policy think tank Civic Exchange and conducted by the Hong Kong Transition Project revealed that 88 per cent, a vast majority, of the Hong Kong people wanted constitutional reform.[26] Also, 81 per cent of those interviewed were in support of direct election of the CE, with 33 per cent of them "strongly support" such a decision.[27]

As democratic development gradually progresses with an increasing awareness of the lack of constituency of the CE among Hong Kong people, universal suffrage for the election of our CE stands out as the best method to be implemented that will be "in accordance with" the principles stipulated in art 45. Meanwhile, ordinary citizens have the experience of electing

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22 Cheung, A, "What Next in Constitutional Reform? Enhancing Representation and Ensuring Effective Governance", p 10, at http://www.synergynet.org.hk/en_main.htm.

23 *Supra* note 1, art 45.

24 "Taiwan Must Guard Its Democracy", *Taipei Times*, 15 December 2003.

25 "Take Heed", *South China Morning Post*, 1 January 2004.

26 "We want democracy, say 88 per cent", *South China Morning Post*, 13 January 2004.

27 *Ibid.*

more LegCo members since post-1997.[28] This already serves as the best proof that a similar method of selecting our CE is "in accordance with the principle of gradual and orderly progress" as well as "in light of the actual situation in the HKSAR".

2. *Alternative B: Converting the 800-member Election Committee to a nomination committee with a preliminary nomination by ordinary citizens*[29] *and universal suffrage*

Professor Cheng theorised that given the reforms of the present EC and conversion of the EC into a nomination committee, "there should still be opportunities for 'preliminary nomination' by ordinary citizens."[30] In his proposal, candidates for CE can be nominated by 500 voters (the threshold can be agreed upon later) among the general public and be endorsed to run in the election by 100 members of the new nominating committee. He further suggested the shortlisted candidates be elected by universal suffrage.

Cheng and Lo also had a similar line of argument that the candidate can only qualify for formal candidacy "through the collection of a number of supporting signatures from registered voters."[31] However, they differed from Cheng in the sense that the "reasonable number of registered voters whose support is required for formal candidacy may range from 50,000 to 100,000."[32] The number of voters required for formal candidacy, to both parties, is negotiable. The fundamental rationale of this option is to conform to art 45 of the *Basic law*, which says the "CE has to be ultimately elected on the basis of universal suffrage upon nomination by a broadly representative nominating committee in accordance with democratic procedures."[33]

3. *Alternative C: Allowing the LegCo to act as a nomination committee and universal suffrage*

Miss Margaret Ng Ngoi-yee proposed that the LegCo can act as a nomination committee, thus giving it a greater role to play in the reform process because its function under the constitutional design of the *Basic Law* is already very limited. LegCo can be empowered to nominate any candidate with the approval and support of at least a certain number or percentage of its members, of which the exact amount is to be further discussed and agreed upon. This will most probably increase the diversity and constituency of the potential candidates, as different political convictions are largely represented in the LegCo.

4. *Alternative D: Retaining the existing electoral system, converting the 800-member Election Committee into a nomination committee but reforming it*

It is wrong merely to equate constitutional reform to being able to choose the CE through universal suffrage and has perhaps over-simplified the issue. Constitutional development touches a wide range of subjects – the relationship between the executive and the legislature, the role played by political parties, the accountability system and civil servants, to name just a

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28 Members returned by the EC during the second term of LegCo were 6 and in the 2004 LegCo election, we will have no LegCo members returned by the EC but 30 LegCo members returned by the FC and another 30 LegCo members returned by GC. *Supra* note 1, annex II.

29 *Supra* note 22.

30 *Supra* note 22, p 13.

31 Cheng, J and Lo, S, "Green Paper: Review of the Political System in the HKSAR", 23 December 2003, p 14, at http://www.pfd.org.hk/.

32 *Ibid.*

33 *Supra* note 20.

few.

On a more realistic front, if universal suffrage is not introduced in 2007, the electoral base of the 800-member EC can be widened before being turned into a nomination committee. The 800-member EC currently comprises members from business, professional and labour sectors. For example, former Solicitor General Daniel Fung Wah-kin SC proposed the electorate in the professional sector be expanded "to rank-and-file medical workers, rather than confining them to doctors under the present system."[34]

Alternatively, while the present EC comprises 200 members from each of the four board sectors representing business, middle class, working class and politicians,[35] Professor Cheung suggested that members of all sectors be elected "on the basis of one-person-one-vote within the sector" and be increased to 1,200 members elected from the four board sectors in order to ensure that the nomination committee (formerly EC) is, according to art 45 of the *Basic Law*, "broadly representative".[36]

Moreover, Cheng and Lo found there is room for expanding the size of EC from 800 members to 1,000, 1,200 or even more, and to involve ethnic minorities as well.[37] Another suggestion made by Cheng and Lo is that the EC can be "fully democratised by following the US model of an Electoral College".[38] The result of this reform is that the EC would be elected by universal suffrage and we would then have an indirect election of the CE.

Since the CPG may not agree to the election of the CE by universal suffrage in 2007, expanding the size of the electorate that chooses the members of the EC allows wider public participation in the elections and democratises the process. Moreover, democratising and broadening the scope of the EC to involve new groups "has the advantage of enhancing its legitimacy and representativeness".[39]

B. Problems

One obvious problem for alternative A is that the nomination committee might be able to screen out certain candidates, who would be undesirables in the eyes of Beijing, although it was positively held by DAB's former chairman Mr Jasper Tsang Yok-shing who found this moderate package of electoral mechanism being able to please Beijing. The reason is that such a system, while certainly preferable to the current one, will not be fully democratic. Direct election of the CE with a filtering system in the form of a restrictive nomination committee works against the democratic principle. As stated in art 45 of the *Basic Law*, the nomination committee should be broadly representative. The least restrictive nomination committee would be more in line with the democratic aspirations of the public. Miss Margaret Ng Ngoi-yee, the legal sector's representative in LegCo, further addressed this issue in her letter that in unfolding the direction of constitutional reforms for Hong Kong, we are not to first ascertain Beijing's intention but to work out what is the right way forward for our own people, taking into account of Hong Kong's actual situation, the already crippled-economy, the imminent need for social stability and a restoration of confidence in the Government's

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34 "Call to open up Election Committee", *South China Morning Post*, 2 February 2004.
35 See *Basic Law*, annex I.
36 *Supra* note 22.
37 *Supra* note 31, p 12.
38 *Supra* note 31, p 12.
39 *Supra* note 37.

administration.[40]

In addition, Cheng and Lo agreed that this option would amount to screening out candidates who are unacceptable to the CPG and who "are deemed to be unfit by the Committee members. In the event that the EC's composition cannot fully represent either all the sectors of the community or the opinions of the public, the legitimacy of the candidates will be questioned."[41] In light of this possible screening-out issue, the representativeness of the EC can be enhanced by expanding the size or democratising its composition. Therefore, the electoral base of the EC ought to be widened in order to avoid potential candidates being screened out.

Professor Albert Chen, a member of the influential Basic Law Committee, believed that the new legislature to be formed in 2004 would only be able to pass a moderate package on the CE election in 2007.[42] The reason is that even if universal suffrage is introduced and passed with the two-thirds of vote in the legislature, art 45 stipulates that the CE still has to be appointed by the CPG who can refuse to appoint a popularly-elected CE and this power is entrenched in the *Basic Law*. Before proceeding further, the general public must understand that the pace and scope of democratisation are of great concern to China's leaders, for two reasons. First, they fear an injection of uncertainty into Hong Kong politics if parties they deem unsound win power. Second, they worry about the effect democratisation may have on other parts of China.

On the other hand, during times when there is much public discontent about Government failure and increasing consensus that the existing political system no longer works, reforming the EC alone may not be sufficient to address the root causes of this legitimacy crisis. Even so, the crux of the problem is that our CE will still be selected by a "small-group circle" and this kind of selection method cannot confer much legitimacy on the elected CE.[43]

As long as our CE is selected by a relatively small portion of the population, which means the vast majority cannot participate in the election, the threat of yet another demonstration yearning for increased democracy still exists. Governance will not be able to improve in the long run because the "elected" CE cannot be thrown out when he / she falters. Even if the "elected" CE is in office, he / she will not be in a better position to govern due to the lack of mandate from people. On the other hand, a CE elected by people will be in a much better position to take unpopular action than someone without a public mandate. Democracy is the only way to produce leaders who can lead and who can, if necessary, take unpopular but necessary action.

C. Prospects

1. Universal Suffrage

For the Chinese leadership to accept direct election of CE in 2007, it must be assured that the rigid framework underpinning its Hong Kong policy will not be breached. It must also be

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40 Ng, M, "Letter to Hong Kong", 14 December 2003, at http://www.rthk.org.hk/rthk/radio3/lettertohongkong/+%22chief+executive+election%22+and+%222007%22&hl=zh-TW&ie=UTF-8.

41 *Supra* note 31.

42 "Hopes for Political Reform are Challenged", *South China Morning Post*, 8 September 2003.

43 *Ibid*, p 12.

persuaded that the only way to restore credibility of the Hong Kong Government is to secure mandate from the mass through a democratic electoral process. Beijing has to understand that it will have less to lose by accepting this than by letting the political rot continue under the Tung administration.

From this perspective, the way forward for universal suffrage looks rough, though not impossible. Political maturity of Hong Kong people would be one of the factors to justify changes to the electoral methods. In fact, the local community has been urging for democratic reforms slowly over 15 years. After the demonstrations on 1 July 2003 and 1 January 2004 and District Council's elections in November 2003, we see a clear and obvious general consensus in support of universal suffrage. To Cheung, "universal suffrage can satisfy the principle of balanced participation of different sectors, and help improve the legitimacy of the HKSAR Government and hence its capacity to lead and govern effectively."[44]

However, following this path is incredibly difficult. Beijing has already laid its cards on the table: under no circumstances will it allow the election of the CE by universal suffrage in 2007. The bottom line was more or less spelt out by the two Mainland legal experts who visited Hong Kong recently. Few people in Hong Kong would doubt the fact that their views represent those of Beijing. Professor Xiao, one of the architects of the *Basic Law*, dampened hopes of the CE election by universal suffrage in 2007 during his recent visit to Hong Kong when he said that the ultimate goal "was universal suffrage by 2030 or 2040".[45] Professor Xiao's comments may have no binding force on the direction of our constitutional reform but we can speculate with some confidence that the CPG may resort to various ways to intervene and oppose any constitutional reforms with respect to the method for the selection of the CE. Although Miss Margaret Ng Ngoi-yee has suggested that the comments made by the mainland legal experts "should not be taken as the official interpretation of the Basic Law"[46] and we should be careful not to overreact to the opinions of Professor Xiao, as the *Basic Law* does give the CPG a say – indeed the final say – over the pace and development of universal suffrage in Hong Kong. If Professor Xiao was not carrying Beijing's message, why did the Hong Kong media, and local politicians, pay so much attention to him?

In other words, locally passed reforms which fail to win Beijing's approval cannot be implemented. For instance, the CPG can solicit support of the pro-Beijing camp in the LegCo to vote against such changes. It can express its stance to the CE and ask him / her not to assent to it. To the extreme, the CPG can issue a statement through the Xinhua News Agency or the four "Great Defenders of the Law" to openly state that it would not accept a CE returned by universal suffrage. The last step that the CPG may take is to reject such amendments.

Moreover, One Country Two Systems Research Institute Executive Mr Shiu Sin-por, a pro-Beijing hard-liner, said a consensus must be reached in order to introduce universal suffrage in 2007, and he was pessimistic this about because there was a huge divergence of views in the community.[47] He believed if this was really the case, then the CE in 2007 would continue to be returned by the 800 member EC. However, his view is flawed. As aforementioned, opinion polls showed that two-thirds of Hong Kong people wanted

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44 Cheung, A, "SynergyNet's Meeting with the Constitutional Development Task Force Summary of Points", 13 February 2004, at http://www.synergynet.org.hk/en_main.htm.

45 "Mainland Academics Words Noted", *The Standard*, 29 January 2004.

46 "Lawyers Put Universal Suffrage Case", *South China Morning Post*, 20 January 2004.

47 "Democracy Gulf 'Too Wide for A Solution'", *The Standard*, 28 January 2004.

constitutional reforms before the 2007 CE election.[48] Only 3 per cent opposed any reforms, ever. It would, therefore, be a mistake to oppose democratisation in Hong Kong. His mistaken belief certainly does not represent the views of the rest. To think that his belief would make for a stable Hong Kong is perhaps the biggest mistake of all.

Although immediate implementation of universal suffrage will not, and can never be, a quick answer to all problems, it is nonetheless possible. The recent survey showed that Beijing should handle the controversial subject of constitutional reform with great care. According to Michael DeGolyer, Director of Hong Kong Transition Project, "Hong Kong could be destabilized if Beijing goes against constitutional reform or fails to produce a timetable for its introduction . . . because the middle class will be outraged should that happen and Beijing could lose its political capital if it does not handle the issue properly."[49] The fact that vast majority of Hong Kong people should have the right to elect the next CE in 2007 should not be in doubt. The large-scale demonstrations provided ample evidence of the people's desire for democracy. In a nutshell, despite the fact that Mainland experts kept throwing cold water on Hong Kong's democratisation, there is still hope for the early introduction of universal suffrage and there is room to negotiate as Beijing had not refused to discuss the issue.[50]

2. Reforming the Election Committee

This option is more likely to be successful because after all, Hong Kong is not a completely independent political entity but is only a local government. In addition, Tung reiterated the need to consult Beijing in handling the issue of constitutional reform.[51] Obviously, Beijing is worried that, if Hong Kong's CE were elected by universal suffrage, Hong Kong people might elect one like Chen Shui-bian in Taiwan. That would indeed be detrimental to "One Country". However, there is no evidence that a democratic Hong Kong Government would pose a Taiwan-style challenge to the CPG. There has never been an independent movement in Hong Kong. Domestic forces have shown great restraint. Democrats appear to understand that a democratic government which frequently challenges Beijing would surely not contribute to its political success.

Since any public consultation without the prior consent of Beijing would be a futile and dangerous exercise, enhancing the legitimacy of the EC appears to be a relatively moderate political system which the NPCSC would more likely approve. One may argue Beijing would not allow change in the election method of the CE to be decided solely by Hong Kong citizens. The fact that Beijing has also stressed that "one country" is the premise of "One Country Two Systems", any kind of constitutional reform looks bleak. Do we have any chance to even reform the EC at all? There is an observation that "in the wake of the July 1 march, Beijing went so far as to quit requiring the immediate passage of Article 23 Bill, though it bears on national security."[52] This implies that Beijing will probably not dictate the course of reform or "impose any kind of 'undemocratic' reform plan which we cannot possibly accept."[53]

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48 "First, Let's Build a Consensus", *South China Morning Post*, 28 January 2004.

49 *Supra* note 26.

50 "Academic Offers Compromise", *South China Morning Post*, 14 January 2004.

51 "Tung Rejects Charges of Stalling on Reforms", *Metropolis Daily*, 9 January 2004.

52 "Rational Dialogue Would Dispel Misunderstandings", *Mingpao*, 8 December 2003.

53 *Ibid.*

VI. Conclusion

It is the CPG's design that the CE of the HKSAR would only be accountable to the NPCSC and has disproportionate influence in both the executive and legislative branches. The *Basic Law* also stipulated that the CE ought to be appointed and approved by the CPG. Therefore, it is largely the institutional designs of the current electoral system that produce an undemocratic and unrepresentative CE in the HKSAR.

Under the present system, legislators have very limited power to initiate policy. As a result, universal suffrage of the CE in the near future, if not 2007, may serve to increase the Government's accountability and answerability to the people. Furthermore, reforming the composition of the EC and the procedures for nominating candidates for the CE election may also help to improve governance, though great care must be given to the discussion on screening out candidates with different political convictions.

Through the Article 23 saga, we know now, if not before, how high-handed a government can be when it is not politically answerable to the people. Although the *Basic Law* provides room for incremental electoral reforms, including popular election of the CE and all members of the LegCo, uncertainties and questions still remain about the commitment of the Government and authorities in Beijing to these reforms. Yet, in taking Hong Kong forward, I am still optimistic because I saw how the two massive protests conveyed a peaceful message which rocked the HKSAR and earned the world. Amid the heat on 1 July 2003, there was an ideal which supported the patience and insistence, an ideal which brought unity and sacrifice. I believe a continually united public voice can indeed be a source of pressure and accountability that the government cannot omit. We see when the public voiced their care and hope, the government cannot ignore the voice of the masses anymore. The massive demonstrations have captured the world's attention mainly because they were so peaceful, orderly and dignified, and the demands were so reasonable and within the confines of the *Basic Law*. As a result, people do expect progress to be made. To ignore the wishes of the Hong Kong people again, as was done with Tung's re-election in 2002, would be fatal.

A democratic system is the only safeguard for the protection of rights and the rule of law. A more open and accountable government is also a better safeguard for a level playing field. In order for Hong Kong to keep up its competitiveness in the global contest for investment and trade, economic development underpinned by fair competition and due process of law would be essential.

There is still a long way for to go for the pro-democracy movement. Direct election by 2007 is yet to realise. The best response to the demand for democracy is for the Government to engage in community-wide consultations. Ideally, a compromise which will be endorsed by the CPG may be reached. If Hong Kong can achieve full democracy based on the consensus of the people, then the "One Country Two Systems" model will still be appealing to the people of Taiwan, and the image of the new Beijing leadership in the international arena can be further improved.

Whether the democrats can rise to this challenge remains uncertain. The fight for a democratic government takes much efforts and time, but it is not impossible. The fight is not yet over, it is just the beginning.

ARTICLE 45 OF THE BASIC LAW OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION OF THE PEOPLE'S REPUBLIC OF CHINA – SELECTION OF THE CHIEF EXECUTIVE BY UNIVERSAL SUFFRAGE: A MISSION IMPOSSIBLE?

WILLIAM KWUN-WA LIU[*] [**]

On interpreting Paragraph 7 of Annex I of the Basic Law, *it is clear that there can be changes in the method of election of the Chief Executive in 2007. This paper deals with two questions which logically follow: (1) whether there should be any changes in 2007; and (2) if so, what changes should be made. The writer answers the first question in the affirmative. He argues that the government is against public demand, with the Chief Executive not being accountable or legitimate and there being conflicts between the executive and legislative branches of the government. In his view, democracy is a global trend which Hong Kong should follow. Before answering the second question by proposing eight options for changes, the writer considers several legal and political factors. He concludes that, on one hand, the pace of democratisation should not be slow or symbolic; on the other hand, universal suffrage cannot be achieved in 2007 because of the necessity to uphold the rule of law. The writer urges that the government should plan carefully by consulting all parties in order to achieve the ultimate aim of introducing universal suffrage in 2012.*

I. Introduction

This paper aims to focus on art 45 of the *Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China* (the *Basic Law*) and to see whether there should be any changes in the selection method of the Chief Executive of Hong Kong Special Administrative Region (Hong Kong). Factors relevant to the proposing of any changes in the selection method of the Chief Executive will be discussed, and different methods of selection will be proposed.

II. Article 45 of the Basic Law

In the Chief Executive's *Policy Address 2004*, it was mentioned that there would be a proper and serious constitutional review and that a Constitutional Development Task Force headed by the Chief Secretary for Administration was set up. It would explore issues concerning the methods of selection of the Chief Executive and formation of the Legislative Council. On the basis of maintaining "One Country Two Systems" and adhering to the *Basic Law*, the Government will actively promote constitutional development in Hong Kong.[1] So far, the Commission has issued three reports on issues of legislative process, principle and areas which may be amended respectively.[2] The principle and method for selecting the Chief Executive is prescribed in art 45 and Annex I of the *Basic Law*.

According to art 45 para 2, "the method for selecting the Chief Executive shall be specified in the light of the actual situation in the Hong Kong Special Administrative Region and in accordance with the principle of gradual and orderly progress. The ultimate aim is the selection of the Chief Executive by universal suffrage upon nomination by a broadly

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[**] The author wishes to thank his family for their constant love and support in my life, the exchange study and countless other endeavours.

1 Chief Executive's Policy Address 2004, pp 27-28. For the full details of the Policy Address, see http://www.policyaddress.gov.hk/pa04/eng/.

2 For more information about the three reports and the work of the Task Force, see http://www.info.gov.hk/cab/cab-review/

representative nominating committee in accordance with democratic procedures." According to Annex I art 7, "if there is a need to amend the method for selecting the Chief Executives for the terms subsequent to the year 2007, such amendments must be made with the endorsement of a two-third majority of all the members of the Legislative Council and the consent of the Chief Executive, and they shall be reported to the Standing Committee of the National People's Congress for approval."

It has been doubted whether "subsequent to the year 2007" includes the year 2007 and hence affects whether there can be changes in the selection of Chief Executive in 2007.[3] Now, with full hindsight of the interpretation by the Standing Committee of the National People's Congress (hereinafter "the NPCSC"), it is clear that there can be changes to the selection of the third Chief Executive who is to be elected in 2007. As correctly pointed out in the First Report of the Constitutional Development Task Force[4] and the Article 45 Concern Group[5], this is consistent with what Mr Ji Pengfei, then Chairman of the Drafting Committee for the Basic Law, said in his address to the 7th National People's Congress on 28 March 1990, "[i]n the ten years between 1997 and 2007, the Chief Executive will be elected by a broadly representative election committee. If there is a need to amend this method of election after that period, such amendment must be made . . . "

III. Should There be any Changes in 2007?

Provided that there can be changes in the election of the Chief Executive in 2007, the next question is: should there be any changes in 2007?[6] It is submitted that the answer should be affirmative because of the following reasons.

A. The Government is against Public Demand

The Chief Executive is not legitimate and held accountable for his actions; there are conflicts between the executive and the legislative branches of the government.

1. Against Public Demand

Unlike other executive-led regimes, the Chief Executive of Hong Kong is not popularly elected. Therefore, he does not have the political legitimacy which is normally commanded by popularly elected presidents.[7] Although enormous constitutional power is at the disposal of the Chief Executive, there is no guarantee of a stable and reliable majority support in the legislature.[8] This can be seen in the conflicts concerning the legislation mandated by art 23 of the *Basic Law*. The government finally withdrew the Bill after James Tien resigned as a

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3 For example, Professor Xiao Weiyun of Peking University and Wang Mingang (a member of the National People's Congress) expressed that the consultation of constitutional reform should be commenced after 2007.

4 The report can be downloaded from http://www.info.gov.hk/cab/cab-review/eng/report/index.htm.

5 Article 45 Concern Group, Opinion No. 1. For the full version of Mr Ji's address, see Yuan, Q (ed), *Collection of Important Documents of the Transitional Period of Hong Kong* (In Chinese) (Hong Kong: Joint Publishing Co (Hong Kong Branch), 1997), p.77-88.

6 As interpreted by the NPCSC, the provision in Annex I that "if there is a need" to amend means they may be amended or remain unamended.

7 See the outline of "Challenge of Universal Suffrage to Executive-led Government" by Professor Lau Siu-kai in "Government in Evolution" at one of the series of seminars on the long-term development of the Hong Kong Government held on 1 March 1998.

8 *Ibid.*

member of the Executive Council because it was obvious that the Bill could not be passed without the support of members of the Liberal Party. It seems that the government only surrendered because of the political fact but was not really responding to public demand. This was manifested by the slow response of the government to address the July 1 March 2003. In addition, in the 2004 Legislative Council Election, the Honourable Leung Kwok-hung, a member of the April Fifth Action, was successfully elected in a geographical constituency. His image to the general citizens is that he represents the grass-roots as he lives in a public estate and his education level is only up to Form Six.[9] He symbolizes the "anti-government" as he joins almost every demonstration and he advocates for the redress of the June 4th Movement of *Tiananmen* in 1989. From the fact that he was elected despite his relatively low education level, we realize how dissatisfied Hong Kong citizens are towards the government. In the July 1st March, July 9 and 13 assemblies of 2003, people expressed their dissatisfaction towards the government and the *National Security (Legislative Provisions) Bill*. People called for the step down of the current Chief Executive. The fundamental political will of the general public is democratisation of the election of the Chief Executive and the formation of the Legislative Council.[10]

2. *Chief Executive not Held Accountable*

The process of democratisation is mandated by the *Basic Law*. However, the need of such democratisation is accelerated by the poor accountability and performance of the current Chief Executive. The crux of the problem is that the Chief Executive is not responsible both objectively and subjectively.[11] Objectively, he should be accountable to the Central People's Government and Hong Kong.[12] However, it seems that he is not accountable to the latter. This can be seen from the low responsiveness after the July 1st March and the protection of some principal officials' status quo after they have committed certain mistakes. Moreover, the Chief Executive should be accountable to his Election Committee. There should be debates or forums to increase his accountability and the legitimacy of the Committee.[13] Unfortunately, there has been none. Subjectively, the Chief Executive, being the highest leader of Hong Kong, should be accountable to all citizens in Hong Kong but his performance has been far from satisfactory. As correctly pointed out by Kuan Hsin-chi, "the panacea for our political ills is not to find a better successor." He thought that leadership succession is not really a way out of the trap of frustration. Our political ills are rooted in structural conditions. He contended that "while leadership matters, our problem is not a single individual, but structural. Without the structural faults removed, a different individual will still be unable to bring about much improvement."[14]

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9 For details of the profile of Hon Leung Kwok-hung, see http://www.legco.gov.hk/.

10 Tai, B, "The Constitutional Significance of half a million Hong Kong people marched in the street" (In Chinese) (2003) 152 *Strait Review*, pp 22-27.

11 Frederick Mosher made a distinction between objective and subjective responsibility. Objective responsibility connotes the responsibility of a person or an organization to someone else, outside of self, for something or some kind of performance. It is closely akin to accountability or answerability. Subjective responsibility focuses not upon to whom or for what one is responsible but to whom or for what one feels responsible and behaves responsibly. For a more detailed analysis on objective and subjective responsibility, see Adie, R F, and Thomas, P G, *Canadian Public Administration: Problematical Perspectives* (Scarborough, Ontario: Prentice-Hall, 1982), pp 262-263.

12 Article 43, *The Basic Law of the Hong Kong Special Administrative Region.*

13 Lo, S H, Yu, W Y, Kwong, K K, Wan, K F and Cheung, Y F, *The Tung Chee-hwa Government: Governing Crisis and its solution* (In Chinese) (Hong Kong: Ming Pao Publisher, 2002) pp 159-160

14 See the speech titled "The Next Stage of Constitutional Reform in Hong Kong" by Professor Kuan Hsin-chi on 20 May 2003.

3. Conflicts between the Executive and the Legislature

Recently, the government has been losing support and met with increasingly fierce public opposition. The legislative election, though more legitimate in the eyes of the electorate, does not determine the formation of the government. Political power is divorced from the representation of the people's will.

"Such a mismatch robs the government of the necessary legitimacy to mobilize resources in society, to demand sacrifice from the people when needed, and to reconcile conflicts generated by its policy interventions."[15] To enhance the legitimacy and accountability of the government, reform is necessary and should be implemented as soon as possible. Otherwise, it will be more difficult for the government to carry out policies and gain support from the Legislative Council in important matters such as public expenditure. This is evident in the rejection of the total recurrent grant for the University Grants Committee-funded institutions for the 2004/05 academic year in the Finance Committee of the Legislative Council on 7 January 2004.[16]

The current government has become a "minority" government similar to the British government, or, more precisely, the Labour Party in late 1970s which lacked support from the Parliament. The official opposition gained more support from the general public and finally the government stepped down due to a vote of no confidence by the Conservative Party.[17] There is no such vote of no confidence in Hong Kong. It seems that the current Chief Executive would stay until 2007, as he has said, on various occasions, that it was more difficult for him to stay than to leave. Therefore, to ensure the Chief Executive it will be more difficult for accountable for his decisions, the only way out is to have democracy.

B. Democracy is a Global Trend

Hong Kong has long been praised as a liberal city. However, liberalism does not equal democracy though the two are highly related.[18] Up to now, Hong Kong has little democracy though it is liberal and is upholding the rule of law.

1. Undemocratic Indirect Election

What is democracy? Everyone has a concept of democracy, but the conception of democracy differs from one to another.[19] According to James Allan, the essence of democracy is much simpler to describe. A democratic government refers to how a government is chosen. That method is by voting, with the majority's preference (loosely speaking) prevailing.

In Hong Kong, the Chief Executive is elected by the Election Committee. This is a form of indirect election. Many democratic jurisdictions adopt indirect elections to choose their Chief

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15 *Ibid.*

16 For the results of the Finance Committee Meeting, see http://www.legco.gov.hk/yr03-04/english/fc/fc/papers/f03-52e.pdf.

17 "跛腳施政報告難有作爲", *Mingpao*, 3 January 2004.

18 For a detailed analysis of liberalism and democracy, see Allan, J, "Liberalism, Democracy, and Hong Kong" (1998) 28 *Hong Kong Law Journal*, p 156.

19 This is similar to the difference in concept of justice and conception of justice as proposed by John Rawls. See Rawls, J, *A Theory of Justice*, (Oxford: Oxford University Press, 1972).

Executives.[20] Regrettably, since the Election Committee is not representative and members therein are not elected by all citizens, the indirect election in Hong Kong is far from democratic. Some people may argue that even a democratic country such as the United States (US) adopts an indirect election method. However, the American voting system with its electoral college is for the protection of the interest of individual states, and is very different from that of Hong Kong.[21] At least, every US citizen could vote; in Hong Kong, general citizens do not have any say or influence on the election of the Chief Executive.

Some people hold the opinion that democracy is not only measured by the method of election. There is peculiarity in the constitutional and political development of Hong Kong which justifies the current system.[22] Undoubtedly, Hong Kong has its own peculiarity, specialty and history. However, this does not prevent Hong Kong from developing democracy. In drafting art 45 of the *Basic Law*, the principle of gradual and orderly progress was adopted with these peculiarities already taken into consideration.[23]

2. *Factors Leading to Democracy*

In the past 30 years, authoritarian governments of over 30 countries have democratised. We cannot ignore the third wave of worldwide democratisation.[24]

According to Samuel Huntington, there are several factors leading to the third wave of democratisation. They include legitimacy of the government, improvement of economy, standard of life and educational level of citizens, change in the doctrine and actions of the Catholics, the change in the policies of some countries in Europe and America and the demonstration effect of democratisation in some countries.[25] Larry Diamond basically agrees with Huntington, but he added two more factors to the list: internal separation and disputes in the government and changes in the development, organisation, awareness and action of the

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20 For example, America, Finland, India, Italy, Germany, etc. See Sung, S J, *The Basic Law of Hong Kong SAR and Post-transitional Period Conflicts* (In Chinese) (Hong Kong: Hong Kong Cultural Education Publishing Co, 1998), p 272.

21 For details of the American election of the President, see Dahl, R A, *How Democratic Is the American Constitution?*, (New Haven: Yale University Press, c2001) pp 73-89

22 Lee, C D, Gung, H H, *Perceive the Basic Law Clearly* (In Chinese) (Hong Kong: Zhonghua Publishing Co (Hong Kong Branch), 1990), pp 180-181.

23 In deciding when to allow direct election in Hong Kong, there are several approaches. The first is setting a time table, ie stipulating the exact time of a direct election; the second is setting an objective triggering point, e.g. when more than 50% of people vote in the election of the members of Legislative Council; the third is general polling, ie all citizens decide when to have a direct election and this can be seen in the draft of the *Basic Law*. For details, *supra* note 21.

24 Lau, S K, *Hong Kong Politics in the Transitional Period* (In Chinese) (Hong Kong: Wide Angle Press Ltd., 1996), pp. 421-422.For details of the third wave of democratization in the world, see Diamond, L and Plattner, M F, (eds), *The Global Resurgence of Democracy* (Baltimore: John Hopkins University Press, 1993); Huntington, S P, *The Third Wave: Democratisation in the Twentieth Century* (Norman: University of Oklahoma Press, 1991); Diamond, L, Lipset, S M and Linz, J, "Building and Sustaining Democratic Government in Developing Countries: Some Tentative Findings", v 150 (1987) *World Affairs*, pp 5-19; Paster, R A (ed), *Democracy in Americas: Stopping the Pendulum* (New York: Holmes and Meier, 1989); Robinson, T W (ed), *Democracy and Development in East Asia* (Washington DC: The AEI Press, 1991); Bermeo, N (ed), *Liberalization and Democratisation: Change in the Soviet Union and Eastern Europe* (Baltimore: Johns Hopkins University Press, 1992) and Rozman, G (ed), *Dismantling Communism: Common Causes and Regional Variation* (Baltimore: Johns Hopkins University Press: 1992).

25 Huntington, S P, "Democracy's Third Wave", in Diamond, L and Plattner, M F (eds), *The Global Resurgence of Democracy*, p 3

general public.[26]

In 1993, Lau Siu-kai said these factors did not apply to Hong Kong.[27] First, he said that the road to democracy of Hong Kong is special and specific. It will not be affected by the global trend.[28] He said except for some westernized elites, the international diffusion of democracy had little effect on Hong Kong. Second, he said external forces such as the US are limited. Third, although Hong Kong was a colony, there was no crisis of legitimacy of the government; on the contrary, people supported the government for its good economical and administrative performance. Fourth, there were no disputes among the governing elites. Fifth, the middle class was the beneficiary of such a political system and hence they were more conservative and mild. Finally, the religious bodies in Hong Kong had little impact on the process of democratisation. These were accurate observations in 1993.

However, society has changed a lot after 10 years. First, more and more people are becoming aware of the importance of democracy. This is evidenced by the increasing participation in the District Council Election and the Legislative Council Election and the marches and assemblies for democracy held by local organizations. Second, external powers may not have a great impact on Hong Kong's constitutional reform, but their influence cannot be ignored as Hong Kong is an international city.[29] Third, the Hong Kong government is currently under a crisis of legitimacy. This is evident from the various demonstrations against the government and the failure of the pro-government political parties in the District Council Election. According to the University of Hong Kong Public Opinion Programme ("HKU POP"), not many Hong Kong citizens trust the government and Policy Address 2004 only scores 49.3 marks, a record low as well as the first time it scores below the passing mark 50.[30] Fourth, there are disputes among the governing elites. This can be seen from the resignation of James Tien and the conflicts between the Financial Secretary and the Secretary for Education and Manpower over the issue of budget cut on education. Fifth, the middle class is no longer mild and conservative. As indicated in HKU POP website, over half of the people who joined the July 1st March 2003 have completed tertiary education. They are middle class and professionals.[31] Finally, the effect of religious bodies on democratisation has become more significant. Bishop Joseph Zen Ze-kiun of the Catholic Church in Hong Kong criticized the government severely and told members of the Church to join the July 1st March 2003. Therefore, it can be seen that factors previously nonexistent in 1993 do exist now. It is now time to start considering constitutional reform, and the election of the Chief Executive in 2007 should be democratised.

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26 Diamond, L, "The Globalization of Democracy", in Slater, R O, Dorr, S R, (eds), *Global Transformation and the Third World*, pp 43-49

27 See the inaugural speech of Professor Lau Siu-kai as a professor of sociology of the Chinese University of Hong Kong on 3 Dec 1993, for details, see *supra* note 20.

28 For example, he said that global anti-colonialism in 1950s and 1960s did not affect Hong Kong

29 For example, despite the strong opposition of the Chinese government, the Spokesman of the US Department of State Mr Richard Boucher on 9 Jan 2004 expressed clearly the strong support to Hong Kong citizens in developing democracy through electoral reform and universal suffrage in accordance with the *Basic Law*. For the full version of the statement, see http://usinfo.state.gov/; the Secretary of State for Trade and Industry and Minister for Women of the United Kingdom Ms Patricia Hewitt also expressed the support to Hong Kong citizens in democratisation.

30 For details of the HKU POP Site, see http://hkupop.hku.hk/.

31 *Ibid.* See also *Mingpao*, 7 July 2003.

IV. How to make the changes?

Before proposing any reform in the election method of the Chief Executive, several legal and political factors must be taken into consideration.

A. Legal Factors

We have to read art 45 and Annex I of the *Basic Law* very carefully. First, we have to interpret the meaning of terms such as "in the light of the actual situation" and "principle of gradual and orderly progress". Second, we need to know whether the Hong Kong government can determine if there is a need to amend the selection method of the Chief Executive. Third, we need to know whether it is necessary to amend the *Basic Law* when reforming the selection method of the Chief Executive.

1. "In the light of the actual situation"

"In the light of the actual situation" should mean the political atmosphere of Hong Kong and this should be objective. As mentioned above, there is a strong and undeniable demand for democracy and time has come for the government to consider democratisation.

One may argue that "in the light of the actual situation" should be interpreted by the NPCSC. However, this is unnecessary as the NPCSC should reflect public opinions. All power in China belongs to the people and the National Peoples' Congress is responsible to the people and subject to their supervision.[32] It follows that the NPCSC should reflect opinions of the general public of Hong Kong when interpreting the provisions and hence should reach the conclusion that in the light of the actual situation of Hong Kong, there can be changes to the method of selection of the Chief Executive in 2007.

Since it is expressly stated that actual situation must be referred to, the law should not be interpreted artificially without clear understanding of the public demand. We must bear in mind that all people are bound by the law because we have agreed to abide by a law which is made by all people through a representative system. It is a reflection of the public. If the law, or, more precisely, the interpretation is against public demand of Hong Kong, it will surely affect the legitimacy of the NPCSC, the policy of "One Country Two Systems" and the autonomy of Hong Kong. Unless the NPCSC takes this risk, there should be changes in the selection method of the Chief Executive in 2007 after considering the actual situation of Hong Kong.

2. "Principle of gradual and orderly progress"

This is perhaps the most controversial section. Surprisingly, this provision does not appear in the *Basic Law of the Macau Special Administrative Region of the People's Republic of China* ("the Macau *Basic Law*"). This is because, as pointed out by Professor Xiao Weiyun, unlike Hong Kong, there was no serious dispute about the election of Chief Executive when drafting the Macau *Basic Law*.[33]

Some legal experts in Hong Kong contend that the phrases "in the light of the actual

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32 Articles 2 and 3, *Constitution of People's Republic of China.*

33 Yeung, C F and Lee, C K, *Comparative Study of the Basic Law of HKSAR and Macau SAR* (In Chinese) (Macau: Macau Fund, 1996), pp 219-220

situation" and "principle of gradual and orderly progress" should be read together and they are not procedural or systematic in nature but refer to the political atmosphere and public opinions in Hong Kong.[34] They seem to focus more on the "actual situation". On the other hand, some Mainland legal experts contend that if there is universal suffrage of the Chief Executive in 2007, it violates the principle of gradual and orderly progress, as Hong Kong people have administered themselves since the handover, an occurrence which is unprecedented.[35] They seem to focus more on the "principle of gradual and orderly progress".

Literally, the provision means the method can be amended incrementally (gradual progress) with a certain pace (orderly progress). It is submitted that "in the light of the actual situation" and "principle of gradual and orderly progress" should neither be viewed as completely separate nor completely together. The meaning of "incrementally" or "gradual progress" is quite clear. It means that there must be a transition.[36] However, the pace or the orderly progress is not mandated in the *Basic Law*. The pace should depend on the actual situation of Hong Kong. Therefore, the conclusion is that we cannot have universal suffrage of the Chief Executive in 2007 unless we amend art 45 of the *Basic Law* and delete the principle of gradual and orderly progress. This is quite impossible because it involves complicated procedures as stated in art 159. Nonetheless, because of the actual situation that the people are urging for democracy, it is necessary to quicken the pace to achieve the ultimate aim of universal suffrage for the election of the Chief Executive. We cannot have universal suffrage in 2007 because it violates the gradual process principle but we may have universal suffrage in the fourth election of the Chief Executive in 2012.

Purposively, "in the light of the actual situation" and "principle of gradual and orderly progress" are to maintain the stability of Hong Kong in both economic and political aspects. This is also one of the spirits of "One Country Two Systems". Actually the principle of gradual and orderly progress is similar to the "successive limited comparisons" approach or incrementalism, a public policy making model in the theory of public administration suggested by Charles Lindblom.[37] Amitai Etzioni has expressed the fear that incrementalism goes too far in buttressing the established order or status quo but Yehezkel Dror argues that incrementalism acts as an ideological reinforcement of the pro-inertia and anti-inertia forces are prevalent in all human organizations, administrative and policy making.[38] No matter which side is correct, what is certain is that it can maintain stability. Nevertheless, it does not mean that the change in 2007 can only be minimal. Afterall, the *Basic Law* was drafted about 15 years ago and the drafters could not foresee the current situation in Hong Kong. Now, ironically, to maintain political stability, we have to democratise the election of the Chief Executive, otherwise, there may be another crisis of legitimacy in the next administration.

Apart from political stability, many people, especially the business elites and the pro-government, fear that democracy will affect economic stability. They are afraid that Hong Kong will turn to a welfare state which discourages investments. Their concerns are not strongly grounded. Many democratic countries have good and stable economies. Moreover,

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34 "何謂循序漸進非程序問題", Tong, R, *Mingpao*, 14 January 2004; Leong, A, *Mingpao*, 14 January 2004.

35 Xiao, W Y, one of the "Four Mainland Legal Experts". He expressed this view after the Policy Address 2004 of the Chief Executive and in a forum held in Hong Kong on 16 January 2004.

36 This is consistent with the opinions of one of the Basic Law drafters, Professor Xiao Wei-yun.

37 Kernaghan and Siegel, *Public Administration in Canada*, p 135.

38 *Ibid*

recently, some countries with free markets[39] were crushed by waves of unprecedented financial crisis.[40] While economic factors play an important role in the collapse of these economies, observers have increasingly begun to notice that they often shared disturbing similarities in the political realm - namely, lack of transparency in the way reforms were carried out which exposed repeated cases of moral hazard on the part of policymakers.[41] Manzatti concluded that enacting sweeping economic changes in a rush without holding public officials accountable is a recipe for disaster. Lack of accountability for government actions was associated with countries suffering severe economic crisis. Without sufficient checks and balances, crony capitalism and political patronage are likely to thrive. Hong Kong should learn a lesson from these countries before crisis actually occurs. We should realise that democracy will not undermine economy but actually underpin it.

3. Whether the Hong Kong Government Can Determine If There is a Need to Amend the Method for Selecting the Chief Executive

The answer to this question should be affirmative. From Annex I of the *Basic Law*, it is clear that to amend Annex I, three steps are necessary, namely, endorsement of a two-third majority of all the members of the Legislative Council, consent of the Chief Executive and approval of NPCSC. The first two steps are within Hong Kong's autonomy and hence should be done by Hong Kong. It can be seen that the whole amendment procedure is initiated by Hong Kong, hence the Hong Kong government should have the right to determine whether there is such a need. Nonetheless, as the amendment procedure requires the final approval of the NPCSC, it is wise to consult the opinions of NPCSC to avoid any constitutional crisis.[42]

4. Whether it is Necessary to Amend the Basic Law When Amending the Method of Selection of the Chief Executive

The answer to this question must be negative and the selection method of the Chief Executive has nothing to do with art 159 of the *Basic Law*. The answer is self-evident, as the three steps of amendment are stipulated in Annex I specifically - if we were to amend Annex I under art 159, any stipulation of such procedures would have been unnecessary. This opinion is consistent with what Mr Ji Pengfei said in his address to the 7th National People's Congress on 28 March 1990.[43] He said that using an annex to stipulate the method of selection of the Chief Executive is more flexible and convenient for amendment when necessary. Therefore, amending Annex I of the *Basic Law* does not require the procedures in art 159 but only the three steps mentioned above.

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39 For example, Indonesia, Thailand, Russia and Argentina.

40 Manzetti, L, "Political Manipulations and Market Reforms Failures", *World Politics*, Vol 55, No 3 (April 2003), pp 315-360.

41 *Ibid.*

42 It is because there is no procedure provided in the *Basic Law* in case a veto of appointment of the Chief Executive is exercised by the NPCSC. For details, see Yash, G, *Hong Kong's New Constitutional Order: the Resumption of Chinese Sovereignty and the Basic Law*, (Hong Kong: Hong Kong University Press, 1999 Second Edition), pp 257-258; Cheng, J, "The Political System", Wesley-Smith, P and Chen, A (eds), *The Basic Law and Hong Kong's Future*, (Hong Kong: Butterworths, 1988), pp 141-171.

43 Yuan, O (ed), *Collection of Important Documents of the Transitional Period of Hong Kong* (In Chinese) (Hong Kong: Joint Publishing Co (Hong Kong Branch), 1997), pp 77-88.

B. Political Factors

Apart from legal factors, there are political factors that must be considered. Politics, being defined as the authoritative allocation of values, or the process of deciding "who gets what, when and how",[44] plays an important role. In this context, the one who can decide "who gets what, when and how" include two parties, China and Hong Kong. We must not ignore the fact that the ultimate decision maker is the NPCSC. Therefore, it is helpful look at the factors considered by the NPCSC.

1. "One Country Two Systems" and Taiwan

"One Country Two Systems" has a demonstrative effect on Taiwan. Deng Xiao-ping, the architect of "One Country Two Systems", hoped his invention can be a peaceful means of the unification of China.[45] If democratisation of Hong Kong is hindered by the NPCSC, it may further deter Taiwan people from accepting "One Country Two Systems". Therefore, it is likely that the NPCSC will allow Hong Kong to develop democracy but the pace may be controlled.

2. "One Country Two Systems" and Hong Kong SAR

For several times, Deng mentioned that there must be a standard and limit for the ruling class of Hong Kong. The limit is that the governing body must be composed mainly by patriots. He further defined the meaning of patriots. They are people who respect their ethnos, sincerely support the resumption of the exercise of sovereignty over Hong Kong and do not undermine the prosperity and stability of Hong Kong.[46] In addition, Deng expressed that the political system of Hong Kong cannot be fully westernized.[47] On the issue of universal suffrage, Deng thought that universal suffrage could not guarantee that the governing bodies would be composed by patriots but he did not fully reject it. He said it was more practical to attain it in a gradual and orderly progress as suggested by Sir David Wilson, the second last governor of Hong Kong.[48] Therefore, we can see that developing democracy in Hong Kong is possible, but Chinese officials may be more conservative as they are afraid that some people will use Hong Kong as a base to overthrow the Chinese government and democracy affects stability. These worries are actually unnecessary. Hong Kong people only wish to choose good leaders and hope that they can maintain prosperity and stability of Hong Kong. With the rule of law and the protection of human rights, tyranny of majority would not happen easily.

After considering legal and political factors, it can be concluded that there should be amendments of Annex I of the *Basic Law* in 2007. Although universal suffrage cannot be

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44 Easton, D, *A System Analysis of Political Life*, (New York: Wiley Publishing, 1965).

45 For example, in the third General Meeting of the Central Advisory Commission on 22 December 1984, Deng said that the way to solve the Hong Kong problem will directly affect the resolving of the Taiwan problem. For details, see *Debates on Hong Kong Problems by Deng Xiao-ping* (In Chinese) (Hong Kong: Joint Publishing Co (Hong Kong Branch), 1993), pp 16-26.

46 Deng expressed this opinion in the meeting with industrial and business sectors of Hong Kong on 22, 23 June 1984, and in the meeting with people of Hong Kong and Macau on 3 October 1984. For details, see *ibid*, pp 5-8, 11-15.

47 Deng expressed this opinion in the meeting with the Drafting Committee of Basic Law of HKSAR on 16 April 1987 and in the international conference "China and the world in the 90s" on 3 June 1988. For details, see *ibid*, pp 30-39.

48 Deng expressed this opinion in the meeting with the Drafting Committee of Basic Law of HKSAR on 16 April 1987. For details, see *ibid*, pp 30-37.

achieved in 2007, the progress of democracy should not be too slow or symbolic and a time-table of achieving universal suffrage should be produced after obtaining consensus among all parties.

C. *The Interpretation and the Decision of the NPCSC*

On 6 June 2004, there was a self-initiated interpretation by the NPCSC of art 7 of Annex I and art 3 of Annex II of the *Basic Law*.[49] Four interpretations were made, among them the third paragraph stipulated that the Chief Executive of Hong Kong shall make a report to the NPCSC concerning whether there is a need to make an amendment; and the NPCSC shall, in accordance with the provisions of arts 45 and 68 of the *Basic Law*, make a determination in light of the actual situation in Hong Kong and in accordance with the principle of gradual and orderly progress.

It is submitted that this is an additional procedure under the framework of Annex I and Annex II of the *Basic Law* and it could be regarded as an amendment to para 7 of Annex I. Without such interpretation, the NPCSC would have a final say to approve the amendment of election of the Chief Executive as provided for in art 7 of Annex I. This arrangement is to allow high autonomy of Hong Kong and to allow the exercise of sovereignty by Mainland China. It is politically wise for the Hong Kong government to reach an agreement with the Chinese government before proposing the amendment to the Legislative Council. However, now, under the interpretation, the NPCSC can make a decision, and it actually made one on 26 April 2004, after the Chief Executive submitted the report to Chairman Wu Bangguo of the NPCSC on 15 April 2004.[50] According to that decision, the election of the third Chief Executive in 2007 shall not be by means of universal suffrage. Although the same conclusion that there will be no universal suffrage in 2007 was reached, the self-initiated interpretation requiring additional procedures undermined the autonomy and the procedural justice as provided for in the *Basic Law*.

V. *Different Methods of Selecting the Chief Executive*

Given that the decision made by the NPCSC cannot be challenged, it is time to discuss what amendments should be made. The following options are proposed and some of them cannot be achieved in 2007 as they involve introducing universal suffrage. Reference has been made to a number of papers and documents about the *Basic Law*, especially suggestions from the general public including the five final proposals in drafting the *Basic Law*.[51]

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49 The document can be downloaded from the website of the Constitutional Development Task Force, http://www.info.gov.hk/cab/cab-review/.

50 *Ibid.*

51 For example, Cheng, J and Lo, S, *Green Paper: Review of the Political System in the Hong Kong Special Administrative Region* (Hong Kong: 民主動力:香港民主促進會, 2003); Article 45 Concern Group, *Opinion No. 1*; The Consultative Committee for the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, *The Draft Basic Law of the Hong Kong Administrative Region of the People's Republic of China (For Solicitation of Opinions) Consultation Report Volume 1*, (October 1988); The Consultative Committee for the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, *The Draft Basic Law of the Hong Kong Administrative Region of the People's Republic of China (For Solicitation of Opinions) Consultation Report Volume 5*, (October 1988); The Consultative Committee for the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, *The Draft Basic Law of the Hong Kong Administrative Region of the People's Republic of China (For Solicitation of Opinions) Consultation Report (3) Specific Report*, (October 1988); Secretariat of the Consultative Committee for the Basic Law of the Hong Kong Special Administrative; Region of the People's Republic of China, *Reference Papers for the Basic Law of the*

i. Retaining the existing mode of the Election Committee but expanding it and enhancing its representativeness by, for example, introducing some directly elected members;
ii. Candidates nominated by the Election Committee / expanded Election Committee and elected by the legislature;
iii. Candidates nominated by the legislature and elected by the Election Committee / expanded Election Committee; and
iv. Candidates nominated and elected by the members of the legislature.

For methods i to iv, when the candidate is elected, he or she may undergo a general polling to see whether he or she can get sufficient support from the general public.

v. Candidates nominated by the Election Committee / expanded Election Committee and elected by universal suffrage;
vi. Candidates nominated by the legislature and elected by universal suffrage;
vii. Candidates nominated by a directly elected Nomination Committee and elected by universal suffrage; and
viii. Candidates nominated by a Nomination Committee when they get a certain amount of support from the public and elected by universal suffrage.

Each method has its own advantages and shortcomings. They deserve in-depth consideration but such consideration is beyond the scope of this paper. There are different electoral systems such as the second ballot system and the alternative ballot system.[52] All of these should be fully considered so as to ensure healthy growth of the political system.

VI. Conclusion

In this paper, reasons for amending the selection method of the Chief Executive are examined. As the Chief Executive is not legitimate and held accountable for his actions, and universal suffrage is a public demand in Hong Kong as well as a global trend, there should be changes in the Annex I of the *Basic Law* in 2007. In deciding how to select the Chief Executive in 2007, legal and political considerations are involved. The writer's conclusion is that the pace of democratisation should not be slow or symbolic. However, to uphold the rule of law, we cannot have universal suffrage in 2007, but we can have it in 2012. This coincides with the decision of the NPCSC. The government should seriously plan when this ultimate aim is to be achieved. The schedule of democratisation must be set carefully after consulting all parties including the Chinese authority to prevent any constitutional crisis. We must be patient when striving for democracy. After all, Rome was not built in a day. Nevertheless, with our persistence, I sincerely believe that that day is not too far away.

Hong Kong Special Administrative Region of the People's Republic of China (Draft), (February 1989); *The Draft Basic Law of the Hong Kong Administrative Region of the People's Republic of China (For Solicitation of Opinions)*, (April 1988); Special Group on the Political Structure of the SAR, *Report on the Summary of the Proposals Regarding the Selection of the Chief Executive*, (4 November 1987)

52 For details of different electoral systems, see Farrell, D M, *Comparing Electoral Systems* (Britain: Prentice Hall Harvester Wheatsheaf, 1997); Speech by Dr David Newman titled "Voting Theory and Proportional Representation as a Voting System" at one of the series of seminars on the long-term development of the Hong Kong Government held on 1 March 1998.

A DEBATE BETWEEN JOHN STUART MILL AND JOHN RAWLS ON THE RIGHT TO DEMOCRATIC GOVERNANCE IN HONG KONG

LEONA CHEUNG

"[L]egalities (meaning the PRC Constitution, *the* Basic Law, Bill of Rights, ICCPR *and other international treaties etc.) aside, were John Rawls and John Stuart Mill asked whether Hong Kong people should have the right to have their Chief Executive directly elected, how would they respond?" There is a wide gulf between the aspirations of the majority in Hong Kong and China's authoritarian rulers when it comes to "One Country, Two Systems". The issue of whether there would be direct election for the Chief Executive at least in the near future has been answered politically, but the issue of whether there should be direct election remains under debate. The author attempts to probe further into the debate through a more philosophical angle.*

I. Background of the Debate

Communist China welcomed Hong Kong back in 1997 under its "One Country, Two Systems" policy, whereby Hong Kong people could enjoy a high degree of autonomy and freedom. But when it comes to the "One Country, Two Systems" policy, there is a wide gulf between the aspirations of the majority in Hong Kong and China's authoritarian rulers. What is under debate is the next step towards democratisation in Hong Kong in 2007. Hong Kong's *Basic Law* allows for the possibility of direct elections for the Chief Executive[1] (CE) and all of the seats in the Legislative Council[2] in 2007, subject to Beijing's approval to any electoral changes. It has been said that China's Communist Party clearly fears growing demands for full democracy in Hong Kong as it may threaten its control over the territory and possibly spread to mainland China.[3] Some mainland officials doubt Hong Kong's patriotism after a massive protest against the local Beijing-backed government in July 2003 which drew half a million people into the streets to denounce attempts by CE to push through an unpopular anti-subversion bill. Pro-"democracy" groups are, *inter alia*, pressing for universal suffrage in the election for Hong Kong's third CE in 2007.

Many meanings can be attached to the term "right to democratic governance". Due to the word limit, this debate is confined to "democratic governance" in the sense that the CE is directly elected.

The main question is: legalities (meaning the *PRC Constitution*, the *Basic Law*, *Bill of Rights*, *ICCPR* and other international treaties etc.) aside, were John Rawls (Rawls) and John Stuart Mill (Mill) asked whether Hong Kong people should have the right to have their CE directly elected, how would they respond?

II. The Approach

There are two possible ways of looking at the questions. To adopt Rawls' terminology, we can either look at "democratic governance" as a "basic structure" of society or we can look at it as a form of "political rights" which is a "basic good" which the "basic structure" must protect according to the principles of justice.

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1 Art 45, *The Basic Law of the Hong Kong Special Administrative Region.*

2 *Ibid*, art 68.

3 Feinerman, J V, "Hearings on Prospects for Democracy in Hong Kong", 15 Mar 2004, at http://asianresearch.org/articles/1929.html (last visited on 20 Mar 2004).

Both Rawls and Mill did not expressly discuss a person's *right* to have a certain form of social structure; they only listed out the situations where a particular form of government should be *preferred*. On the other hand, both discussed the situations where a person can exercise a right. In order to meaningfully apply their theories to the question and to compare their thoughts, the main question is divided into the following sub-questions:

(1) Under what circumstances can a person exercise a "right"?

(2) Does the fact that the right in question relates to society's basic structure make any difference?

(3) How do the above apply to Hong Kong?

III. Under What Circumstances Can a Person Exercise a "Right"?

A. Rawls: Principles of Justice

Individual members of society make competing claims to advantages ("rights and liberties, powers and opportunities, income and wealth"[4]) produced by social co-operation. Rawls wrote that it is theoretically possible that all members of society agree on principles to regulate the distribution of these advantages. Such a hypothetical agreement or contract can be taken as specifying principles of justice, subject to conditions that it be made in the original position – a situation which is fair as between all the parties involved.

To Rawls, people have a moral duty to choose the principles of justice which include a lexical order for the enforcement of rights. Principles of justice are those which rational persons concerned to advance their own interests would consent to as equals when none are known to be advantaged or disadvantaged by social and natural contingencies. Rational persons in the original position would agree to two principles[5]:

> (1) "each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others";
> (2) "social and economic inequalities are to be arranged so that they are both (a) reasonably expected to be to everyone's advantage, and (b) attached to positions and offices open to all".

A more general conception of justice is that:

> "[a]ll social values – liberty and opportunity, income and wealth, and the bases of self-respect – are to be distributed equally unless an unequal distribution of any, or all, of these values is to everyone's advantage."[6]

In other words, if a right is a "basic right", it will be equally enforceable by all and will be given priority. If it is not, its distribution would depend on the second principle of justice and the general principle above.

B. Mill: "The Fallibility of What is Called the Moral Sense"[7]

Mill agreed that there must be some constraints upon the actions of other people so that a person's liberties are not unjustifiably trampled on. However, he thought that it is an

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4 Lessnoff, M, *Social Contract* (London: Macmillan Education Ltd, 1986), p 132.

5 Rawls, J, "A Theory of Justice", in Freeman, M D A, *Lloyd's Introduction to Jurisprudence* (London: Sweet & Maxwell, 2001), p 569.

6 *Ibid*, p 570.

7 Mill, J S, *On Liberty* (UK: Basil Blackwell Oxford, 1948), p 7.

"illusion" to think that these rules are to be obtained among the people themselves as self-evident and self-justifying.[8] People are merely accustomed to believe that their feelings are better than reasons, rendering reasons unnecessary. He pointed out that if any reasons, when given, are a mere appeal to a similar preference felt by other people, it is still only many people's liking instead of one. Therefore, he would disagree with Rawls and would think that any agreement arrived at by rational self-interested people in the original position regarding how and whether liberties or rights should be assigned is not meaningful since it is merely formed by consensus without reference to actual facts.

C. Mill: Harm Principle

Mill thought that the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.[9] As long as mankind have attained the capacity of being guided to their own improvement by conviction or persuasion, compulsion is no longer admissible as a means to their own good, and justifiable only for the security of others.[10]

Hence, for Mill, a person can exercise a right as long as it does not harm others. However, since the lack of harm to others does not entail justice, Rawls would disagree that this is the criteria.

IV. When the Right in Question is the Right to Direct Election of the Chief Executive (i.e. Directly Related to Social Structure)...

A. Mill: Application of the Harm principle

If a political system with a directly elected CE does not cause harm, according to Mill, people should be allowed to exercise their right to have their CE directly elected. Therefore, the first question is whether direct election of the CE harms anybody.

Mill discussed whether a form of government is "good" or not, but never whether a form of government causes any harm or not. Logically speaking, a good system does not entail a harmless system. However, since Mill's "good" democratic system was designed to do away with its potential "evils", if the direct election of the CE matches the descriptions of Mill's system, it is both "good" and harmless.

An "evil" Mill contemplated was the lack of representative of the minority. He wrote that in a representative body, the minority must of course be overruled, but it does not follow that the minority should have no representative at all. In a really equal democracy, every section of society should be represented, not disproportionately, but proportionately.[11] Otherwise, it is merely a government of inequality and privilege where one part of the people rule over the rest.[12] Hence, some mechanisms that ensure that the minority will be heard are needed.

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8 *Ibid*, p 5.
9 *Ibid*, p 8.
10 *Ibid*, p 9.
11 Mill, J S, *Utilitarianism, Liberty and Representative Government* (USA: E P Dutton & Co, Inc, 1951) p 345.
12 *Ibid*, p 346.

Another "evil" Mill tried to avoid was the natural tendency of representative government towards collective mediocrity. Mill thought that although superior intellects will necessarily be outnumbered, it makes a great difference whether they are heard or not.[13] In all human affairs, every person has an admitted claim to a voice, and when his exercise of it is not inconsistent with the safety of the whole, [his voice cannot be justly excluded. But that everyone should have an equal voice is a totally different proposition.[14] No one needs ever be called upon of a complete sacrifice of his own opinion. It can always be taken into the calculation, and counted at a certain figure, a higher figure being assigned to the suffrages of those whose opinion is entitled to greater weight.[15] Hence, more weight should be given to the votes of the "wiser" in society.

Mill was also concerned that some sections of society may lose their voice due to the artificial division of election constituencies. According to him, "real equality of representation is not obtained unless any set of electors amounting to the average number of a constituency, wherever in the country they happen to reside, have the power of combining with one another to return a representative"[16]. Hence, in Mill's "good" system, there should be no artificial division of constituencies that minimizes people's voices.

If the system for the direct election of CE can satisfy the above requirements, it is a harmless system. The next step would be to consider the three conditions that have to be fulfilled before a form of government can be adopted:[17]

- people for whom the form of government is intended are willing to accept it/ not so unwilling as to oppose;
- they are willing and able to do what is necessary to keep it standing;
- they are willing and able to do what it requires them to enable it to fulfill its purposes.

Within the limits set by the three conditions, forms of government are a matter of choice. One of "the most rational objects to which practical effort can address itself" is "to introduce into any country the best institutions which, in the existing state of that country, are capable of, in any tolerable degree, fulfilling the conditions".[18]

Moreover, there are two good elements of a good government. The first is how far it can promote the virtue and intelligence of the people composing the community. The second is the machinery itself – the degree in which it is adapted to make existing good qualities instrumental to the right purposes.[19]

These two considerations cannot be separated from a contemplation of the stage of advancement the society in question has already reached.[20] A good form of government for a particular society must depend on the stage of civilisation of the people and the one indispensable merit of a government is that its operation on the people is favorable (or not unfavorable) to the next step which is necessary for them to take, in order to raise themselves

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13 *Ibid*, p 357.
14 *Ibid*, p 381.
15 *Ibid*, p 382.
16 *Ibid*, p 351.
17 *Ibid*.
18 *Ibid*, p 244.
19 *Ibid*, p 259.
20 *Ibid*, p 265.

to a higher level.[21]

Mill thought that representative government possibly might exist but some other form of government would be preferable when the people, in order to advance in civilisation, have some lesson to learn or some habit not yet acquired, to the acquisition of which a representative government is likely to be an impediment.[22] One such situation would be where there is an inveterate spirit of locality, where portions of mankind, in many other aspects capable of, and prepared for, freedom, may be unqualified for amalgamating into even the smallest nation.[23] The most favorable improvement that would be made in this situation would be to raise up representative institutions without a representative government; a representative body or bodies, drawn from the localities, making itself the auxiliary and instrument of the central power, but seldom attempting to thwart or control it. By "irresponsible monarchy" rather than by representative government, a multitude of insignificant political units can be welded into a people, with common feelings of cohesion and affairs sufficiently various and considerable of its own to occupy worthily and expand to fit the social and political intelligence of the population.[24]

In other words, according to Mill, provided that the system contains mechanisms to avoid "evils", that it fulfils the three basic conditions for any form of government and the two requirements for a good government, and that the society needs the improvements that can be potentially brought about by that form of government, a person can exercise his or her right to have that form of government.

B. Rawls: Focus should be Justice instead of the Particular Circumstances of Society

To Rawls, the principles of justice apply to the basic structure of society and govern the assignment of rights and duties and to regulate the distribution of social and economic advantages. According to his second principle of justice, each person must benefit from permissible inequalities in the basic structure. It must be reasonable for each "representative man", when he views it as a going concern, to prefer his prospects with the inequality to his prospects without it.

Whether any inequality brought about by people's exercise of "the right to democratic governance" should be permitted should depend on which form of government persons in the original position would prefer. Hence, Rawls would disagree with Mill in that whether people should enjoy the right to democratic governance does not depend on the particular circumstances (e.g. level of civility, whether a democratic governance would improve the level of the people) as Mill would argue. Rawls would believe that these are irrelevant; what is relevant should be whether rational people in the "constitutional convention" stage[25] would agree on allowing everybody in society to enjoy the right to democratic governance.

1. Rawls: Two Conditions

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21 *Ibid*, p 266.

22 *Ibid*, p 295.

23 *Ibid*, p 298.

24 *Ibid*, p 299.

25 Hart, H L A, "Rawls on Liberty and its Priority", in Daniels Norman (ed), *Reading Rawls: Critical Studies on Rawls' Theory of Justice*, p 233.

a. Does not Unjustly Interfere with other Rights

For Rawls, the legitimacy of a social structure is based on its justice. Society bears the responsibility for upholding the principles of justice and secures for everyone a fair share of primary goods within a framework of equal liberty and fair equality of opportunity. The only reason for circumscribing the rights defining liberty and making men's freedom less extensive than it might otherwise be is that these equal rights as institutionally defined would interfere with one another.[26]

To permit a right to democratic governance, the rights of some citizens who wish to have other forms of governance would be interfered with. So is true for the right of the authorities to rule without being subject to democratic governance. Hence, the question would be whether rational self-interested people in the original position would agree to permit citizens to have a right to democratic governance. Rawls would probably say they would.

b. Role of Basic Structure – can be fulfilled as long as society is well-ordered

However, it must be noted that for Rawls, although the basic structure is very important to people since their life prospects ("expectations") depend on it,[27] people are not "*entitled*" to any particular form of society as such. Instead, they have a fundamental moral obligation to *accept* regulatory social principles (and the institutions that conform to these principles) which they would agree to in the "original position".[28] This does not mean they have a moral obligation to *choose* democracy in the original position – they are only obliged to choose whatever is "just", whatever is the best outcome, from the viewpoint of their self-interest, given the constraints inherent in the ideally fair contractual situation.

As long as the society is a "well-ordered" one, it is just; and a "well-ordered" society needs not be democratic. A well-ordered society is one which is regulated by a public conception of justice, relatively stable to its conception of justice and the members of which are free, equal and moral persons.[29] An institutional basis that realizes the three requirements can take many forms and a liberal democratic society is only an example.[30]

Therefore, according to Rawls, democratic governance is a *possible choice* open to people, but there is nothing to compel a society into granting its citizens a "right to democratic governance" as such.

V. Application to Hong Kong

To have the CE directly elected conforms to the *ideals* of both Rawls and Mill. However, they disagree on when this ideal can become reality.

For Rawls, since rational self-interested people in the original position would prefer a directly elected CE, and since having a democratically elected CE does not interfere with Hong Kong's being a well-ordered society, Hong Kong people may have the right to "democratic

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26 Rawls, J, "A Kantian Conception of Equality", in Stewart, R M (ed), *Readings in Social and Political Philosophy* (New York: Oxford University Press, 1996), p 215.

27 *Supra* note 5, p 571.

28 *Supra* note 4, p134.

29 *Supra* note 26, p 211.

30 *Supra* note 5, p 587.

governance". As for the special mechanisms outlined by Mill, Rawls would consider them acceptable if such inequality in the distribution of "election rights" would be beneficial to even the least advantaged. Rawls would argue that Hong Kong people should have the right to directly elect their CE.

For Mill, a system which consists of a directly elected CE satisfies the 3 conditions for the adoption of a government. However, he may argue that since Hong Kong people are not "patriotic" enough, i.e. that there is an "inveterate spirit of locality" in Hong Kong, a representative government is not the best option. Mill would also insist that even if a direct election should take place, the minority's voice must be heard and that more weight should be given to the votes of "experts".

AN EVALUATION OF LIFE?

JING-JING ZHAO

Suing the doctor for medical negligence in performing a sterilisation procedure has become a popular tortious claim. The parents attempt to claim for the ordinary costs of rearing the child, who is the result of a 'wrongful birth', from the negligent doctor. The author reviews three English cases decided by the House of Lords and the Court of Appeal on this particular issue. She also raises a fourth case, a recent Australian High Court case, which provides a round-up resolution for the entire category of negligent sterilisation cases. The principle initially set out in the test case on this topic, McFarlane and Another v Tayside Health Board [2000] 2 AC 59, has been developed and extended within a short period of only four years. Negligence in sterilization can come in different permutations: the outcome is different when the parent is/is not healthy; likewise, it is different when the child is born healthy/unhealthy. The author comments that the evolving judicial disposition towards awarding parents damages as a result of the doctor's negligence may be attributed to the recognition of the ideology of individualism and liberalism. It is fair to admit that any legal doctrine development will be derived from an evolving social context. We are expecting to see more developments on this topic as human rights and personal autonomy gain much importance in the tort law area.

I. Overview

No one would feel comfortable when they encounter phrases such as "wrongful conception", "wrongful birth" or even "wrongful life". Yet unfortunately, from time to time, the courts have to cope with issues involving this type of wrongness.

A child might be born because of a failed sterilization, but his/her right of living is inarguable. Who should be responsible for the concomitant "detriments", if any? The unthankful parents? Possibly, but their rights in planning their own way of life were indeed infringed. Further, the unexpected burden of rearing could be peculiarly heavy if the child turns out to be disabled. The negligent surgeon who performed the operation? Possibly, but it is rather absurd to shift the full responsibility from the parents to him/her, just to realize the general purpose of tort law — to restore the victims (i.e. the parents) to the situation as if the tort had never happened.

In England, the House of Lords and the Court of Appeal have so far decided a handful of cases on this particular issue. It will be helpful to have a close examination on these cases, since the judgments have set down some pattern rationales for other Commonwealth jurisdictions including Hong Kong. Here I will mainly look into the trilogy of *McFarlane and Another v Tayside Health Board*[1], *Parkinson v St James and Seacroft University Hospital NHS Trust*[2] and *Rees v Darlington Memorial Hospital NHS Trust*[3].

A word of note to be added here is that, although a considerable volume of the judgments alluded to the judges' respective jurisprudential understanding on the intricate relationship between law and morality, this case review, instead of furthering the discussions on that direction, would rather dwell on how such understanding was manifested by the selection and application of the established principles in tort law. Another focus of the article lies in the reasoning development along the line of cases: how those intriguing factual distinctions

* The author would like to express her gratitude to Mr Desmond Greenwood, and to the editors of HKSLR, for their invaluable comments on earlier drafts of this article.

1 *McFarlane and Another v Tayside Health Board* [2000] 2 AC 59.

2 *Parkinson v St James and Seacroft University Hospital NHS Trust* [2001] EWCA Civ 530; [2001] 3 WLR 376.

3 *Rees v Darlington Memorial Hospital NHS Trust* [2002] EWCA Civ 88.

inspired the innovations to the law is a vivid demonstration of our common law tradition of *stare decisis*.

II. McFarlane and Another v Tayside Health Board

Although the House of Lord case *McFarlane and Another v Tayside Health Board* was not the first to raise the perplexing question, it has been recognized as the test case of this category. A fundamental principle was established in refusing the parents' claim for the ordinary costs of rearing: parents could not claim the costs of bringing up their *healthy* child, notwithstanding his/her birth was due to a negligently operated sterilization procedure.

Lord Slynn of Hadley was the one who took the issue as one of liability because "[t]he doctor does not assume responsibility for those economic losses",[4] the duty of care owed did not reach to the extent of rearing the child and thereby to impose such costs upon the doctor was not fair, just or reasonable. Furthermore, he declined to assume that the benefits the child might bring would necessarily outweigh the costs, in terms of the impossibility of illustrating the benefits by realistic figures.

Lord Steyn also rejected the "benefits rule" since it was not a solid legal analysis. Instead, he rested his judgment on the doctrine of *distributive justice*, that the ordinary traveller on the London Underground would consider it unfit to allow remedies to the parents of a healthy child.

Lord Hope of Craighead opined that "the costs can be calculated but the benefits, which in fairness must be set against them, cannot . . . It cannot be established that, overall and in the long run, these costs will exceed the value of the benefit . . ."[5] This suggested that he was not prepared to agree on offsetting of the costs against the benefits.

Similarly, Lord Clyde refused to accept the offsetting theory. He had resorted to the most fundamental idea of restitution of the tort law, reckoning that to allow the remedy would over-compensate the parents as they would for sure benefit from the enjoyment of the child, yet free from any costs.

Lord Millet, by saying that "[n]ature herself does not permit the parents to enjoy the advantages and dispense with the disadvantages",[6] pointed out that the benefits of the child must be taken into account. But he also turned away from the offsetting theory.

In general, all the discussions were focused on a thorough evaluation of the child's life. Although the topic is morally invidious, the Law Lords made great efforts in avoiding to act like a court of morals, but approached the problem through proper legal analyses. The two lines of reasoning which won over their consensus were the incalculability of the benefits that a child may bring about and a "fair, just and reasonable" test. Finally, it was unanimously agreed that the costs of bringing up the healthy child was irrecoverable, while on the other hand, damages for the mother's pain and distress during pregnancy and childbirth was decided by a majority (Lord Millet dissenting) to be recoverable. This indication of a cut-off point on the birthday of the child was later echoed in *Groom v Selby*[7], in which case Brooke

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4 *Supra* note 1, at 76C.
5 *Ibid* at 97D-E.
6 *Ibid* at 114C.
7 *Groom v Selby* [2001] EWCA Civ 1522.

LJ also considered that the child's healthiness had been a decisive factor in the Law Lords' deliberation in *McFarlane*.

III. Parkinson v St James and Seacroft University Hospital NHS Trust

Then came the case *Parkinson v St James and Seacroft University Hospital NHS Trust*, where the child was also born due to a negligently performed sterilization operation. However, the child this time was born with genetic disability. In terms of the economic consequence resulted form the surgeon's negligence, in the case of Parkinson, not only the cost of raising a normal child was foreseeable, as in McFarlane, but also the further cost derived from the child's congenital disability. Therefore the assumed responsibility should be deemed to cover both. The "fair, just and reasonable" test was again applied here, eliciting that to award the extra costs associated to the child's disability was a legitimate extension from the *McFarlane* principle.

It was notable that Hale LJ, as the only female judge sitting in that case, canvassed for quite a length on the infringements inflicted on the mother's rights and interests. From this unique angle, she considered that the invasion of the bodily integrity or personal autonomy of the mother did not stop at the end of pregnancy, it continued through the time thereafter. This is, as I see it, a starting point on the evaluation of the parents' life, especially the mother's. As to the issue of costs and/or benefits from the child, she nonetheless developed a convenient "deemed equilibrium" theory from the judgment of *McFarlane*.

IV. Rees v Darlington Memorial Hospital NHS Trust

These two fresh points of view became all the more prominent and controversial in *Rees v Darlington Memorial Hospital NHS Trust*, where a handicapped mother gave birth to a healthy child as a result of a negligent sterilization. One year after delivering her innovative judgment in *Parkinson*, Hale LJ, giving judgment again in this case, was the only one of the three judges who preferred the "deemed equilibrium" theory. In addition, her concern about the mother's interests was even more apparent. In contrast to Hale LJ's mother-focused reasoning, Robert Walker LJ only acceded to it as an acceptable favor to a disabled parent, and Waller LJ simply manifested that difference in the parents' states of health ought to be left out of account in accordance with the rules set down in *McFarlane*. Still, the majority consisting of these latter two judges applied the "fair, just and reasonable" test.

The decision of *Rees*, in my opinion, was another exception from *McFarlane*. Yet, because of the ambivalence in the *McFarlane* principle with regard to the parents' condition, when positions of the mother and the child in *Rees* presented a converse to those in *Parkinson*, uncertainty arose as to whether *Rees* and *Parkinson* were parallel deviations from the facts in *McFarlane*, or, whether one set of facts was within the confines of the *McFarlane* principle while the other was outside.

Rees triggered a close re-examination and intense controversy on the earlier two decisions. In an article published one month after it was adjudged, B Mahendra commented on the Court of Appeal's reasoning in *Rees*, through which he actually criticized the benchmark decision of the House of Lords in *McFarlane*:[8] that the Law Lords arrived at their judgment through a hermetic atmosphere rather than a realistic attitude towards every human existence. The

[8] Mahendra, B, "Left holding the baby — Act III", (2002) The New Law Journal 152, p 409.

purported incalculability of child's benefits was suspected; constrastingly, the author opined that 'in any event, the law routinely makes an attempt at computing the 'incalculable'".

If this is the case, why is it an exception when a child was involved? As far as I observed, it was a moral reluctance to evaluate a person's life at birth that deterred the calculation, or even the simple assumption that the benefits offset the costs. In addition, I doubt if the "fair, just and reasonable" test could effectively propound a pure legal reasoning without moral concerns. In *Rees*, where the crux was a weighing exercise between the approach emphasizing the mother's particularity and the other reinforcing the decisiveness of the child's position, it was in fact just another moral evaluation of the values or the importance of parents and the children. All in all, no matter how hard the Law Lords tried to circumvent the issue of public policy, the factor of social standard of morality in their eyes inevitably affected their reasoning.

V. Conclusion

Although similar cases have not yet come before Hong Kong courts, there is always a possibility that Hong Kong courts have to tackle one in future. The rules laid down above in *McFarlane, Parkinson, Rees* and other cases alike will likely be considered but not necessarily followed. But nothing can assure that an element of morality will be prevented from stipulating an underlying direction in this marginal area of the tort law.

VI. Author's Note on the Recent Case Law Development in Australia

In July 2003, the High Court of Australia made an avant-garde stance in respect of the negligent sterilization cases by a 4:3 majority decision.[9] *Cattanach v Melchior* did not involve any special health condition either with the parents or with the child; in this sense it was a typical case falling under the principle of *McFarlane*, but for the slight difference that the doctor's negligence lied not in the sterilization operation, but in negligently accepting the mother's false assertion that her right ovary and right fallopian had both been removed, and in failing to suggest confirming investigation or to warn against possible mistake in that assertion. Quite naturally, counsel for the doctor relied on the effect of the House of Lords decision *McFarlane*, contending that the cost of rearing a healthy child should not be included into the parents' damages; that if the court decides to allow it, the sum ought to be reduced by the benefits and joys the parents had received and would receive from the child's birth.

While the dissenting judges perceivably re-exhibited the collective arguments of the five Law Lords in *McFarlane*, the authority of that decision was met with a critical examination of its legal rationales behind by the majority judges.

McHugh and Gummow JJ expressly favored the view of Hale LJ in *Parkinson* over the one of Lord Slynn of Hadley in *McFarlane*, that a doctor undertaking a duty of care to prevent conception does assume the responsibility for all clearly foreseeable economic losses in bringing up the child.[10] Rather than simply following the *McFarlane* "rule", they tried to establish this actionable damage by applying the fundamental tort law principles,[11] namely,

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9 *Cattanach v Melchior* [2003] HCA 38. McHugh, Gummow, Kirby, Callinan JJ (Gleeson CJ, Hayne, Heydon JJ dissenting).

10 *Ibid* at para 53.

11 *Ibid* at para 65.

whether the interest infringed by the breach of duty is one recognized by law,[12] whether loss ensued from the infringement (in this regard their Honours remarked that the parents' damage was the legal and moral responsibilities in bringing up the child and not the creation of parent-child relationship or the misnomered "wrongful birth"),[13] whether causation and reasonable foreseeablity are established (their Honours criticized the illusory distinction between "consequential loss" and "pure economic loss").[14] Having answered all these question affirmatively, their Honours went on to attack several other reasoning in *McFarlane*: the reliance on the value of importance of life was contradicted by postulating the child as "healthy".[15] the suggestion that the birth of a child is always a blessing denied the reality of widespread contraception,[16] and the imaginary London commuters' opinion was not necessarily definite nor reliable (again Hale LJ's comment in *Parkinson* was preferred).[17] Lastly, the attempt to set off the sum by the child's benefits was disposed of by a "same interest" limitation.[18] The full damages claimed for child-rearing was awarded.

The reasoning of Kirby J was of a similar track. Though he did not openly reject the Law Lords' opinions in *McFarlane*, His Honour justified deviation from them with "the fact in Australia", "the contemporary Australian values",[19] and "an applicable Australian public policy".[20] Callinan J likewise reviewed most of the historical reasons against an award for child-rearing cost and countered them on similar grounds. In particular, His Honour observed that there was no identifiable, universal principle of public policy that could override such an award which was the result of applying all the solid touchstones of tort law.[21]

These opinions will undoubtedly have an enormous impact on future cases, especially the judgment of Kirby J, in which His Honour attempted not only to answer the questions raised in this particular case but also to give a round-up resolution for the entire category of negligent sterilization cases. On the other hand, it shall not be ignored that the dissenting voices only gave way to the majority by a thinnest margin; indeed, some of the arguments such as the lack of legal coherence, the selectiveness and partiality in the calculation of damages/ the impossibility in making a rational or fair assessment, still carried much weight.

The majority judgment in *Cattanach v Melchior* gives the impression that the granting of the award was based on the application of hard legal principles rather than those intangible "public policy", "natural law", "distributive justice" or "fair, just and reasonable test". The author ventures to think that, just as the pro-*McFarlane* decisions represent a traditional value of familial bond and affection, the new opinion represents a judicial recognition of the modern ideology of individualism and liberalism. Although subjectivity is always strived against, it is fair to admit that any development in legal doctrines will be derived from a perception of the evolving social context. As to the field of negligence in sterilization, which side of the views is likely to be accepted in a given jurisdiction is a question that we can hardly predict.

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12 *Ibid* at para 66.
13 *Ibid* at para 67, 68 and 72.
14 *Ibid* at para 71 and 72.
15 *Ibid* at para 78.
16 *Ibid* at para 79.
17 *Ibid* at para 81-83.
18 *Ibid* at para 84-90.
19 *Ibid* at para 164.
20 *Ibid* at para 178.
21 *Ibid* at para 299.

CONFRONTING THE PROBLEM OF HOME ALONE CHILDREN IN HONG KONG

ALICE PO-HUNG YAU

This essay examines the problem of home alone children in Hong Kong. It begins by outlining its causes, which include economic, social and cultural factors. While the writer is of the view that there are international (the United Nations Convention of the Rights of the Child) and domestic (the Basic Law, the Bill of Rights Ordinance, the Protection of Children and Juveniles Ordinance and the Offences Against the Person Ordinance) obligations to address this problem, the writer goes further to consider the mechanisms in fulfilling these responsibilities. These mechanisms are divided into family, community and state levels. Family has the primary responsibility. On community level, more social welfare programs should be provided to support families and create a suitable environment for children. On state level, there are strong oppositions against legislation on child neglect, yet the present legal protection of children is far from sufficient.

The writer concludes by giving recommendations to improve the present situation. A focused and coherent policy supported by different social sectors is required to combat this social evil.

I. Introduction

The *Home Alone* movies have been so popular that there are now four in the series, starring a highly-inventive 8-year-old who constantly gets into mischief when he is left behind while his parents vacation abroad.[1] Nevertheless, the reality is that a child left alone, even for a short time, is at risk of death or fatal injury.

The problem of child neglect remains prevalent in Hong Kong. There have been three tragic incidents within three months between February and April 2004. On 16 February 2004, a four-year-old boy fell from his sixth-floor unit in Shamshuipo while his mother took his sister to catch a school bus. On 5 April 2004, a four-year-old boy, left unattended, fell from his second-floor apartment in Western when his father went to talk to a neighbour next door. [2] On 24 April 2004, an unattended four-year-old boy fell from a ninth-floor apartment in Sheung Shui.[3]

No doubt, child neglect is a social problem that the government and the society must address. Among the various aspects of child neglect, this paper focuses on unattended children, as newspaper headlines show this is an ever more pressing social issue. Moreover, it is also an area worth studying because there have been ongoing debates in Hong Kong about whether to punish parents who leave their children at home unattended. Hence, this paper will provide a comprehensive analysis of the problem in the Hong Kong context. In addition, this paper also considers the causes of the unattended children problem; whether Hong Kong has an

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1 Crouse, Janice, "Home Alone Without the Hilarity: Ph.D. Study Finds Unsupervised Children at Greater Risk of Injury" at http://www.beverlylahayeinstitute.org/articledisplay.asp?id=3983&department=BLI&categoryid=documentary (visited on 20 May 2004).

2 "Home-alone boy critical after falling from flat", *South China Morning Post*, 6 April 2004.

3 "Boy who fell nine floors survives by landing in flower bed", *South China Morning Post*, 24 April 2004.

obligation to address the problem; and also, whether the existing mechanisms at the family, community and state levels are adequate in fulfilling these obligations.

II. What is Child Neglect?

A. Definition

Child neglect is generally recognized as one of the four categories of child abuse: among the three others are physical,[4] sexual,[5] and emotional/psychological[6] abuses.[7] For neglect, it is often defined as the severe or persistent lack of attention to a child's basic needs (such as adequate food, clothing, shelter, education or health care) that endangers or impairs the child's health or development.

Neglect can be specifically divided into three areas: physical neglect, education, and emotional neglect. Physical neglect refers to failure to provide the child with adequate level of basic physical care, such as nutrition, hygiene, clothing, shelter, safety and medical attention. Education neglect refers to failure to ensure school attendance and to allow the child to receive additional educational input when this is indicated. Emotional neglect refers to failure to provide nurturing experiences, such as affection and supervision, thus exposing child to psychological harm. It is important to note that these three forms of neglect are interlinked with one another in most cases. Thus, in cases of unattended children, not only does the lack of supervision generally include physical neglect, but in the long run, it is inevitable that it also involves educational and emotional neglect, given that the parent/primary care-giver is not present to give suitable guidance in educational matters nor provide sufficient support for the child's emotional development.[8]

In Hong Kong, extreme cases of neglect culminate in the liability for criminal act of gross neglect. The "Guide to the Identification of Child Abuse" published by the Hong Kong Government in 1991 defines gross neglect as the failure to provide a child with adequate food, clothing, shelter, health care, forcing a child to undertake duties inappropriate to his or her physical strength or age, and leaving a child habitually unattended.[9]

There is no agreed definition in Hong Kong legislation as to the duration, age and circumstances of which constitutes leaving the child unattended. However, the Census and

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4 Physical abuse includes battering, non-accidental use of force or deliberate poisoning resulting in the physical injury or death of the child. As a result, bruises, burns, scalds, bite marks and fractures may be found on the body of the child.

5 Sexual abuse involves direct or indirect sexual exploitation and abuse such as incest or exposing a child to other forms of sexual activity like fondling or pornographic activities. Signs of abuse include complaints of pain in the genital area, unusually sophisticated sexual knowledge of behaviour, early seductive behaviour or intensive dislike for being left somewhere or with someone.

6 Emotional/psychological abuse is a pattern of behaviour and attitudes towards a child that endanger or impair the child's emotional or intellectual development. Examples include denying emotional responsiveness or terrorizing, rejection of child through indifference, deprivation of play and education, putting a child in fear/desperation.

7 Definition provided by Social Welfare Department November 1993 as cited in Rhind, N, *Conference Proceedings of 1993 and 1995 on Children's Rights in Hong Kong* (Hong Kong: Hong Kong Committee on Children's Rights; Against Child Abuse Society, 1995), p 105.

8 Definition provided by US Department of Health and Human Services 1988 as cited in O'Brian, C, Cheng, C Y L and Rhind, N, *Responding to Child Abuse: Procedures and Practice for Child Protection in Hong Kong* (Hong Kong: Hong Kong University Press, 1997), p 97.

9 *Ibid*, p 89.

Statistics Department has noted that it is a situation where children aged 12 and below are left unattended at home.

B. Impact of Child Neglect

According to studies by the Social Welfare Department 1991 and the Hansard 1993, high incidence of injuries and fatalities are inevitable under conditions of a lack of supervision. The results may involve physical injuries, ill-health, malnutrition, poor hygiene, inadequate clothing for certain weather conditions, unnecessary exposure to hazards, etc. In the extreme, it can lead to starvation, non-treatment of illness and death.[10] Equally dire consequences are the psychological impact which stem from the fear, anxiety, loneliness, anger, despair due to the lack of protection and presence of the parents or care-givers. Child neglect also hampers emotional development to build a secured trust and affection ties with parents, a sense of self-control, self-confidence and self-worth which can only be possible from receiving a level of sensitivity and care from care-givers.[11] Also, the failure to attend to the needs and growth of the child can in the worst cases lead to delayed developmental milestones, academic underachievement, or even intellectual retardation.

Upon understanding the serious impact on the development of children, we will now look into the extent of the problem in Hong Kong.

III. Extent of Child Neglect in Hong Kong

A. During the 1980's and 1990's

The problem of child neglect was serious during the previous two decades. The Coroners' statistics indicate that in the five years from 1989 to 1994, a total of 113 unattended children died in Hong Kong. Specifically, from 1986 to 1988, 15 children younger than ten years old died from falling out of a window.[12] In a Legislative Council debate in 1993, legislator Dr Leong Che-hung reported that every year some 100 children die and 60,000 attend accident and emergency departments, while 17,000 are admitted to hospital for various injuries.[13] Most importantly, a hospital survey found that 50% of childhood injuries occurred at home and almost half (46%) of such cases resulted from children being left unattended. Thus, these data highlight the fact that child neglect is a major contributor for children's injuries and death in Hong Kong.

B. Recent Statistics

In 2000, the Social Welfare Department announced there were 30 cases in the year, accounting for 6% of the total number of child abuse cases; in 2001, 29 cases accounting for 5%; in 2002, 17 cases accounting for 3%.[14] For fatalities, the Coroner's Report documented 9 deaths in 2000, a total of 3 in 2001 and 2 in 2002.[15] In addition, in the year 2002/2003,

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10 *Ibid*, p 97.

11 Hetherington, E M and Parke, R D, *Child Psychology: A Contemporary Viewpoint* (New York: McGraw-Hill Book company, 1986) as cited in *Ibid* at p 98.

12 Hong Kong Childhood Injury Prevention Research Group, "Childhood Injury Prevention in Hong Kong", (1998) 4 *Hong Kong Medical Journal*, pp 400-404.

13 "Legislation can be Deterrent to Neglect", *South China Morning Post*, 6 December 1995.

14 Appendix 1.

15 Appendix 2.

Against Child Abuse recorded 56 telephone calls regarding suspected child neglect cases, which accounts for 12.6% of all hotline calls.[16] With this and the frequency of accidents reaching the newspaper headlines due to leaving children unattended, it is justified to conclude that the problem of child neglect remains a serious social problem in Hong Kong.

C. Characteristics of Child Neglect in Hong Kong

The characteristics of child neglect cases can be observed from a well-resourced survey conducted by the HKSAR government in 1997 ("the Survey"). It interviewed 11,200 domestic households, with respondents 16 years old and older who are usually responsible for taking care of children aged 12 years and below. These participants were asked whether they have left the children unattended in the previous seven days. It must be noted however, that there was no minimum time limit on duration, thus, it was accepted that this survey includes leaving the children alone for a few minutes.

1. Numbers of Unattended Children

The survey estimated that about 110,000 children aged 12 and below in about 73,900 domestic households (having children 12 and below) have been left unattended during the previous week. Accordingly, it was found that the overall rate of domestic households with children left unattended was 11.8%.[17] This reflects the severity of the situation in that about one in every ten children in Hong Kong left unattended at least once in a week.

2. Duration

The results indicate that about 40% of the respondents have left the child unattended for more than two hours.[18] More serious is the problem that one in five parents/care giver (20.5%) have left their child unattended for two to four hours; also 2.6% indicated a period of ten hours or more. It is worrying to find that the median time of leaving the child unattended was about one hour.[19] This points to the gravity of the problem in that, for example, in the Sheung Shui case on 24 April 2004 a son fell out of the window after the father left him alone for ten minutes and still it resulted in the fatal injury.[20] Hence, the median duration of one hour definitely highlights the danger posed to children in Hong Kong. All this suggests that no matter how briefly a child is left alone unattended, s/he is likely to be exposed to serious dangers.

3. Age Distribution of Unattended Children

More than half of the unattended children were in the age group of 10-12; 37% were in 6-9 age group; and 10.1% were in 3-5 age group. It was found that there was a higher rate for elder children being left unattended: the rate of 10-12 unattended was double that of the average at 22.7%.[21] This reflects that most parents may consider children in 10-12 age group to be old enough to be left unattended. However, the problem is that there is an overestimation

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16 Appendix 3.

17 Social Analysis and Research Section, Census and Statistics Department, Hong Kong Special Administrative Region, *Special Data collected via the General Household Survey: Special Topics Report No. 17: Leaving Children Aged 12 and Below Unattended at Home* (April to June 1997), para 1.9.

18 *Ibid* at para 1.7.

19 *Ibid* at para 1.19.

20 *Supra* note 3.

21 *Supra* note 17, at para 1.12.

of their ability for take care of themselves; also, this group of children may be even more inclined to engage in dangerous or risky activities. This is significant given that, as will be discussed in more detail below; there are numerous dangers in the home context, (which are unfortunately aggravated by the particularly overcrowded living and housing environment in Hong Kong) such as bunk beds, unrailed windows, balconies, etc. Thus, the greater number of children aged between 10-12 being left unattended and which was not considered as a danger is undeniably a cause for concern for our community.

4. Types of Injuries

In another survey, it was found that some types of injury show a definite seasonal pattern — for example, fractures are more common during the summer holidays and burns occur around mid-autumn festival.[22] This indicates that unattended children are not only at risk to the problems caused by physical neglect, but that the circumstances of being unattended increase the possibility for engaging in dangerous behaviour. This reinforces two things. First, it is not safe to assume that older children, such as those from 10-12 age group, are less vulnerable to the problems of child neglect than younger children because older children may be even more reckless by playing with matches, running out of the house and wandering in the streets, etc. Secondly, consequences of child neglect do not only include accidents, such as falling off a window, being trapped at home when there is fire because they are not old enough or not able to unlock the doors (which is particularly the case where heavy locks and gates are widely used in Hong Kong homes), etc; in addition, it includes deliberate misbehaviours of children. Hence, in such case, leaving them unattended opens the gateway for all sorts of avoidable injuries.

Having seen the extent of the problem and the characteristics in which it manifests in Hong Kong, the next question to consider is the causes of the problem of child neglect.

IV. Causes of Child Neglect

As with all social problems, child neglect is the result of a combination of different factors: economic, social and cultural. It is important to note that these categories are to facilitate discussion of the complicated social issue; in reality, they cannot be so clear cut. They are often intertwined with one another, especially for the areas of economic and social factors.

A. Economic Factors

1. Economic Hardship

The Survey indicated that the median monthly household income among families that leave children unattended was $15,000. Among those with monthly incomes of $10,000-$19,999, 15.9% left their child unattended; while 4.3% of those making $30,000 left their children alone.[23] This suggests that low socio-economic status is linked proportionately to increasing child neglect cases. This may be due to two reasons.

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22 Cheng, C Y and Chen, W Y, "Limb fracture pattern in 2500 children under age 12", (1991) 43 *Journal of Hong Kong Medical Association*, pp 230-234 and Cheng, C Y and Lam, C L, Leung, P C and Mak, D P, "An epidemiological study on burn injuries in Hong Kong", (1990) 42 *Journal of Hong Kong Medical Association*, pp 26-28. as cited in Hong Kong Childhood Injury Prevention Research Group, "Childhood injury prevention in Hong Kong", (1998) 4 *Hong Kong Medical Journal*, pp 400-404.

23 *Supra* note 17 at para 1.11.

First, members of the lower socio-economic are less likely to be able to afford the expenses to hire a domestic helper or send a child to child care centers to be properly attended. Instead, due to the economic constraint, they may be forced to leave their children alone while going to work. This is illustrated by the Survey outcome which found that 27.9% of the parents who left the child unattended were due to employment. [24] The problem was further aggravated by the setback in Hong Kong's economy in 1998-1999 resulting from the impact of Asian financial crisis, and the latter part of 2001 upon the synchronized downturn in global economy.[25] Mr. Otto Lau Kwok-wa, who heads the Hong Kong Council of Social Service's special committee on family relationships, stated that employers make people work harder and longer hours for less money.[26] The impact is felt most strongly among the lower socio-economic class in that a reduction of a few hundred dollars, from their $4000-$5000 salary (which, according to the 2001 figures provided by the Census and Statistics Department, accounts for 10% of the Hong Kong population) [27] may prompt both parents to go out to work so as to maintain sufficient living and compensate for the deduction.

Secondly, there was a notable structural transformation of the Hong Kong economy from a manufacturing-based to a highly service-oriented economy, which demands professional, managerial, supervisory and technical personnel.[28] This is highlighted by the fact that in 2001, 87% of GDP was from the service-oriented industry.[29] Hence, the lower socio-economic class, who are least likely to possess such professional and specialized skills are further marginalized because they may be subject to even lower wages in this changing economy. This also prevents them from hiring child-minders or benefiting from child care services.

2. *Welfare Cuts*

In recent years, the social welfare sector has been hit hard by government efforts to rein in spending to tackle the budget deficit. The Comprehensive Social Security Assistance Scheme ("CSSA") is to provide a safety net for the poor or unemployed (among others who are unable to meet basic needs of living).[30] CSSA payments were cut by 11% in June 2004.[31] In addition, millions of dollars have been cut from the welfare budget, putting pressure on the provision of services. For example, support centres which help new migrants and single-parent families are under threat of closure.[32] Thus, these budget cuts mean less support for the families who are most in need of government's support in providing adequate child care facilities.

B. Social Factors

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24 *Supra* note 17, at para 1.17.

25 Government Logistics Department, *Second Report of the Hong Kong Special Administrative Region of the People's Republic of China in the light of the International Covenant on Economic, Social and Cultural Rights*, (2003), p 118.

26 "Service Cuts are blamed for failing families: Critics call for more caring policies as a study shows the erosion of home life", *South China Morning Post*, 15 May 2004.

27 Census and Statistics Department, "Domestic Households by Monthly Domestic Household Income, 1991, 1996 and 2001" at http://www.info.gov.hk/censtatd/eng/hkstat/fas/01c/cd0132001_index.html (visited on 21 May 2004).

28 Printing Department, *Report of the Hong Kong Special Administrative Region of the People's Republic of China in the light of the International Covenant on Economic, Social and Cultural Rights* (1999), p 115.

29 *Supra* note 25, p 119.

30 *Supra* note 28, p 51.

31 "Welfare failings have created a time bomb", *South China Morning Post*, 14 April 2004.

32 *Supra* note 26.

1. Housing Arrangements

In the Survey, 46% of the respondents lived in public rental housing, 36.3% in private permanent housing, and 15.9% in Housing Authority subsidized sale flats.[33] It was found that those living in pubic rental housing had the highest rate of leaving the children unattended at 15.1%, while those in private housing report the lowest of 8.7%. This suggests that the living environment both reflects and also contributes to the problem of child neglect.

First, the living arrangement reflects the economic status of the family. This in turn relates to the fact that the lower socio-economic class is more vulnerable to problems of child neglect. Secondly, the poor housing and living environment contribute to the problem. With reference to the official data provided by the HKSAR government, as at June 1998, a total of 170 000 households, that is, 437 000 persons accounting for 6% of the Hong Kong population, are inadequately housed. This means that they are living in squatter areas, in temporary housing, cottage areas, non-self-contained flats, roof-top structures or shared accommodation in private sector. [34] In addition, as at 30 June 1998, a total of 2.2 million people in Hong Kong (33% of population) lives in public housing estates (in 656, 000 flats).[35]

The problem lies in the fact that over-crowdedness (which is a well-recognized problem particularly in Hong Kong public housing estates and improperly constructed "housing structures", if not also for most private flats) is conducive to accidents occurring at home. This is particularly so if the children are left without the supervision of adults. Specifically, the overcrowded home environment leads to the use of bunk beds, camp beds, folding chairs, and folding tables by many families to save space. From 1985 to 1989, eight children suffocated to death because they became trapped in folding tables. Also, falling off a bed, especially from a bunk bed, is a common cause of head injury.[36] In addition, due to over-crowdedness, it is common that there is no proper allocation of different items in properly locked cupboards. Hence, there is often the problem of poorly stored hazardous medicines, cleaning products, hazardous cooking equipment and fire matches.[37] This corresponds to the report that in 1994, a total of 183 cases of fire were due to children playing with matches.[38] No doubt, it is even easier for curious or naughty children to get into contact with these dangerous items while unattended.

2. Divorce and Single-Parent Families

The divorce rate has increased dramatically over the past decade. For example, in 2001, there were 15,380 petitions for divorce, up from 14,482 in 1997 and 5747 in 1987.[39] As a result, the number of split families "continues to grow at an alarming rate".[40] As a result, there are increasing numbers of single-parent families. As at 2001, a great majority (57%) of these single-parents have paid employment.[41] Thus, since there is no support from the spouse in attending the child, there is greater temptation for these families to leave their child

33 *Supra* note 17 at para 1.10.
34 *Supra* note 28, p 120.
35 *Ibid,* p 124.
36 *Ibid,* p 134.
37 *Supra* note 7, p 153.
38 *Supra* note 12.
39 *Supra* note 25, p 80.
40 *Supra* note 28, p 76.
41 *Supra* note 28, p 73.

unattended while they go out for daily routines, if not also for work.

3. The Role of Nuclear Families

It was found in the survey that 91.9% of the respondents, who are the ones responsible for attending the child, were parents, only 3.7% were grandparents and 2% were live-in domestic helpers.[42] This shows that small nuclear families have substituted traditional extended family to be the dominant form of family living arrangement in Hong Kong. The trend is further evidenced by the 1996 Hong Kong Population Census which showed that nuclear families accounted for 63.6%, up from the 61.6% in 1996.[43] The traditional extended family is beneficial to reducing the problems of child neglect because besides a parent, grandparents can also help tend the children. Thus, with the gradual and continuous weakening of family ties, there is a growing problem of unattended children in the modern Hong Kong society.[44]

4. Constraints of Working Parents

It was found that among the parents who left the child unattended, a total of 27.9% was because of work. This shows that many children are left unattended at home due to parent's employment. This is dangerous especially because there is currently an increase in number of working parents in Hong Kong, which might mean the number of child neglect cases would be on the rise. [45] Moreover, with the high cost of living, rising educational level, increased employment opportunities and economic status of females in society, more mothers are leaving home for work after giving birth; this further aggravates the problem of unattended children.

5. The Relationship with Domestic Violence

According to the Hong Kong Council of Social Service, family violence cases have increased from 1,253 in 1996 to 1,665 in 2002. Spousal abuse cases more than tripled over the same period, from about 1,000 to 3,034 in 2002. The number of child abuse cases reported increased from 311 in 1996 to 481 in 2003.[46] These statistics reflect that cases of child abuse have increased correspondingly with that of domestic violence. In fact, the problem of domestic violence is a factor in the rise in child neglect cases: because the wives/mothers are often the victims of spousal abuse, if they are subject to such violence over a period of time, there is definitely a danger that they would be less able to care for and attend to the needs of the child, resulting in child neglect. Therefore, the rise in domestic violence cases is a signal of the increased danger of the child neglect problem in Hong Kong.

6. Problems Specific to New Mainland Immigrants

There has been a substantial increase of new immigrant residents in Hong Kong in the past few years. During 1998 and 2003, a total of 50,000-60,000 mainland residents have settled in Hong Kong each year. Among them, 40-50% was children.[47] About 150 migrants everyday,

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42 *Supra* note 17 at para 1.16.

43 *Supra* note 28, p 73.

44 *Ibid.*

45 *Supra* note 12.

46 *Supra* note 26.

47 Chow, C B, "Immigration and Health Care" in Chan, J and Rwezaura, B (eds), *Immigration Law in Hong Kong: An Interdisciplinary Study* (Hong Kong: Sweet & Maxwell, 2004), p 251.

4,500 every month, and 54,750 every year settle in Hong Kong. This represents an annual intake of 0.8% of population, which is very high as compared to 0.2% to 0.3% in Western countries which are much less densely populated than Hong Kong.[48]

There is a greater problem of child neglect for these families. First, it is because it was found that new immigrants are more likely to work with lower wage. This was noted by Mr. John So Sze-chun, the executive secretary of the Hong Kong Committee on Children's Rights, who said that usually both parents from mainland immigrant re-union families both work and that they do not have the income to hire maids to take care of the kids.'[49] Specifically, with reference to the Special Topics Report Number 25 of the HKSAR Census and Statistics Department 2000, among those 70,800 employed new immigrants surveyed, 84.5% have income below the median monthly salary of $10,000.[50] Hence, their experiences are analogous to those in the lower socio-economic group.

Secondly, and more specific to the situation of families with new immigrant parents and / or children, the government's 2003 population policy announced that new arrivals cannot claim welfare payments until they have been in Hong Kong for seven years. Previously, they could claim such allowance 12 months after arrival. [51] As a result, they are even less likely to be able to afford proper child care facilities while they are ineligible for welfare.

In addition, the Fee Assistance Scheme for Child Care Centres which is for low-income families with a social need to place their children in day care to receive financial assistance is not applicable to new immigrants. This is because one of the criteria was that both the child and the applicant must be Hong Kong residents. Thus families with children born in the Mainland cannot benefit from such services.

Lastly, even though the public housing flats are over-crowded, they are still much more preferable to cage homes, squattering and roof-top structures. [52] However, the most recent government policy requires applicants for public rental housing to have more than 50% of their family members having at least seven years' residence in Hong Kong before being eligible for public rental flats. Such policy further marginalizes the new arrivals.[53] As a result, the problems and dangers of over-crowdedness may be even more prevalent for these groups of people, who are as well part of Hong Kong community and who are notably increasing in numbers among the Hong Kong population. Thus, it is worrying to find that new immigrant families are more at risk to the problem of child neglect.

C. Cultural Factors

In the Survey, it was found that 58.8% of the children were left unattended because their caretaker went to the supermarket and 3.7% for accompanying another child to/from school.[54] For those who left the child (age 6 or below) unattended, 78.6% said they did not seek for

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48 Tong, T, "Hong Kong's Immigration Policy on Persons From the Mainland of China", *supra* note 47 p 62.

49 Chui, E, "Housing and Welfare Services for New Arrivals from China: Inclusion or Exclusion?" in *supra* note 47, p 235.

50 Chui, E, "Housing and Welfare Services for New Arrivals from China: Inclusion or Exclusion?" in *supra* note 47, p 235.

51 *Supra* note 31.

52 *Supra* note 50, p 234.

53 *Supra* note 28, p 133.

54 *Supra* note 17 at para 1.17.

help from neighbour/friends to look after the children[55]; also 94.5% did not seek for help from child care centres or occasional child care service.[56] Also, for those who left their 6-12 year old children unattended after school, 70.2% believed that the children were capable of taking care of themselves.[57] When asked whether they are worried, 43.2% said they were not.[58] 31.9% also claimed that there was no need to seek help because they thought the duration was short.[59] The results show that most parents underestimate the problem of child neglect and overestimate the ability of their child to look after themselves.

Such perception may be the result of the cultural characteristic in viewing and rearing children, which is quite different from the West. In fact, it may be justified for Professor Athena Liu to comment that in Hong Kong Family Law: "East is East, and West is West, and never shall the twain meet."[60] This is because the more "Western" concept of child neglect is less familiar in the daily context of Asian Hong Kong families.

First, in Asian culture, children are expected to mature quicker. This may be particularly so among the lower socio-economic class in that they hope their children could take up more and help share the responsibility of the family earlier. It is related to the Chinese mentality that children are expected to contribute to the family instead of being viewed as individuals who have distinct "rights". [61] Also, in Chinese culture, the subordination of individual interests to the general well-being and harmony of the family is greatly valued. As a result, children are taught and expected not to complain even if they are left unattended while the parents run daily errands or leave for work.

Secondly, in Chinese families, "good children" are generally expected to stay put, be obedient to parents' commands, and respect parental authority, as reflected specifically in a survey of Taiwanese families. [62] Thus, it is common for Chinese parents to instruct their children to remain obedient themselves in home.

Upon discussing the causes of child neglect, it is important to consider whether there is an obligation in Hong Kong to address this social problem.

V. International and Domestic Obligation

In 1994, the *United Nations Convention of the Rights of the Child* (*UNCRC*) was extended to Hong Kong. This Convention sets out a comprehensive range of rights for the child and a corresponding range of obligations of the State. It imposes binding obligations on states which are party to or who have ratified the Convention to ensure that children have their rights to protection and provision fulfilled.[63]

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55 *Ibid* at para 1.21.

56 *Ibid* at para 1.20.

57 *Ibid* at para 1.23.

58 *Ibid* at para 1.20.

59 *Ibid* at para 1.22.

60 Liu, A, *Family Law for the Hong Kong Special Administrative Region* (Hong Kong: Hong Kong University Press, 1999) Preface p 1.

61 Rwezaura, B, "Legal and Cultural Context of Children's Rights in Hong Kong", (1994) 24 *Hong Kong Law Journal*, pp 276-290, at p 289.

62 Tong, C K, Elliott, M J, and Tan, P, "Public Perceptions of Child Abuse and Neglect in Singapore", at http://www.childrensociety.org.sg/doc/Monograph1.pdf.

63 *Supra* note 7, p 134.

Each child's inherent right to life is protected by the *UNCRC* art 6(1); and subsection (2) indicates that States Parties shall ensure to the maximum extent possible the survival and development of the child. Also, State Parties have to take all appropriate legislative measures to protect the child from all forms of neglect while in the care of parents or legal guardians according to art 19(1); and subsection (2) indicates that such protective measures should include effective procedures for the establishment of social programmes to provide necessary support for the child and their parents/legal guardian for prevention, identification, reporting, referral, investigation, treatment and follow-up of instances of child neglect.[64] Hence, the HKSAR government should render appropriate assistance to parents in the performance of their child rearing responsibilities and ensure the development of institutions, facilities and services for the care of children. It would seem that the underlying principle of the article is 'the need for the community to care for its children'.[65]

The laws previously in force before 1997 in Hong Kong shall be maintained according to art 8 of the Basic Law.[66] This includes the *Bill of Rights Ordinance*[67] which was enacted in 1991. The *Ordinance* includes provisions relating to the children, which are based on similar provisions in the *International Covenant on Civil and Political Rights* (*ICCPR*). In particular, s 8 art 20[68] (*ICCPR* art 24) provides for the children's rights to protection by the family, society and the State.[69]

To comply with the duties set forth in *UNCRC* art 19, there are domestic legislations such as the *Protection of Children and Juveniles Ordinance*[70] which sets out the general law governing the investigation and protection of children and *Offences Against the Person Ordinance*[71], specifically s 26 and s 27, which hopes to address the problem and to penalize child neglect.

Accordingly, Hong Kong has both the international and domestic obligation to address the problem of child neglect. Having noted the obligation, this paper will next consider the mechanisms in force which attempt to fulfil these responsibilities.

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64 *UNCRC* art 19 states: "1. State Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child. 2. Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement."

65 *Supra* note 7, p 138.

66 Article 8, *Basic Law of the Hong Kong Special Administrative Region* states that: "The laws previously in force in Hong Kong, that is, the common law, rules of equity, ordinances, subordinate legislation and customary law shall be maintained, except for any that contravene this Law, and subject to any amendment by the legislature of the Hong Kong Special Administrative Region."

67 *Bill of Rights Ordinance* (Cap 383).

68 *Ibid,* art 20: Rights of children, s 8 states that: "(1) Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State."

69 Against child abuse, *20th Anniversary Commemorative Issue, 1979-1999* (1999), p 50.

70 *Protection of Children and Juveniles Ordinance* (Cap 213).

71 *Offences Against the Person Ordinance* (Cap 212).

VI. Mechanisms to Address Child Neglect

The mechanisms to address the problem of child neglect are divided into three main levels: the family, community and state.

A. Family Level

The family has the primary responsibility for the rearing and development of the child with reference to *UNCRC* art 18(1).[72] Such rights of the parents in the upbringing and protection of the child is respected and protected. However, there is also the responsibility to exercise such rights consistently with the obligations set out in the *UNCRC*, as denoted in art 5.[73] Therefore, the state has to respect the parents who have the right to make arrangements for their child, but which must be in accordance with responsibility in the *UNCRC* to provide adequate supervision and protection.

B. Community Level

Both the second and third level involve the state, in which the State plays the role of a watchdog: it supervises the families to fulfil their responsibilities, if not, the state intervenes and take over the role as the protector of the child (*UNCRC* art 3 (2), (3)).[74] In the second stage, the state plays a non-confrontational and supportive role as a partner who assists the family if there are problems in carrying out their expected responsibility. This is achieved through the provision of social welfare services and subsidies.[75] Whereas in the third stage, the State plays a stronger role in legislating to punish the wrongdoing parents.

1. Aim of Social Welfare

To comply with the requirements set out in *UNCRC* art 19(2) to set up a system of support parents with limited child-rearing abilities, there are social welfare programs to address these needs. The general direction is set out in the 1991 Social Welfare White Paper "Social Welfare

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72 *UNCRC* art 18 (1) states "State Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern. (2): For the purpose of guaranteeing and promoting the rights set forth in the present Convention, States Parties shall render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities and shall ensure the development of institutions, facilities and services for the care of children. (3) States Parties shall take all appropriate measures to ensure that children of working parents have the right to benefit from child-care services and facilities for which they are eligible.

73 *UNCRC* art 5 states: "State Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention."

74 *UNCRC* art 3 states "2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures. 3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision."

75 Social Welfare Department, "Family and Child Welfare Services" at http://www.info.gov.hk/swd/html_eng/ser_sec/fam_ser/index.html (visited on May 23 2004).

into the 1990s and Beyond" which states that the overall objective of child welfare services is to support families so that they can provide a suitable environment for the physical, emotional and social development of children.[76]

2. Community Support for Families

The Social Welfare Department aims to provide alternative child care services for parents to reduce the probability of leaving the child unattended. There are essentially four types of community facilities.

First, Family Casework Service aims at helping families to cope with family or social adjustment problems. The services are provided by family services centres operated by the Social Welfare Department and subverted non-governmental organizations. The nature of activities include referral service, in which supportive services such as residential care service will be referred as required; also, centres for children who are in need of care or protection from neglect are available. [77]

Secondly, Single Parents Centres aim to assist single parents in overcoming problems arising from single parenthood and build up a social network of support and mutual help. The centres provide a package of services including information on resources, support groups, mutual help groups for child-minding service, etc. [78] There are currently five centres around Hong Kong for this purpose.[79]

Thirdly, Child Care Service aims to support the family and to enhance the physical, intellectual, language, social and emotional development of the children under the age of six years. The majority of the child care centres receive subsidy from the Government, while others are operated by non-profit-making organizations or private operators.

There are currently seven types of child care services. First, the Day Nursery provides care and education and looks after the developmental needs of children aged between two and under six. Secondly, Day Crèche provides care and education services to children below the age of two. Thirdly, Mixed Child Care Centre provides education and care services to children below six. Fourthly, Occasional Child Care Service provides full-day, half-day or two-hour sessions in some child care centres for children whose parents are unable to look after them occasionally due to various commitments or sudden engagements. Fifthly, Extended Hours Service aims to meet the social needs of families and working parents who necessitate longer hours of child care assistance. Sixthly, Mutual Help Child Care Centre aims at promoting mutual help on child care within the neighbourhood. Lastly, After-school Care is service provided by voluntary agencies on a half-day basis, which is aimed at children in 6-14 age group who are usually attending half-day schools. [80]

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76 *Supra* note 7, p 82.

77 *Supra* note 74.

78 *Ibid.*

79 The five Centres are: Caritas Mutual Aid Centre for Single Parent Families in HK Island; Hong Kong Single Parents Association West Kowloon Single Parent Career Development Centre in West Kowloon; Christian Family Service Centre Lai Chi Single Parent Centre in East Kowloon; Yan Oi Tong Single Parent Centre in West New Territories; and Neighbourhood Advice-Action Council Single Parent Family Centre in East New Territories.

80 *Supra* note 74.

Fourthly, Residential Child Care Services are provided for children who cannot be adequately cared for by their families for various reasons such as family crises arising from illness, death and desertion. The types of services include Non-Institutional Care: foster care -- for children under 18 years of age; emergency foster care - for children under 18 years of age; and small group homes -- for children from 4 to 18 years of age. In addition, there are Institutional Care which includes Residential crèches -- for babies under two years of age; Residential nurseries -- for children aged from two to under six; Children's reception centres -- for children aged under 18 years of age; Children's homes -- for children or young persons between 6 and under 21 years of age.[81]

Next, we will consider the effectiveness of these services and if they are not useful, the reasons for it.

3. Inadequacy to Address the Problem of Child Neglect

The provision of alternative child care services which purports to solve the problem of child neglect at the community level in Hong Kong is not adequate. There are three main reasons for such inadequacy.

a. Insufficient Promotion and Awareness of Such Provisions

In the 1997 survey, it is disturbing to find that 94.5% of the parents / care-takers interviewed would not seek help from child care centres for occasional child care service before leaving children aged below six unattended.[82] One of the three most popular reasons, accounting for 14.5%, was that they were not aware of the provision of services. Also, 95.9% of the respondents said they have not tried to seek help from after school care for 6-12 children.[83] Of this group of respondents, 15.1% said they were not aware of such provision. These responses reinforce that the government have not done enough publication and promotion of the services to reach these target groups.

b. Inflexible Hours

The opening hours for Child Care Centres and Occasional Child Care Services are from 8:00 am to 6:00 pm on Mondays to Fridays and from 8:00 am to 1:00 pm on Saturdays. For Extended Hours Service, they are mostly from 6:00 pm to 8:00 pm on Mondays to Fridays and from 1:00 pm to 3:00 pm on Saturdays.

In a Hong Kong Family and Welfare Society survey conducted in Tuen Mun, it was found that many working parents found that there was inadequate social support which contributed to leaving their children unattended at home.[84] In fact, the restricted and rigid opening hours was one of the three highest rated reasons for finding them not helpful and not catering for their needs. Moreover, it appears that a great number of parents or in fact, employees in Hong Kong, may well work pass 8 pm on weekdays. Thus, the limited hours for the extension service further indicate the narrow function and help of these community resources for needy families.

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81 *Ibid.*

82 *Supra* note 17 at para 1.22.

83 *Ibid* at para 1.23.

84 Ho, W S, and Yeung, K C, *Child-Minding Needs in Butterfly Bay* (Hong Kong: Hong Kong Family Welfare Society, 1995), as cited in *supra* note 7, p 139.

c. Fees and Charges

There are fees charged by the child care centres. Currently, Occasional Child Care Services charges $64 for a full-day session, $32 for a half-day session and $16 for a two-hour session. Extended Hours Service charges $624 per month or $13 per hour. For After-school care, it is around $917 per month.[85] Given that there are 372,781 families, accounting for 18.2% of the domestic households, who live below the income level of $8,000 per month[86], it appears that some may not be able to afford these services and thus opt for a much cheaper alternative that is, leaving the child unattended at home. This may especially be the case where some parents of primary school children between age 6-12 may view that it should not be a serious problem to stay at home alone for only a few hours. Yet, reality shows that even leaving the child unattended for a few minutes can result in tragic accidents.

C. State Level

In the third level, the State takes a leading role is legislating to penalize parents who fail to fulfil their responsibilities. This paper will now analyze such legislation in Hong Kong: the background/history, the opposition and the reasons for legislation will be discussed. In addition, if it is not specifically legislated, this paper will review the current legislations' effectiveness in fulfilling the international obligation.

1. Specific Legislation against Child Neglect?

a. History of Proposed Legislation

In 1987, after two unattended young children died in a fire at home while their parents left for work, a legislative councillor called for legislation to make it illegal to leave children under certain age unattended. However, this was opposed by parents who argued for their right to work and non-interference of the government in family life. Thus, no action was taken. The Social Welfare Advisory Committee opted instead for encouragement of mutual help among families, more child care facilities, public education and advertisements.[87]

In 1990, when four young children, frequently left alone by their parents in a padlocked flat, died in a fire in their home, the Coroner suggested legislation to prevent further tragedies.[88] In 1991, the government spent three months reviewing whether an ordinance should be enacted to discourage parents (and other persons in charge of children) from leaving their children unattended -- "the Consultation Paper on Measures to Prevent Children from Being Left Unattended at Home 1991". After consultation, it was decided that it was neither desirable nor feasible to introduce such legislation.[89] This is because there was great opposition as evident from the response of women's groups and other sectors of the public, including many legislators, who protested vociferously. In fact, the current Secretary of Justice, Ms Elsie Leung recognized that out of all forms of intervention, legislative and legal

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85 *Supra* note 25, p 100.

86 *Supra* note 27.

87 Mulvey, T, "Historical Overview: Developments in Child Protection Services and Procedures" in *supra* note 8, p 11.

88 *Supra* note 13.

89 *Supra* note 61 at p 288.

interventions are the least acceptable to the Hong Kong public. [90] The alarming part of the problem is that up to now, in 2003, the government and community at large appear highly tolerant of the situation and regard legislating as undesirable and impractical[91] for the three reasons below.

b. Opposition to Legislation

Low Income Families

The Social Welfare Department's Assistant Director, Mr Alfred Chui Wing-man, commented that legislation was inappropriate because it is "unfair and discriminative to single parents and the low income families."[92] It was thought that legislation against unattended children would cause hardship and thus specifically marginalizes the low-income families who cannot afford to pay for the compulsory child care services.[93] This is noted above in the section "Fees and Charges" (that a fee is required for the child care facilities, which may be unaffordable to these lower income families).

Women's Right to Work

One of the strongest opposition against legislation is from the mothers who opposed legislation on grounds of preserving their right to work and non-interference with the mother's right to make her own arrangements for her child while she worked, as many mothers do in Hong Kong.[94] This opposition is likely to be more significant given that, as discussed in the section of "Constraints of Working Parents", that there is now an increasing number of mothers working after giving birth.

Family Autonomy

Many regard arrangements for attending children as a purely private and domestic matter where the government should not abridge a family's right to autonomy. Moreover, some may consider leaving a 10-12 year old child unattended while parents work as an acceptable subordination of individual interests to the needs of the family.[95] This is particularly the case in Chinese society where family is regarded as a close-knit, mutually dependent unit which requires the aggregate interests and well-being of the family to be considered first. This is valued as a guiding principle in the traditional pattern of socialization within Chinese families.[96] Given the great majority of Hong Kong people are Chinese – according to government statistics in 2001, Chinese accounts for 94.9% of the population[97] -- it is expected that this influential Chinese mentality would resist legislation in this "family matter".

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90 *Supra* note 8, p 79.

91 Lui, P, Asian Human Rights Commission, "Asian Charter, Children's rights in Hong Kong" at http://www.ahrchk.net/charter/mainfile.php/east/13/ (visited on March 212004).

92 "Toddlers fight for lives after fire; Government puts onus on parents", *South China Morning Post*, 31 January 1993.

93 *Supra* note 8, p 85.

94 *Ibid*, p 7.

95 *Supra* note 7, p 31.

96 *Ibid*, p 31.

97 *Supra* note 25 at p 10.

c. Proposition for Legislation

It is submitted that specific legislation should be the way forward to address the problem and to duly fulfil the obligation set forth under *UNCRC* art 19(1). To tackle the problem of unattended children, apart from public education and support, legislation plays an important and necessary role for four reasons as elucidated below.

Equal Right to Protection for Children in Rich and Poor Families

Every child has a right to life and protection. Child abuse is an infringement of the children's rights. [98] The right should be opened to every child regardless of the family background or status. This is reinforced by the Hong Kong Family Welfare Society which stressed that neither poor nor rich families should expose their children to danger.[99]

Setting the Minimum Standard

The dilemma in legislation lies in that, on the one hand, the State must fulfil its obligations as *parens patriae*, the legal protector of citizens who are unable to protect themselves; on the other, the State's involvement must not unduly interfere in the complex emotional dynamics of family life. [100] No doubt, this fine balance requires appropriate sensitivity. However, refraining from legislation does not mean this balance is achieved. Instead, legislating is the means to provide and uphold the minimum standard of care by parents and thereby also fulfilling the role as expected of *parens patriae*.[101] Legislation also functions to *standardize* the level of care and support required in parenting, rather than leaving them to the sole discretion of individual parents. This is particularly so given that the society is not homogeneous. There are cultural differences between the different races in Hong Kong: the West and the East. Also, there are differences even within people of the same ethnicity: for example, the middle and upper class of Chinese may be more westernized, in that this group of Hong Kong people are the group who are mostly likely to have gone overseas for education, and thus more receptive of the individual "rights" of children, instead of the more traditional Chinese perception that children are to subordinate their interests to that of the family. Given the differences of opinion and understanding, it is important that the State set a minimum standard which every responsible parent needs to observe. [102]

Deterrence and Education

Parents who do not take the necessary and feasible precautions to prevent the dangers of child neglect should be penalized. The level of penalty need not be unnecessarily harsh and inhumane: sometimes imprisonment for even one day can impress offenders as to the seriousness of leaving children unattended.[103] Through legislation, legal penalties can be imposed, including monetary fines and imprisonment. Thus, these legal consequences may alert parents to the severity of the problem and thus educate and encourage them to take greater precaution. Indeed, some parents unnecessarily place their children at risk, thus, legislation can and should reverse such behaviours so that the children from these families are

98 *Supra* note 7, p 102.
99 *Supra* note 13.
100 *Supra* note 69, p 48.
101 *Supra* note 28, p 93.
102 *Supra* note 8, p 87.
103 "Counselling could help", *South China Morning Post*, 13 December 1995.

protected by the state.

Compatible with other Measures

According to Mrs Priscilla Lui Tsang Sun-kai, Director of Against Child Abuse, legislation does not mean the government's focus is only on penalty and putting all offending parents in jail. Instead, it is not mutually exclusive with requiring offending parents to receive therapy, counselling (which aims to alleviate associated stigma, anger and guilt)[104] and parenting skills training.

Summary

In short, the four reasons set out above justify the concerns and opposition against legislation. Thus, the failure of the Hong Kong legislature to enact a specific legislation regarding child neglect highlights the inadequacy at state level to address the problem and to fulfil its international obligation as set out in *UNCRC*. In fact, Hong Kong's neighbours – Japan, Singapore, Malaysia, China, South Korea – also do not have specific legislation against child neglect. This may be because the cultural factors of Asian communities are at play in underestimated the problem and raising strong opposition against the intervention of the State in this issue.

Given that there is no specific legislation in Hong Kong against child neglect, it will then be discussed if the existing legislation is sufficient and useful to tackle the problem.

2. *Domestic Legislation*

To comply with the duties set forth in *UNCRC* art 19(1) in legislating to protect children from neglect, the Hong Kong legislature has two pieces of legislation relevant to controlling the problem.

a. *Details of the Ordinance*

Firstly, *Offences Against the Persons Ordinance* (*OAPO*) s 26 specifies the legal consequences and penalties of exposing a child whereby life is endangered. It provides that:

> "Any person who unlawfully abandons or exposes any child, being under the age of 2 years, whereby the life of such child is endangered, or the health of such child is or is likely to be permanently injured, shall be guilty of an offence and shall be liable:
>
> (a) on conviction on indictment to imprisonment for 10 years;
>
> or
>
> (b) on summary conviction to imprisonment for 3 years."[105]

Section 27 specifies the details and consequences of neglect by those in charge of child or young person. It provides that:

> "(1) If any person over the age of 16 years who has the custody, charge or care of any child . . . wilfully . . . neglects, abandons or exposes such child . . . in a manner likely to cause such child . . . unnecessary suffering or injury to his health . . . such person shall be guilty of an offence and shall be liable:

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104 *Supra* note 8, p 95.

105 *Supra* note 71, s 26.

> (a) on conviction on indictment to imprisonment for 10 years;
> or
> (b) on summary conviction to imprisonment for 3 years,
> and for the purposes of this section a parent or other person over the age of 16 having the custody, charge or care of a child or young person under that age shall be deemed to have neglected him in a manner likely to cause injury to his health if he fails to provide adequate food, clothing or lodging for the child or young person . . ."[106]

Secondly, the *Protection of Children and Juveniles Ordinance* aims to protect children's rights in care or protection proceedings. *PCJO* defines a child "in need of care or protection" as one who has been or is being . . . neglected or whose health, development or welfare has been or is being or appears likely to be neglected. The section includes omission or failure to provide for child's physical needs' and therefore encompasses the general phenomenon of child neglect cases.[107] Section 34(1) of *PCJO* provides that a juvenile court may make certain orders to remove a child from its parents or imposes some kind of supervision on the child's upbringing.[108] This includes legal guardianship to Director of Social Welfare (ss 34(5), (6)), care committed to another person or institution (s 34(4)(a)); parent's recognisance; and supervision order s 34(1)(d).[109]

b. Limits of the Existing Legislation

Vague

The current Secretary of Justice, Ms Elsie Leung conceded that these two pieces of legislation are highly inadequate to address the problem of child neglect. Sections 26 and 27 of *OAPO* are written in broad and purposive terms so as to be all-embracing and cover a wide range of neglectful conducts. However, there is too little guidance as to how these laws are to be interpreted, which depends on the social and cultural norms and background of the judges.[110] While it is criticized as being too general, it is also regarded as being too restrictive in that it requires "wilful" acts of neglect to bring about harm, thus setting a very high threshold. [111] In fact, most parents would not "wilfully" neglect their child to subject them to injuries; it is most often the case of carelessness or accidents. Hence, it seems that this legislation is not effective in addressing the situation of child neglect cases.

For *PCJO*, Professor Athena Liu commented that its weakness lies in the criteria for making an order. The legislation only defines conditions under which a child may be the subject of a care or protection order. However, it is silent on when should the court make such an order, on what basis should the court decide, etc.[112] Moreover, the words "significant and avoidable harm" is regarded as being too vague and leaves much grey areas when making a judgment.[113]

Given the ambiguity of the terms in the legislation and the inability to specifically address the situation of child neglect cases, there may be great difference in opinion between parents and professionals and the court about what constitutes child neglect and therefore becomes a

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106 *Ibid*, s 27.
107 *Supra* note 7, p 118.
108 *Supra* note 60, p 448.
109 *Ibid*, p 455.
110 *Supra* note 8, p 81.
111 *Ibid*, p 57.
112 *Supra* note 7, p 119.
113 *Supra* note 8, p 22.

further source of conflict. [114] The vagueness of the provisions reduces the effectiveness of the legal sanction. Worse, even the police and social workers were found to be reluctant to invoke full powers of law and enforce the provisions.[115] As a result, the problem of unattended child has never been brought to the attention of the Hong Kong courts at large.

Low Rate of Reporting

The prevalence of under-reporting of child neglect cases is well-recognized as one of the root of the problem. There is no compulsory reporting statues which impose a duty on any ordinary citizen to report to relevant authority.[116] Hence, reporting depends much on the initiative of the victims, the spouse of the neglectful parent, neighbours, relatives and teachers. The problem of the low rate of reporting is that it further perpetuates the situation by suggesting that it is not "a problem" and thereby not prompting others to help and advice.[117]

From the perspective of the neglected children, the under-reporting may be because they tend to deny the existence of the problem. First, they may not be aware that it is a problem. Second, even if they do, due to psycho-social reasons, they would fear that reporting would cause hardship for their parents in that their parents may be forced to hire a child-minder or send the child to child care centres. With this, the child may be blamed for causing additional family hardship, undermine harmony in the family by enforcing their rights.[118] In addition, the abuser or neglectful parent may be the only one to have close and endearing relationship with the victim. To avoid being blamed by their significant others, the neglected children may thus be reluctant to tell their stories or seek for help from others (such as the other parent, teacher, school authorities and friends).

There is also a cultural factor in the reluctance to report. In Chinese society, neighbours (who would be a possible group of people to recognize the problem given the particular proximity of households in Hong Kong housing estates) or even relatives are hesitant to be involved in another family's affairs: they are afraid to be considered as unnecessarily intrusive in "minding other's business".[119] Moreover, since reporting and involvement of police authorities are generally considered as a disgrace or "loss of face", this discourages others to report for fear of causing trouble for another's family.[120] Moreover, given that great value is placed on the family unit and that the reporting may involve the authorities taking away or punishing the parents, with the worst result of breaking up the family, there is little initiative for others to report child neglect cases in Hong Kong.

VII. Recommendations

From the above discussion, it is found that the major contributors of the problem are the limited social and community support, ineffective legal provisions, and lack of awareness and recognition of the problem. Accordingly, I will provide seven areas of recommendation in hope to alleviate and eventually eliminate the problem of child neglect.

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114 *Ibid*, p 39.
115 *Ibid*, p 81.
116 *Supra* note 108, p 442.
117 *Supra* note 7, p 80.
118 *Supra* note 61, p 289.
119 *Supra* note 62.
120 *Ibid.*

A. Promotion of the Problem and Available Facilities

It is recommended that there should be stronger promotion campaigns in raising the awareness of the community to the problem of child neglect. More efforts must be made in promoting the use of the alternative child care facilities: when they are open and their whereabouts. This can be carried out in many forms: media advertisement, posters in housing estates and fundraising activities.

In addition, it is important to involve the education authorities and schools to participate in raising students' and parents' awareness of the problem. They would be effective parties in teaching the students what is child neglect and what they should do if they face such problem. Also, through the schools, information about after-school care and other child care facilities in the district can be more effectively disseminated to the parents.

B. Strengthen Community Ties

Given the social changes in the society where there are increasing working parents, nuclear families, divorce cases and single-parent families, the necessity of community support for alternative child care services become ever more greater. Thus, not only should there be more effective, user-friendly and flexible institutional child care facilities, the Social Welfare Department should build up a stronger social network among local communities. This would be effective in providing mutual help when parents need to be away for a short period and yet are unable to find appropriate institutional centres for temporary care. If the social ties are better-established, families can benefit from more effective support from their neighbours and who can also be more aware of the occurrences of child neglect.

C. Home Safety

As Hong Kong housing is typified by its height and that there are many cases of children falling out of the home window, there should be greater promotion of home safety, which includes installing railings in windows and balconies. Also, general home safety knowledge should be publicized – for example, highlighting the dangers in the home (bunk beds and fold tables) and dangerous items which should be properly stored or locked (such as drugs, fire matches and cleaning detergents).

D. Better Understanding of Children's Needs

There are many instances where parents leave their child unattended because they assume their child is "old enough" to be so and that their slightly elder siblings have the ability to look after them. Hence, insufficient understanding of the children's abilities results in most cases overestimation of the child's ability and underestimation of the danger of child neglect. Hence, there should greater efforts in drawing up and promoting parental courses or family education program to illustrate to parents the true abilities of children at different ages. Moreover, these programs can better prevent child neglect at its root in that, upon better understanding the children's developmental process, the parents would understand their child's emotional needs as well, and thus, have fewer chances of leaving them frequently unattended.

E. Legislation

For current legislation in *OAPO* ss 26 and s 27, it is recommended to delete the word "wilfully" so as to consider what harms or potential harm is done to the child. Intent should not be a prerequisite for neglect to be diagnosed; instead, it should serve only as a mitigating factor in court or consideration of child's future plan. Also, for the definition of "health", it should clearly indicate whether it is physical and / or psychological health.[121]

Moreover, it is recommended that a specific legislation be enacted for child neglect. For example, in two states in USA – Illinois and Maryland – there is legislation against leaving children unattended and specific provisions for the legal age that children can be left home alone.

Illinois law defines a neglected minor as "any minor under the age of 14 years whose parent or other person responsible for the minor's welfare leaves the minor without supervision for an unreasonable period of time without regard for the mental or physical health, safety or welfare of that minor."[122]

While recognizing that many factors may apply, Illinois law clearly lists 15 specific factors to be considered when deciding whether a child has been left alone for an unreasonable period of time.[123] This sets the legal guideline specifying the concerns that parents must have before leaving the child unattended.

For Maryland, the Maryland Department of Juvenile Services (DJS) provides that:

> "(a) A person who is charged with the care of a child under the age of 8 years may not allow the

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121 *Supra* note 87 at p 58.

122 *Juvenile Court Act*, 705 ILCS 405/2-3(1)(d). United States, Department of Health and Human Services (Administration for Children and Families) at http://www.nccic.org/poptopics/homealone.html (visited on 28 April 2004).

123 The Guidelines are:
1. the age of the minor;
2. the number of minors left at the location;
3. special needs of the minor, including whether the minor is physically or mentally handicapped, or otherwise in need of ongoing prescribed medical treatment such as periodic dosages of insulin or other medications;
4. the duration of time in which the minor was left without supervision;
5. the condition and location of the place where the child was left without supervision;
6. the time of day or night when the minor was left without supervision;
7. the weather conditions, including whether the minor was left in a location with adequate protection from the natural elements such as adequate heat or light;
8. the location of the parent or guardian at the time the minor was left without supervision, the physical distance the minor was from the parent or guardian at the time the minor was without supervision;
9. whether the minor's movement was restricted, or the minor was otherwise locked within a room or other structure;
10. whether the minor was given a phone number of a person or location to call in the event of an emergency and whether the minor was capable of making an emergency call;
11. whether there was food and other provision left for the minor;
12. whether any of the conduct is attributable to economic hardship or illness and the parent, guardian or other person having physical custody or control of the child made a good faith effort to provide for the health and safety of the minor;
13. the age and physical and mental capabilities of the person or persons who provided supervision for the minor;
14. whether the minor was left under the supervision of another person;
15. any other factor that would endanger the health and safety of that particular minor.

child to be locked or confined in a dwelling, building, enclosure, or motor vehicle while the person charged is absent and the dwelling, building, enclosure, or motor vehicle is out of the sight of the person charged unless the person charged provides a reliable person at least 13 years old to remain with the child to protect the child.

(b) A person who violates this section is guilty of a misdemeanor and on conviction is subject to a fine not exceeding $500 or imprisonment not exceeding 30 days, or both. (Family Law Article, § 5-801)"

F. Clear Guidelines

Even if specific legislation is not possible, the government can provide clear guidelines for parents to follow, as in the Fairfax County Department of Family Services which lists Child Supervision Guidelines in the "*Children Home Alone* (2001)" catalogue:

"7 & under:
Should not be left alone for any period of time. This may include leaving children unattended in cars, playgrounds, and backyards. The determining consideration would be the dangers in the environment and the ability of the caretaker to intervene.

8 to 10 years:
Should not be left alone for more than 1½ hours and only during daylight and early evening hours.

11 to 12 years:
May be left alone for up to 3 hours but not late at night or in circumstances requiring inappropriate responsibility.

13 to 15 years:
May be left unsupervised, but not overnight.

16 to 17 years:
May be left unsupervised (in some cases, for up to two consecutive overnight periods)."

G. Change of Policies Regarding New Mainland Immigrants

The current population and welfare policies which prevent new Mainland immigrants from applying for public rental housing, Fee Assistance Scheme for child care services and social welfare benefits should be re-evaluated. No doubt, given the current budget deficit Hong Kong faces and to be fair to those who have been residents in Hong Kong for more than seven years, it is justified to limit the benefits for the new immigrants to some extent. Nevertheless, upon weighing the benefit and costs of such policies, it is suggested that such policy is short-sighted and not beneficial in the long run. This is because this group of new immigrants is part of the Hong Kong population and will very likely be Hong Kong citizens in some years. Thus, there would be social costs – such as increased crime, family violence and juvenile delinquent problems – if the community continues to adopt discriminative policies against them and thereby marginalizing them. No doubt, this cannot be beneficial to the development of Hong Kong on the whole in the long run. In addition, on humanitarian grounds, it is submitted that such criteria should be waived in circumstances of real hardship.

VIII. Conclusions

The problem of child neglect has been in Hong Kong since the early 1987 with the widely publicized case of two children killed in a fire when their parents went to work. Yet, with the development and modernization of various areas in the Hong Kong society and economy, the problem of unattended children does not seem to go away. As highlighted from the earlier parts in the paper, Hong Kong has both the international and domestic obligation to address

the problem. Yet, with the analysis of the available mechanisms in place at the community and state level, it appears the obligation is not adequately fulfilled.

No doubt, child neglect is a complicated social issue which is the result of a spectrum of factors: economic hardship, housing problems, changes in family structure, limited social awareness and recognition of the problem, inflexible child care facilities, ineffective legal sanctions and short-sighted policies towards new Mainland immigrants. Hence, to fully address the problem, it requires focused and determined efforts from different parts of the society: teachers, parents, social welfare policies-makers, legislators and all members of the community. It is only through a coherent and focused policy can the problem be addressed at its roots.

All in all, child neglect is a social evil that has never dissipated from the Hong Kong community. Protection of children does not only stem from the fact that they are the least able to protect themselves and thus be vulnerable to abuse and neglect; in addition, they are also the future of the society. Thus, to build a promising and strong community, it is essential to secure a healthy and safe environment for the children to grow, to prevent neglect at home and the resulting injuries and death. Hence, it is important that the Hong Kong community address the issue immediately.

TARGETING THE REAL VICTIMS: THE CASE FOR LEGALISING THE BUSINESS OF PROSTITUTION

CORA SAU-WAI CHAN*

Under the present Hong Kong law, the "business of prostitution", that is, the setting up of brothels and involvement of third parties in the operation and management thereof, is altogether criminalised. The case for such blanket criminalisation is premised on the assumption that prostitutes need protection because they are, invariably, a vulnerable group forced into the business by fraud and coercion, and subject to sexual exploitation by brothel managers. The author opines that such an assumption is over-generalised, in that it fails to take account of the fact that there are indeed prostitutes who join brothels voluntarily for security and economic reasons, and are not tricked, coerced or abused by any third party. As a result, the present law fails to give due regard to this latter group of prostitutes not subject to abuse and cannot afford due legal protection as far as this group is concerned.

The author first examines the problems of the existing Hong Kong law in criminalising indiscriminately the business of prostitution, and in this connection the similar English experience is discussed. Outlining three options of decriminalizing, criminalizing and legislating, the author proceeds to argue that "legalisation" of the prostitution business offers the most effective and consistent protection to prostitutes, citing the positive experience of such implementation in Nevada, USA. Lastly, the author concludes the article by a comment as to the prospects of the proposed reform in Hong Kong.

Introduction

The "*business* of prostitution" – the setting up of brothels and involvement of third parties in prostitution – is a subject torn among issues of prostitutes' rights, working conditions, and public nuisance and morality that conflict sometimes. The question is where the law should be positioned in the balance.

There are three options in dealing with the business of prostitution: criminalisation, decriminalisation and legalisation.[1] The law in England and Hong Kong adopts criminalisation.[2] Legalisation is the other far end of the spectrum, under which the law closely regulates the business.[3] In the United States, all but one state criminalised prostitution.[4] Nevada is an exception in that the business is highly regulated.[5] Lying in between these two ends is decriminalisation, where laws against the trade are repealed and the government exercises minimal interference in the business.[6]

In devising which means to adopt to deal with the business, governments often lack a *critical reflection of who the law really seeks to protect.* The over-generalised assumption that the

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1 Drexler, J N, "Governments' Role in Turning Tricks", (1996) 15 *Dickinson Journal of International Law* 201, p 216.

2 Section 139, *Crimes Ordinance* (Cap 200). Section 33, *Sexual Offences Act 1956* (UK).

3 Sion, A, *Prostitution and its Control* (London: Faber and Faber, 1977), p 34. Brewis, J and Linstead, S, *Sex, Work and Sex Work* (London: Routledge, 2000), p 247.

4 Nevada is the only state that does not criminalise the act and business of prostitution. For the full list of state laws against prostitution and brothels, refer to Bingham, M, "Nevada Sex Trade: A Gamble for the Workers", (1998) 10 *Yale Journal of Law and Feminism* 69, fn 1.

5 *Nevada Revised Statutes* (NRS) 224.345 (2004) (US).

6 *Supra* note 1.

business of prostitution is necessarily linked with sexual exploitation[7] reflects the neglect of *the actual working conditions of individual prostitutes.*[8]

The perspective that this paper takes is an exploration of who the law seeks to protect in the business of prostitution, and which position of the law should be taken to *effectively and consistently* protect this group. Part I will first examine the problems of the existing Hong Kong law. A comparison will be made with England's similar system of criminalisation. Part II will then justify why legalisation is a better way of dealing with the problems. Nevada's experience of regulation will mainly be referred to. Lastly, a conclusion will be drawn as to the prospects of reform in Hong Kong.

Under Hong Kong law, a prostitute is a person who offers his / her body commonly for lewdness for payment in return.[9] Since the overwhelming majority of prostitutes are female, this essay will focus on analysing the impact of the law on female prostitutes. The definition of brothels will be taken as that in Hong Kong law, under which the term "vice establishment" is used instead of "brothels": "premises, vessel, or place used wholly or mainly by two or more persons for the purposes of prostitution, or in connection with the organising or arranging of prostitution."[10]

. *Part I – The Case against Criminalisation*

. *What Conduct Should be Criminalised*

The common justifications for criminalising behaviour rest on three grounds: harm to others, harm to self and immorality.[11] The plethora of international conventions and domestic legislation that criminalise brothels set out to prevent "exploitation of prostitution",[12] yet the term "exploitation" is never defined.[13]

It is necessary to distinguish two groups of prostitutes involved in the business of selling sex. The first is those who entered brothels because of fraud or coercion, or are subsequently taken unreasonable disadvantage of by brothel managers or "pimps", in the form of exorbitant payments or long working hours. This vulnerable group includes children, those trafficked,

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7 The 1951 Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others calls on state parties to punish anyone that finances / manages a brothel, or lets a premise of the purpose of prostitution (Art 2). Article 1 calls on state parties to suppress exploitation of prostitution even with the consent of that person. The 1979 Convention on the Elimination of All Forms of Discrimination against Women again calls for the suppression of all forms of exploitation of women. However, "exploitation of prostitution" is not defined in any of these instruments.

8 A legislator remarked that the current English legislation does little to address the vulnerability of sex workers. See *Hansard*, House of Lords Debate on Prostitution, 16 October 2003, Columns 1167 and 1169.

9 The court held in *R v Li Kin Wai* [1985] 1 HKC 249 that the word "commonly" in *R v De Munck* [1918] 1 KB 635 was intended to mean "indiscriminately" and "promiscuously". Section 117 of the *Crimes Ordinance* (Cap 200) defines "prostitute" as a prostitute of either sex.

10 Section 117(3), *Crimes Ordinance* (Cap 200).

11 Jackson, M, *Criminal Law in Hong Kong* (Hong Kong: Hong Kong University Press, 2003), p 13.

12 *Hansard*, House of Lords Debate on Sexual Offences Bill for Increase of Penalty for Keeping a Brothel, 3 November 2003. It was repeatedly mentioned by legislators that the offence of keeping a brothel and the increase in penalty were to prevent the "exploitation of prostitution".

13 In none of these instruments was the term "exploitation" defined. This criticism was made in Kinnell, H, *Memorandum on Sexual Offences Bill 2003 submitted by UK Network of Sex Work Projects* (February 2003). See *Hansard*, House of Lords Debate on Sexual Offences Bill 2003, 10 July 2003, Appendix 30.

and those subject to crimes without legal protection. This group is whom legislators in Hong Kong and other places intended to protect.[14] Criminalisation of brothels involving this group is justified as prostitution is forced upon the prostitute.

On the other hand, there are prostitutes who form / join brothels voluntarily for security, economic or emotional reasons, and are not tricked, coerced or abused by any third party.[15] This second group is rarely given attention; an automatic link of brothel business with exploitation is assumed. However, it is difficult to see any direct coercion or exploitation. The justification for criminalisation in these cases lies mainly on the moral ground.[16] The argument is that brothels in any case taint morality because profiting from a women's sale of sex is "virtually a form of trafficking of human beings".[17] Since a third party is involved in the business, it is no longer a matter of private sexuality, and the law can legitimately interfere.[18] The problem with this argument is the shaky interpretation of "public" morality. The fact that a third party is involved does not necessarily increase offence to public decency and nuisance. If the law, as that in Hong Kong, chooses to tolerate private prostitution acts and suppress only those that offend public decency,[19] it should logically tolerate brothels that do not invade public decency.[20] In fact, as will be shown, the regulation of brothels may even be more effective in reducing nuisance and offence to public decency.

The intent of Hong Kong law is to criminalise exploitation of prostitution. However, in order to effectively target the real victims, the law should "distinguish truly abusive from non-abusive relationships between sex workers and those whom they have business relationships with".[21]

. *Casting the Net Too Widely: Problems with the Existing Hong Kong Law*

The *Crimes Ordinance* stipulates that a person who keeps, or manages or assists in the management, or is otherwise in charge or control of, any premises, vessel or place as a vice establishment commits an offence.[22]

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14 For instance, in England, there is clear evidence that sexual offences are targeted mainly at victims such as children and trafficked prostitutes. *The Sexual Offences (Conspiracy and Incitement) Act 1996* is the first piece of legislation directed against sexual tourism. See Alldridge, P, "The Sexual Offences (Conspiracy and Incitement) Act 1996", [1997] *Criminal Law Review* 30, p 30. See *Supra* note 12. It was repeatedly mentioned by legislators that the offence of keeping a brothel and the increase in penalty were to tackle the exploitative aspects of the industry. Also see *Hansard*, House of Lords Debate on Sexual Offences Bill, 18 September 2003, Column 272.

15 Ah Chang, "Ah Chang's Story", *Zi Teng's Monthly Publication*, Issue No 9, September 1999, p 1.

16 This can be ascertained by reading the Lords' remarks in the *Hansard* reports. It was commented in the Commentary, "Professionalising the Oldest Profession", (1996) 69 *The Police Journal* 283, pp 283-284, that the "overriding consideration" of legalising the business is the lowering of "the standard or morality in UK." "The promiscuous use of a woman's body for profit, whilst recognized as a reality must never be approved as a lawful practice by the state."

17 *South Africa v Jordan* 2001 (10) BCLR 1055 (T) at 1072.

18 *Ibid* at 1068.

19 For instance, public soliciting / loitering and advertisement are not allowed. See ss 147, 147A, *Crimes Ordinance* (Cap 200).

20 In "Setting Up a Red-light District", *Oriental Daily*, 21 October 2003, the author argued that if prostitution itself is decriminalised, the issue of brothels simply becomes a question of morality. If public decency is not threatened, the extent which this question of morality became "public" is questionable.

21 *Supra* note 13.

22 Section 139, *Crimes Ordinance* (Cap 200). "Keeping" means maintaining the premises, knowing that they are being used as such (see *R v Wong Chi-Hung* [1982] HKLR 361). "Assisting in the management" includes doing something which is more than menial in the provision of immoral services, with the

The broad definition of "vice establishment" includes cases where two prostitutes group together to work, with only one prostitute on the premise at one time.[23] The law against brothels is targeted at those brothel-keepers who exploit inmates. Nonetheless, in banning brothels as a sweeping category, the law has deprived prostitutes of the option of being protected by legally-regulated brothels, and as a result, contributed to *more prostitutes falling into the realm where the law is in no position to regulate or offer protection.*[24]

The law on brothels should be viewed in light of *other laws against prostitution* and *the context of Hong Kong* to holistically ascertain prostitutes' actual working conditions. Like the English legislation, the Hong Kong law is somewhat contradictory in that it pushes prostitutes out onto, but at the same time, off, the streets, leaving them with little protected work space.[25] Public soliciting, advertisement, and letting premises for use as a vice establishment are criminal offences.[26] As a result, many prostitutes are forced to resort to working in quiet areas and are thus subject to more violence, theft and rape than if they work indoors.[27] Some turn to underground brothels for protection.[28] In Hong Kong, this unregulated business is dominated by triad groups.[29] The limited choices for protection available to prostitutes have created an enabling environment for triad groups to thrive.[30] These are the very conditions under which prostitutes are most vulnerable to fraud, coercion and exploitation.[31] Without legal protection of their rights, many do not report their abusive situation because of threats from triad groups, or because they genuinely need their protection.[32] Many brothel workers are abused by the police, but cannot complain because their rights are unprotected.[33]

These problems brought about by an indiscriminate prohibition can be compared to the English experience. As in Hong Kong, prostitutes are marginalised and have few alternatives to protection as they are targeted by the *Street Offences Act 1959*,[34] and more recently, the *Crime and Disorder Act 1998*.[35] Keeping and managing brothel is an offence under the

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knowledge that the premises were a vice establishment (see *R v Tam Wing Kwong* [1988] 2 HKLR 313). "Operating (in terms of in charge / control of) a vice establishment" means the operator has overall control (see *R v Chan Hang-wan* (1996) Mag App No 423 of 1996, 23 July 1996).

23 *R v Liu Yu-tsai* (1981) Crim App No 631 of 1981. *Stevens and Stevens v Christy* (1987) 151 JP 366: two sisters working together, never with more than one prostitute on the premise, is found to be keeping a brothel.

24 Hoshii, I, *The World of Sex Vol 4: Sex in Ethics and Law* (Ashford: Paul Norbury Publications Ltd, 1987), p 209.

25 *Supra* note 8, Column 1174.

26 Sections 147, *Crimes Ordinance* (Cap 200) on soliciting, 147A on advertising, and 143-145 on use of premise.

27 It was found that prostitutes that work on the street are more vulnerable to crime (especially physical assault) than those who work in brothels. Stout, J and Tanana, T, "Could California reduce AIDS by modeling Nevada Prostitution Law?" (1994) 2 *San Diego Justice Journal* 491, p 498.

28 Pearson, V and Wu, R, "Business and Pleasure: Aspects of the Commercial Sex Industry", in Pearson, V and Leung, B (eds), *Women in Hong Kong* (Hong Kong: Oxford University Press), p 253.

29 *Ibid.* Also see "Shum Shui Po Councillor Urges the Setting Up of Red Light District", *Apple Daily*, 27 July 2001.

30 *Supra* note 24.

31 *Supra* note 27.

32 "Red-light District and Legalization", *Oriental Daily*, 20 April 2002. Also see note 15.

33 "90% of Prostitutes Have Been Disturbed by Police", *Apple Daily*, 1 July 2001.

34 Section 1, *Street Offences Act 1959* (UK) makes it an offence for a common prostitute to loiter or solicit in a public place for the purpose of prostitution.

35 Anti-social Behaviour Orders are civil orders issued against those who have acted in an "antisocial manner" (s 1, *Crime and Disorder Act 1998* (UK)). These orders were increasingly used to target prostitutes. It was criticised as discriminatory given failure to specify the meaning of anti-social

Sexual Offences Act 1956.[36] The broad definition of brothel is highlighted in *Stevens and Stevens v Christy*[37], the decision of which was heavily criticised as "falling foul of the legislation" as it prevents prostitutes from "working together for mutual protection".[38] Prostitutes are forced to work discreetly on streets, with crime rates against these prostitutes much higher than those who work indoors.[39] Underground brothels flourish. By failing to distinguish exploitative from non-exploitative conduct, the English law "militates against safer working conditions and less exploitative relationships".[40]

The heavy penalty of the offence[41] is also disproportionate in punishing the "victimless" "crime" of those who keep / manage brothels free from fraud, coercion and exploitative relationships.[42]

. *Part II – The Case for Legalisation*

The alternatives to the present system include legalisation, decriminalisation and continued criminalisation with certain reforms. The third option has been considered by the Criminal Law Revision Committee, which recommended narrowing down the meaning of "brothel" to allow two prostitutes to share premises for self-protection.[43] This option may slightly reduce the problems of the existing law yet it would still cast the net too widely and criminalise the keeping of brothels without exploitation.

My proposal is to make the distinction clear in the law. Any offence related to the business of prostitution should target at protecting the real victims. Keeping / managing / operating a brothel for "exploitation of prostitution" should be defined in terms of deception about the nature of the work, coercion, intimidation, physical / economic abuse, the presence of trafficked and / or under-aged workers.[44] This means that keeping / managing / assisting a vice establishment *per se* will not be illegal, unless they are for the purpose of "exploiting of the prostitutes" as defined above or are "unlicensed brothels" under the legalization system. In the following paragraphs, it will be shown that legalisation is more effective than decriminalisation in *catching truly exploitative conduct while regulating non-exploitative ones.*

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behaviour. See s 1 *Crime and Disorder Act 1998* (UK). Also see Jones, H and Sager, T, "Crime and Disorder Act 1998: Prostitution and the Anti-Social Behaviour Order", [2001] *Criminal Law Review* 872, p 873.

36 Section 33, *Sexual Offences Act 1956* (UK).

37 *Stevens and Stevens v Christy* (1987) 151 JP 366.

38 Editorial, "A Licence for Brothels?" (1996) 146 No 6756 *New Law Journal* 1177, p 1177. Also see Case commentary, "Brothel Used by a Team of Prostitutes – Stevens and Stevens v Christy", (1988) 52 *The Journal of Criminal Law* 108, pp 108-9.

39 Research by the Economic and Social Research Council in the United Kingdom shows that prostitutes working on Glasgow's streets were six times more likely to be violently attacked by clients than those working indoors in Edinburgh. *Supra* note 8, Column 1167. This is also confirmed by the United States experience of criminalising prostitution. *Supra* note 1, p 202.

40 *Supra* note 13.

41 The recent s 33A *Sexual Offences Act 2003* (UK) raised the maximum penalty of keeping a brothel used for prostitution to 6 months and 7 years imprisonment for summary and indictment trial respectively. In Hong Kong, the penalty is even higher, with maximum penalty of 3 and 10 years imprisonment respectively. See s 139 (1)(b)(i-ii), *Crimes Ordinance* (Cap 200).

42 *Supra* note 13.

43 Criminal Law Revision Committee, *Working Paper*, published in 1982, cited in Hansen, O, "Off Street Activities", (1986) 136 Nos 6235/6236 *New Law Journal* 3. This recommendation was also made in the House of Lords. See *Hansard*, HOL Debate on Sexual Offences Act, 13 May 2003, Column 193.

44 *Supra* note 13.

. *Legalisation vs Decriminalisation*

The legalisation system in Nevada represents a highly state-regulated system. The Nevada Revised Statutes allow counties with population of less than 400,000 to issue licenses to brothels.[45] The Supreme Court of Nevada held in *Nye County v Plankinton*[46] that houses of prostitution no longer constituted a nuisance *per se*. Pandering is still prohibited.[47] There is stringent health testing on prostitutes,[48] and zoning restrictions are designed to keep brothels relatively separate from schoolhouses, churches, and principal business streets. [49] Decriminalisation, on the other hand, lifts the laws on the trade, and allows the business to self-regulate.[50]

Effectiveness in Enforcing the Continuing Criminalisation of Exploitation of Prostitution

The greatest concern is whether lifting the ban on brothels would in effect lift the ban on exploitative brothels as well. In Hong Kong's case, if the business is decriminalised, self-regulation would likely fall into the hands of triad groups. Without adequate government regulation, this would lead to a *de facto* decriminalisation of exploitative conduct by triad groups.

Legalisation is proposed as a system that can more effectively preserve the criminalisation of exploitation of prostitution. A government licensing system which would restrict brothels to areas distant from schooling, central business and residential areas would address the gravest concern to Hong Kong people.[51] The business of licensed brothels will be legitimised, and prostitutes in these brothels will be accorded the same rights as other workers. Brothel managers and prostitutes who meet the requisite income level will be taxed. With information of the location of licensed brothels, resources can be spent targeting the "real crimes"[52] – inspecting licensed brothels to check against exploitation of prostitution, and hunting down brothels not licensed.

The first doubt raised against this system is the ability of licensed brothels to protect prostates. The English experience have shown that there is great difficulty in proving coercion of and deception to prostitutes because prostitutes often refuse to testify against pimps.[53] Further, licensed brothels may also be used as a disguise for housing trafficked and under-aged prostitutes. It is submitted that such problems will be solved by preserving the present law that grants police a wide and general power to search and seize.[54] On the other hand, legitimizing prostitution and recognising prostitutes' rights as workers will increase

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45 *Nevada Revised Statutes (NRS)*, 224.345 (2004).
46 587 P.2d 421 (1978).
47 *NRS*, 201.300-360.
48 *Nevada Administrative Code*, Ch 441A010-A325 and 441A775-A815.
49 *NRS*, 201.380, 201.390.
50 *Supra* note 1. The Amsterdam system is an example of the decriminalisation approach.
51 A survey by Politics and Sociology Faculty of Lingnan University shows that 90% of interviewees thought that prostitutes should be moved to non-residential areas. See "60% of interviewees in Shum Shui Po support a red-light district", *The Sun*, 7 May 2002.
52 *Supra* note 1, p 213. Charles Arnold Baker, "Decriminalising prostitution" (27 March 1992) 142 No 6545 *New Law Journal*, p 412.
53 *Supra* note 8, Column 1177.
54 Section 152, *Crimes Ordinance* (Cap 200).

prostitutes' *bargaining power and will to defend her rights* when they are violated.[55]

The second difficulty in proving the mental element of the crime may also be overcome. The *mens rea* of the present offences in s 139(1) is *knowledge* that the premises were a vice establishment.[56] If brothels are legalised, knowledge of elements of "exploitation of prostitution" of those who manages / assists the vice establishment may be harder to prove. A lower standard of *mens rea* (ie *Cunningham* recklessness) in addition to knowledge is therefore suggested.

A third challenge is that the ambiguity of the terms "physical and economic exploitation" can be manipulated. It is suggested that the terms can be defined as unreasonable physical and economic extraction. An objective reasonableness standard can be adopted, and it would be up to courts to decide whether the conduct falls below the reasonable standard in light of the particular facts of each case. The "personal and economic dependency" element in the *German Penal Code*[57] can be a factor for consideration in determining whether the reasonableness standard is satisfied.

. ***Effectiveness in Preventing Prostitutes from Being Exploited***

Legalisation of the business of prostitution would give prostitutes an alternative of working in licensed brothels where they would be legally protected from crime[58] and exploitation,[59] and reduce the need for them to resort to unregulated brothels.[60] Indeed, in Nevada, crime rates significantly decreased after the legalisation of brothels.[61]

Proponents of criminalisation would argue that the proposed effect of preventing exploitation is insignificant since very few would really move to work in licensed brothels. In Nevada, street prostitution and illegal brothels remain a problem.[62] This is likely to be the situation in Hong Kong too because here: Firstly, most prostitutes are trafficked by triad groups from abroad.[63] These triad groups are those who control prostitutes and brothels. They are unlikely to register with the government because of various restrictions that a license poses. Secondly, there are prostitutes who prefer to work independently from brothels.[64]

It is conceded that legalisation is not a panacea; the abuse that legalisation seeks to reduce cannot be totally eliminated. What legalisation does is to *extend the law's regulatory ambit* to provide an option of a legally protected work environment to dissuade "legal" prostitutes from falling into the illegal, unregulated area. With information of the location of licensed brothels, legalisation also focuses resources on regulating licensed brothels,[65] ensuring that no exploitation of prostitution takes place, and targeting any other brothel *outside* licensed

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55 *Supra* note 32.

56 *R v Wong Chi-Hung* [1982] HKLR 361.

57 In Germany, brothels are legal, but the *German Penal Code* criminalises "the management of a house of prostitution in which prostitutes are kept in a state of *personal or economic dependency*". See s 180 (1) *German Penal Code* (Germany).

58 Editorial, "A licence for brothels?", *supra* note 38, p 1177.

59 *Supra* note 13.

60 Ma, L, "Private Vice, Public Virtues? – The Role of Law in Regulating Prostitution", (2000) 6 *Hong Kong Student Law Review* 1, p 19.

61 *Supra* note 1, p 230.

62 Street prostitutes remain more numerous than legal prostitutes in Nevada, *supra* note 4, p 93.

63 *Supra* note 28, p 254.

64 *Supra* note 28, pp 249, 256.

65 *Supra* note 52.

premises. As for prostitutes who enjoy working independently, it is certainly up to individuals to weigh the risks and benefits of working alone. What legalisation does is to provide a safe alternative for those who decide that the risks are too high. Indeed there has been a fall in the number of street prostitutes in places where brothels were legalised.[66]

. *Public Nuisance and Decency*

In Hong Kong, the greatest source of nuisance caused by prostitution is public soliciting.[67] Surveys show that 64% of residents in Shum Shui Po preferred legalisation of brothels to reduce the number of streetwalkers and hence this nuisance.[68] The predicted fall in the number of streetwalkers based on the legalisation experiences of Nevada and elsewhere can thus reduce instead of create nuisance. As for public decency, the existing offences of public soliciting / loitering, incitement / procurement and trafficking should be effective in dealing with the situation. Therefore, if appropriate regulatory measures are in place, concerns of public nuisance and decency can be even better addressed.

. *Conclusion*

The present blanket criminalisation of brothels in Hong Kong does not *consistently and effectively* deal with the *problem of exploitation of prostitution.* In neglecting prostitutes' actual vulnerable situation, the law contributed to creating dangerous work conditions that attract crime and exploitative relationships. Legalisation of the business with regulatory measures is proposed as a better way to target real cases of exploitation.

Given the prevalent opposition to legalization in the Hong Kong government and Legislature, it is unlikely that the business of prostitution will be legalised in the near future.[69] Yet, voices calling for legalization are getting stronger.[70] It remains to be seen when our legislators and citizens would realise the role of law in a pluralistic society – to provide an effective legal framework to protect individuals (including prostitutes) from crime, exploitation and nuisance,[71] rather than to "unrealistically moralise"[72] with significant costs to the safety of the most vulnerable.

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66 In Nevada, street prostitutes decreased significantly (though not totally eliminated) after brothels were legalised. *Supra* note 1, p 229. Edwards, S, "In Praise of 'Licensed' Brothels?", (1999) 149 No 6880 *New Law Journal* 403, p 403.

67 *Supra* note 51.

68 "64% of Shum Shui Po Residents Supports Setting Up of Red-light District", *The Sun*, 17 January 2002. *Supra* note 51 for similar results in a survey done by Lingnan University.

69 See Zi Teng, "Legco Members Benefit from Suppressing Vulnerable Groups", *Zi Teng Monthly Publication*, Issue No 10. Zi Teng argues that legislators often victimise prostitutes to gain political support. The overall atmosphere of the Executive and Legislature is still very much against prostitution. See also "Not the Right Time for Red-light District", *Sing Tao Daily*, 27 July 2001 and "Government Refuses to Publicly Consult regarding the Problem of Prostitution in Shum Shui Po", *Ming Pao*, 27 July 2001.

70 Among prostitutes' groups as well as citizens who find public soliciting a constant source of nuisance. *Supra* notes 51 and 69.

71 *Supra* note 8, Column 1178.

72 Friedman, L M, "Two Faces of Law", [1984] *Wisconsin Law Review* 13, p 17.

ANTI-SPAMMING LEGISLATION IN HONG KONG

JESSIE WING-YAN SHAM

The author considers email as a double-edged sword which can facilitate communications among people but is also subject to abuse for advertisement purpose. Since email spamming has become increasingly uncontrollable in Hong Kong, the author suggests that it is necessary to legislate against it. This article begins by reviewing different interpretations of "spamming" adopted worldwide. It then turns to consider the strengths and weaknesses of two different approaches to anti-spamming legislation, namely a total ban for spam sent with a wrong purpose notwithstanding its means and minimum legislation targeted at spam sent with a proper purpose but wrong means. Finally, the author concludes that different approaches should be used to regulate different types of spam in order to preserve freedom of speech to the largest extent, both on commercial and personal levels.

I. Introduction

Email spamming undoubtedly produces a lot of adverse effects and inconvenience to people living in Hong Kong. Common sense also tells us that spamming has a great potential to shift its costs to other users.[1] Accordingly, most people would indeed agree with Perez that "the time is ripe for spam laws".[2] In other words, legislation seems to be a logical response to an environment swamped and flooded by spam. Despite the fact that any unnecessary delay in enacting anti-spamming legislation in Hong Kong could cost our society millions,[3] we should be cautious and flexible when defining the proper scope and purpose of spamming so to mitigate the harsh consequences of legislation.

Turning to definitions, Spam simply means any "unsolicited messages sent in bulk"[4] which can be transmitted through many different modes of communications, ranging from everyday technology like email, fax[5] and mobile phone[6] to traditional forms such as telephone and postage. Among these, email spamming is the most prevalent medium adopted worldwide,[7] because it can easily reach a large number of recipients while costing minimal time and money. Warnereminde has coined this situation as the "Spam Epidemic".[8]

II. The Call for Legislation

' The author would like to thank Ms Alana Maurashat for her enlightenment and support in making this research in anti-spamming a successful one.

1 The author will take up the discussion on this cost-shifting issue later in this article.

2 "The Time is Ripe for Spam Laws", *South China Morning Post*, 11 November 2003.

3 As will explain in subsequent paragraphs, spam shifts cost to other users. *Infra* note 12.

4 Schwartz, A and Garfinkel, S, *Stopping Spam* (Beijing: O'Reilly, 1998), p 11.

5 Fogo, C E, "The Postman Always Rings 4,000 Times: New Approaches to Curb Spam", (2000) 18 *The John Marshall Journal of Computer & Information Law* 915. It is said that the best analogy to spam is junk fax, which does not require human interaction or attention to oversee the receipt of a message. It is later banned by the *Telephone Consumer Protection Act* in US.

6 Cramer, E, "The Future of Wireless Spam", [2002] *Duke Law and Technology Review* 21. Japanese cellular provider NTT DoCoMo ushered a new age of cellular commerce by sending wireless advertising to cell phones users. It is later regulated by the Japanese parliament in April 2002.

7 "Result of Survey on Unsolicited E-messages by the Office of Mr Sin Chung Kai (Annexed)". Cited in Hong Kong Anti-Spam Coalition, "Legislation: One of the Key Pillars in the Fight Against Spam", January 2004, at http://www.asiadma.com/downloads/research/pdf/100040/HK_Coalition_Position_Paper_v.7.0.pdf.

8 Warnereminde, C, "Govt Struggling with Spam: Alston", 28 November 2002, at http://www.zdnet.com/au/news/business/0,39023166,20270274,00.htm.

Email usage has become increasing popular due to the economic benefits and convenience it brings.[9] Unfortunately, spamming has tainted the email system with various adverse impacts, such as invasion of Internet users' online privacy[10] and cost-shifting.[11] Cost for spammers to send out email spam is "virtually non-existing",[12] whereas other innocent parties including the Internet Service Providers (ISP), spam recipients and corporations have to bear the burdens.[13]

Survey shows that around 50% of all emails in Hong Kong are spam, with a significant 5% of them originated from the city. Furthermore, the annual economic cost of spam to Hong Kong can amount to as much as HK$10 billion while loss in productivity alone is estimated to be HK$6 billion.[14] When passive responses have proved insufficient,[15] legislation becomes a necessary tool to address the problem.[16] In light of this, the Hong Kong Anti-Spam Coalition has done a public consultation in January 2004 to examine the possibility of enacting legislation against spamming and concluded that anti-spamming legislation is probably the best way to move forward.[17]

III. Different Understanding of Spam

Enacting legislation to regulate spam in Hong Kong is by no means an easy task. The greatest obstacle is perhaps to lay down a precise definition of "spam".[18] Spam has been a public

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9 Hong Kong Anti-Spam Coalition, "Legislation: One of the Key Pillars in the Fight against Spam", January 2004, at http://www.asiadma.com/downloads/research/pdf/100040/HK_Coalition_Position_Paper_v.7.0.pdf. It is expected that by year 2006, the total number of email messages sent daily will exceed 60 billion worldwide, up from 31 billion in 2002. See also Glube, J, "The Death of E-Mail Marketing?", 2003, at http://www.learnsteps4profit.com/antispam.html. People benefit from email usage, including changing paper base economy into electronic economy for some businesses, as well as opening up new marketing channels for small businesses, and decreasing the geographical boundaries globally.

10 The Office of the Telecommunications Authority (HK), "FAQs on SPAM", at http://www.ofta.gov.hk/junk-email/page1.htm.

11 Cobos, S, "A Two-Tiered Registry System to Regulate Spam", [2003] *UCLA Journal of Law and Technology* 5.

12 Vircom Inc, "Can Laws Block Spam", 2004, at http://www.spamhelp.org/articles/Can_Laws_Block_Spam.pdf.

13 Section 17529(g), Chapter 1 of Part 3 of Division 7 of the California *Business and Professions Code*. Article 1.8, Restrictions on Unsolicited Commercial E-mail Advertisers, *California State Laws*, at http://www.spamlaws.com/state/ca1.html. It is said that "spam is easy and inexpensive to create, but difficult and costly to eliminate." See also Rice, C M, "Comment: The TCPA: A Justification for the Prohibition of Spam in 2002? Unsolicited Commercial E-mail: Why is it such a Problem?" (2002) 3 *North Carolina Journal of Law and Technology* 375 and Fallows, D, "Spam – How It Is Hurting Email and Degrading Life on the Internet", October 2003, at http://www.pewinternet.org/reports/toc.asp?Report=102. There are discussions on costs to ISPs, including the two largest players AOL and MSN.

14 *Supra* note 8.

15 "Spamfighting Overview FAQ", at http://www.secinf.net/anti_spam/Spamfighting_Overview_FAQ.html. Inactivity of people only helps the spammers because they can point to statistics and say "I sent my spam to 7 million email addresses and only 190 people complained so that other 6,999,810 must have been happy to receive it."

16 *Supra* note 6. It is said that 71.8% respondents to the survey feel that the legislation is necessary as unsolicited e-messages are annoying and waste time (81.2%), they waste Internet / Telecom network resource (77.6%) and they decrease the productivity of the business (77.6%).

17 *Supra* note 8.

18 Fallows, D, "Spam – How It Is Hurting Email and Degrading Life on the Internet", October 2003, at http://www.pewinternet.org/reports/toc.asp?Report=102. "And email users are not entirely clear on just what is spam, an issue that is an absolute stopper for writing effective, enforceable legislation against

sentiment, where interpretation differs across culture, age group and gender.[19] In the words of Potter Stewart J, spam is something that "they [the people] know it when they see it."[20] In general, spam refers to "unsolicited electronic messages sent in an untargeted and indiscriminate manner to a large number of recipients regardless of its content".[21]

Instead of defining spam loosely according to what most laymen think, it is necessary to give a clear and consistent legal meaning to "spam" for the purpose of legislation. Interestingly, "spam" is not statutorily defined in most jurisdictions. In many countries, including the United States and Australia, "spam" implies that a "commercial element" exists and is further qualified by being "unsolicited" (ie unauthorized by recipients). It is important to note that this definition pays no attention to non-commercial emails. In short, anti-spamming legislations in most jurisdictions are enacted to regulate "unsolicited commercial email".[22] However, there still remains the question of whether these classification systems are effective for the purpose of legislation.

A. The United States

Section 2(a) of the "Congressional Findings" of the US CAN-SPAM Act[23] is largely about "pornography" and "marketing" information obtained through spam. Section 3(2) defines "commercial electronic mail message" as "any electronic mail message the primary purpose of which is the commercial advertisement or promotion of a commercial product or service." Moreover, expressed exemption is given to transactional and relationship messages under the same subsection, which the Act itself does not regulate.[24]

Identifying spam by its commercial nature gives rise to regulatory problems. Firstly, the Act fails to address the pornography issue, which is more often sent on an individual / personal basis unrelated to commercial purposes. Starting from s 2(a)(2) onwards, the whole CAN-SPAM Act only contains provisions about regulating commercial spam with marketing purposes. Secondly, two types of spam are indirectly "legalized" as a result, namely those

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spam. While internet users generally agree that spam is unsolicited email from a sender you don't know, there is plenty room for fuzziness around the edges."

19 *Ibid* at 18. "Women are more bothered than men by everything about spam, whereas young people are more tolerant to spam than older people."

20 *Jacobellis v Ohio*, 378 US 184 (1964) at 197. Cited in Kendrick, J P, "Anti-Spam Laws Force Emerging Internet Business Advertisers to Wear the Scarlet 'S'", (2003) 7 *Journal of Small and Emerging Business Law* 563.

21 National Office for the Information Economy, *Spam – the Final Report of the NOIE Review of the Spam Problem and How It Can Be Countered*, 2003, at http://www2.dicta.gov.au/_data/assets/file/13050/SPAMreport.pdf.

22 In the US, the term "unsolicited commercial electronic mail" is used; whereas in Australia, the term "unsolicited commercial electronic messages" is used.

23 The long title of the *CAN-SPAM Act* is "Controlling the Assault of Non-solicited Pornography and Marketing Act of 2003", at http://www.spamlaws.com/federal/108s877.html. It takes effect on 1 January 2004.

24 Section 3(2) of *CAN-SPAM Act*:

> (A) IN GENERAL – The term "commercial electronic mail message" means any electronic mail message that primary purpose of which is the commercial advertisement or promotion of a commercial product or service (including content on an Internet website operated for a commercial purpose).
>
> (B) TRANSACTIONAL OR RELATIONSIHP MESSAGES – The term "commercial electronic mail message" does not include a transactional or relationship message.

which are non-commercial and those which fall under the exceptions.[25] This effect of "legalizing" spam can also be found in the business-to-business situations under the United Kingdom's Electronic Communications Directive.[26] Similarly, since the enactment of a regulation substantially similar to the CAN-SPAM Act, spam has increased by a factor of 11 within three months in Korea and in fact, a lot of it came from well-established and well-financed stores.[27] Although 21 states in the US have their respective State Laws against spamming, with more stringent regulations and penalties (eg in California[28]), the CAN-SPAM Act is still able to overrule the individual State Laws. Therefore, it is very likely that the spammers will continue to exploit the legislative defects until they are corrected by further amendments.

B. Australia

The Australian *Spam Act 2003* also regulates commercial spam by a two-tier system.[29] At the first-tier, the distinction is made between commercial (which is regulated under the Act) and non-commercial (which is not regulated). At the second-tier, within the group of commercial spam, those which are further classified under Schedule 1 as designated spam will be subject to some less stringent requirements than non-designated ones. Unfortunately, a careful examination of the Act will again disclose its insufficiencies.

Under Schedule 1 clause 2(a), the criteria to be considered as a "designated commercial email" is that the message consists of no more than factual information and any of the following additional information (where different methods available to identify the sender are provided in the subsequent list). Clause 2(b) says, "assuming that none of that additional information had been included in the message, the message would not have been a commercial electronic message". In essence, even when an email is *prima facie* commercial in nature under the first-tier classification, if the message only contains factual information but does not disclose the identity of the sender, it will fall under the non-commercial category and attract no liability or regulations from this Act. Hence ironically, factual messages which honestly disclose the identity of the senders will be subject to regulations (though less severe than purely commercial ones) while those concealing their identities will not be regulated at all. This is illogical and should not have been the true intention of the Act.

In comparison, the two-tier system of the Australian Spam Act is undoubtedly more sophisticated than the US CAN-SPAM Act. However, as there is only little time to draft the Act before its commencement (which became effective from 10 April 2004), the definition of

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25 *Supra* note 11. "Detractors claim that the CAN-SPAM Act has created a safe haven for spammers, by effectively legalizing spamming." *Supra* note 34. "The CAN-SPAM Act does not outlaw all unsolicited e-mail, but in fact legalises some forms of spam."

26 *Supra* note 11. The United Kingdom has the *Privacy and Electronic Communications Regulations 2003* (EC Directive) where express exception is made to direct marketing e-mails where the sender has obtained contact details of the recipient in course of sale / negotiation to promote similar products and services as the sale / negotiation, and the recipient has been given a simple means of refusing the use of his contact details for purpose of direct marketing.

27 *Ibid* at 26.

28 Lacy, S, "Proofpoint Joins Anti-Spam Crowd", (2003) 21(10) *Silicon Valley / San Jose Business Journal* 3. California, with its fast technology developments from the Silicon Valley, has laid down the most stringent state regulations against spamming as disincentives for people to take advantage of the email system for immoral purposes. At the same time, it also has the largest number of Anti-spam technology companies as local supportive measures.

29 The long title of Australian *Spam Act* is: "An Act about Spam, and for related purposes", at http://scaleplus.law.gov.au/html/comact/11/6735/top.htm.

commercial spam has yet to face more challenges, tests and amendments in order to make it fit for practical applications.

C. *Hong Kong*

From the above analysis, it shows that the current anti-spamming regulatory regimes available are far from perfect and fail to address the problem of non-commercial spam which may be equally hazardous. Moreover, the Hong Kong Anti-Spam Coalition has suggested that we use the "unsolicited bulk email or unsolicited commercial email" as our legal definition of "spam".[30] This approach of giving "spam" two distinct meanings implies that not all bulk emails are commercial in nature. It seems that our local understanding of spam has stretched to include non-commercial / personal bulk mails.

IV. *Different Approaches to Anti-Spamming Legislation in Hong Kong: A Matter of Spammers' Intention*

In light of the above, it is the writer's suggestion that "spam" be redefined with a *broader scope* as "unsolicited messages sent in bulk" to make it more *neutral* for the sake of legislation. This approach not only avoids the loopholes, which are inherent in our current definition of spam, of having to regulate spam as a whole but also conceptualises the varying standards of public sentiment regarding spam (eg "commercial vs person nature" or "size vs frequency") into a unified standard. The ultimate aim of anti-spamming legislation is to strike a proper balance between cyber freedom and spamming regulation. A neutral definition of spam helps to achieve legislative flexibility because it can further be divided into "spam sent with the right purpose but wrong means" and "spam sent with a wrong purpose, notwithstanding its means". Different levels of regulations will then be enacted and applied to each category accordingly. It then follows that two major legislative concerns have to be considered, namely *"what"* is needed to be legislated and *"how"*?

A. *A Total Ban for "Spam Sent With a Wrongful Purpose Notwithstanding Its Means"*

1. *What to Legislate?*

Spam enclosing virus, pornography, fraud, false claims, Nigerian Bank Scam, pyramidal-marketing etc are all examples of spam sent with a morally culpable purpose.[31] Reference can be made to the US CAN-SPAM Act, where meaning of "fraud" is provided under s 4 and "misleading information" under s 5(a) which includes, but not limited to, concealment of sender identity, misrepresentation of subject line and misleading content.

Dishonesty is a common feature inherent in all spam sent with a wrongful purpose, in which the burden outweighs the benefits it brings. The sender is deemed to be morally culpable. Hence, these bulk and unsolicited messages, regardless of the means they are passed on, for instance fax, postage or mobile SMS messages, should be regulated. Since email is the least costly and most commonly used medium to spread spam, special legislation targeting at a total ban of email spam deserves efforts and attention.

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30 *Supra* note 8.

31 Rimmers, S W, "Death to Spam – A Guide to Dealing with Unwanted Email", 2003, at http://www.mindworkshop.com/alchemy/nospam.html.

2. How to Legislate?

Imposing strict rules with severe punishment may be one way to achieve total banning. This not only helps to ensure effective deterrence for spam sent with a wrongful purpose[32] but also lays down a good foundation for the development of the culture of cyber-honesty.

a. The United States

The US CAN-SPAM Act has been criticised for its light penalties. For instance, person sending fraudulent spam will only be liable for imprisonment for not more than 5 years.[33] Even if there is a forfeiture clause, only the traceable profits and computer equipment will be forfeited.[34] In contrast, the California State Law imposes a fine of up to US$1 million for each piece of spam.[35]

b. Australia

The Australia Spam Act has been widely applauded for its heavy penalties "coupled with a provision requiring forfeiture of profits from spam" and opt-in regulation which combine together to serve as a sufficient "disincentive to any spammer located in Australia".[36] Such heavy punishments explain why "spamming can never be profitable in Australia".[37] For example, s 24(1) provides that recovery of penalties is "as the court determines to be appropriate." There is no cap in relation to punishment which may restrict or lessen the severity of penalty.

c. Hong Kong

To deter wrongful purpose spam in Hong Kong, it appears necessary to set heavier penalties similar to Australia's. Criminal punishment should involve forfeiture of profits as well as a fine decided at the court's discretion; whereas civil actions should strengthen to allow local ISPs to take legal actions against specific offenders.[38] In addition, it has been suggested that the HKISPA be granted the power to remove any party's rights to advertise through emails for regulatory purposes.[39]

B. Minimum Legislation for "Spam Sent With a Proper Purpose But Wrong Means"

1. What to Legislate?

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32 *Supra* note 11. It is said that "penalties need to address the severity of the crime . . ."

33 Section 4, *CAN-SPAM Act* (US), amendment to s 1037(b) of Chapter 47 of Title 18, *United States Code*.

34 *Ibid* at 33.

35 Trussell, J, "Is the CAN-SPAM Act the Answer to the Growing Problem of Spam?", (2004) 16 *Loyola Consumer Law Review* 175.

36 *Supra* note 11.

37 *Supra* note 11.

38 Kosiba, J L, "Legal Relief from Spam-induced Internet Indigestion", (1999) 25 *University of Dayton Law Review* 187. Civil action is more applicable to ISPs than individual citizen as ISPs are at a better position both in resources and technological support to track down spammers. Individual citizen may find himself unable to finance a civil action.

39 Office of the Telecommunications Authority, *Anti-SPAM – Code of Practice issued by HKISPA*, at http://www.ofta.gov.hk/junk-email/junk_email_eng.html. The long form of HKISPA is Hong Kong Internet Service Providers Association.

The email system is a useful communication medium both for persons and businesses, if used for a proper purpose. Yet, sometimes people are not aware that they are actually using it as a wrong means of communication. An example to illustrate this is a local pizza store may send the same promotional materials to untargeted recipients using either email or postage.[40] Frequently, most recipients who do not subscribe to this kind of promotional notification service tend to regard such emails as unsolicited spam, in which they can identify the sender as the pizza store and delete those emails immediately to free storage space. On the contrary, the postage printouts sent to "the residents" are more likely to be read and treated as legitimate commercials. Assuming that these promotional materials serve the same purpose of advertisement, it would seem ridiculous to punish companies who choose to use email (which is, in fact, more environmentally friendly) as a promotional strategy but allow others who use postage to go free.[41]

The aim of legislation is always to strike a proper balance between freedom and regulation, and there is no exception to the cyber world. Though cracking down spam is necessary, only minimum legislation, in contrast to a total ban, is required in cases where messages are sent with a rightful intent. There are, of course, policy reasons behind the rationale of minimum legislation, such as protecting personal and commercial freedoms, just to name a few. These reasons will be subsequently explained.

a. Personal Cyber-freedom – Freedom of Speech

Preserving individual freedom of speech, in particular in the cyberspace, is always a major concern within the US community. The CAN-SPAM Act has unavoidably been criticised because some provisions have the effect of limiting freedom of speech protected by the First Amendment of the US Constitution[42] which is equivalent to art 24 of the Basic Law in Hong Kong.[43] These harsh criticisms eventually pressed the US Government to look for justifications in enacting regulations against spamming. Fortunately, it survived this constitutional crisis and came up with four reasons which showed that there were indeed "greater interests" for the Government to protect *vis-à-vis* individual's freedom of speech in the cyber world.[44]

Hong Kong, in contrast, can take the initiative in preserving freedom of speech on the Internet through advocating minimum legislation regulating spam sent with a proper purpose. Hong Kong legislators can perhaps avoid much debate and misunderstanding over the notion of freedom of speech, if they legislate against spamming according to the distinction between having a morally acceptable as opposed to a morally culpable purpose.

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40 The pizza store illustration is taken from the actual practice of a local pizza chain which sends out identical promotional messages on monthly basis to mass undistinguished recipients.

41 Although "commercial promotion" is chosen as illustration, similar situation can arise from messages sent out of rightful noncommercial/personal purposes, eg useful information sharing, free data analysis, recruitment for voluntary helpers in social services etc.

42 *Supra* note 34. This article focuses on the competing interests of preserving the viability of email as a medium of communication or the need to protect Internet users' privacy rights, and whether the *CAN-SPAM Act* can survive the constitutional challenge regarding the First Amendment.

43 Article 24, *The Basic Law of the HKSAR of the PRC*, at http://www.info.gov.hk/basic_law/fulltext/. Freedom of speech is protected under art 24 of the *Basic Law*.

44 *Supra* note 4. The four "greater interests" are (1) reducing the system overloads that are a demonstrably crushing burden on network capacity; (2) preventing spammers from misappropriating others' services and identities; (3) preventing consumer fraud; and (4) reducing the heavy cost burden that spam shifts from the advertiser to the listener.

b. Commercial Cyber-freedom – Business Freedom

Similarly, minimum legislation is conducive to a better information flow, which further adds values to Hong Kong's market economy. Companies should be allowed to boost profit margins by using e-marketing strategy which is very cost-effective.[45] Furthermore, customers can be constantly informed of the companies' promotions, availability of alternatives for the same product and price-quality comparisons.[46] Consequently, minimum legislation can help create a level-playing field for companies by increasing competition, and reducing monopoly and market dominations. Spam is also essential for startup companies to compete with existing sellers without being discriminated due to lack of initial customer-base.[47] There is simply no substitute for startups to use mass email as a marketing strategy.[48]

On the other hand, spam recipients should be given a degree of autonomy over their cyberspace. They have the right to both receive and resist information. There will be automatic market adjustment that is if a company sends out messages which become a burden on the recipients, the company will in turn suffer from the negative image associated with the spam. In a nutshell, minimum legislation is a proper mechanism to effectively control the scope of spamming while maintaining the most business freedom.

2. How to Legislate: Opt-in vs Opt-out?

Regarding the issue of how to achieve minimum legislation, two options are available, namely "opt-in" and "opt-out". "Opt-in" refers to the "sending of information only at the recipient's request."[49] In the European Union (EU) legislation and the original California State Law, Opt-in is the preferred practice.[50] Supporters of Opt-ins claim that once an Internet user voluntarily agrees to receive messages from a sender, subsequent messages will not be unsolicited anymore. However, it is doubtful how Opt-in buttons can effectively reach potential receivers in the first place without causing spam. Moreover, it is not uncommon to have users voluntarily opt-in but then complain about getting the spam upon receipt of information.[51] Thus, the effectiveness of opt-in practice to reduce spam for receivers is questionable.

In contrast, opt-out refers to "messages which a recipient is expected to answer with a remove request" so to prevent any future correspondence.[52] Both the US CAN-SPAM Act and the

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45 *Supra* note 10. It is stated that there needs to be a control mechanism that will legitimise UCE (ie unsolicited commercial mails) to a certain extent so that legitimate businesses can still utilise this valuable marketing tool to reach those wishing to receive their electronic advertisements.

46 *Supra* note 19.

47 *Ibid* at 46.

48 "A Spam Law that Slams Small Business", *Business Week Online*, at http://www.businessweek.com/smallbiz/content/nov2003/sb2003113_4527_PG2.htm. Advertising on TV and radio are not as effective as email, and it may even take months to "get a good buzz out in the right journals".

49 "Opt-in-email", July 2003, at http://www.perbopedia.com/TERM/O/opt_in_email.hml.

50 "Data Protection: Anti-Spam Legislation Update", at http://www.allenovery.com/asp/infocus.asp?pageID=3716. The EU Electronic Communications and Privacy Directive 2002/58/EC, implemented in July 2003, give individuals right to "opt in" before receiving e-marketing. See also s 17529.1(o), Chapter 1 of Part 3 of Division 7 of the California *Business and Professions Code*. Article 1.8, Restrictions on Unsolicited Commercial E-mail Advertisers, *California State Laws*, at http://www.spamlaws.com/state/ca1.html.

51 Glube, J, "The Death of E-Mail Marketing?", 2003, at http://www.learnsteps4profit.com/antispam.html.

52 "Opt-in vs Opt-out", at http://www.euro.cauce.org/en/optinvsoptout.html.

Australian Spam Act have adopted this approach. Complaints against opt-out are based on the principle that receivers never consent, ask or give permission to receive spam in the first place. Why should they bear the extra burden of clicking opt-out buttons to delist themselves?[53] Secondly, opt-out buttons are confirmation for spammers of a responsive email address.[54] Most opt-outs are ignored and hence, become ineffective.

At present, there is no single solution of whether the opt-in or opt-out practice is more preferable if we are to legislate anti-spamming laws in Hong Kong. To be consistent with the liberal approach used in regulating right-purposed spam, opt-out might be a more appropriate option.

V. Conclusion

Recent survey has confirmed the need to legislate against spamming in Hong Kong. Albeit so, the first issue our legislators have to resolve is to properly define "spam" apart from its common sense conception. After reviewing the US and the Australian anti-spam models, it seems that the way forward is to redefine spam broadly and neutrally, and legislate according to spammers' intent in sending out unsolicited emails so to achieve flexibility. Spam sent with a morally culpable purpose deserves a total ban, whereas the morally rightful spam only requires minimum legislation. Last but not least, it is necessary that legislators, Internet users and the technology sector cooperate to bring a desired outcome when attempting to enact anti-spamming laws.

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53 *Supra* note 10.
54 *Supra* note 17.

REFORMING HONG KONG'S LAW ON INVOLUNTARY MANSLAUGHTER

JING-JING ZHAO*

In this article, the author recommends the law on involuntary manslaughter in Hong Kong be rationalized by way of codification. Through detailed analysis of English authorities and the recent reforms in Canada and Australia, the author is of view that the law on involuntary manslaughter should be rearranged into two new offences differentiated only on the basis of mens rea, *ie.* (Cunningham) *Reckless killing" and the other lesser offence of "killing by gross carelessness". As such, apart from the special offences of infanticide and causing death by dangerous driving, it is proposed that the general homicide offences be arrayed in four degrees: murder, voluntary manslaughter, reckless killing and killing by gross carelessness. This will limit the breadth of the current Manslaughter offences, and to spell out in perspective the culpability of the defendant's state of mind (rather than the consequence of his conduct) in the gradation of labelling of the offence and the sentencing.*

I. Introduction

In the matrix of Criminal Law, the law on homicide governs the human conduct which leads to consequences of top severity. Nonetheless, these conduct, that leads to the consequence of death to an often innocent party, do not always attract the heaviest punishment. This is because of the orthodox subjectivist philosophy in imposing criminal liability on an individual is that the defendant's state of mind (*mens rea*) at the time of committing the alleged conduct must be morally culpable.[1] This legal theory, together with massive parts of the English legal system, had been transplanted to and is deeply rooted in Hong Kong. They are enshrined as a fundamental common law requirement for proof of *mens rea* in every offence. The essential role of *mens rea* marks the different labelling between two major homicide offences, namely, murder and manslaughter, as well as measures the gradation of sentencing in the latter case. These two important offences are largely ruled by an accumulation of case law; in particular, the wide-embracing involuntary manslaughter is completely dependent on a repository of inconsistent authorities, which inevitably results in uncertainties of the law and difficulties in application.

It is submitted in this article that the law on involuntary manslaughter should be rationalized in the form of codification. In the first part, the relevant statutes and case law will be studied, in order to illustrate how contemporary homicide law is formed and administered. In the second part, with the discussion of competing rationales behind different common law principles, the most obvious uncertainties in the law of involuntary manslaughter will be closely examined. The effect such uncertainties on the administration of criminal justice will also be considered at the end. In the third part, frontier developments in both Canadian and Australian homicide law will be presented, which are positive attempts to address the problems that have permeated our jurisdiction. In the fourth part, the ongoing reform of the law on involuntary manslaughter in England will be investigated and similar programs in Hong Kong will be recommended, bringing us back to the theme of this article.

II. Status quo of the Homicide Law in Hong Kong and England

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* The author would like to express her gratitude to Mrs Janice Brabyn, and to the editors of HKSLR, for their invaluable comments on earlier drafts of this article.

1 The Law Commission Report No 237, *Legislating the Criminal Code: Involuntary Manslaughter* (1996), para 4.4-4.6.

Currently in Hong Kong, legislated homicide law is scattered in three ordinances: the *Offences Against the Person Ordinance*[2], the *Homicide Ordinance*[3], and the *Road Traffic Ordinance*[4]. Apart from homicide in special circumstances, such as the offences of Infanticide and Causing Death by Dangerous Driving, definitions of murder and manslaughter are still left to the common law. Although both murder and the various types of involuntary manslaughter bears the same *actus reus* of causing death of a human being, the *mens rea* of murder is well settled law.[5] In contrast, the *mens rea* of different types of involuntary manslaughter is much open to debate.

Following long lines of authorities, it is now generally accepted in England that there are two types of involuntary manslaughter: manslaughter by an unlawful and dangerous act (constructive manslaughter) and manslaughter by gross negligence, both different from murder by the absence of intention to cause death or serious injury.[6]

All intentional "unlawful" act causing death was regarded as constructive manslaughter, until 1937 when the House of Lords unequivocally exclude civil unlawfulness (such as a tort of negligence or a breach of contract), thus confining constructive manslaughter to an act involving the commission of a criminal offence.[7] Before the factor of dangerousness was added to the definition, this type of manslaughter could be truly 'constructive' where death was unfortunately caused by an unlawful act in which no risk of bodily harm can be reasonably discerned at all. Therefore, by the requirement that the act is such that "all sober and reasonable people would inevitably recognize [that it] must subject the other person to at least some risk of harm . . . albeit not serious harm"[8], liability for manslaughter by an unlawful act is no longer rested solely on the consequences of the act, but also on the defendant's mental state, though objectively.

With regard to manslaughter by gross negligence, its four-prong formula set out in *R v Bateman is* now restated as good law, consisting of namely, (1) the defendant's pre-existing duty; (2) his act or omission in breach of such duty; (3) causing death of another; and (4) the breach involving gross negligence.[9] However, the meaning of 'gross negligence' is never capable of being clearly explained, which must have been the primary reason why a strong line of '*reckless manslaughter*' was thus developed and thrived for over a decade since the 1980s. The diversion to "*Caldwell* recklessness" test promoted by Lord Roskill's famous trilogy decisions[10] was extensively followed, to the extent that almost displaced the gross negligence test. Only after the case of *R v Adomako*[11] was the original *Bateman* formula

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2 *Offences Against the Person Ordinance*, (Cap 212). Sections 2 and 7 regarding sentencing matters of murder and manslaughter; comparable with ss 47C-47D Offences against the Person Act 1861(UK); comparable with the *Infanticide Act 1938* (UK).

3 *Homicide Ordinance*, (Cap 339). Regarding circumstances in which a charge of murder shall be reduced to (voluntary) manslaughter, comparable with the *Homicide Act 1957* (UK).

4 *Road Traffic Ordinance, (Cap 374)*. Section 36, comparable with the *Road Traffic Act 1991* (UK).

5 *Mens rea* refers to the intention to kill or intention to cause grievous bodily harm; see *R v Moloney* [1985] AC 905, *Attorney General's Reference (No3 of 1994)* [1998] AC 245, reaffirmed in *HKSAR Lau Cheong & Another* [2002] 3 HKC 146 (CFA).

6 *Supra* note 1 at para 1.4.

7 *Andrews v DDP* [1937] AC 576.

8 See *R v Church* [1966] 1 QB 59, explaining the factor of dangerousness as first introduced in Larkin [1943] KB 174; later affirmed in *DPP v Newbury* [1977] AC 500.

9 *R v Bateman* [1925] 19 Cr App R 8

10 *Government of USA v Jennings* [1983] 1 AC 624, *Seymour* [1983] 2 AC 493, *Kong Cheuk-kwan* [1986] HKLR 648 (PC).

11 *R v Adomako* [1995] 1 AC 171.

finally restored as the appropriate basis for liability in this branch of manslaughter. Nonetheless, the influence of reckless manslaughter seems to have lingered on: The Law Commission itself appeared reluctant to totally abandon this tag, and in its Report on Involuntary Manslaughter, "*Caldwell* recklessness" is frequently mentioned together with manslaughter by gross negligence. This maybe be explained by that *Caldwell* recklessness does provide a similar concept to a very high level of negligence and hence a convenient way to explain the latter.

Hong Kong adopts the standard English formulation of constructive manslaughter, taking the same basis of liability in the Specimen Directions.[12] Yet the situation with manslaughter by gross negligence is arguably cloudier, since there has not been in Hong Kong an outright approval of *Adomako*[13]. As such, the Privy Council decision of *Kong Cheuk-kwan*[14] is yet to be openly overruled by the CFA.

III. Contemporary Confusions in the law on Involuntary Manslaughter

As we have seen, the law on Involuntary Manslaughter in Hong Kong and in England is left completely in the hands of the Judiciary rather than the Legislature. Although voluminous judicial discussions have pieced together comparatively clear pictures of the two types of Involuntary Manslaughter, a satisfactory state of the law has not yet been achieved. There are ample inconsistent precedents defining their ingredients.

Starting with unlawful act manslaughter, two problems arise as to the "unlawfulness" factor. Regarding the requirement that the alleged act must involve the commission of an offence, there has been doubt whether it must be a specifically identifiable offence in the statutes or at common law[15]. Even if a specific offence is identified, once there was a challenge to the necessity of proving both the *actus reus* and the *mens rea* of this offence, in view of the fact that manslaughter itself is merely a basic intent offence.[16] More problematic is the objective "dangerousness" factor by which some risk of physical harm, no matter how trivial, should be recognized by all sober and reasonably people. There have always been concerns that this scope of risk is too sweepingly defined. Take, for example, if a Defendant pushed a victim, this would only have amounted to a minor offence of common assault involving of course *some* risk of injury but not an obvious risk of serious injury or even death, the fact that the victim stumbled and knocked his head against the pavement thereby incurring a fatal injury would render the defendant to be caught by this unlawful act manslaughter. Such 'one unfortunate blow' cases have aroused heated academic debates in England and attracted the Law Commission's focus upon the potential injustice therein.[17] Moreover, with respect to a further question whether the dangerousness must be directed at the victim, later authorities[18]

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12 *Supra* note 11.

13 *Supra* note 11.

14 *Supra* note 11.

15 *Cato* [1976] 1 WLR 110.

16 *DPP v Newbury* [1977] AC 500. Although there is another line of authorities (*Lamb* [1967] 2 QB 981, *Gray v Barr* [1971] 2 QB 544, *Scarlett* [1993] 4 ALL ER 629) saying that both the *actus reus* and the *mens rea* should be proved, those cases were all concerned with an identified offence of assault or battery, which are also basic intent offences. If the alleged offence involved is a specific intent offence, for example criminal damage, the Newbury argument could amount to a forceful objection.

17 *Supra* note 1, para 3.5-3.6, 4.17-4.20, 4.33-4.43.

18 *Mitchell* [1983] QB 741, *Goodfellow* [1986] 83 Cr App R 23, *A-G's Reference (No.3 of 1994)* [1998] AC 245.

held that it need not, and that the defendant should be responsible for the death of *any* person subject to a risk of injury caused by his unlawful act, even though he was targeted by the defendant. If we accept this proposition, the breadth of unlawful act manslaughter would all the more be widened, so that if the victim was a mere bystander to a fight and was dragged down by the person who had been punched by the defendant, the defendant would be liable for his accidental death.

Now we turn to the arena of gross negligence manslaughter. Putting aside the issue whether, so long as the statutory offence of causing death by reckless driving has been abolished in Hong Kong, where *Kong Cheuk-kwan*[19] no longer represents the correct law, *Adomako*[20] do not eliminate all the doubts even if it is assumed to be followed by Hong Kong judges. First, how do we determine if a pre-existing duty has already arisen in a case, and how does the proper standard of care vary according to each duty? That "the ordinary principles of the law of negligence apply"[21], that the common behavioural duty of every person not to injure another and the obvious duties arising from contractual and certain social relationships can be easily identified. However, when such apparent indications are absent, does the defendant's voluntary undertaking to care for the victim implicitly impose upon him a duty? The English Court of Appeal answered affirmatively in *Stone and Dobinson*[22], but this case has been subject to criticism that it excessively extends the scope of duty of care by confusing the meaning of the word "undertake"[23]. From a more general perspective, if it is the potential risk that would be created by the defendant's act or omission that give rise to a correspondent duty of care, then we should ask ourselves the next question,: what precise risk could make such an act or omission "grossly negligent"? For years, a risk of injury to health and welfare of the victim, as asserted in *Stone and Dobinson*[24], had been held to be sufficient, and this has also been followed in Hong Kong.[25] But in the recent authority *Adomako*[26], the House of Lords proposed a much higher threshold i.e. that the risk is one of death. This brings the situation in Hong Kong into speculation.

IV. Developments in Canada and Australia

A. Canada

From the above, it could be seen that so far, Hong Kong has been following English case law to a large extent, thereby naturally troubled by many of its uncertainties. The same had once occurred to Canada and Australia, yet ambitious legislative actions were taken to resolve the problems.

Canada made its early move in 1985 by enacting a general Criminal Code which is applicable nationwide, except being subjected to other relevant Acts in three provinces of the country.[27] Under Part VIII, 'Offences against the Person and Reputation', Murder and Infanticide, the

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19 *Supra* note 14.
20 *Supra* note 11.
21 *R v Adomko* [1995] 1 AC 171 at 181A.
22 *Stone and Dobinson* [1977] 1 QB 354.
23 Williams, G, *Textbook of Criminal Law* (London: Stevens, 1983), pp 262-263.
24 *Supra* note 22.
25 *Cheung Ping-mui* [1991] 1 HKC 302.
26 *Supra* note 11.
27 Section 8(1), *Criminal Code*.

two narrow homicide offences, are given clear-cut definitions.[28] While the much broader offence of manslaughter covers all the remaining culpable homicides,[29] a separate offence of motor homicide is not present.[30]

Apart from retaining the common law rule on *mens rea* for murder, s 229 also codified the principle of transferred malice. Most notably, it invented a fresh kind of *mens rea*: unlawful objective combined with *Caldwell* recklessness of a risk of death.[31] This type of murder is an upgraded version of unlawful act manslaughter, where both the scope of unlawfulness and the culpability of the defendant's mentality are refined. The defendant only has to harbour an unlawful objective in mind but not necessarily committed any act of crime. At the same time, the foreseen or foreseeable risk involved in his act is stringently restricted to that of death.

Though the two forms of manslaughter are not expressly divided in legislation, save for voluntary manslaughter appearing as mitigated murder under s 232, the rest can be recognized as involuntary manslaughter, which perceivably consists of two general types.[32] One is causing death by an unlawful act absent of the abovementioned three grounds of *mens rea* for murder, which can be seen as our current unlawful act manslaughter in a diminished form. The other is causing death by criminal negligence, with 'criminal negligence' as explained in an individual section.[33] The confusion about the pre-existing duty is absolved by a demarcation of the acts of commission and acts of omission. In the latter case, the duty is only those specifically imposed by law, while in the former, the duty is the reasonable duty of care in tort law. Legal duties are provided in detail under a separate title of "Duties Tending to Preservation of Life".[34] In particular, s 217 appears to be a designed legislative recognition of the implicit imposition of duty by the defendant's undertaking, thus upholding the rule as set down in *Stone and Dobison*[35].

It is submitted that the Canadian *Criminal Code* has successfully solved much of the problems discussed in the previous parts of this article. By reallocating the most culpable level of manslaughter into the realm of Murder, it restrains the overreaching scope of *mens rea* manslaughter. The troublesome mutual influence between motor manslaughter and a distinct traffic offence is avoided by confining special homicide offence to a single infanticide. Questions about the gradation of risks and the imposition of legal duties are also expressly dealt with, where a set of consistent common law principles are legislated. The traditional homicide law structure is not altered, but well clarified by these renovations.

B. Australia

Turning to Australia, the federal states operate various criminal laws within their own territories. Five out of the eight states have legislated on the definitions of murder and manslaughter.[36] Similar to Canada, these states expanded the *mens rea* for murder: unlawful

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28 Sections 229 and 233, *Criminal Code*.
29 Section 234, *Criminal Code*.
30 Sections 249-264, *Criminal Code*.
31 Section 229(c), *Criminal Code*.
32 Section 222(5), *Criminal Code*.
33 Section 219, *Criminal Code*.
34 Sections 215-217, *Criminal Code*.
35 *Supra* note 22.
36 Sections 12 and 15, *Crimes Act 1900* (Australian Capital Territory); s 18 *Crimes Act 1900* (New South Wales); ss 162 and 163 *Criminal Code of the Northern Territory of Australia* (Northern Territory of

purpose to include a reckless indifference to risk to human life.[37] This was added as a new ground. However, apart from the ordinary justifications and excuses for homicide and the mitigation for murder, no particular provisions regarding manslaughter as those in the Canadian *Criminal Code* were made, leaving the law on involuntary manslaughter a matter based on common law.[38]

Notably, a Model Criminal Code to be applied throughout Australia is in its process of drafting.[39] In the proposed Criminal Code, the *mens rea* for murder is specific intention to cause death or a general "recklessness about causing death" (ie *Cunningham* recklessness: actual foresight of the risk of death and unjustifiably taking such risk). It has been recommended that an intention to cause serious bodily harm without such a recklessness to life should be excluded. Instead, in view of the abolition of the partial defences of provocation and diminished responsibility, an intention to cause or (*Cunningham*) recklessness about causing serious harm should be the *mens rea* for manslaughter; so that the offence of manslaughter as proposed above is purely involuntary or unintentional. On the other hand, causing death by negligent conduct is taken as the third type of homicide offence titled 'dangerous conduct causing death'. This new offence is intended to displace the current common law manslaughter by an unlawful and dangerous act and to encompass manslaughter by gross negligence. The fact that negligence involved must be about "causing the *death* of any other person" stresses the correlation between the culpability of the defendant's mind and the consequence of his act. Special homicide offences of infanticide and vehicular killing are both recommended to be abolished.

The proposed revision to the Australian *Criminal Code* is a rather fundamental reform to the current homicide law, thoroughly restructuring all the homicide offences. It is certainly well-reasoned, yet the necessity of such an entire reformulation and the possibility of confusions with pre-reform precedents in actual application is doubted. Whether the draft is to be adopted in its present shape is yet to be seen.

V. Conclusion: Reforms is a Pressed Need

Through a review of Canadian and Australian developments in this respect of law, it can be seen that the insistence on a fault element (or a guilty mind) is gradually weakening. This trend is also reflected in the ongoing English reform of homicide law. Dealing separately with the law on involuntary manslaughter, the Law Commission's Report (No. 237)[40] suggests rearranging it into two new offences differentiated only on the basis of *mens rea*, displacing the current distinction of the two offences. The first suggested offence is "(*Cunningham*) reckless killing": the defendant actually foresaw a risk of death or serious injury nonetheless unreasonably took the risk thereby causing death. The other lesser manslaughter offence is

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Australia). ss 302 and 303 *Criminal Code 1899* (Queensland); ss 278-280 *Criminal Code* (Western Australia).

37 With technical variance in some respect in the Northern Territories (the unlawful purpose of the new type of *mens rea* be confined to specified severe offences only) and Western Australia (sub-categorization of "wilful murder" with particularly an intention to kill as the *mens rea*, and 'murder' with the other two types of *mens rea*).

38 Yet in the Northern Territories, Queensland and Western Australia, there are provisions specifying the legal duties, conceivably in order to assist the law regarding gross negligence manslaughter. All of them adopt *Stone and Dobinson*, *supra* note 22, approach of imposing a duty.

39 Model Criminal Code Officers Committee of the Standing Committee of Attorney-General, *Discussion Paper: Model Criminal Code*, Chapter 5 '*Fatal Offences against the Person*', 1998.

40 *Supra* note 1.

"killing by gross carelessness": there being a risk of death or serious injury reasonably foreseeable by the defendant, he either acted in a lawful manner yet below what can be reasonably expected, or, he intended to cause or is reckless (in *Cunningham* sense) about unlawfully causing some injury, thereby causing death.

Retaining the special offences of infanticide and causing death by dangerous driving, it is said that the general homicide offences should then, according to the proposed reform, be arrayed in four degrees: murder, voluntary manslaughter, reckless killing and killing by gross carelessness.[41] This ranking truly achieves the English Law Commission's purpose to limit the breadth of current manslaughter, and to mirror precisely the culpability of the defendant's mind (rather than the consequence of his conduct) in the gradation of labelling and sentencing[42]. Notwithstanding the suggestion that a fifth level homicide of "unforeseeably causing death with an intention only to inflict minor injury" might be added at the lower end, the Home Office had largely endorsed the subjectivist approach taken by the Law Commission and its Draft Involuntary Homicide Bill put forward.[43]

Regrettably, Hong Kong is lagging behind in this area of law. Though judges in various circumstances appreciated the difficulties in sentencing such offences,[44] little dissatisfaction about the unsatisfactory state of the law was expressed. However, if we keep the current law, while England and Australia are actually implementing those reforms that have been earnestly pursued, the laws on involuntary manslaughter in those major common law jurisdictions would be substantially dissimilar to Hong Kong's. Predictably, we would then find ourselves in a handicapped state without comparable foreign legal rationales, left with the out-dated principles. More importantly, this top section of the criminal law is forever a most contested arena of fundamental human rights and is of the greatest public concern. The increasing emphasis on a subjectivist doctrine represents the widely welcomed human-rights-conscious development. Therefore, reforms in this direction must be an inevitable uptrend.

It is astounding to find that there is little in-depth review of the law on involuntary manslaughter in Hong Kong or academic discussion on this important point of law in the last decade. For reasons advanced above, I am of view that the Law Reform Commission's attention and other legislative actions with respect to timely reforms in this area is urgently needed.

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41 *Ibid* at para.1.9.

42 *Ibid* at para.1.5.

43 Home Office, *Reforming the Law on Involuntary Manslaughter: the Government's Proposals*, 2000, pp 9-11, 27.

44 *HKSAR v Liu Kwai Wing* [2002] 2 HKC 388; *HKSAR v Reynaldo* [2000] 4 HKC 37; *The Queen v Chan Man-Tung* [1996] 125 HKCU 1, 1995, No.553 (Criminal); *HKSAR v Lam Wai Man* [2000] 2 HKC 550; *R v Chang Wai Kwan* [1994] 1 HKC 301; *The Queen v Hang Wai-kwan* [1994] 2 HKCLR 28; *R v Lo Bing Sun* [1994] HKLY 423.

PROPERTY RIGHTS IN INDIVIDUAL HUMAN GENETIC MATERIALS FOR PROTECTION AGAINST COMMERCIAL EXPLOITATION IN GENETIC RESEARCH

VICKY WAI-YU CHEUNG*

The author opines that current legal safeguard is insufficient to protect human genetic material from commercial exploitation in genetic research. Starting with a general framework of genetic research and research sources, the author then outlines current legal safeguards available to genetic material donors on both international and national levels, and highlights the limitations of such safeguards. The case of Moore v Regents of the University of California *is discussed at length as an illustration of certain recourse donors may have against researchers. The author concludes that conferring proprietary rights upon human genetic materials and body tissues in conjunction with the need for informed consent is the best solution, as compared to holding researchers under a fiduciary duty or to solely rely on the doctrine of informed consent.*

I. Introduction

With the expansion of biotechnology and genetic research, body tissues and human genetic materials are increasingly utilised in advancing the many aspects of science. "Technology and resources generated by the Human Genome Project and other genomic research are having major impacts on research across the life sciences".[1] Doubling in size in 10 years, the US biotechnology industry generated revenues totalling more than US$48.5 billion in 2001.[2] The rapid progress of the industry also realises the growing trend of commercialisation of body materials and biotechnological products. Biotechnology companies sought for patents of newly discovered isolated genes or proteins derived from human DNA or pharmaceutical inventions based on those genes and proteins. "As of the end of 2001, the US Patent and Trademark Office had issued over 6,500 patents covering gene and open reading frame sequences (DNA sequences that code for proteins). Of these, over 1,300 patents of those patents were for human genes or open reading frames".[3] However, individuals who agree to donate tissue and DNA samples are not often informed about the full range of uses for their genetic information, particularly the lucrative economic benefits that may be derived from their donation. "They have never been party to the multimillion-dollar agreements between research institutions and pharmaceutical companies that have become routine in the world of biotechnology".[4] Informed consent alone is now by no means sufficient to cope with the many controversial issues that arise due to the widespread commercial exploitation of genetic research. There is an increasing need in recognising a means to address the rights an individual holds over his own human genetic materials. This paper proposes property rights be conferred in human genetic materials to ensure adequate protection against commercial exploitation in genetic research.

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1 "Genomics and its impact on Science and Society", at http://www.ornl.gov/sci/techresources/Human_Genome/publicat/primer2001/7.shtml (visited on 26 May, 2004).

2 *Ibid.*

3 "Biotechnology Industry Organisation – Primer: Genome and Genetic Research, Patent Protection and 21st Century Medicine", at http://www.bio.org/ip/primer/genesequences.asp (visited on 26 May 2004).

4 Tokar, B, "Your Genes, Owned by Others – Mining Humanity", at http://www.progress.org/tokar01.htm (visited on 26 May 2004).

Part I provides the background information to understanding genetic research and the problem of commercialisation of human body materials, highlighting the need to protect human genetic materials against this form of exploitation. Part II offers an overview as to the current forms of protection and rights an individual enjoys over his genetic materials and body tissues in relation to genetic research. Part III presents the famous US case of *Moore v Regents of the University of California*[5] as an illustration of the common issues which arise in commercial exploitation of human genetic materials and body tissues. The inadequacies of the current safeguards would be examined and additional protection is called for. Part IV puts forward the "property" approach as a way of protecting individual genetic materials and considers the controversies that may arise. Lastly, Part V concludes that the "property" approach is suitable and necessary in dealing with the matter in issue and suggests that such rights may be extended to cover body tissues to ensure more practical protection.

II. Part I

A. Background

This section provides background knowledge of DNA and genetic research, followed by an overview of the forms of commercialisation of genetic research and possible exploitation which ensue. The understanding of these reveals why DNA qualifies for special protection.

B. Understanding Genetic Research

1. Human Genetic Materials – DNA and their Particularities

The human gene is the fundamental physical and functional unit of heredity[6] consisting of a "lengthwise span of DNA[7]".[8] The genetic makeup of each individual is unique and therefore makes each person distinguishable from the other. Geneticists only need a small amount of DNA to carry out their research, and may generate a wealth of information.[9] Genetic materials (the DNA) contain information which is vital, profound and very personal and could serve as identification purposes. Social and personal habits may also be revealed.[10] The encoded information in DNA is also an important resource that would bring vast benefits to medical and scientific research. It has the potential to tell us a great deal about our heritage

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5 *Moore v Regents of the University of California*, 793 P 2d 479 (Cal 1990).

6 Gene: A gene is an ordered sequence of nucleotides located in a particular position on a particular chromosome that encodes a specific functional product (ie a protein or RNA molecule). US Department of Energy Office of Science, "Genome Glossary", at http://www.ornl.gov/sci/techresources/Human_Genome/glossary/glossary_g.shtml (visited on 12 April 2004).

7 DNA: The molecule that encodes genetic information. DNA is a double-stranded molecule held together by weak bonds between base pairs of nucleotides. *Ibid.*

8 Farrell, M C, "Designer DNA for Humans: Biotech Patent Law Made Interesting for the Average Lawyer", (1999/2000) 35 *Gonzaga Law Review* 515, p 519.

9 Dekkers, W J M and Ten Have, H A M J, "Biomedical Research with Human Body 'Parts'" in Ten Have, H A M J, Welie, J V M and Spicker, S F (eds), *Ownership of the Human Body: Philosophical Considerations on the Use of the Human Body and its Parts in Healthcare* (Dordrecht, Boston: Kluwer Academic Publishers, 1998), p 53.

10 McGee, G, *The Perfect Baby: A Pragmatic Approach to Genetics* (Lanham: Rowman & Littlefield Publishers, 1997), p 74.

and to make predictions about our future.[11] It therefore enables individuals to make appropriate lifestyle and health choices, or to evade possible pitfalls predicted by their genes.[12] At the same time, an individual's genetic information will also reveal details of close blood relatives or a particular ethnic community.[13]

2. *Genetic Research*

"The term 'research' refers to a class of activity designed to develop or contribute to generalisable knowledge."[14] Raw materials for genetic research include cells and tissues samples where DNA subsists. Specimens may come from tissues that were removed in the course of clinical treatment, by way of diagnostic or therapeutic procedures, autopsies, or the voluntary donation of biological materials such as blood or semen.[15] Human genetic research involves the study of inherited human traits. It aims at identifying the DNA sequence and mutations that can cause specific health problems[16] and enable studies of the prevalence of a particular disease or the identification of a disease's genes.[17] DNA information reveals not only the individual's health status but also the characteristics of his ethnic group. It may show that genetic mutations linked to a certain disease occur more frequently in certain populations than others.[18] Knowledge revealed from the DNA sequence has a profound impact on the way disorders are diagnosed, treated, and prevented, bringing about revolutionary changes in clinical and public health practice.[19] It allows the improvement of diagnosis of diseases, detection of genetic predispositions to disease, rapid detection and treatment of pathogens in clinical practice, creation of drugs based on the information and design of "custom drugs" based on individual genetic profiles.[20] It also enables and enhances the operation of gene therapy[21] and genetic testing.[22]

C. *Why is Protection Important?*

1. *Exploitation*

Exploitation is generally understood as the utilisation of resources so as to prevent them from

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11 AustLII Legal Information Assess Centre, "Genetic Testing", at http://www.austlii.edu.au/au/other/liac/hot_topic/hottopic/2002/1/2.html (visited on 29 February 2004).

12 *Ibid.*

13 *Ibid.*

14 Council for International Organizations of Medical Sciences (CIOMS) in collaboration with the World Health Organization (WHO), "Preamble", *International Ethical Guidelines for Biomedical Research involving Human Subjects*, at http://www.cioms.ch/frame_guidelines_nov_2002.htm (visited on 1 April 2004).

15 Andrews, L and Nelkin, D, *Body Bazaar: The Market for Human Tissue in the Biotechnology Age* (New York: Crown Publishers, 2001), p 11.

16 Andrews, L B, Mehlman, M J and Rothstein, M A, *Genetics: Ethics, Law and Policy* (Minnesota: West Group, 2002), p 94.

17 *Supra* note 15.

18 Genetic information rarely provides certainties about an individual's future. The majority of genetic disorders are multifactorial – a combination of genetic inheritance and environmental factors. *Supra* note 10.

19 *Supra* note 1.

20 *Ibid.*

21 An experimental procedure aimed at replacing, manipulating, or supplementing nonfunctional or misfunctioning genes with healthy genes. *Supra* note 6.

22 Analyzing an individual's genetic material to determine predisposition to a particular health condition or to confirm a diagnosis of genetic disease. *Ibid.*

being wasted. Alternatively it also means some form of cheating or unfair advantage in the use of resources.[23] For the purpose of present discussion, we are concerned with the latter meaning. Exploitation involves wrongful use of a person, where "people are being treated as a means to other ends, and the consequence is generally liable to moral objections; it would involve some violation of a principle requiring protection of the vulnerable."[24] This concept may also include some financial or commercial dimensions to the transaction.[25] A typical example is child prostitution, where "children, both male and female, engaging in sexual activities for money, profit, or any other consideration due to coercion or influence by any adult, syndicate or group".[26]

2. *Commercial Exploitation of DNA in Genetic Research*

Traditionally, tissue procurement is by way of donation as economic incentives are illegal in almost all countries.[27] Legal and ethical standards from EU countries and UNESCO[28] feature several explicit bans on payment to tissue sources. The Council of Europe's Convention on Human Rights and Biomedicine prohibits direct payment for "the human body and its parts"[29] while the Universal Declaration on the Human Genome and Human Rights (UDHGHR) prohibits direct payment for "the human genome in its natural state".[30] Ethically, direct payment is also discouraged as it treats human body tissues as commodities and is repugnant to human dignity and autonomy. As a result, sample donors would not be rewarded for their donation and they have no right of access to or control over the samples once the tissue has been excised from their body.

However, many forms of commercial activities ensue as a result of such genetic research. Firstly, research results give rise to potential gene patent claims, such as the process by which the gene is purified and the use of the gene or protein to detect or treat a disease or condition.[31] As a result, patients and research subjects become potential treasure troves to researchers seeking lucrative genes. Researchers become commercially interested and their capacity to behave solely for the betterment of medical advances is hindered.

Secondly, private biotechnology companies make enormous profits from the manufacture of new drugs and other medical treatments based on genetic information from the research. The company can develop commercial products utilising its patented gene and enjoy monopoly over these products. The commercial benefits create potential misuse of research samples by

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23 Harris, J, *Clones, Genes, and Immortality: Ethics and the Genetic Revolution* (Oxford, New York: Oxford University Press, 1998), p 144.

24 *Ibid.*

25 This concept could involve mutually self-interested, consensual exchange in which what one party transfers is of greater value than what is received in return. *Ibid*, p 152.

26 UNICEF UK, "The End Child Exploitation Campaign", at http://www.endchildexploitation.org.uk/issue_sexual_exploitation.asp (visited on 22 May 2004).

27 World Health Organisation, "Human Organ and Tissue Transplantation: Report by the Secretariat", May 2003, at http://www.who.int/ethics/topics/human_transplant_report/en/index1.html (visited on 21 March 2004).

28 United Nations Educational, Scientific and Cultural Organisation.

29 Article 21, Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine, at http://conventions.coe.int/Treaty/en/Treaties/Html/164.htm (visited on 12 April 2004).

30 Article 4, Universal Declaration on the Human Genome and Human Rights, at http://portal.unesco.org/en/ev.php-URL_ID=13177&URL_DO=DO_TOPIC&URL_SECTION=201.html (visited on 12 April 2004).

31 *Supra* note 16, p 146.

researchers selling genetic sequence discovered to these companies without first informing and seeking the samplers' consent on such sale.

The commercial exploitation of research findings gives rise to issues concerning whether informed consent by individuals providing the DNA samples should include potential foreseeable commercial benefits and whether they should have a share of profit.

Due to the special status and significance of human genetic materials, there lies behind concerns about gene patenting and its related issues the assumption that "those who engage in commercial human genetic research incur special moral obligations to share the benefits of that research with research subjects, members of a particular community, or with society in general."[32] It is widely accepted that "benefits from advances in genetics and medicine should be made available to all, with due regard to the dignity and human rights of each individual".[33] Why then should a particular party, the researchers or biotechnology companies, be allowed to make enormous benefit and not share them? If sample providers are not allowed to have a share of the profit, they should at least be informed of any potential commercial benefit that may arise before they decide whether or not to offer their DNA samples.

Moreover, this form of commercial exploitation is against the notion of justice.[34] "At present there is great inequality between the rich and poor nations in the direction and priorities of research and in the distribution and access to the benefits thereof."[35] Donors may feel that the researchers have been unjustly enriched. "In view of the vast difference in power between those carrying out the research and the participants, and the possibility of substantial profit, considerations of justice support the desirability of distributing some profits."[36]

Furthermore, in the extreme case where the researcher deliberately conceals any commercial interest he has in the research, as illustrated in the case of *Moore v Regents of University of California* to be discussed in Part III, it might amount to deception. Unless the law requires such commercial interests be disclosed, the donor is left with no remedy against researchers unjustly enriched from deception.

A recent US case from Florida once again demonstrates the urgent need in protecting the rights of genetic research participants from commercial exploitation. In *Greenberg v Miami Children's Hospital Research Institute, Inc*[37] (*Greenberg*) the plaintiffs, a group of parents who gave birth to children afflicted with Canavan disease and three non-profit community groups dedicated to assisting those affected by this condition, supplied to the defendants tissue samples, personal data and funding to advance medical research of Canavan disease. The plaintiff viewed the collaboration as a mutual understanding which would yield in the future a widely accessible genetic testing program. Unknown to the plaintiffs, the defendants filed a patent application for the gene associated with Canavan disease and related

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32 "Policy Implications of Commercial Human Genetic Research in Newfoundland and Labrador: A Report for the Newfoundland and Labrador Department of Health and Community Services", January 2003, at http://www.ucs.mun.ca/~alatus/benefitsharing/FinalReport.pdf (visited on 26 May 2004).

33 *Supra* note 30, art 12(a).

34 *Supra* note 16, p 214.

35 *Ibid.*

36 *Ibid.*

37 *Greenberg v Miami Children's Hospital Research Institute, Inc*, 208 F Supp 2d 918 at 928-29 (ND Ill 2002).

applications, including carrier and prenatal testing. As a result the plaintiff brought the case to court, alleging that the defendants, a scientific researcher and a hospital, breached their duty of informed consent and fiduciary duty by failing to disclose to the plaintiffs their intention to patent as well as conversion of the plaintiffs' property by using plaintiffs' contributions to reap personal economic benefit rather than to promote widely affordable genetic testing for Canavan disease. The plaintiffs also asserted claims of unjust enrichment.

Greenberg is only one of the many cases where research participants are being unjustly commercially exploited. With the rapid expansion of the biotechnology industry and completion of the mapping of human genome, genetic materials will have many more applications in genetic research. Given due regard to the important information which subsists in human genetic materials, the law should provide sufficient and balanced protection to DNA and their sources so as to ensure promotion of individual autonomy, privacy and human dignity.

III. Part II

A. Current Safeguards

This section provides an overview of the existing safeguards and legal protection DNA and research subjects enjoy in the research context. It features protection provided by international instruments and national statutory provisions. As DNA subsists in all body materials, the protection accorded to human tissues is also relevant.

B. Protection of Research Subjects and Their Genetic Materials in Research – An Overview

1. International Level

The Nuremberg Code (1947)[38] is one of the first modern codes of ethics for medical research on humans which "has influenced the formulation of international, regional and national legislation and codes of conduct."[39] It articulated the requirement of informed voluntary consent from the research subject before and during the continuation of the experiment, and that the benefits should be sufficient to outweigh the minimized harms associated with the research.[40]

The Declaration of Helsinki, adopted by the World Medical Association in 1964,[41] provides a code of ethics to physicians and other participants in medical research involving human subjects.[42] The Declaration emphasized the safeguard of rights and respect of integrity of research subjects.[43] Informed consent should be obtained for research projects and research

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38 It is set out as part of the judgment in Nuremberg against the Nazi doctors who led the Nazi research on concentration camp inmates. Brody, B A, *The Ethics of Biomedical Research* (New York: Oxford University Press, 1998), pp 35-36.

39 *Supra* note 14, "International Instruments and Guidelines".

40 *Ibid.*

41 It was first adopted in 1964 and has been amended five times since (1975, 1983, 1989, 1996, 2000). The latest being the World Medical Association Declaration of Helsinki (para 29 clarified in 2002), at http://www.wma.net/e/ethicsunit/helsinki.htm (visited on 31 March 2004).

42 *Ibid*, "Introduction".

43 *Ibid*, para 22-26, 31.

should be done only when it is justified by its prophylactic, diagnostic and therapeutic value.[44] Another important feature of the Declaration is the recommendation that proposals of experimental procedures in a protocol should be transmitted to a specially appointed independent ethical review committee for consideration, comment and guidance.[45]

Based on the 1975 Declaration of Helsinki, the World Health Organisation ("WHO") and the Council for International Organizations of Medical Sciences ("CIOMS") issued the International Ethical Guidelines (the "Guidelines") for Biomedical Research involving Human Subjects 1993 which was superseded by the new text in 2002.[46] The Guidelines affirmed the fundamental principle that research involving human subjects must not violate any universally applicable ethical standards, and acknowledged the importance of obtaining informed consent.

Like the Helsinki Declaration, the Guidelines provide for the independent ethical review of research protocols. However, the Guidelines require approval of every research protocol involving humans by an independent ethical review committee. Analysis of Guideline 2 of the Guidelines also suggests that though the ethical review committees have no authority to impose sanctions on researchers for non-compliance, the committees should report to institutional or governmental authorities where there is serious or continuous breach of ethical standards. Sanctions, such as fines or suspension of eligibility to receive research funding, may be imposed by the government as a last resort.

The UDHGHR adopted in 1997,[47] while "recognising that research on the human genome and the resulting applications open up vast prospects or progress in improving the health of individuals and of humankind as a whole" also emphasised that such research should fully respect human dignity and freedom. In particular, art 5 emphasized the importance of obtaining free informed consent for research. As mentioned in Part I B above, the declaration also provides that the "human genome in its natural state shall not give rise to financial gains".[48] However, it seems commercial activities deriving from research results are allowed.

The greatest weakness in these declarations and guidelines is their lack of enforceability. They are not legally binding and only act as guidelines to help researchers in conducting ethical research and as framework for countries to legislate on these matters. Breach of these guidelines would not be followed by criminal sanctions unless there is voluntary enactment by national legislatures or application by judicial bodies.

The Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine[49] issued by the Council of Europe in 1997 is the first international treaty in this field. Until now, only 17 member states have ratified the convention.[50] These countries would

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44 *Ibid.*

45 *Ibid*, para 13.

46 *Supra* note 14.

47 Universal Declaration on the Human Genome and Human Rights (UDHGHR) 11 November, 1997 http://portal.unesco.org/en/ev.php@URL_ID=13177&URL_DO=DO_TOPIC&URL_SECTION=201.html (visited 12th April, 2004)

48 *Ibid*, art 4.

49 *Supra* note 29.

50 http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=164&CM=8&DF=12/04/04&CL=ENG (visited on 12 April 2004).

be required to make laws and devise regulatory schemes in accordance with the convention. It affirms "that progress in biology and medicine should be used for the benefit of present and future generations" while also conscious of the need to "respect the human being both as an individual and as a member of the human species".[51] Articles 15-17 set out the principles relating to protection of persons undergoing research, noting the importance of informed consent. Article 22 expressly states that where any human body parts removed are to be used for purposes other than for which it was removed, subsequent informed consent procedures are necessary. Article 21 also prohibits financial gain from human body parts, however it does not state whether any commercial interests researchers may derive from research on human body parts need to be disclosed nor specifies which kind of acts giving rise to financial gains are prohibited.

The Council of Europe, with more than 40 member states, is currently developing a Protocol on Biomedical Research, which will be an additional protocol to the Council's 1997 Convention on Human Rights and Biomedicine.[52] It aims at setting out and safeguarding the fundamental rights of individuals whose biological materials are used in biomedical research, while recognising the importance of freedom of research. In particular, it addresses the situation where there may be commercial interests in the human biological materials. Article 8 provides that in general, human biological materials used in research should not give rise to financial gain. However, where there may be a profitable cell-line[53] created from an individual, the case may be different. It suggests the possibility of remuneration in such circumstances. Article 12 states that when research protocols are to be submitted for review by independent ethics review committees, researchers have to include information concerning foreseeable commercial uses of the research results and the human biological materials. This information, in addition to arrangements for storage and research for potential future use, should be disclosed to research participants as part of the informed consent procedures.[54]

By requiring a greater scope of information be disclosed, this additional protocol, if passed, ratified and enforced would provide a much greater scope of protection to research subjects. It allows sample contributors to be aware of any possibility of commercial exploitation and abuse, paying greater respect to the contributors' autonomy and dignity, as a reasonable person might wish to take commercialisation plans into account when deciding whether or not to contribute his genetic materials.

2. *National Level*

a. *United Kingdom*

The UK Medical Research Council had issued the Operational and Ethical Guidelines on

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51 *Supra* note 29, Preamble.

52 "Draft Additional Protocol to the Convention on Human Rights and Biomedicine", at http://www.coe.int/T/E/Legal_affairs/Legal_co-operation/Bioethics/Activities/Biomedical_research/CDBI-INF(2003)6eREV.pdf (visited on 12 April 2004).

53 "The first step in manufacturing a protein or antibody is to genetically engineer a cell so that it produces the desired product. This requires introducing the genetic information - DNA - that provides the cell with the instructions it needs to produce the protein or antibody. Once a cell has been engineered to express the product of interest, it is used to establish a cell line, i.e. thousands of copies of this original cell. This cell line is then frozen and stored for use in the manufacturing process." Genentech newsroom, Genentech's manufacturing advantage http://www.gene.com/gene/news/kits/corporate/manufacturing.jsp (visited 26 May, 2004)

54 *Supra* note 52, art 15.

Human Tissue and Biological Samples for Use in Research in 2001 which encompassed the fundamental values in the Declaration of Helsinki. According to the Guidelines, researchers have a responsibility to ensure the donor's wishes are respected when using his materials. Where samples might be used in commercial research, donors should also be informed about the potential financial benefits the researcher may have.[55] Yet clause 4.2 expressed the view that participants should not be entitled to any share of profits that might ensue. In cases where body materials left over following diagnosis or treatment, informed consent of patients should also be obtained for potential use for later research.[56] However, the Guidelines serve only as guidance and lack any effective enforcement mechanisms.

In December 2003, the Human Tissue Bill 2003 was introduced to the UK Parliament and is currently under consideration.[57] It was introduced as prior inquiry revealed that human organs and tissues had often been removed and retained after death without the consent of families, which causes great shock to many families involved, and yet the current law failed to cope with these problems.[58] The purpose of the Bill is to provide a consistent legislative framework for issues relating to whole body donation and the taking, storage and use of human organs and tissue. It sets out an ethical framework for medical research using human tissues. The Bill will repeal and replace the *Human Tissue Act 1961*, the *Anatomy Act 1984* and the *Human Organ Transplants Act 1989*.[59] It also suggests the establishment of a new regular, Human Tissue Authority to oversee this field. The Bill emphasizes the importance of obtaining appropriate consent in procuring human body materials.[60] Section 19 expressly prohibits commercial dealings of human tissues by rewarding the person who supplies the body materials. Though the Bill is mainly concerned with human tissues, it has also included several sections relating to the handling of DNA. Section 46 makes non-consensual analysis of DNA a criminal offence[61] yet this section has been criticised by the UK Medical Research Council that it does not fit well with the rest of the Bill and would better be covered by other legislation.[62] However, in view of the piecemeal legislation in this area, as illustrated by the separate legislations governing human tissues, organs and anatomical parts, it is desirable that this section be included in the new Bill. DNA subsists in all body materials and as the Bill aims at regulating storage and use of human organs and tissues, it is consistent to include regulation of non-consensual analysis of DNA, a prospective use of body tissues.

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55 UK Medical Research Council, "Human Tissue and Biological Samples for Use in Research – Operational and Ethical Guidelines", at http://www.mrc.ac.uk/pdf-tissue_guide_fin.pdf (visited on 9 April 2004).

56 *Ibid*, ch 3.2.

57 "The substantive provisions of the Bill will come into force on days appointed by the Secretary of State by order, not intended to be before April 2005. This will allow the Human Tissue Authority (HTA) to be set up and codes of practice to be prepared." Paragraph 85, Explanatory Notes, *Human Tissue Bill 2003*, at http://www.publications.parliament.uk/pa/cm200304/cmbills/009/en/04009x-b.htm (visited on 9 April 2004).

58 "Human Bodies, Human Choices, Summary of Responses to the Consultation Report", at http://www.doh.gov.uk/tissue/summaryofresponsestotheconsultationreport.pdf (visited 23 May 2004).

59 "The substantive provisions of the Bill will come into force on days appointed by the Secretary of State by order, not intended to be before April 2005. This will allow the Human Tissue Authority (HTA) to be set up and codes of practice to be prepared." Human Tissue Bill, 2003, Explanatory notes.

60 Part 1, *Human Tissue Bill 2003*, at http://www.parliament.the-stationery-office.co.uk/pa/cm200304/cmbills/009/04009.i-v.html (visited on 4 April 2004).

61 This clause makes it an offence to have any bodily material with a view to the DNA being analysed without qualifying consent and results of the analysis being used otherwise than for excepted purposes as stipulated in clause 47. *Ibid*, part 2.

62 UK Medical Research Council, "Human Tissue Bill: Views of the Medical Research Council", 26 January 2004, at http://www.mrc.ac.uk/pdf-postioning_paper_htb.pdf (visited on 4 April 2004).

It should be noted that the Bill has not addressed issues relating to commercial exploitation of DNA. Although the Bill made it an offence[63] for conducting research without consent, it fails to cover the situation when research results are used subsequently for commercial purposes. In fact, the Bill does not mandate that donors be informed about any commercial incentive behind the research as part of the informed consent process. Therefore, even if the Bill is enforced it is unable to safeguard individuals against commercial exploitation.

b. United States

In the United States, the *Belmont Report*[64] issued by the National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research identified basic ethical principles and guidelines, including informed consent, for human research conduct. Research that is supported in some way by the federal government, has to comply with the "Common Rule",[65] which also acknowledges the informed consent doctrine. The "Common Rule" is promulgated by the US Department of Health and Human Services (DHHS), the National Institute of Health (NIH) and the Office for Protection from Research Risks as part of the Code of Federal Regulations. The Office for Protection from Research Risks is also responsible for ensuring compliance by institutions with the "Common Rule".

A draft bill, *Genetic Privacy Act*,[66] was written in 1995 by George Annas of the Boston University School of Public Health as a proposal for federal legislation. This sample bill aims at protecting the privacy of DNA materials by way of regulating the collection, analysis and storage of DNA samples, and disclosure of the genetic information derived from the analysis of these samples.[67] The Bill confers on the source of the DNA a protectable property interest in the DNA itself.[68] Section 103(a)(8) expresses that where the sample donor does not wish the sample be used for commercial purposes, he should be allowed to do so. In other words, where the sample is to be used for commercial purposes, research participants must be informed and their authorization for such commercial use is required.

The model Act was introduced into the United States Congress as the *Genetic Confidentiality and Nondiscrimination Act* in 1996.[69] However, it was not adopted by the Congress. State level legislation conferring property interest in the human DNA is also lacking. Although Oregon was the first state in the US to grant ownership rights in genetic samples to the individual from whom they were obtained,[70] the law was repealed in 2001[71] and specified

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63 *Ibid*, s 6(1).

64 The National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research, US Department of Health and Human Services, "Ethical Principles and Guidelines for the Protection of Human Subjects of Research", 18 April 1979, at http://ohrp.osophs.dhhs.gov/humansubjects/guidance/belmont.htm#xethica (visited on 29 May 2004).

65 Subpart A, Title 45 Public Welfare, Part 46 Protection of Human Subjects, *Code of Federal Regulations*, 13 November 2001, at http://www.hhs.gov/ohrp/humansubjects/guidance/45cfr46.htm (visited on 29 May 2004).

66 Annas, G A, Glantz, L H and Roche, G H, *The Genetic Privacy Act and Commentary*, 28 February 1995, at http://www.ornl.gov/sci/techresources/Human_Genome/resource/privacy/privacy1.html (visited on 5 April 2004).

67 *Ibid.*

68 *Ibid*, s 104(a).

69 S 1898 (introduced in Senate), at http://thomas.loc.gov/cgi-bin/query/D?c104:1:./temp/~c104hCtDRF (visited on 10 April 2004).

70 *Genetic Privacy Act 1995.*

71 SB 114.

that though both genetic samples and information were private and must be protected, genetic samples were not property.[72]

As a result, genetic research in the US, which is often privately funded, is still dependent on researchers' voluntary compliance with the *Belmont Report*.

c. Australia

Recently, the Australian Law Reform Commission and the Australian Health Ethics Committee of the National Health and Medical Research Council ("NHMRC") conducted a two-year inquiry and presented a report on "The Protection of Human Genetic Information in Australia". The aim of the inquiry is to scrutinise the existing regimes and tailor them to the particular needs and demands of genetic testing and information as well as to recommend new forms of regulation to address existing gaps.[73] Apart from reinforcing the importance of compliance with the National Statement on Ethical Conduct in Research Involving Humans (the National Statement) created by NHMRC, including adhering to the informed consent doctrine while carrying out human researches, it aims to set out a regulatory framework for genetic research. The report also discusses the possibility of recognising statutory property rights in human genetic samples. After balancing the pros and cons of adopting the property approach, it was finally concluded that no legislation should be enacted to confer full proprietary rights in human genetic samples and proprietary rights in preserved samples (both tissues and DNA samples), and that it should continue to be decided on a case-by-case basis under the common law.[74]

It is observed the international and national instruments mainly provide protection by way of affirming the necessity of informed consent and ensuring the privacy of genetic information, but few confer express rights on individuals allowing them to have active control over their body materials. Moreover, despite efforts made by countries in developing their own regulatory regime to protect human body materials and genetic information, they are yet to be established. Even when members of the Council of Europe ratify the Convention on Human Rights and Biomedicine, statutes are still incapable of governing all situations that arise, there remains unattended issues such as the commercial exploitation of DNA without consent. In the meantime, individuals are left with insufficient protection, relying only on the initiative of researchers to comply with the ethical codes and guidelines, without any means of enforcement. The only remedy research subjects could have in circumstances of commercial exploitation in genetic research is mainly by the common law action of lack of informed consent.

IV. Part III

A. Moore v Regents of University of California[75] – *A Case of Commercial Exploitation*

In this section, the case of *Moore v Regents of University of California* (*Moore*) illustrates the

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72 *Ibid.*

73 Australian Law Reform Commission, Essentially Yours: The Protection of Human Genetic Information in Australia (ALRC 96, 2003), at http://www.austlii.edu.au/au/other/alrc/publications/reports/96/index.html (visited on 10 April 2004).

74 *Ibid*, ch 20.

75 *Supra* note 5.

typical issues that arise in cases of commercial exploitation in biomedical research. How the Court of Appeal and Supreme Court of California dealt with the doctrine of informed consent and breach of fiduciary duty and their different conclusions as to the success of the action of conversion will also be examined. The discussion of the courts' decision reveals the inadequacies of informed consent in genetic research.

1. Moore v Regents of the University of California

a. Facts of the Case

John Moore was treated at UCLA medical centre for hairy cell leukaemia. The doctors, the defendants, soon realised the potential commercial and scientific utility of Moore's body tissues. They told Moore the excision of his spleen is necessary. In fact, the doctors planned to use his excised spleen for research purposes of which they had not obtained consent from Moore. The defendants, using Moore's cells, developed a cell-line which was capable of producing pharmaceutical products of enormous therapeutic and commercial value. Later, Moore brought claims to the court, alleging the doctors to be in breach of fiduciary duty and having acted in absence of his informed consent. He also claimed that the tissue removed from his body constituted his personal property and was therefore subject to conversion.

b. Fiduciary Duty Claim

> "A fiduciary duty is the duty to act for someone else's benefit, while subordinating one's personal interests to that of the other person. Trust or confidence reposed by one person in the integrity and fidelity of another establishes the fiduciary relationship."[76]

Doctor-patient v Researcher-patient

It is uncertain whether fiduciary duty exists between doctors and patients. At common law, only Canada and some states in the US had recognised such rights.[77] Where doctors fail to make full disclosure accompanying medical procedure, including undisclosed research interest, the doctor is liable for breach of fiduciary duty, as in *Moore*. However, Panelli J in the Supreme Court of *Moore* noted the general term "fiduciary" may be too broad, and expressed that in *Moore* it is only to signify the doctor must disclose all facts material to the patient's decision because certain personal interests may affect his professional judgment.

Australian courts rejected the recognition of a fiduciary duty on the basis that "duty of good faith and loyalty does not fit with the Australian duty of the doctor to exercise reasonable skill in care and giving treatment and advice".[78] This is so because according to the "prudent patient" test adopted by Australian courts as part of informed consent, the doctor is to disclose material risks only which the doctors thinks the patient should know. Necessitating full disclosure as required by fiduciary relationship is contrary to this position.

Imposing a fiduciary duty on researchers is even more problematic. While researchers work to

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76 Rosenman, H, "Patient's Rights to Access Their Medical Records: An Argument for Uniform Recognition of a Right of Access in the United States and Australia", (1998) 21 *Fordham International Law Journal* 1500, p 1512.

77 *Halushka v University of Saskatchewan* (1965) 53 DLR (2d) 436; *Moore v Regents of the University of California* 793 P 2d 479 (Cal 1990). *Ibid*, p 1550.

78 *Supra* note 76, p 1550.

find cures for diseases and maladies, they often lose sight of their subjects' best interests.[79] Researchers may also have an interest such as the commercialisation of research findings. If the researcher-subject relationship is fiduciary in nature, the researcher would be in breach of his duty by failing to disclose and acting in conflict of interests.[80] The fiduciary would have no defence that the public benefited from the research undertaken[81] and would be prevented from profiting altogether.[82] This relationship is not possible and impractical, as privately-funded genetic research has become more prevalent and genetic research involves funding resources from commercial corporations that operate for profit.

At times, physicians may play dual roles as doctor and researcher, as in *Moore*. This dual role further exacerbates the dilemma in treating the doctor-subject relationship as fiduciary in nature, as there is often a blurred distinction between doctor-patient and researcher-subject relationships. On one hand, the treating physician has a role to provide the best treatment according to the patient's condition. On the other hand, as a researcher, "the physician-investigator has a scientific interest in seeing his idea tested."[83] Due to the possibility of potential commercial interest in his findings, he may have "an understandable enthusiasm for and a not-so-objective bias in favour of the experimental intervention".[84] Nonetheless, the Supreme Court held that the physician is still bound by his fiduciary duty and accordingly has breached the duty by failing to make full disclosure, including his potential commercial interests to Mr Moore.

c. Doctrine of Informed Consent

It is well established that consent is necessary for any medical treatment. The rationale behind this is to protect the individual's bodily integrity and autonomy by affirming the right to self-determination of the patient. For consent to be valid, first, it must be expressly or impliedly made and the patient should have a clear understanding as to what he is consenting to.[85] Second, the person giving consent should be competent, having a sound mind. Third, consent should be made freely and voluntarily without duress or undue influence, the patient has the right to refuse treatment according to his own wish.[86] "A surgeon who performs an operation without his patient's consent commits an assault, for which he is liable in damages."[87]

Traditionally, the duty owed by medical physicians to patients is to give advice according to the standard set out in *Bolam*[88], where the doctor is to give advice which is accepted as proper

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79 Orlowski, V, "Promising Protection through Internationally Derived Duties", (2003) 36 *Cornell International Law Journal* 381, p 391.

80 Cote, A, "Adequate Protection for the Autonomous Research Subject? The Disclosure of Sources of Funding and Commercialisation in Genetic Research Trials", (2002) 28 *The Manitoba Law Journal* 347, p 373.

81 *Ibid.*

82 *Ibid.*

83 Oberman, M and Frader, J, "Dying Children and Medical Research: Access to Clinical Trials as Benefit and Burden", (2003) 29 *American Journal of Law and Medicine* 301.

84 *Ibid.*

85 *Chatterson v Gerson* [1981] 1 QB 433 at 442-443.

86 *Re T* (Adult: Refusal of Treatment) [1992] 4 All ER 649.

87 *Justice Cardozoin Schloendorgg v Society of New York Hospital* 105 NE 92 (1914), quoted in Dworkin, G and Kennedy, I, "Human Tissue: Rights in the Body and Its Parts", (1993) 1 *Medical Law Review* 293, p 298.

88 *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582.

in the eyes of a responsible body of medical men skilled in that particular art. Recently, however, the informed consent test is preferred and adopted in US, UK and Australia.[89] The doctrine requires the doctor, in determining what to tell the patient to "take into account all the relevant considerations, which include the ability of the patient to comprehend what he has to say to him and the state of the patient at the particular time, both from the physical and emotional point of view".[90] The patient should be informed if there is a significant risk which would affect the judgment of a reasonable patient, so that the patient can determine for himself what course to take.[91]

d. Informed Consent for Research

The doctrine of informed consent is well-developed within the arena of biomedical research. Informed consent entitles competent individuals to choose freely whether or not to participate in research.[92] As an additional safeguard, it must always be complemented by independent ethical review of research proposals.[93] Apart from satisfying the requirements of a valid consent as discussed above, informed consent also requires disclosure of research aims, methods, risks and benefits of research in which human subjects are asked to participate. The consent is effective only if the person from whom consent is sought can comprehend fully the information being disclosed concerning the procedures involved in data collection, the nature of the research being conducted and the uses which will be made of any data collected.[94]

However, in light of the biotechnology era where there is intense commercialisation of genetic research, the question of whether informed consent should be obtained from research subjects about potential commercial activities and benefits researchers receive has been under much concern. Such disclosure is important in safeguarding the patient's interest by allowing the patient to assess accurately the benefits and costs of various medical treatments and be aware of possible ulterior motive the physicians possess so as to make the best decision concerning their medical treatment.

In *Moore*, both the Court of Appeal and the Supreme Court held that such information should be disclosed to the research subject as part of the informed consent process. The Court of Appeal concluded that the plaintiff consented to the splenectomy and some of the other removals of tissue and blood, but he did not consent to the commercial exploitation and research on his tissue and therefore there was a lack of informed consent. The Supreme Court affirmed this view and stated that such requirement offers protection to patients. As a

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89 The reason to this is in some situations, the experts would have weighed the relative risks and benefits and formed their own opinions in adopting a particular medical practice, and if the judge feels this is not capable of withstanding logical analysis, the judge is entitled to hold the opinion not reasonable. *Bolitho v City and Hackney Health Authority* [1997] 3 WLR 1151 at 1160; *Rogers v Whitaker* (1993) 67 ALJR 47; *Canterbury v Spence* 464 F 2d 772 (DC Cir 1972).

90 *Pearce and another v United Bristol Healthcare NHS Trust* (1998) 48 BMLR 118.

91 *Bolitho v City and Hackney Health Authority* [1997] 3 WLR 1151 at 1160. Australian courts call this the reasonable patient test, and the doctor should disclose all "material risks" which a reasonable person would think the physician having known the position of the patient should be informed of the risk, so to decide whether or not to choose the proposed therapy. *Chappel v Hart* (1998) 195 CLR 232.

92 Council for International Organisations of Medial Sciences (CIOMS) in collaboration with the World Health Organization (WHO), "2002 International Ethical Guidelines for Biomedical Research Involving Human Subjects", in Centre of Medical Law and Ethics, King's College London, Eckstein, S (ed), *Manual for Research Ethics Committees* (Cambridge: Cambridge University Press, 2003), p 471.

93 *Supra* note 14, Guideline 2, Ethical Review Committee.

94 Smith, M J, "Population-Based Genetic Studies: Informed Consent and Confidentiality", (2001) 18 *Santa Clara Computer and High Technology Law Journal* 57.

physician may also have a research interest, he may have conflicting loyalties and make decisions which may not offer benefit to the patient, it is therefore material that the patient be informed of these conflicting interests. The failure to do so would render the informed consent invalid and the researcher is liable for damages. It is on this ground the Supreme Court concluded that by requiring full disclosure, Mr Moore's interest would be adequately protected.

e. Conversion

Conversion is defined as "an unauthorised assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of their condition or the exclusion of the owner's rights".[95] The Court of Appeal in *Moore* set out the conditions for conversion: (1) plaintiff's ownership or right to possession of the property at the time of the conversion; (2) defendant's conversion by a wrongful act or disposition of plaintiffs' property rights and (3) damages. Conversion is a strict liability tort and neither the negligence, knowledge nor ignorance of the defendant is relevant. In *Moore*, there was unauthorised use of Mr Moore's tissue. The physician therefore converts the tissue when he exploits its commercial value without the express consent of the patient. It follows that the crux of the case is whether or not Moore's tissue is his personal property.

Court of Appeal Decision[96]

The majority in the Court of Appeal concluded there was property right in Moore's tissue including his genetic material and hence the action of conversion succeeded. The Court based its decision on several grounds. First, there was no public policy nor statutory authority which stated property interest against one's own body. The plaintiff's spleen, which contained special cells, was something which the plaintiff enjoyed an unrestricted right to use, control and dispose of. These rights and interests are so akin to property interests that it would be a "subterfuge to call them something else".[97] The Court of Appeal pointed out the limitation imposed on the disposition of dead bodies was for public health concerns, rather than a legislative policy against a property interest in a living body. In addition, the Court reviewed authorities which recognise a quasi-property right in the dead body for burial purposes.

Second, the California state laws regarding medical experimentation on human subjects[98] is to honour the strong public policy that due respect must be given to the preciousness of human life and the right of individuals to determine what is to be done to their own bodies. The essence of a property interest – the ultimate right of control therefore exists with regard to one's own body. The limitation on one's own body due to public health concerns does not negate the existence of a property right for the purpose of a conversion action. The court affirmed that California courts would "afford legal protection to an individual's proprietary interest in his own identity. If the court have found a sufficient proprietary interest in one's persona, how could one not have a right in his own genetic material, something far more profoundly the essence of one's human uniqueness than a name or a face".[99] Therefore,

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95 Hardiman, R, "Toward the Right of Commerciality: Recognising Property Rights in the Commercial Value of Human Tissue", (1986) 34 *UCLA Law Review* 207, p 250.

96 *Moore v Regents of the University of California*, 249 Cal Rptr 494 (1988).

97 *Ibid* at 505.

98 *Protection of Human Subjects in Medical Experimentation Act 1978.*

99 *Supra* note 96 at 508.

genetic materials of a person qualify as property.

Third, research is no longer oriented solely by academic incentives. The science has become a science for profit. In such situation, the Court saw no justification for excluding the patient from participation in those profits. In addition, the argument that the allowance of conversion would hinder research is not sound, as researchers are required no more than to seek for consent of the donor of the tissue before it can be appropriated.

Supreme Court Decision

The majority in the Supreme Court of California however, rejected the extension of a cause of action for conversion into the area of human research. The Supreme Court of California overturned the Court of Appeal's decision and held that Moore "could not have reasonably expected to retain possession of his cells after they were removed from his body".[100] "The court gave three reasons why Moore did not retain an ownership interest in his excised cells. Firstly, the court asserted that no judicial decision supported Moore's claim. To impose the strict liability of tort would "implicate policy concerns far removed from the traditional, two-party ownership disputes in which law of conversion arose." [101] The policy considerations being: (1) the protection of a patient's right to make independent medical decisions is already grounded in the principles of fiduciary duty and informed consent;[102] and (2) the extension of a cause of action for conversion into the area of human research would impede research by restricting access to raw materials and would threaten to "destroy the economic incentive to conduct important medical research."[103]

Moreover, the California statutory law imposed drastic limits on a patient's control over excised cells, which provides human tissues following conclusion of scientific use shall be disposed of by incineration. The primary object of the statute though is to protect public health and safety, but the practical effect is to limit the patient's control over excised cells. There could hence be nothing which amounts to "property" for purposes of the law of conversion. On this, the Supreme Court concluded that a decision to recognise the tort of conversion for unauthorized use of excised cells was for the legislature to make.[104]

Furthermore, the majority of the Supreme Court maintained that "the subject matter of the Regents' patent the patented cell line and the products derived from it cannot be Moore's property", hence Moore has no property interest in the products and no conversion is possible.

The dissenting judges in the Supreme Court criticised the majority's rejection of conversion on different reasoning. Broussard J was of view the majority had based their reasoning on that a patient retains no ownership interest in a body part once it has been removed from his body, but it cannot conclude the broad proposition that the removed body part is not property and reject the action of conversion. He also pointed out, correctly in the author's opinion, that the majority erred in concluding there was no conversion because Moore has no property interest in the patented cell line. What Moore was claiming was a property interest in the source of the cell-line – his body tissues, and it is the unauthorised use of this tissue, and not the patented

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100 Quoted in Wagner, D M, "Property Rights in the Human Body: The Commercialization of Organ Transplantation and Biotechnology", (1995) 33 *Duquesne Law Review* 931, p 936.

101 In the judgment by Panelli J, Supreme Court, *Moore*.

102 *Ibid* at 937.

103 *Ibid.*

104 *Ibid.*

work, which constitutes conversion.

However, Broussard J expressed his view that once the body parts have been excised from the body with consent, the patient has abandoned all its right thereof and could not demand any share of profit from subsequent commercialisation. Conversion is not possible unless the patient is deceived into removing the body parts.[105] Accordingly, as Mr Moore was deceived into believing the physician has no commercial interest before he consented to removal of his body parts, an action of conversion is available in the case.

Mosk J dissented on policy grounds. He was of view that the majority's single policy consideration was outweighed by two contrary considerations. First, the society acknowledges "a profound ethical imperative" to respect the integrity of the human body. Prohibition against indirect abuse of the body by its economic exploitation for the sole benefit of another person is of paramount importance. Respect for the sanctity of the human body would be absent if researchers are allowed to further their own interests using the patient's tissue without the patient's participation and consent. Second, the policy consideration of unjust enrichment by the researchers has not been dealt with. Rejecting conversion and hence denying Mr Moore's entitlement to any share in the proceeds of his cell line is both inequitable and immoral. The action of conversion should therefore be allowed to cater for these two policy considerations.

B. Discussion of Moore

The Supreme Court grounded its reasoning in rejecting conversion on the breach of fiduciary duty and the lack of informed consent as having provided adequate remedy for Mr Moore. Such a result is only possible in this particular situation where the defendant plays the dual roles of physician and researcher.

1. Fiduciary Relationship

In the event of pure research-subject relationship, the breach of fiduciary relationship could not stand. Indeed, a fiduciary relationship between researcher and subjects has been rejected in *Greenberg*, where the parties are in a researcher-participant relationship. The Southern District Court of Florida held that researchers have no fiduciary duty nor the need to disclose economic interest as part of informed consent as requiring to do so would have "pernicious effect on medical research". The action for conversion however, was rejected by relying on the Supreme Court majority's reasoning in *Moore*, holding that the participants had ceded their property right once the sample was voluntarily given to the third party. The claim for unjust enrichment in *Greenberg* only succeeded on its particular facts – that the plaintiffs had invested time and significant resources in assisting the research, and should therefore be compensated for their contribution.

2. Informed Consent in Obtaining DNA for Genetic Research

The doctrine of informed consent is also insufficient to protect individuals in genetic research. In addition to the standard information to be disclosed, subjects donating DNA samples should also be told the types of information that could result from genetic research due to the particular nature of the genetic information which could yield.[106]

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105 *Supra* note 100, p 939.

106 *Supra* note 16, p 102.

Similar to body tissues, DNA samples may often be used for purposes quite different from those for which they were originally obtained.[107] The explosive growth in genetic applications raises many potential use of DNA unforeseen when samples were first procured. Therefore, it may be very useful to keep DNA samples for retrospective studies. The application of informed consent in this context has however, given rise to various problems. One of the major problems is the kind of information that must be provided by physicians or researchers when informed consent is first obtained. Should patients and research participants be given an opportunity to express preferences regarding: (1) anonymization of their DNA samples; (2) the future biomedical purposes for which the tissue samples can be used; (3) future access by third parties to the personal information that may be gained from their stored samples[108] and (4) potential commercial exploitation of their DNA samples?

Another problem is whether research participants, particularly those far removed from modern science, could understand the project sufficiently to give true consent.[109] Media representations of genetic discoveries may foster misconceptions and the risks created by use of genetic information by third parties may be hard to comprehend.[110] Individuals' understanding of genetic research, information and the risks and benefits of the uses of genetic information are limited. If they do not understand the information accurately, then individuals may not be able to effectively protect themselves and exercise their autonomy as to how their body materials should be dealt with by giving informed consent.

Informed decision allows research participants to control his individually identifiable DNA samples and private genetic information by deciding whether or not to participate. However, even if any commercial interests the researcher may have are disclosed, this cannot address the problems created by commercial exploitation.[111] This problem is observable in *Moore*, where research subjects are only given the right to prohibit the commercialisation of his tissue but not the right to grant consent to commercialisation on the condition that he shares profits of the lucrative products which was created from his contribution. Individuals would still be left with no remedies where researchers are unjustly enriched.

3. *Conversion*

The action of conversion could however, offer much wider protection for research participants where they are commercially exploited. The Supreme Court's reasoning for rejecting conversion is arguably unconvincing. First, as discussed above, informed consent is no longer sufficient in dealing with circumstances of commercial exploitation. Second, the suggestion that conversion would hinder research is unsupported by any empirical facts. Third, the

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107 Godard, B, "DNA Sampling and Banking: Practices and Procedures" in Knoppers, B M (ed), *Human DNA: Law and Policy: International and Comparative Perspectives* (The Hague: Kluwer Law International, 1997), p 429.

108 Weir, R F, "Differing Perspectives on Consent, Choice and Control", *Ibid*, p 91.

109 Greely, H T, "Informed Consent, Stored Tissue Samples, and the Human Genome Diversity Project: Protecting the Rights of Research Participants", in Weir, R F (ed), *Stored Tissue Samples, Ethical, Legal, and Public Policy Implications* (Iowa: University of Iowa Press, 1998), p 93.

110 Chadwick, R, "The Ethics of Genetic Research", in Centre of Medical Law and Ethics, King's College London, Eckstein, S (ed), *Manual for Research Ethics Committees*, (Cambridge: Cambridge University Press, 2003), p 58.

111 Knoppers, B M, Caulfield, T, Kinsella, T D, "Introduction", in Knoppers, B M, Caulfield, T, Kinsella, T D (eds), *Legal Rights and Human Genetic Materials* (Toronto: Emond Montgomery Publications Limited, 1996), p 1.

Supreme Court had confused the subject matter which Moore was claiming for conversion, as pointed out by Broussard J. The Court of Appeal on the other hand, has embarked on a much more persuasive discussion of property rights in human body parts to enable conversion. Their reasoning and arguments given are sound and managed to take into account the uniqueness of human genetic materials and the changing nature of modern research from purely academic to heavily commercialised. Mosk J's dissenting judgment has also pointed out two more important policy considerations that had given due regard to human dignity.

Conversion is desirable as it allows first, the research participants to actively choose before removal of tissues the permissible uses to which their body parts may be put to after removal. Second, it provides the possibility to profit from the fortuitous value that adheres in the body parts.[112] Third, such action is in line with the notion that the contributor should be rewarded fairly.[113]

In any event, it should be noted the *Moore* decision is limited by California statutes and is in no way binding in other countries, not even other states in the US in cases dealing with commercial exploitation of research participants.

In the era where biotechnology is continuously acquiring novel techniques that manipulate the human body, on the forefront of any moral debate thereof is the affront to human dignity. Promoting and ensuring self-autonomy and self-determination are therefore of utmost importance to safeguard human integrity in any medical research. Accordingly, recognising a right in the human body, particularly in DNA, to enable individuals to exercise their protective rights against commercial exploitation is necessary.

V. *Part IV*

A. *Proposing a Property Right in DNA to Prevent Commercial Exploitation by Genetic Researchers*

The currently recognised proprietary rights in the human body will first be examined. In light of the particularities of genetic materials and the widespread phenomenon of commercialisation of genetic research, the proposition that property rights should be conferred in human genetic materials for protection against commercial exploitation is put forward.

B. *Recognizing Property Rights in the Human Body*

Property and Property Rights

In law, property rights are generally understood as a bundle of rights. These rights include the right to possess, the right to exclude, the right to use, the right to dispose, the right to enjoy fruits or profits and the right to destroy.[114] However, for an object to come within the realm of property it must possess the particular nature expounded by Lord Wilberforce in *National*

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112 *Supra* note 16, pp 210-211.
113 *Ibid.*
114 *Supra* note 100, p 933.

Provincial Bank Ltd v Ainsworth[115] ("*Ainsworth*"), that "it must be definable, identifiable and capable in its nature of assumption by third parties and have some degree of permanence or stability".[116] This position has been supported in other jurisdictions. The court in *First Victoria National Bank v United States*[117] affirmed *Ainsworth* but added a caveat that an interest may qualify as "property" for some purposes even though it lacks some of these attributes. Therefore, an individual does not need to possess all of the rights in the bundle in relation to an object in order to have "property rights" in that object.[118]

C. Currently Recognised Property Rights in the Human Body

1. "Quasi-property" Right in Dead Bodies

The question of ownership of a human body first arose before courts in context of disposal or removal of a body after death for funeral or scientific research. The claim of ownership over buried or unburied dead bodies, however, was rejected by English courts.[119] The Court of Appeal in *Dobson v North Tyneside Health Authority*[120] ("*Dobson*") introduced an exception that unless a corpse had undergone a process or other application of human skill, the executors or administrators or other persons who have lawful duty to inter the body has a right of custody and possession until it is buried.[121] This principle is affirmed and applied in *R v Kelly*[122], a case involved with dead body parts. The defendants in the case were convicted of theft of a quantity of dead body parts from the Royal College of Surgeons. The Court of Appeal, by applying *Dobson*, concluded that since the dead body parts have acquired special attributes after preservation, it is capable of being property under the UK *Theft Act 1968*.[123]

US courts however, "showed their aversion to the British no-property rule because of its conceivable injustice to a plaintiff whose dead relative's body was the object of abuse or desecration by a defendant".[124] The US therefore recognises a quasi-property right in dead bodies, a right conferred to the family and close friends to claim a corpse for the purpose of burial but not for any other reason. The primary concern of this right is not the injury to the dead body itself, but whether the improper action causes emotional or physical pain or suffering to surviving family members.[125]

2. Property Rights in Human Body Parts and Tissues

As discussed in Part II, genetic materials are protected under various statutory instruments in various countries. However, few expressly recognise proprietary interests in human body tissues, let alone human genetic materials. Although courts have begun to examine the issues

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115 *National Provincial Bank Ltd v Ainsworth* [1965] AC 1175 at 1247-1248.

116 Quoted in Nwabueze, R N, "Biotechnology and the New Property Regime in Human Bodies and Body Parts", (2002) 24 *Loyola of Los Angeles International & Comparative Law Review* 19, p 48.

117 *First Victoria Nat'l Bank v United States*, 620 F 2d 1096 (5th Cir 1980).

118 *Supra* note 100, p 933.

119 "It has now been the common law for 150 years at least that neither a corpse nor parts of a corpse are in themselves . . . capable of being property protected by rights . . . If that principle is to be changed, in our view, it must be by Parliament . . ." *R v Kelly* [1999] QB 621 at 630.

120 *Dobson and another v North Tyneside Health Authority and another* [1996] 4 All ER 474.

121 *Ibid* at 478.

122 *R v Kelly* [1999] QB 621.

123 *Ibid* at 630.

124 *Supra* note 116, p 28.

125 O'Carroll, T L, "Over My Dead Body: Recognizing Property Rights in Corpses", (1996) 29 *Journal of Health Law* 238.

involved in the ownership of body parts at common law, those cases have failed to set forth a clear rule.[126]

The decisions of *Moore* and *Greenberg* demonstrate property rights in body tissues are still rejected in the US. The judgments of *Moore* are however, limited by California statutes in defining what amounts to property and the acquisition of property. Nonetheless, they may serve as references, particularly the Court of Appeal judgment, as to how common law jurisdictions could deal with the status of body tissues and consideration of meriting property rights in human biological materials.

There is no court decision in England directly addressing whether body parts, tissue or fluids taken from a living person are "property". *R v Kelly*[127] had hypothesized the possible extension of exception that body parts may hold as property under s 4[128] of the UK *Theft Act 1968*, "even without the acquisition of different attributes, if they have a use or significance beyond their mere existence".[129] The court expressed its view that possible cases of exception include when body parts are used for the extraction of DNA.[130] The extension is to provide protection for persons who hold the body part for a legitimate purpose and to prevent taking by others and to obtain its return if taken unlawfully. These views are however, limited to dead body parts. The case fails to directly address the issue whether body materials taken from a living person constitute "property" nor the possibility of an action of conversion when they are being commercially exploited. Yet arguably, the "no property" rule would not prevent the reaching of the conclusion that living body parts are property as the rule applies to corpses only.

While there is no authority which accords property rights to human tissues, society has accepted the sale of blood, sperm, hair and other renewable bodily fluids and tissues,[131] though the "sale of blood" is sometimes treated as a service instead due to the fear of product liability. Accordingly, given the pecuniary value and trading practice of these body materials, it is arguable to say society has actually accepted that body tissues are capable of being "property".

3. *Intellectual Property Right*

Patent laws create an exclusive property right in the intangible subject matter relating to a technological advancement. Given the time, effort and money involved in genetic research and the high percentage of the research being used in the development of highly lucrative commercial products or process and research, obtaining a patent has been one of the methods of protecting human DNA.[132] However, patent protection emerges only after modification of the extracted DNA sequence or alteration from its natural state. Natural products, such as

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126 Lin, M M J, "Conferring a Federal Property Right in Genetic Material: Stepping into the Future with the Genetic Privacy Act", (1996) 22 *American Journal of Law and Medicine* 109, p 112.

127 *Supra* note 122.

128 "'Property' includes money and all other property, real or personal, including things in action and other intangible property." Section 5(1) provides that "Property shall be regarded as belonging to any person having possession or control of it, or having in it any proprietary right or interest."

129 *Supra* note 122 at 630.

130 *Ibid.*

131 *Supra* note 100, p 945.

132 Caulfield, T, Cherniawsky, K and Nelson, E, "Patent Law and Human DNA: Current Practice", *Supra* note 111, p 117.

genes, generally cannot be patented, unless they can be part of a specific use. Thus patent protection is not available for human tissues in its unaltered form and is therefore not an available form of protection for individuals. To the contrary, it is this very form of protection offered to researchers and biotechnology companies which result in the extensive sought of patents creating the widespread commercial exploitation of genetic research.

D. Property Rights in Human Genetic Materials?

1. DNA Possess Characteristic of Property

Genetic materials possess characteristics of "property". First, an individual possesses the DNA in his body. DNA is physically located in his body and the individual can exclude others from using or befitting from the use of his genetic materials by restricting access to his cells.[133] Second, he can control access to his genetic material by voluntarily deciding to whom and how the DNA sample is to be given away.[134]

Although DNA does not satisfy all requirements stipulated in *Ainsworth* to qualify it as property, "*Ainsworth*'s proposition was established in a period that had not witnessed the tremendous biotechnological advances of today".[135] In the past, there was no need to recognise property rights in the body because body parts were not as commercially and medically useful as they are today. Rigidly applying an archaic definition of "property" is counterproductive to property in biological forms. The law should be capable of growth and adaptation to changes according to realities of the society.

In any event as discussed in Part II section B, an individual does not need to possess all of the rights in the bundle in order to enjoy "property rights" in an object. DNA is therefore capable of being a property.

2. The Need of Recognising Property Rights in DNA in Light of the Commercialisation of Genetic Research

Traditionally, research subjects are willing to donate body tissue samples in the hope that it could contribute to the advancement of medical science. His tissue is a gift for research but not a licence for commercial exploitation. However, with the evolution of commercial value in human tissues, particularly DNA samples, it is desirable that researchers acknowledge the contribution of the research participants to avoid unfair exploitation. This could be achieved by meriting property rights in genetic materials, hence allowing people to know about their rights in advance. Once property rights are recognised, the rights to use, alienate, exclude, or in any way control DNA samples follows.[136] An important right that entails is the enabling of an action of conversion. As seen in Part III section A 1 c, the tort of conversion allows exploiters be made liable and confers sample donors a right to share the proceeds of commercial exploitation.

Assimilating DNA and other genetic materials into common law concepts of "property" also allows greater flexibility than specific legislative enactments, as the common law conception

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133 Valerio Barrad, C M, "Genetic Information and Property Theory", (1992) 87 *Northwestern University Law Review* 1037, pp 1050-1051.

134 *Ibid.*

135 *Supra* note 116 at 52.

136 Mahoney, J D, "The Market for Human Tissue", (2000) 86 *Virginia Law Review* 163, p 201.

is more adaptable to the world's changing technologies. It could also provide uniformity in dealing with disputes over human biological materials, hence assuring greater predictability by treating like cases alike.[137] Recognising property rights in DNA also gives effect to notions of fairness and prevents unjust enrichment. The physician-patient relationship is noteworthy for the inherently unequal bargaining power of the parties:[138] Biomedical researchers possess scientific information which are unknown to their research participants, for instance the value of body tissues and the patentable DNA sequence and products derived thereof.[139] "Moreover, research participants are often concerned about a disease affecting themselves or their loved ones and therefore may be particularly vulnerable during the bargaining process."[140]

Property rights help to counteract the way in which biotechnology improves the already superior bargaining position of the physician[141] by allowing patients to negotiate with the physicians concerning possible commercial arrangements. "Intuitively, one would expect that the individual, whose body is being commercially exploited should profit from that exploitation."[142] Donors could be given monetary rewards for their contribution. It was submitted that the availability of monetary reward might discourage altruism of gratuitous donation.[143] However, this policy consideration should be overridden by the concern that the individual's autonomy would be infringed by researchers' unlimited commercial exploitation if the law fails to provide adequate safeguards for the DNA sample providers.

Given the nature of genetic materials, suggestions of granting property rights in DNA have attracted vast criticisms pronouncing it as an affront to human dignity by acknowledging the right to commercialisation of the human body. The consequences of such could potentially include the establishment of "a marketplace of human body parts", competitive bidding for research materials and exposure of researchers to "potentially limitless and unchartered tort liability".[144] True, the recognition of such rights entails a lot of moral criticisms yet the conferral of a proprietary right is not to acknowledge and support the promotion of commodification of human beings, but rather to counteract and to minimise the harm done to individuals in a society where commodification has already taken place.

Another worry for according property right is that the more vulnerable groups, such as the poor, are more prone to exploitation for they are more likely and willing to offer their DNA information for research purposes in return for monetary reward. However, it is unlikely that medical advances associated with genes will directly benefit those who provide the raw materials for genetic researches, particularly those in less developed countries. Internationally, concern about exploitation of people in less developed communities has already led to calls

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137 Pignatella Cain, A S, "Property Rights in Human Biological Materials: Studies in Species Reproduction and Biomedical Technology", (2000) 17 *Arizona Journal of International and Comparative Law* 449, p 480.

138 *Supra* note 95, p 231.

139 Gitter, D M, Ownership of Human Tissue: A Proposal for Federal Recognition of Human Research Participants' Property Rights in Their Biological Material, (2004) 61 *Washington & Lee Law Review* 257, p 303

140 *Ibid.*

141 *Supra* note 95, p 231.

142 *Ibid*, p 229.

143 Mahoney, J D, "The Market for Human Tissue", (2000) 86 *Virginia Law Review* 163, p 164.

144 *Supra* note 100, p 938.

for benefit-sharing with groups participating in research.[145]

Conferral of property rights in genetic materials is opposed also because of its potential negative impact on scientific research. First, it would drastically hinder research efforts by forcing scientists to obtain permission to use genetic information and complicate research by creating royalty issues for those whose genetic information yielding from their DNA led to significant discoveries. If an individual owns their genetic material in the same manner as any other material possession, compensation would have to be offered in exchange for its use. Second, creating property rights in genetic materials may hinder the maintenance of a steady flow of available raw material for genetic research. "Companies are unlikely to invest heavily in developing, manufacturing or marketing a product when uncertainty about clear title exists."[146]

This argument is not convincing either. If the researcher is allowed to seek commercial benefits and invest time and efforts in developing lucrative profits, why should they not be required to seek permission for the use of DNA in commercial research? Moreover, it is also inconclusive that creating property rights will hinder the supply of genetic materials for research, as commercial incentives may "spur the consent from some who would not normally agree to the use of their tissue for commercial gain".[147]

The recognition of property rights would properly balance the interests of the various stakeholders. Society's interest is to promote health and well being of the society: "the researchers' interests which include academic recognition and respect, stability of funding and personal wealth"; corporate interest is to make profit; and the patients' interest is receive the best treatment possible, securing all reasonable benefits of treatment and having full knowledge of the treatment concerned to facilitate the making of a rational decision.[148] Conferring property right on human genetics materials could assure that all parties participate in the control of DNA and share the resulting benefits. Calls have already been made to recognise body tissues as property. Why then should something as akin to our identity as DNA not be accorded the same, if not greater, the same status and protection?

VI. Conclusion

No single perspective is sufficient to provide a full protection, consent, choice and control. Ultimately, how the law treats human beings is affected by judicial perceptions of what is in the public interest and what the community is prepared to tolerate.[149] What is necessary is to find an approach of treating human genetic materials which is consistent with the common law's approach and coherent enough to keep pace with advances in medicine, while still protecting the dignity and autonomy of the DNA owner.

Given the complexity of the legal and policy issues raised by particularities of genetic materials and the sensitivity of the information derived thereof, it is unlikely that informed

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145 Harrison, C H, "Neither Moore nor the Market: Alternative Models for Compensating Contributors of Human Tissue", (2002) 28 *American Journal of Law and Medicine* 77, p 80.

146 *Supra* note 100, p 937.

147 *Supra* note 95, p 233.

148 *Ibid.*

149 Mortimer, D, "Proprietary Rights in Body Parts: The Relevance of *Moore's Case* in Australia", (1993) 19 *Monash University Law Review* 217.

consent alone can fit comfortably into all the issues that arise.[150] Various interests and policy issues are involved, such as autonomy, privacy, physical integrity, equality, free flow of information and the protection and promotion of research. A great degree of flexibility is necessary to deal with these diverse, conflicting and fluctuating issues.

The purpose of this paper is to propose a method which could counteract the problem created by commercialisation of genetic research. What is put forward is a common law property right to be conferred on human DNA that goes hand in hand with the informed consent doctrine so as to ensure the greatest feasible protection for individuals.

The legislature could always, after balancing various policy considerations, impose limitations on these rights, such as prohibiting direct payment for DNA sampling, which could also bring the law in line with international instruments and alleviate the moral debate of commodification of human body parts. Profit-sharing schemes could also operate as suggested by the developing Protocol on Biomedical Research for the Convention on Human Rights and Medicine, where only in cases of lucrative profits could profit sharing be allowed.

In addition, noting that human genetic materials subsist in all human body materials including tissues and cells, apart from preventing the misappropriation of genetic materials, it is desirable to protect DNA from unjust appropriation by meriting property rights in human tissues as well.

After all, genetic research is for the benefit of mankind and to foster health for all human beings. Recognising property rights in DNA offers the "opportunity to advance biotechnological innovation, enhance the public accountability of researchers, and foster citizen involvement in pressing public health decisions, while ensuring honourable and equitable treatment of research participants".[151]

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150 Litman, M and Robertson, G, "The Common Law Status of Genetic Materials", *Supra* note 111, p 82.

151 *Supra* note 139, p 345.

THE IMPACT OF ETHICS ON GLOBAL PATENT HARMONISATION

RONALD KER-WEI YU*

The last century has witnessed a significant contribution to intellectual property regimes through the process of patent harmonisation, yielding significant benefits to international trade and reducing incentives of "forum shopping". However the rapid expansion in the field of biotechnology raises several problems, including the dilemma of reconciling ethics and patentability. This paper addresses this issue by first looking at the benefits of patent harmonisation and then critically examines the controversies surrounding biotechnology. The author further evaluates the political and economic ramifications of such issues of morality and deduces that this increased ethical discord might lead harmonisation in certain technological areas difficult, if not impossible to achieve.

I. Introduction

Increased harmonisation of world patent laws would provide numerous advantages for countries, companies and inventors alike. Through the elimination of separate, divergent national patent systems that in turn lead to duplicative and wasteful efforts in patent procurement,[1] harmonisation would eliminate unnecessary complexity in patent law and reduce legal and administrative fees, benefiting international trade and multinational ownership interests.[2] In addition, harmonisation would reduce the incentive for "forum shopping", particularly by applicants seeking favourable jurisdictions for multinational litigation enforcement efforts[3] and would create greater certainty of patent rights.[4]

Not surprisingly, many countries have embraced greater harmonisation of global patent laws. However, the increasing impact of ethical considerations, both directly on patent laws themselves and indirectly, via constitutional and other legislation, brought about largely from the moral controversies surrounding developments in biotechnology and nanotechnology are now making global patent harmonisation increasingly difficult, if not impossible, at least in certain technology sectors.

This may result in added strain being placed on the already overburdened intellectual property systems of developing nations, exacerbating disparities in global investments and development as investors, businesses and other interested parties direct their financial and technological resources to friendlier, less controversial jurisdictions, and increased forum shopping.

Are moral concerns now threatening to derail past efforts at harmonisation and if so, what might the potential impact be?

To answer this question, Part One of this paper looks briefly at the benefits of patent harmonisation and past efforts to achieve greater unification of international patent regimes.

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* The author wishes to offer special thanks to Ms Li Yahong and Ms Alana Maurushat and Messieurs Joeson Wong and Lawrence Lau for their assistance and support.

1 Duffy, J F, "Harmony and Diversity in Global Patent Law", (2002) 17 *Berkeley Technology Law Journal* 685.

2 Murashige, K H, "Harmonization of Patent Laws", (1994) 16 *Houston Journal of International Law* 591.

3 Kaminski, M D, "Patent Harmonization", at http://biotech.about.com/od/patentlawsandregulations/.

4 Sherman, B and Bently, L, "The Question of Patenting Life", in Bently, L and Maniatis, S M (eds), *Intellectual Property and Ethics* (London: Sweet & Maxwell, 1998), pp 116-117.

Part Two examines the controversies, particularly the ones surrounding biotechnology, which are threatening to cause new divisions in global patent regimes.

Part Three then evaluates how different nations have tackled the problem of reconciling ethics and patentability.

Part Four looks at how issues of morality are causing discordance in global patent regimes either by affecting the patent laws directly or by impacting other related legislation, such as constitutional law, (by examining differences in ethical viewpoints, their potential political impact and possible economic ramifications, both for developed and developing nations, of greater divergence in global patent regimes).

Part Five considers where this increased ethical discord might be headed and concludes that harmonisation in certain technological areas may be difficult, if not impossible, to achieve.

Finally, the paper considers the potential impact of this lack of harmonisation.

II. Part 1: Reaching International Consensus in Patenting

In the past century, one of the defining characteristics of intellectual property has been the manner in which questions of judgment have been replaced with what are taken as objective criteria.[5] This approach has undoubtedly contributed to global harmonisation enabling inventions to be judged primarily on their technical merits rather than their ethical ones.

Indeed, global patent regimes have been inching their way towards greater harmonisation over the past 130 odd years starting in 1883[6] with the Paris Convention. The Paris Convention forms the basis for international cooperation in patent protection. Its most significant provisions allow an applicant to retain the initial filing date of an application filed in any member state against a corresponding application in another member state provided that an application is filed in the other member state within a year of the original filing.[7]

Another giant step toward harmonisation was made in 1977 with the emergence of the European Patent Convention (EPC) and the formation of the European Patent Office (EPO) while a smaller step toward substantive harmonisation is reflected in the Patent Cooperation Treaty (PCT).[8] Following the 1986-1994 Uruguay Round came TRIPs whose scope went well beyond the Paris Convention.[9]

In June 2002, the World Intellectual Property Organization (WIPO) began its Patent Law Treaty (PLT)[10] initiative to harmonize the formalities that patent offices undertake to administer patent applications, defining one set of rules on how to prepare, file and manage patents in all the countries that sign on.[11]

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5 *Ibid.*

6 *Ibid.*

7 *Supra* note 2.

8 *Supra* note 2.

9 Sterckx, S, "European Patent Law and Biotechnological Inventions", in Sterckx, S, *Biotechnology, Patents and Morality* (Aldershot: Ashgate, 2000), p 82.

10 The PLT is not in force yet, because 40 governments have not yet ratified it.

11 This discussion on past efforts at harmonisation would not be complete without some mention of the failed WIPO that began in 1985. This treaty would have changed the United States patent system from a first-to-invent to a first-to-file system, created a prior user defence, called for publishing applications, and

Finally, in March 2003, the European Council reached an agreement on a "common political approach" to the proposed community patent convention that will make it possible for inventors, with a single application, to obtain a patent, which is valid in the 25 States that are signatories to the EPC.[12]

The creation of a global patent system is increasingly seen as both necessary and achievable; the necessity of harmonisation generally being attributed to the realities of globalisation and developing technologies.[13]

Reductions in costs are one important benefit potentially offered by international patent harmonisation. At present, per-country patent costs are in the order of US$5000.[14] This does not include the added delays or costs involved if translation to local languages are required nor does it include the risk that an error made during such translation might either impact the scope of the claims, the patentability of the entire invention, or cause the inventor to either lose the patent or obtain greatly reduced coverage if the error cannot be corrected.[15]

The reduction of such costs, particularly for inventions applications that would be filed in several countries, would be especially welcome news for small inventors, as it would greatly enhance their accessibility to world markets.[16]

Greater consensus among patent regimes could allow for the rationalization of the administration of patent systems, allowing countries to consolidate intellectual property expertise and resources among different nations, thereby enabling efficient and resourceful administration of patent rights.[17]

This would be especially helpful for developing countries struggling to achieve compliance with the TRIPs requirements particularly if the existing national systems of these countries

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based the patent term on the filing date rather than the date of issuance. The possibility of harmonisation ended on 24 January 1994, however, with the announcement that the United States would maintain its system of first-to-invent. See Pritchard, R W, "The Future Is Now - The Case for Patent Harmonization", (1995) 20 *North Carolina Journal of International Law and Commercial Regulation* 291. *Supra* note 8.

12 A&L Goodbody International Financial Services Centre, "Community Patent Convention", 10 March 2003, at http://www.algoodbody.ie/news/load.asp?date=23/03/2005&file=PUB%3A872.

13 Pila, J, "Bound Futures: Patent Law and Modern Biotechnology", (2003) 9 *Boston University Journal of Science and Technology Law* 326.

14 "Obtaining Foreign Patent Protection", July 1999, at http://www.iplawky.com/wcsb/procedur.htm. The cost of filing a foreign patent application for an American inventor typically falls into three stages:

(1) A typical PCT application costs about US$3000 at the time of filing.

(2) About six months later, the request for examination costs an additional estimated US$800 to US$900, and there will likely be service fees for the work done in replying to any communications from the search and examination of the application.

(3) After another six months has passed, the patent owner is faced with the biggest outlay of fees to start what is called the national/regional phase. For certain countries, like Japan, where translations are costly, the cost of filing the application alone is likely to exceed US$4000 with other fees expected for prosecution and issuance. In Canada, the cost will be far less. The EPO filing will exceed US$6000, some prosecution cost will be involved, and translations will be needed once the patent is ready to be issued.

15 Campbell, R L, "Global Patent Law Harmonization: Benefits and Implementation", (2003) 13 *Indiana International and Comparative Law Review* 605.

16 *Ibid.*

17 Nguyen, C H, "A Unitary ASEAN Patent Law in the Aftermath of TRIPS", (1999) 8 *Pacific Rim Law and Policy Journal* 453.

lack expertise and adequate fund, or are inefficient in application processing.

Moreover, the recent globalisation of capital[18] and the industry's desires for a level playing field have served to push for greater harmonisation by highlighting how differing levels of patent protection both act against commercial even handedness and constrain trade.[19]

III. Part 2: An Overview of the major ethical controversies in biotechnology and nanotechnology

While biotechnology (which may be defined as the use of living organisms to make commercially valuable products and processes, including *inter alia*, therapeutic compositions and agricultural and industrial products[20]) and nanotechnology (the creation of molecule-size machines and other devices and the manipulation of substances molecule by molecule[21]) have enormous potential to help society, their introduction and implementation have raised serious societal and ethical issues which are impacting patent law. Though most of the controversies involve biotechnology, significant ethical issues are now emerging with nanotechnology, particularly for technology that has such biotechnological applications as the ability to custom build portions of DNA and other chemicals bit by bit and the potential to create machines that can interact with, or even penetrate cells of a living organism.

A. The Impact of Biotechnology on Patent Law

The emergence of biotechnology has thrown traditional conceptions of patent law into turmoil. Biotechnology distinguishes itself from the traditional mechanical and chemical arts that uproot patent law doctrines. Self-replicating biotechnological inventions pose unique problems, not only because the product duplicates itself for competitors as well as for consumers, but also because the concept of patenting a living creature cuts against patent law's mechanically based norms. Moreover, the puzzle of distinguishing the man-made from the natural challenges the definitions that both patent doctrine and traditional science impose on the resulting organisms. As more biotechnological inventions mature into marketable products, commercial conflicts over the problem of defining such products in traditional terms have increased.[22]

Among the patented biotechnology inventions that have generated controversy include isolated genes, sequenced DNA, medical procedures, embryonic stem cells, genetically modified transgenic animals, and methods of cloning mammals. Moral controversies surrounding these and other biotech inventions stem from several concerns including those arising from the mixing of human and animal species, the denigration of human dignity, the destruction of potential human life, and the ownership of humans.[23]

Of course, controversies in patents are nothing new. American courts, for instance, have

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18 Leith, P, Chandler, A (ed), *Harmonisation of Intellectual Property in Europe: A Case Study of Patent Procedure* (London: Sweet & Maxwell, 1998), p 1.

19 *Supra* note 2.

20 Seide, R K and Smith, F A, "Intellectual Property Protection and Biotechnology", (1995) 67-JUN *New York State Bar Journal* 52.

21 Wolfson, J R, "Social and Ethical Issues in Nanotechnology: Lessons from Biotechnology and Other High Technologies", (2003) 22 *Biotechnology Law Report* 376.

22 Ko, Y, "An Economic Analysis of Biotechnology Patent Protection", (1992) 102 *Yale Law Journal* 777.

23 Bagley, M A, "Patent First, Ask Questions Later: Morality and Biotechnology in Patent Law", (2003) 45 *William and Mary Law Review* 469.

debated the patentability of inventions used solely for gambling or fraud. They have also upheld the validity of software business methods patents even though the legitimacy of such patents has been disputed.[24]

Yet none of these past controversies has matched the scope and intensity of the furor surrounding biotechnology. This is probably not surprising given that biotechnology is a fundamental technology that reaches into all aspects of four very basic areas: food, health, reproduction and environment.[25]

A brief examination of some of these controversies reveals a host of contentious environmental, animal rights, safety, religious, ownership, farmers' rights and globalisation issues. Moreover, there are indications that nanotechnology, which may have biotechnological applications, may prove highly contentious as well.

B. Ethical Issues of Patenting Life and Exploiting Animals

Concerns have been raised about the ethics of the patenting of life or the extension of patent law to living materials by groups including Greenpeace,[26] the Patent Concern Coalition,[27] various religious groups and farmer's interest advocates.[28] Some groups such as the Society for the Protection of Animals[29] and People for the Ethical Treatment of Animals (PETA)[30] object to such patents on the grounds that they foster the exploitation of animals while other groups such as Global Action in the Interest of Animals[31] oppose not only patents for transgenic animals but also the use of such animals in research or other fields.

Among the concerns more commonly expressed include contentions that genetically engineered animals could damage or destroy native species by over population, over consumption, habitat destruction, or simply interbreeding so that no "natural" examples of a species remain. Others have questioned whether humans' property rights over animals are

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24 Stern, R H, "Scope-of-Protection Problems With Patents and Copyrights on Methods of Doing Business", (1999) 10 *Fordham Intellectual Property, Media and Entertainment Law Journal* 105. See also The League for Programming Freedom, "Against Software Patents", 28 February 1991, at http://lpf.ai.mit.edu/Patents/against-software-patents.html and Red Hat, Inc, "Statement of Position and Our Promise on Software Patents", at http://www.redhat.com/legal/patent_policy.html.

25 Drahos, P and Braithwaite, J, *Information Feudalism: Who Owns the Knowledge Economy?* (London: Earthscan, 2002), p 165.

26 Alexander, D, "The Case For and Against the Patenting of Biotechnological Inventions", in Sterckx, S (ed), *Biotechnology, Patents and Morality* (Aldershot: Ashgate, 2000), pp 254-258.

27 Emmott, S, "The Case For and Against the Patenting of Biotechnological Inventions", in Sterckx, S (ed), *Biotechnology, Patents and Morality* (Aldershot: Ashgate, 2000), pp 250-253.

28 *Supra* note 9, p 18.

29 Linskens, M, "The Case For and Against the Patenting of Biotechnological Inventions", in Sterckx, S (ed), *Biotechnology, Patents and Morality* (Aldershot: Ashgate, 2000), pp 262-265. See also Hong Kong Society for the Prevention of Cruelty to Animals, *Policy Document Draft* (May 2002), art 11.3.1. The SPCA believes that patenting an animal reduces the intrinsic value of that animal, demoting it to a mere "scientific invention" and that this encourages the view that animals are merely laboratory tools rather than sentient beings capable of suffering. Furthermore, the SPCA believes the financial incentives involved in patenting transgenic animals could lead to welfare considerations for those animals being overridden. The incentive to establish patents could lead to an increase in the use of animals in research in attempts to develop patentable products.

30 According to PETA, "Animals are not test tubes with tails, but feeling beings like us." See also Visser, D, "Who's Going to Stop Me from Patenting My Six-legged Chicken: An Analysis of the Moral Utility Doctrine in the United States", (2000) 46 *The Wayne Law Review* 2067.

31 Vandenbosch, M, "The Case For and Against the Patenting of Biotechnological Inventions", in Sterckx, S (ed), *Biotechnology, Patents and Morality* (Aldershot: Ashgate, 2000), pp 259-261.

such that they allow humans to alter animals' genetic structures.

Animal rights advocates have voiced concerns that animal patenting will cause increased animal suffering particularly transgenic research animals; some of whom are created to suffer while others suffer as a result of unanticipated consequences.

Other objections to transgenic creatures concern animals created for the entertainment purposes of people – animals created for their freakish appearance, size (big or small) or their unusual abilities – which might end up being forced to endure lifetime of suffering. Some transgenic animals have been horribly unfortunate, such as the pig with a human growth gene which unexpectedly grew to be "excessively hairy, riddled with arthritis, and cross-eyed", seldom even standing up.[32]

Many jurisdictions have statutes criminalising cruelty to animals though these statutes vary considerably while some jurisdictions also protect specific animals. The United States, for example, protects the Bald and Golden Eagles and Fur Seals through the *Bald and Golden Eagle Protection Act of 1973* and the *Fur Seal Act of 1966* respectively.

C. Safety Issues

In addition to the questions raised by the potential abuse of genetically modified organisms (GMOs), a second category of concern surrounds the question whether GMOs are safe for people and the natural environment.

Controversy over such genetic modification of animals and plants has been growing considerably over the past decade, particularly in Europe, and increasingly, in the United States with news articles questioning "Frankenstein Food" or television images of protesters ripping up test plots of "transgenic" plants. In November 1999, forty-eight members of the US Congress joined several groups in urging the American Food and Drug Administration (FDA) to require that foods with genetically modified components be labelled. As a result of these expressions of concern, the FDA held several public comment meetings in November and December of 1999 and now requires that genetically modified foods be labelled if the foods represent a chance of a safety risk.

Yet, safety concerns only begin to address the myriad concerns to which transgenic foods give rise. Some vegetarians might object to the presence of animal genes in their food, and some Jews might be concerned that kosher foods with genes of non-kosher animals might enter their food supply in an unrecognisable way.

Awareness of the potential harms of genetically modified foods comes, in part, from two highly publicized discoveries in 1999. Pioneer Hi-Bred International asked a University of Nebraska scientist to test a variety of soybean seed into which a Brazil nut gene had been introduced (to increase the bean's protein level). The scientist discovered that the soybean caused an allergic reaction in people with Brazil nut allergies. Similarly, scientists at Cornell University discovered that corn that had been genetically altered to produce an insecticide released pollen on nearby plants with the unexpected result of killing monarch butterfly larvae, potentially threatening the entire monarch butterfly population as well as threatening the

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32 Edwards, B S, "' . . . and on his farm he had a geep': Patenting Transgenic Animals", (2001) *Minnesota Intellectual Property* 3.

plants and animals that rely on the monarchs.[33]

D. Environmentalism

Environmentalists also voice concerns regarding the potential loss of genetic or biological[34] diversity or the fear of a loss of genetic diversity, notably the potential impact that a new disease could have on a plant or animal population that has been bred without resistance to the disease.[35] Other commonly expressed concerns hold that genetically engineered organisms could escape and infect or transmit their altered genetic material to other organisms, or even outbreed and overrun naturally occurring species.[36]

Non-native species of plant and animal regularly invade the environment causing great harm. For example the gypsy moth which was artificially introduced to the United States, has "defoliated an estimated ten million acres" while the unintentional release of zebra mussels into American lakes in the 1980s significantly changed the ecology of some American lakes and rivers, threatening several species of native animals by consuming food resources native fish and mussel species require, depleting oxygen levels in the waters they inhabit, clogging power station pipes and damaging boats.

Several articles have recently expressed concern over transgenic salmon escaping into the wild and, possibly, endangering native populations through over-consumption or over population while evidence of the dangers escaped transgenic animals could cause to the environment was recently supplied by two Purdue University scientists who modelled the release of transgenic fish into a wild environment and concluded that "introduction of genetically modified organisms into natural populations could result in ecological hazards, such as species extinction." Professors Muir and Howard inserted human growth hormone genes into medaka (a type of small fish) to study "*the ecological consequences of transgene release into natural populations*" and discovered that the transgenic fish had a four-fold mating advantage which spread the transgenic in a manner which could be disastrous for the native species: "*we refer to this type of extinction as the 'Trojan gene effect', because the mating advantage provides a mechanism for the transgene to enter and spread in a population, and the viability reduction (of the offspring) eventually results in population extinction.*"[37] In fact, the potential fallout resulting from accidental introduction of genetically engineered organisms into the wild was the main hurdle that Dr Chakrabarty was unable to overcome in order to put his oil-eating bacteria to use [*Supra* p 17].

E. Playing God

Recombinant DNA patents also raise questions about playing God[38] including fears that genetic engineering may result in genetic discrimination or determinism that may result in, among other things, the creation of a new underclass or other problems such as selective

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33 *Ibid.*

34 Srividhya, G S, "Biological Diversity: An Indian Perspective on North-South Issues", in Hill, K M, Takenaka, T and Takeuchi, K (eds), *CASRIP Symposium Publication Series No 6: Rethinking International Intellectual Property* (Seattle: University of Washington, 2001), pp 225-233.

35 *Supra* note 30.

36 *Ibid.*

37 *Supra* note 32.

38 Hayry, M, "Categorical Objections to Genetic Engineering – A Critique", in Dyson, A and Harris, J (eds), *Ethics and Biotechnology* (London: Routledge, 1994), p 205.

abortions.[39]

Today, it is possible to find a great deal of genetic information about a person. Though such genetic information clearly provides benefits, for example in giving information about the risk of future disease, disability and early death, there is widespread concern, both at the public policy and at the individual levels, about the misuse of these information as grounds for discrimination.[40] Cases of genetic discrimination are already emerging, in the Hong Kong case of *K & Others v Secretary for Justice*[41], the first case concerning genetic discrimination in a common law jurisdiction, which involved three men who were rejected for jobs in the Hong Kong civil service due to the history of mental illness, namely schizophrenia, in a parent.[42] The court eventually ruled that the discrimination was unlawful.

Eugenics will likely prove more controversial. While eugenic genetic engineering may enable the improvement of the complex of human traits and may be used positively to eliminate certain types of hereditary ailments at the same time, it could potentially exacerbate current social and economic disparities if beneficial procedures are only available to the rich.

There are also issues of deciding what types of illnesses or physical characteristics deserve treatment or warrant improvement, as well as concerns that essential human dignity may be compromised if a person realizes that he/she is the product of genetic fabrication[43] or that eugenics work could demean human dignity if it were used to create, for example, a class of non aggressive, mentally very limited individuals who would probably be happy with industrial working conditions intolerable for man.[44]

F. Ownership Issues

The ownership of human genetic material is another contentious area surrounding human biotechnology and the overall ethics of tampering with DNA.[45]

Moore v The Regents of the University of California

In *Moore v The Regents of the University of California*[46] the Supreme Court of California addressed the controversial issue of whether tissues which had been removed from a person's body constituted that person's property and were therefore subject to conversion.

In 1976, John Moore was treated at the UCLA Medical Center for hairy-cell leukemia. Moore's doctor removed blood products from Moore's body and soon realized that these blood products contained substances that would be commercially and scientifically useful.

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39 Peters, T, *Playing God?: Genetic Determinism and Human Freedom* (New York, London: Routledge, 2003), pp 122-3.

40 Wong, J G and Lieh-Mak, F, "Genetic Discrimination and Mental Illness: A Case Report", (2001) 27 *Journal of Medical Ethics* 393.

41 *K and Others v Secretary for Justice* (2000) DCt, Case No 3, 4, 7 of 1999, 27 September 2000, Judge Christie.

42 *Supra* note 40.

43 *Supra* note 30.

44 Wessels, U, "Genetic Engineering and Ethics in Germany", in Dyson, A and Harris, J (eds), *Ethics and Biotechnology* (London: Routledge, 1994), p 241.

45 Wei, G, *An Introduction of Genetic Engineering, Life Sciences and the Law* (Singapore: Singapore University Press, 2002).

46 *Moore v The Regents of the University of California*, 793 P 2d 479 (1990).

The doctor then informed Moore that the removal of his spleen was necessary both to slow the progress of the disease and save Moore's life. The doctor and several others, however, actually planned to use Moore's spleen in research efforts. No one informed Moore of the research activities nor did they request his permission to use the spleen for research purposes. Moore returned to the UCLA Medical Center several times between 1976 and 1983, at his doctor's insistence, to have more blood removed.[47] Eventually, T-lymphocytes from Moore's spleen and other tissue were used to establish a cell line. The cell line and various methods for using it were eventually patented and at one time were estimated to be worth over US$3 billion due to the variety of rare products the cell line was capable of producing.[48]

Mr Moore subsequently sued the doctor, alleging conversion, and claiming that he had property rights in his cells and amputated spleen. However, while the California Supreme Court found a duty on the part of physician-researchers to make fuller disclosure to patients than was made to Moore, it declined to acknowledge a claim for unlawful taking or "conversion" of Moore's "property" under California law.[49]

In explaining why Moore did not retain an ownership interest in his cells, the court asserted that no judicial decision supported Moore's claim. In addition the court interpreted California statutory law regarding the disposal of human body parts after scientific use to severely limit any interest of a patient in cells once they had been removed. The court concluded that the patented cell line and its products could not be Moore's property, basing this conclusion on the fact that the patented cell line was "factually and legally distinct" from the cells removed from Moore's body, stating that Moore could not claim to own the cell line because the nature of the patent assured that the cell line was the product of invention.[50]

Finally, the court noted that the conversion and property right claims threatened to destroy the economic incentive to conduct important medical research and that because liability for conversion is predicated on a continuing ownership interest, companies are unlikely to invest heavily in developing, manufacturing, or marketing a product when uncertainty about clear title exists. In essence, the court concluded that it was economically irrational to grant Mr Moore rights in his cells. (It should be noted that the issue of ownership is dealt with in Recital 26[51] of the EC Biotech Directive).

G. Other Issues

There are still more controversies surrounding biotechnology patents. Some have called for a ban on "immoral" patents on the grounds that they foster a widening of the existing divide between wealthy and poor nations[52] and/or contravene the rights of poor farmers.

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47 Wegner, D M, "Property Rights in the Human Body: The Commercialization of Organ Transplantation and Biotechnology", (1995) 33 *Duquesne Law Review* 931.

48 Muchmore, J J, "Proprietary Rights and the Human Genome Project: A Legal and Economic Perspective", (2000) 8 *The Digest* 45.

49 Harrison, C H, "Neither Moore nor the Market: Alternative Models for Compensating Contributors of Human Tissue", (2002) 28 *American Journal of Law and Medicine* 77.

50 *Supra* note 47.

51 Recital 26 of EC Directive 98/44 states that "Whereas if an invention is based on biological material of human origin . . . the person from whose body the material is taken must have an opportunity of expressing free and informed consent thereto, in accordance with national law".

52 Shiva, V, "Intellectual Property Protection in the North/South Divide", in Heath, C and Sanders, A K (eds), *Intellectual Property in the Digital Age: Challenges for Asia* (The Hague: Kluwer Law International, 2001), p 113.

Groups such as The Institute of Science in Society[53] have raised objections to biotechnology patents in general while groups such as the Working Group for a Just and Responsible Agriculture (WERVEL) have raised concerns regarding safe food production, farmers' rights and sustainable agriculture[54] noting for instance that certain classes of patents, such as patents on higher non-human life forms, threaten to undermine the economic viability of industries that rely on plants and animals.[55]

Among the arguments such groups have put forth include greater dependency of farmers on multinational corporations, added economic costs for farmers who would be obliged to pay royalties on every generation of plants and livestock they buy and reproduce, lack of free access by breeders to germ plasma for developing new varieties of plants and animals as well as the risks of monopoly control over genetic resources, farmers' harvests and the processed results, including erosion of genetic diversity and excessive control over food supplies.[56]

Many traditional societies have put forth the proposition that monopoly protection of products derived from traditional ecological knowledge is exploitative and morally wrong[57] while others argue that the Third World will increasingly lose access to scientific information and technology transfer and will see their freely donated biological resources privatized by the North.[58]

Others have warned that biotechnological cartels which control important biotechnological intellectual properties pose dangers to pricing, consumer welfare and public good qualities.[59]

Members of the clergy have opposed patents on living organisms, for instance Methodist Bishop Kenneth Carder once stated that "because Life is a gift from God and because as a gift life has intrinsic value, the problem with patenting is that it reduces life to its economic worth."[60]

H. Nanotechnology

Finally, it should be noted that significant ethical debates are not limited to biotechnology. Moral debates surrounding nanotechnology are also emerging.

Because of its microscopic size, easy dispersal, self-replication, and potential to inflict massive harm on persons, machines, or the environment, nanotechnology makes a tempting terrorist weapon. There is a risk in nanotechnology that microscopic pieces of assemblies can

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53 Ho, M W, "Why Biotech Patents Are Patently Absurd – Scientific Briefing on TRIPs and Related Issues", at http://www.ratical.org/co-globalize/MaeWanHo/trips2.html.

54 Vankrunkelsven, L, "The Case For and Against the Patenting of Biotechnological Inventions", in Sterckx, S (ed), *Biotechnology, Patents and Morality* (Aldershot: Ashgate, 2000), pp 274-276.

55 Geci, C and Knoppers, B M, "Patenting of Higher Life Forms: A Canadian Perspective", (paper presented at the Intellectual Property and Biological Diversity Resources Conference, 2003, Singapore, cited with authors' permission).

56 *Supra* note 54.

57 Jeffery, M I, "Intellectual Property Rights and Biodiversity Conservation: Reconciling the Incompatibilities of the TRIPs Agreement and the Convention of Biological Diversity", (paper presented at the Intellectual Property and Biological Diversity Resources Conference, 2003, Singapore, cited with author's permission)

58 *Supra* note 54.

59 *Supra* note 25.

60 *Supra* note 39, p 140.

break off and float in the air and as nanotechnology has the power to self-replicate, it poses dangers that are similar to those posed by biotechnology and bioengineering research and development, but with its own unique twists. For instance, nano-machines could be produced to build other nanotechnology and thus could become self-replicating. This could have potentially negative consequences – if producers are inside an important structure (such as a human body, a bridge, or a computer that controls a hospital's functions) and they reproduce quickly and efficiently, they may cause the surrounding "organ" or structure to cease to function properly. Such failure can lead to death or other harmful consequences. Further, nano-machines could be programmed to do two functions – replicate a certain number of times and then move on to do "useful" work. If there were programming or design errors in the instructions for the "useful" work function, then the danger posed by self-replicating nano-machines could be severe. Additionally, nanotechnology can be used to clone machines as well as living creatures. Issues similar to those currently plaguing policy makers about biological cloning need to be raised early in the life of nanotechnology.

Others have highlighted potential dangers of nanotechnology becoming an engine of police repression or oversight and potential dangers with military applications of this technology.[61]

I. National and Industry Incentives for Global Patent Harmonisation

As strong as the ethical opposition to certain classes of patents is, there are compelling economic and policy considerations for technological development[62] supporting the patentability of morally contentious inventions.

For instance, support of the patentability of higher life forms provides the necessary financial incentive for industry to invent, disclose and make new technology available to the public by helping industry attract investment and recoup its costs of research and development. While some contend that patents on higher life forms are unnecessary as patents on DNA sequences or the processes necessary to invent a plant or an animal, as well as trade secrets or plant breeders' rights, offer sufficient protection to the inventor,[63] the availability of patent protection fosters openness and innovation by providing an alternative to trade secret protection or that a nation may suffer economically if it does not follow its major trading partners. And of course, other forms of intellectual property protection are not immune to ethical controversy either.

Certainly, the biotechnology industry would like continued patent protection for its technological investments, given the economics of the business. A 1991 Journal of Health Economics study found that it is not unusual for the cost of developing a single, new drug to reach as high as US$500 million[64] while other studies have shown that total cost of bringing a new drug to market has climbed dramatically from US$54 million in 1976 to US$231 million in 1987, to US$802 million in 2000. These figures include the cost of research into failed compounds, as well as the cost of interest over the time period of dollar investment. Of all of the drug compounds that a company may initially study and screen, only a few will ever

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61 *Supra* note 21.

62 Schatz, U, "Patents and Morality", in Sterckx, S (ed), *Biotechnology, Patents and Morality* (Aldershot: Ashgate, 2000), pp 219-220.

63 *Supra* note 55.

64 Collins, T, "The Pharmaceutical Companies Versus AIDS Victims: A Classic Case of Bad versus Good? A Look at the Struggle between International Intellectual Property Rights and Access to Treatment", (2001) 29 *Syracuse Journal of International Law and Commerce* 159.

make it to market[65] and not all drugs that are introduced into the market generate enough profits to cover development costs.

Overall, the amount of money spent by the industry as a whole is massive – Pharmaceutical Research and Manufacturers of America (PhRMA), the pharmaceutical industry's trade group reported that in 2002, PhRMA members invested more than US$32 billion in research and development.[66]

Not surprisingly the number of patent filings and issued patents for biotechnology-related inventions has exploded in the past 20 years and that such patents are often the most valuable assets typically held by a biotechnology company, as evidenced by increases in the value of a company's stock upon issuance of a patent covering valuable technology.[67]

It is also not surprising that given the biotechnology industry's heavy dependence on strong patent protection that the biotechnology industry should be particularly interested in global patent harmonisation. Indeed, ongoing differences in national standards of patentability are a constant source of complaint within the biotechnology industry, both because of the legal (and thus commercial) uncertainty they create, and the risk they pose of technological piracy in countries offering lesser standards of protection.[68]

But nations that house biotechnology companies and that derive significant revenue from exportation of those companies' products also have a vested interest in harmonisation, given their desires for a commitment from their trading partners to recognize the same high level of patent protection for modern biotechnology as they themselves provide. Developing nations without strong biotechnology industries may nevertheless support a harmonized system in order to secure their own stake in modern biotechnology – a stake that derives, above all, from their (often rich) and commercially valuable genetic and other biological resources, and from their dependence on the pharmaceutical and other products that research into and development of those resources gives rise.[69]

Finally, there is the ongoing political pressure on all countries to yield to international standards, and the fear that if they do not they will become technologically dependent on (and exploited by) their trading partners.[70]

IV. Part 3: Ethics and Patents

Yet whether or not harmonisation is achievable has been called into question by controversies over the ethics of biotechnology and one consequence of these patent controversies has been the emergence of a new phenomenon – as patent offices began to receive patent applications for genetic materials of micro-organisms, plants, animals and humans or for micro-organisms, plants and animals as such, they began to receive oppositions not only by competitors, as was traditionally the case with opposition proceedings, but by organizations such as Greenpeace,

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65 *Ibid.*

66 The Pharmaceutical Research and Manufacturers of America, "Appendix: Detailed Results from the PhRMA Annual Membership Survey 2002", at http://www.phrma.org/publications/publications/profile02/index.cfm.

67 *Supra* note 20.

68 *Supra* note 13.

69 *Ibid.*

70 *Ibid.*

"No Patents on Life", animal welfare organizations and other coalitions.[71]

For example, in the American case of *Animal Legal Defense Fund v Quigg*[72] several farmers and animal rights groups including the Animal Legal Defense Fund, the American Society for the Prevention of Cruelty to Animals, the Marin Humane Society, Wisconsin Family Farm Defense Fund (WFFDF), Humane Farming Association, Association of Veterinarians for Animal Rights, and PETA unsuccessfully challenged the statutory authority of the US Patent and Trademark Office (USPTO) to define the scope of patentability on both procedural and substantive grounds[73] after the USPTO issued a notice stating that non-human living organisms, including animals, were patentable.

The plaintiffs argued, *inter alia*, that the notice should have been published in the Federal Register pursuant to section 553 of the *Administrative Procedure Act* (APA) and sued to enjoin the defendant commissioner from issuing such patents until he had complied with the public notice provision of the APA. The plaintiffs also sought a declaration that USPTO acted in excess of its statutory jurisdiction by including animals as patentable subject matter.

However, the US District Court for the Northern District of California rejected these assertions and held that the rule was an interpretation of prior decisional precedent and not the result of substantive rulemaking, it therefore was an interpretative rule not subject to APA notice and comment requirements. The Federal Circuit affirmed dismissal and determined that the animal rights groups and farmers lacked standing.

Several years after the decision in *Animal Legal Defense Fund v Quigg*, Dr Stuart Newman, a cellular biologist at New York Medical College, and Jeremy Rifkin, a prominent opponent of biotechnology, filed for a US patent covering the production of human-animal chimeras[74] that could be up to 50% human (the so-called Rifkin-Newman patent application) on 18 December 1997.[75] In filing their patent, Newman and Rifkin hoped to either prevent other scientists from creating human-animal chimeras for at least two decades by obtaining this patent or have USPTO reject their application on moral grounds and alter USPTO procedures to prohibit the patenting of ethically questionable practices, as has been done in the European Community (EC).[76]

The Rifkin-Newman patent application promoted a response from the USPTO in the form of a media advisory which stated that "*the PTO fully applies the law without discriminating against a particular field of technology*" and that patents are not granted unless they "*meet the strict patentability requirements set forth in patent laws*".[77]

Yet, this and similar statements have failed to quell the growing disquiet surrounding biotechnology. Indeed, differences over biotechnology are already causing rifts to develop in

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71 *Supra* note 9.

72 *Animal Legal Defense Fund v Quigg*, 18 USPQ2D (BNA) 1677 (1991).

73 Sellers, M E, "Patenting Nonnaturally Occurring, Man-Made Life: A Practical Look at the Economic, Environmental, and Ethical Challenges Facing Animal Patents", (1994) 47 *Arkansas Law Review* 269.

74 A "chimera" is "an organism, esp a plant, with tissues from at least two genetically distinct parents". *Webster's II New Riverside Dictionary* (Boston: Houghton Mifflin, 1988), p 256.

75 *Supra* note 32.

76 Magnani, T A, "The Patentability of Human-Animal Chimera", (1994) 14 *Berkeley Technology Law Journal* 443.

77 Ho, C M, "Splicing Morality and Patent Law: Issues Arising from Mixing Mice and Men", [2000] 2 *Washington University Journal of Law and Policy* 247.

worldwide patent regimes. In October 1998, the Government of the Netherlands filed a legal action before the European Court of Justice for the EC Directive 98/44/EC, the so-called EC Biotech Directive (1998), to be annulled.[78] The Dutch government, which was joined by the governments of Italy and Norway, argued *inter alia* that because the Commission's proposal for the Directive had not been provided to all of the Commissioners in all of the official languages, the Commission's proposal was unlawful and that the Biotech Directive was unclear, in terms of when biotechnological inventions would be ineligible for patent protection on ethical grounds and allowed patents to be obtained over isolated parts of the human body, which was offensive to human dignity from an ethical point of view.

However, the Court of Justice dismissed the Dutch application for interim measures on 25 July 2000 and in a subsequent advisory opinion, Advocate General Jacobs also rejected the material request on 14 June 2001 on the basis that the grounds invoked for the annulment of the Directive were incorrectly based on Article 100a of the Treaty, were contrary to the principle of subsidiarity, infringed the principle of legal certainty, were incompatible with international obligations, breached fundamental rights, and were not properly adopted as the definitive version of the proposal submitted to the Parliament and the Council had not been decided on by the college of Commissioners.

On 9 October 2001, the Court followed the Advocate General's lead and dismissed the action, holding that the Directive complies with EC law.[79] Yet, in spite of the Court's decision, several countries did not implement the directive within the requisite time frames and in July 2003, the European Union (EU) initiated court action against Germany, Austria, Belgium, France, Italy, Luxembourg, the Netherlands and Sweden, for their failure to adopt the EC Biotech Directive.[80]

More recently Canadian Supreme Court decided to deny patentability to the Harvard Oncomouse, a mouse genetically engineered to be susceptible to cancer, in the face of American and EPC patent approvals.

Thus it would seem that the intrusion of ethics, and growing importance generally of judicial discretion within contemporary patent discourse, appears to be creating increased uncertainty and propensity for divergent standards of protection[81] that does not bode well for continued international efforts at harmonisation.

A. Impact on Harmonisation

Despite its achievements, TRIPs was unable to effect complete harmonisation and considerations of the ethical aspects of patentability proved highly contentious with the United States, Japan, the Nordic countries and Switzerland pressing for no or minimal exceptions to patentable subject matter, while the EU and a host of developing countries wishing to exclude patents for inventions which would be contrary to public policy or

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78 *Kingdom of the Netherlands v European Parliament and Council of the European Union*, European Court of Justice, Case C-377/98, decision of 9 October 2001, at http://www.curia.eu.int/jurisp/cgi-bin/form.pl?lang=en.

79 Spranger, T M, "Europe's Biotech Patent Landscape: Conditions and Recent Developments", (2002) 3 *Minnesota Intellectual Property Review* 235.

80 "EU Takes Nations to Court on Patent Laws", *The Washington Post*, 10 July 2003, at http://www.zsa.ca/En/Articles/article.php?aid=480.

81 *Supra* note 13.

health.[82] Article 27(2) of TRIPs arose from this widespread disagreement, its final wording reflecting its highly compromised nature. Article 27(2) allows members to "*exclude from patentability . . . the commercial exploitation of which is necessary to protect ordre public or morality, including to protect human, animal or plant life or health or to avoid serious prejudice to the environment.*"

In addition, Article 27(3) of TRIPs allows members to *exclude diagnostic, therapeutic and surgical methods of treatment of humans and animals* (Article 27(3)(a)) and *essentially biological processes for the production of plants and animals other than non-biological and microbiological processes* (Article 27(3)(b)).

While provisions similar to TRIPs Article 27(2) can be found in numerous patent and patent-related legislation world wide including, for example, Article 32 of the Japanese *Patent Law*,[83] the UK *Patents Act*,[84] s 13(3) of the Singapore *Patents Act*,[85] art 5 of China's *Patent Law*[86] and s 93 of the Hong Kong *Patents Ordinance*,[87] the wording and scope differ among the various laws. For example, under the UK and European Patent legislation, it is the *exploitation and publication* that are contrary to public order or morality that may result in unpatentability though under TRIPs only the *exploitation* of inventions is required.[88]

However, as the insertion of an *ordre public* or morality provision is optional, several major jurisdictions including the United States, Canada and Australia have chosen not to express any restriction to patentability based on art 27(2) though s 18(2) of the Australian *Patents Act 1990* contains an express bar against patenting human beings or biological processes for their generation and that Australia retains the link between invention and the term "manner of manufacture" as used in s 6 of the *Statute of Monopolies* as allowed grant of patent rights over manner of manufacture provided, *inter alia*, "*that the grant is not contrary to law nor mischievous to the State . . . or generally inconvenient*".[89]

Divergences in substantive law have also led to divergences in the ways countries factor morality into the patentability equation.

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82 Ford, R, "The Morality of Biotech Patents: Differing Legal Obligations in Europe", (1997) 19(6) *European Intellectual Property Review* 315.

83 Article 32 of Japanese *Patent Law* states that "The inventions liable to contravene public order, morality or public health shall not be patented, notwithstanding Section 29."

84 The UK *Patents Act* 1977 states that "a patent shall not be granted . . . for an invention the publication or exploitation of which would be generally expected to encourage offensive, immoral or anti-social behaviour."

85 Section 13(3) of the *Patents Act* (Singapore) states that "An invention the publication or exploitation of which would be generally expected to encourage offensive, immoral or anti-social behavior is not a patentable invention". Section 13(4) further provides that for the purposes of s 13(3), "behavior shall not be regarded as offensive, immoral or anti-social only because it is prohibited by law in Singapore."

86 Article 5 of the *Patent Law* (PRC) states that "No patent right shall be granted for any invention-creation that is contrary to the laws of the State or social morality or is detrimental to public interest."

87 Section 93(5) of the *Patents Ordinance* (Cap 514) states that "An invention the publication or working of which would be contrary to public order ("*ordre public*") or morality shall not be a patentable invention; however, the working of an invention shall not be deemed to be so contrary merely because it is prohibited by any law in force in Hong Kong."

88 Warren-Jones, A, *Patenting rDNA: Human and Animal Biotechnology in the United Kingdom and Europe* (Witney, Oxon: Lawtext, 2001), p 131.

89 Wei, G, "Fitting Biological Products within the Intellectual Property Framework: Challenges Facing the Policy Makers", (paper presented at the Intellectual Property and Biological Diversity Resources Conference, 2003, Singapore, cited with author's permission).

1. North America

a. United States

Though American patent law does not expressly bar patentability for reasons of morality or public order, an invention can nevertheless be denied patentability on the basis of incapacity for beneficial[90] or moral utility[91] under the moral utility doctrine that originated from the 1817 case of *Lowell v Lewis*[92].

In *Lowell v Lewis*, which concerned the patentability of a water pump, Story J indicated that utility would be lacking[93] if an invention was "*frivolous or injurious to the well-being . . . or sound morals of society. The word "useful" therefore, is incorporated into the act in contradistinction to mischievous or immoral*".[94] As examples of immoral inventions, Story J cited "*a new invention to poison people, or to promote debauchery, or to facilitate private assassination*".[95]

American courts once have used "moral utility" to deny patent protection for inventions used solely for gambling or fraud denying, for instance, patentability to devices whose sole purpose was for fraud in *Richard v DuBon*[96] or illegal gambling *Brewer v Lichtenstein*[97]. However, no court has relied on this doctrine since the USPTO Board of Appeals held that an invention used solely for gambling could be patentable in the 1977 decision of *Ex Parte Murphy*[98]. In its opinion the Board noted that while gambling could be considered injurious to public morals, there was no justification for denying a patent on a gambling device based on lack of utility and that the USPTO should not dictate a morality standard through the utility requirement.

The earliest cases, dating around the late-1800s, held that an invention lacked moral utility if it could be used for at least one immoral purpose, regardless of the existence of other beneficial uses for the invention but it became apparent early on that this view excluded too many common inventions. As such, it quickly evolved into a broader test, such that an invention met the moral utility requirement if it had at least one beneficial purpose.[99]

During the latter half of the 20th Century no court has relied upon *Lowell v Lewis* for the moral utility principle. In fact, courts have even upheld patents for inventions that have potentially illegal uses as they did in *Whistler Corporation v Autotronics, Inc*[100] where the court declined to find that the patented radar detector lacked utility even though the

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90 Chisum, D S, *Chisum on Patents: A Treatise on the Law of Patentability, Validity and Infringement*, (New York: Matthew Bender, 2002), pp 4-19-4-22. See also *Patent Act*, 35 USCS § 101: To be useful invention it is not necessary that its utility be great, but only that it is capable of use and is not injurious to morals, health, or good order of society. *Bedford v Hunt*, 3 F Cas 37 (1817); *Converse v Cannon*, 6 F Cas 370 (1873).

91 *Ibid.*

92 *Lowell v Lewis*, 15 F Cas 1018 (1817).

93 Machin, N, "Prospective Utility: A New Interpretation of the Utility Requirement of Section 101 of the Patent Act", (1999) 87 *California Law Review* 421.

94 *Supra* note 90, p 4-17.

95 *Supra* note 76.

96 *Supra* note 90, p 4-21.

97 *Supra* note 90, p 4-19.

98 *Ex Parte Murphy*, 200 USPQ (BNA) 801 (1977).

99 *Supra* note 76.

100 *Whistler Corporation v Autotronics, Inc*, 14 USPQ2D (BNA) 1885 (1988) at 1886.

invention's primary purpose was to circumvent law enforcement.[101]

Nowadays, *Lowell v Lewis* is quoted primarily for the principle that inventions of specious utility are not patentable, rather than for the doctrine of moral utility as was seen in *Tol-o-Matic, Inc v Proma Produkt-Und Marketing Gesellschaft*[102], where the US Federal Circuit declared that a patent on a rodless piston-cylinder was not invalid for lack of utility. In discussing the standard of utility under which the invention should be judged, the court noted that 35 USC 101 "has been interpreted to exclude inventions deemed immoral" quoting the Lowell opinion extensively.

Separation of Ethics and Patent Law

In clear contrast to other jurisdictions which integrate considerations of morality and public order with patent legislation and examination, the United States has drawn a clear delineation between ethical assessments and patent law.

In *Diamond v Chakrabarty*[103] the US Supreme Court stated that:

> "The choice we are urged to make is a matter of high policy for resolution within the legislative process after the kind of investigation, examination, and study that legislative bodies can provide and courts cannot. That process involves the balancing of competing values and interests, which in our democratic system is the business of elected representatives. Whatever their validity, the contentions now pressed on us should be addressed to the political branches of the Government, the Congress and the Executive, and not to the courts."[104]

Not surprisingly, it has been the legislative rather than the judicial branch or the USPTO that has taken the lead in the debate between ethics and patents with the US Congress declaring that "*patent law is not the place to exercise moral judgments about scientific activity*".[105]

One of the most notable interventions by the American legislative branch into USPTO patent activities occurred in 1987 when the USPTO agreed to an eight-month moratorium[106] on animal patents at the request of House Representative Kastenmeier[107] shortly after the Board of Patent Appeals and Interferences decided, in *Ex Parte Allen*[108] that hydrostatically altered Pacific polypoid oysters were patentable subject matter.

That same year, Representative Charles Rose unsuccessfully tried to introduce a two year freeze on patents on "*vertebrate or invertebrate animals, modified, altered or in any way changed through genetic engineering*" and in February 1988, Senator Mark Hatfield introduced a bill calling for an indefinite ban on the patenting of genetically altered animals. Though Hatfield's bill did not pass, legislation was approved in August 1988 that created an infringement exception for farmers using patented animals.[109]

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101 *Supra* note 77.
102 *Tol-o-Matic, Inc v Proma Produkt-Und Marketing Gesellschaft*, 945 F 2d 1546 (1991).
103 *Diamond v Chakrabarty*, 447 US 303, 65 L Ed 2d 144 (1980).
104 *Ibid* at 317.
105 Schapira, R, "Biotechnology Patents in the United States", in Sterckx, S (ed), *Biotechnology, Patents and Morality* (Aldershot: Ashgate, 1997), p 172.
106 This moratorium expired and shortly thereafter, in April 1988, the world's first patent on animals was granted to the inventors of the Harvard oncomouse.
107 *Supra* note 9, p 18.
108 *Ex Parte Allen*, 2 USPQ2D (BNA) 1425 (1987).
109 *Supra* note 9.

While legislative and other initiatives failed to force the USPTO to ban patents over living materials, public outcry over the scope and patentability of the human genome[110] prompted the USPTO to promulgate internal guidelines for the examination of gene patents; its advisory on the patenting of part-human life forms stating that "*inventions directed to human/non-human chimera could, under certain circumstances, not be patentable*", implying that there may be circumstances where they would be patentable.[111]

b. Canada

Canada, which *Patent Act* also lacks an express morality provision, has also chosen to push considerations of morality and patentability to the legislature. As the American Supreme Court declared in *Diamond v Chakrabarty* that it was not competent to rule on ecological and ethical matters,[112] its Canadian counterpart made a similar declaration in *Harvard College v Canada (Commissioner of Patents)*[113] where the central matter was not the patentability of microorganisms but whether higher life forms were patentable.[114] Here, the Canadian Supreme Court noted that such issues were better addressed by the legislature stating that:

> "*The Patent Act has always had the . . . objective of encouraging the disclosure of the fruit of human inventiveness in exchange for the statutory rewards. The balance between the other competing policy considerations is for Parliament to strike . . . Neither the Commissioner (of Patents) nor the courts have the authority to declare a moratorium on 'higher' life patents until Parliament chooses to act.*"[115]

2. The European approach

Recognizing the ethical and moral problems associated with the patentability of inventions Europe gives the morality issue more consideration that either America or Canada with *ordre public* morality provisions included in both Article 52(a) of the EPC[116] and Article 6 of the EC Biotech Directive.[117]

With such legislated exclusions from patentability, it is not surprising that Europe adopts a very different posture from America with respect to the role played by patent offices in

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110 Norton, V, "What Nanotechnology Means for IP", June 2003, at http://www.managingip.com.

111 *Supra* note 30.

112 Van Overwalle, G, "Biotechnology Patents in Europe: From Law to Ethics", in Stercks, S (ed), *Biotechnology, Patents and Morality* (Aldershot: Ashgate, 2000), p 205.

113 *Harvard College v Canada (Commissioner of Patents)*, 2002 SCC 76.

114 The Canadian Intellectual Property Office initially rejected the Oncomouse patent in 1985, stating it had no authority to grant ownership rights over a species of mammal. A Canadian federal court upheld this decision in 1998, but two years later, the appellate court overturned the ruling. Most recently, the Supreme Court of Canada upheld an appeal by the Canadian Intellectual Property Office, ruling that the Oncomouse does not constitute a "composition of matter" and therefore does not qualify as an invention worthy of a patent. The court went on to state that higher life forms could only be patented "under the clear and unequivocal direction of the Canadian parliament." See Nature Biotechnology, "Patenting Pieces of People", April 2003, at http://www.gene.ch/genet/2003/Apr/msg00010.html.

115 *Ibid.*

116 Article 53(a) of the European Patent Convention (EPC) states that "European patents shall not be granted in respect of inventions the publication or exploitation of which would be contrary to '*ordre public*' or morality".

117 Article 6 of EC Directive 98/44 states that "inventions shall be considered unpatentable where their commercial exploitation would be contrary to ordre public or morality".

making moral judgments as epitomized in *Greenpeace v Plant Genetic Systems NV.*[118]

Greenpeace v Plant Genetic Systems NV

Plant Genetic Systems NV (PGS) was granted a patent in October 1990 covering plants and seeds resistant to glutamine synthetase inhibitors (GSIs), a particular class of herbicides. This resistance enabled selective protection against weeds and fungal diseases.

Of the 44 claims made in the patent, of significance were Claim 1 which was directed to the control of actions of a GSI in altered plant cells and plants through the integration of a suitable heterologous DNA into the genomic DNA of the plant cells, Claim 7 that was directed at producing a plant or reproduction material of altered plants, including the stably integrated heterologous DNA and Claims 14 and 21 that were respectively directed to corresponding plant cells and eventual plants.

Greenpeace challenged the patent on the grounds that the grant of a patent for plant life forms and the exploitation of the patent was contrary to morality and/or *ordre public* under Article 53(a) of the EPC, that the claims relating to plants and to processes for their production were not patentable under Article 53(b) of the EPC and that plant products from any generation beyond the first one did not constitute an invention under Article 52 of the EPC. (After this decision, the EPO's Examining Division stopped their practice of granting patents to transgenic plants and animals and the law was thrown into some disarray. This situation was clarified in the *Novartis Transgenic Plant*[119] case which held that claims to transgenic plants were not to be disallowed merely because they embraced plant varieties.[120])

The 1995 decision by the EPO's Technical Board of Appeal[121] held that claims on plants *per se* were no longer considered acceptable, whereas plant cells were determined to be patentable.[122] The decision also established that the EPO would define the normative contents of "*ordre public*" and "morality" by itself then apply them;[123] in effect making the EPO, in effect, both legislator and judge.[124]

B. Human-related Inventions

Even where American and European patent systems do agree on a moral stance – human-related inventions – both regimes have implemented this ban differently. In Europe,

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118 *Greenpeace v Plant Genetic Systems NV*, EPO (Technical Board of Appeal), Case No T356/93, decision of 21 February 1995, [1995] EPOR 357.

119 *Novartis Transgenic Plant*, EPO (Technical Board of Appeal), Case No T1054/96, decision of 13 October 1997, [1999] EPOR 123 and EPO (Enlarged Board of Appeal), decision of 20 December 1999, [2000] EPOR 303.

120 Kamstra, G, Doring, M, Scott-Ram, N, Sheard, A and Wixon, H, *Patents on Biotechnological Inventions: The E.C. Directive* (London: Sweet & Maxwell, 2002), p 28.

121 *Supra* note 118.

122 Van Overwalle, G, "Patent Protection for Plants: A Comparison of American and European Approaches", (1999) 39 *IDEA: The Journal of Law and Technology* 143.

123 In the decision, it was stated that "The EPO . . . was qualified to make value judgments about a given technology. When granting patents, the EPO had to take into primary consideration public interest which, in the specific case at issue, was the preservation of the environment."

124 *Supra* note 62.

EU patent law contains a statutory exclusion[125] while Article 5.1 of EC Directive 98/44 states that "*The human body, at the various stages of its formation and development, and the simple discovery of one of its elements, including the sequence or partial sequence of a gene, cannot constitute patentable inventions.*"

In the United States the exclusion is based on the policy of the USPTO[126] yet USPTO guidelines do not preclude patents on human tissues modified by man, such as cell lines and though the USPTO maintains its position that it will not issue a patent for a human being, transgenic animals combining human gene sequences have been patented. These include patents for mice that contain an amyloid peptide for use in studying Alzheimer's disease (US Patent 5,998,698), rabbits that produce human lipoprotein for use in the study of high cholesterol diseases (US Patent 6,512,161) and pigs for use as organ donors (US Patent 6,331,658).[127]

With respect to the patenting of transgenic humans, though some argue that the American Thirteenth Amendment restricts patenting transgenic humans, this argument has proven faulty because the Thirteenth Amendment (which states that "*Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction*") does not prohibit patenting of transgenic animals with some human genetic component; rather, it prohibits the use of a human for servitude.[128]

Interestingly, both the American and European regimes lack a clear definition of what constitutes a "human being" as well as what constitutes an "animal".[129] (As a comparison China adopts a similar scheme to the US, its Patent Examination Guidelines prohibiting the patenting of processes for cloning humans, changing the inherent identity of the human reproductive system and exploitation of human embryos.[130])

C. Problems of Prediction

As TRIPs has allowed individual nations to retain their own decision-making infrastructure with respect to ethics and patentability, divergences in protection among trading partners have emerged, even among partners with ostensibly closely aligned economic and social interests as the American, European and Canadian Harvard Oncomouse cases reveal.

1. The Harvard Oncomouse

On 12 April 1988, the day the eight-month moratorium on patenting of life forms expired, US Patent 4,736,866 was issued to Philip Leder and Timothy Steward of Harvard University for

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125 Koopman, J, "The Patentability of Transgenic Animals in the United States of America and the European Union: A Proposal for Harmonization", (2002) 13 *Fordham Intellectual Property, Media and Entertainment Law Journal* 103.

126 *Ibid.*

127 Dubois, P and McCallie, K, "Of Mice and Men", June 2003, at http://www.managingip.com.

128 Walter, C F, "Beyond the Harvard Mouse: Current Patent Practice and the Necessity of Clear Guidelines in Biotechnology Patent Law", (1998) 73 *Indiana Law Journal* 1025.

129 *Supra* note 125.

130 Xue, H and Zheng, C, *Chinese Intellectual Property Law in the 21st Century* (Hong Kong: Sweet & Maxwell Asia, 2002), p 169.

the Harvard Oncomouse, a mouse created through microinjection[131] to be susceptible to cancer.[132]

The Oncomouse patent was the first animal patent issued by the USPTO and in granting the patent the USPTO followed the approach adopted under *Diamond v Chakrabarty* that anything under the sun that is made by man is patentable. However, the Oncomouse application received a very different reception in Europe.[133]

a. The European Application

Harvard's initial European application for a patent for its Oncomouse was originally rejected in 1989 by the EPO's Examining Division, which held that under Article 53(b) of the EPC, patents for animal and plant varieties were prohibited. On appeal to the EPO's Technical Board of Appeal in 1990[134] the case was returned to the EPO's Examining Division with the finding that animals generally were not excluded from patentability under the EPC and the Harvard Oncomouse patent was accepted. Sixteen different parties, mostly animal rights and anti-vivisectionist groups from the United Kingdom, Germany and Austria, immediately filed opposition notices claiming that the patent violated European morality provisions.[135]

In deciding whether the Oncomouse should be rejected, the EPO Appeal Board balanced, among other things the potential risks to the environment and any suffering incurred by the animals against the potential benefits that the mouse offered to mankind.[136] Eventually, the Harvard Oncomouse was granted a European Patent[137] after the EPO Appeal Board decided that the benefits (the study of cancer) outweighed the disadvantages (cruelty to animals).[138]

After the outcomes of the American and European applications, one might have expected that the Oncomouse application would have been successful in Canada, particularly as Canada like the United States does not have a morality clause in its patent law. Yet that was not the case.

b. The Canadian Case

In 1985, Harvard College applied for a patent for its Oncomouse in Canada. In the Canadian patent application, Harvard made 26 claims for the Harvard mouse that sought to protect the process by which the oncomice were produced and the end product of the process the founder mouse and the offspring whose cells were affected by the oncogene.[139]

On 24 March 1993 the Canadian Patent Examiner allowed a patent for the process claims but

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131 First, purified copies of genes are injected directly into a fertilized animal egg. The egg is then surgically implanted into the mother so that she may bring it to term. Although very few of the injections result in the live birth of a transgenic animal, successful injections result in offspring which exhibit traits attributable to the inserted genes.

132 *Supra* note 128.

133 *Supra* note 30.

134 *Harvard/Onco-Mouse*, Case No T19/90, EPO (Technical Board of Appeal), decision on 3 October 1990, [1990] EPOR 501.

135 *Supra* note 55.

136 *Ibid.*

137 European Patent No 169672.

138 Available at http://www.med.govt.nz/buslt/int_prop/patentsreview/discussion/patentsreview-07.html#P289_74430.

139 Mandelker, B S, "Harvard College v Canada", (1998-1999) 13 *Intellectual Property Journal* 87.

the first twelve claims, that sought to claim the transgenic animal itself as the invention or the subject or a patent, were denied.[140]

In arriving at the decision, the examiner relied heavily on the decision of the Canadian Federal Court of Appeal in *Pioneer Hi-Bred Ltd v Canada*[141] which involved the patent application for a new variety of soybean where the court concluded that the plant could neither be considered a manufacture nor a composition of matter as the claimed soy plant could not have been said to have been produced from raw materials or be a combination of two or more substances united by mechanical or chemical means, held that a transgenic mouse was not an "invention" as defined in Section 2 of the Canadian *Patent Act*.

Also bearing on the Canadian Harvard Oncomouse case was the 1982 Canadian case of *Re Abitibi Co*[142] where the Canadian Patent Appeal board held that certain genetically modified microbial cultures used in sewage treatment did constitute patentable subject matter and that to be patentable the organism had to be sufficiently different from known species that its creation involved the necessary element of invention.[143]

In the Harvard Oncomouse case, the examiner reasoned that if a plant was held not to be an invention, then a mammal, being more complex and a higher life form, must also be unpatentable.

The case was appealed to the Canadian Patent Appeal Board and the Commissioner of Patents that, in a decision dated 4 August 1995, affirmed the Examiner's earlier decision, adding that the inventors did not have full control over all the characteristics of the resulting mouse.[144]

Harvard appealed this decision to the Federal Court of Canada and on 17 November 1997, the Federal Court (Trial Division) heard the appeal of the decision of the *Commissioner of Patents in Harvard College v Canada (Commissioner of Patents)*. The Federal Court ruled out all categories of patentable subject matter except "composition of matter" and "manufacture" and decided that transgenic mammals were within the definition of composition of matter, removing the necessity of considering whether they were also a "manufacture". As the requirements of novelty, non-obviousness, and utility were not at issue, the final hurdle of patentability – whether the mouse was either a "composition of matter" or a "manufacture" was cleared. The claims for the Oncomouse were allowed.

However, the Harvard Oncomouse case was subsequently appealed to the Supreme Court of Canada, which held, in a 5-4 majority decision that higher life forms, such as mammals, were not patentable subject matter[145] as they were neither a "manufacture" nor a "composition of

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140 Of the disallowed claims, claims 1, 11, and 12 were singled out by the Examiner in his decision as representative of the rejected claims. Claim 1: A transgenic non-human mammal whose germ cells and somatic cells contain an activated oncogene sequence introduced into a said mammal, or an ancestor of said mammal, at an embryonic stage. Claim 11: The mammal of claim 1, said mammal being a rodent. Claim 12: The mammal of claim 11, said rodent being a mouse.

141 *Pioneer Hi-Bred Ltd v Canada (Commissioner of Patents)*, [1987] 3 FC 8.

142 *Re Application of Abitibi Co*, 62 C.P.R. (2d) 81 (1982).

143 *Supra* note 128.

144 *Supra* note 139.

145 Griffin, S and Marusyk, R, "Comment on a Recent Case: From Making a Better Mouse Trap to Making a Better Mouse: The *Harvard Mouse* Decision", (2003) 22 *Biotechnology Law Report* 115.

matter" within the meaning of s 2 of the Canadian *Patent Act*.[146]

Thus, as the American, European and Canadian Harvard Oncomouse cases have shown, that which may be patentable both in Europe and in America may not be so in Canada.

V. *Part 4: Will Issues of Morality Cause Further Discord in Patenting?*

Whether issues of morality will continue to cause discordance in global patent regimes either by affecting the patent laws directly or by impacting other related legislation, such as constitutional law, will depend both on differences in ethical viewpoints and politics, both of which are highly volatile.

A. *The Moralities Involved*

Moral beliefs and practices do not remain constant; rather they differ with time and place.[147] For instance, gambling, once considered the scourge of the devil has been legalized in some jurisdictions. The American government once banned alcoholic beverages with the Eighteenth Amendment but later repealed prohibition with the Twenty-first Amendment.[148] The USPTO has even gone so far as to grant a patent on a radar detector, the sole purpose of which is to allow someone to break the law and evade the police.[149] Moral beliefs also vary by place. In 1991, 74% of the Japanese population opposed gene therapy[150] while in Europe, 72.5% accepted it.[151]

Even within a defined area and time, significant moral and ethical differences can exist. Consider a moral utility analysis within the confines of the European community. An examination of the decision in *Greenpeace v PGS*, reveals that the concept of morality is related to the belief that some behaviour is right and acceptable whereas other behaviour is wrong, this being founded on accepted norms which are deeply rooted in a particular culture and that for the purposes of the EPC, the culture in question is the one inherent in European society and civilization.[152]

Nevertheless, questions of what constitutes either "European culture" or "*ordre public* and morality" remain. This is no small matter given the divergence of moral conventions among European nations. For example in July 1998, Austrian artist Hermann Nitsch managed a public slaughter and disemboweling which involved naked participants gyrating in animal entrails from slaughtered lambs[153] and drinking the animals' blood – in the name of art. While Nitch's "performance" might have contravened the Swiss constitution which states that the dignity of animals needs to be protected, Austrian authorities would not consider any interference with Nitch's performance as freedom of artistic expression is included in the

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146 *Supra* note 113. See also Baudenbacher, C, "Judicial Globalization: New Development or Old Wine in New Bottles?", (2003) 38 *Texas International Law Journal* 505.

147 Smith, D M, *Moral Geographies: Ethics in a World of Difference* (Edinburgh: Edinburgh University Press, 2000), p 23.

148 *Supra* note 30.

149 *Ibid.*

150 Though 54% would accept the technology if it could be used to cure their own fatal disease.

151 Praaning, R D, "Intrinsic Value of Balanced Views and Policies on Biotechnology", in Sterckx, S (ed), *Biotechnology, Patents and Morality* (Aldershot: Ashgate, 2000), pp 154-156.

152 *Ibid*, p 220.

153 Gorny, E, "Bloody Man: The Ritual Art of Hermann Nitsch", April – August 1993, at http://www.zhurnal.ru/staff/gorny/english/nitsch.htm.

Austrian constitution.[154]

B. Legal Dimensions

Even were international consensus among patent laws to be achieved, differences in patentable subject matter might still persist among nations, as patent law may not be the only law governing morally controversial subject matter.

Consider that though Australia omits a direct morality provision in its patent law other than an express bar against the patenting of human beings or biological processes for their generation in s 18(2) of the Australian *Patents Act 1999*, moral considerations are present in s 6 of the country's *Statute of Monopolies* which allows the grant of patent rights over manner of manufacture provided, *inter alia*, "*that the grant is not contrary to law nor mischievous to the State . . . or generally inconvenient*".[155]

Similarly, animal rights provisions in the German and Swiss constitutions might also affect the patentability of certain inventions.

C. Political Dimensions

There is also a political dimension to the overall debate that, to a large extent, hinges on whether special interest groups can muster the necessary public support to effect substantive legal challenges – or change.

Animal rights organizations, for example, are well established in Western countries and enjoy substantial political clout; certainly enough to effect legislative modification on occasion. For instance, in 2002 Germany became the first European nation to vote to guarantee animal rights in its constitution[156] while in America, lack of support by grassroots animal and property rights proponents doomed corporate efforts to reform the *Endangered Species Act* (ESA).[157]

In Asia, animal rights groups are relatively less developed, their issues somewhat less visible. For instance, even though Asians generally react similarly to animal suffering as their Western counterparts, there is relatively less clamor for animal rights legislation in Asia not only because of the relative youth of many animal rights movements there (versus the West), but also because of cultural considerations that place greater value on harmony and compliance than overt challenges to authority.[158]

Nevertheless ethical considerations may start to play a greater role in Asia as social development progresses and animal and human rights figure more prominently in daily life. For instance, Greenpeace has now extended its presence in China from its headquarters in Hong Kong to an office in Beijing[159] while several animal rights groups have been

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154 World Animal Net, "Animal Protection and Constitutions", at http://worldanimal.net/const-leaflet.htm.

155 *Supra* note 89.

156 "Germany Votes for Animal Rights", CNN, 17 May 2002, at http://archives.cnn.com/2002/WORLD/europe/05/17/germany.animals/.

157 Libby, R T, *Eco-wars: Political Campaigns and Social Movements* (New York: Columbia University Press, 1998), p 207.

158 Interview with Dr John Wedderburn, Chair of Asian Animal Protection Network, 14 November 2003.

159 "Biotech's Yin and Yang", *The Economist* (US Edition), 14 December 2002.

established in China over the past few years.[160]

D. Future Challenges?

Whether animal rights, religious and other movements opposed to biotechnological and other patents can continue to wield substantive political influence is not entirely clear. Though biotechnology companies and their main trade group, the Biotechnology Industry Organization, spent US$143 million to sway Congress, the White House and the US Food and Drug Administration over the past four years,[161] according to a study by the Center for Responsive Politics special interest groups operating without large operating budgets, have proven to be formidable opponents using combinations of effective strategy, a social movement of enthusiastic supporters, political skill, sophisticated public relations and a reputation for wielding political influence to successfully challenge business interests.[162]

In India, action by the Gene Campaign and several other civil society groups succeeded in forcing amendments to the Indian *Plant Variety and Farmers' Rights Act 2001* changing what had originally been a bill favouring seed breeders into a law that better balances farmers' and breeders' rights.[163]

Not only do the controversies show no signs of abating, things may even be getting even uglier. While various groups have denounced the biotechnology and pharmaceutical industries, special interest groups have also been accused of unethical tactics. For example, Carl Feldbaum, president of Biotechnology Industry Organization, has charged Jeremy Rifkin's Foundation on Economic Trends with using the clergy as a cover for launching cynical attacks on the biotechnology industry and its patents.[164]

Other technologies are also being drawn into the moral debate. For instance nanotechnology has biotechnological applications and commentators have proposed the adoption of guidelines for nanotechnology patents.[165]

Further complicating moves towards patent harmonisation are constitutional and other potential legal roadblocks. As noted earlier, Germany and Switzerland offer constitutional protection for animals.

At the international level, nations are also putting forth their own proposals – during the TRIPs Council meeting held on 21 March 2000 to review TRIPs Article 27(3)(b), Brazil issued a paper suggesting that "*moral and ethical consequences of inventions are better dealt with . . . by inhibiting the development of the technologies themselves instead of creating obstacles to their patentability.*"[166]

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160 *Supra* note 158.

161 "Biotechs Intensify Lobbying Efforts", *The Boston Herald*, 12 July 2003.

162 *Supra* note 157.

163 Sahai, S, "India's Plant Variety Protection and Farmers' Rights Legislation", in Drahos, P and Mayne, R (eds), *Global Intellectual Property Rights: Knowledge, Access and Development* (Basingstoke, Hampshire: Palgrave, 2002), pp 214-223.

164 *Supra* note 39, p 122.

165 *Supra* note 110.

166 Blakeney, M, "Agricultural Research: Intellectual Property and the CGIAR System", in Drahos, P and Mayne, R (eds), *Global Intellectual Property Rights: Knowledge, Access and Development* (Basingstoke, Hampshire: Palgrave, 2002), p 121.

E. Potential Outcomes

Were ethical considerations to result in new patent barriers, what might happen?

One possible outcome is that research and development resources get channelled away from areas of significant controversy to jurisdictions where ethical debates surrounding patents, in particular those for biotechnology, are more muted or insignificant. The potential economic consequences of such redistribution would be staggering.

Between 1990 and 1999, global biotech R&D increased by 262%[167] with much of this concentrated in the United States. As an indication of American dominance in this industry consider that in 2001, the entire European biotech industry was only worth slightly more than Amgen, the largest US company[168] or that around 72% of the global biotechnology revenues are from US companies or the American biotechnology industry spent US$15.6 billion on research and development in 2001, an amount that greatly exceeds that spent by their foreign counterparts. In contrast, Europe's 1,879 biotechnology companies account for 22% of global biotechnology revenues.[169]

Were the ethical climate to get too "hot" for biotechnology companies in Europe, for example, other countries would be more than happy to welcome industry money and technology with open arms. Japan, whose pharmaceutical market, comprises roughly 12% of the global pharmaceutical industry, is seeking to establish a greater role in the biotechnology field using a combination of improvements in its regulatory climate that should make it easier for US companies to obtain drug approval, government assistance for foreign firms through the Japan External Trade Organization (JETRO), which matches US companies with their Japanese counterparts, and initiatives such as Japan Bio-Venture Development Association's (JBDA) collaboration with Global Tech Investment to connect technology-based researchers in universities with interested parties in the business community.[170]

F. Other Consequences

Ethical developments in biotechnology may also be relevant to other industries, notably nanotechnology[171] whose industry spent over US$2 billion in 2002 according to Toronto's Joint Centre for Bioethics[172] and bioinformatics whose companies offer products and services to the biotechnology and pharmaceutical industries.[173]

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167 Kermani, F and Bonacossa, P, "Biotech around the World: An Overview", June 2003 at http://www.biojapan.de/features/globalbt2003.html.

168 Parker, T, "Biotech Companies Call for Patent Reform", June 2001, at http://www.managingip.com.

169 *Supra* note 167.

170 *Ibid.*

171 *Supra* note 110.

172 *Ibid.*

173 Bioinformatics firms provide algorithms, databases, user interfaces, and statistical methods. These important tools are essential to scientists interested in comparative genomics, or the comparison of different organisms' genomes. Without the ability to effectively mine these genomes for information, the sequences themselves are less useful because they do not reveal what genes do. The bioinformatics market can be divided into four main segments: databases, software, hardware, and custom consulting. Databases are the "heart" of bioinformatics because the first step in the bioinformatics process is usually the accumulation of biological data for storage. Bioinformatics firms use databases extensively as part of their services. To utilise information contained in these databases, software developers have developed bioinformatics programs to organise, access, analyse, and view sequence information. One such program, BLAST ("Basic Local Alignment Search Tool"), compares sequences for similarity by first aligning two

Finally, as multinational enforcement of patent claims is not unusual in industries such as pharmaceuticals where patent applications are typically filed in several countries, growing disparities in global patent regimes may result in more of the "forum shopping" that international harmonisation was supposed to help eliminate.

G. Asia's Reaction?

How Asia might react to this new ethical challenge to patent law is unclear. In addition to Japan, China and Singapore have also targeted biotechnology as a strategic industry yet moral positions differ widely not only among these countries but with other nations as well.

Policy makers in China have begun to recognize the importance of establishing ethical and technical standards.[174] Article 5 of China's *Patent Law* contains morality exclusions denying patentability to inventions contrary to social morality or public interest[175] and China's Patent Examination Guidelines prohibit the patenting of certain types of inventions including processes for cloning humans or cloned animals, processes for changing animals' inherent identity that may result in the animal suffering but has no substantial benefit to human or animal medical treatment and the animal obtained thereby and, as noted earlier, processes changing the inherent identity of the human reproductive system, exploitation of human embryos for industrial or commercial purposes.[176] Nevertheless, there are concerns about whether China is prepared to embrace the principles it claims to have adopted.[177]

Singapore, whose government has committed US$1.7 billion to become Asia's hub for biomedical science[178] has already established several ethics committees including a Bioethics Advisory Committee that looks at legal, ethical and social issues of human biological resources and the Genetic Modification Advisory Committee whose role is to formulate specific guidelines to assist regulators in respect of activities and products associated with genetic modification technology.[179]

Yet in July 2003, Singapore allowed an operation to separate conjoined 29-year-old Iranian sisters Ladan and Laleh Bijani that was criticized by bioethics experts from other countries such as Australia[180] again illustrating the vast ethical chasm that exists between nations.

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sequences at areas of local identity or similarity and then calculating a "similarity score". Such programs are useful in predicting the function of an unknown gene or protein, or to draw evolutionary relationships. See McBride, S, "Bioinformatics and Intellectual Property Protection", (2002) 17 *Berkeley Technology Law Journal* 1331 and Vorndran, C and Florence, R L, "Bioinformatics: Patenting the Bridge between Information Technology and the Life Sciences", (2002) 42 *IDEA: The Journal of Law and Technology* 93.

174 Doring, O, "Searching for Advances in Biomedical Ethics in China: Recent Trends", *China Analysis* No. 27 (October 2003), at http://www.chinapolitik.de.

175 Under Article 5 of the *Patent Law* (PRC), "No patent shall be granted for any invention-creation that is contrary to the laws of the State or social morality or that is detrimental to public interest."

176 *Supra* note 130, p 169.

177 Doring, O, "China's Struggle for Practical Regulations in Medical Ethics", (2003) 4(3) *Nature Review Genetics* 233, at http://www.nature.com/nrg/index.html.

178 "Challenges Continue as Global Biotech Industry Undergoes Extraordinary Change", *Pharma Marketletter*, 16 June 2003.

179 *Supra* note 45, pp 284-285.

180 Reuters Health, "Failed Separation Surgery Fuels Ethics Debate", 9 July 2003, at http://12.31.13.115/HealthNews/reuters/NewsStory070920031.htm.

Finally, Japan, along with France and Italy, announced its opposition to the patenting of Expressed Sequence Tags by the American National Institutes of Health, though this opposition arguably arose more from fear that such patents would competitively disadvantage its budding biotechnology enterprises than from ethical concerns.[181]

H. Impact on Developing Countries

The impact of increased fragmentation in world patent laws would probably add to the strain faced by developing nations. To begin with, developing countries not only provide insufficient patent protection under the substantive law, they often inadequately enforce the legal standards that do exist.[182] Though in their defence, developing countries often cite the costs associated with developing and maintaining a sophisticated intellectual property system.[183]

Yet denial of patent protection may lead to the detrimental results that developing countries fear as patent protection promotes the availability of an invention in a country because inventors from developed nations will not be afraid of piracy and therefore will be more willing to make their invention available in the developing country. Good protection of patents may encourage foreign investment leading to increased development. This would further promote the local knowledge base leading to a better foundation for growth of domestic industries.[184]

Finally, if a developing country does not grant adequate patent protection, the United States or other countries might resort to unilateral actions, including sanctions. For the United States, s 301 sanctions are one such device.[185]

Ultimately it is debatable whether developing countries with deficient legal systems can observe the tasks charged under TRIPs[186] much less be expected to follow ethical debates over subject mater patentability in other nations. In fact, asking such countries to follow ethical developments elsewhere would only serve to further burden their already overstrained intellectual property systems. Rather it is more likely such nations will place higher priority on economic factors than ethical concerns in protecting intellectual properties and would likely view debates over ethics and patents as a luxury for the world's richer nations.

VI. Part 5: What Happens Next?

Some have said that the legitimacy of patent law is based upon the idea that it operates apolitically and neutrally, to reward and stimulate scientific progress.[187] Yet, political

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181 Kevles, D J and Berkowitz, A, "The Gene Patenting Controversy: A Convergence of Law, Economic Interests, and Ethics", (2001) 67 *Brooklyn Law Review* 233.

182 *Supra* note 8.

183 McCabe, K W, "The January 1999 Review of Article 27 of the TRIPS Agreement: Diverging Views of Developed and Developing Countries towards the Patentability of Biotechnology", (1998) 6 *Journal of Intellectual Property Law* 41.

184 Jozwiak, E T, "Worms, Mice, Cows and Pigs: The Importance of Animal Patents in Developing Countries", (1994) 14 *Journal of International Law and Business* 620.

185 Under the Special 301 provision, the United States Trade Representative identifies "priority countries" that do not provide adequate intellectual property protection to the United States then initiates unfair trade practice investigations. If an agreement is not reached between the two countries within six months, the US President may take retaliatory measures against the pirating country according to Section 301 of the *Omnibus Trade and Competitiveness Act of 1988*. See *Ibid.*

186 *Supra* note 17.

187 *Supra* note 4, p 124.

considerations in patent law are unavoidable not only because of the link between inventive activity and patents but also the use of patents to protect domestic industries.[188] Though the patent system has never been entirely free from moral conflict the ethical debate surrounding patents has never been so intense or so politically charged.

Today a new, uneasy relationship exists between patent law and ethics that may be bringing forth new barriers to harmonisation. Already, Europe and America are adopting different approaches with Europe moving towards a more substantive inclusion of ethical considerations in the patent examination process[189] and America[190] continuing to stress the separation of ethics and patent law.[191]

One argument in favour of the American position is that patent offices and examiners lack sufficient expertise or qualifications to judge morality or even societal risks of inventions except where the immorality or the risks are perceived as highly unacceptable by the vast majority of the members at large of that society.[192] Patent examiners are generally scientists or engineers who have a technical background in the subject matter of the invention. They are required to have such a background as a condition of employment, but experience with issues of morality is not typically expected[193] and when asked to make moral judgments, such individuals are likely feel ill at ease in doing so as experiences at the EPO have shown. Furthermore, there is the inherent problem in that what constitutes an ethical invention is typically not a decision upon which parties would agree, thus creating problems with uniformity.[194]

One might put forth the notion that judicial bodies may be better suited to judging moral issues, indeed courts have tackled ethically controversial subjects before as the US Supreme Court did in *Roe v Wade*[195]. Yet, as noted earlier, American and Canadian courts have preferred to push considerations of morality and patentability to the political branches.

Even if morality should be considered in the context of patentability, an exclusion based on commercial exploitation of the patented invention, as required under the EPC, the EU Directive, and TRIPs is problematic. The patent office would not have information regarding commercial exploitation of an invention since that information is not necessary to establish any of the requirements of patentability. Moreover, if an applicant waited until commercial applications were known, entitlement to a patent could be compromised as the invention might no longer satisfy the novelty requirement.[196]

If the American approach looks like the ethics buck is being passed elsewhere (ie to the

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188 American multinationals have, for example, complained that Japan uses its patent system as a means to protecting its own industries by making the granting of a patent slower for non-Japanese applicants when the patent deals with commercially important areas. *Supra* note 18, pp 13-15.

189 *Supra* note 106.

190 *Supra* note 62.

191 *Supra* note 105.

192 *Supra* note 105, pp 229-230.

193 *Supra* note 77.

194 *Ibid.*

195 *Roe v Wade*, 410 US 113 (1973). See Bopp, J and Coleson, R E, "Roe v Wade and the Euthanasia Debate", (1997) 12 *Issues in Law and Medicine* 343, Robertson, J A, "Gestational Burdens and Fetal Status: Justifying *Roe v Wade*", (1987) 13 *American Journal of Law and Medicine* 189, and Sekulow, J A and Tuskey, J, "Dialogue: The "Center" is in the Eye of the Beholder", (1996) 40 *New York Law School Law Review* 945.

196 *Supra* note 77.

politicians), the European approach begs the questions whether asking patent examiners to judge technology and ethics imposes an undue burden on examiners and whether the incorporation of ethics into patent law undermines both the neutrality and universality of the patent system.[197]

The European approach also places examiners in a practical bind. While art 53(a) of the EPC explicitly mandates that morality be considered in determining patentability stating that patents shall not be granted for "*inventions the publication or exploitation of which would be contrary to 'ordre public' or morality, provided that the exploitation shall not be deemed to be so contrary merely because it is prohibited by law or regulation in some or all of the Contracting States*", neither *ordre public* nor morality are defined within the EPC.[198] Thus the practical issue of how examiners are to ascertain exactly what constitutes *ordre public* and morality remains.

Public surveys might be one possible vehicle, yet the EPO has thus far not used surveys in its moral assessments and even dismissed their utility. During the *Greenpeace v PGS* trial, Greenpeace included as its evidence, a survey showing that over 80% of Swedish farmers opposed the patenting of genetically engineered, herbicide resistant plants, such as the plant invented by PGS and put forth a proposition that an overwhelming majority of the public must favour exploitation of the invention for it to be patentable. Yet the EPO's Opposition Division rejected Greenpeace's suggestion noting that Greenpeace only presented "*abstract ethical and moral arguments*".[199]

Even if surveys could be used to assess public views on *ordre public* and morality, differences in cultural norms across Europe might well result in conflicting survey results in different countries.

Arguably, the image of neutrality and universality has played an important role in both ensuring the efficacy of the patent system and in transporting the regime throughout the world. Patent law is supposed to transcend the local; a machine or genetically modified seed is the same whether considered by the law in Germany, Britain or India.[200]

Furthermore, art 27(1) of TRIPs reminds us that "*patents shall be available for any inventions, whether products or processes, in all fields of technology . . . Patents shall be available and patent rights enjoyable without discrimination as to the place of invention, the field of technology and whether products are imported or locally produced.*"

But whether a new international patent regime can be crafted to adequately incorporate morality is questionable. Even if ethics could be incorporated in national patent laws, for example those of America, further study of the purpose of such an exclusion, as well as how that impacts the patent system, would have to be considered.

In the case of the United States, as the foundation of its patent laws lies in the constitutional mandate to promote the progress of useful arts, the question of considering morality must also be considered in that context. Namely, would a consideration of morality further the goal of

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197 In theory, were the ethics of biotechnology patents to be judged, all inventions should be ethically assessed in order to be fair.

198 *Supra* note 77.

199 *Ibid.*

200 *Supra* note 4, p 124.

promoting the progress in useful arts? Should patent law take on a wider role of promoting, managing or shaping technological change or the allocation of responsibilities in a way that best serves the interests of society at large?[201] Not only does this require a consideration of constitutional interpretation and policy, but it also requires a consideration of the effect on the patent system of excluding arguably unethical inventions.[202]

Yet, even national resolution of certain ethical controversies may be impossible. In America, for instance, the Rifkin-Newman patent is still being decided[203] and were we to widen the scope to consider other ethical debates, we see that many issues have defied resolution for decades. For instance, the 1973 Supreme Court decision of *Roe v Wade*[204] and its central issue of abortion rights still remains highly controversial.

Without the resolution of issues of patents and morality at the national level substantive international harmonisation can probably not be achieved. As a consequence, some setbacks in past harmonisation efforts will be inevitable.

VII. Part 6: Is Lack of Harmonisation Necessarily a Bad Thing?

Even though countries have been moving towards greater consistency in their patent laws, incompatibilities in ethical positions and practices are giving rise to barriers to harmonisation. Though some countries, such as Canada,[205] do not impose ethical constraints on the patentability of products, other nations do as does the EPC, with the consequence that inventions patentable in America, for example, may still be unpatentable in Europe.[206]

Furthermore, as the Harvard Oncomouse case has shown, that which may be patentable both in Europe and in America may not be so in Canada.

Yet even if governments wanted to unify their national patent laws on an international basis, they could still face other local legislative or constitutional constraints. For example, constitutional guarantees for animal dignity or rights, such as the ones found in the Swiss and German constitutions or restrictions in Australia's *Statute of Monopolies*, might be used to restrict the patentability of certain inventions at a local level.

Thus the increasingly complex interplay of ethical, legal and political considerations in patent law as well as the profound differences surrounding the issues involved in certain technologies, notably biotechnology and to a lesser extent, nanotechnology, has made the attainment of substantive international harmonisation, at least in certain technological areas, difficult at best.

Whether strong economic incentives and other policy-based considerations will be enough to overcome moral controversies remains to be seen but if ethical divisions are not resolved,

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201 *Supra* note 45.

202 *Supra* note 77.

203 Noted by Margo Bagley, Associate Professor of Emory University, at the Intellectual Property and Biological Diversity Resources Conference, 2003, Singapore.

204 *Supra* note 195.

205 Unlike the EPC of 1973, which denies a patent to inventions "the publication or exploitation of which would be contrary to '*ordre public*' or morality," Canada's patent law (The Patent Act) contains no such limitation. See McTeer, M, "Harvard Mice on Thin Ice", 9 December 2002, at http://www.globeandmail.com/servlet/ArticleNews/printarticle/gam/20021209/COMOUSE.

206 *Supra* note 181.

uncertainty and propensity for divergent standards of protection will remain. Thus the international intellectual property arena will continue to be a segmented potpourri of national patent systems.[207] But is this necessarily a bad thing?

Patent Uniformity or Lack Thereof?

As nations transform from industrial-based economies to information-based economies[208] and as companies around the world become increasingly reliant on global markets, differences among national or regional patent offices may act as an impediment to inventors and hinder opportunities for greater trade among nations.[209]

Another advantage of patent law harmonisation is that such harmonisation would evenly spread the administrative burden and redundancy present in prosecuting international patent applications among participating nations reducing the cost of prosecuting an international patent.[210] This would increase the small inventor's accessibility to the world market and reduce the time and expense required to obtain international protection.[211]

Uniformity of law also simplifies the law, making it easier to learn. Yet some argue that such uniformity risks making the law unresponsive to local variations. As a single set of health, labour, safety, and environmental regulations are unlikely to be appropriate for all members of the world trading community, given the wide variance in national levels of development, uniform patent laws may similarly be undesirable.[212]

Uniformity would also eliminate inter jurisdictional competition and decrease the possibilities for legal experimentation. Given that there may not always be a "best" rule for every problem that will arise, some suggest that experimentation and concomitant jurisdictional diversity may be essential so that the evolution of law in this area keeps pace with rapid technical change.[213]

But though the laws of Man may vary from state to state, the laws of science apply equally to all. Herein lies the problem. Patent laws focus on promotion of technological progress that in turn, is based on the laws of science. That patent examiners who were originally hired to judge an invention's patentability based on ethics as well as on technological grounds is, as noted earlier, uncomfortable if not fair and arguably, patent regimes are not the best forum for establishing or imposing standards of morality.

If one accepts that patent examination is a technological audit to which courts afford some measure of deference[214] arguably such examination should remain a technological one, unclouded by judgments of moral suitability particularly if, as noted earlier, patent examiners are not comfortable with making such decisions and if nations can impose their local standards through constitutional means or other legal options rather than through local patent law.

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207 *Supra* note 15.
208 *Ibid.*
209 Sabatelli, A D and Rasser, J C, Impediments to Global Patent Law Harmonization", (1995) 22 *Northern Kentucky University Law Review* 579.
210 *Supra* note 15.
211 *Ibid.*
212 *Supra* note 1.
213 *Ibid.*
214 *Ibid.*

Moreover, inclusion of moral conditions on patentability would not only serve to widen disparities amongst national patent regimes, but would potentially exacerbate forum shopping practices as inventors seek more favourable jurisdictions or the use of trade secret protection. But trade secrets offer protection only as long as the relevant knowledge is kept secret and tend to be appropriate for matter that has slim likelihood of independent discovery, which is not the situation in many areas such as biotechnology. Moreover, as trade secrets discourage rather than encourage disclosure, they arguably stifle rather than promote technological advancement.

Finally, there is no guarantee that mixing moral and technological judgments in patent examination would not necessarily eliminate "immoral" inventions, in fact such co-mingling might drive developers underground if they feared that their inventions might be considered rendered unpatentable on moral grounds.

VIII. Conclusions

Many years ago, Alvin Toffler wrote that "*For the foreseeable future, we must anticipate still more rapid value change.*"[215]

If we are to accept that change is inevitable and occurring at increasingly faster rates, and that the world is becoming increasingly unified through globalisation, greater harmonisation among patent laws would promote easier trade and thus stronger bonds among nations.

Given the growing economic costs of technological progress, particularly in biotechnology, many inventors may increasingly need to recover their investments on a global scale and the ability to obtain international rather than merely local IP protection becomes increasingly relevant.

One might argue that promoting innovation requires that care be taken not to raise the cost of knowledge to so high a level that it impedes further inventiveness. How that problem is best solved can depend on a country's intellectual and industrial development, its culture, and the types of creative work in which its citizens are engaged[216] and thus justify a set of patent rules specific to that country. But at the same time such divergence might likely slow the pace of progress by creating legal diversity and thus greater global uncertainty.

With more industries becoming increasingly global in nature, a likely outcome may be continued fear of technological piracy. Added strain may be placed on the already overburdened intellectual property systems of developing nation, disparities in global investments and development may be exacerbated as investors, businesses and other interested parties direct their financial and technological resources to friendly, less controversial jurisdictions – and the forum shopping practices that patent harmonisation should have helped to lessen if not eliminate might return.

Legal uncertainty might negatively impact international patentability potentially leading to reductions in investment funding for further research and development.

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215 Toffler, A, *Future Shock* (New York: Bantam Books, 1984).

216 *Supra* note 1.

Analyses of patentability are primarily technical in nature and have been so historically, thus they ought to remain so. Despite arguments in support of the co-mingling of moral and technological judgments in patent examination, such combination would not necessarily eliminate "immoral" inventions.

Ultimately, local issues of deciding what constitutes moral invention becomes a matter of balancing competing values and this is a job that patent offices were never originally charged with. Rather, such balancing acts are better left, as the American Supreme Court noted, to "*the political branches of the Government, the Congress and the Executive*".[217]

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[217] *Supra* note 103 at 306.

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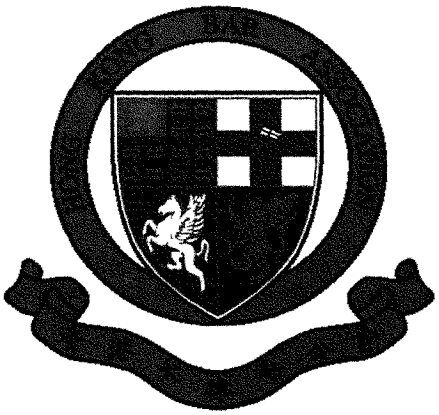

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