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The Development of Immigration Law and Policy:
The Hong Kong Experience

Albert H.Y. Chen*

Hong Kong is a modern financial and industrial centre, enjoying a standard of living significantly higher than that of its neighbours. It is also, however, one of the most densely populated territories in the world. The natural desire of residents of neighbouring countries to relocate to Hong Kong, either as refugees fleeing persecution, or as economic migrants seeking a better life, is therefore in sharp conflict with the equally firm policy of the Hong Kong authorities of protecting its economic achievements by limiting population growth. The task of the immigration authorities is complicated by the fact that Hong Kong is regarded by the British government as a colony of the United Kingdom, and by the Chinese government as an integral part of the People's Republic of China. In this article the author traces the development of immigration law in Hong Kong. He begins by presenting an overview of the history of immigration law from 1842 to 1980. He then proceeds to discuss developments in immigration law in the 1980s. Two themes emerge: first, the impact of the political relations between the United Kingdom and the P.R.C. on the capacity of Hong Kong to control immigration from Guangdong province; and second, the efforts of the authorities to reconcile the necessity of firm deterrence with the popular demand for humanitarian treatment of refugees from Vietnam and immigrants from China.

Hong Kong est un centre financier et industriel moderne qui jouit d'un niveau de vie nettement supérieur à celui de ses voisins. Mais il s'agit aussi de l'un des territoires les plus densément peuplés au monde. Le souhait naturel des résidents des pays avoisinants de s'établir à Hong Kong, que ce soit à titre de réfugiés politiques fuyant la persécution ou en tant que réfugiés économiques à la recherche d'une vie meilleure, va donc nettement à l'encontre de la politique très ferme des autorités de Hong Kong de protéger ses réalisations économiques en limitant la croissance de la population. La tâche des autorités de l'immigration est compliquée par le fait que Hong Kong est considérée par le gouvernement britannique comme une colonie du Royaume-Uni, et par le gouvernement chinois comme une partie intégrante de la République populaire de Chine. Dans cet article, l'auteur décrit le développement du droit de l'immigration à Hong Kong. Il débute par un survol du droit de l'immigration de 1842 à 1980. Il poursuit avec une discussion des développements observés au cours des années 1980. Deux thèmes ressortent de cette étude : d'abord, l'impact des relations politiques entre le Royaume-Uni et la République populaire de Chine sur la capacité de Hong Kong de contrôler l'immigration à partir de la province de Guangdong ; puis, les efforts des autorités de concilier la nécessité de dissuader les immigrants potentiels avec les revendications populaires pour un traitement humanitaire des réfugiés du Vietnam et des immigrants de Chine.

*Of the Faculty of Law, University of Hong Kong.

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I. Introduction

Immigration control is an important governmental function in most nations of the contemporary world. A historical study of a territory's immigration law and policy can reveal much about the development of its social, political, economic and cultural conditions.¹ This is probably particularly true in the case of Hong Kong, about sixty per cent of whose people are immigrants from mainland China,² and whose population has gone up from 500,000 to 5,500,000 over the past forty years as a result of immigra-

¹See, e.g., J.M. Evans, *Immigration Law* (London: Sweet & Maxwell, 1983) at 1-2.

²According to the 1981 census, only 57.2 per cent of the population was born in Hong Kong. See Hong Kong Government Information Service, *Hong Kong 1984* (Hong Kong: Government Printer, 1984) at 236.

tion.³ These people live in a territory of only 1070 square kilometres,⁴ much of which is in fact unproductive hillsides or barren islets. Yet as an industrial, commercial and financial centre and a modernized city, enjoying a standard of living higher than that of neighbouring regions, Hong Kong continues to attract immigrants from mainland China and refugees from Vietnam.

This article seeks to describe and explain the historical development of immigration law and policy in Hong Kong since the British colony was founded near the middle of the nineteenth century. It is hoped that the study will facilitate a better understanding of some of the issues, as well as dilemmas, of the growth of Hong Kong as a society, and to contribute, if possible, to comparative research on systems of immigration control in various parts of the world. On a more philosophical or theoretical plane, it is also hoped that this exercise might illustrate some of the fundamental problems of law and policy, of rule and discretion, and of utilitarian and humanitarian considerations, which are inherent in any system of legal regulation over human beings.

This essay is divided into five parts, corresponding to the different periods into which the history of Hong Kong immigration law may be divided. The final part, however, deals with the future rather than the past, and presents relevant issues arising from the rendition of Hong Kong to the People's Republic of China.

II. 1842-1945

The British colony of Hong Kong is situated on the southern coast of China, occupying, as mentioned above, a total land area of 1070 square kilometres. Geographically, the territory consists of three parts — Hong Kong Island, which was ceded to Great Britain by China under the Treaty of Nanking 1842; Kowloon Peninsula, which was ceded under the Convention of Peking 1860; and the New Territories, comprising 92 per cent of the total land area of the present territory of Hong Kong, which was leased to Britain in 1898 for a period of 99 years commencing in July 1898.⁵ Although

³*Hong Kong Hansard*, 1986-87 at 675 (7 January 1987; Secretary for Security).

⁴Hong Kong Government Information Service, *Hong Kong: The Facts — Immigration*, (Hong Kong: Government Printer, June 1987) (two-page fact sheet).

⁵For the constitutional history of Hong Kong, see generally Hong Kong Government Information Service, *Hong Kong 1986* (Hong Kong: Government Printer, 1986) c. 22; P. Wesley-Smith, "Hong Kong" in A.P. Blaustein & E.B. Blaustein, eds, *Constitutions of Dependencies and Special Sovereignties* (Dobbs Ferry, New York: Oceana Publications, 1985); P. Wesley-Smith, *Unequal Treaty 1898-1997* (Hong Kong: Oxford University Press, 1980). On the different views held by the Chinese and British governments on the legal status of Hong Kong, see A. Dicks, "Treaty, Grant, Usage or Sufferance? Some Legal Aspects of the Status of Hong Kong" (1983) 95 *China Q.* 427; R. Mushkat, "The Transition from British to Chinese Rule in Hong Kong: A Discussion of Salient International Legal Issues" (1986) 14 *Denver J. of Int'l L. and Pol'y* 171.

the People's Republic of China ("P.R.C."), which was established in 1949, regarded the treaties of cession and lease as "unequal treaties" and not binding,⁶ and has insisted that sovereignty in the whole of the territory of Hong Kong has always belonged to China and has never been effectively transferred to Britain, the treaties did, at least from the British point of view, form the legal foundation for British administration of Hong Kong until the signature of the Sino-British Joint Declaration on the Question of Hong Kong.⁷ This agreement, entered into by the two governments in December 1984, provides for the termination of British rule on 30 June 1997, not only in respect of the New Territories, but in respect of the whole of the present British dependent territory of Hong Kong, and the establishment immediately after that date of the "Hong Kong Special Administrative Region" of the P.R.C.⁸

When the British first acquired Hong Kong Island in 1842, it was, in the words of Lord Palmerston, British Foreign Secretary, "a barren island with hardly a house upon it."⁹ In 1845, the population was estimated at 23,817, which included 595 Europeans.¹⁰ If the areas of Kowloon and the New Territories, which were subsequently incorporated into the colony of Hong Kong, were also taken into account, the total population as of 1845 was probably in the region of 100,000.¹¹ This contrasts dramatically with the present population figure of 5.5 million. Such population growth has largely been the result of influx of migrants from mainland China.

For a long time since the colony was founded, people were allowed complete freedom of movement in both directions across the border between the colony and mainland China.¹² As a leading historian on Hong Kong wrote, "incessant coming and going was a feature of the island's life from the start."¹³ The colonial government seemed to have accepted the view of the Chinese government that the creation of the colony did not take away

⁶See the last two works cited *supra*, note 5.

⁷*A Draft Agreement between the Government of the United Kingdom of Great Britain and the Government of the People's Republic of China on the Future of Hong Kong*, 26 September 1984, 23 I.L.M. 1366. The text of the Joint Declaration may also be found in Wesley-Smith, *Unequal Treaties 1898-1997*, *supra*, note 5, or Hong Kong Government Information Service, *Hong Kong 1985* (Hong Kong: Government Printer, 1985) c. 1.

⁸See below, Part V.

⁹*Hong Kong 1984*, *supra*, note 2.

¹⁰G.B. Endacott, *A History of Hong Kong*, 2d ed. (Hong Kong: Oxford University Press, 1973) at 65.

¹¹D. Podmore, "The Population of Hong Kong" in K. Hopkins, ed., *Hong Kong: The Industrial Colony* (Hong Kong: Oxford University Press, 1971) 21 at 23.

¹²As pointed out in T. Lui, "Undocumented Migration in Hong Kong", paper presented at the 6th Seminar on Adaption and Integration of Immigrants, organised by the International Committee for Migration (Geneva, 11-15 April 1983).

¹³Endacott, *supra*, note 10 at 65.

the right of Chinese to enter the territory as they wished.¹⁴ Indeed, no attempt was made to restrict immigration from mainland China until the middle of the twentieth century.¹⁵

The flow of migrant population from mainland China into Hong Kong was not a smooth or steady process;¹⁶ it was instead characterized by various "waves" of migration reflecting the political and economic conditions in mainland China. Whenever the mainland experienced political struggles, economic crisis, social unrest, civil war or foreign invasion, many Chinese from the mainland, particularly from the nearby Guangdong region, fled to Hong Kong for shelter. Unfortunately, modern Chinese history was full of such incidents, and the story of immigration into Hong Kong is also the story of disturbances and difficulties in nineteenth and twentieth century China.

The first great wave of refugees from mainland China was brought about by the chaos and disturbances of the Taiping Rebellion in 1850-64.¹⁷ Hong Kong experienced a rapid population increase in the 1850s, and in 1861, the total population of the area which now forms the colony of Hong Kong had risen to an estimated 165,000.¹⁸ The 1911 Revolution, which brought about the downfall of the Qing dynasty, marked the beginning of another period of unrest in China. Between 1901 and 1921, the population of Hong Kong doubled from 300,000 to 625,000 as a result of migration from the mainland.¹⁹

The enactment by the colonial legislature of the *Passports Ordinance*²⁰ in 1923 was the starting point of the history of immigration, or at least travel, control in Hong Kong. This ordinance "to regulate the admission of persons into the Colony of Hong Kong"²¹ empowered the Governor in Council to make regulations to prohibit persons of any specified class from entering the colony without a passport or some other approved document.²² Regulations made under the ordinance²³ required all persons entering Hong Kong, except *persons of Chinese race*, children aged under fifteen, and per-

¹⁴P. Geddes, *In the Mouth of the Dragon* (London: Century Publishing Co., 1982) at 81.

¹⁵See the discussion below, Part III, on developments in 1940 and 1949.

¹⁶As pointed out in S.K. Lau, *Society and Politics in Hong Kong* (Hong Kong: Chinese University Press, 1984) at 3.

¹⁷On the rebellion, see I.C.Y. Hsu, *The Rise of Modern China*, 2d ed. (Hong Kong: Oxford University Press, 1975) c. 10; Endacott, *supra*, note 10 at 85, 116; P. Harris, *Public Administration and Public Affairs in Hong Kong* (Hong Kong: Heinemann Asia, 1983) at 81.

¹⁸Podmore, *supra*, note 11 at 23.

¹⁹*Ibid.* at 23-24; *Hong Kong 1984*, *supra*, note 2 at 247.

²⁰Ordinance No. 35 of 1923.

²¹Quotation from the long title of the ordinance.

²²*Passports Ordinance*, *supra*, note 20, s. 2(1)(a).

²³They were set out in the schedule to the *Passports Ordinance*, *ibid.*

sons in transit, to possess travel documents, and, in the case of non-British subjects, also visas. Thus free entry of Chinese people from the mainland into Hong Kong continued to be permitted.

In the decade preceding 1923, the colony had already begun to legislate on immigration related matters by introducing the *Travellers Restrictions Ordinance 1915*,²⁴ the *Registration of Persons Ordinance 1916*,²⁵ and the *Deportation Ordinance 1917*.²⁶ The 1915 ordinance provided for the examination of ships arriving in the colony;²⁷ "persons of non-Asiatic race or nationality and all Indians" who arrived in the colony without being examined upon arrival were required to report themselves at a police station within twelve hours of their arrival.²⁸ The 1916 ordinance required persons in the colony to furnish certain particulars for registration with the police.²⁹ It is noteworthy, however, that "persons of Chinese race" were among the groups exempted from the ordinance.³⁰ The *Deportation Ordinance 1917*, consolidating and amending the law relating to deportation as contained in the *Deportation Ordinances* of 1912-15,³¹ conferred upon the Governor in Council wide powers to deport persons, particularly non-British subjects.³² British subjects, however, could only be deported under more limited circumstances.³³

The systems of immigration control and registration of persons were further developed in 1934 by the *Immigration and Passports Ordinance*³⁴ and the *Registration of Persons Ordinance*³⁵ of that year. The former extended the 1923 system by setting out nine categories of "undesirable immigrants"³⁶ who might be refused permission to land upon arrival by ship.³⁷ In requiring persons entering the colony to possess travel documents and (in the case of non-British subjects) visas,³⁸ the ordinance followed the

²⁴Ordinance No. 19 of 1915.

²⁵Ordinance No. 6 of 1916.

²⁶Ordinance No. 25 of 1917.

²⁷*Travellers Restrictions Ordinance 1915, supra, note 24, s. 3.*

²⁸*Ibid.*, ss 4, 10, and the Schedule.

²⁹*Registration of Persons Ordinance 1916, supra, note 25, s. 2.*

³⁰See the first schedule to the Ordinance, *ibid.*

³¹*Deportation Ordinance 1917, supra, note 26, s. 15.*

³²*Ibid.*, ss 3(1), 3(2), 4.

³³*Ibid.*, s. 4(14).

³⁴Ordinance No. 8 of 1934.

³⁵Ordinance No. 3 of 1934.

³⁶This is a term used in the long title of the *Immigration and Passports Ordinance 1934, supra, note 34.*

³⁷*Ibid.*, ss 4(1), 2(4). It may be noted that most Chinese immigrants from the mainland arrived by land by crossing the northern frontier of the New Territories. They would not therefore be subject to this system of control on persons arriving by sea.

³⁸*Ibid.*, ss 8, 9.

1923 ordinance in exempting persons of Chinese race from the requirement.³⁹ The *Registration of Persons Ordinance 1934* repealed the *Travellers Restrictions Ordinance 1915* and the *Registration of Persons Ordinance 1916*,⁴⁰ and required every alien (non-British subjects) in the colony, "other than an alien of Chinese race", to register with the police.⁴¹

In 1931 the population of Hong Kong was estimated to be 850,000,⁴² but this figure was to be doubled in the next decade. Japanese invasion of China began in 1931 with the military occupation of Manchuria. Further attempts to control northern China led to open war between the two nations in 1937. In 1938, the fall of Guangzhou (Canton), situated ninety miles north of Hong Kong, led to a mass flight of refugees to Hong Kong. About 100,000 refugees entered the colony in 1937, 500,000 in 1938 and 150,000 in 1939, bringing the population to an estimated 1,639,000 in 1941.⁴³

It was said that at the height of the refugee influx, about half a million people were sleeping in the streets of Hong Kong.⁴⁴ It was clear that the colony's resources could no longer cope with the situation. Thus in 1940, the Hong Kong government attempted — for the first time in the history of the colony — to control immigration of Chinese from mainland China, by introducing the *Immigration Control Ordinance 1940*,⁴⁵ which repealed and replaced the *Immigration and Passports Ordinance 1934*.⁴⁶ The 1940 ordinance empowered⁴⁷ the colony's immigration officers to refuse permission to land or enter (or to remain after landing in or entering) the colony in relation to any person not in possession of relevant travel documents, visas (in cases of non-British subjects), or entry permits, frontier passes or certificates of residence issued under the ordinance.⁴⁸ Unlike its predecessor, no exemption was made in respect of persons of Chinese race. The ordinance thus abolished, at least in legal theory, the traditional freedom of persons of Chinese race to enter and stay in the colony without restrictions.

However, the law in the books was not to be the law in action. The new system of immigration control was not effectively enforced, and during

³⁹*Ibid.*, s. 7.

⁴⁰*Travellers Restrictions Ordinance 1915*, *supra*, note 24; *Registration of Persons Ordinance 1916*, *supra*, note 25.

⁴¹*Registration of Persons Ordinance 1934*, *supra*, note 35, ss 8, 2. This basic principle was not changed when the *Registration of Persons Ordinance 1934* was repealed and replaced by the *Registration of Persons Ordinance 1939*, Ordinance No. 12 of 1939.

⁴²Podmore, *supra*, note 11 at 24; Endacott, *supra*, note 10 at 289.

⁴³*Hong Kong 1984*, *supra*, note 2 at 247; Endacott, *supra*, note 10 at 289.

⁴⁴*Hong Kong 1984*, *supra*, note 2 at 247; Podmore, *supra*, note 11 at 24.

⁴⁵Ordinance No. 32 of 1940.

⁴⁶*Ibid.*, s. 23 repealed the *Immigration and Passports Ordinance 1934*, *supra*, note 34.

⁴⁷*Supra*, note 45, s. 9.

⁴⁸*Ibid.*, s. 12.

1941 large numbers of migrants continued to come to Hong Kong.⁴⁹ A new immigration department of the government was in fact formed in 1940 to take over the former functions of the police in this domain, but it did not survive the Pacific War,⁵⁰ during which Hong Kong itself was taken over by Japanese forces. This took place in December 1941, and Hong Kong was occupied by the Japanese until August 1945. Poor economic conditions in Hong Kong during the occupation forced large numbers of people to leave the territory for other parts of mainland China. By August 1945, the population had been reduced to 600,000.⁵¹

III. 1945-1970

After the Japanese surrender, many former Hong Kong residents who had moved into China during the war returned, at the rate of almost 100,000 a month.⁵² Another new and huge influx of immigrants, unparalleled in Hong Kong's previous history, developed in the late 1940s, when civil war broke out in China between the Kuomintang (Nationalist Party) and the Communists. A United Nations report estimated that 1,285,000 people arrived in the colony between September 1945 and December 1949.⁵³ Another source reported that from the beginning of 1949 to the spring of 1950, which was the period of the defeat of the Kuomintang forces on the mainland and the establishment of the P.R.C., 776,000 refugees crowded into the colony, so that by 1950 the population had risen to 2,360,000.⁵⁴

The severe strain on the colony's financial and social resources caused by the unprecedented migration wave made the Hong Kong government realize that the century-old policy of open frontier with mainland China could no longer be maintained.⁵⁵ A new system of immigration control was therefore introduced in 1949 with the enactment of the *Immigrants Control Ordinance 1949*.⁵⁶ It was provided that no person may enter the colony save under and in accordance with a permit of the Immigration Officer.⁵⁷ Furthermore, no person may enter the colony without either a travel doc-

⁴⁹Podmore, *supra*, note 11 at 24.

⁵⁰*Hong Kong: The Facts — Immigration, supra*, note 4.

⁵¹*Hong Kong 1984, supra*, note 2 at 247; Harris, *supra*, note 17 at 82.

⁵²*Hong Kong 1984, supra*, note 2 at 247; G.B. Endacott, *Government and People in Hong Kong 1841-1962* (Hong Kong: Hong Kong University Press, 1964) at 197.

⁵³E. Hambro, *The Problem of Chinese Refugees in Hong Kong* (Leyden, 1955) 148, cited in Podmore, *supra*, note 11 at 25.

⁵⁴Endacott, *supra*, note 52 at 197; Hong Kong Government Information Service, *Hong Kong Annual Report 1951* (Hong Kong: Government Press, 1952) at 23; Endacott, *supra*, note 10 at 310.

⁵⁵Endacott, *supra*, note 52 at 5.

⁵⁶Ordinance No. 4 of 1949.

⁵⁷*Ibid.*, s. 4.

ument or an entry permit, certificate of residence or frontier pass issued under the ordinance.⁵⁸ No exception applied to persons of Chinese race. Like the *Immigrants Control Ordinance 1940*, the 1949 ordinance provided for a number of categories of undesirable immigrants (an immigrant being defined as a person other than one born in the colony and in possession of documentary proof of such birth)⁵⁹ whom the Immigration Officer may prohibit from landing in the colony.⁶⁰ However, the 1949 law departed from the previous approach to registration of persons by requiring all aliens (*i.e.* non-British subjects) to register with the Registrar of Aliens and not providing any exception in respect of persons of Chinese race.⁶¹ The new law also provided stricter treatment of illegal immigrants, that is to say, immigrants who entered the colony in breach of the requirements of the ordinance, by making it a criminal offence to contravene or to fail to comply with any provision of the ordinance.⁶² Hence a person who entered the colony without a permit from the Immigration Officer thereby committed an offence under the ordinance and would "upon conviction be liable in addition to expulsion from the Colony by order of the convicting magistrate."⁶³

A legislative measure related to the *Immigrants Control Ordinance 1949* was the *Registration of Persons Ordinance 1949*.⁶⁴ The ordinance introduced, for the first time in the history of the colony, a comprehensive system of compulsory registration⁶⁵ extending to all persons in the colony,⁶⁶ including persons of Chinese race who had previously been exempted from the registration requirement under the *Registration of Persons Ordinance 1934*. Also for the first time in Hong Kong's history, a system for the issue of identity cards to all registered persons was introduced.⁶⁷ Applicants for registration had to submit to the recording of fingerprints and the taking of photographs by the authorities.⁶⁸ Failure to apply to be registered under the ordinance was made a criminal offence punishable by a fine not exceeding \$2,000 and imprisonment for a term not exceeding one year.⁶⁹

⁵⁸*Ibid.*, s. 18.

⁵⁹*Ibid.*, s. 2(d).

⁶⁰*Ibid.*, s. 11.

⁶¹*Ibid.*, s. 24.

⁶²*Ibid.*, s. 33(1), (2).

⁶³*Ibid.*, s. 33(3); see also s. 11(5) regarding arrest and return of illegal immigrants.

⁶⁴Ordinance No. 37 of 1949.

⁶⁵*Ibid.*, s. 4(1).

⁶⁶Some limited exceptions were provided in s. 15, *ibid.* These included, for example, travellers in transit through the colony and children under the age of 12 years.

⁶⁷*Ibid.*, s. 10.

⁶⁸*Ibid.*, s. 7, and regulations 11, 12 of the *Registration of Persons Rules 1949* made under the ordinance.

⁶⁹*Ibid.*, s. 12.

In May 1950 the Hong Kong government first used its powers under the *Immigrants Control Ordinance 1949* to restrict entry of immigrants at the Hong Kong-P.R.C. border by a daily quota system.⁷⁰ Only those to whom the Hong Kong immigration authorities granted permits to enter were allowed to enter. However, the policy exempted natives of Guangdong province from the requirement of entry permits, so that such persons were still permitted to come to Hong Kong relatively freely.⁷¹ It is interesting to note that the introduction of immigration control in 1950 prompted a formal protest on 8 May 1950 by the Foreign Ministry of the P.R.C. to the U.K. government, asserting that the measure was "an unreasonable and unfriendly act towards the P.R.C. and its people."⁷² This probably reflected the P.R.C. view that Hong Kong was Chinese territory and that therefore the right of Chinese to enter Hong Kong should not be excluded or limited.⁷³

In the 1950s and 1960s — with the exception of the year 1962 — immigration from mainland China ceased to be the main factor in Hong Kong's population growth, because China imposed stringent exit controls on Chinese citizens and the Hong Kong-P.R.C. border was closely watched on both sides.⁷⁴ The exception year of 1962, a time of agricultural and economic difficulties on the mainland, saw a sudden relaxation on exit control on the part of the Chinese authorities. A "great exodus"⁷⁵ of migrants into Hong Kong took place. It was estimated that the influx of the year added 200,000 people to Hong Kong's population, pushing the figure up to 3.5 million in 1962, even though many illegal immigrants arrested in the border area were returned to the mainland.⁷⁶

Although the problem of illegal immigration was not considered to be serious in other years of the 1950s and 1960s, relatively small numbers of

⁷⁰Endacott, *supra*, note 10 at 310; Hong Kong Government Information Service, *Hong Kong 1987* (Hong Kong: Government Printer, 1987) at 222.

⁷¹*Hong Kong: The Facts — Immigration, supra*, note 4; *Hong Kong 1987, supra*, note 70 at 222.

⁷²Hong Kong's Future Research Society, *Hong Kong's Future* (Hong Kong: Hong Kong's Future Research Society, 1982) at 31 (in Chinese); Wide Angle Press, eds, *Hong Kong and China* (Hong Kong: Wide Angle Press, 1981) at 9 (in Chinese).

⁷³Lui, *supra*, note 12 at 3. For the same reason, after the P.R.C. started to impose stringent exit controls on Chinese citizens in 1951, the Chinese government did not request the Hong Kong government to repatriate Chinese who left the P.R.C. unlawfully: *ibid.*

⁷⁴Podmore, *supra*, note 11 at 25.

⁷⁵*Hong Kong: The Facts — Immigration, supra*, note 4.

⁷⁶At the peak of the immigrant traffic on 23 May 1962, 5,620 illegal immigrants were arrested in the border area, and 5,112 were returned to China: see *Hong Kong: The Facts — Immigration, supra*, note 4. According to Podmore, *supra*, note 11 at 38-39, over 60,000 people were arrested and returned to China in 6 weeks in April to May 1962, and it was estimated that a similar number succeeded evading arrest in the same period.

illegal immigrants did continue to come to Hong Kong, in addition to legal immigrants — those granted exit permits by the Chinese authorities and permitted to enter and stay in Hong Kong by the Hong Kong government. The colony of Hong Kong, which possesses many deserted coastlines and includes many sparsely populated islands, offered good opportunities for illegal entry.⁷⁷ When illegal immigrants were intercepted, whether they would be repatriated or allowed to stay depended entirely on how the immigration authorities exercised their discretion in deciding whether to grant permission to enter.⁷⁸ The law did provide that any person dissatisfied with the exercise of any discretion or decision under the ordinance may appeal to the Governor in Council,⁷⁹ but persons repatriated immediately on arrest would hardly be able to avail themselves of such a channel of appeal.

The legal machinery for immigration control was refined and improved in 1958 by the enactment of the *Immigration (Control and Offences) Ordinance*,⁸⁰ which replaced the *Immigrants Control Ordinance 1949*. The basic elements of the 1949 legislation were retained, but some supplementary provisions were added. In particular, more detailed rules were introduced to deal specifically with illegal immigrants, *i.e.* those who had entered without the permission of the immigration authorities and subsequently discovered in the colony. It was expressly provided that an illegal immigrant could remain in the colony if he was granted a permit to do so by the immigration authorities.⁸¹ Such permit may be subject to various conditions⁸² and limits⁸³ of stay. On the other hand, if the authorities decided not to grant such a permit to an illegal immigrant, the latter could be arrested and repatriated by an order of the Governor.⁸⁴ For the first time, the harbouring of an illegal immigrant was made a statutory offence.⁸⁵ In 1961, an Immigration Department, separate and distinct from the police, was established by the Hong Kong government to deal with the increasing volume of immigration work.⁸⁶

Under the legal framework described above, whether illegal immigrants were strictly dealt with and repatriated or leniently treated and permitted

⁷⁷Podmore, *supra*, note 11 at 37.

⁷⁸*Immigrants Control Ordinance 1949, supra*, note 56, ss 2, 18.

⁷⁹*Ibid.*, s. 35; *Immigration (Control and Offences) Ordinance 1958, infra*, note 80.

⁸⁰Ordinance No. 34 of 1958.

⁸¹*Ibid.*, s. 4.

⁸²*Ibid.*, s. 15.

⁸³*Ibid.*, s. 22.

⁸⁴*Ibid.*, s. 11(5)(c). Compare this with s. 33(3) of the *Immigrants Control Ordinance 1949, supra*, note 56, under which the power to order expulsion was vested in a magistrate and not the Governor.

⁸⁵*Supra*, note 80, s. 40.

⁸⁶*Hong Kong: The Facts — Immigration, supra*, note 4.

to stay was a matter of executive policy from time to time. Following the "great exodus" of 1962, the pronounced policy was that illegal immigrants from mainland China would be repatriated, though a limited number of entry permits were also issued, after making allowances for individual circumstances, to enable some of these immigrants to stay. The result was that an average of a few thousand illegal immigrants per year from mainland China were absorbed in the period 1963-67.⁸⁷ In 1967, the Hong Kong government decided to resume a more open door policy. In most cases, illegal entrants from mainland China who were discovered in Hong Kong would not be repatriated but would simply be required to report to the authorities to obtain entry permits for the purpose of regularizing their stay.⁸⁸ This lenient policy continued until 1974, which saw changes to be discussed in the next part of this essay.

IV. 1971-1980

A. *The Immigration Ordinance 1971*

The year 1971 marked the beginning of a new stage of the history of immigration law in Hong Kong with the enactment of the *Immigration Ordinance 1971*.⁸⁹ The ordinance consolidated and revised the existing immigration and deportation laws⁹⁰ as contained in the *Immigration (Control and Offences) Ordinance 1958*, the *Deportation (British Subjects) Ordinance 1936*⁹¹ and the *Deportation of Aliens Ordinance 1935*.⁹² The main features of the two latter ordinances are reviewed here to facilitate understanding of the background to the 1971 ordinance.

The 1935 and 1936 ordinances were passed to replace the deportation law previously set out in the *Deportation Ordinance 1917*, which has been mentioned above. As regards aliens (*i.e.* non-British subjects), the 1935 ordinance extended the deportation powers of the Governor in Council, empowering it, *inter alia*, "to make summarily a deportation order against the alien" if it "deems it to be conducive to the public good."⁹³ As against British subjects, the 1936 ordinance also granted increased deportation pow-

⁸⁷Lui, *supra*, note 12 at 5.

⁸⁸*Ibid.*. Podmore, *supra*, note 11 at 38.

⁸⁹Ordinance No. 55 of 1971.

⁹⁰As pointed out in the explanatory memorandum of the bill, reprinted in *Hong Kong Hansard*, 1970-71 at 786.

⁹¹Ordinance No. 16 of 1936.

⁹²Ordinance No. 39 of 1935.

⁹³*Ibid.*, s. 3(1)(c). Section 17 provided that the decision of the Governor in Council as to whether any person was liable to deportation or should be deported shall be final and conclusive for all purposes whatsoever.

ers compared to the 1917 legislation. However, a British subject who was born in Hong Kong or who had been ordinarily resident in Hong Kong continuously for a period of seven years could not be deported.⁹⁴ The ordinance also provided that no deportation order may be made against a British subject unless a court had so recommended or unless the Governor in Council decided to make the order after considering a report by a judge on the matter.⁹⁵ There were other provisions⁹⁶ which effectively guaranteed a higher degree of procedural due process compared to the procedure for deportation of aliens. The *Immigration Ordinance 1971* was described by a legislative councillor at the time of its enactment as "probably the most important measure that has come before this Council in the past few years."⁹⁷ Its importance lies in the fact that it not only consolidated and amended the existing deportation and immigration laws but also introduced, for the first time in Hong Kong's history, the definitions of three categories of Hong Kong residents, which collectively embraced almost all people resident in Hong Kong. The three groups may be briefly described as follows:⁹⁸

(1) *Hong Kong Belongers*: All British subjects born in Hong Kong were included in this category.⁹⁹ It should be noted that under the then existing British nationality law as set out in the *British Nationality Act 1948*, the general rule was that every person born within the United Kingdom or its colonies was a Citizen of the United Kingdom and Colonies ("C.U.K.C.") and also a British subject. Under that Act, "British subject" had the same meaning as "Commonwealth citizen", and the terms embraced C.U.K.C.s as well as the citizens of some Commonwealth countries. Hong Kong Belongers had "the right to land in Hong Kong"¹⁰⁰ and could not therefore be refused entry by Hong Kong's immigration authorities¹⁰¹ or made subject to conditions of stay.¹⁰² They also had a full right to reside in Hong Kong

⁹⁴*Deportation (British Subjects) Ordinance 1936, supra*, note 91, ss 3, 2(2).

⁹⁵*Ibid.*, s. 4.

⁹⁶*Ibid.*, ss 5-8, 9(3).

⁹⁷*Hong Kong Hansard, 1971-72* at 103 (13 October 1971; O. Cheung).

⁹⁸For a more detailed analysis, see W.S. Clarke, "Hong Kong Immigration Control: The Law and the Bureaucratic Maze" (1986) 16 *Hong Kong L.J.* 342.

⁹⁹See the definition of Hong Kong Belonger in section 2 of the ordinance. The section also provided that a British subject who was married to or was the child of a Hong Kong Belonger was also a Hong Kong Belonger. Apart from birth as a British subject in Hong Kong, the status of Hong Kong Belonger could also be acquired by naturalization or registration as a British subject in Hong Kong (under section 7(2) of the *British Nationality Act 1948* (U.K.), 11 & 12 Geo. 6, c. 56.

¹⁰⁰*Immigration Ordinance 1971, supra*, note 89, s. 8(1)(a).

¹⁰¹*Ibid.*, s. 7(a).

¹⁰²*Ibid.*, s. 8(2).

in the sense that they could not be removed¹⁰³ or deported¹⁰⁴ from the colony.

(2) *Chinese Residents*: This concept did not exist in the original bill for the ordinance but was inserted when the ordinance was passed in response to public criticism of the failure of the bill to give due recognition of the rights of non-British Chinese residents in Hong Kong.¹⁰⁵ The introduction of provisions about "Chinese residents" in the *Immigration Ordinance 1971* was thus intended to give them "a greater feeling of security"¹⁰⁶ as regards their rights of residence in Hong Kong. Chinese Residents were defined as non-Hong Kong Belongers (*i.e.* persons who did not fall within the definition of Hong Kong Belongers) who were "wholly or partly of Chinese race" and had "at any time been ordinarily resident in Hong Kong for a continuous period of not less than seven years."¹⁰⁷ Thus Chinese Residents referred mainly to Chinese born outside Hong Kong who had emigrated to Hong Kong and stayed for seven years or more. These people were given a general right to land in Hong Kong,¹⁰⁸ but their right of residence in Hong Kong was, relatively speaking, more limited than that of Hong Kong Belongers because they may be the subject of a deportation order by the Governor in Council. Such a deportation order could only be made if the person had been convicted in Hong Kong of an offence punishable with imprisonment for not less than two years, or if the Governor in Council deemed it to be conducive to the public good,¹⁰⁹ and the law also provided some procedural safeguards¹¹⁰ by prohibiting a deportation order against a Chinese Resident from being made except (a) on the recommendation of a court, (b) after consideration of a deportation tribunal's report, or (c) "where the Governor certifies that the case concerns the security of Hong Kong or the relations of Her Majesty's Government in the United Kingdom with another country."¹¹¹

(3) *Resident United Kingdom Belongers*: This term referred to C.U.K.C.s by reason of birth, adoption, naturalization or registration in the U.K. (including the wife and child of such a person) who had been ordinarily resident

¹⁰³*Ibid.*, ss 18, 19(2).

¹⁰⁴*Ibid.*, s. 20.

¹⁰⁵See the second reading debate on the bill in *Hong Kong Hansard*, 1971-72 at 101-09 (13 October 1971).

¹⁰⁶Speech of the Attorney General during the debate on the bill, *Hong Kong Hansard*, 1971-72 at 109 (13 October 1971).

¹⁰⁷See the definition of "Chinese resident" in s. 2 of the *Immigration Ordinance 1971*, *supra*, note 89.

¹⁰⁸*Ibid.*, s. 8(1)(c).

¹⁰⁹*Ibid.*, s. 20(2).

¹¹⁰*Ibid.*, s. 20(3).

¹¹¹*Ibid.*, s. 20(3)(c).

in Hong Kong for a continuous period of not less than seven years.¹¹² Their right to land in Hong Kong¹¹³ and their possible liability to deportation were similar to those of Chinese Residents, except that the grounds on which Resident United Kingdom Belongers could be deported were more limited than those applicable to Chinese Residents: the former could only be deported "if the Governor in Council deems it to be conclusive to the public good on the ground that the departure of such person from Hong Kong is necessary in the interest of the security of Hong Kong or for political reasons affecting the relations of Her Majesty's Government in the United Kingdom with another country."¹¹⁴

(4) *Others.* People not falling into any of the three categories above have¹¹⁵ no inherent right to land in Hong Kong and may only enter Hong Kong with the permission of the immigration authorities,¹¹⁶ who can in their discretion give permission to land or remain in Hong Kong subject to such conditions of stay as they may impose.¹¹⁷ They have the power to authorize persons who landed in Hong Kong unlawfully to remain in Hong Kong.¹¹⁸ Thus each illegal immigrant arriving from mainland China who is discovered in Hong Kong may either be given permission to remain or be removed from Hong Kong. The latter alternative is governed by a set of express provisions on the making of removal orders, which may be made against persons who do not have a right to land in Hong Kong and have entered or remained in Hong Kong without the permission of the immigration authorities or in breach of conditions of stay subject to which such permission had been granted.¹¹⁹

In addition to the possibility of being removed, illegal immigrants are also liable to criminal punishment under the ordinance. It is a criminal offence for a person (not having the right to land in Hong Kong) to land or remain in Hong Kong without permission. The maximum punishment was a fine of HK\$5,000 and imprisonment for three years.¹²⁰ Captains and owners of ships carrying illegal immigrants landing or seeking to land in

¹¹²See the definitions of "resident United Kingdom belongers" and "United Kingdom belongers", *ibid.*, s. 2.

¹¹³*Ibid.*, s. 8(1)(b).

¹¹⁴*Ibid.*, s. 20(4).

¹¹⁵The present tense is used here and at appropriate places below in describing a point of law which has not changed since the introduction of the legislation under discussion and which is therefore still valid at present.

¹¹⁶*Ibid.*, ss 7, 11.

¹¹⁷*Ibid.*, s. 11.

¹¹⁸*Ibid.*, s. 13.

¹¹⁹*Ibid.*, s. 19.

¹²⁰*Ibid.*, s. 38(1).

Hong Kong are also guilty of an offence,¹²¹ and the ships are liable to forfeiture.¹²² Finally, it should also be noted that a person (not having a right to land in Hong Kong) who has been granted permission to land or remain in Hong Kong commits a criminal offence if he contravenes a condition to stay subject to which the permission has been granted.¹²³

Even if such a person has not directly contravened any relevant conditions of stay, a removal order or deportation order can still be made against him in certain situations. Firstly, if such a person has only been ordinarily resident in Hong Kong for less than three years, he can be removed if he is considered an "undesirable immigrant."¹²⁴ Secondly, such a person can be deported by the Governor in Council if he has been convicted in Hong Kong of an offence punishable with imprisonment for not less than two years or if the Governor in Council deems it to be conducive to the public good.¹²⁵

Looking at the *Immigration Ordinance 1971* as a whole and from a historical point of view, its most significant feature lies probably in the introduction of the "right to land in Hong Kong" and the corresponding limitation on removal and deportation powers against those who possess this right, which together pointed to, though they did not amount to a clear formulation of, a right of abode in the territory. Before 1971, immigration authorities had in law an almost unfettered discretion in granting or not granting permission to enter Hong Kong.¹²⁶ The 1971 ordinance took away the discretion as far as Hong Kong Belongers, Chinese Residents and Resident United Kingdom Belongers were concerned. However, the existence of deportation powers against the two latter groups, and the wide and vague terms in which the condition for the exercise of such powers were formu-

¹²¹*Ibid.*, ss 38(4), 39.

¹²²*Ibid.*, s. 47.

¹²³*Ibid.*, s. 41.

¹²⁴*Ibid.*, s. 19(1)(c). Although the ordinance defined "immigrant" as "a person who is not a Hong Kong believer", there was no definition of "undesirable immigrant" in the ordinance. It should be noted that the making of a removal order against a United Kingdom Belonger (i.e. a C.U.K.C. by reason of birth, adoption, naturalization or registration in the U.K.) on this ground was subject to a special procedural safeguard (regarding the holding of an inquiry by a deportation tribunal) in s. 19(3).

¹²⁵*Ibid.*, s. 20(1). Again the making of a deportation order against a United Kingdom Belonger was subject to special procedural safeguards in s. 20(3).

¹²⁶See the previous discussion in this article on the *Immigrants Control Ordinance 1949*, *supra*, note 56, and *Immigration (Control and Offences) Ordinance 1958*, *supra*, note 80 and accompanying text.

lated,¹²⁷ meant that these two groups of people did not possess a full right of abode in the colony.

The power to make deportation orders is not merely of academic or theoretical significance. It is a real power that was actually exercised from time to time not only to remove criminals from the territory,¹²⁸ but also in accordance with the needs of the sensitive political climate in the colony. For example, in the early 1950s, when tense relations existed between the P.R.C. and Britain, some pro-P.R.C. trade union activists and writers in Hong Kong were deported.¹²⁹ It has also been pointed out that in later periods, when Sino-British relations had improved, the deportation power has also been used against spy rings and agents of Taiwan and the Soviet Union in Hong Kong, probably in deference to the wishes of the P.R.C. government.¹³⁰

In relation to the admission of and permission to stay for persons who were not Hong Kong Belongers, Chinese Residents or Resident United Kingdom Belongers, the discretionary powers of the immigration authorities have remained unfettered under the scheme of the 1971 ordinance. In practice, however, it is known that they exercise their powers in accordance with definite policy guidelines which are applied in a rather rigid and inflexible manner.¹³¹ Hence a characteristic of the system is that changes, even major changes, in immigration policies can often be made without necessitating legislative debate and amendment. In other words, Hong Kong's immigration law has been able to accommodate a wide range of different policy options towards different types of immigrants to Hong Kong.

One example of a change in policy but not in law relates to the admission of Commonwealth citizens. Before 1969, Commonwealth citizens, unlike non-Chinese aliens, were generally permitted to enter Hong Kong without a visa, even for the purpose of residence or employment. In 1969,

¹²⁷See the criticism in Clarke, *supra*, note 98 at 355-56. The writer concluded that "the power to deport Chinese residents, resident British citizens and resident United Kingdom belongers is so wide as to permit the deportation of persons simply because they express views which are unpopular or contrary to the official position." For the definitions of "Chinese residents" and "resident British citizens", see Part IV, section A, above.

¹²⁸In 1976, 90 deportation orders were approved by the Governor in Council: see *Hong Kong 1977*, *supra*, note 70 at 136. In 1977, 79 such orders were made (see Hong Kong Government Information Service, *Hong Kong 1978* (Hong Kong: Government Printer, 1978) at 135). Most of the orders were against persons convicted of criminal offences.

¹²⁹*Hong Kong and China*, *supra*, note 72 at 11-12.

¹³⁰N.J. Miners, *The Government and Politics of Hong Kong*, 3d ed. (Hong Kong: Oxford University Press, 1981) at 21.

¹³¹See generally Clarke, *supra*, note 98 at 358ff; A. Hicks, "Admission of Foreign Domestic Helpers: Some Legal Issues" (1983) 13 *Hong Kong L.J.* 194. The guidelines have not been published in a form available to the general public.

in view of the increasing numbers of unskilled immigrants entering the colony, immigration controls on aliens were extended to Commonwealth citizens, except that persons born in Hong Kong or the U.K., or naturalized or registered as British subjects in Hong Kong or the U.K., were still exempt from the controls.¹³² The policy was further tightened in 1972, when United Kingdom Belongers (as defined in the *Immigration Ordinance 1971*) were also required to obtain permission before they could enter and remain in Hong Kong.¹³³

Another fundamental rule of policy implemented by Hong Kong's immigration authorities is that intended immigrants from mainland China who have been granted "one-way exit permits" by the P.R.C. authorities have invariably been given permission by Hong Kong's immigration authorities to enter and remain in Hong Kong.¹³⁴ Such immigrants are known as "legal immigrants", in contrast to illegal immigrants — those who have entered Hong Kong without permission by physically evading the immigration control system. Apart from the "one-way exit permits" mentioned above, "two-way exit permits" are also issued by the P.R.C. authorities to enable mainland residents to visit Hong Kong for a limited period and then to return to China. Again, Hong Kong's immigration authorities invariably grant permission to holders of such permits to enter Hong Kong and remain in Hong Kong for the relevant period. Indeed, the conditions of stay provided for in the permission by the Hong Kong authorities are usually identical to the conditions set out in the two-way exit permit granted by P.R.C. authorities.¹³⁵

B. The Policy Towards Illegal Immigrants

While the policy to admit holders of P.R.C.-issued one-way exit permits as legal immigrants has been a consistent one, the treatment of illegal immigrants was the subject of policy changes made in response to changes in the rate of illegal immigration. This topic was partially covered in Part II

¹³²Hong Kong Government Information Service, *Hong Kong Annual Report 1969* (Hong Kong: Government Press, 1970) at 149.

¹³³*Hong Kong: The Facts — Immigration*, *supra*, note 4. They are normally given such permission subject to an initial limitation on the length of stay: see Clarke, *supra*, note 98 at 359.

¹³⁴Clarke, *supra*, note 98 at 360; W.S. Clarke, "Freedom of Movement" in R. Wacks, ed., *Civil Liberties in Hong Kong* (Hong Kong: Oxford University Press, 1988) c. 11 at 327, especially note 31. See also *Hong Kong Hansard*, 1973-74 at 844 (8 May 1974; Secretary for Security); *Hong Kong Hansard*, 1980-81 at 103 (23 October 1980; Governor); *Hong Kong Hansard*, 1986-87 at 828 (18 February 1987; Secretary for Security).

¹³⁵Clarke, *supra*, note 98 at 360. The writer commented on this system as follows at 360-61: "So automatically does the Hong Kong Immigration Department implement the conditions imposed by the mainland authorities that the question of unlawful subdelegation is raised."

of this essay. In the 1970s, the turning point in the policy towards illegal immigrants from mainland China came in November 1974. Before that, as discussed above, the prevailing policy adopted since 1967 was an "open door" one, allowing most (though not all) of the illegal immigrants from mainland China to stay in Hong Kong. This policy did not survive 1973, a year in which an estimated 56,000 illegal immigrants arrived from the mainland.¹³⁶ This was a dramatic increase compared to the figures for the preceding years: in the whole of the decade 1962-72, the total number of illegal immigrants from China was about 60,000, only 4,000 above the figure for the single year of 1973.¹³⁷ A new policy, taking effect on 30 November 1974, was therefore introduced to deal with the situation. This policy has become known as the "touch-base" or "reach-base" policy: illegal immigrants who were arrested in the border region or on Hong Kong territorial waters during their attempt to enter Hong Kong would be repatriated, but all others who evaded immediate capture, entered the urban areas and subsequently gained a home with relatives or otherwise found proper accommodation (*i.e.* those who "reached base") would be given permission to stay in Hong Kong when they applied for it at the Immigration Department.¹³⁸ The rationale for leniency to those who "reached base" was to avoid the creation of an underground community of second-class residents who were compelled to live on the fringe of society and likely to resort to criminal activities in order to survive.¹³⁹

The change in policy in 1974 only affected illegal immigrants; mainland residents who obtained permission from the P.R.C. authorities to leave mainland China and settle in Hong Kong continued to be accepted as legal immigrants. For example, in 1974, Hong Kong accepted 36,224 legal immigrants, mostly from China.¹⁴⁰ In 1976 and 1977, the figures for immigrants from China were approximately 27,500 and 34,000.¹⁴¹ But before we return to the topic of immigrants from mainland China in the next section of this essay, let us now turn to another major source of immigration into Hong Kong in the late 1970s — Vietnamese refugees.

¹³⁶Lui, *supra*, note 12 at 5.

¹³⁷*Ibid.*

¹³⁸*Hong Kong 1981* (Hong Kong: Government Printer, 1981) at 145; A.H.Y. Chen, "Judicial Review of Immigration Tribunal Decisions" (1985) 15 *Hong Kong L.J.* 212, 213, especially note 8; Lui, *supra*, note 12 at 6; Harris, *supra*, note 17 at 86; Clarke, *supra*, note 98 at 361.

¹³⁹*Hong Kong 1981*, *ibid.* at 145; Lui, *supra*, note 12 at 6; *Hong Kong Hansard*, 1980-81 at 104 (23 October 1980; Governor).

¹⁴⁰Hong Kong Government Information Service, *Hong Kong 1975* (Hong Kong: Government Printer, 1975) at 123.

¹⁴¹Hong Kong Government Information Service, *Hong Kong 1977* (Hong Kong: Government Printer, 1977) at 136; Hong Kong Government Information Service, *Hong Kong 1978* (Hong Kong: Government Printer, 1978) at 135.

C. *The Arrival of Vietnamese Refugees*

Vietnamese refugees started to arrive in Hong Kong after the fall of Saigon to the Communists in April 1975. Most of them came in small boats — hence the name “boat people”; some were however rescued at sea by ocean-going vessels,¹⁴² and there were also several occasions in which they came in chartered ships. In contrast to the policy of repatriating illegal immigrants from mainland China, the Hong Kong government regarded these “boat people” as refugees and granted temporary asylum to them in accordance with international law regarding refugees. At this point it may be noted that there have never existed any statutory rules regarding either the definition or treatment of “refugees” in Hong Kong. The concept of refugees has never been openly invoked by the Hong Kong government in dealing with immigrants from mainland China. The U.K. government has, for reasons which have not been made explicit, refrained from extending to the colony of Hong Kong the 1951 convention¹⁴³ and 1967 protocol¹⁴⁴ relating to the status of refugees.¹⁴⁵ One writer speculated that “the British Government has been wary of the possibility of encouraging the flow of illegal immigrants from China (who might claim refugee status in Hong Kong) and of potential difficulties with the Chinese authorities who might have raised objections to the designation of arrivals from China as ‘refugees’ in what they consider to be, in the final analysis, a part of Chinese territory.”¹⁴⁶ Although there existed no Hong Kong law on refugees and on their right to asylum, the Hong Kong government adhered to the “first port of call principle”¹⁴⁷ in relation to the boat people from Vietnam, who were designated refugees in accordance with administrative procedures:¹⁴⁸ shipwrecked survivors rescued by ocean-going vessels whose next scheduled port of call was Hong Kong would be allowed to land in Hong Kong. Refugees coming on small ships or boats were also allowed ashore: the policy was not to turn away persons in such vessels in circumstances in which loss of life may occur.¹⁴⁹ Thus, generally speaking, temporary refuge was extended to Vietnamese refugees for whom Hong Kong was a “country of first asylum”, pending their permanent resettlement in other countries;¹⁵⁰ the prin-

¹⁴²Of all the refugees arriving from Vietnam in 1975-1982, less than ten were brought by vessels to Hong Kong as the next scheduled port of call: see Lui, *supra*, note 12 at 16.

¹⁴³Convention of 28 July 1951, 189 U.N.T.S. 137.

¹⁴⁴Protocol of 31 Jan. 1967, 606 U.N.T.S. 267.

¹⁴⁵R. Mushkat, “Refugees in Hong Kong: Legal Provisions and Policies” (1980) 10 Hong Kong L.J. 169 at 172.

¹⁴⁶*Ibid.*

¹⁴⁷Mushkat, *supra*, note 145 at 173-74.

¹⁴⁸For details concerning such procedures, see *ibid.* at 177-78.

¹⁴⁹*Hong Kong Hansard* 1978-79 1038 (1 August 1979; Secretary for Security).

¹⁵⁰R. Mushkat, “Hong Kong as a Country of Temporary Refuge: An Interim Analysis” (1982) 12 Hong Kong L.J. 157 at 171.

ciple of non-refoulement — that a refugee should not be forcibly returned to a country where he is likely to suffer political persecution — was followed.¹⁵¹ Thus as from 1975, camps were set up by the government in Hong Kong to provide temporary accommodation for the Vietnamese refugees, and arrangements were made through the United Nations High Commissioner for Refugees (U.N.H.C.R.) for finding permanent homes for them overseas.¹⁵² A limited number of such refugees were accepted for permanent resettlement in Hong Kong itself.¹⁵³ It should be noted that Hong Kong's approach to arriving Vietnamese refugees was more humane than that adopted by most neighbouring Asian countries.¹⁵⁴ In this regard, the desire of the British government to adhere to international norms regarding treatment of refugees was probably a major factor. However, the expenses of operating the refugee camps, and of feeding and providing various social services to the refugees, were largely borne by Hong Kong taxpayers, although the U.N.H.C.R. also shared a portion of the cost.¹⁵⁵ In some sections of the Hong Kong community, there was possibly some resentment at the government's policy towards Vietnamese refugees, partly because some of the services and material benefits which the refugees were provided exceeded those available to many working class people in Hong Kong itself,¹⁵⁶ and partly because of the contrast between the repatriation of "illegal in-migrants" from mainland China — many of whom were relatives of Hong Kong residents — and the indiscriminating admission of all "refugees" from Vietnam.¹⁵⁷ The flexibility of the immigration control scheme under the *Immigration Ordinance 1971* was such that no change in the law to address the problem of Vietnamese refugees was introduced until 1979, although such refugees started to come in 1975. The number of arriving refugees was 3,743 in 1975, falling to 191 in 1976, then rising to 1,001 in 1977, 6,678 in 1978 and then dramatically to 74,483 in 1979.¹⁵⁸ In the light of the growing magnitude of the problem and the revelation that syndicates were operating to ship Vietnamese Chinese to Hong Kong for monetary rewards, the Hong Kong government decided to introduce legislation in 1979 to impose severe

¹⁵¹Mushkat, *supra*, note 145 at 176.

¹⁵²Lui, *supra*, note 12 at 9; Harris, *supra*, note 17 at 84; *Hong Kong: The Facts — Immigration, supra*, note 4.

¹⁵³Mushkat, *supra*, note 145 at 170; Mushkat, *supra*, note 150 at 169; Hong Kong Government Information Service, *Hong Kong 1982* (Hong Kong: Government Printer, 1982) at 154. At least 14,000 were so resettled in Hong Kong.

¹⁵⁴Mushkat, *supra*, note 150 at 171-72.

¹⁵⁵For example, in 1979 the Hong Kong government incurred HK\$70 million in direct expenditure on the refugees: Mushkat, *supra*, note 145 at 171.

¹⁵⁶Mushkat, *supra*, note 145 at 171. The benefits included, for example, rent-free accommodation, basic cooking facilities, free-of-charge child-care services for working parents, and subsidy allowances from the U.N.H.C.R.

¹⁵⁷Mushkat, *supra*, note 150 at 177.

¹⁵⁸*Ibid.* at 157.

penalties on those who organized for profit the illegal shipment of Vietnamese refugees and other illegal immigrants into Hong Kong. The relevant law was the *Immigration (Amendment) (No. 3) Ordinance 1979*,¹⁵⁹ which added the new parts VIIA and VIIB to the existing *Immigration Ordinance*.¹⁶⁰ Under the new provisions, it is a criminal offence, punishable by a maximum fine of HK\$5,000,000 and life imprisonment, for crew members or owners of ships to bring "unauthorised entrants"¹⁶¹ to Hong Kong,¹⁶² or for any person to arrange or assist the passage to Hong Kong of unauthorised entrants,¹⁶³ unless the ship has been granted special permission to enter Hong Kong or unless the ship's first port of call is Hong Kong and "the unauthorised entrant was taken on board without reward pursuant to a legal obligation to go to his assistance."¹⁶⁴ Ships used in the commission of such an offence are liable to forfeiture.¹⁶⁵ The introduction of these relatively draconian provisions¹⁶⁶ was not, however, aimed at the refugees themselves, who would continue, in accordance with Hong Kong's existing humanitarian refugee policy, to be permitted to stay in Hong Kong pending resettlement and would not be prosecuted for illegal entry.¹⁶⁷ As will be seen in the next part of this essay, the Vietnamese refugee problem continued to aggravate after 1979 and eventually led to the introduction of further legislative measures.

¹⁵⁹Ordinance No. 61 of 1979 [hereinafter *Immigration Ordinance* as amended (1979)].

¹⁶⁰In 1972 the previous Immigration Ordinances were consolidated by L.N. 62/84 as the *Immigration Ordinance*, Laws of Hong Kong, c. 115 [hereinafter *Immigration Ordinance* as consolidated (1972)]. Sections 37M and 37T of the consolidated ordinance provided for the expiration of the two parts on 31 December 1980 unless the Legislative Council by resolution otherwise determined. At the Legislative Council debate on the bill, councillors believed that the severe measures in the new parts VIIA and VIIB were unusual and of an emergency nature only: see *Hong Kong Hansard*, 1978-79 at 1037, 1040 (1 August 1979). However, the two parts have in fact been continuously extended subsequently and are still in force at present in 1988.

¹⁶¹Vietnamese refugees are unauthorised entrants; so are illegal immigrants from mainland China: see section 37B of the *Immigration Ordinance* as consolidated (1972), as amended by the *Immigration (Amendment) (No. 3) Ordinance 1979*, *supra*, note 159, and the *Immigration (Unauthorised Entrants) Order* made under the ordinance. Thus the provisions against trafficking in illegal immigrants have been applied to combat illegal immigrants from China as well as Vietnamese refugees: see the Legislative Council debate on the 1979 ordinance in *Hong Kong Hansard*, 1978-79 at 1037-41, notably 1040 (1 August 1979; O. Cheung) and *Hong Kong Hansard*, 1980-81 at 155 (5 November 1980; Attorney General).

¹⁶²*Immigration Ordinance, ibid.*, ss 37C and 37O.

¹⁶³*Ibid.*, ss 37D and 37P.

¹⁶⁴*Ibid.*, ss 37I and 37R.

¹⁶⁵*Ibid.*, ss 37E and 37Q.

¹⁶⁶They may be compared to those in part VIII of the ordinance, *ibid.*, such as ss 38(4) and 39 (on the punishment of captains and owners of ships carrying illegal immigrants to Hong Kong), which cover similar activities but do not impose such heavy sentences.

¹⁶⁷*I.e.* under s. 38, *ibid.*

V. The 1980s

A. *The Abolition of the "Reached Base" Policy*

October 1980 marked another turning point in Hong Kong's immigration policy. To understand the background of this development, it is necessary to review the situation regarding immigration from mainland China in the late 1970s after the adoption in November 1974 of the policy of repatriating illegal immigrants caught in the border area but not those who managed to "reach base." That policy was indeed effective in bringing down the number of illegal immigrants in 1975-1977. In these three years, the numbers of illegal entrants from mainland China arrested on arrival and repatriated were approximately 1,200, 800 and 1,800 respectively. At the same time, it was estimated that the numbers of those who evaded capture at the border and "reached base" in the three years were 6,600, 6,100 and 6,600 respectively.¹⁶⁸ However, beginning from 1978, the numbers increased dramatically, probably as a result of the more relaxed political atmosphere in China and increased contact between her people and the outside world.¹⁶⁹ In 1978 the numbers of those repatriated and those who reached base rose to 8,200 and 28,000 respectively, and in 1979 they rose even more sharply to 90,000 and 108,000.¹⁷⁰ The situation continued in the first ten months of 1980, for which the relevant figures were 80,500 and 69,500 respectively.¹⁷¹

The flood of immigrants in 1978-1980 was the third major surge of migration from the mainland to Hong Kong, following the first wave in the late 1940s and the second in 1962.¹⁷² This time it was all the more threatening to Hong Kong because by June 1980, Hong Kong's population had reached an estimated 5,067,900, giving a population density of 4,776 persons per square kilometer¹⁷³ and making it one of the most densely populated places in the world.¹⁷⁴ Among the five million people, nearly 10 per cent (or, more exactly, 460,000) were immigrants who came to Hong Kong from

¹⁶⁸Government Secretariat of the Hong Kong Government, *Information Paper on the Background to the Problem of Illegal Immigration from China into Hong Kong* (Hong Kong: Government Printer, 1980) at 5 [hereinafter *Information Paper*].

¹⁶⁹*Hong Kong: The Facts — Immigration*, *supra*, note 4. See also the attempted explanation in Harris, *supra*, note 17 at 85-86.

¹⁷⁰*Information Paper*, *supra*, note 168 at 5.

¹⁷¹*Hong Kong: The Facts — Immigration*, *supra*, note 4.

¹⁷²Lui, *supra*, note 12 at 7.

¹⁷³Lui, *supra*, note 12 at 7; *Information Paper*, *supra*, note 168 at 3. It should also be borne in mind in this regard that a large portion of Hong Kong's land is rugged and uninhabitable.

¹⁷⁴In 1980, the density in the Mong Kok district in the urban area of Hong Kong was 145,000 per square kilometer: *Information Paper*, *supra*, note 168 at 3.

mainland China since the beginning of 1975,¹⁷⁵ and 28,200 were Vietnamese refugees waiting to be resettled.¹⁷⁶ In 1979 the rate of population growth in Hong Kong was over 5 per cent, and if Vietnamese refugees were also taken into account, it was 6.3 per cent, over five times the natural growth rate of 1.2 per cent.¹⁷⁷ Given these circumstances, it was widely felt in 1980 that Hong Kong could no longer continue to absorb the huge influx of immigrants without experiencing gradual deterioration in the quality of life. In particular, the existing social services — such as housing, medical and health services, education, social welfare, and transport — and their further development as originally planned would not be able to cope with such an abnormally high rate of population growth. There was also concern about the involvement of new immigrants in crimes.¹⁷⁸ On 23 October 1980, the government proposed a piece of legislation which “would radically change the traditional policy towards illegal immigrants from China”.¹⁷⁹ That law — the *Immigration (Amendment) (No. 2) Ordinance 1980* — passed all its three readings in the Legislative Council on that day. In presenting the proposal, the administration explained that the “reached base” policy was no longer appropriate in the existing circumstances of Hong Kong. The policy “has become a tragic charade in which the illegal immigrant has little to lose and everything to gain by attempting to run the gauntlet of Chinese and Hong Kong forces, and even if caught has every incentive to try again.”¹⁸⁰ It was therefore decided to introduce the new policy of repatriating all illegal immigrants regardless of whether they had “reached base” or not.¹⁸¹ It is interesting to note that this change of policy would not in itself have required any legislative action, because under the existing system the immigration authorities had full power to decide whether an illegal immigrant should be allowed to stay or be repatriated. The *Immigration (Amendment) (No. 2) Ordinance 1980*¹⁸² was therefore designed to facilitate the enforcement of the new policy rather than to enact the policy itself. It

¹⁷⁵*Ibid.* Most of them (about 80%) were farm-laborers before they came to Hong Kong; *ibid.* at 5.

¹⁷⁶*Information Paper, supra*, note 168 at 6.

¹⁷⁷*Ibid.* at 3. During 1971-1977, the average annual rate of population growth was 2%.

¹⁷⁸See generally *Information Paper, supra*, note 168; Lui, *supra*, note 12 at 7-8; *Hong Kong Hansard*, 1980-81 at 111 (23 October 1980; O. Cheung).

¹⁷⁹*Hong Kong Hansard*, 1980-81 at 103 (23 October 1980; Governor).

¹⁸⁰*Ibid.* at 104.

¹⁸¹*Ibid.* The new policy applied to all illegal immigrants entering Hong Kong from China after 23 October 1980. However, illegal immigrants from China who were already in Hong Kong on 23 October and who had not yet registered with the authorities were given a period of three days to do so: *ibid.* at 105; *Information Paper, supra*, note 168 at 1.

¹⁸²Ordinance No. 62 of 1980. As was pointed out by Huggins V.-P. in *Mak Yiu-ming v. Attorney General*, [1981] H.K.L.R. 435 at 437 (C.A.), the abolition of the “touched base” policy was only a change in executive policy; even before 1980, the existing law permitted the repatriation of all illegal immigrants, whether they had “reached base” or not.

made improved provision for the detection and removal of illegal immigrants in two ways. First, the ordinance introduced the new Part IVA of the *Immigration Ordinance*, which requires all persons in Hong Kong aged fifteen or above to carry at all times their identity cards or some other acceptable proof of identity, and to produce them on demand to the police; failure to do so without reasonable excuse carries liability to a fine of HK\$1,000.¹⁸³ Persons discovered on identity checks¹⁸⁴ to be illegal immigrants will be arrested and repatriated as mentioned below. Secondly, the new Part IVB of the *Immigration Ordinance* introduced by the 1980 amendment prohibits the employment of illegal immigrants: it is obligatory for employers to inspect the identity cards of all those either on their payroll or whom they wish to recruit, and it is a criminal offence, punishable by a fine of HK\$50,000 or imprisonment for a year, to employ someone without a relevant identity document.¹⁸⁵ The object of this measure was to debar illegal immigrants from employment and from earning income, thus deterring them from coming to Hong Kong and forcing those who were in Hong Kong to surrender to the authorities. The measure was enforced by inspectors of the Labour Department visiting various work places and inspecting records on employees' identity.¹⁸⁶ In addition to the above, a related policy was also introduced to discourage illegal immigration to Hong Kong, although this was not expressly provided for in law. It was declared that production of identity cards would henceforth be needed for the transaction of day-to-day business with government departments, and, in particular, for the provision of public service (other than services of an emergency kind such as urgent medical treatment or the saving of life and property). "[T]he intention is that all the normal Government services enjoyed by residents of Hong Kong will be denied to illegal immigrants."¹⁸⁷

The government acknowledged that the new policies would be somewhat painful to enforce, but explained that they were indeed necessitated by the drastic immigration situation. In the words of the Chief Secretary in the second reading debate on the 1980 enactment:

The severe problems brought about by illegal immigration are well known. What has to be done is quite clear: but in taking this essential, no longer avoidable, action which we propose today, let us be clear also the penalties which we — as a community — have to pay, the frustrations and problems with which we shall be presenting ourselves, are very considerable too. It is a

¹⁸³Section 17C of the *Immigration Ordinance* as consolidated (1972), *supra*, note 160.

¹⁸⁴In the following four months, police patrolling in the streets checked on the identity documents of approximately three quarters of a million people: Lui, *supra*, note 12 at 14.

¹⁸⁵*Immigration Ordinance* as consolidated (1972), *supra*, note 160, ss 17H, 17I and 17J.

¹⁸⁶*Ibid.*, ss 17K and 17L. In the following four months, records in 40,000 work places were inspected: Lui, *supra*, note 12 at 14.

¹⁸⁷*Hong Kong Hansard*, 1980-81 at 110 (23 October 1980; Chief Secretary).

choice of evils. In many ways the Hong Kong of the future will not be the sort of Hong Kong we all have known until today.¹⁸⁸

Another point to note about the *Immigration (Amendment) (No. 2) Ordinance 1980* is that it altered the existing procedure regarding removal of illegal immigrants who were not captured during their attempt to enter but were discovered subsequently. The power to make removal orders against such illegal immigrants in most cases was transferred from the Governor to the Director of Immigration or his deputy.¹⁸⁹ As a safeguard, a new system of appeals was instituted. A person against whom a removal order has been made may appeal to an immigration tribunal, consisting of lay assessors, on the ground that (a) he has the right to land in Hong Kong, or (b) he had, at the time of the making of the removal order, the permission of the Director of Immigration to remain in Hong Kong.¹⁹⁰

The introduction of the 1980 measures was not a unilateral decision on the part of the Hong Kong government; they were adopted only after consultation with the U.K. government, the central government of the P.R.C. and the provincial authorities of Guangdong.¹⁹¹ Consultation with the Chinese government was even more important in relation to the number of legal immigrants from mainland China to Hong Kong. As mentioned above, Hong Kong's immigration policy has always been such that all holders of one-way exit permits issued by the Chinese authorities would be automatically given permission to enter and reside in Hong Kong, and such immigrants are known as "legal immigrants." Such legal immigration reached a peak in December 1978, when the number of legal immigrants from China entering Hong Kong was 310 per day.¹⁹² Thus the total number of such immigrants in 1978 was 67,495, compared to 25,373 in 1977.¹⁹³ In response to representations to the P.R.C. authorities from the Hong Kong

¹⁸⁸*Ibid.* at 111.

¹⁸⁹See s. 19 of the *Immigration Ordinance* as consolidated (1972), *supra*, note 160, as amended by Ordinance No. 75 of 1981, s. 7; Ordinance No. 62 of 1980, *supra*, note 182; Ordinance No. 31 of 1984, s. 7, Ordinance No. 79 of 1982, s. 8; and Ordinance No. 78 of 1982, s. 6.

¹⁹⁰Section 53A(1), *Immigration Ordinance, ibid.*, as consolidated (1972), *supra*, note 160, as amended by Ordinance No. 62 of 1980, *supra*, note 182. See generally Chen, *supra*, note 138.

¹⁹¹*Information Paper, supra*, note 168 at 4; *Hong Kong Hansard*, 1980-81 at 104 (23 October 1980; Governor).

¹⁹²*Hong Kong Hansard*, 1979-80 at 45 (17 October 1979; Secretary for Security); *Information Paper, supra*, note 168 at 5.

¹⁹³*Ibid.*

and U.K. governments,¹⁹⁴ the volume was reduced to 150 per day in 1980.¹⁹⁵ This still represented an addition of about 55,000 a year. A further reduction was later negotiated,¹⁹⁶ as a result of which the number of legal immigrants from China since 1983 stayed at approximately 27,000 per year (or 75 per day).¹⁹⁷ The number is likely to remain at this level in the foreseeable future.¹⁹⁸ Returning to the subject of illegal immigration, it may be noted that the 1980 measures proved to be largely effective in curbing the flood of illegal immigrants. In the months preceding October 1980, an average of 450 illegal immigrants were intercepted per day during their attempt to enter Hong Kong.¹⁹⁹ In 1981 this figure was reduced to 21 per day, while another 5 per day on the average were detected in the city (after successfully evading arrest at the border) and repatriated.²⁰⁰ In the following years, the numbers of illegal immigrants captured during entry and those subsequently arrested within the city were respectively 23 and 6 in 1982;²⁰¹ 13 and 8 in 1983;²⁰² 26 and 8 in 1984;²⁰³ 35 and 9 in 1985;²⁰⁴ 46 and 10 in 1986.²⁰⁵

B. Illegal Immigrant Children, Wives and Mothers

One problem which attracted attention in the 1980s was the smuggling of child immigrants from mainland China to Hong Kong. The demand for the "services" provided by the traffickers arose from the fact that some

¹⁹⁴*Hong Kong Hansard*, 1978-79 at 904 (6 June 1974; Secretary for Security); Hong Kong Government Information Service, *Hong Kong 1979* (Hong Kong: Government Printer, 1979) at 142. See also Lui, *supra*, note 12 at 20-21, in which the author points out that such discussion was a politically sensitive matter because the Chinese government holds the view that Hong Kong is part of China and Chinese people should not in principle be debarred from entering Hong Kong; the negotiating approach of the Hong Kong government must therefore be to win China's sympathy and support as regards Hong Kong's immigration problems.

¹⁹⁵*Hong Kong Hansard*, 1979-80 at 45 (17 October 1979; Secretary for Security); *Information Paper*, *supra*, note 168 at 5; *Hong Kong Hansard*, 1980-81 at 103 (23 October 1980; Governor).

¹⁹⁶*Hong Kong Hansard*, 1981-82 at 309 (6 January 1982; Secretary for Security).

¹⁹⁷*Hong Kong Hansard*, 1986-87 at 167 (29 October 1986; Secretary for Security), 758 (21 January 1987; Secretary for Security), 828 (18 February 1987; Secretary for Security).

¹⁹⁸*Hong Kong Hansard*, 1986-87 at 758 (21 January 1987; Secretary for Security). It should be noted that the number of Chinese entering Hong Kong with two-way permits (for the purpose of visiting Hong Kong and then returning to China) was also limited by the Chinese authorities on the basis of an understanding with the Hong Kong government in December 1982. Initially it was also set at 75 per day, but it has subsequently been increased to 140. See *Hong Kong Hansard*, 1985-86 at 454 (8 January 1986; Attorney General).

¹⁹⁹*Hong Kong 1982*, *supra*, note 153 at 152.

²⁰⁰Hong Kong Government Information Service, *Hong Kong 1983* (Hong Kong: Government Printer, 1983) at 157.

²⁰¹*Ibid.*

²⁰²*Hong Kong 1984*, *supra*, note 2 at 181.

²⁰³*Hong Kong 1985*, *supra*, note 7 at 229.

²⁰⁴*Hong Kong 1986*, *supra*, note 5 at 208.

²⁰⁵*Hong Kong 1987*, *supra*, note 70 at 223.

mainland Chinese had emigrated to Hong Kong leaving their children behind,²⁰⁶ and they wanted their children to join them now. There are also cases of Hong Kong residents travelling to mainland China to marry and their wives have given birth to children there. In both types of cases, it normally takes a long time, usually a number of years, before the children can be admitted to Hong Kong as legal immigrants, because of the quota on legal immigrants agreed between the two governments as mentioned above.²⁰⁷ Hence the desire to avoid the queue by resorting to smuggling, which in many cases is hazardous and puts the lives of the children at risk.²⁰⁸ In December 1981 the government took legislative action against the problem, and, in particular, to close a relevant loophole in the existing law, under which the power to make a removal order against an illegal immigrant²⁰⁹ was dependent on an offence of unlawful landing in Hong Kong²¹⁰ having been committed. Similarly, many of the supplementary sanctions against illegal landing (such as the forfeiture of ships) were also tied to the commission of the offence of unlawful landing.²¹¹ The problem was that it was difficult to show that a child illegal immigrant had committed such an offence: under Hong Kong law, a child under the age of seven is conclusively presumed to be incapable of committing any offence, and children between the ages of 7 and 14 are presumed to be so incapable unless there is sufficient evidence proving that they have the intention and mental capacity to commit the offence.²¹² Hence there were legal difficulties in effecting the removal of illegal immigrant children and in prosecuting those who smuggled them to Hong Kong. The *Immigration (Amendment) (No. 4) Ordinance 1981*²¹³ dealt with this problem by deleting, from the relevant provisions in the existing law, the references to the commission of the offence of unlawful landing and substituting instead reference merely to "landing unlawfully in Hong Kong." The 1981 amendment ordinance also added a new section 37DA to Part VIIA²¹⁴ of the *Immigration Ordinance*. The new provision

²⁰⁶Some of these immigrants might have lied to the authorities when they applied for emigration, claiming that they had no dependants: see "Tough policy on child illegals must remain" [*Hong Kong*] *South China Morning Post* (17 November 1986).

²⁰⁷See *Hong Kong Hansard*, 1986-87 at 472 (19 November 1986; Secretary for Security). It was pointed out that at least half of those emigrating from China to Hong Kong on the 75-a-day one-way permit system are children joining their parents in Hong Kong.

²⁰⁸See *South China Morning Post*, *supra*, note 206.

²⁰⁹*Immigration Ordinance* as consolidated (1972), *supra*, note 160, s. 19(1)(b), as amended by Ordinance No. 75 of 1981, s. 7.

²¹⁰Section 38(1) of the *Immigration Ordinance* as consolidated (1972), *supra*, note 160, s. 38(1).

²¹¹*Hong Kong Hansard*, 1981-82 at 245 (9 December 1981; Attorney General).

²¹²*Ibid.*

²¹³Ordinance No. 75 of 1981.

²¹⁴This part has been discussed in Section III of this essay in connection with Vietnamese refugees.

made it an offence, punishable by a maximum fine of HK\$200,000 and imprisonment for ten years, to assist an unauthorised entrant²¹⁵ to remain in Hong Kong. Thus it can be used to prosecute parents or relatives living with illegal immigrant children in Hong Kong. When introducing the bill, the Attorney General said:

Obviously, prosecutions under the new section 37DA involving, as they sometimes will do, prosecuting relatives for assisting an unauthorised entrant to remain will have to be taken with discretion and after careful consideration of all the circumstances of the case. That will be ensured by existing section 37L which provides that no prosecution under Part VIIA may be brought without the consent of the Attorney General.²¹⁶

From the humanitarian point of view,²¹⁷ the post-1980 system of immigration control can be criticized since it requires the forcible separation of spouses from each other or of child from parent in cases where a person enters Hong Kong as an illegal immigrant to join his or her family and finally meets the fate of being repatriated and separated from the Hong Kong family members again. The more sensational cases of this nature in recent years include those of the "boat-wives" and the "illegal immigrant mothers."

The problem of the "boat-wives" arose in 1985, when it was discovered that some women from mainland China who were married to Hong Kong fishermen were living with their husbands on land in Hong Kong. The general rule is of course that illegal immigrant spouses of Hong Kong residents will be repatriated: they should not "jump the queue" (of legal immigrants under the daily quota of 75) but should, while they are in mainland China, apply for one-way exit permits from the Chinese authorities, upon obtaining which they will be allowed to enter and stay in Hong Kong by Hong Kong's immigration authorities. The special circumstances in the case of the boat-wives were that these women had already been issued "landing and boarding permits" by the Guangdong authorities, who had allowed them to leave P.R.C. territories and to enter Hong Kong waters with their fishermen-husbands on fishing vessels. However, since they were not immigrants under the "one-way exit permit" system, Hong Kong's immigration authorities had not given them permission to land and reside in Hong Kong. The practice adopted instead was "to tolerate the presence of these 'boat-wives' on fishing vessels in Hong Kong waters but not to allow them on

²¹⁵As mentioned above, the *Immigration (Unauthorised Entrants) Order* provides, *inter alia*, that illegal immigrants from mainland China are unauthorised entrants.

²¹⁶*Hong Kong Hansard*, 1981-82 at 247 (9 December 1981; Attorney General).

²¹⁷See also art. 23 of the *International Covenant on Civil and Political Rights* and art. 10 of the *International Covenant on Economic, Social and Cultural Rights* regarding the protection of the family as "the natural and fundamental group unit of society."

land except in special circumstances, such as when they need medical attention."²¹⁸ Thus when some of them were found living ashore in 1985 (because their husbands had changed occupation or because the living conditions on the boats had become too poor), they were forcibly separated from their families and repatriated to mainland China.²¹⁹ The policy provoked a lot of public criticism but was nevertheless implemented. Fortunately, the subsequent applications by the repatriated boat-wives for immigration under the one-way exit permit system were successful, and it was reported in 1987 that they had now returned to Hong Kong as legal immigrants.²²⁰ In 1987 it was estimated that there were still 1,000 boat-wives in Hong Kong who had not yet obtained the one-way exit permits and thus permission to land in Hong Kong. The policy is still that they will only be allowed to stay in Hong Kong waters with their families, but not to reside on land, until and unless they obtain the permits (which of course requires waiting in the queue under the 75-immigrants-a-day system). Meanwhile the Hong Kong government has initiated discussion with the Guangdong authorities and a "long-term solution"²²¹ has now been found: after 10 August 1986, the Guangdong authorities would no longer issue "landing and boarding permits" to Chinese women who marry Hong Kong fishermen after that date; and any Chinese women (*i.e.* non-Hong Kong resident) found on Hong Kong waters without landing and boarding permits (and without any other official permission to leave mainland China and settle in Hong Kong) would be repatriated by Hong Kong's immigration authorities, even if they are the wives of Hong Kong fishermen.²²²

Another incident which attracted much criticism from the humanitarian point of view was the repatriation of certain "illegal immigrant mothers" in January 1988.²²³ The matter arose out of an "amnesty" on 28 April 1987 granted to unregistered or illegal immigrant children in Hong Kong. Some mothers, who were themselves illegal immigrants, brought their illegal im-

²¹⁸*Hong Kong Hansard*, 1986-87 at 631 (7 January 1987; Tam).

²¹⁹It is known that an exception was made for a very small number of them, who were allowed to stay, but the special circumstances justifying the exceptional treatment were not disclosed so as not to create a precedent for others to imitate: see "Solving the problem of the boat-wives" [*Hong Kong*] *Ming Pao* (12 August 1986) (in Chinese).

²²⁰See *Hong Kong Hansard*, *supra*, note 218, which discusses 14 such boat-wives.

²²¹*Ibid.*

²²²*Ibid.*; "Solving the problem of the boat-wives", *supra*, note 219.

²²³See generally "Church protest by illegals" [*Hong Kong*] *South China Morning Post* (12 January 1988); "Illegal mothers call off protest" [*Hong Kong*] *South China Morning Post* (13 January 1988); "Merciless act to part mothers and infants" [*Hong Kong*] *South China Morning Post* (11 January 1988) (editorial); L.S. Lee (for Secretary of Security), "Illegal immigrant mothers had to be returned to China" [*Hong Kong*] *South China Morning Post* (30 January 1988) (letter to the editor); N. Jayawickrama, "Disregarding solemn international treaty obligations" [*Hong Kong*] *South China Morning Post* (11 February 1988) (letter to the editor).

migrant children to register with the authorities in order to obtain the benefit of the amnesty. As a result, the identity of the mothers as illegal immigrants was discovered and it was decided to repatriate them.²²⁴ The government defended the forcible separation of the mothers from their families, including their small babies in some cases, by arguing that the measure was necessary in order to deter mainland residents, particularly the large number of wives in mainland China married to Hong Kong residents, from jumping the queue (under the daily legal immigrant quota of 75) by illegal entry. In addition, it was pointed out that other illegal immigrant women in similar situations have been repatriated in the past two years²²⁵ and it would be unfair to them and to others waiting in the queue if these particular illegal immigrant mothers were allowed to stay.²²⁶

C. *The Immigration Tribunal and the Courts*

Since the change in immigration law and policy in 1980, a body of case law has emerged relating to their implementation. The following features are noteworthy:

(1) It is clear²²⁷ that the Immigration Tribunal,²²⁸ to which appeals against removal orders lie²²⁹ and whose decisions are final,²³⁰ is not entitled to review the exercise of discretion by immigration officials by, for example,

²²⁴Again, an exception was made for 4 of these mothers, who were allowed to stay for special humanitarian reasons which were not disclosed. The number of those to be repatriated was 65.

²²⁵According to L.S. Lee writing on behalf of the Hong Kong government, *supra*, note 223: "Hundreds of women, many of whom had been in Hong Kong for a number of years and had also given birth to children while they were here, have been sent back since October 1980 when we began to repatriate adult illegal immigrants. In 1986 alone we repatriated 156 illegal immigrant mothers and last year we repatriated 144."

²²⁶According to recent figures, in cases of Hong Kong residents who marry in China, the average time it takes for the mainland Chinese spouse to obtain a one-way permit for reunion is 3 to 5 years from the time of marriage in China. Over 98% of those who emigrate to Hong Kong from China through the one-way permit system come in order to be reunited with their immediate families. "As long as local residents continue to go back to China to get married there are bound to continue to be families being separated temporarily until exit permits can be issued for them to join their spouses or parents in Hong Kong": *Hong Kong Hansard*, 1986-87 at 828-29 (18 February 1987; Secretary for Security).

²²⁷From the cases of *Re Hsu Ching-po* (10 August 1984), M.P. No. 2007 of 1984, Mantell J.; *Yip Chi-lin v. The Director of Immigration* (4 February 1986), Civ. App. No. 144 of 1985 (C.A.).

²²⁸See generally Chen, *supra*, note 138.

²²⁹*Immigration Ordinance* as consolidated (1972), *supra*, note 160, s. 53A, as amended by ordinance No. 62 of 1980, s. 9.

²³⁰*Ibid.*, s. 53D(2).

re-assessing relevant humanitarian considerations.²³¹ As laid down in the Ordinance,²³² the function of the tribunal is strictly limited to the determination of the question of whether the appellant has a legal right to land in Hong Kong or has obtained the permission of the Director of Immigration to remain in Hong Kong. If the question is answered in the negative on the facts of the case as the tribunal finds them, the appeal must be dismissed and the removal order affirmed even if there were overwhelming humanitarian considerations suggesting that the appellant should be allowed to stay. In the words of the Chief Justice of Hong Kong:

It is not for the Tribunal to enquire as to whether or not there are humanitarian grounds, which the Director [of Immigration] should consider, nor to make any recommendations to the Director in that regard. Whether or not a person is ultimately to be repatriated is a matter within the discretion of the Director who, no doubt, in practice, takes into account such humanitarian grounds as he considers merit consideration.²³³

(2) Although the courts have accepted that they have no power whatsoever under the immigration legislation as it stands to intervene in removal decisions on humanitarian grounds, they have in a number of cases expressly or impliedly criticized the conduct of the immigration authorities from a moral point of view.

For example, in *Attorney General v. Cheung Kam-ping*,²³⁴ a majority of the Court of Appeal held that the respondent, who had entered Hong Kong as an illegal immigrant in 1970 and had thereafter "for ten years led a blameless life... as a peaceful, useful and worthy citizen" and "made what appears to be a very valuable contribution to the community in which he lives", did not have the right to reside in Hong Kong as a Chinese Resident under the Immigration Ordinance, because he had not been lawfully resident, and therefore not been "ordinarily resident" in Hong Kong for seven years. While upholding the removal order, one of the justices of appeal remarked: "One would hope that even now with the principle [regarding

²³¹Compare, for example, the English system, under which the appellate authorities can indeed review the exercise of discretion by immigration authorities: see generally I.A. Macdonald, *Immigration Law and Practice*, 2d ed. (London: Butterworths, 1987) at 427ff.

²³²Section 53D of the *Immigration Ordinance* as consolidated (1972), *supra*, note 160, as amended by Ordinance No. 62 of 1980 s. 9.

²³³Roberts C.J., in *Yip Chi-lin v. The Director of Immigration*, *supra*, note 227. There is however evidence that the tribunal does sometimes invite applicants or their legal representatives to address it on humanitarian factors, and makes informal recommendations to the immigration authorities: *Re Hsu Ching-po*, *supra*, note 227; A.Y.F. Chan, *Immigration Law in Hong Kong*, (unpublished dissertation no. 846, Faculty of Law, University of Hong Kong, 1986) at 22.

²³⁴[1980] H.K.L.R. 602 (C.A.).

the legal meaning of "ordinarily resident"] vindicated — if it is vindicated — it is not too late for more humane considerations to prevail."²³⁵

In *Re Wong Shu-hung*,²³⁶ two boys had been smuggled across the border in 1982 to join their parents in Hong Kong. Their parents, who had lied about the number of children they had when they themselves applied for emigration to Hong Kong several years before, took the two boys to the immigration authorities to be registered. After a protracted examination of the case by the authorities, removal orders were issued against the two children in 1984. While upholding the removal orders on the ground that permission by the Director of Immigration to remain in Hong Kong could not be implied from the act of "suffering" the children to remain during the investigation process, Mantell J. said:

Therefore, it would seem that if these removal orders are carried into effect the result will be that the Wong family will be separated perhaps indefinitely, and, as Mr Wong himself affirms, it is not known what will become of the two boys. It is a sorry business and taking into account the period of time which was allowed to elapse before the removal orders were made, the discretion to make them seems to have been insensitively exercised.²³⁷

Yet he went on to say:

But all that is immaterial. The Director of Immigration and the Deputy Director of Immigration are not answerable to the court for the manner in which they exercise their discretion ...²³⁸

A similar situation was revealed in *Chen Chiu-lin v. The Director of Immigration*.²³⁹ A fourteen-year old girl, together with her three sisters, entered Hong Kong illegally in October 1984 to join their parents. The father immediately reported them to the authorities and applied for permission for them to stay in Hong Kong. In February 1985, the girl was detained; in March, a removal order was made against her. An appeal to the Immigration Tribunal was dismissed in March but the tribunal forwarded relevant information to the Secretary for Security for further consideration. The girl was released from custody in August on a recognizance entered by her father. In November, the Secretary for Security finally decided to uphold the removal order. Although the Court of Appeal also upheld the order, it commented that "these long delays, for which no sensible explanation has been offered, shows a serious disregard for humanitarian considerations which does no credit to those involved."²⁴⁰

²³⁵*Ibid.*

²³⁶[1985] H.K.L.R. 463 (H.C.).

²³⁷*Ibid.* at 465.

²³⁸*Ibid.* at 466.

²³⁹(28 February 1986) Civ. App. No. 20 of 1986 (C.A.).

²⁴⁰*Ibid.*

A case which was even more unfortunate was that of *Cheung Yuk-sai v. The Director of Immigration*.²⁴¹ In October 1984, a fifteen-year old girl, together with her two sisters, entered Hong Kong unlawfully and were reported to the immigration authorities. The two sisters were allowed to stay but the girl was not: after a period of investigation which lasted for one and a half years, she was arrested and a removal order was made against her in March 1986. An appeal to the Immigration Tribunal was dismissed without a hearing.²⁴² Her father applied for leave for judicial review of the decision; such leave was refused by the High Court but was granted by the Court of Appeal in April 1986, on the ground that the notice of appeal to the Immigration Tribunal did raise a reasonably arguable point. In making this decision, Silke J.A. said:

This matter has been outstanding for an unconscionable period of time. It cannot be right, whatever policy decisions might be pending, that a fifteen year old girl should be kept for over a year in limbo and with the strong likelihood of there being raised in her mind a reasonable expectation of her being allowed to stay with the rest of her family. This goes to the humanitarian aspect of this case but is not a factor which can, in law, be for the consideration, in these proceedings, of this Court or indeed for the Tribunal.²⁴³

Alas, it was not until another year later that the fate of the girl was decided. After judicial review by the High Court of the Immigration Tribunal decision, the case was remitted for a further hearing before the tribunal. This time the tribunal found in favour of the girl. The Director of Immigration in turn sought judicial review, and the High Court granted judicial review, holding that there was no evidence to justify the tribunal's findings and remitting the matter to the tribunal to make a decision in accordance with the High Court's finding. On appeal by the father again to the Court of Appeal, it was held in February 1987 that the appeal was wholly without any merit, and the father's protracted legal campaign to keep his daughter finally failed. On the father's efforts, Clough J.A. commented: "[H]e appears to have been under the misapprehension during the course of this hearing

²⁴¹(25 April 1986), Civ. App. No. 42 of 1986 (C.A.), app'd, *Director of Immigration v. Cheung Yuk-sai* (13 February 1987), Civ. App. No. 113 of 1986 (C.A.).

²⁴²Under s. 53C of the *Immigration Ordinance* as consolidated (1972), *supra*, note 160, as amended by ordinance No. 62 of 1980, s. 9, the tribunal may dismiss an appeal without a hearing where it is satisfied, upon an examination of the written grounds of appeal, that "the facts or matters on which the appellant is seeming to rely are matters which would not entitle the appellant to succeed in the appeal." It has been held that notices of appeal to the Immigration Tribunal should be read liberally and sympathetically, because a person against whom a removal order is made has only 24 hours in which to serve the notice of appeal (s. 53A(2)). Thus the tribunal should hold a hearing if the notice contains a reasonably arguable ground of appeal. See *Re Hui Lai-ming* (7 September 1984), M.P. Nos. 1714 and 1715 of 1984, Mayo J.; Chen, *supra*, note 138; *Re Wong Shu-hung*, *supra*, note 236.

²⁴³*Cheung Yuk-sai v. The Director of Immigration*, *supra*, note 241.

that the court has power to decide generally whether his daughter may remain in Hong Kong. This is of course a matter for the Director of Immigration to whom he should make such representations that he may think fit."²⁴⁴

(3) In applying the penal provisions of the Immigration Ordinance designed to combat illegal immigration, the courts are highly conscious of policy considerations of deterrence and the current immigration situation. The more common charges relating to illegal immigration include:

(a) *Landing in Hong Kong unlawfully or remaining in Hong Kong without the authority of the Director of Immigration.*²⁴⁵ The maximum penalty for this offence is a fine of HK\$5,000 and imprisonment for three years. Thus an illegal immigrant may have to serve a prison sentence in Hong Kong before being repatriated to mainland China. The usual sentence imposed by the courts is nine to fifteen months' imprisonment.²⁴⁶

(b) *Having a forged identity card without lawful authority or excuse.*²⁴⁷ The maximum penalty is a fine of HK\$50,000 and imprisonment for seven years on conviction on indictment, and a fine of HK\$20,000 and imprisonment for two years on summary conviction. It is settled that "except where there are strong humanitarian considerations, a sentence of fifteen months' imprisonment is a proper sentence"²⁴⁸ for an illegal immigrant convicted of this offence.

(c) *Using another person's identity card.*²⁴⁹ The maximum penalty is a fine of HK\$5,000 and imprisonment for two years. Although there were once conflicting decisions on sentencing in this regard, the Court of Appeal has now held that fifteen months' imprisonment is also the appropriate sentence, in the absence of strong humanitarian considerations, for a person convicted of using another person's identity card in circumstances where it is being used in order to remain illegally in Hong Kong.²⁵⁰ The courts however recognised that the same approach would not necessarily be appropriate to Hong Kong residents (not being illegal immigrants) committing

²⁴⁴*The Director of Immigration v. Cheung Yuk-sai*, *supra*, note 241.

²⁴⁵*Immigration Ordinance* as consolidated (1972), *supra*, note 160, s. 38(1), as amended by Ordinance No. 15 of 1980 s. 10.

²⁴⁶*R. v. Lau Chung-kwan*, [1987] H.K.L.R. 203 at 204, 207 (C.A.). For an exceptional case in which an illegal immigrant mother was leniently dealt with, see *Ng Fong-yu* (5 March 1985), Cr. App. No. 83 of 1985, Barnes J. (digested in (1985) 15 Hong Kong L.J. 251).

²⁴⁷Section 7A, *Registration of Persons Ordinance*, Laws of Hong Kong, c. 177, as amended by Ordinance No. 54 of 1981, s. 4.

²⁴⁸*R. v. Lau Chung-kwan*, *supra*, note 246 at 205.

²⁴⁹Reg. 12(3), *Registration of Persons Regulations*, L.N. 86/83 (consolidated with Laws of Hong Kong, c. 177).

²⁵⁰*R. v. Lau Chung-kwan*, *supra*, note 246, especially at 209.

the same offence. The fact that the defendant is an illegal immigrant using the card to masquerade as a lawful resident can properly be considered as a relevant factor in sentencing for the offence.²⁵¹

It is essential, if the underlying purpose of the ordinance is to be achieved, that the prospective illegal immigrant should be made aware that, just as in the case of forged identity cards so in the case of the use of another person's card for the purpose of entering or remaining or working in Hong Kong will be severely punished.²⁵²

Heavy deterrent sentences are also imposed by Hong Kong courts on persons who assist in bringing illegal immigrants to Hong Kong. Such persons may be charged either for aiding and abetting illegal immigrants in unlawfully landing in Hong Kong (for which the maximum penalty is three years' imprisonment or a fine of HK\$5,000),²⁵³ or for carrying unauthorised entrants into Hong Kong by ship or boat (which carries a maximum penalty of life imprisonment or a fine of HK\$5,000,000 on conviction on indictment, or of three years' imprisonment and a fine of HK\$100,000 on summary conviction).²⁵⁴

Those who take part ... in the smuggling of illegal immigrants for gain must expect the courts to regard such conduct as deserving of severe punishment... . [A] magistrate would be correct to take into account the very serious nature, in present conditions in Hong Kong, of offences involving illegal immigrants.²⁵⁵

Thus in *Attorney General v. Leung Ming*²⁵⁶ the Court of Appeal, on the Attorney General's application for a review of sentences imposed by a magistrate for the carrying of unauthorised entrants to Hong Kong by a motorized sampan, increased the sentence to two years' imprisonment. In *R. v. Chan Kwok-keung*,²⁵⁷ the Court of Appeal held that a sentence of three and a half years imprisonment imposed on the defendants, themselves illegal immigrants aged seventeen and nineteen, for assisting the passage to Hong Kong of unauthorised entrants was appropriate.

²⁵¹*R. v. Lam Shui-leung*, [1987] H.K.L.R. 57 at 58 (H.C.), app'r'd in *R. v. Lau Chung-kwan*, *supra*, note 246 at 206.

²⁵²*R. v. Lau Chung-kwan*, *supra*, note 246 at 209.

²⁵³Immigration Ordinance as consolidated (1972), *supra*, note 160, s. 38(1)(a), as amended by ordinance No. 15 of 1980.

²⁵⁴*Ibid.*, s. 37C(1)(a).

²⁵⁵*A.-G.H.K. v. Leung Ming*, [1980] H.K.L.R. 341 at 343, 342 (C.A.).

²⁵⁶*Ibid.*

²⁵⁷(3 December 1987), Crim. App. No. 244 of 1987 (C.A.). It should be noted that the above is not an exhaustive discussion of all relevant cases on immigration law in Hong Kong. For other interesting cases, see *e.g. Mak Yui-ming v. A.-G.H.K.* (1980), [1981] H.K.L.R. 435 (C.A.); *A.-G.H.K. v. Ng Yuen-shiu*, [1983] 2 W.L.R. 735 (C.A.); *Cheung Cheong v. A.-G.H.K.* (1986), [1987] H.K.L.R. 356 (C.A.); *Director of Immigration v. Ng Shun-loi*, [1987] H.K.L.R. 798 (C.A.); *Elvira Vergara v. A.-G.H.K.* (14 October 1987), Civ. App. No. 120 of 1987 (C.A.); *Re Tse Chuk-fuk* (13 April 1987), M.P. No. 537 of 1987, Godfrey J.

D. Further Controls on Vietnamese Refugees

Before we close this survey of past and present immigration law and policy in Hong Kong, the discussion about Vietnamese refugees in Part III of this essay needs to be brought up to date. Two main legislative measures were introduced in the 1980s relating to these refugees. The *Immigration (Amendment) Ordinance 1981*²⁵⁸ provided a statutory framework for imposing conditions of stay on Vietnamese refugees allowed to stay in Hong Kong pending resettlement and for their proper control. One reason for the introduction of the ordinance was that some refugees who were offered resettlement places by particular countries "became rather choosy"²⁵⁹ and delayed in accepting such offers in the hope that other better arrangements could be made. Hence it was provided under the new amendment ordinance that one condition of stay for Vietnamese refugees was that they shall not, *inter alia*, without reasonable excuses fail or refuse to accept an offer of overseas settlement.²⁶⁰

Furthermore, they were required to comply with the rules of refugee centers and abide by conditions relating to employment. Breach of conditions of stay became punishable by detention for 28 days,²⁶¹ and contravention of rules by a fine of HK\$100 or confinement for a period of seven days.²⁶²

1982 saw a further tightening up of Hong Kong's policy towards Vietnamese refugees. At that time the refugee population in Hong Kong was 10,800 and was rising, because the rate of settlement overseas had slowed down due to exhaustion or reduction of quota or tightening of eligibility criteria by resettlement countries,²⁶³ while the inflow of refugees into Hong Kong continued. Indeed, the figures showed that Hong Kong had become an attractive destination for Vietnamese refugees compared to other countries in the region, probably because Hong Kong not only provided asylum for them and accommodated them in camps, but also allowed them to move freely in Hong Kong, to work outside the camps and earn income.

²⁵⁸Ordinance No. 35 of 1981. The ordinance added a new Part IIIA to the *Immigration Ordinance* as consolidated (1972), *supra*, note 160.

²⁵⁹*Hong Kong Hansard*, 1980-81 at 868 (13 May 1981; Secretary for Security).

²⁶⁰See *Immigration Ordinance* as consolidated (1972), *supra*, note 160, s. 13A, as amended by Ordinance No. 35 of 1981.

²⁶¹*Immigration Ordinance, ibid.*, s. 13A(6).

²⁶²*Immigration Ordinance, ibid.*, s. 13C.

²⁶³There was concern that many refugees were in fact "economic migrants" trying to better themselves economically by settling overseas rather than escaping from political or racial persecution: Hong Kong Government Information Service, *Hong Kong 1983* (Hong Kong: Government Printer, 1983) at 158; Lui, *supra*, note 12 at 12.

To deter more refugees from coming, the Hong Kong government decided to introduce a new "closed camps" policy.²⁶⁴ All Vietnamese refugees arriving in Hong Kong on or after 2 July 1982 were to be detained in closed camps. The *Immigration (Amendment) Ordinance 1982*²⁶⁵ empowered the government to set up such camps, to detain refugees in them, and to draw up rules for their management. It also made it possible for the authorities to transfer refugees previously allowed to stay in open centers to closed camps if they have contravened any condition of stay or been found guilty of any offence punishable by imprisonment.²⁶⁶ In addition, even if a refugee has not been proved to have breached his conditions of stay or the law, the Director of Immigration may still detain him in a closed camp if "the Director certifies that it is necessary in the interests of order or good management in any refugee centre" that the refugee be detained.²⁶⁷ "This power, deliberately far reaching, is an indication to refugees who are already here that we intend to maintain better order in open refugee centres in the future than some of them have been ready to accept in the past."²⁶⁸

The closed camps are administered by the Correctional Services Department.²⁶⁹ Refugees detained in the closed camps are subjected to regulation and control. They are not allowed to seek outside employment; visits are regulated and generally limited to relatives and close friends;²⁷⁰ refugees are required to abide by disciplinary rules governing the daily running of the camps. Families split between open and closed centers are allowed to be reunited in closed centers.²⁷¹ The policy of closed camps has been called one of "humane deterrence."²⁷² It has been pointed out that the adoption

²⁶⁴It was noted that the most effective deterrent would be repatriation, but it was not feasible without the co-operation of the Vietnamese authorities, and there was no early prospect of securing this: *Hong Kong Hansard*, 1981-82 at 1022 (30 June 1982; Secretary for Security).

²⁶⁵Ordinance No. 42 of 1982.

²⁶⁶*Immigration Ordinance* as consolidated (1972), *supra*, note 160, s. 13A(6), as amended by Ordinance No. 42 of 1982.

²⁶⁷*Immigration Ordinance* as consolidated (1972), *supra*, note 160, s. 13A(6A).

²⁶⁸*Hong Kong Hansard*, 1981-82 at 1023-24 (Secretary for Security; June 30, 1982). There were in fact instances of disorder in the open centers before the introduction of the closed camp policy, such as that at the Kai Tak Transit Centre in May 1982: see *Hong Kong 1983*, *supra*, note 263 at 158. Disturbances also broke out at two centers in 1984: see *Hong Kong 1985*, *supra*, note 7 at 231.

²⁶⁹*Immigration Ordinance* as consolidated (1972), *supra*, note 160, s. 13C(4), as amended by Ordinance No. 42 of 1982. This department was formerly known as the Prisons Department and is also responsible for management of prisons in Hong Kong: see Lui, *supra*, note 12 at 17.

²⁷⁰*Hong Kong 1984*, *supra*, note 2 at 182.

²⁷¹See *Hong Kong 1986*, *supra*, note 5 at 210.

²⁷²*Hong Kong 1983*, *supra*, note 264 at 158.

of this approach in Hong Kong merely brought its Vietnamese refugee policy into line with that already practised in other countries in southeast Asia.²⁷³

After 1982, the inflow of Vietnamese refugees continued despite the new policy. In 1983, 3,651 arrived;²⁷⁴ in 1984, 2,230;²⁷⁵ in 1985, 1,112;²⁷⁶ and in 1986, 2,087.²⁷⁷ Figures in early 1987 show that more than 104,570 Vietnamese refugees had been resettled from Hong Kong since 1979, but about 8,000 refugees still remained, and it has become increasingly difficult to find permanent homes for them as resettlement opportunities overseas decrease.²⁷⁸ By December 1987 the refugee number in Hong Kong increased to 9,529;²⁷⁹ Hong Kong taxpayers were footing the bill to the extent of HK\$117 million in the financial year 1985-86 alone,²⁸⁰ and no end to the problem is yet in sight. There is a growing feeling of disappointment²⁸¹ at the British government's refusal after September 1986 to provide resettlement places in the U.K.²⁸² (which if provided would have the effect of encouraging other resettlement countries to increase their intake) and its failure to engage actively in negotiations²⁸³ with the Vietnamese government on repatriation of refugees to Vietnam.

Meanwhile, the Hong Kong government continues to maintain that involuntary repatriation,²⁸⁴ though a true long term solution, will not be pursued until and unless it is "reasonably satisfied that [the refugees] will not be treated inhumanely on their return to Vietnam."²⁸⁵ As one Legislative

²⁷³Lui, *supra*, note 12 at 17; *Hong Kong 1983*, *ibid.* at 158.

²⁷⁴*Hong Kong 1984*, *supra*, note 2 at 182.

²⁷⁵*Hong Kong 1985*, *supra*, note 7 at 230.

²⁷⁶*Hong Kong 1986*, *supra*, note 5 at 210.

²⁷⁷*Hong Kong 1987*, *supra*, note 70 at 224.

²⁷⁸*Hong Kong: The Facts — Immigration*, *supra*, note 4.

²⁷⁹"Call to end 'country of first asylum' policy" [*Hong Kong*] *Ming Pao* (30 December 1987) (in Chinese).

²⁸⁰*Hong Kong Hansard*, 1986-87 at 659 (7 January 1987; Fan).

²⁸¹See generally the adjournment debate in the Legislative Council in January 1987, *Hong Kong Hansard*, 1986-87 at 658ff; S. N. Harte, "Facing refugee problem without British backing", [*Hong Kong*] *South China Morning Post* (22 November 1987); "Time for HK to take initiative on refugees" [*Hong Kong*] *South China Morning Post* (10 September 1987) (editorial).

²⁸²*Hong Kong Hansard*, 1986-87 at 389 (6 November 1986; Ho).

²⁸³It was reported in Sept 1987 that there was no possibility of such negotiation in the near future: S. Macklin, "The refugee reality starts to dawn", [*Hong Kong*] *South China Morning Post* (14 September 1987).

²⁸⁴It may be noted that the legal power to repatriate does exist under s. 13E of the *Immigration Ordinance* as consolidated (1972), *supra*, note 160, as amended by Ordinance No. 42 of 1982.

²⁸⁵*Hong Kong Hansard*, 1986-87 at 675 (7 January 1987; Secretary for Security). It is implied in the official statements that such "reasonable satisfaction" can only be based on an express agreement with the Vietnamese government. See also *Hong Kong Hansard*, 1986-87 at 529 (26 November 1986; Attorney General), 1385 (8 April 1987; Secretary for Security). It has also been noted that "it is difficult for Hong Kong to agree that it must accept Vietnamese non-

Councillor put it: "We must steer a narrow course between treating humanely the refugees who are already in Hong Kong and deterring new refugees from coming."²⁸⁶ As we approach the end of the parts of this essay dealing with the past, it is apparent that the development of the whole of Hong Kong's immigration policy in recent decades has been a difficult and often painful exercise in steering a narrow course.

VI. The Future

Until 1 January 1983, the date when the *British Nationality Act 1981* came into force, the general rule governing the nationality status of Hong Kong people had been that persons born in Hong Kong, whether Chinese by race or not, were in British and Hong Kong law Citizens of the United Kingdom and Colonies ("C.U.K.C."). Thus they shared exactly the same citizenship with British people in the U.K. Before 1962, they even had the right to enter, live and work in the U.K. itself, but this right was taken away by the *Commonwealth Immigrants Act 1962*.²⁸⁷ Under Hong Kong's *Immigration Ordinance 1971*, they were Hong Kong Belongers as explained above and had the right to land and reside in Hong Kong.

One of the purported objectives of the *British Nationality Act 1981* was to rationalize the existing nationality law and provide for citizenship statuses which correspond more closely with, or reflect more truly, the relevant right of abode.²⁸⁸ The Act replaces the corporate Citizenship of the United Kingdom and Colonies by three separate citizenships — British Citizenship (for those British nationals with a full right of abode in the U.K.), British Dependent Territories Citizenship ("B.D.T.C."), and British Overseas Citizenship. Hong Kong residents who were formerly C.U.K.C.s by virtue of a connection with Hong Kong (such as birth in Hong Kong) are given the new status of B.D.T.C.s.²⁸⁹ Although this was largely a change in nomenclature only — the pre-existing position as regards the right of abode not having been changed — some Hong Kong people interpreted the devel-

refugees, in other words those who cannot establish that they have refugees status, those that are economic migrants, when it has to return . . . all other illegal arrivals to Hong Kong including close relatives of people already here who have arrived from China": see *Hong Kong Hansard*, 1986-87 at 675-76 (7 January 1987; Secretary for Security).

²⁸⁶*Hong Kong Hansard*, 1986-87 at 384 (6 November 1986; P.C. Wong).

²⁸⁷*British Nationality Act 1981* (U.K.), 1981, c. 61; *Commonwealth Immigrants Act* (U.K.), 10 & 11 Eliz. 2, c. 21. See Clarke, *supra*, note 134 at 344-45.

²⁸⁸H. Street & R. Brazier, eds, *de Smith's Constitutional and Administrative Law*, 5th ed. (Hammondsworth, Eng.: Penguin Books, 1985) 429; Macdonald, *supra*, note 231 at 1.

²⁸⁹In 1981, 2.6 million of the 5 million inhabitants of Hong Kong were C.U.K.C.s: (1982) 4:1 *Hong Kong J. of Pub. Admin.* 101.

opment pessimistically as "an act of political disengagement"²⁹⁰ by the British government in preparation for possible withdrawal of British administration over Hong Kong.²⁹¹

In relation to the citizenship status of children born in Hong Kong after 1 January 1983 the law did change significantly. Under the 1981 Act²⁹² and the consequential amendment to the *Immigration Ordinance* introduced by the *Immigration (Amendment) (No. 2) and (No. 3) Ordinances 1982*,²⁹³ such children would only acquire B.D.T.C. status and that of Hong Kong Belongers (a) if at the time of birth his father or mother was either a B.D.T.C. or "settled"²⁹⁴ in Hong Kong, or alternatively, (b) upon registration as a B.D.T.C. if (i) his father or mother becomes a B.D.T.C. or settled in Hong Kong while he is still a minor, or if (ii) he remains in Hong Kong for the first ten years of his life. Thus children born in Hong Kong of parents who are both illegal immigrants or Vietnamese refugees will not be entitled to any form of British nationality or to reside in Hong Kong as of right.

As mentioned near the beginning of this essay, the greater part of the colony of Hong Kong was the subject of a 99-year lease by the imperial Qing government of China to Britain commencing from 1898. As Hong Kong moved into the 1980s, there was an increasing feeling of uncertainty about the constitutional and political future of Hong Kong. On this matter the British government commenced negotiations with the P.R.C. government in September 1982. These ultimately led to the signature of the Joint Declaration of the U.K. Government and the P.R.C. Government on the Question of Hong Kong on 19 December 1984.²⁹⁵

The Joint Declaration formally came into effect on 27 May 1985 when the exchange of the instruments of ratification took place. This is a re-

²⁹⁰*Hong Kong Hansard*, 1981-82 at 384 (22 December 1982; Lobo) (quotation from address of Lord MacLehose, former Governor of Hong Kong, in the U.K. House of Lords).

²⁹¹See Hong Kong J. of Pub. Admin., *supra*, note 289.

²⁹²See particularly s. 15 of the *British Nationality Act 1981*, *supra*, note 287.

²⁹³Ordinances Nos 78 and 79 of 1982. Another change brought about by the former ordinance was that a new category of classification called "Resident British Citizen" was introduced. This is the equivalent of "Resident United Kingdom Belonger" under the *Immigration Ordinance 1971* as mentioned above. See the definition of Resident British Citizen in the revised s. 2 of the *Immigration Ordinance* as consolidated (1972), *supra*, note 160, as amended by Ordinance No. 78 of 1982, s. 2; Clarke, *supra*, note 98 at 351-52.

²⁹⁴"Settled" is defined in s. 50(2) of the *British Nationality Act 1981*, *supra*, note 287 to mean ordinarily resident in the territory without being subject under immigration law to any restriction on the period for which the person may remain. Thus in the case of Hong Kong, legal immigrants from mainland China are not settled in Hong Kong (because they will be subject to conditions of stay imposed on them when they enter) until they have resided in Hong Kong for 7 years and thereby acquired the status of Chinese Residents.

²⁹⁵See *supra*, note 7.

markable document, serving as a detailed blueprint for the future of Hong Kong. Briefly speaking, it provides that British rule over the whole of the present territory will come to an end on 30 June 1997. Hong Kong will then become a Special Administrative Region ("S.A.R.") of the P.R.C. As such it will be ruled by local inhabitants and enjoy a high degree of autonomy. The existing capitalist system will remain unchanged for fifty years as from the establishment of the S.A.R. The existing legal system, social system and life-style of Hong Kong people will also be preserved. On the same day as the signature of the Joint Declaration, there was also an exchange of memoranda²⁹⁶ between the two governments on nationality issues relating to the people of Hong Kong. The Chinese memorandum states in unequivocal terms that "[u]nder the Nationality Law of the People's Republic of China, all Hong Kong Chinese compatriots, whether they are holders of the 'British Dependent Territories Citizens' Passport' or not, are Chinese nationals." This position is probably based on the P.R.C. view²⁹⁷ that Hong Kong has always been and is Chinese territory and its non-recognition of the claim of British sovereignty over Hong Kong, which leads to the proposition that Chinese persons born in Hong Kong are Chinese nationals in the same way as Chinese born in mainland China are Chinese nationals.²⁹⁸

The British memorandum states that all persons who on 30 June 1997 are B.D.T.C.s by virtue of a connection with Hong Kong will cease to be B.D.T.C.s with effect from 1 July 1997 but "will be eligible to retain an appropriate status which, without conferring the right of abode in the United Kingdom, will entitle them to continue to use passports issued by the Government of the United Kingdom." According to the Chinese memorandum, "Chinese nationals in Hong Kong who were previously called 'British Dependent Territories Citizens' " will be permitted by the Chinese government to use "travel documents" issued by the U.K. after 1 July 1997 for the purpose of travelling to other states and regions.²⁹⁹ This is understood as

²⁹⁶*Ibid.*

²⁹⁷This is reflected in the text of the Joint Declaration itself, in paragraph 1 of which the P.R.C. government declares that "it has decided to resume the exercise of sovereignty over Hong Kong with effect from July 1, 1997."

²⁹⁸According to art. 4 of the P.R.C. *Nationality Law 1980*, any person born in China whose parents are Chinese nationals or one of whose parents is a Chinese national has Chinese nationality. Art. 3 provides that dual nationality for any Chinese national is not recognised. See Clarke, *supra*, note 98 at 349. For a general discussion, see G. Ginsburgs, "The 1980 Nationality Law of the People's Republic of China" (1982) 30 *Am. J. Comp. L.* 459; T.P. Chen, "The Nationality Law of the People's Republic of China and the Overseas Chinese in Hong Kong, Macao and Southeast Asia" (1984) 5 *N.Y.L. Sch. J. Int'l & Comp. L.* 281.

²⁹⁹The Chinese Memorandum to the Joint Declaration, *supra*, note 7 also expressly provides that they "will not be entitled to British consular protection in the Hong Kong Special Administrative Region and other parts of the People's Republic of China on account of their holding the above-mentioned British travel documents."

a compromise reached on pragmatic considerations: the "travel documents" referred to in the Chinese memorandum are the "passports" referred to in the U.K. memorandum, though the Chinese government will not expressly recognize them as such, just as it will not recognize the "appropriate status" under British nationality law mentioned in the U.K. memorandum insofar as it is purportedly conferred on "Hong Kong Chinese compatriots."

That "appropriate status" has now been defined by the *Hong Kong Act 1985* as British Nationals (Overseas) ("B.N.O."), a new form of British nationality created to provide for the Hong Kong situation.³⁰⁰ Detailed rules relating to this status were enacted in the *Hong Kong (British Nationality) Order 1986*,³⁰¹ under which B.D.T.C.s by virtue of a connection with Hong Kong have a right, after 1 July 1987 and before 1 July 1997 to be registered as a B.N.O. and to be issued a passport appropriate to that status.³⁰² However, Hong Kong B.D.T.C.s who do not apply to be so registered will not retain any form of British nationality after 1997.³⁰³

Arrangements concerning passports, travel documents and identity cards were among the matters discussed in the Sino-British Joint Liaison Group set up pursuant to the Joint Declaration to conduct consultations on the implementation of the Joint Declaration. Agreement has now been reached on various matters, such as the issue of identity cards and travel documents³⁰⁴ in the pre-1997 transition and their continual validity after 1997, and the terms of the "right of abode endorsement" in the B.N.O. passports to be issued by the U.K. government concerning the holders' right of abode in Hong Kong.³⁰⁵

The basic principles governing the right of abode in the Hong Kong S.A.R. and the issue of passports and travel documents after 1997 are set out in section XIV of Annex I of the Joint Declaration. To bring Hong

³⁰⁰See para. 2(1) of the schedule to the *British Nationality Act 1981*, *supra*, note 287.

³⁰¹*Hong Kong Government Gazette* 1986, L.S. No. 2 at B623 (L.N. 233/86).

³⁰²Article 3 of the Order. Thus as from 1 July 1987 B.N.O. passports have been issued. These types of passports can continue to be used by their holders after 1997, but the Hong Kong B.D.T.C. passport will no longer be valid after the establishment of the Hong Kong S.A.R.: *Hong Kong Hansard*, 1987-88 at 16, 40-41 (7 October 1987; Governor).

³⁰³An exception is however provided by the provisions for reducing statelessness in article 6. For a critical discussion, see "Anti-climax over nationality" [*Hong Kong*] *South China Morning Post* (1 May 1986) (editorial).

³⁰⁴For the various types of travel documents issued by the Hong Kong government, see Clarke, *supra*, note 134 at 341-43.

³⁰⁵See generally "Joint Liaison Group Reports" *Hongkong Standard* (15 March 1986); "10-year validity period for CIs after '97" *Hongkong Standard* (26 July 1986); "Exchange of memoranda concerning use of 'DI' after '97" *Wen Wei Po* (19 May 1987) (in Chinese). See also *Hong Kong Hansard*, 1985-86 at 1100 (30 April 1986; Chief Secretary); *Hong Kong Hansard*, 1986-87 at 1390ff (8 April 1987; Secretary for Security).

Kong's existing law closer to those principles, the *Immigration (Amendment) (No. 2) Ordinance 1987*³⁰⁶ and *Registration of Persons (Amendment) Ordinance 1987*³⁰⁷ were enacted. The former introduced an express provision about "the right of abode" in Hong Kong for the first time in the history of Hong Kong immigration law. The right is defined to include the right to land in Hong Kong, and the right not to be subject to any condition of stay, deportation order or removal order.³⁰⁸ The term "Hong Kong permanent resident" was also introduced into the law, and any person having this status is given the right of abode in Hong Kong.³⁰⁹ The definition of "Hong Kong permanent resident" is such that all Hong Kong Belongers and Chinese Residents³¹⁰ under the existing law, of which there were 3.25 million and 1.74 million respectively in 1987,³¹¹ became "Hong Kong permanent residents."³¹² Under the *Registration of Persons (Amendment) Ordinance 1987*, they are entitled to the new "permanent identity card" which, unlike the existing cards, contains a statement that the holder has the right of abode in Hong Kong.

As regards the problem of immigration from mainland China into Hong Kong, section XIV of Annex I of the Joint Declaration provides that "[e]ntry into the Hong Kong Special Administrative Region of persons from other parts of China shall continue to be regulated in accordance with the present practice." In the current draft of the Basic Law of the Hong Kong S.A.R., a document intended to serve as the constitutional instrument for the Hong Kong S.A.R. and which is in the process of being drafted by the P.R.C. authorities, there is a brief provision that "[p]eople from other parts of China who wish to enter the Hong Kong Special Administrative Region shall have to apply for permission."³¹³ However, the exact mechanism for this aspect of future immigration control is yet to be worked out.³¹⁴ Whether the in-

³⁰⁶Ordinance No. 31 of 1987. See Clarke, *supra*, note 134 at 325-26.

³⁰⁷Ordinance No. 32 of 1987.

³⁰⁸The new s. 2A of the *Immigration Ordinance* as consolidated (1972), *supra*, note 160, as amended by Ordinance No. 31 of 1987.

³⁰⁹*Ibid.*

³¹⁰Thus former Chinese Residents, who now acquire the status of "Hong Kong permanent residents", can no longer be deported; this is different from the position under the pre-existing law as mentioned above. See also Clarke, *supra*, note 134 at 325-26.

³¹¹*Hong Kong Hansard*, 1986-87 at 1390 (8 April 1987; Secretary for Security).

³¹²Thus 90% of Hong Kong's population became "Hong Kong permanent residents", as pointed out in *Hong Kong Hansard*, 1986-87 at 1665 (27 March 1987; Cleong-leen).

³¹³Art. 21 of the draft Basic Law, published in *Wen Wei Po* (13 December 1987) (in Chinese).

³¹⁴See Special Group on Inhabitants' and Other Persons' Rights, Freedom, Welfare, and Duties, Basic Law Consultative Committee, "Final Report on Definition of Inhabitants, Right to Land, Right of Abode, Freedom from Deportation, and Rights to Vote and Stand for Election", unpublished document of the Basic Law Consultative Committee, CCBL-SG/RDI-00-FR02-870220(E); "Control on number of mainland immigrants to Hong Kong" [*Hong Kong Ming Pao* (29 October 1987) (in Chinese)]; "Fear over 'legal immigrants'" [*Hong Kong South China Morning Post* (29 October 1987)].

corporation of Hong Kong into the P.R.C. in 1997 will result in any significant change to the present inflow of legal and illegal immigrants from mainland China to Hong Kong remains to be seen, and this is indeed one of the critical issues on which the future political stability and economic prosperity of Hong Kong depend.

It may be seen from this short history of immigration law and policy in Hong Kong that though politically a British colony in modern times, Hong Kong has been all through its colonial history largely a society of immigrants from mainland China. The development of its immigration law testifies to the dilemmas of growth of this peculiar society. Although the eventual return of Hong Kong to China should probably have been perceived as inevitable even in the past, the definite provisions of the Joint Declaration and the approach of 1997 have produced mixed reactions from the people of Hong Kong. Some observers point to a crisis of confidence as indicated by rising numbers of applications for emigration overseas.³¹⁵ Others raise the concern that post-1997 Hong Kong might not be able to resist immigration pressure from mainland China, which will ultimately result in a deterioration in the standards of living in Hong Kong. This is not the place to offer predictions; it is only to be hoped that the present study has illuminated some fundamental aspects of the Hong Kong experience for the purpose of comparative research.

³¹⁵See e.g., *Hong Kong Hansard*, 1986-87 at 637 (information on emigrants from Hong Kong), 1513-16 (on the general level of confidence in Hong Kong). According to a survey conducted by a market research company in January 1988, 14% of the 1.5 million families in Hong Kong have at least one family member with a right of abode in a foreign country, and another 7% have at least one family member attempting to emigrate overseas: "20% of families may emigrate" [*Hong Kong Ming Pao* (13 February 1988) (in Chinese)].