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Kam C. Wong

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1 Visiting Professor of Law, City University of Hong Kong, School of Law (Summer 2005 – 7). Chair and Professor, Xavier University, Cincinnati, OH 45207. B.A. (Hons.), J.D. (Indiana); Diploma (N.I.T.A. – Northwestern); M.A., Ph.D. (SUNY – Albany – Criminal Justice); vice-Chair, Hong Kong Society of Criminology; Associate Fellow, Center of Criminology, University of Hong Kong, vice-President (2001-2), President (2002-3) AAPS (Asian Association of Police Studies). His has published 70 books/articles appeared in Criminal Law Bulletin; Georgetown Journal of Law and Public Policy; Columbia Journal of Asian Law; British Journal of Criminology; Journal of Information Law & Technology (JILT); Pacific Rim Law & Policy Journal; International Journal of the Sociology of Law; Australian Journal of Law and Society; Australian and New Zealand Journal of Criminology; John Marshall Journal of Computer and Information Law, and others. His latest books are: and others. His latest books are:
ABSTRACT

On August 6, 2006, the Hong Kong Legislative Council passed the Interception of Communications Surveillance Ordinance (ICO) in Hong Kong. The ICO is a first successful legislative attempt by the Hong Kong government to regulate the interception of citizens’ private communications. A review of the literature finds no comprehensive, systematic and critical assessment of the IOC since its passage. This is a first attempt to do so. As a critique, this article makes seven observations. First, viewed in a historical context, the ICO is a politically mature legislation. Second, viewed in a legal context, the ICO is a constitutionally mandated legislation. Third, viewed in a legislative context, the ICO is a controversial legislative process. Fourth, viewed in a socio-cultural context, the ICO is a philosophically and culturally ill informed legislation. Fifth, viewed in jurisprudential terms, ICO should be assessed with Chinese jurisprudential principles. Sixth, as an assessment, ICO is a flawed legislation. The article concludes with a discussion of the comparability and compatibility between Chinese QLF and Western rule of law regimes, observing that there are many practical similarities between the two, amidst major theoretical differences.
Hong Kong Interception of Communications and Surveillance Ordinance: A Critical Assessment

“The common law would have been ineffective if it had not taken account of the culture and customs of the Chinese.”

Matthew H. Hurlock (1993) ²

Introduction

At 2.30 a.m. on Sunday, August 6, 2006, the Hong Kong Legislative Council (Legco), passed the much delayed³ and long awaited Interception of Communications Surveillance Ordinance in Hong Kong⁴ (hereinafter ICO),⁵ with a vote of 32-0,⁶ after a protracted,⁷ raucous,⁸

³ The first Interception of Communications Ordinance (ICO) was introduced by Legislator TO Kun-sun as a private member bill. It passed the Legislative Council in June of 1997 but was never signed into law by the Chief Executive on the pretext that it might hamper Hong Kong law enforcement. For legislative history of ICO, see ICO Legco Papers, APPENDIX I.
⁵ Article 1 (1): “This Ordinance may be cited as the Interception of Communications Ordinance.”
⁷ Jonathan Cheng, “Legislators protest as Fan warns of all-night sessions,” Standard August 4, 2007. (Four hours into the second of a five day emergency meeting, President of Legco warned of a lengthy debate.)
⁸ “Lee Siu-kowng, To Kun-sun, both attack each other as shameless,” Ming Bao August 3, 2006.
factitious, and litigious legislative process.

This is a critical assessment of ICO. A cursory review of legal and social science literature shows that there is little research on ICO. This is a first attempt to do so. As a critique, this article makes seven observations. First, viewed in a historical context, the ICO is a politically mature legislation (Part I). Second, viewed in a legal context, the ICO is a constitutionally mandated legislation (Part II). Third, viewed in a legislative context, ICO is a controversial legislative process (Part III). Fourth, viewed in a socio-cultural context, the ICO is a philosophically and culturally ill informed legislation (Part IV). Fifth, viewed in jurisprudential terms, ICO should be assessed with Chinese jurisprudential principles (Part V). Sixth, as an assessment, ICO is a flawed legislation (Part VI). The article concludes with a discussion of the comparability and compatibility between Chinese QLF and Western rule of law regimes, observing that there are many practical similarities between the two, amidst major theoretical differences (Part VII).

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11 An electronic search (on June 1, 2007) of Lexis-nexis with the key words “Hong Kong” and “police” or “Interception of Communication and Surveillance” with no date limits yield no article bearing on this subject (police surveillance, privacy legislation) generally, and ICO particularly. Like lack of result obtains with the use of political and social science literature search engine with Pro-Quest. The only relevant article published on ICO is Thomas E. Kellogg, “A Flawed Effort? Legislating On Surveillance In Hong Kong,” Hong Kong Journal, http://www.hkjournal.org/archive/2007_summer/kellogg.htm
I

ICO a politically mature legislation

ICO a politically mature legislation because Hong Kong has been politically evolving from a dependent territory of the Crown where dominated subjects were allowed few political rights of self-expression, thought not without a voice, to an administrative region of China where liberated citizens enjoyed high degree of autonomy, though not without bound.¹³

Colonial policy

Hong Kong, as a colony (1842 – 1997), was governed as a police state,¹⁴ all be it in a paternalistic manner¹⁵ and minimalist way,¹⁶ by and through indirect rule:

“For all its lack of democracy, Hong Kong is a colony only in a technical sense, and though constitutionally its government could take the form of a dictatorship, in reality

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¹⁴ Tsui Yiu-Kowng, “Problems of a Para-Military Police in Changing Society: A Case Study of The Royal Hong Kong Police Force.” Examination Paper. Chinese University of Hong Kong, 1979. Tsui’s paper remains to be the most authoritative study on the role of Hong Kong police as para-military force, being responsive and accountable only to the Governor thought the Commission of Police.


¹⁶ Ian Scott, *Political Change and the Crisis of Legitimacy in Hong Kong* (Honolulu : University of Hawaii Press, 1989), p. 39. (From its inception until about 1966 (riot), British colonial policy in Hong Kong called for a minimalist state secured by imperial armed forces. The government was only concerned with maintaining law and order, e.g., fighting off pirates or eradicating Triad society.)
is does not. Constitutionally it is under the Crown, but it acts more like a semi-autonomous city-state, free since 1974 even from the financial controls that London once exercised over it. The colonial government – dominated at the top by British expatriates – decides its own internal affairs largely independently of Whitehall and in consultation with local conservative elites, pressure groups and business lobbies who are in frequent contact with the decision makers.”

The Governor of Hong Kong led executive government held the balance of power over every aspect of social, economic, and above all else, political life. In colonial Hong Kong, there were few concerns with human rights and little debate over personal liberties. Political policing was taken for granted, e.g., secretive Special Branch has unfettered powers to monitor political dissidents. Police abuse of

17 Id. 30 – 31.
18 A. Grantham, *From Hong Kong to Hong Kong* (Hong Kong, 1967), p. 107 (“in a crown Colony, the Governor is next to the Almighty.”)
20 The Colonial government of Hong Kong has adopted a positive non-intervention policy in Hong Kong.
21 The Colonial government of Hong Kong has maintained firm control over Hong Kong’s political development (or absent of development) and legal regime.
22 In the early years, Hong Kong people were subjected to summary arrest and punishment in the hands of the police. There were few ways to bring the unruly and transient Hong Kong population effectively under control. See Chapter 3: “Cheap, Summary, Sharp Justice’: The Early Hong Kong Magistrate.”
23 Hualing Fu and Richard Cullen, “Political Policing in Hong Kong,” *Hong Kong*
powers was accepted as a fact of life, e.g., zealous CID used third degree to facilitate criminal investigation.²⁴

There is no accurate and reliable data on police abuse of power in Hong Kong. The government did not keep track. There was no independent watch dog. In 1984 The Law Reform Commission of Hong Kong collected some court case data on challenges to police confessions in the courts of Hong Kong. It found that coerced confessions were rampant and a major drain on judicial resources (Law Reform Commission. 1984).

An ongoing study by Janice Brabyn of the University of Hong Kong has revealed that 162 or 21% of 762 defendants in criminal cases handled by the Magistracy over a two-month period challenged confession evidence. In 74, or 46% of those cases, the defendants alleged improper police behavior in obtaining confessions. 43 claimed that they had been assaulted by the police, 36 claimed that threats were made against them or family members in order to induce confession. Tellingly, the magistrate upheld the defendant's challenge in 29, or 18% of the 162 cases in which confession evidence was at issue. Hong Kong's rate of challenge to the admissibility of confessions and the rate at which such challenges are upheld is quite high compared to other jurisdictions. Many of the Monitor’s members are legal practitioners and have long believed that illegal or improper

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use of force in arrest and interrogation is routine. This is confirmed.”

In the pasts, there was very little police accountability. Before 1974 there was no legal complaint against police process. Until the formation of ICAC in 1974 there was no institutional check on police corruption. Laboring under such a political economy, there was little need for interception of communications and surveillance related legal rules and administrative policies. Hong Kong Police powers were plenary when it comes to investigating crime and providing for security.

How could such apathy towards police abuse of powers be explained?

Acceptance of Colonial Powers

26 Byron Kong, “A REVIEW OF THE EFFECTIVENESS OF THE EXTENT OF DISCRETION EXERCISED BY POLICE OFFICER OF HONG KONG POLICE IN STREET LEVEL,” MPA Dissertation (2003). (Case studies of police operations (Chapter 3) and personal interviews with HKP officers (Chapter 4) show that street police officers enjoyed wide discretion in Hong Kong, especially in minor cases, e.g., traffic cases.)
Culturally, legalism and constitutionalism was never a dominant feature of Chinese imperial governments. Confucian ethics – social status, hierarchical relationships and self-cultivation – guided the operations of society as a whole. Confucianism proposed the concentration of powers in sage officials and the imposition of duties on the common citizens. As a governing philosophy, Confucianism led inevitably to police abuse of powers, especially during the colonial policing days of old in Hong Kong.

At heart, Hong Kong people are economic, not political animals. Colonial Hong Kong government wanted a vibrant commercial center with compliant-socialized subjects, not a democratic state, with politicized – contentious citizenry. Endacott observed that Hong Kong people are not politically apathetic as much they cannot be bothered with politics. Political apathy in Hong Kong was strikingly illustrated in 1967 when, soon after the 1967 riots, only 26,000 (out of 300,000

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eligible) people bothered to vote for elected Urban Council members. Political apathy reduces police accountable.

What then accounted for renew a interest with police accountability, calling for the adoption of ICO?  

Post 1997 Police Powers Concerns

In the run up to 1997, the departing British, under the leadership of Chris Patten, proceeded to democratize Hong Kong, both to leave a British legacy as well as to keep faith with the Hong Kong people. Meantime, Hong Kong belongers and domesticated political elites started to worry about implications of re-uniting with China, their

36 Institutionally, HKP is not the only law enforcement agency, it is however the most dominant and powerful one. Functional, the HKP is the sole agency in charge of virtual criminality and political security, and has the need for extensive powers to intercept communication and conduct electronic surveillance routinely to police political terrorism
39 Brian Hook, “British Views of the Legacy of the Colonial Administration of Hong Kong: A Preliminary Assessment,” *The China Quarterly*, No. 151: 553-566 (1997) (But for political development in China, the British government has long sought partial democratization of Hong Kong, in tune with rising aspirations of an economically well off, educationally endowed and politically assertive middle class.)
40 See “Wishes of the Belongers themselves.” In Joseph Cheng, “Joseph Y. S. Cheng, “The Future of Hong Kong: A Hong Kong ‘Belonger's' View,” *International Affairs* Vol. 58(3): 476-488 (1982). (Hong Kong belongers recognized the inevitability of the Chinese rule. All they demand is that their interests and welfare is being taken care of, e.g., being able to maintain the same standard of living, with little change in lifestyle.)
41 Joseph S. Cheng, “The Future of Hong Kong: Surveys of the Hong Kong People's Attitudes,” *The Australian Journal of Chinese Affairs* Vol. 12: 113-142 (1984) (A majority of the Hong Kong people liked to see Hong Kong ruled by the British. A telephone survey of 998 people sponsored by the Hong Kong Reform Club (March 4-
mother land, especially about lost of freedom under People’s Republic of China rule. As 1997 neared, the Hong Kong people got increasingly concerned with and vocal about police abuse of powers; perceived to be harbinger of things to come. For example, in October of 2000, the HKP arrested a number of university student representatives for failing to give notice as required by the Public Order Ordinance before demonstrating. This attracted public outcry ending in street protests. Second, on October 9, 1999, a 16-year-old, Chinese national turned United States resident, Lin Qiaying, was arrested and subsequently jailed for 3 ½ months for using a forged passport while returning to the United States from Fouzhou through Hong Kong. She was arrested on account of her own induced or coerced confession. It turned out that her passport

13, 1983) showed that 70% desired to maintain the status quo and 15% wanted Hong Kong to become a trusted territory. (p. 117)

42 Id. In another survey sponsored by Hong Kong Observer conducted between May 10 and June 11, 1982, 65% considered their roots in Hong Kong and only 33% considered themselves Hong Kong citizens, while 61% said that they are Chinese, p. 122.


44 Raymond Chow, “A nervous Hong Kong remembers Tiananmen Square as China rule nears,” Associated Press June 4, 1997 ( A protester: “What we're doing here is against the Communist Party. They won't allow us to do this. That's why many people are here this time, because it's the last time.” “Hong Kong key to Chinese democracy, dissidents tell Tiananmen vigil, “Agence France Presse – English. June 04, 1998 11:45 GMT (June 4 exiled dissidents Wei Jingsheng spoke to Hong Kong people: "If the people in Hong Kong can keep a firm hold on this small democratic field, it is essential to the process of democratisation of the whole of China")

is real. The community was up in arms. A local newspaper has called the incident ‘bizarre’ and a ‘travesty of justice’.  

Finally, public outcry against police brutality and abuse of power, calling for reform, found expression in HKP sponsored public survey. In November of 1999, a HKP – Hong Kong University ‘Public Opinion Survey’ showed that the HKP has low regard for people’s privacy and respect for the rights of suspect.

**Table 1: Values and Behavior of Officers**

<table>
<thead>
<tr>
<th>Performance Area</th>
<th>Positive</th>
<th>Neutral</th>
<th>Negative</th>
</tr>
</thead>
<tbody>
<tr>
<td>Taking stand against corruption</td>
<td>35%</td>
<td>21%</td>
<td>18%</td>
</tr>
<tr>
<td>Protecting others’ privacy</td>
<td>29%</td>
<td>17%</td>
<td>21%</td>
</tr>
<tr>
<td>Respecting the rights of persons in custody</td>
<td>21%</td>
<td>19%</td>
<td>15%</td>
</tr>
</tbody>
</table>

Source: Extracted from Public Opinion Survey, Hong Kong Police (November 1999) (Hong Kong University)

The subject of policing the police has given rise to fierce public debates. Legislative Council Member Ho Sai-chu asked the Secretary for Justice the following question:

Will the government inform this Council of: (a) the number of complaints received by the Complaint Against

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Police Office about people being treated with violence by police officers during detention at police stations in each of the past three years, and the number of substantiated cases; and (b) the measures in place to prevent the occurrence of such incidents? 48

1997 Privacy Concerns 49

One of the major issues in the run up to the 1997 transfer of sovereignty of Hong Kong from the British government to the PRC was human rights protections, including privacy.

As far back as 1984, the “Joint Declaration” paved the way for the return of Hong Kong to China on July 1, 1997. 50 The Joint Declaration provided that the rights and freedoms enjoyed by the people of Hong Kong would last for 50 years, to be secured by a Basic Law. 51 Specifically, Article 3(5) of the Declaration provides:

(5) The current social and economic systems in Hong Kong will remain unchanged, and so will the life-style. Rights and freedoms, including those of the person, of speech, of the press, of assembly, of association, of travel, of movement, of

48 Hong Kong SAR Government. ‘LCQ 8: Complaints received by CAPO’ Press Release, Wednesday, April 21, 1999.
51 The drafting of Basic Law begins in 1985 when the National People's Congress appointed the Basic Law Drafting Committee, comprising of more than 50 mainland and Hong Kong members. The Basic Law of Hong Kong was adopted on April 4, 1990 by the Seventh National People's Congress of the People's Republic of China at its Third Session. See Y. Ghai, Hong Kong's New Constitutional Order: The Resumption of Chinese Sovereignty and the Basic Law (Hong Kong University Press 1997).
correspondence, of strike, of choice of occupation, of academic research and of religious belief will be ensured by law in the Hong Kong Special Administrative Region. Private property, ownership of enterprises, legitimate right of inheritance and foreign investment will be protected by law.

As a result, the Basic Laws of Hong Kong (1997) specially provide for the guarantee of basic human rights. Specifically, Article 29 provides that the "homes and other premises of Hong Kong residents shall be inviolable. Arbitrary or unlawful search of, or intrusion into, a resident's home or other premises shall be prohibited." Article 30 further provides that the:

"freedom and privacy of communications of Hong Kong residents shall be protected by law. No department or individual may, on any grounds, infringe upon the freedom and privacy of communications of residents except that the relevant authorities may inspect communications in accordance with legal procedures to meet the needs of public security or of investigation into criminal offenses."

Rights under The Joint Declaration (1984) and Basic Law (1997) are not self executing. They need to be implemented by law, and enforced with executive actions. This fell on the shoulder of Christ Pattern (1992 to 1997), the last (28th) Governor of Hong Kong. As governor he made clear that: "The British role is to discharge our colonial responsibilities honourably and competently."\(^52\) In practice that meant pursuing a two-prone strategy: introducing democratic institutions and establishing a

human rights regime.

In 1996, the Law Reform Commission took another look at some of the more salient privacy issues raised by electronic data interception, interference and theft. This resulted in the issuance in December 1996 of a report entitled, “Report on Privacy: Regulating the Interception of Communications”. The 1996 Report observed:

“The rapid expansion of the Internet, and the resultant increase in the amount of personal information available online, has made the public more concerned about the privacy of their communications. Service companies are likely to use privacy as a competitive weapon in winning customers.”

The growth in the use of electronic communications systems by industry had increased the need for secure communications in areas such as banking and finance. Service carriers were aware that an inability to safeguard customer information would adversely affect customer relations and their businesses. Another concern was that of theft of proprietary information.” Ominously, the 1996 Report warned of the coming privacy crisis. “The development of advanced communications networks is likely to be hindered unless service carriers can assure the public that there is adequate security for their communications.”

53 The 1996 Report “Terms of References” are anchored within that of Reform of the Law relating to the Protection of Personal Data and states: “The issues raised at items (a) and (b) in the terms of reference were addressed in the Law Reform Commission report on Reform of the Law relating to the Protection of Personal Data published in August 1994. Most of the recommendations of that report were adopted with the enactment of the Personal Data (Privacy) Ordinance (Cap. 486) on 3 August 1995. This report deals mainly with item (d).” See paragraph 5 to “Introduction” of 1996 Report.
54 See 10 (b) to “Introduction” of 1996 Report.
55 See 10 (c) to “Introduction” to 1996 Report.
This detour into 1997 politics and the Hong Kong Law Reform's Commission on “privacy (1996 Report) makes abundantly clear that the “discovery” of privacy in Hong Kong was driven by many forces and advanced along a number of paths.

Public Awareness of Privacy

Privacy has never been a major concern to the Hong Kong people and with the Hong Kong government. In 1999, two high profile cases sensitized the Hong Kong public to emergent piracy issues, and need for legal protection. One of the earliest cases drawing the public’s attention on (computer) privacy was that of HKSAR v. Tsun Shui Lun [1999]. The case happened in April 1998. It involved Tsu Shui Lun, a technical assistant, to a radiologist at Queen Mary Hospital. Tsu used his computer access at the hospital to retrieve medical records of the Secretary for Justice. He shared the records with his wife, friends and two local newspapers. He was arrested and prosecuted under Section 161 (1) (C) of the Crime Ordinance (Cap.200), i.e., theft of computer data for personal benefits.

Tsu defended himself by saying that he released the information to the newspapers not for personal pain, a legal requirement, but “because the public have the right to know the truth”, i.e., that the government has lied about the medical conditions of the Secretary of Justice requiring her hospitalization. The case raised a furor in Hong Kong over the public’s

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right to know, a government employee’s ethical duty to keep a secret and ultimately a patient’s privacy. In a still larger context, the case raised the broader issue of computer security.

The second case raised the issue of government power of search and seizure of confidential computer data held by the press (media). In November of 1999, a leading anti-government newspaper, Apple Daily was searched by the Independent Commission Against Corruption (ICAC) in a corruption investigation. It was alleged that the paper’s journalists were bribing police officers to supply police information. Later two police communications officers and one reporter were sent to jail for selling and purchasing of police information. During the ICAC search for evidence at Apple Daily computers were seized and data base were searched for evidence.

The Newspaper appealed to the Court of Appeals and argued that the Interpretation and General Clauses Ordinance, which made provisions for search and seizure journalistic materials were too broad. Otherwise, the search and seizure of information in newspapers’ computers placed the confidentiality between the media and informants at risk and the privacy of innocent third party in jeopardy. The case caused an uproar in Hong Kong, and was very much the talk of the town.\(^5^7\)

The two (selected) high profile cases reported here are important milestones to Hong Kong’s journey of “discovery of privacy”. They are

\(^{57}\) “Hong Kong’s media face to face with the Taiwan factor,” 2000 ANNUAL REPORT JOINT REPORT OF THE HONG KONG JOURNALISTS ASSOCIATION AND ARTICLE 19 © HKJA and ARTICLE 19 (JULY 2000).
important milestones because, viewed individually in point of time and together as a time series, they tell us how far we have come in recognizing privacy issues. The fact that the cases were able to precipitate a debate over privacy of patience (case 1) and authority of search and seizure (case 2) is the clearest indication yet that privacy as a concept has penetrated people’s psychic and invaded the public’s hearts and mind.

**Observations**

Until recently in Hong Kong, public concerns about abuse of police powers, though exist, have been effectively suppressed; being summarily denied and adroitly managed. Entrenched Chinese culture and established Hong Kong custom made people defer to government authority. As Endacott observed ‘there is also among the Chinese a tendency to political acquiescence, which stems from a Confucian respect for the official and which should not be mistaken for apathy’. 58

Hong Kong people are also more law and order oriented. Professor Kuan Hsin-chi has conducted survey research on legal culture in Hong Kong and found that Hong Kong people are more inclined to support the police in maintaining order at the expense of [maintaining] the rule of law. 59

Since 1997, Hong Kong people’s relationship with government and attitude over rights changed with the return of Hong Kong to China, and

with the adoption of Joint Declaration and publication of Hong Kong Basic Law. The ICO is one more step is that direction.

II

ICO is a constitutionally mandated legislation

There is no definitive legislative history on ICO. “As a British colony, Hong Kong for much of its history did not enjoy particular strong basic rights protection.”

*Hong Kong police powers*

HKP laws and power followed U.K. jurisprudential rules and legislative principles. In England, the central principle of police powers and restraints was articulated by *Entick v. Carrington* (1765):

> [E]very official interference with individual liberty and security is unlawful unless justified by some existing and specific statutory or common law rule; any search of private property will similarly be a trespass and illegal unless some recognized lawful authority for it can be produced; in general, coercion should only be brought to bear on individuals and their property at the instance of regular judicial officers acting in accordance with established and known rule of law, and not be executive officers acting in their discretion; and finally it is law, whether common law or statute, and not a plea of public interest or an allegation of state necessity that will justify acts normally

60 See Submission from Hong Kong Human Rights Monitor on surveillance, Article 30 of the Basic Law and the right to privacy in Hong Kong [CB(2)259/05-06(01)] (Hong Kong law on electronic surveillance and attempts at reform (pp. 15 – 22). See also Leung Kwok Hung and Koo Sze Yiu v Chief Executive of the Hong Kong Special Administrative Region (HCAL 107/2005).

61 Id. Submission from Hong Kong Human Rights.

62 R. Wacks *Police Powers in Hong Kong: Problems and Prospect* (Hong Kong: University of Hong Kong Faculty of Law, 1989)
illegall.\textsuperscript{63}

Powers of the HKP can be found in Chapter: 232, \textit{Police Force Ordinance}, Sections 50 to 59. The most often exercised of these powers are: Section 50: “Arrest, detention and bail of suspected persons and seizure of suspected property”; Section 51: “Person arrested to be delivered to custody of police officer in charge of police station”; Section 52: “Person arrested to be discharged on recognizance or brought before a magistrate”; Section 53: “Power of arrest”; Section 54: “Power to stop, detain and search”; and Section 55: “Power to stop, search and detain vessels, etc., or person suspected of conveying stolen property”.

The POLICE FORCE ORDINANCES were supplemented by internal police organizational rules and standing orders of various commands, the most important of which is the Police General Order. The court has also played a role in policing the police when evidence has found to be illegally obtained, e.g., adoption of judges rule.

A close scrutiny of such POLICE FORCE ORDINANCE, POLICE GENERAL ORDER and judges rule uncovered no provisions for interception of communications or covert surveillance. In such cases, the HKP, like its colonial master, followed the common law. Common law knows no concept of privacy\textsuperscript{64} and allows police a free rein of authority, without constrain.

The only other Hong Kong ordinance in place are two, i.e., the

\textsuperscript{63} (1827) 6 B & C 635.
Telecommunications Ordinance (1963)\textsuperscript{65} and the Postal Ordinance.

S.33 of the Telecommunications Ordinance reads:

“This Whenever he considers that the public interest so requires, the Chief Executive, or any public officer authorized in that behalf by the Chief Executive either generally or for any particular occasion, may order that any message or any class of messages brought for transmission by telecommunication shall not be transmitted or that any message or any class of messages brought for transmission, or transmitted or received or being transmitted, by telecommunication shall be intercepted or detained or disclosed to the Government or to the public officer specified in the order.”

The ICO is based on recommendations contained in two privacy study by Hong Kong Law Reform Commission, namely: \textit{Report on Privacy: Regulating the Interception of Communications} (December 1996) (IR) and \textit{Privacy: The Regulation of Covert Surveillance} (March 2006) (hereinafter SR). Specifically, \textit{Report on Privacy: Regulating the Interception of Communications} (para 3.45) observed that \textit{Telecommunications Ordinance} (Cap. 106) did not give “an adequate indication of the circumstances in which, and the conditions on which, interceptions may be authorised” and offer scant protection for privacy and freedom of communication as required by Article 17 of the \textit{International Covenant on Civil and Political Rights} (ICCPR).\textsuperscript{66}

\textsuperscript{65} Hong Kong’s \textit{Telecommunications Ordinance} Cap. 106) prohibits unauthorised interference with a telecommunication installation in order to intercept a message (s27).

\textsuperscript{66} See Article 14 of the \textit{Bill of Rights Ordinance} (BORO) and the Basic Law (Article 39) which referenced which also requires ‘legal procedures’ to sanction any
Both of the above Hong Kong Law Reform Commission reports are exclusively based on Western (U.S., U.K., Australia) jurisprudence, e.g., “Report of the research study on regulation of interception of communications in overseas jurisdictions” [RP02/04-05] (1 March 2005).\(^{67}\) Transferable experience was sought in the area of legal framework; warrant issuing authority; duration, termination and renewal of warrants; interception without warrant; internal safeguard measures; external safeguard mechanisms; limit of executive discretion in execution; legislative amendments post 9/11.\(^{68}\)

The IR recommended making illegal interception of communications a crime and applying for a warrant for approval to intercept communications.\(^{69}\) Specifically, IR proposed making it a crime “intentionally to intercept or interfere with – (1) a telecommunication; (b) a sealed postal packet; (c) a transmission by radio on frequencies which are not licensed for broadcast…”\(^{70}\) Legal interception can only be conducted with a warrant issues by a High Court judge based on a written application: (a) to prevent or detect serous crime; (b) to safeguard public security in respect of Hong Kong. In issuing a warrant, a judge must be


\(^{68}\) Ibid. Executive Summary, para. (1).

\(^{69}\) See Appendix I: “The Law Reform Commission’s recommendations on regulating the interception of communications” to Background brief entitled "Regulation of surveillance and the interception of communications" prepared by the Legislative Council Secretariat [CB(2)2431/04-05(01)] (15 August 2005) [http://www.legco.gov.hk/yr04-05/english/panels/se/papers/se0815cb2-2431-1e.pdf]

\(^{70}\) Ibid. p. 1
satisfied that: (a) that there is a reasonable suspicion that an individual has, is, or about to commit a crime, or information is likely to be of substantial value in safeguarding Hong Kong public security; (b) reasonable believe that information relevant to investigation will be obtained through interception; (c) information cannot be reasonably obtained in less intrusive ways.\textsuperscript{71}

\textit{Judicial Proceeding}

The origination and development of ICO was facilitated by two seminal legal decisions in Hong Kong Courts.\textsuperscript{72} The first case \textit{R v Lee Man-Tak and 3 others} (DCCC 689 of 2004, 22 April 2005) challenged the constitutionality of ICAC covert surveillance. The second contested the legality of the Law Enforcement (Covert Surveillance Procedures) Order in setting forth a “legal process” in guiding police covert surveillance.

In \textit{R v Lee Man-Tak and 3 others} the judge held that evidence in the form of video recordings of meetings obtained by covert surveillance was obtained in breach of Article 30. However, he went on to admit the covert recordings into evidence on the basis that their admission did not cause unfairness to the defendants.\textsuperscript{73}

\textsuperscript{71} \textit{Ibid.} p. 3
\textsuperscript{72} For a brief, but information, description of the legal history of the ICO up through the legal challenges and judicial proceedings, See Thomas E. Kellogg, “A Flawed Effort? Legislating on Surveillance in Hong Kong.” \textit{Hong Kong Journal} http://www.hkjournal.org/archive/2007_summer/kellogg.htm
\textsuperscript{73} An accompanying case was that of \textit{R v Shum Chiu and 5 others} (DCCC 687 of 2004, 5 July 2005). In the \textit{Shum Chiu} case, the court found the interception of conversations between the 3\textsuperscript{rd} defendant and his solicitor to be illegal, as against Basic
On August 5, 2005, the Chief Executive of Hong Kong (‘‘CE’’) promulgated the Law Enforcement (Covert Surveillance Procedures) Order (‘‘Order’’) pursuant to Hong Kong Basic Law (‘‘BC’’) Article 48 (4), to come into operations the beginning of August 6, 2005. The Order was made without first consulting the Executive Council, Legislative Council of Hong Kong (‘‘Legco’’) and public at large.

Law 30 and lawyer-client relationship. The judge stayed the prosecution against the 3rd defendant permanently.

The Order was made by the CE on July 31, 2005, and Gazetted on August 5, 2005. Law Enforcement (Covert Surveillance Procedures) Order SS NO. 5 TO GAZETTE NO. 31/2005. EXECUTIVE ORDER. No. 1 of 2005


The CE made clear the following: (1) The Order is a procedure rule, not substantive law. (2) The Order is there to restrict government powers not limit people’s rights. (3) The Order has nothing to do with BC30. “CE speaks on Law Enforcement (Covert Surveillance Procedures) Order.” HK Government Press Release. August 6, 2005.

http://www.info.gov.hk/gia/general/200508/06/08060147.htm The CE repeated the same message to allay fears. (1) The Order is there to “ensure that we have uniform, very carefully crafted procedures to ensure that the disciplined services when they carry out surveillance … internal discipline purposes…” (2) “Order is not a law in itself; it does not impose any criminal liabilities or any sanctions on ordinary citizens.” (3) It is an interim measure. “Transcript of Chief Executive's media stand-up session,” HK Government Press Release. August 11, 2005.


BC 48 (4) provides in pertinent part: “The Chief Executive of the Hong Kong Special Administrative Region shall exercise the following powers and functions: (4) To decide on government policies and to issue executive orders.” Hong Kong – Constitution http://www.oefre.unibe.ch/law/icl/hk00000_.html

Section 1 (1) (2). Oder.


Id. p. 29. lines 25 – 27. (CE issued the Order three months after the Shum Chiu case. There was more than enough time to consult legco.) Margret Ng, “Daily
The Order provided explicit and specific guidelines for the law enforcement agencies in Hong Kong – Independent Commission Against Corruption (ICAC), Hong Kong Police (HKP), Hong Kong Exercise and Custom (HKEC), Hong Kong Immigration (HKI) – to follow when conducting needed secret surveillance, as required by the BC Article 30.

The Order was called into service by the opinion of the presiding judge of a pair of cases holding that existing legislative scheme and regulatory regime failed to satisfy Basic Law and other UN Convention in protecting the privacy rights of the citizens of Hong Kong.\textsuperscript{83} The Order attracted piercing legal analysis, cryptic political commentaries,\textsuperscript{84} and mixed public responses.\textsuperscript{85} It was big news in Hong Kong and abroad.

\begin{quote}
contemplation – With Tsang Yam Pui permission) \textit{Apple Daily} - Commentary. August 16, 2005. (Every citizen concedes that there is a need for secret surveillance in fighting crime. But most disagree that the CE should be the one who issued such Order and not through the legislative process.)

\url{http://www.margaretng.com/index.php?p=377}
\end{quote}

\textsuperscript{82} Id. 30, lines 1-2. For CE’s rejoinder. “CE defends surveillance order,” Hong Kong – Law and Order, August 25, 2005 (“I think it is right for the legal fraternity to challenge the things they are doubtful about …But one thing I cannot accept is that we have a hiatus here, that we have a doubt in the minds of law-enforcement agencies that they cannot carry out surveillance operation, which is part and parcel of keeping law and order in Hong Kong.”)

\begin{quote}
\end{quote}


\textsuperscript{84} “Many Hong Kong lawyers and legal scholars criticize the Law Enforcement (Covert Surveillance Procedures) Order,” (\textit{Radio Free Asia} 2005.08.08 (RFA is not an independent news agency and might be biased in favor of U.S. views.)

\begin{quote}
\url{http://www.rfa.org/cantonese/xinwen/2005/08/08/hongkong_law/?simple=1}
\end{quote}

\textsuperscript{85} The Hong Kong Democratic Party conducted a random phone survey of 534 citizens between August 11 – 16, 2005, over the issue of regulation of secret
Major issues concerned the necessity and desirability the Order, the authority and propriety of the CE acting alone, the role and functions of CE vs. Legco, and ultimately the legality and Constitutionality of the Order.

In 2005 two Hong Kong prominent political activists[^86] challenged the Order to be unconstitutional in law and inadequate in content to safeguard citizens against arbitrary search and intrusion of privacy. On February 6, 2006 the Hong Kong Court of Appeal[^87] found the Order to be inadequate in protecting privacy rights or fulfill BC30 mandate.[^88] This surveillance: 48.7% agreed (25.5% disagreed) that the government should promulgate legislation to control the process of interception of communications and secret surveillance. 54.7% agreed that court authorization is necessary for secret surveillance. 9.4% was of the opinion that government should not listen on to citizens’ phone under any circumstances. 48.8% opinioned that it is not appropriate for police and law enforcement to decide whether to conduct secret surveillance. (Electronic phone survey. Sample called 18,476. Successfully connection: 11, 344 (61.2%). Response rate: 534 (4.7%).) “Near 50% of respondents hope for expeditious legislation regulating law enforcement agencies’ secret surveillance activities” The Democratic Party – Research and Commentary. [http://www.dphk.org/2003/research/research.asp?iCommentId=2585&szColumnId=researchsecure](http://www.dphk.org/2003/research/research.asp?iCommentId=2585&szColumnId=researchsecure)

“Survey says snooping law should offer more protection,” South China Morning Post, Monday, July 3, 2006. (In July of 2006, the South China Morning Post survey of 300 Hong Kong residents. Most respondents expressed concerns and were suspicion of ICO. A full 72% of the respondents preferred appointment of a “three-judges” commission to oversee wiretapping requests, rather than by the Chief Executive. A majority wanted to ICO the the mainland.)


[^87]: Leung Kwok Hung and Koo Sze Yiu v Chief Executive of the Hong Kong Special Administrative Region (HCAL 107/2005)

prompted another round of debate in Legco\textsuperscript{89} and within the community of the need to pass a secret surveillance legislation to guide LEA activities and protect citizens’ rights.\textsuperscript{90}

III

ICO is a controversial legislative process

Significance of ICO

The ICO is first successful attempt to regulate the interception of citizens’ private communications by public officials.\textsuperscript{91} It is also the first time the government assertively championed and aggressively orchestrated the passage of a Bill.\textsuperscript{92} On July 31, 2006, The Chief


\textsuperscript{90} Paper provided by the Administration on "Impact of the judgment delivered by the Court of Final Appeal in LEUNG Kwok-hung and KOO Sze-yiu v. Chief Executive of the Hong Kong Special Administrative Region on law enforcement before the enactment of the Interception of Communications and Surveillance Bill and the preparatory work undertaken by the Administration for the implementation of the Bill as enacted" [CB(2)2860/05-06(01)] (31 July 2006)


\textsuperscript{92} “Absolutely assuring the passage of interception communication (Bill), officials set up defense in Legco,” Ming Bao August 3, 2006. A12. (There were more government AOs (Administrative Officers) than reporters and security officers. They were deployed in the Legco building to assure that Legco remembers voted, in favor of the Bill.) Jonathan Cheng, “Lawmakers on 5-days sprint to pass surveillance laws.” The Standard. August 3, 2006.
Executive of Hong Kong Donald Tsang sent pro-government lawmakers a letter stressing the importance of their votes: “In view of the immense public interests at stake, it is of the utmost importance that we must muster sufficient support in defense of the administration’s proposals and avoid any disruption of the proceedings.”

The original Interception of Communication Ordinance (1997), then as now, was a controversial piece of legislation. In response to the first ICO in 1997, Secretary for Security Peter Lai Hing-ling objected to the law in content and process

"We find that the bill ... would pose serious operational difficulties to our law enforcement agencies ... The implementation of the bill would be prejudicial to the security of Hong Kong and would bring no benefit other than to criminals who will benefit from its flaws ... Mr James To's members' bill, drawn up without prior consultation with the law enforcement agencies, is entirely unworkable and the administration will not be able to bring it into operation ..."

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93 Id.
94 “To’s bill faced different deadline: the handover,” The Standard Tuesday, August 01, 2006. (Legco member Emily Lau (Frontier) accused then Governor Chris Patten of a breach of faith and deliberate delay. Ip Kwok-him DAB (Democratic Alliance for the Betterment of Hong Kong) recognized the importance of the law for law enforcement officials but lamented the fact that (DAB [the then Democratic Alliance for the Betterment of Hong Kong] was not properly consulted. He was against “hasty passage of the bill at this stage.” Selina Chow Liang Shuk-yee (Liberal Party) felt that the law was an important one in protect human rights but nevertheless abstained from voting.
95 Jonathan Cheng, “Snooping law set for debut,” The Standard Monday, August 07, 2006 (The CE of Hong Kong, Donald Tsang described the ICO as one that is “rich in controversy.). For a list of concerns being raised by HK Legco members, see “Summary of concerns and queries raised by Members at the special meetings on 15 August and 4 October 2005 prepared by the Legislative Council Secretariat”. [CB(2)971/05-06(02)] (7 February 2006).
96 “To’s bill faced different deadline: the handover,” The Standard Tuesday, August 01, 2006.
Legislative history and dynamics

The Bill must be passed by August 8, 2006 to avoid a “legal vacuum”. Forebodingly the Legoc President warned: “We will meet for as many hours as we need, and use whatever methods we have at our disposal, to get this bill done.”

The government has proposed 190 amendments. The democrats (mainly Margaret Ng and To) have proposed more than 200 amendments. The Frontier legislator Emily Lau Wai-hing wanted the ICO to cover the Chief Executive. Civic Party lawmaker Ronny Tong Ka-wah observed that it is unconstitutional for the Chief Executive to operate outside the ICO. Permanent Secretary for Security Stanley Ying Yiu-hong however dismissed such concerns as being over exaggerated in fact and insignificant in consequence. Legco member Leung Kwok Hung legally challenged President of Legislative Council Rita Fan’s decision to deny Leung’s amendment to the ICO as violating the Hong Kong Basic Law Article 74, to wit: “Bills which do not relate to public expenditure or political structure or the operation of the government may be introduced individually or jointly by members of the Council.”(Emphasis provided).

99 Id.
100 Ravina Shamdasani, “Chief executive could spy on opponents, legislators claim,” South China Morning Post, June 6, 2006. Pg. 3.
101 “Leung Kwok Hung seeks judicial appeal challenging Ms. Fan’s decision to quash amendment,” Ming Bao August 6, 2006.
The ICO sponsored by the Hong Kong government was finally passed over the objection of the “pan democratic” group of legislators, led by Margaret Ng Ngoi-yee (Civic Party) and To Kun-sun (Democratic Party). The pro-democracy group did not vote for ICO after its last ditch effort to amend the Bill with a “sun-set” amendment was quashed by a vote of 18 to 32 (5 to 22 among functional representatives, 13 to 10 among directly elected).

**Legislative issues**

With the new ICO (2006), there is a legitimate concern with the legislative process, e.g., government officers shadowing legislators, and continued partisan disputations over the content, e.g., ICO fails to define national security. There are unsettled and unsettling questions being raised as to the magnitude, pervasiveness and seriousness of police surveillance and interception in Hong Kong, before and after ICO.

In terms of legislative process, Martin Lee (Democratic Party) accused the government of rushing the legislative process to meet the August 8, 2006 deadline, after failing to act on the matter for years. The Hong Kong government and “pro-emperor party” were taken to task for

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104 On Feb. 21, 2006, the Legco Security Panel ask for data on police surveillance which has not be maintained thus far. On June 9, 2006, the Secretary for Security responded: From Feb 20 to May 19, 2007 there were (ICO) kind of interception and 238 covert surveillances (44 requiring judges’ authorization. Administration's letter dated to 9 June 2006 regarding the number of cases of interception of communications and covert surveillance for the three-month period up to 19 May 2006. Secretary for Security. HKSAR. CB(2)2361/05-06(01) (English Version)
being interested only interesting in securing votes, not winning hearts and minds. To many people, especially the public, he marathon legco session – 8/2/06 from 11 am to 10 pm, 8/3 from 9 am to 12 mid-night, 8/4 9 am to 12 mid-night, 8/5 9 am to 2.26 am – was entirely not necessary. The “rush” was not conducive to good decision making.\(^\text{105}\) Audry Yu pointed out that it was odd that the pro-government legco members accused her and others of prolong the debate and delaying the promulgation of the ICO when in fact it was the government which refused to sign off the original law ICO passed by the Legco in June 24, 1997, some 10 years ago. Since then, the government has relied on departmental regulations and executive order to regulate the police. This showed gross disrespect for the rule of law and substantial erosion of the Leco as functional institution in safeguarding citizens’ rights and controlling government actions.\(^\text{106}\)

In terms of content, Emily Lau (Frontier) was much concerned with a failure to define key terms in the ICO, e.g., the lack of definition for “public security” and the difficulty in defining “reasonable privacy”. She also echoed HK Journalists Association’s concern that the ICO might dry up news sources.\(^\text{107}\) Audrea Yu (Civic Party) pointed out that although the Legco met for 58 hours, there was no substantive discussion and meaningful debate over the issues that should be discussed, e.g., only a few legco members spoke out with point counter point exchange.

In terms of practice, Audrea Yu was worried about the possible abusive use of ICO to monitor political dissidents by a pro-Beijing

\(^\text{106}\) Ng Chi Sum “Tsang Yu Shing is not a robber” *Ming Bao* August 8, 2006. A28.
government, as did Tsang Yuk Sing, years ago by the Special Branch of the HKP under the British Colonial rule. Yu concerns was supported by a commentator who observed that Tsang Yuk Shing (DAB) was being shadowed by Hong Kong Police Special Branch not because of any criminal wrongdoing, alleged or proven, but because of unspecific and speculative fear of his political conviction, i.e., being a communist.

A controversial legislative process

In this section, we want to make some observations about the ICO – legislative process. Specifically, is the ICO fact finding process reasonable. The observation here is that the ICO legislative fact finding process is controversial, both in terms of perspective adopted and methods pursued.

There are three kinds of legislative fact findings associated with ICO legislative process, i.e., facts about the necessity, utility or appropriateness of ICO? For fact finding purposes, the question of necessity, utility and appropriateness could not be properly addressed without resolving the issues of perspective.

As it stands, the ICO fact finding process – from HK Law Reform Commission investigation to HK Legco public consultation – has been directed at what the Hong Kong administrative, political and legal elites think about Hong Kong people’s needs and wants. Three kinds of voices are conspicuously missing: that of the Hong Kong people (segmentized and as a whole); that of the Hong Kong police (in its law enforcement and

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109 It is most ironic that in spite of Tsang’s experience with Hong Kong government illegal surveillance, he turned to be a key supporter of the IOC.
security roles); that of the Chinese people (citizens, CCP and PRC).

With the voices of the Hong Kong people, it is observed that indigenous Hong Kong voices were under represented, in process and by result, deliberately or neglectfully, in the entire ICO legislative process. For example, the Hong Kong Bar Association’s position was prominently reported and seriously discussed, but the diverse voices of the people in the street were not assertively sought and seriously entertained. The methodological section will address the issue of lack of empirical research.

With respect to voices of the Hong Kong law enforcement and security agencies, again, no attempt has been made to capture their points of views. Thus while the Security Bureau have an earlier opportunity to raise concerns about the adverse impact of ICO on police operations, there were no independent and objective, systematic and comprehensive, scientific and comprehensive study done about the possible impact and implications of the law on Hong Kong public security. The various Law Reform Commission reports come close, but they all missed the mark, by wide margin, in what they fail to do or say, i.e., there was little space devoted to the discussion of law enforcement problems and issues, in concrete and specific terms.

Finally, with respect to Chinese voices, they were deemed illegitimate and unimportant to think about. Through out the whole legislative process, every attempt was made to block out the voices of the

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110 That is not to suggest that the people’s voices were not, or not adequately, represented by the political parties or elected officials. It is however observed that the police voices were drowned out by the elite voices, offering paternalistic and platitudinous comments without factual support.
Chinese people as a whole, i.e., what the PRC government, Communist party, and citizens think? For example, how might Chinese residents’ privacy interests be affected when communicating with their family members? Or how might PRC real national security concerns neglected by IOC? Notwithstanding the Basic Law, Chinese people’s interests in Hong Kong and aspiration for Hong Kong cannot be artificially severed. Conversely, Hong Kong people’s Basic Law right to autonomy does not mean that it is rightful or prudent (reasonable – “he qing li”) to exclude PRC government’s concerns and Chinese citizens’ concerns.

Methodologically, the public consultation process while formally open to all could not and did not reach into the hearts and mind of the people, in systematic, comprehensive, scientific ways. For example, there was no effort – scientific or otherwise - to study the attitude and sentiment of the Hong Kong people towards the issues of civil liberties, privacy and security.111 From US experience, we learned that after 9/11, a clear majority of the people in the US were willing to trade security for liberty.112 While the wisdom of this preference has been called into question, public opinions must be taken into account.

As to the ascertaining Hong Kong law enforcement needs and security professionals concerns, there should be an independent

111 When it comes to law and order issues, Hong Kong people are very conservative. Otherwise, they have different ideas about and feeling for law and rights issues. Hsin-chi Kuan Support for the Rule of Law in Hong Kong, 27 Hong Kong L.J. 187 (1997).
112 Berry Fong-Chung Hsu, THE COMMON LAW SYSTEM IN CHINESE CONTEXT, (Armonk, New York: M.E. Sharpe, Inc., 1992) (34.37 percent of Chinese population and 37.5 percent of legal profession) who believe that the police should be permitted to use limited torture to extract confessions. Table 6.1., p. 71)
commission set up to study the impact and implications of the ICO on China and Hong Kong, including the Hong Kong Police and ICAC operations. For example, how might law enforcement activities and anti-terrorists investigation be affected with or without the ICO? What are the direct and indirect, long and short term, costs of ICO to law enforcers?

In summary, HKSAR and Legislative Council failed to investigate the facts and circumstances bearing upon the necessity, utility and appropriateness of ICO.

IV

ICO is philosophically and culturally ill informed legislation

Hong Kong legal culture, judicial thinking and legislative reasoning, has long been held captive by foreign (trained) jurists, Westernized politicians and progressive scholars. This fixation on Western ideas, liberal ideal and utopian ideology must be reflected upon and counter balanced by (more) local perspective as reflecting traditional thinking and grounded sentiments.¹¹³

Hong Kong Joint Declaration envisions an autonomous Hong Kong developing on its own terms, at its own pace, and more importantly, for its own good. The Hong Kong Basic Law in turns promises an independent and autonomous SAR, operated by and for Hong Kong people. Such a political settlement and constitutional regime requires

¹¹³ It has been observed that Confucianism is less a set of philosophical principles dealing with abstract issues of good vs. bad morally than a collection of conduct norms catering to concrete problems of desirable vs. undesirable pragmatically. For example, every person in China has a prescribed title (ming) and status (fen), and with it role and functions because people desires know no bound, and would run amock if not properly delimited in advance.
indigenization of Hong Kong law, i.e., giving Hong Kong people a voice, in theory as well as practice, process and result.\textsuperscript{114}

The only issue confronting us is how to give meaning and effect to indigenization of Hong Kong law. In material terms, how does ICO reflect and reinforce indigenous values and local culture.

Through out the legislative process, the necessity and appropriateness of the ICO was taken for granted. The debate centered on how best to protect the rights of the people. There was virtually no discussion of how to evaluate the necessity, appropriateness, utility of the IOC from a Chinese – Hong Kong perspective.

\textit{Cultural pluralism}

There is a need to revisit Western jurisprudential principles on human rights and privacy which are claimed to be absolute and universal, with critical theoretical examination and objective empirical validation.\textsuperscript{115} In context and as applied, is Western concept of rights, freedom and democracy fit for Hong Kong?\textsuperscript{116} The central thesis here is that Western jurisprudential principles should not be applied to Hong Kong

\textsuperscript{114}The are two interesting philosophical question that deserve pondering and await elaboration: (1) What does ‘autonomy” mean? Does “autonomy” mean total and complete isolation from external influence(s)? Or, does it mean selective exercise of “autonomy”, i.e., incorporation of foreign ideas if and when deemed appropriate, including abdication of “autonomy”, with intent or by default? (2) If “autonomy” does not preclude external influence, in what way can it be said that the “domestication” of foreign ideas transform such ideas into “domestic” ones?

\textsuperscript{115}Orlando Patterson, \textit{Freedom in the Making of Western Culture} (Basic Books, 1991) (The idea and ideal of freedom is not naturally derived but socially constructed. It is the existence and perpetuation of freedom in the West which requires explanation and not the lack thereof in non-Western countries should be justified. “Preface”)

automatically and unreflectively, still less adhere to universally and absolute. Hong Kong legislators and courts should honor their constitutional duties in developing ICO jurisprudence that best fit Hong Kong history and culture, in realizing Hong Kong people’s interest and welfare, needs and wants, sense and sensibilities, dreams and aspirations, i.e., in its totality an ICO that is “good” for Hong Kong.

Human right activists and democracy champions from the West talk about the importance of human rights, freedom and democracy as universal and fundamental moral principles. Many people from around the world have argued that human rights while important and deserving of our attention, should not remain our exclusive, or even dominant, concern. In our debate over human values, we also need to think about cultural exchange, and not simply imposition of one nation/people/culture values on other autonomous individuals or sovereign nations.

To start the debate, we need to observe that there are many values worthy of human pursuit; e.g., freedom from starvation, personal integrity, filial piety, social responsibilities and loyalty to one’s country. In this


118 China championed negative rights, e.g., right to be free of hunger and exploitation while Singapore promoted Asian values.
119 This calls to mind President Bush’s insistent that only American conception of freedom and democracy is worth fighting for. ‘Freedom fighters’ from other nations are ipso facto terrorists.
120 “Not so (respect for life as universal). In the classical Chinese tradition in
regard, there are four observations to be made. First, it is obviously true that not all values are created equal. For example, material goods pale alongside moral and spiritual ones. Second, it is also clear that no single value, moral principles included, is so fundamental as to absolutely overshadow others at all times, in all places, and in all situations. Even the taking of innocent human lives can at times be justified in the name of stopping a greater evil. Third, judging values in context goes well beyond merely determining which moral principles should apply in a given decision making frame. Many valves are involved. Most of them are in conflict and priorities must be set. The challenge is, given a set of ranked values, national priorities and limited resources, prioritizing. Fourth, the ranking of values in the abstract is so loaded with conditions and disclaimers as to be of little use when applied to real-life situations. Indeed, they might create problems even in a theoretical multi-value matrix decision making set. Should I kill one to save the lives of many or possibly to improve the welfare of all? If not, then what right do we have, as a civilized government, to build a highway which, after all, kills? Are the traffic fatalities not victims of a government’s conscious policy

which I was brought up, we are aught to respect for parents, respect for teachers, respect for ancestors and for duly constituted authority, but the conception of respect due to the individual human beings as such does not exist in that culture.” Basil Mitchell, “The Value of Human Life,” in PETER BYRNE, MEDICINE, MEDICAL ETHICS AND THE VALUE OF LIFE 34-47 (1990).

121 However, in Buddhist thought the principle of respect for life must be understood within the context of other aspects of Buddhism teaching as well as other percepts. Different traditions within Buddhism balance the concern for respect for life with concern with doing the “most compassionate action.” Kevin WM. Wildes, S.A., “Sanctity of Life: A Study in Ambiguity and Confusion,” in JAPANESE AND WESTERN BIOETHICS 89-101(Kazumasa Hoshino ed., 1997).

choice, to develop highways instead of airports? Do we not call them casualties of human progress? The complexities and difficulties in arriving at agreed values are best described thusly:

“Second: there is no shared set of value priorities. We make much of the fact that we share values and we frequently say that, well, basically humans want the same things so we ought to be able to work things out. Perhaps, at a survival level, but beyond that, and even there, there is not a shared set of priorities with regard to values. Instead, priorities change with circumstance, time, and group. Here are some examples where value priorities differ depending on the group and circumstance. Short term expedience versus long term prudent behavior and vice versa. Group identity versus individual identity. Individual responsibility versus societal responsibility. Freedom vs equality. Local claims versus larger claims for commitment. Universal rights versus local rights (that can repudiate universal rights; fundamentalisms, for example.) Human rights versus national interests (e.g., economic competition or nationalist terrorism). Public interest versus privacy (the encryption conflict, health information, whether private or not). First amendment limits (pornography, etc.). Seeking new knowledge and its potential benefits vs its potential costs. Who sets the rules of the game and who decides? These are all issues where the priority of values are in contention. There is no reliable set of priorities in place that can be used to choose decisively among actions toward the larger issues.”

The above are not arguments for value relativity, nor propositions for situational ethics. It is a proposition for value pluralism. Value

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123 Point: Observations Regarding a Missing Elephant by Donald N. Michael, Emeritus Professor of Planning and Public Policy, University of Michigan (http://www.panetics.org/)
124 Tom L. Beauchamp, “Comparative Studies: Japan and America,” in JAPANESE AND
pluralism simply mean that there are many more human values which give
meaning to life and happiness to people than the principles of justice,
freedom, equality and democracy. Put it in another way, a country can
hold other enduring values—love for family, loyalty to friends, duty to
society—and still deserve our admiration and respect. A benevolent
dictator is better to many than starvation and chaos.

Human rights advocates argue that human rights are so fundamental
that all other values pale in comparison. While this argument has surface
appeal and is emotionally satisfying, a moment of critical reflection show
that this does not conform to our understanding of how human values are
formed, adopted, and evolved. First, human rights advocates deem it
“self-evident” that human rights—life, liberty and the pursuit of
happiness\textsuperscript{125}—are fundamental in nature, universal in application, and
apparent to all. All human beings should and must subscribe to the same

\textit{Western Bioethics} 25-47 (Kazumasa Hoshino ed., 1997). I came to my observation
here—similar values but differentially ranked (individually and in conjunction with
others) and variously applied (taking up contextual importance)—quiet independent
of Beauchamp’s work. But Beauchamp’s work—narrow morality (universal
principles) and broad morality (differential application)—share one thing in common
with mine, i.e., “the principles upon which men reason in morals are always the
same; thought the conclusions which they draw are different.” \textit{Id.} at 27. For a
discussion of moral objectivism and indeterminacy, see Russ Shafer-Landau, “Ethical
Disagreement, Ethical Objectivism and Moral Indeterminacy,” 54 \textit{Phil. &
Phenomenological Res.} 331-44 (1994) (available at
\textsuperscript{125}The Declaration of Independence para.1 (U.S. 1776).
set of human rights values—in content, importance, and, when compared with other values, priority. There are no exceptions or deviations.

Nothing could be further from the truth. Human values, as with beauty, are in the eyes of the beholder. Likewise, there are many ways to discover human values; as many as there are individuals on this earth.

On a theoretical plane, Kant’s categorical imperatives\textsuperscript{126} or Bentham’s utilitarianism\textsuperscript{127} are good starting points in order for one to discover individual or social values, but these are not final. Ontological and teleological validation of value choices are not exhaustive.

In more practical terms, rational analysis and positive thinking are

\textsuperscript{126} Immanuel Kant, \textit{Groundwork of the Metaphysics of Morals} (J.K. Patton trans., Harper Perennial 1965) (“Act only according to that maxim by which you can at the same time will that it would become a universal law.”). Kant made this observation when applying his categorical imperative to suicide: “If a man is reduced to despair by a series of misfortunes and feels wearied of life, but is still so far in possession of his reason that he can ask himself whether it would not be contrary to his duty to himself to take his own life, he should ask himself a question. He should inquire whether the maxim of his action could become a universal law of nature. His maxim is: From self-love I adopt it as a principle to shorten my life when its longer duration is likely to bring more evil than satisfaction. It is asked then simply whether this principle founded on self-love can become a universal law of nature. Now we see at once that a system of nature of which it should be a law to destroy life by means of the very feeling whose special nature it is to impel to the improvement of life would contradict itself, and therefore could not exist as a system of nature; hence the maxim cannot possibly exist as a universal law of nature, and consequently would be wholly inconsistent with the supreme principle of all duty.”

\textsuperscript{127} “By the principle of utility is meant that principle which approves or disapproves of every action whatsoever, according to the tendency which it appears to have to augment or diminish the happiness of the party whose interest is in question: or, what is the same thing in other words, to promote or to oppose that happiness.” Jeremy Bentham, \textit{An Introduction to the Principles of Morals and Legislation} 14 (Batoche Books, 2000)(1781).
not the only, nor even the best, tools to determine the contour and
correctness of human values. Indeed, I venture to guess rational analysis
is ill-suited to the investigation of value matters which are, after all, more
instinctual than cognitive, and more emotive than logical. We love
humanity with our heart, and appreciate life with our soul, not with a
computer and a brain. In the end, spiritual enlightenment, personal
feelings, human experience and collective wisdom can all play a part in
one’s endless value search.

Second, human rights belong to each and every individual, and are
not monopolized by one ideological camp. Most certainly, values, of
which human rights are an integral part, are not beholden to the
intellectually bright, militarily strong, economically wealthy or culturally
rich. As nations, as communities, as families, and as individuals, we all
subscribe to a set of values. Each of us is equally capable of finding a set
of values suited to our taste. All of us are equally endowed as moral
agents. It is apparent that no one country—no matter how big, how
strong, how rich, and how enlightened—can monopolize the creation of
desirable values, much less be the net exporter of virtues.128

128 See M. Angell, Ethical imperialism?, 319 NEW ENG J. MED. 1081-83
(1988) (universal values cannot be compromised without compromising
Third, national values, as with one’s moral compass, do not come prepackaged. They are a combined and integrated product of personal make-up, cultural heritage, social consensus, economic circumstances, and even accidental events. In sum, values are a sum total of human existence; wants, needs, phobia, remembrance, dreams, and hopes. Once formed, they are a given fact of nationhood and are seldom right or wrong in the abstract or in total.

Fourth, values are formed experientially, experimentally, naturally, and incrementally, more so than cognitively, absolutely, positively and dramatically. Historical accidents and national happenstance have as much to do with a country’s value formation as do rational discourse and reflective policy. Much of the values Americans take for granted are rooted the manner by which the United States found liberation, independence, and an individuality as a result of rebellion against British rule. Conversely, the Chinese people have sought refuge in paternalism and collectivity because their historical embracing of the teachings of Confucius.

Given this “dynamic” and “dialectical” process of human value
formation, it should come as no surprise to anyone to learn that human values never stop growing and evolving, changing in content and mix every minute and hour of the day. “We get wiser as we grow older” is as much a descriptive statement as it is an admonition to the young who are eager to live all that life has to offer in one day. Viewed in this light, the search for human values is not a discovery process but a creative journey. An individual, a people, a community, a nation-state; all are searching for an illusive and transient identity; but never arrive at an ultimate destiny. It is the process of searching for, and not the ultimate finding of, human values, which gives meaning to life.

Lastly and most significantly, values are bound by time and space, and posited within certain places, and societies. Two very important observations flow from this postulate. First, values exist within a context of history, place, people, society, and culture. There is no ahistorical, asocial or acultural value. To appreciate why Chinese rulers, and, for that matter, many Asian leaders, adopt a paternalistic attitude towards their subjects, it is necessary to consider the importance and structure of the family within Chinese history and culture. A critique of the Chinese style of government is not just an attack on Chinese current leaders but also an
indictment against China’s cultural heritage in general, and the role and
functions of family in particular. With so much at stake, and such
complexities involved, a country passing judgment on others should be
more reflective, thoughtful and considerate. It is easy to be misinformed
and misjudge.

Second, values are bundled goods. The meaning and importance of a
value cannot be easily extracted from the collective of values of which it
forms an integral part. The surgical removal and strategic implantation of
values will certainly cause political disruption, such as the wholesale
abandonment of communism in U.S.S.R., which led to social unrest and
political chaos,¹²⁹ and social rejection, such as the ban on U.S.-style
adversarial journalism in Singapore.¹³⁰

It is most difficult, if not impossible, for a person or country to
cross its intellectual horizon and value space. Cultural myopia is the
norm. China calls herself “Central Kingdom” and still acts that way.
Intellectual provincialism is the rule. All rationality is bounded.

Marx’s critique of the capitalistic intellectual order, that the

¹²⁹ Stephen E. Hanson, “Reform and Revolution in the Late Soviet Context,” 63
¹³⁰ Douglas Sikorski, “Effective Government in Singapore: Perspective of a
consciousness of the mass is conditioned, controlled and dominated by ideas emulating from the economic base,\textsuperscript{131} is flawed, less so because it is an overbroad observation than because it is not carried far enough. Marx failed to explain convincingly why he could liberate himself from such an all-embracing ideological confine to lead the charge against capitalism, while others could not. Rawls’ Theory of Justice\textsuperscript{132} suffered from a similar cultural straight jacket: the just society behind “the veil of ignorance” envisioned by Rawl looked more like twentieth century Boston than traditional Indonesia or contemporary Japan.

Is it surprising to see first the Romans, then the British and now the Americans preaching the virtues of their culture to the rest of the world; through persuasion if possible (BBC, VOA, CNN) and by force (extraterritoriality, Vietnam, Iraq) if necessary? Echoing Huffington,\textsuperscript{133} does it not appear odd that it takes the British a few hundred years to discover the essence of civilization while the Egyptians are still at a loss after 6000 years? Is it possible that the Americans find the best in government in


\textsuperscript{132} JOHN RAWLS, \textit{A Theory of Justice} (1971)

\textsuperscript{133} SAMUEL P. HUNTINGTON, \textit{The Clash of Civilizations and the Remaking of World Order} (1996).
200 years while the Chinese keep missing them after 4,000 years?

The discovery of universal values has more to do with individual ego and national pride than any intrinsic merit associated with those values. The successful spread of values, from democracy to gay rights, reflects more upon a country’s economic strength and concomitant cultural domination, than on any inherent appeal and demonstrated goodness of certain moral principles.

Is it surprising that almost all participants of international conferences speak English, most with an U.S. accent, and wear ties and jackets? Cultural domination, abet in subtle form, is here to stay.

Singapore’s senior statesman was right when he said that Asian values are as worthy of respect—because those values tell Asians who they are. 134

**Intellectual provincialism**

Western studies of Chinese law and law enforcement have been afflicted with ethnocentrism and cultural ignorance; knowing too much (of self) and too little (of others) at the same time. For example, Michael R. Dutton wrote one of the only full length books 135 on Chinese

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135 Frederic, Jr. Wakeman’s seminal book on *Policing Shanghai, 1927-1937* (University of California Press; Reprint edition (November 6, 1996) covers only a short 10 years of China history.)
The central question Dutton posed for himself and his readers is: How does traditional technology of policing fuse with the present social control framework (pp. 5-6). He observed that the PRC’s household registration system now is an extension, reproduction and sublimation of past practices, rather than a brand new invention. Specifically, China's present control method is a "remnant" of feudal past practices, albeit serving different governance purposes (p. 6).

In terms of method, Dutton employed Michel Foucault’s "genealogical method" to construct “histories of the present." In the main, Dutton relied on secondary English materials to complete his study.

In terms of theory, Dutton borrowed Foucault’s theoretical insight to analyze China’s household registration regime, past and present, concluding that Chinese state control has moved away from inflicting pain on the body to marking of personal files. In this regard, Dutton observed that China is the first nation to use statistical records effectively to track and keep its people in place.

According to Dutton, in imperial China, the state controlled a person’s behavior by anchoring the person within an intricate web of relationship starting with the family. Individuals were kept in place by critical self-introspection, stern family discipline, and ubiquitous community surveillance. In contemporary China, the state regulates people with a comprehensive household registration system:

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"[W]e may now see a regime which centers on work and production rather than on family and Confucian ethics, but the form of its policing, the modes of its regulation and the way it constitutes its disciplinary subjects all have resonance in the past." (p. 5)

As a critique, Dutton’s book, notwithstanding the inviting title, bold assertions and erudite presentation, tells us more about social regulation than law enforcement, more about administrative regiment than policing strategy, and finally, more about what Dutton’s observation of China as an administrative state than what people in China think, feel, experience and understand policing to be. Radcliffe-Brown has cautioned against such Western cultural imposition, sold as sociological imagination:

“In the primitive societies that are studied by social anthropology there are no historical records… Anthropologists, thinking of their study as a kind of historical study, fall back on conjecture and imagination, and invent "pseudo-historical" or "pseudo-casual" explanations.”

In essence where Dutton discovered clear and conclusive archeological

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139 Mills, C. Wright, The Sociological Imagination. (New York: Oxford University Press, 1959 [1976]) (Sociological imagination allows us to see mundane social facts in different light.)

evidences of historical continuity in a disciplinary state, Chinese found coincidental confluences of people, events, and circumstances vying for influence over the individual. Where Dutton privileged a grand design to explain state governance, the Chinese people favored human nature (“renxin”)\textsuperscript{141} and heavenly providence (“tianming”)\textsuperscript{142} to justify individual obedience. Thus observed, Dutton’s “theory of policing” is irrelevant to Chinese’s understanding of their personal conditions and collective fate.\textsuperscript{143} On a sill larger intellectual compass, Westerners go about constructing history of China out of whole clothe and in accordance with a grand scheme of things, while Chinese people continue to weave their life course clothing one stitch at a time and in step with the particulars of the “way” (“dao”) life.\textsuperscript{144}

\textsuperscript{143} This shifts the intellectual debate from what counts as a sound theory (i.e., validity issues) and accepted as good evidence (i.e., reliability problems) to what matters (i.e., policy concerns) and to whom (i.e., political consideration). The debate further implicates paradigmatic issues of positivism vs. post modernism.
\textsuperscript{144} This line of critique finds empirical support in China law and society research. Theoretically, it has been observed that law in action is mediated by powerful social actors as driven by a convergence of social and cultural forces. In “The Practice of Law as an Obstacle to Justice: Chinese Lawyers at Work” \textit{Law \\& Soc'y Rev.} 40 (2006) researcher Ethan Michelson found that that legal justice in China was subjected to and subverted by the lawyers who acted as gatekeepers to law and justice. Accessibility to the legal system of clients was dictated by professional interests (i.e., who can paid) and circumscribed by cultural values (i.e., who is deserving of help). Empirically, \textit{He, Xin} found in “Why Do They Not Comply with the Law? Illegality and Semi-Legality among Rural-Urban Migrant Entrepreneurs in Beijing,” \textit{Law \\& Society Review} Vol. 39 (3): 527-62 (2005) that in practice the “hukou” system did not comport with the administrators’ design or people’s expectations. Ultimately, the “hu kou” system did not serve to “discipline” the
If we find Dutton’s approach to China police studies wanting – sterile and irrelevant, how might we improve the studying and understanding of Chinese (Hong Kong) law? To this central issue we now turn.

**Hong Kong law with Chinese characteristics**

Study of Chinese law should avoid cultural (pre-) disposition, as informed by received/hidden assumptions, driven by self-evidence/universal political orientation and fortified with embraced migrant’s (as intimated by Dutton) but was negotiated by all those who were affected by it (police, migrants, business) to serve their respective institutional or personal interests.

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145 Harry Harding, “From China, with Disdain: New Trends in the Study of China,” *Asian Survey (AS)* Vol. 22 (10): 934-958 (1982) (Established China scholars have observed that different perception and misperception of China has more to do with the investigators’ disposition or disciplinary paradigm towards China than reflecting true conditions and likely prospect of China reform. Sentiments about China ran from torrid love affair borne out of romantic attachment, if not involvement with Mao’s egalitarian and utopian quest, cir. 1970s (p. 396) to bitter resentment resulting from abject disappointment over China’s oppressive policy and repressive practices, cir. 1980 (p. 396). The reassessment resulted in part from “Changing Intellectual Assumptions” (p. 942): (1) The prevailing assumptions in the 1970s were that we have no right (at least not being fair) to judge China by Western standards or values, such as over freedom and human rights issues (p.943). (2) Economically, Chinese people are less developed and thus care more about economic survival than liberty. Culturally, Chinese people have no history and tradition of democracy, privacy and individualism. As such these rights mean very little in China. (3) In the 1970s we often judged China by the lofty goals espoused by the leaders and not their actual implementation or eventual success/failures at the grassroots.(p. 944).

By far the most established assumption shared by many who engaged in State and society research in China is the idea that there is a connection between economic development and demands for political liberation. Elizabeth J. Perry, “Trends in the Study of Chinese Politics: State-Society Relations,” *China Quarterly (CQ)* No. 139: 704-713 (1994).

146 For a trenchant critique of post modernist scholarship in rescuing the Chinese scholars from the pitfall of liberal critique of China, see Joseph W. Esherick, "Cherishing Sources from Afar," *Modern China (MC)* Vol. 24 (2): 135-161 (1998) (McCartney’s *Hervin’s Cherishing Men from Afar* (1995) provided a revisionist reading of China. His observations of China were based on mis-translation of primary sources and misinterpretation of secondary historical data, all the time being driven by
ignorance. Taking this admonition to heart, we find that few if any existing social, criminological or jurisprudential theories, mostly developed in the West, can be easily made to fit China’s particularistic cultural pattern, multifaceted social conditions and complex political circumstances without suffering from various minor inaccuracies and/or gross distortions. More significantly, there is not enough valid and reliable empirical data to support any theory building.

personal bias and political ideology. See “Methodology and the Politics of Post-Colonial Scholarship” (pp. 153 – 159).

147 Chinese legal scholars have adopted the view that China has no or non-functioning legal system when there were ample evidence suggesting otherwise, i.e., Qing dynasty has a sophisticated legal code and effective justice administration system. William P. Alford, “Law, Law, What Law?: Why Western Scholars of Chinese History and Society Have Not Had More to Say about Its Law,” MC Vol. 23 (4): 398-419 (1997).

148 See “Theory, Method, and Data in Comparative Criminology” (2000).

149 Kam C. Wong, “The Study of Criminology (犯罪学) in China.” (On file with author.)

150 Lucian W. Pye, “Review: Social Science Theories in Search of Chinese Realities,” CQ No. 132: 1161-1170 (1992) (Career minded young Asian scholars wanting to establish themselves or seeking to secure tenure tried to force ill fitting Western theories in their respective disciplines to explain complex and complicated world of China.)

151 See “3. Jingcha xue xueke yanjiu ben tu hua de wenti.” In Zhu Xudong, “Regarding certain issues regarding research on police studies” (“Guanyu jingcha xueke yanjiu zhong jige wenti de tantao”) PSUJ Vol. 101: 149 - 155 (2002) (“Ben tu hua” or “domestication” of foreign ideas and practices, privileged Western ideas over domestic ones. This resulted from an uncritical acceptance of positive science by the academic community in the 19th century, as championed by England, France, German, Italy and the United States. With the decline of European and United States’ influence in world affairs and the emergence of post modernism and multi-culturalism, the positive scientific model’s “objective” view of the world is increasingly being challenged by culturalists and ridiculed by the post-modernists. Since policing research is a local knowledge (“di fang sheng zhishi”) (C. Geerz), foreign and imported police ideas and practices must be subjected to local adaptation before used. Specifically, police studies must reflect and be informed by Chinese historical, social and cultural characteristics. Police research must focus on China problems and issues. Police research must be an independent exercise and be critical of status quo. Police research must make independent contribution to China policing and purge of foreign
A different approach to the study of Chinese law is in order. One proposal is to have bi-cultural researchers who are at ease in two cultures. It is observed that intimate knowledge with culture and good facility with language allows a researcher to reach back into forgotten historical memory, dig deep into obscured cultural meaning and access to latent emotional feelings to provide a more complete and holistic picture of matters under investigation and materials to be interpreted. While Huang made clear that his preference for bi-cultural researchers is not influences, entirely. (pp. 153-4).

In other areas of research, archives are opening up for inquisitive scholars, Philip C. C. Huang, "County Archives and the Study of Local Social History: Report on a Year's Research in China," *MC* Vol. 8; (1) 133-143 (1982).

Philip C. C. Huang, "Theory and the Study of Modern Chinese History: Four Traps and a Question," *MC* Vol. 24(2): 183-208. (Empirical historical research is better than theoretically driven one in understanding China. Theory might be too simplistic, ideological or ethnocentric to obscure in capturing true conditions in China.)


For a rejoinder see, Prasenjit Duara, "Response to Philip Huang's "Biculturality in Modern China and in Chinese Studies" *MC* Vol. 26 (1): 32-37 (2001) (Bi-cultural approach provides no escape from globalization of knowledge, universalization of culture, and commodization of ideas, especially when the underlying indigenous culture (China) (willingly or by force of circumstances, consciously or unconsciously) increasingly takes on a modernized look and feel.) In response to Duara, my sense is that the transformation of indigenous culture, while a distinct possibility, does not mean that local knowledge and indigenous understanding is no longer necessary for researcher. First, cultural transformation is an incremental, interactive, and intergenerational project. Japan today still enjoys a village like culture, in many respects. David Bayley, *Forces of Order* (University of California Press, 1991). Second, local memory is cumulative and become part of a bi-cultural person’s persona, once assimilated. All understanding of a culture will relate back to his/her exposure to a culture, especially when one is being brought up in a certain cultural milieu in time and place. The culture will change, but ones cultural identity and memory stays, and keep renewing and reinventing itself. This cultural exposure become ones life experience and provide the context, and facility, for one to make sense of what one sees and hear in later life. Berman, Harold J., "The Historical Foundation of Law" *Emory Law Journal*, Vol. 54 (2005). Learning a language and culture is thus learning how to negotiate in a given social milieu; what things mean and potent. Thus to understand a language is also to under life as experienced in a group.) Michael W. Nicholson, "Abusing Wittgenstein: The Misuse Of The Concept Of Language Games In Contemporary Theology," *JOURNAL OF THE EVANGELICAL THEOLOGICAL SOCIETY* Vol. 39(4): 617 – 630 (1996).
meant to exclude “foreign” researchers, it is also clear that Huang thought that researchers locally born and bred has a natural advantage over and above those who just learned about China by education and through emersion.

Another proposal is to supplement foreign view of China reform in general and legal reform in particular, counter-balancing them with internal perspectives, domestic voices and grass root understanding. This approach is what is sought here.

156 With an abiding faith in U.S. ideological exceptionalism (democracy, equality, rule of law) and an equally strong conviction in scientific universalism (rationality, objectivity, generalizability), American scholars have a tendency to examine societies everywhere under a microscope, in order to validate the absolute superiority of American theories or downplay the possible contribution of non-American paradigms. Lucian W. Pye, ”Asia Studies and the Discipline,” PS: Political Science and Politics Vol. 34(4): 805 – 807 (2001). (“But does anyone believe that American practice can be treated as the norm for everyone? Or even for any other particular country. (p.805)

157 In 1999, the author started with other interested Asian police scholars from Taiwan, PRC, Hong Kong, Korea the Asian Association of Policing to bring indigenous voices to the study of Asian policing. “Closing Remark” (AAPS Presidency Inauguration Speech) AAPS Third Annual Conference: Asian Policing in the 21st Century, Open University, July 29, 2002. Co-sponsored by Center for Criminology, Hong Kong University, Open University, Chinese University of Hong Kong. Kam C. Wong, Asian Policing in the 21st Century (Proceedings) (Hong Kong: AAPS, 2002) (There is a need to study policing from a local perspective and with indigenous data, looking at policing from inside out and bottom up. Comparative policing should be taught with local content and within local context.) Many of the recent China political science and police studies research and writing are by first and second generation China scholars who are educated in the West, e.g., Wu Guoguan a Princeton political scientist from Victoria University was within the inner circle of PRC Premier Zhao Zhiyang before his demise and Fu Hualing who single handedly plowed the field of China police studies in Hong Kong University in the 1990s was educated at University of Toronto and a PRC police instructor in the 1980s. David Shambaugh, ”Keeping Pace with a Changing China: CQ at 35.” CQ No. 143: 669-676 (1995) (The China Quarterly now has outstanding contributions from mainland China emigrant who bring with them personal experience and nebula (internal) documents), connection within China and contacts inside institutions.)
V

ICO should be assessed with Chinese jurisprudential principles

Chinese jurisprudential ideas and ideal: Qing Li Fa

The legal concepts and jurisprudential principles of “Qing” “Li” “Fa” (情理法) (hereinafter QLF) or “ren qing” (“human nature/relation/compassion”) vs. “tian li” (“heavenly principles”) or “qing li” (“accepted code of conduct”) or “lun li” (ethical principles) vs. “guo fa” (“state law”) are dominate ideal and dominating ideas behind Chinese legal qua general culture.

QLF are embedded and inter-related cultural tenets, espoused and dynamic ethical percepts in imperial China which informed

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158 One of the major difficulties in comprehending, interpreting and applying QLF, as jurisprudential concepts is that “qing” and “li”, like justice and fairness, means different thing to different people. Furthermore the weighting, prioritizing and balancing of QLF in arriving at an optimal QLF decision is not something which everyone can agree upon. In fact, different mixes of QLF in various decisions can satisfy most people. Conversely, any imbalance of QLF, no matter how slight, might attract detractors and dissenters. It goes without saying that any change in findings or interpretation of facts might affect outcome.

159 What is deemed reasonable. PYCED, p. 676R.

160 What is deemed reasonable. PYCED, p. 556L.

161 PYCED p. 449L.

162 In the popular culture, QLF has often been routinely borrowed to justify ones’ action; oftentimes contrary to or deviation from what QLF truly entails or actually requires. In other circumstances, people have failed to grasp the true meaning of QLF. For example, QLF has been equated with human emotion – reasoning – law.

163 LF is inter-related in the following senses: (1) “qing” vs. “li” vs. “fa” are not independent from each other, conceptually, theoretically and operationally. For example, conceptually “qing” or “rengqing” (human nature) while born to human is shaped by law of nature (tian li) and conditioned by rules of culture (li). (2) The formulation and content of “li” is less an arm chair contemplative product as it is a grounded intuitive, experiential and empirical exercise. In this regard, “li” must cater to natural forces, social conditions, human nature, life circumstances and situational factors. (3) In terms of application, what is proper “li” is never a stand alone ethical-principle derivative (as with categorical imperative of Kant) but very much a factual ethical product (much like determination of negligence).
social practices and guided personal conduct. As jurisprudential
principles, QLF considered independently and as a whole is central to the
formulation of legislation, implementation of law and dispensation of
justice, and indeed all life choices, in imperial China.

The import and impact of QLF in Chinese culture and social
intercourse can be gauged by looking at popular culture practices. Chinese people then as now make evaluative social, economic, political
or legal judgment of all kinds as “he qing he li” (compatible with human
nature and reason) or “bu he qing li fa” (not being compatible with

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QLF is dynamic in many ways. (1) QLF are not static concepts. The content and
contour, meaning and feelings of QLF, individually and collectively, changes with
time, people, place and issues. (2) QLF interacts with each others dialectically and
continuously in shaping content and defining practice. (3) Outcome of QLF is
contingent on the totality of material context and all aspects of prevailing
circumstances. (4) Process of QLF is as important as standard of QLF in shaping
outcome. Change in process leads to change in outcome. (5) There is no one correct
or best QLF disposition, but many acceptable QLF outcome.

A legitimate question is raised as to the content and viability, priority and mix,
identification and subscription of QLF in modernized China, Westernized Hong Kong
or globalized Taiwan. Like questions can, and should be raised about how QLF fare
within diverse population in Hong Kong, e.g., Hong Kong belongers vs. new
immigrants, Western educated vs. domestic breed, professionals vs. blue collars.

A key word search with “情理法” on yahoo.com turned up 23, 600 items. A search
on Google – Scholar turned up 240 items.

“Qing li fa” in management (“管理中的情理法”) (Modern business management can improve with “qing” “li” “fa”. Q is human
sentiment and individual feelings. L is reasoning. Fa is fundamental principles
adopted by the company

E Wang Yun, “Qing li fa conflicts in maintenance disputes) (赡养纠纷的情理法冲突)

Law in Oriental Eyes April 26, 2007. (In China there is a venerable tradition: “old
people are to be supported” (“老有所养”). This is changing with time and with the
breaking of old social and moral order. This sea change of culture, custom and attitude
affects how old people should be taken care of. The law has to provide for the old
people when they were maintained by their child out of qing and li in the process.
This raised a whole host of QLF issues the law has yet to satisfactorily resolved For
example, maintenance issues arouse because one or more children do not want to
assume responsibility due to lack of education, lack of ability, felling unfairly treated
by parents over estate dispersal, unequal burden because only male has to pay
maintenance, parents vs. children discord.)

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The ultimate objective of law makers and judicial officials was to actualize QLF as a way of life, i.e., establishing a harmonious and peaceful world wherein the ideas and ideal Confucius hold sway. Everything should be found in its proper place and intercourse with each other should be conducted in a harmonious and well balanced manner without conflicts or disputes.

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169 Huang Yongmin, “Hexie shehui yujing xia de “zhifa ru shui” linian ji qi shijian” (The concept and practice of “implementation of law like water” within the language of harmonious society”) Jaingcha Fengyun (检察风云) 2007-03-05 12:04:15 (The vision of a socialist legal system is to achieve harmony. This lofty goal is made unattainable by litigation explosion. People are taught to fight for their legal rights at all costs. They also resort to court to resolve interpersonal problems as a first instead of last resort.) http://www.cnjccn.com/article/2007/0305/article_329.html

170 Gu Yuan (顾 元), “Conflict and reconciliation between following and not following the law: balancing qing and fa “Xun fa yu beifa de maodun you tuoxtie,zhuo yu fail zi ping” http://www.legalhistory.com.cn/ 2007-2-16

171 The Chinese character for “law” (“fa”) consisted of two radicals. The radical to the left represents water and the radical to the right represents wash way. The function of law is thus to wash away bad things with water and return to normality, tranquil and peaceful. Thus justice to Chinese is leveling of upheaval to a prior state of tranquility, much like the natural tendency of water. Water will return to flatness in due course. Huang Yongmin, Hexie shehui yujing xia de “zhifa ru shui” linian ji qi shijian” The concept and practice of “implementation of law like water” within the language of harmonious society” Jaingcha Fengyun 2007-03-05 12:04:15 Xu Zhongming, Precedents, stories and judicial culture of Ming Qing dynasties (Anli, Gushi yu Ming Qing shiqi de shifa wenhua) (Beijing: Falu Chubanshe, 2006), pp. 336-339.

172 Liang Zhiping, Seeking harmony in natural order (“Xuzhao zhiran zhixu zhing de hexie”) (Zhongguo zhengfa daxue chubanshe, 1997).
Chinese philosophers have long been interested in QLF as jurisprudential principles. This is particularly so with the publication of the book “Qing, Li, Fa and Chinese People” in 1991.

Research and publications to date has focused on the nature and characteristics, role and functions, theory and practice, conflict and resolution, impact and implications of QLF. However, notwithstanding importance QLC, there are very few occidental legal or jurisprudential publication on this subject matter. This lack of Western literature hampers our understanding of Chinese (Hong Kong) law in theory and practice.

173 Huo Cunfu, “The cultural traits and trace of traditional Chinese legal cultural – the origination, development and prospect of Qing-Li-Fa,” Legal System and Society Development Vol. 7(3) (2001). (The article traces the origin and development as it details the nature and characteristics, theory and practice of QLF as jurisprudential principles, cultural ideas and philosophical ideal.) Fan Yu, “The Contradiction and Integration of Qing Li Fa) Xinhua Wen July 7, 2003.


174 Fan Zhong Xin, Qing Li Fa Yu Zhong GuoRen (QLF and the Chinese) (Beijing: Chinese People’s University Press, 1992).

175 Wu Qin-dian “Revelation about traditional Chinese law which accommodate qing li fa” (“Qing lif fa jian ron de zhonguo gudai falu ji qish”) http://www.legalhistory.com.cn/ 2007-2-16 Updated Time : 2007-2-16 (Qing Li fa is revealing of the nature and characteristic of Chinese legal system, in culture and operations.)

176 “Implementation of law like mountain” (zhifa rushan) (that is called for by rule of law regime) is incompatible with “Implementation of law like water” (zhi far u shui) Huang Yongmin, “Hexie shehui yujing xia de “zhifa ru shui” linian ji qi shijian” (“The concept and practice of “implementation of law like water” within the language of harmonious society”) Jiaingcha Fengyun 2007-03-05 12:04:15 (The abstract, general, universal, and inflexible of the law cannot deal with every concrete, individualistic, particularistic and evolving life situations. The court must resort to negotiated justice and QLF to make litigants happy.)

177 Judges should take into account the effect of consequences of decision on litigations directly, other people indirectly and the society ultimately. For example what is the impact of judicial decision on relationship of parties or final settlement of disputes. Id.
The supremacy of “qing” over “li”

In imperial China, human conducts are judged by and regulated with “li” (rites) inculcated through “jiao” (education) and not with “fa” (law) enforced by means of “xing” (punishment). Law is established to supplement the rites, and brought into play as a last resort. Doctrinally, this is called the Confucianization of the law.\(^{178}\)

Confucianization preached that rites provide the law with content and spirit. Law is used to promote Confucius ideas and ideal. In judicial practices, law is based on Confucius teachings and Confucius teachings are resorted to in interpreting and applying the law. This is called “jing yi jue yu” (deciding cases based on Confucius teachings).\(^{179}\)

QLF as legislative goal

The Preface to Tanglu Shuyi (Commentary to Tang Code (653 AD) observed that: “Law is established at Tang, but it should represent the essence of human nature (“tongji renqing”) and the dynamics of legal reasoning (“fali zi bian”). (Tang) Law should not stop (evolving) with


\(^{179}\) “jing yi jue yu” is also refer to as “Chunqiu jue yu”. “Chunqiu” (*Autumn and Spring Annals*) of course is one of the five classics (wujing) authored by Confucius to teach his followers. “Chunqiu jue yu” as complete Confucianization of law was achieved in the Han dynasty (206 BC – 24 AD). The basic principles of “Chunqiu jue yu” is cases are decided upon with reference to Confucius doctrine, starting with determining the “heart” and “motive” of people, not just intent, act or harm. Ma Zuowu, *Chinese traditional legal culture* (Zhongguo gudai falu wenhua) (Jinan daixu chubanshijie 1998), pp. 136 – 142.
In essence, Tang Code, as with all laws, should reflect and reinforced “renqing” (as human nature) and “fali” (as moral principles).

During the Ming dynasty (1368–1644), Liu Weiqian, a counselor to Zhu Yuanzhang, the first emperor of Ming Dynasty compiled the <Jing Ming Lu Biao> to advise Zhu on how to establish the Ta-Ming-Lu. Zhu observed: “Your honor considers matters broad and deep. Law should be made in accordance with principles of heaven above and compatible with human nature below. These standards should last for hundreds of years.”

Finally, in the Preface to “Great Qing Code”, it was said: “The emperor … ordered officials to take the laws …. and edited the same. Law should be made consistent with heaven’s principles and acceptable to human nature.”

As above legal text made clear, laws in imperial China must flow from natural law above (tien li) and derive from human nature below (renqing).

**QLF as adjudication standards**

“*QLF*” was first adopted to guide adjudication. Historical

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\(^{180}\)《〈唐律疏议〉序》云：“然则律虽定于唐，而所以通极乎人情、法理之变者，其可画唐而遽止哉？”

\(^{181}\)明人刘惟谦等《进明律表》：“陛下圣虑渊深，上稽天理，下揆人情，成此百代之准绳。”

\(^{182}\)A number of misconceptions about Chinese legal system and judicial process need to be corrected. First, Chinese judicial process is an arbitrary one, not confined by ascertainable rules, informed by objective facts, and given to arbitrary decision, i.e., totally devoid of internal rationality and external accountability. Nothing can be further from the truth. Max Weber described Chinese justice as non-rational - Kadith justice. In fact, Chinese officials were closely supervised and tightly regulated in
records made clear that the term “QL” started to be widely used in Song – Ming – Qing dynasties to decide cases.

Originally, “qing” refers to “anqing” (facts of case) or “shiqing” (cause of case) or “zhenqing” (truth of a case). In order to decide a case correctly, the judicial officers must ascertain the facts and circumstances of each case, i.e., “anqing”, with an eye towards establishing “zhen qing” or truth. With the ascertainment of “zhen qing” (truth), the “yuanqing” (ultimate cause) of a case can be established. With the discovery of truth and finding of cause of a case at hand, the case is ready of resolution, at its roots and once and for all.

Why is there a need for “quanqing” to be found? In imperial China, personal conflicts were viewed as a social – structural problem, not just an inter-personal dispute. In order to satisfactorily resolve a dispute once and for all the magistrate must find out all the pertinent facts: the immediate cause, the ultimate cause, all contributing factors and every mitigating and aggravating circumstances. This means that the imperial officials must not only look at immediate transactional facts of the case – who did what to whom and how, but also seek to understand the historical context, prevailing circumstances, situational dynamics, personal background, mental disposition attending the case before he could decide. In essence, the magistrate must discover the true facts and

what they can and cannot do. Imperial China was an administrative state in pursuit of a heavenly mandate on earth by an absolute emperor. The emperor ruled by and through his officials. This is called “li zhi” or governing through officials. Under “li zhi” officials are strictly regulated by law and accountable to the emperor. The yushi functioned as the emperor personal envoy in checking on the officials. 183 “Zheng” means Marx real. “Qing” means circumstances or feelings. “Zheng Qing” thus mean “real situation” or “state of affairs” or “true feelings or sentiments”. PYCED.
find the root cause of a case in front of him.

It is postulated that the discovery of (true) facts and (ultimate) cause contributes to real understanding which led to human compassion (“renqing”), the ultimate objective of adjudication. In this regard Confucius said in “Lunyu Zichang”: “If people up top lose the way, the people below will be in chaos. If people truly understand the situation they (officials) would feel sad instead of happy.” Ignorance of facts and circumstances of a case would likely results in the miscarriage of justice, e.g., blaming the exploited and punishing the oppressed citizens for government malfeasant.

Attaining ultimate truth (“yuan qing” “原情”) allows Chinese officials to pursue “yuan qing ding guo” or “finding liability based on facts and circumstances of a case”. Particularly, the determination of every case was made to turn on the subjective motivation (“dong ji”) of a person and objective circumstances (“qingjie”) in a case.

Yuang Zhang Yanghao (1270 – 1329) who has worked as a local magistrate, imperial censor (yushi) and Secretary of Board of Rite (Libu Shangshu) observed that people are basically good, they turned to criminality because of forced circumstances, e.g., lack or education or

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184 《论语·子张》：‘上失其道，民散久矣。如得其情.
185 “Yuan” “ben yuan” the original root or source. Actually, “yuan” derived from the original words phrase “shui yuan” the source of river or stream. (In “shui yuan”, the word yuan has a radical of water on the left”). Hanyu Dacidian (Hanyudacidian chubanshe, 1986), Vol. 1, p. 927L. Yuan has been interpreted as “yuan ben” unprocessed or origin, not mediated, interpreted, or nowadays “spinner”. (928L). “Yuan Qing” thus mean the facts and circumstances of a case (“ben qing” or “qing you”) (933R).
186 P. 933 R.
187 PYCED, p. 161R. “motive” or “intention”. Reasoning behind action.
188 “Qing jie” 556L. Circumstance of a case.
opportunity. “Who can resist temptation when they are poor and struggle for survival.” ¹⁸⁹ For example, when parents are starving and not properly clothed, when family members are sick and hungry, and when wife are sad and despondent, the family head, husband or children are compelled to act, even if it is against the law. If that should be the case, the government should be showing magnanimous compassion to the people, instead of imposing draconian punishment on the offenders.

To be compassionate is to put ourselves in the shoes of the offenders – seeing things from their perspective and felling emotion as they did. This is where “renqing” (or “ren zhi chang qing” comes in).¹⁹⁰ The underlying assumption is that people would not resort to crime unless they have to. The family bears responsibility for moral education, community bears responsibility for social supervision and state bears responsible for maintenance. Crime happens because failure in one or more these necessary components to good order and discipline in a community.¹⁹¹ In this regard, it was also said that:

“Common people are more likely to be alienated (易于散) because those above (authority) have failed to purse an integrative policy. In cases of hunger and coldness, alienation result. In the case of too many drafts of services, alienation result. In cases of too much levy and taxation,

¹⁸⁹Yuang Zhang Yanghao (1270 – 1329)《Advise for Cultivating Citizenry》(Mu Min Zhong Gao). Zhang has worked as local magistrate, imperial censor (yushi) and Secretary of Board of Rite 元张养浩《牧民忠告》
¹⁹⁰“Ren” is human. “Zhi” is a possessive verb. “Chang” is routine or normal. “Qing” is condition. This “ren zhi chang qing” mean normally how things work out or how people behave. PYCED 573R..
¹⁹¹See “Crime Prevention” and pRC Comprehensive control. Chinese see the wold as intgated and inte-depending.
alienation result. If people are alienated, there is no mutuality of feelings, without feelings there is no obligation, without obligation, there will be conflicts and litigations. People try to take advantage of each other. This is why officials should seek out the facts and circumstances before seeking punishment. Feeling sad and sorry, and happy. Sad because of misfortune of the downtrodden, Sorry because of the lack of knowledge of the offenders. Not happy and content with ability to control the people. The terms “qing you ke yuan” is best summed up as “guilty but excusable”.

As an illustrative example, it was recorded in “History of Sung. Criminal Law Notes” that during the rein of Song Emperor Zhenzhong there was a drought. People robbed the granary. This was a capital offense (弃市). A total of 318 Sazhou residents were sentenced to death. Emperor Zhenzhong remarked: “It is sad to rob rice. It is sick to harm and rob. Even though when done as a result of lack of food to survive.” Since then judicial officials were admonished to “jin qing” to decide cases, i.e., to be empathetic to the plights of the offenders.

Thus, in deciding cases, the judicial officials were to follow two rules: “tui ji yi yiwu” and “she zhuan yi tan qing.” “Tui ji yi yiwu” is to put oneself in the shoes of others, i.e., empathy. “She zhuan yi tan

192明邱濬《大学衍义补》卷一百O六.
193 The De
194 Sungshi Xinga Zhi《宋史·刑法志》
195 Song Zhengzhong (宋真宗) (968年~1022年)
196 仁宗曰:‘饥劫米可哀,盗伤主可疾。虽然,无知迫于食不足耳。
197断狱者“尽情”察狱（即尽己“情”以断狱.
198 http://www.legal-history.net/articleshow.asp?c_class=5&id=1627&c_page=1
199 “推己以议物”
200 “舍状以探情”
“qing” is to look beyond the surface, i.e., seeking the truth. The first is a call for proper judicial disposition. If officials really care and understand the people, who are their boss, they must be share in their outlook (perspective) and be solicitous of their welfare (sensitivity). This disposition, once adopted, would make the officials see things the people’s way. In so doing, the officials would be advocates of people’s interests instead of overseers of people’s fault. The second is a judicial technique. It calls for investigating a case in depth and leaving no stone unturned. It also admonishes the magistrates to look into contextual matters, ultimate cause(s) and contributing factor(s) in helping with the understanding the case, in terms of what, why and how things happened.

What is “qing”? 

“Qing” has diverse and rich cultural meanings. According Hanyu Dacidian, “qing” can mean any one of the following: First, “gan qing” (“emotion or feeling”). Xunzi (c. 213 BCE) observed that people have emotions and are given to “hao” (love), “e” (evilness), “xi” (pleasure), “nu” (anger), “ai” (sadness), “le” (happiness); Second, “benxing” (“natural characteristics/instinct/disposition”); Third, “yiyuan” (“aspiration/desire”), Fourth “qingyu” (“sexual passion”),

202 Id.p. 576L. Also “qing gan” PYCED p. 536R
203 “Xunzi. Zhengming”
204 PYCED, p. 29L.
205 PYCED, p. 824R
206 PYCED, p. 556R
Fifth, “qingli” (“reasonable” or “accepted code of human conduct”).
Sixth, “min xin” (“people’s aspiration/feelings”).

In Chinese agrarian society of old, “qing” is a most important consideration. According to folklore “qing” originates from the “heart” (xin) and afflicts everything we do. It is fair to say without “qing” social intercourse stops.

In the reading of imperial judicial decisions there were many ways the word “qing” was used, depending on context, circumstances and situations:

1. Qing as “an qing” “zhengqing” and “yuanqing” The first and foremost task of a judicial office is to “an qing” (facts of case) “zhengqing” (truth in case) and “yuanqing” (cause of case).

2. Qing as “renqing” The most common is to talk in terms of “renqing”. This refers to ordinary disposition of man (ping fan zi xin - 平凡人之心). To know about “ren qing” allows us to calculate what others would think and do in like circumstances. People can anticipate and make allowance for each if people understand each other. It also set forth a reasonable conduct code for people to follow.

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207 Id.p. 556L
208 Id.p. 473.
209 Western culture, reinforced by jurisprudential principle, promote autonomous individualism. We are not expect to anticipate and make allowance of other people do. This is a reactive model, i.e., react to what other people do, instead of proactive model, i.e., anticipate what others do in adjusting our own actions.
(3) *Qing as qing yi.* The word “qing” also refers to good relationship between people, e.g., “qing yi” (friendly feeling), 210 “qing mian” (consideration for others feelings) 211 This is commonly refers to as “renqqing” (human feelings, sensitivity, sympathy.). 212 “Qing yi” is the basic of Confucius moral principles.

(4) *Qing as lun li* For most of the time the use of work “qing”, refers to the moral principles (lun li -伦理) of “renqqing” (人情), 214 more generally “renqing shigu” (人情世故) or worldly wisdom, 215 local conditions and custom (defang fengtu renqing 地方风土人情), 216 custom and habits (fengsu xiguan -风俗习惯). As a result “renqing” carries with it large Confucius influence. In some cases “qing li” reference to logical deduction (loji duili 逻辑推理) or common regulatory principles (guilu zheng de daoli - 普遍规律性的道理). 217

What is “li”

“Li” can be translated into “dao li” meaning reason; alternatively,
justification for doing things, or “you dao li” (possessing of reason). Reason or justification of actions taken or things done is informed by culture, and follow bounded rationality. It goes without saying that what is reasonable in one place, with one person, at one moment, within one community, for one culture may or may not be reasonable for another.

“Li” is also called “qing li” or what we can expect from a person given his or her life circumstances, and situation factors. This recalls the “reasonable man” standard in tort law. “Qingli” can be two kinds:

First, “qingli” is what people would or would not do under like circumstances. What people would do depends entirely on what people are born with naturally or have been nurtured into. Thus it is reasonable to expect a son to conceal his father’s crime from the official. It is also reasonable for irate husband to kill wife who cheated on him. Loyalty to father and jealousy of wife are all human nature. Sometimes we called this “qing bu zhi jin” (one cannot resist ones nature).

Second, “qingli” also refers to collective feeling of groups on certain issue. Collective sentiments can be entrenched, as in customary norm, or they can be temporary, as in the case of public opinion. Thus, it is reasonable to expect a person to side with his clan against another feuding group.

Finally. “tian li” refers to heavenly way, i.e., natural law of how and why things work the way that they do. In the eyes of Confucius, “tianli” agrees with Confucius “lun li” (morality and ethics), based on structured relationship between people: emperor vs. officials, father vs. son, husband vs. wife; brother vs. sister, friend vs. friend, and ethics, “li” (rites), “ren” (benevolence) and “yi” (loyalty).
What is “fa”  “Fa” means law in China. In traditional China “fa” is equated with and amount to “xing” or punishment, ranging from war like extermination (and associated enslavement) to torture to imprisonment. Since punishment can be inflicted by the emperor (by and through the officials) and used by the family (from head of family to chief of clan), “fa” refers to coercive punishment imposed by “guofa” and “jiagui”, incorporating “tianli” from heaven above (as reflecting natural/moral rules and as required by Confucius teachings) and “qingli” from earth below (as reflected in customary rules and as required by family expectations). Thus understood, “fa” encompasses positive rules (Tang Code, “jiagui”) as well as informal norms (Emperor’s decree, parental expectations), moral (Confucianism) and conventional (custom).

How judge apply qing li fa

What is being called for to be a QLF judge in imperial China? When resolving disputes or rendering judgment, Chinese imperial officials started with a search for the truth before exercising discretion, as guided by law. Song Emperor Gao Zhong has called for “yuan qing ding zui” (determining guilt based on true facts): “Once a law

218 Liu X Jun(劉馨珺), “A discussion on the use of ‘qing li fa’ in ‘prison litigations” (Lun Songdai ‘yusong’ zhong ‘qing li fa’ de yuyong) (“論宋代「獄訟」中「情理法」的運用”). Professor Liu studied judicial opinions from Song dynasty to under the principles and application of QLF, inductively.

219 Imperial Chinese officials closest to the people are likely to be the local magistrates. The magistrates were called “fu wu guan” (father and mother official). Like parents they take care of all the needs, wants and problems for the people. In deciding cases, the magistrate do not only apply the law and decide right or wrong. Instead they try to resolve the disputes between the parties with an eye toward solving the problems once and for all. They are responsible for educating the people, making them better people with higher moral standing, making the society a better one in the process.
is promulgated it will never change. However, facts and circumstances are always different. Since law is to forestall evil, (judges need to) ascertain all the facts before positing guilty. They need to get the truth of the matter.”

“Yuan qing ding zui” (deciding guilt based on true facts) requires the officials to discover the cause of the incident and motive of people, before passing judgment.

First, by understanding others (motives) we will have understanding of their action, and with that, naturally, have more identification with and compassion for their plight. This is the doctrine of “yuan qing shi you ke men”. In essence, the more we know the more we understanding, and the more we understand the more we will can identify - empathize and sympathize - with the offender.

Second, the more we know, the more we can see the person’s act as normal instead abnormal. People have their own reasons, in accessible to others and incomprehensible to society, in doing things the way they do. Epistemologically understanding requires knowing more, judging less.

Third, a person’s liability and punishment should be determined with reference to motive or what comes from the heart (“xin”). Well intended action should not be punished, or at least punished less. Evil intentions are punished with or without being manifested in action.

Fourth, in passing judgment the yardstick is “ren qing” and “tienli”. The issue here is: did the defendant do something a normal person would do in like situation, or what comes naturally to a person of similar status and under like circumstances.

Fifth, officials were required to apply law on the books to facts in

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221 Id. 6.

222 There is an issue as to whether “ren qing” as a reasonable person standard is to he set set empirically (custom) or prescriptively (Confucius). Id. p. 7.
the street; finding concrete individual justice with abstract general justice principles. This required the fitting of sterile, monolithic and inflexible laws to divergent contexts, moving events and dynamic situation. This requires officials to differentiate between people and determine the existence of mitigating and aggravating circumstances, that ultimately bears upon moral culpability, social accountability and criminal liability. Specifically, the officials should treat offenders lightly when circumstance dictate, i.e., “qing qing fa zhong” (literally “facts light and law serious”). In “qing zhong fa qing” cases (literally “facts serious and law light”), the officials were supposed to levy more punishment.\footnote{223}{Id. 9.}

Finally, officials followed principle of compassion, i.e., “zui yi cong qing” (treat doubtful cases lightly). In essence, if in doubt, offenders should be spared heavy punishment.\footnote{224}{Id. p. 12.}

\textit{Applying qing li fa: A demonstrative case}

A breach of marriage contract case in the Qing dynasty published recently in China help to demonstrate and make clear how “qing” “li” “fa” were applied to resolve a breach of marriage contract dispute.

The case happened Qing dynasty, during the Emperor Daoguang rein (3 October1820–25 February 1850). A young lady named Wang lived with her mother after his father’s death. She was engaged married to a young man in the same village. Soon after the engagement, Wang fell ill. The doctors in the village could not help her. Her mother was very worried for her health. One day, a young doctor named Pang came by the village. Pang treated Wang and nurtured her to good health.
Wang was grateful to Pang and felt in love with him. Since Wang’s family was poor, Wang’s mother arranged for Wang to marry Pang to settle the medical charged. In the meantime, Wang and Pang had consummated the marriage.

Wang’s fiancé found out about Wang and Pang’s relationship. He went to the local magistrate to content Wang – Pang’s illegitimate relationship. Wang threaten death if she was forced to marry her fiancé. The magistrate was confronted with a difficult case of qing li fa.

In law Wang has broken a marriage engagement. However, Wang and Pang were truly in love, unintended and by force of circumstances. They have also consummated the matrimony, all be it illegally. In essence, they are def facto husband and wife.

The magistrate decided the case as follows: Wang and Pang stayed married. Pang has to redeem himself from punishment by paying Wang’s fiancé 10,000 dollars. He also has to return to the finance the 3000 dollars of bride price had and received.

As explained in the commentary of the case, Pang, Wang and her mother have clearly violated the law by breaching an engagement, intentionally. Pang and Wang has engaged in immoral and illegal sexual activities while not married. The finance on the other hand had done nothing wrong. Legally, Wang/Pang should be punished and the finance should be made whole, i.e., getting Wang back. The moral and legal order must likewise be vindicated.
However, the magistrate must consider the facts and circumstances to take into the qing, li, fa considerations in the case. First, here is “ren qing” and “fa li” to be considered.

In terms of “ren qing”, it is most natural for Wang to fall in love with Pang who saved her life. Pang has given her a new lease on life. Wang was naturally appreciative of all the care and attention bestowed.

In terms of “qing li” and “tian li” it is both naturally reasonable and morally right for Wang to marry Pang to repay him personally and emotionally. Chinese culture promotes the idea of “bao”. It was also quite natural for the mother to repay the medical debt by marrying Pang off. Wang threatened death is a natural thing to do. Wang cannot love two persons at the same time. Her love with Pang is more real and deep. On the other hand Wang’s relationship with her fiancé was written on paper. Were Wang and finance forced to get marry they will end up with a broken family. Wang’s threat was also an honorable thing to do. Wang could not see herself having another husband. Wang and Pang was already married Pang. They were de facto husband and wife!

The best way to accommodate Q L F was to punish Wang and Pang with a heavy punishment, monetary. The principles of the law must be vindicated. No one will be tempted to violate the law again. Pang has the benefit of Wang at the expense of the fiancé, he must stand ready to make the finance whole, by compensatory and punitive damages.
V
ICO is a flawed legislation

*Failure of “li”*

In terms of “li” or “qingli” the question to be asked is what is “reasonable” and “prudent” for Hong Kong people to do in light of the threat we face (security-terrorism) and risk we take (interest-liberty). For *QLF* analysis, it is not enough to conclude that ICO is needed to secure Hong Kong from criminals or protect Hong Kong people’s rights. We must look broader and deeper to provide for all the security needs of Hong Kong, existing or prospective, predictable and contingent.

From a law and order stand point, ICO fails to address two emerging criminal problem and compelling security needs to Hong Kong, i.e., cyber crime and terrorists acts.

In terms of cyber crime, it is clear that traditional interception and surveillance powers possessed by the HKP are not adequate to deal with the emergent problem on hand. In point of fact, the ICO was not designed to address computer crimes problems, issues and concerns, explicitly and directly. Since Hong Kong is an established international commercial center and it is the government’s policy to make Hong Kong the cyber city of the world, it stands to reason (“qingli”) that the ICO should focus on dealing with police cyber power issues.\(^{225}\) The failure to do so certainly detracts from the utility and effectiveness of ICO as a

comprehensive and forward looking crime fighting tool.

As a start, a properly drafted ICO, in order to meeting cyber crime investigative needs, must address a number of unique issues posed by the virtual world.²²⁶ What is the authority of spouse, parents and employers to consent to search computer?²²⁷ What is the privacy expectation of netizen subscribing to network services?²²⁸ Can HKP keep surveillance on BBBs with or without sysops permission?²²⁹ What is the scope of a warrant search of computer when the computer is connected to other devices, e.g., external disc, or other depository of data on LAN or GAL?²³⁰ Should computer search be conduct on site or should computers be seized?²³¹

In terms of political crimes – treason or terrorism, the ICO is equally silenced. If there is ever a compelling need, HKP needs structured interception and surveillance authority to adequate deal with terrorism and subversive activities to Hong Kong or Chinese government, especially after 9/11.

Hong Kong is an international city. Many countries commercial and political interests are represented in Hong Kong. Hong Kong is also

²²⁸ Ibid. P. 23.
²²⁹ Ibid P. 25.
²³⁰ P. 26.
²³¹ P. 56.
an open city. People from all over the world, with different political ideology and religious conviction can come and go at will. Terrorism is a real threat to Hong Kong multi-national interests. Given the new organization structure – small cell, autonomous operation, independent command, fanaticism culture, advance (WMD) technology, global (internet) communication capacity of post “new terrorism”, the HKP is ill equipped to deal with them.

The ICO does not go far enough in meeting emerging security needs of Hong Kong. For example, since the small terrorists cells operate independently with few external links and little financial support, the HKP must use electronic surveillance or mass data mining to keep track of them. Currently, under IOC warrant mass data mining operations are not allowed.

*Failure of “fa’*

The ICO followed Hong Kong law in positive way and formal manner, only. In effect, ICO failed “guo fa” in spirit and ignored customary norms, in process and content, altogether. Under Chinese concept of ‘fa”, legislative process is there to make sure that the voices of all the interested parties – however marginal or powerless - are respected and taken into account in material and discernible ways , e.g.,, the officials who are charged with the implementation of the law (here police operations) and the people who lend their authority and legitimacy to the law (here community sentiments). During the entire ICO process, the parliamentary rules were used to shut out police input, silence minority outburst and otherwise marginalized grass-roots needs and concerns. In essence, “legislative due process” is not being followed.
ICO also violated “fa” in ignoring the roots of law (communal needs and public sentiments), moral of the law, multiple realms of law (PRC law, common law).

VII

QLF and rule of law compared

The article is a first attempt to assess the merit of ICO with venerable, popular and entrenched Chinese jurisprudential principles. In so doing it argued that the ICO legislative process and statutory content did not satisfy QLF jurisprudential standards in two critical respects: First, the Hong Kong government failed to investigate all the (relevant) facts before legislating, i.e.,, failure in “qing”. Second, the ICO failed to address legitimate law enforcement and public security needs, i.e.,, failure of “li”. The failure of ICO legislative process in ascertaining “zhen qing” and failure to fill ICO statutory content with “qingli” place the political legitimacy and social utility of ICO in doubt.

Before we close, we need to address one important issue – How comparable and compatible is Chinese jurisprudential thoughts of QLF with that of Western rule of law practices. In practice, is QLF ever relevant considerations in Western judicial decision making process.

Conventional wisdom and learned jurists observed that rule of law

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232 ICO should give vent to local sentiments (security over liberties) and interests (stability over rights).
233 PRC Constitution and Hong Kong Basic Law precludes the interference of Hong Kong legal system by China or operation of Chinese law in Hong Kong. It does not preclude Hong Kong people and by extension the legco from respecting PRC legal interests (subversion) and applying Chinese jurisprudential principles to Hong Kong, at least theoretically and as points of contentions.
regime requires applying transparent, predictable and general rule equally to all people and situations, including the law giver and enforcer, with no exceptions. This formulation precludes considerations of extra-legal matters, such as that of “renqing” (human nature - sentiments) or “tianli” (natural law - morality). If this should be the case, an interesting question avails itself: to the extent that “qing” and “li” are common features in all human societies, what role do they and should they play in Western rule of law jurisprudence?

On closer inspection, a rule of law regime is not adverse to taking extra-legal – natural human sentiments and shared moral principles - into account. In fact, it is observed here that no dispute resolution system in the world can long survive without meeting basic human needs or reflecting fundamental moral values. As to the justification for the first observation, it was Holmes, the quintessential legal realistic, who once said, the life of law is experience, not logic. As to the foundation of the second, it was the Bible which observed that men do not live by bread alone. The Anglo-American legal system and process accommodate and give expression to basic (including debased human instinct (Chinese “renqing”) and moral (including amoral principles (Chinese “qingli” (custom) “tien li” (natural law) in the following systemic and doctrinally

235 Idea of revenge comes to mind
236 Communist comes to mind.
ways:

*First, the common law tradition,* unlike the positive law invention, is based on local custom and community conventions. The judges in hearing cases seek to ascertain local community standards making up of public expectations and personal sentiments. Under traditional common law, the judges do not make law as much as they find law in the ways and means of the people, as registered in their hearts and mind, as reflecting in their values and dispositions, and as manifested in their taste and habits. When people’s ways and means changes, so does the case law.238

While both legal systems subscript to inductive norms based on local sentiments, the common law follows common – rational expectations of the people in establishing norms, and QLF make allowances for individual – personal differences, as exceptions. In this way, rule of law regime seeks to standardize human needs (that is what reasonable man is all away) while QLF embraces individual and individualized accountability (that is why motive is important). The other difference is that QLF is prepared to recognize the effective needs


238 The common law has been used in Hong Kong to important Western values and universal rights.2 *Am. U.J. Int’l L. & Pol’y* 361 (1997). Daniel D. Bradlow, RECENT DEVELOPMENT: FOREWORD: American University Washington College of Law Hong Kong: Preserving Human Rights and the Rule of Law; A Conference Sponsored by The International Legal Studies Program of the Washington College of Law, Human Rights Watch/Asia, and the Lawyers Committee for Human Rights; March 18 - 19, 1997 (Both Christin Loh and Margret Ng has posited faith in common law tradition of Hong Kong to safeguard the right of Hong Kong people from arbitrary and abusive Chinese – Communist influence, though importation of human rights principles from abroad.)
and emotional instinct of the individual, as natural and inevitable, whereas common law assumes that people can and should act rationally, notwithstanding such emotion and instinct.

Second, the equity branch of the law allows natural justice principles to come into play to challenge “unfair” legal process and void “unjust” outcome of the law. Historically, common law courts restricted litigants to pre-establish single write filing process, where only known legal cause of action and limited remedies are available. The Chancellor court provides equitable remedies for such and other manifested injustice. In this way, the Chancellor’s jurisdiction and operations function very much like QLF, except that QLF operates routinely in applying integrated equity and legal principles and the Chancellor court intervenes, occasionally and exceptionally, when the legal system fails.

Third, the jury system plays an important role in bringing people’s voice into the law and individual justice to the person. For example, in civil - tort cases, the jury play an important role is determining the normative standard of negligent, a factual – legal exercise. To do so the


\[240\] Id. 129.

\[241\] This amounted to an interjection of an extra-legal requirement of “reasonableness” in the approval process. “Negligence” or “reasonableness” is a trojan horse of the law. It allows social morality to come into play in determining whether an act is legal. This conforms with traditional Chinese practice where the law adopted and incorporated social morality through a process called the Confucianization of the law. Kam C. Wong, “Confucianization of the Law: A Study if Speech Crime Prosecution in Imperial China.” In Western jurisprudence, the issue is most often raised under the rubric of a law vs. morality debate. See Martin P. Golding, Philosophy of Law (Englewood Cliffs, N.J.: Prentice-Hall, Inc., 1975). The more pressing issue in the current context is whether social-moral principles could be used to interpret legal rules? In American tort law, the “standard of reasonable conduct” is a community standard and an ethico-legal judgment. See William Prosner, Law of Tort (West, 1971), p. 167.
jury members have to consider the facts and circumstances of the case from the motive of the person to custom of the place to the conduct of the parties, and finally to a variety of mitigating and aggravating circumstances.  

*Fourth, the substantive due process doctrine* allows the judges to read into the Constitution what society considered to be fair and just to invalidate federal state and local criminal justice process and practices. The 14th Amendment of the U.S. Constitution reads: “*Section. I* …No State shall make or enforce any law which shall deprive any person of life, liberty, or property, without due process of law ….” The Supreme Court of the U.S. has used the 14th Amendment to declare certain rights to be “fundamental” in nature and cannot be deprived, e.g., coercive interrogation practices such as sleep deprivation.  

*Finally, mitigating and aggravating circumstances in sentencing,* are considered at the penalty phase of a criminal trial, not liability phrase.

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242 The American jury system has originated with the firm belief that community justice shall prevail over the black letter law. Jeffrey Abramson, *We, The Jury* (Basic Books, 1994), pp. 22-33. This has led inevitably to the nullification of the law based on “conscience of the community” in modern time. Michael Granberry, “Abortion Protest Juries Told to Ignore Nullification Ad,” *L.A. Times* (San Diego County edition), Jan. 27, 1990, p.B1. See Jon M. Van Dyke, “Merciful Juries: The Resilience of Jury Nullification.” *Washington and Lee Law Review* 48 (1991): 165-83. In the case of ‘Camden 28’ the judge allowed the draft card burning defendants to argue for nullification based on the fact that the FBI informants have supplied the antiwar protesters with the tools to carry out their draft raids. Donald Jackson, “Judge Instructs ‘Camden 28’ Jury,” *New York Times*, May 18, 1973, p. 13. The defense lawyer in the case argued to the jury that the term “nullification” means: “power of a jury to acquit if they believe that a particular law is oppressive, or if they believe that a law is fair, but to apply it in certain circumstances would be oppressive…” *Id. We, The Jury*, p. 59. The jury “nullification” doctrine clearly allows the jury to rise above the confine of the law in search of higher justice. In so doing, they imbue the legal process with moral and ethical considerations.

In civil litigation, mitigating and aggravating circumstances, such as contributory negligence, are foremost in the minds of the jury.

*Confronting QLF: A case study*

Western jurists likewise have to confront QLF issues of concern to Chinese jurists. For example, how should rational law deals with

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244 In making this observation, I am reaffirming that law is an instrument of social control. It was Donald Black who observed that “law is governmental social control. Donald Black, *The Behavior of Law* (N.Y.: Academic Press, 1976), p. 2. In fashioning effective social control measures, law makers/givers (an Austin or Pound) must take human nature (e.g., constitution (Herrnstein), disposition (Adam smith), psychology (Freud) and spirituality (Bible), community aspirations (e.g., ideology and morality), social conditions (e.g., development (Maine), structure (Marx) and process) and nature’s providence into account, albeit in varying degrees and more or less in proportion. Thus observed, social controllers West and East are force to come to terms with (of necessity) and have to make allowance for (inevitably) for imperfect humans (e.g., immature juvenile or emotional conduct), dysfunctional society (e.g., oppressive class structure and conflictual process) and unpredictable nature (e.g., force of nature). More simply controllers have no control over the subject and context of control. But as make clear below, controllers do have ways of understanding (conceiving and perceiving), and in turn dealing with (receiving and disposing) the world as they see fit, as mediated by culture, as informed by philosophy, as driven by ideology. Social control scheme (as with and including law) differs – in context China and West - as a result of two factors: social control philosophy and strategy, or what is the nature of the problem and how to deal with social-behavioral problems of relationship rupture and personal deviance? In terms of philosophy, jurists East and West are both utopians, in search of a better world; a more virtuous world in China and a more just world in the West. . Their difference lies in the fact that Chinese jurists are realists in their mental disposition and pragmatists in their action orientation. The Western jurists are idealists at heart and puritans in action. Thus, Confucius accept people as who they are, i.e., imperfect but perfectable, and the world as what is, i.e., corrupting but changeable, while Western jurists (Kant), are unwilling to (or perhaps incapable of) seeing and accepting the world – flawed individuals (irrationality) and dysfunctional society (exploitative) – as is, but insist on viewing and remaking the world as it ought to be – rational people, just process, equality relations and fair society. When it comes to social control strategy and measures, the Chinese are more practical. They want to change the society and reform the people systematically, comprehensively, holistically, if incrementally, indirectly and slowly. Thus they prefer education over punishment, surveillance over imprisonment, thought control over conduct restrictions, ratification of culture over blaming of individual, improving political/social/material conditions in conjunction with individual/ behavioral control. Conversely, the Western control regime is more punitive, retributive and deterring. They are more interested in making people pay for
irrational people and emotional conduct?\textsuperscript{245} How could with uniform and essentialistic law deals with the vulgarities of human personality, multiplicity of social conditions circumstances and interactive situational context in positing blame and imposing liabilities? Ultimately, what happen when the law fails in its essential purpose – in upholding morality, in delivering justice, in providing for security, in demonstrating reasonableness? In practical terms, the strict enforcement of law brings about unacceptable result; challenging the jurists to forgo law to confront \textit{QLF}. Professor Lon Fuller put masterfully explore how Western civilization and legal culture have to say when the stricture of law contradicts human nature, natural law, practical reasoning, or simple \textit{QLF} issues, in an imaginary cases designed to educate law students and practitioners about the limitations of the rule of law.\textsuperscript{246}

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\textsuperscript{245} Western law is build upon the assumption that people are rational, at least capable of being rational. It also assumes that people have free will. To say that people are rational is to say that their conduct is driven by hedonistic calculus, and are able to be moved by punishment. Thus in drafting law, legislators should adopt Bentham’s utilitarianism (most happiness of most people) and Becerra’s deterrence (certainty, speed and proportionality).

The above brief discussion makes clear that the rule of law regime, based on a positive law theory and operating under a statutory law system, has accepted the need to better provide for human needs (realism) and moral principles (idealism) that are not adequately or properly dealt with by the zealous, fetish and blind application of the rule of law. The common law has to be saved from it works too perfectly and efficiently, a/k/a/ too mechanical in process and too uniform in outcome. For example, by allowing only certain writs to be plea, heard and proven, many worth litigants are left without legal remedy for harm done. The legal process cannot set behavioral standards when they are abased on community values, contingent on totality of circumstances, and informed by ill defined and effervescence moral feelings. Finally, the Constitution, as a living compact, depends on people of the time to give it moral authority.

The different between rule of law and QLF is not that “qing” and “li” are considered as unimportant in Western jurisprudence. As intimated earlier, we can take the law from the people but the human instinct for right and wrong remains. As a result of historical development and social needs, the rule of law regime has chosen to privileged law as preferred

instrumentality to discipline society, paying less attention to “li” and “qing” as ordering devices. With rule of law, the sanctity of the law (FLQ) comes first, in China, violence of the law comes last (QLF). With rule of law, QL becomes irrelevant in most cases. The assumption is, as an ideology the positive law should, and should be, sufficient and adequate in capturing all “qing” and “li” considerations in the legislative process. In exceptional cases, the court would construct mechanism, e.g., jury, and doctrines, e.g., substantive due process, to breach the gap between theory and practice, routine and exceptional. In the case of QLF, issues of QLF must be considered in their totality – integratively, interactively, inter-penetratingly, inter-dependently and holistically.

APPENDIX I: ICO Legislative Documents

- **Submission from Hong Kong Human Right Monitor on surveillance, Article 30 of the Basic Law and the right to privacy in Hong Kong** [CB(2)259/05-06(01)]
- **Judgment delivered by the Court of Final Appeal on the case of KOO Sze-Yiu and LEUNG Kwok-hung v. Chief Executive of the Hong Kong Special Administrative Region on 12 July 2006** (English version only) [CB(2)2731/05-06(01)] (31 July 2006)
• Paper provided by the Administration on "Impact of the judgment delivered by the Court of Final Appeal in LEUNG Kwok-hung and KOO Sze-yiu v. Chief Executive of the Hong Kong Special Administrative Region on law enforcement before the enactment of the Interception of Communications and Surveillance Bill and the preparatory work undertaken by the Administration for the implementation of the Bill as enacted" [CB(2)2860/05-06(01)] (31 July 2006)

• Extract f minutes of meeting of the Panel on Administration of Justice and Legal Services on 27 March 2006 [CB(2)2050/05-06(03)] (22 May 2006)

• Paper provided by the Judiciary Administration on "Resources Implications for the Judiciary arising from the Administration's Legislative Framework Concerning Interception of Communications and Covert Surveillance" [CB(2)2050/05-06(01)] (22 May 2006)

• Paper provided by the Security Bureau on "Staffing Implications of the Implementation of the Interception of Communications and Surveillance Bill" [CB(2)2050/05-06(02)] (22 May 2006)

• Letter dated 6 March 2006 from Hon Ronny TONG to the Administration regarding overseas precedents relating to covert surveillance (English version only) [CB(2)1342/05-06(01)] (7 March 2006)

• Interception of Communications and Covert Surveillance - Panel of Judges [CB(2)1331/05-06(01)] (7 March 2006)
• Interception of Communications and Covert Surveillance - Pre-Appointment Checking [CB(2)1331/05-06(02)] (7 March 2006)

• Legislative Council Brief on the Interception of Communications and Surveillance Bill (7 March 2006)

• Administration's paper entitled "Response to issues raised by Members at the meeting of 21 February 2006" [CB(2)1285/05-06(01)] (2 March 2006)

• Administration's letter dated to 9 June 2006 regarding the number of cases of interception of communications and covert surveillance for the three-month period up to 19 May 2006 [CB(2)2361/05-06(01)] (21 February 2006)

• Interception of Communications and Covert Surveillance : Resource Implications for the Judiciary [CB(2)1189/05-06(01)] (21 February 2006)

• Letter dated 25 February 2006 from the Administration regarding the number of cases of interception of communications and covert surveillance in the last three months of 2005 [CB(2)1258/05-06(01)] (21 February 2006)

• Links to overseas legislation referred to in paragraph 21 of the Administration's response to issues raised by Members at the meeting of 16 February 2006 [CB(2)1260/05-06(01)] (21 February 2006)

• Paper entitled "Response to issues raised by Members at the meeting of 16 February 2006" provided by the Administration [CB(2)1184/05-06(01)] (21 February 2006)
- Judgment on the judicial review in respect of the Law Enforcement (Covert Surveillance Procedures) Order delivered by the High Court on 9 February 2006 (English version only) [CB(2)1097/05-06(01)] (16 February 2006)

- Paper entitled "Leung Kwok Hung and Koo Sze Yiu v Chief Executive of the Hong Kong Special Administrative Region (HCAL 107/2005)" prepared by the Legal Service Division [LS35/05-06] (16 February 2006)

- Paper entitled "Response to issues raised by Members at the meeting of 7 February 2006" provided by the Administration [CB(2)1162/05-06(01)] (16 February 2006)

- Table entitled "Statutory Requirements for Approval of Covert Surveillance - Comparison of the Administration's Proposals and the Australian Regime" provided by the Administration [CB(2)1162/05-06(02)] (16 February 2006)

- Background brief entitled "Regulation of surveillance and the interception of communications" prepared by the Legislative Council Secretariat [CB(2)971/05-06(01)] (7 February 2006)

- Proposed Legislative Framework on Interception of Communications and Covert Surveillance [CB(2)997/05-06(01)] (7 February 2006)

- Submission from the Law Society of Hong Kong on interception of communications and covert surveillance [CB(2)1071/05-06(01)] (7 February 2006)

- Summary of concerns and queries raised by Members at the special meetings on 15 August and 4 October 2005 prepared by the
Legislative Council Secretariat [CB(2)971/05-06(02)] (7 February 2006)

- Administration's paper enclosing its internal guidelines on covert surveillance under the Law Enforcement (Covert Surveillance Procedures) Order and a comparison of the protection provided under the internal guidelines, section 33 of the Telecommunications Ordinance and the Interception of Communications Ordinance [CB(2)2639/04-05(01)] (1 November 2005)

Year 2004 - 2005

- Administration's response on the implications of the ruling of District Court Judge SWEENEY on 22 April 2005 regarding surveillance on the work of law enforcement agencies [CB(2)1657/04-05(01)]

- Information provided by the Independent Commission Against Corruption (ICAC) that the judgment delivered by the District Court on 22 April 2005 regarding a case involving interception of communications by ICAC, a summary of the facts of the case and a response regarding the actions, if any, to be taken by ICAC (English version only) [CB(2)1420/04-05(01)]

- Judgment concerning surveillance work of the Independent Commission Against Corruption delivered by District Court Deputy Judge Julia LIVESEY on 5 July 2005 (English version only) [CB(2)2280/04-05(01)]
• Letter dated 15 July 2005 from the Administration concerning surveillance by law enforcement agencies [CB(2)2315/04-05(01)]

• Response from the Independent Commission Against Corruption on the implications of the ruling of District Court Judge SWEENEY on 22 April 2005 regarding surveillance on its work [CB(2)1660/04-05(01)]

• Administration response on existing legislation which provided that the commissioner or director concerned could direct and control the respective disciplined services, subject to the order and control of the Chief Executive [CB(2)983/05-06(01)] (4 October 2005)

• Administration's response to issues raised at the special meeting of 15 August 2005 and issues subsequently raised by Hon LAU Kong-wah and Hon Audrey EU [CB(2)2632/04-05(01)] (4 October 2005)

• Background brief entitled "Regulation of surveillance and the interception of communications" prepared by the Legislative Council Secretariat [CB(2)2632/04-05(04)] (4 October 2005)

• Copy of the Independent Commission Against Corruption's application of judicial review in Criminal Case No. DCCC687 of 2004 provided by the Administration (English version only) [CB(2)277/05-06(01)] (4 October 2005)

• Information sought by Hon LAU Kong-wah in connection with the Law Enforcement (Covert Surveillance Procedures) Order (Chinese version only) [CB(2)2632/04-05(02)] (4 October 2005)
• **Information sought by Hon Audrey EU in connection with the Law Enforcement (Covert Surveillance Procedures) Order**
   [CB(2)2632/04-05(03)] (4 October 2005)

• **Summary of concerns and queries raised by Members at the special meeting on 15 August 2005 prepared by the Legislative Council Secretariat**
   [CB(2)2632/04-05(05)] (4 October 2005)

• **Administration's paper on the Law Enforcement (Covert Surveillance Procedures) Order**
   [CB(2)2419/04-05(01)] (15 August 2005)

• **Article 14 of the Hong Kong Bill of Rights Ordinance**
   [CB(2)2431/04-05(05)] (15 August 2005)

• **Background brief entitled "Public Service (Administration) Order 1997" prepared by the Legislative Council Secretariat**
   [CB(2)2431/04-05(02)] (15 August 2005)

• **Background brief entitled "Regulation of surveillance and the interception of communications" prepared by the Legislative Council Secretariat**
   [CB(2)2431/04-05(01)] (15 August 2005)

• **Judgment delivered by the District Court on 22 April 2005 (English version only)** [CB(2)1420/04-05] (15 August 2005)

• **Law Enforcement (Covert Surveillance Procedures) Order Supplementary Paper**
   [CB(2)2436/04-05(01)] (15 August 2005)

• **Paper entitled "Comparison of provisions governing authorization to carry out interception of communications or covert surveillance in the Telecommunications Ordinance (Cap. 106), Interception of Communications Ordinance (Cap. 532) and Law Enforcement**
(Covert Surveillance Procedures) Order” prepared by the Legal Service Division [LS103/04-05] (15 August 2005)

- Section 13 of the Post Office Ordinance [CB(2)2431/04-05(03)] (15 August 2005)
- Section 33 of the Telecommunications Ordinance [CB(2)2431/04-05(04)] (15 August 2005)
- Statement of the Hong Kong Bar Association on the Law Enforcement (Covert Surveillance Procedures) Order [CB(2)2446/04-05(01)] (15 August 2005)
- Report of the research study on regulation of interception of communications in overseas jurisdictions [RP02/04-05] (1 March 2005)

The ICO ushered in a new era of police accountability in Hong Kong, but it also raises more questions than it resolved. In studying and assessing the ICO there is a host of questions and plethora of issues that can and should be addressed:

On LEGAL PHILOSOPHY AND POLICY: First, is ICO necessary? First, throughout the legislative debate and public discourse, the (functional) necessity of ICO was tacitly assumed but never affirmatively demonstrated. Second, the meaning of “privacy” and

“security” in local (Asian-China-Hong Kong) cultural and situational context was never explored, still less defined. Third, there was no attempt to balance “privacy” interests against “security” needs, again within a Chinese society and international commerce center.

On LEGISLATIVE PROCEDURE AND PROCESS. Why was the original ICO (1997) not adopted by the government in a timely fashion? Why did the Hong Kong government and Legco not take the necessary time to negotiate for a settlement over ICO? Constitutionally is it appropriate for the administration to affirmatively lobby/promote the ICO, with dedicated government staff, on the Legco floor and in between ICO legislative debate? Legally, can the government spend public money to assure the passage of a Bill?

On REGULATORY FRAMEWORK AND CONTENT: What is a “reasonable” expectation of privacy justifying legal protection? What makes for a “public security” threat calling for surveillance? Should security threats to China as a nation ever be consider as a Hong Kong government’s concern? Can the ICO, as proposed, effectively deal with post 9/11 terrorism intending on destabilizing China or foreign spies working in Hong Kong?

On IMPACT AND IMPLICATION: Socially, is there a need for more anti-terrorism, anti-subversion police powers? Politically, has the ICO legislative proceeding destroyed the personal trust between conservatives and liberal legco members, institutional working relationship between the public and the Hong Kong government? Legally, what is the best arena to determine the meaning of “reasonableness” of privacy expectation or “urgency” of public security?
The above questions and issues cannot be adequately addressed and effectively resolved without first attending to the more fundamental question: What jurisprudential principles should be applied in assessing the language and implementation of the ICO? Specifically, should law reform in Hong Kong take into account Chinese jurisprudential principles? In what way and to what extent Chinese culture in general, and jurisprudential thinking in particular should be a factor to be considered in Hong Kong law makings and judicial decisions. Finally, what is the short term impact and long term implications of transporting and transplanting foreign laws onto Hong Kong soil?

and still less scholarly discourse or public debate on the proper jurisprudential standards to be applied in evaluating Hong Kong legislation. It invites scholars and legislators to look at ICO through the eyes of Hong Kong people, an approach that has been ignored by the conservative Hong Kong government and conveniently side-stepped by the liberal local politicians. In so doing, this article questions the

appropriateness and challenges the legitimacy of adopting Western jurisprudential principles in shaping and evaluating Hong Kong legal system, especially after July 1, 1997.

This investigation is anchored within a larger intellectual canvass,\textsuperscript{252} i.e., the feasibility and utility of transplanting foreign legal institution to domestic soil, the problems and promises with indigenization of foreign laws\textsuperscript{253} and appropriateness and legitimacy of privileging Western rights in Asian societies.\textsuperscript{254}

The article is organized as follows. After this brief introduction, section I (“Context”) explores the historical, political and legal context

\textsuperscript{252} There is a need to investigate into the Chinese law in Chinese society, interdependently and interactively (p. 2). “Future prospect of historical Chinese legal result: Overtaking the West, returning to indigenous roots.” In pp. 3-24 Xu Zhongming, \textit{Precedents, stories and judicial culture of Ming Qing dynasties} (Anli, Gushi yu Ming Qing shiqi de shifa wenhua) (Beijing: Falu Chubanshe, 2006) (China is a country of long history and rich culture. The West was successful in transforming China through military domination, economic exploitation and cultural penetration, with the help of Chinese reformers and in the name of modernization. In the process Chinese jurisprudential thoughts and legal system was summarily dismissed and totally rejected as not compatible with modern and progressive (Western) ideas and ideal, standards and benchmark.) See also David A. Funk, “Traditional Chinese Jurisprudence: Justifying Li and Fa,” 17 \textit{S.U. L. REV.} 1, 2 (1990); Hui Lo Pan, “A Study of Chinese Jurisprudence,” 6 \textit{Illinois Law Review}, 457 (1911-12).

\textsuperscript{253} Western jurists deny the existence of Chinese law in theory or otherwise critical of Chinese law in practice because Chinese law does not fit with Western paradigm. William P. Alford, “Law, Law, What Law?: Why Western Scholars of Chinese History and Society Have Not Had More to Say about Its Law,” \textit{Modern China}, Vol. 23, No. 4: 398-419 (1997) (Western Chinese scholars neglected or mischaracterized the impact of law on China (p. 398) \textit{Precedents, stories and judicial culture of Ming Qing dynasties}, P. 11. (Western jurists observed that there was no law in China because there was no protection for individual and human rights.) Ho __hua (ed.), \textit{The transplantation and indigenization of law} (Beijing: Falu Chubanshe, 2000).

\textsuperscript{254} Amartya Sen, \textit{Human Rights and Asian Values} (Carnegie Council on Ethics and International Affairs, 1997).
leading to the passage of the ICO. It addresses the issue why is the ICO necessary, politically and legally, Section II (“Rationale”) details the reasons for undertaking this study. Philosophically, it argues against treating Western human rights standard as universal, dominant, exclusive yardstick to evaluate Chinese – Hong Kong legal system and process. Intellectually, it observes that foreign observers are prone to view China through a Western lens. It ends with a proposition: the study and assessment of Chinese – Hong Kong legal system should be conducted with indigenous perspective and informed by empirical data. Section III (“Standards”) makes the case that QLF is a more appropriate evaluative paradigm for ICO. It then details the nature and characteristics, content and application, theory and practice of QLF as jurisprudential principles. Section IV (“Comparison”) compares and contrast two jurisprudential traditions: rule of law vs. QLF. It observes that there are convergences between the two systems of thoughts; rule of law regime make allowance for extra-legal considerations, in the name of “equity” and “reasonableness”. Section V (“Assessment”) asks the central research question: Is ICO – in substance and process – compatible with QLF? It observed that Legco failed in ascertaining the “zhenqing” before legislating and it failed to adopt indigenous “li” in drafting ICO.

Section VI (“Conclusion”) provides for a brief summary of the findings of this research, i.e., ICO legislative process failed “qing” and ICO statutory content failed “li” of Hong Kong people and culture.