

The Legal Foundation of Hongkonger Identity

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[ABSTRACT] The individual exists in a context, bounded by history and all sorts of political, legal and social institutions. The individual's identity, rights, freedoms and duties are largely defined and shaped by these secular institutions. Discussion on the Hongkonger identity has been keen recently. The legal aspect of it, however, is usually overlooked. How does the law define the identity of the people of Hong Kong? This paper argues that residency law in Hong Kong provides the fundamental framework in defining who belong to Hong Kong and it gives the foundation on which a civic identity of Hongkongers may be constructed. “Hongkongers” in this sense is inclusive and rights based, and all Hongkongers share constitutionally guaranteed rights and freedom in common. This embrative legal identity also calls for a public morality requiring equal respect and concern for everyone. Such identity is preferred to other narratives, such as one based solely on restrictive linguo-cultural distinction (Cantonese and Cantopop culture for example). Calling for the morality of equal respect and concern is always challenged in the face of narrow, ethnocentric localism discourses. Upholding of such morality requires courage and clear voices. The Catholic Church, as defender of human dignity and bearing the roles of prophet, teacher and servant, has an important role to play here.

Introduction

Identity tells who we are and where do we belong. Yet, it is a complicated, multi-faceted and protean construct. And one can, at the same time, have different identities: personal identity (what I say I am); social identity (what we say we are); legal identity (what the law says I am or we are) and so forth. How does the law define us as members of the Hong Kong Special Administrative Region? This is critical in defining our rights and freedoms and in constructing our relationship with our fellow Hongkongers, compatriots in the same State, the wider community and beyond.

This article intends to give an account on the law defining our legal identity: how has Hong Kong Permanent Resident developed out of the unique historical and constitutional context of Hong Kong? How does the law define it? How does it relate to the wider legal category of Chinese nationality? And how the understanding of the law is relevant to the discourse and narratives on the Hongkonger's identity? It argues that residency law in Hong Kong provides the fundamental framework in defining who belong to Hong Kong and it gives the foundation on which a civic identity of Hongkongers may be constructed. "Hongkongers" in this sense is inclusive and rights based, and all Hongkongers share constitutionally guaranteed rights and freedom in common. This embrative legal identity also calls for a public morality requiring equal respect and concern for everyone. Such identity is preferred to other narratives, such as one based solely on restrictive linguo-cultural distinction (Cantonese and Cantopop culture for example). Calling for the morality of equal respect and concern is always challenged in the face of narrow, ethnocentric localism discourses. Upholding of such morality requires courage and clear voices. The Catholic Church has a role to play here.

A Local Belonging Identity in Law

The establishment of an effective territorial border

Before 1971, there was no legal definition for the Hong Kong believer or citizen. In the first 100 years of Hong Kong’s colonial history, before the end of the Second World War/ Japanese Occupation, the British policy was primarily to make Hong Kong a free port to facilitate trade and business with China, instead of making it a colonial settlement. People came from different places of the world. Free entry and leaving by Chinese migrants from the Mainland were essential as it promoted economic activities and business growth. Chinese who came to Hong Kong mostly left their families behind in the Mainland and came for economic opportunities. People born in Hong Kong were British subjects but there is no law granting them an identity based on their ties with the Colony of Hong Kong. A free, servicing port and free flow of people, goods and businesses were in the best interest of the British and colonial Hong Kong. There was no imminent necessity to define who belonged to Hong Kong and stipulate a distinct legal identity for the people. The conditions were not there. Yet, Hong Kong grew and prospered out of the migratory and transient nature of its population, the laissez-faire economy and English common law.

The end of Second World War and the resumption of the British rule after the Japanese Occupation did not, however, bring back lax border regulations that Hong Kong used to have. The rapid increase in population in Hong Kong in the wake of China’s civil war and concerns over Hong Kong’s capacity and the need to maintain good order prompted the colonial government to impose tighter restrictions on cross-border migration. An Immigrants Control Ordinance (Cap. 243) “to control the entry into, exit from and movement within the Colony of persons not born therein” and a

Registration of Persons Ordinance (Cap. 177) to provide for the registration of every person being in the Colony the issue of identity cards, were enacted in 1949. Failure to obtain permission from the Immigration Officer to enter Hong Kong was made a criminal offence and upon conviction would lead to expulsion from Hong Kong. Failure to register under the Registration of Persons Ordinance was also made criminal.

The establishment of the People's Republic of China in 1949 brought an influx of people from the Mainland to Hong Kong. The imposition of the quota system by the Hong Kong Colonial Government and the exit control over Chinese nationals by the Chinese Government formally ended the century-old freedom of movement across the border. Despite the imposition of tighter bureaucratic control, the border was in fact not effectively guarded. This allowed sporadic migration otherwise through formal channels and large waves of refugee influxes at times and especially during times of turmoil such the Korean War in the early 1950s, starvation caused by the failure of the Great Leap Forward in early 1960s and the political and social unrests due to the Cultural Revolution from the mid-1960s to the 1970s.

Tolerance and acceptance of the society and leniency of the Hong Kong Government policy lasted till 1980, when the “reached-base” policy¹ was formally terminated. Since then, all

¹ The problem of influxes continued without a sign to stop. In 1973 alone, there were some 56,000 illegal migrants came. The Colonial Government decided to implement a “reached-base” policy to address the ever growing number of refugee influx. Under the policy, an illegal immigrant arrested during his attempt to enter into Hong Kong's border area and territorial water would be immediately repatriated. If an illegal immigrant managed to evade capture, enter the urban areas and subsequently reach a home with relatives or proper accommodation (the base), he would be allowed to stay in Hong Kong.

illegal migrants from the Mainland would be repatriated immediately. The development signified the formal end of the decades-long lenient policy towards Mainland illegal migrants and the end of a relatively free migration across the Hong Kong-Mainland border. The problem of “refugees” became one of “illegal immigrants”. With the end of the “reached-base” policy, an effectively guarded territorial Hong Kong-China border was formed. The physical and legal distinctions between “we” and “they” became clearer.

Hongkong Belonger and the right to land

A local belonging legal identity was introduced in the early 1970s, against a background of the change of United Kingdom immigration and citizenship laws in the late 1960s, much attributed to the infamous East African Asians case² and post-war decolonization movement. It was also a time when Hong Kong was baffled by the “problem of people”³ which ultimately led to the termination of the lenient and tolerant policy and approach to Chinese illegal migrants. The development went in parallel with

² *East African Asians v United Kingdom* (1973) 3 EHRR 76. In that case, the European Court of Human Rights held that the United Kingdom acted in contrary to the European Convention on Human Rights (Article 3 Racial Discrimination, Degrading Treatment) by denying entry immigration control citizens of United Kingdom and Colonies of East Africa who were of Asian origins.

³ To paraphrase the title of the paper “A Problem of People” published by the Hong Kong Government in 1956. It gave a brief review of the history of Chinese migration from the Mainland to Hong Kong while raising concerns about the Colony’s capacity. Over-crowding, homelessness, squatter areas, hygiene issues and social order were some salient problems that Hong Kong was facing at the time. Migrants, which traditionally gave life to the Colony and one of the most important driving forces for Hong Kong’s growth, were now seen a problem. Tighter immigration control and more extensive social policies were called for to address the problem.

Hong Kong's economic take-off and growth of wealth, and the emergence of the Hongkonger self-consciousness.⁴

The Immigration Ordinance (Cap. 115) passed in 1971 gave for the first time a clear definition of Hong Kong's own "belongers", sort of an equivalent to nationals or citizens in the context of a state. The concept of Hongkong Belonger was the foundation and precursor to the later category of Hong Kong permanent residents constitutionally defined as the membership to the Hong Kong SAR in the Basic Law. When the Ordinance was first introduced in 1971, it stipulated three categories of people who enjoyed, in varying degrees, the right to land in Hong Kong. These categories were: (a) Hong Kong Belongers; (b) Chinese Residents; and (c) Resident United Kingdom Belongers. Hong Kong Belongers referred to the people who were born in Hong Kong and declared themselves as British at the time of birth. All of them were taken as British subjects and they formed the vast majority of the residents of Hong Kong. Chinese Residents were those who were wholly or partly of Chinese race and who had been ordinarily resident in Hong Kong for a continuous period of not less than seven years, excluding any period of time when their stay in Hong Kong was illegal. Resident United Kingdom Belongers included the British expatriates in Hong Kong and the United Kingdom and Colonies Citizens who had been ordinarily resident in Hong Kong for a continuous period of seven years.

A concept of the right to land was also introduced. All the three categories of residents had the right to land in Hong Kong. Chinese Residents and Resident United Kingdom Belongers were subject to

⁴ See discussion below.

deportation under certain conditions, with those restricting the former stricter than those for the latter.

Albert Chen noted the significance of these provisions and categorization.⁵ First, the right to land and the limitations on deportation against the holder of such rights laid the foundation for the future right of abode. Second, the immigration authorities' unfettered discretion about granting or not granting permission to enter Hong Kong was now taken away with respect to the holders of the right to land in Hong Kong. By holding such a right, the holder is immune from the imposition of any conditions of stay or order of deportation. This right is a trump.

Agnes Ku saw the sociological significance of such legal change. Seeing that the social and the legal processes of identity formation were intermingled, she succinctly concluded, based on her discursive analysis, that

"... the local people soon transmuted the notion of 'Hong Kong believer', introduced as a formal immigration category, into a direct, everyday term: 'Hong Kong people'... Thus, an official category, though perhaps not directly forming an identity, could provide a basis for the public to crystallize or forge their negotiated talk of identity. More specifically, as the idea of 'settled residence' was contested, it became a claim to belonging and to rights."⁶

⁵ Albert Chen, "The Development of Immigration Law and Policy: The Hong Kong Experience," *McGill Law Journal* (1988, Vol. 33 Issue 4), 631, 636.

⁶ Agnes S. Ku, "Immigration Policies, Discourses and the Politics of Local Belonging in Hong Kong (1950-1980)," *Modern China* (2004, Vol. 30 Issue 3), 326, 347.

Local-belonging consciousness

The change in policy towards Mainland illegal immigrants, the establishment of a formal territorial border and the immigration law reform were coupled with a social and discursive process of emerging local belonging, identity and consciousness among local Hong Kong Chinese. They now saw migrants from the Mainland in a more negative light: backward, uncivilized, and ignorant.⁷ At the social level, the previous attitudes of tolerance and acceptance of their cousins from the Mainland were gone. Mainlanders, especially illegal immigrants, were seen as a threat to the economic and social stability of Hong Kong. Mainland migrants were seen more as a burden to the Hong Kong society and threat to its peace and order, in comparison to the attitudes previously held by the public which had treated Mainland migrants in a friendly and accommodating way. The riots in 1967 seemed to be a booster for this change.

Steve Tsang, a historian, saw the social unrests and disorder caused by the riots in 1967 under the aegis of the Chinese communists as a spill-over of the Great Proletariat Cultural Revolution taking place in the Mainland at the time marked a turning point in the history of Hong Kong, boosting the rise of the identity of Hongkongers.⁸ A cultural commentator, Matthew Turner, observed that the rhetoric of ‘citizenship’, ‘community’ and ‘belonging’ was deployed on a large scale as anti-Communist counter-propaganda during and after the riot.⁹ Together with the economic take-off and

⁷ Ibid., 352.

⁸ Steve Tsang, *A Modern History of Hong Kong* (Hong Kong: Hong Kong University Press, 2006), 180-196. Tsang had a chapter-long account of the rise of the Hongkongers and the emergence of a local identity.

⁹ Matthew Turner, “60’s/ 90’s: Dissolving the People,” in *Hong Kong Sixties: Designing Identity*, eds. Matthew Turner and Irene Ngan (Hong Kong: Hong Kong Arts Centre, 1995), 15.

growth of wealth in the 1970s which brought a sense of superiority and pride, local Hong Kong Chinese began to see themselves as a distinct group of people, generally referred to “Hongkongers”, “Hongkongese” or Hongkong people, who were constructed as more civilized, modernized, advanced, knowledgeable and richer in contrast to the people in the Mainland or newly immigrated to Hong Kong, who were generally portrayed as backward, unhygienic, ignorant and miserable “mainlander boy”, “green stamp alien”, “Canton Boy”, “Ah Chan” etc, all derogatory daily vocabularies used to address Chinese immigrants who came to Hong Kong in the late 1970s and early 1980s.¹⁰

Tsang captured what it was like being a Hongkonger in the early 1980s:

“... A Hong Kong person of the early 1980s would identify with Hong Kong and, at the same time, feel at ease both with his Chinese heritage and, for those who claimed British nationality, with travelling on a British passport issued by the Hong Kong government. However, he was not British or western (merely westernized) and at the same time not Chinese in the same way that citizens of the People’s Republic of China were Chinese. He belonged to Hong Kong and was intensely proud of it.”¹¹

¹⁰ Helen F. Siu, “Immigrants and Social Ethos: Hong Kong in the Nineteen-eighties,” *Journal of the Hong Kong Branch of the Royal Asiatic Society* (1986, Vol. 26), 1-16.

¹¹ Tsang, *A Modern History of Hong Kong*, 195.

Hong Kong Permanent Residency

The Sino-British Joint Declaration

China has never recognized the treaties that ceded Hong Kong and Kowloon and leased the New Territories. These treaties, seen as made under duress in the face of imperialism and colonialism, have always been unequal.¹² As such, the basic stance of China is that Hong Kong has always been an inalienable part of China and its people are always compatriots and Chinese by nationality. According to the PRC Nationality Law, which is based on the principle of *jus sanguinis* (blood tie), dual nationality is prohibited.

The Sino-British Joint Declaration on the question of Hong Kong was signed in 1984. By virtue of the Joint Declaration, both the governments of the United Kingdom and the People's Republic of China agreed that the PRC would resume sovereignty over Hong Kong on 1 July 1997 and that Hong Kong would become a special administrative region by virtue of Article 31 of the PRC Constitution. A Basic Law would be enacted to stipulate that Hong Kong's capitalist system and life style should remain unchanged for 50 years.

As to the question of nationality of the residents in the Hong Kong Special Administrative Region, the Joint Declaration provides that both Chinese and non-Chinese nationals can be residents. It also introduces the concept of right of abode, which has an origin in the English common law and nationality law. Annex I Part XIV of the Joint Declaration provides two broad categories of people who could have the right of abode in the Hong Kong Special Administrative Region: (a) Chinese nationals; and (b) non-Chinese

¹² Julia Lovell, *The Opium War: Drugs, Dreams and the Making of China* (London: Picador, 2011), 9.

nationals. Chinese nationals are those “who were born or who have ordinarily resided in Hong Kong before or after the establishment of the Hong Kong Special Administrative Region for a continuous period of 7 years or more, and persons of Chinese nationality born outside Hong Kong of such Chinese nationals.” This sets the foundation of residency/ identity provisions in the Basic Law. A distinct legal identity is thus created within the framework of the Chinese nationality law, policies and Hong Kong’s own law which originates in the English Common Law.

By virtue of the Joint Declaration, all previous Hong Kong Belongers, who were of Chinese origin and Chinese Residents under the Immigration Ordinance 1971, are Chinese nationals under the new categorization and shall enjoy the right of abode in Hong Kong. If they are Chinese by blood and descent in Hong Kong, they are all Chinese nationals.¹³

In fact, the text of the Joint Declaration uses a more general term of “local inhabitants” to refer to the Hong Kong people.¹⁴ It was not until the amendment of the Immigration Ordinance in 1987 that the category of Hong Kong Permanent Residents and the right of abode were formally introduced into Hong Kong law.

Amendments to the Immigration Ordinance and the enactment of the HKSAR Basic Law

The legal category of Hong Kong Permanent Resident (HKPR) formally replaced Hong Kong Belonger, Chinese Residents and Resident United Kingdom Belongers in 1987. Section 2A of the

¹³ *Sino-British Joint Declaration*, Chinese Memorandum.

¹⁴ *Sino-British Joint Declaration*, Part XIV of Annex I.

Ordinance read “Hong Kong Permanent Resident enjoys a right of abode in Hong Kong.” The right of abode is defined as the right-

(a) to land in Hong Kong;

(b) not to have imposed upon him any condition of stay in Hong Kong, and any condition of stay imposed shall have no effect;

(c) not to have a deportation order made against him; and

(d) not to have a removal order made against him.

Residency and the right of abode are provided in Article 24 of the Basic Law, the “mini-constitution” for the Hong Kong Special Administrative Region which was formally enacted in April 1990. Six categories of permanent residents are defined in Article 24(2) as:

(1) Chinese citizens born in Hong Kong before or after the establishment of the HKSAR;

(2) Chinese citizens who have ordinarily resided in Hong Kong for a continuous period of not less than seven years before or after the establishment of the HKSAR;

(3) Persons of Chinese nationality born outside Hong Kong of those residents listed in categories (1) and (2);

(4) Persons not of Chinese nationality who have entered Hong Kong with valid travel documents, have ordinarily resided in Hong Kong for a continuous period of not less than seven years and have taken

Hong Kong as their place of permanent residence before or after the establishment of the HKSAR;

(5) Persons under 21 years of age born in Hong Kong of those residents listed in category (4) before or after the establishment of the HKSAR; and

(6) Persons other than those residents listed in categories (1) to (5), who, before the establishment of the HKSAR, had the right of abode in Hong Kong only.

Article 24(3) provides that the permanent residents shall have the right of abode in Hong Kong. The Court of Final Appeal, in *Ng Ka Ling and Others* case (1999), described that the right of abode as a “core right” that “without it and the right to enter which is an essential element, the rights and freedoms guaranteed [by the Basic Law] can hardly be enjoyed, including in particular the right to vote and to stand for election.”¹⁵

Article 24(4) provides a category called non-permanent residents, who do not have the right of abode in Hong Kong but are qualified to obtain identity cards in accordance with the law.¹⁶

¹⁵ *Ng Ka Ling and Others v Director of Immigration* (1999) 2 HKCFAR 4, 34F-G (per Li, CJ)

¹⁶ According to the Registration of Persons Ordinance (Cap. 177), a person who is allowed by the Director of Immigration to stay in Hong Kong for 180 days or longer shall be registered as a non-permanent resident. People who fall under this category include expatriates working in Hong Kong and Chinese nationals who came to Hong Kong through the One-Way Permit Quota System for settlement.

The universalistic, rights-based and inclusive Hong Kong residency

There are two distinct characteristics of the Hong Kong residency in Hong Kong SAR: its being rights-based and inclusive.

The permanent residency, or the basic “membership”, so to speak, in the Hong Kong Special Administrative Region, as prescribed by Article 24(2) of the Basic Law, is grounded on the right of abode; and this right is stipulated in details under the Immigration Ordinance. Holder of the right of abode shall have the rights to land and freedom from being deported, removed and imposed any conditions of stay. Such freedoms and rights are essential to the individual’s movement and autonomy. In other words, these freedoms and rights are not to be subject to arbitrary control. The right of abode shall override any undue bureaucratic control and measures over the freedom of movement of the HKPRs.

Non-permanent residents’ stay is conditional, as they do not enjoy the right of abode. They are free to move and travel so long as their permission to remain in Hong Kong has not expired.¹⁷

The Basic Law further provides that all residents are equal before law, regardless of nationality and the type of residency they are holding, permanent or non-permanent¹⁸. All Hong Kong residents enjoy a wide range of civil and social rights as protected by Chapter III of the Basic Law, including those protected under the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights

¹⁷ *Gurung Bahadur v Director of Immigration* (2002) 5 HKCFAR 480. See also Johannes Chan and C. L. Lim, eds., *Law of the Hong Kong Constitution* (Hong Kong: Sweet & Maxwell, 2012), 163, para. 5.054.

¹⁸ Hong Kong Basic Law, art 25

which remain in force by virtue of Article 39 of the Basic Law. In as sense, Hong Kong residency has a universalistic nature. All residents share rights and freedoms which are universally recognized and, by virtue of the Basic Law, are constitutionally guaranteed and enforceable in courts.

Another difference between permanent and non-permanent residents is concerned with political participation. Hong Kong Permanent Residents, but not Hong Kong Residents, enjoy equal rights to vote and stand for elections.¹⁹ In case of official appointments, posts such the Chief Executive of HKSAR,²⁰ principal officials,²¹ President of the Legislative Council²² and the Chief Justice²³ are restricted only to HKPRs of Chinese nationality.

Hong Kong permanent residency is inclusive in the sense that both Chinese and non-Chinese can acquire the status due to the link and connection with Hong Kong through birth, settlement or descent. However, this inclusiveness should also be qualified by the followings: (a) acquisition threshold for non-Chinese nationals is higher;²⁴ and (b) the status enjoyed by the non-Chinese nationals may lose due to a continuous absence of not less than 36 months after ceasing to have ordinarily resided in Hong Kong.²⁵

¹⁹ Ibid art 26

²⁰ Ibid art 44

²¹ Ibid art 61

²² Ibid art 71

²³ Ibid art 90

²⁴ There is an application procedure for non-Chinese nationals. For Chinese nationals (categories (1) and (3)), acquisition by birth and by descent is natural. For category (2) acquisition, a 7-year ordinary residence is all that is needed, and is a lower threshold than that for category (4) which requires proof of intention to make Hong Kong a permanent home.

²⁵ Immigration Ordinance, Cap. 115, sch. 1, para 7(1)

The nationality pre-requisite of the first three categories of HKPRs under Article 24(2) is Chinese nationals; and the permanent residency status may be acquired by birth, settlement (fulfillment of the requirement of 7-year continuous and ordinary residence) or descent (limited to persons of Chinese nationality born outside Hong Kong to the categories (1) and (2) HKPRs).²⁶ These three categories of HKPRs form the vast majority of the Hong Kong population.²⁷

For non-Chinese nationals (categories (4) and (5)), they have to fulfill (a) the requirements of seven-year continuous and ordinary residence; and (b) having taken Hong Kong as their permanent place of residence.²⁸ There is an application procedure. In a sense the threshold is high as both conditions (the seven year requirement and the permanence requirement) must be concurrently satisfied at the time of application for the permanent residency status.²⁹ And the second requirement of intention involves a partly objective and partly subject test: the applicant has to furnish evidence to demonstrate that steps have been taken to make Hong Kong his permanent home and that there is a sufficient degree of continuity that could be described as “settled”.³⁰ For their children, only those who are born in Hong Kong and under 21 of age are entitled to Hong Kong permanent residency.³¹

²⁶ Persons of Chinese nationality born outside Hong Kong to the category (3) HKPRs, however, are not entitled to the right of abode by virtue of this provision.

²⁷ According to the 2011 Census data, over 94% of the Hong Kong population are ethnic Chinese (self-identification). It may be used as an indicator of the rough proportion of Chinese nationals in the city.

²⁸ Basic Law, art 24(2)(4)

²⁹ *Fateh Muhammad v Commissioner of Registration* (2001) 4 HKCFAR 278; *Prem Singh v Director of Immigration* (2003) 6 HKCFAR 26.

³⁰ Chan and Lim, *Law of the Hong Kong Constitution*, 162, para 5.049.

³¹ Basic Law, art 24(2) category (5). This status, however, will expire as he reaches 21 of age. By then, he will have to apply to the Director of Immigration for the

The right of abode and hence the status of permanent residency may be acquired by the second generation of categories (1), (2) and (4) permanent residents—acquisition by descent. Children of categories (1) and (2) residents who are of Chinese nationality and born outside Hong Kong are guaranteed such right and status; and there is no age limitation.³² However, for children of category (4) residents, they can only acquire the permanent residency by descent if they are less than 21 years of age.³³

The morality of equal respect and concern

Despite the different ways of acquisition, the relatively more stringent conditions set for non-Chinese nationals, and the consequence that non-Chinese national’s permanent residency status may be lost due to long time absence after ceasing to “ordinarily reside” in Hong Kong, the Basic Law grants equal rights (including voting rights) to *all* permanent residents and they are supposed to be equal before law. The equal constitutional status of residents calls for a public moral that all permanent residents, regardless of their nationalities and the way they acquired their permanent residency, be respected and treated equally.³⁴ To read the constitution and its

permanent residency status.

³² Ibid., art 24(2)(3)

³³ Ibid., art 24(2)(5)

³⁴ This is primarily based on Ronald Dworkin’s rights thesis and idea of moral constitution. For rights thesis, read: Ronald Dworkin *Taking Rights Seriously* (Cambridge, Massachusetts: Harvard University Press 1978). For his idea of constitution of principle: Ronald Dworkin *Life’s Dominion: An Argument about Abortion, Euthanasia, and Individual Freedom* (New York: Vintage Books 1993) 118-147. For the thesis of moral reading of constitution: Ronald Dworkin *Freedom’s Law: The Moral Reading of the American Constitution* (Cambridge, Massachusetts: Harvard University Press, 1996).

rights provisions—including the residency provisions in the context of the Basic Law—in the moral perspective—that is, to treat every member of the society with equal respect and concern—is important to make the Basic Law function as a constitution based on principles, that is, taking the promises of “one county, two systems”, “high degree of autonomy”, “Hong Kong people to rule Hong Kong” as solemn pledges and moral commitments; or otherwise provisions in the constitution would be taken as separate, unconnected and purposeless provisions, susceptible to discretionary interpretation and serving no meaningful purposes.³⁵

Unfortunately, this kind of moral reading of the residency provisions in the Basic Law by the Court of Final Appeal, seemed to have been rejected by the State and the Hong Kong society at large, as shown in the right of abode saga in 1999.

The right of abode cases 1999 and controversies over Article 24(2)(3)

Article 24(2)(3) grants the permanent residency status/ right of abode to all the persons of Chinese nationality born outside Hong Kong to HKPRs. However, the differential treatment that those born and living in the Mainland of China should undergo led to legal challenges to the constitutionality of the laws which established such arrangement.

The Immigration Ordinance was amended shortly after the Handover in 1997 to bring it in line with Article 24 of the Basic Law. A Certificate of Entitlement mechanism (CoE) was established. For

³⁵ The distinction between constitution of principle and constitution of detail. See Dworkin's *Life's Dominion*.

those living in the Mainland who were born to HKPRs and hence eligible under Article 24(2)(3), this mechanism operated in conjunction with the conventional One-Way Permit Quota System (OWPQ), which has been administered by the Chinese authorities for decades regulating migration of the Mainlanders to Hong Kong for settlement.³⁶ Application for the Certificate of Entitlement had to be done through the Mainland public security authorities when the applicant applied for the one-way exit permit from them. Without the exit permit, a Mainland resident could not leave the Mainland. And migration out of the Mainland involves also cancelation of the Mainland residency registration. A doubt was cast on whether such an expedient arrangement would mean subjecting the exercise of Hong Kong’s immigration authority to the Mainland authorities, hence constitutionally inappropriate. And the situation at that time was that there had been at least several thousands of right of abode claimants (children of HKPRs) from the Mainland physically present in Hong Kong. Many of them had either come to Hong Kong before July 1997 without passing an immigration checkpoint or come on valid two-way permit but overstayed. If they were proved to be eligible under Article 24(2)(3), their stay in Hong Kong should not be legally questionable because of their status as holder of the right of abode. To remove them, or to ask them to go back to China to undergo the application procedure would therefore be legally untenable as these would jeopardize their right of abode. The CoE-OWPQ mechanism arguably imposed restrictions on the eligible category (3) persons in their exercise of the constitutionally guaranteed right of abode granted to them. In *Ng Ka Ling and Others*,

³⁶ The origin of this system is dated back to the early 1950s after the establishment of the People’s Republic of China and when the colonial Hong Kong Government unilaterally applied a quota system to regulate the influx of Mainland migrants. See discussion above.

the Mainland born children attempted to challenge the constitutionality of such arrangement and seek recognition of their constitutional right. The Court of Final Appeal handed down a judgment in favour of them, giving primacy to the right of abode and upholding the integrity of Article 24(2)(3) as a constitutional guarantee in the application to all children of Chinese nationality born to HKPRs outside Hong Kong. The Court adopted a purposive interpretation of Article 24(2)(3), that is reading the provision in the light of Hong Kong's constitutional autonomy in the framework of "one country, two systems". By recognizing it as a constitutionally entrenched right, the Court laid down the right of abode as a foundation of Hong Kong permanent residency—the "core right" thesis.³⁷ This "core right" conception may be compared to what some political philosophers or citizenship scholars as "the right to have rights."³⁸

In the moral sense, the decision fulfilled the requirement of "equal respect and concern" for those eligible, according to Ronald Dworkin's moral reading of constitution.³⁹ Article 24(2)(3) grants equal right to all persons born outside Hong Kong to Hong Kong permanent residents; and persons born in the Mainland should not be subject to more restrictions (the CoE-OWPQ mechanism) than those

³⁷ *Ng Ka Ling and Others*

³⁸ The original idea of the "right to have rights" came from reflections over the plight of statelessness and the importance of political identity by Hannah Arendt. But the use of the concept of "right to have rights" extends to citizenship study and becomes a key concept in defining citizenship. Hannah Arendt, *Origins of Totalitarianism* (3rd edn) (London: George Allen & Unwin Ltd 1967) 296-297.

³⁹ Dworkin, *Taking Rights Seriously*, 272-273. Dworkin takes that the right to be treated as equals by the government must be taken as fundamental under the liberal conception of equality. Government must treat the people it governs with equal concern and respect.

who were born in other places outside Hong Kong, as far as the exercise of the right of abode by descent is concerned.

The judgment was supposed to be final as “one country two systems” and the Basic Law have preserved the common law system, judicial independence and final adjudication in Hong Kong. Unfortunately, the decision was later turned down by the Interpretation of the National People’s Congress Standing Committee⁴⁰, at the request of the HKSAR Government fearing that the decision might trigger large influx of Mainland migrants which create social and welfare burden implications would be beyond Hong Kong’s capacity. In the Government’s campaign to garner support for its move to ask the Central People’s Government’s intervention, the “problem of people” argument was rekindled and relied upon again. Hong Kong people and the society at large saw the claimants as Mainlanders wanting to settle in Hong Kong quick, instead of seeing them as HKPRs (Hongkoners). Constitutional recognition of the claims to the right of abode—a core right constitutive of the local belonging legal identity—and the moral right claim to family reunion were, however, displaced by the prevailing sense of Hong Kong identity—built around the values of “prosperity and stability” and an attitude demeaning the Mainlanders. The outcome was, as Agnes Ku identified, a “hegemonic production of consent through construction of social panic” that lent support to the government’s request to the National People’s Congress Standing Committee’s (NPCSC) Interpretation in June 1999 which effectively overruled the supposedly final decisions of the HKSAR Court of Final Appeal in the right of abode cases, bringing about a series of constitutional controversies.⁴¹ Concerns about the potential social impact on Hong

⁴⁰ Hong Kong Government, “A Problem of People,” 1956.

⁴¹ Agnes S. Ku, “Hegemonic construction, negotiation and displacement,”

Kong may not be unreasonable. But in preventing the occurrence of an imagined scenario of massive influx and unbearable welfare burden, ethical requirements, constitutional principles and rights are compromised.⁴² The Interpretation decreed that Article 22(4)⁴³ of the Basic Law covers Article 24(2) category (3) persons born in the Mainland and therefore they must apply to the relevant Mainland authorities for the exit documents before they can enter the HKSAR, despite that they hold the right of abode in Hong Kong. As a result of the Interpretation, the constitutionality of the dual system of CoE-OWPQ as applied to the category (3) eligible Mainland children to HKPRs is preserved. Category (3) eligible persons under the residency provisions of Article 24(2) were treated as Mainland applicants for settling in Hong Kong instead of Hong Kong permanent residents who deserve equal treatment before the law.⁴⁴

HKPR in the Context of PRC Nationality Law

PRC Nationality Law

International Journal of Cultural Studies (2001, Vol. 4 Issue3), 259-278.

⁴² Raymond Wacks, *Law, Morality and the Private Domain* (Hong Kong: Hong Kong University Press, 2000), 3-5. Wacks has long been arguing for a rights-based interpretive approach to the Basic Law. He shares with Ronald Dworkin in seeing the legal system as a moral system. He praised the Court of Final Appeal's decision in *Ng Ka Ling and Others* but lamented after the NPCSC Interpretation that the Court had failed to demonstrate "its earlier fidelity to individual rights".

⁴³ Article 22(4) of the Basic Law reads: For entry into the Hong Kong Special Administrative Region, people from other parts of China must apply for approval. Among them, the number of persons who enter the Region for the purpose of settlement shall be determined by the competent authorities of the Central People's Government after consulting the government of the Region.

⁴⁴ The effect of the NPCSC Interpretation is that the right of abode the eligible persons entitled is subject to Article 22(4) of the Basic Law which governs the Mainland residents who are to migrate to and settle in Hong Kong.

In strict legal sense, Hong Kong residency is only an approximation of citizenship. In the context of Chinese law, there is only Chinese citizen but no HKSAR citizen. The vast majority of Hong Kong permanent residents—categories (1), (2) and (3) permanent residents— are subject to the PRC Nationality Law. Article 33 of the PRC Constitution provides that “all persons holding the nationality of the People’s Republic of China are citizens of the People’s Republic of China.” It further provides that all PRC citizens shall be equal before law. The Constitution equates nationality with citizenship.

PRC Nationality Law is enacted to define Chinese nationality, its acquisition, renunciation and restoration. The law primarily follows the principle of *jus sanguinis*, supplemented by the principle of *jus soli*.⁴⁵

Jus sanguinis is a legal principle by which nationality or citizenship is determined on the basis of blood tie (descent), ethnicity or culture. In other words, nationality is defined by a person’s belonging to a family, tribe, race or a people. *Jus soli*, on the other hand, is a principle by which nationality is determined on the basis of being born in the territory of a political community (state).⁴⁶

⁴⁵ 張勇、陳玉田，《香港居民的國籍問題》（北京：法律出版社，2001）[Zhang Yong and Chen Yutian, *Issues of Nationality of the Hong Kong Residents* (Beijing: Law Publishing House, 2001), 35-48]. These principles have been fundamental to the nationality laws of China since late Imperial Qing Dynasty.

⁴⁶ In discussing citizenship and modern statehood, Preuß argues the importance of *jus soli* principle in delimiting modern state’s authority, sovereignty and claims to obedience along physical boundaries. *Jus sanguinis*, however, was important in maintaining the symbolic boundaries and coherence of migrating nomadic societies. “Wherever there is no physical locus, the symbolic bonds of common blood, descent, history, fate, culture, religion or language evolve into the primary source of commonness and of communal life.” Ulrich K. Preuß, ‘Two Challenges to European

Article 2 of the Nationality Law stipulates that China is a multi-ethnic unitary state and all people from all ethnic groups shall have Chinese nationality. Since there are some 57 officially recognized ethnic groups in China, Chinese nationality based on the principle of *jus sanguinis* is not purely based on natural blood line or ethnicity but is more like a political/ legal construct. Therefore, under the Chinese law, Tibetans, Uyghurs and Hans are all Chinese nationals, despite their having different blood, cultural and ethnic origins.

Articles 4 and 5 of the Nationality Law blend the two principles. Any person born in China whose parents are both Chinese nationals, or one of whose parents is a Chinese national, shall have Chinese nationality.⁴⁷ A person who is born abroad and whose parents are both Chinese nationals, or one of whose parents is a Chinese national, shall have Chinese nationality. But a person whose parents are both Chinese nationals and have both settled abroad, or one of whose parents is a Chinese national and has settled abroad, and who has acquired foreign nationality at birth shall not have Chinese nationality.⁴⁸

Application of the Nationality Law to Hong Kong

The Nationality Law is one of the few national laws that apply to the Hong Kong Special Administrative Region. In 1996, the National People's Congress Standing Committee (NPCSC) issued a

Citizenship' in Richard Bellamy and Dario Castiglione, eds., *Constitutionalism in Transformation: European and Theoretical Perspectives* (Oxford: Blackwell Publishers, 1996), 123, 125.

⁴⁷ PRC Nationality Law, art 4

⁴⁸ *ibid.* art 5

set of specific explanations on the application of the Nationality Law to HKSAR.⁴⁹ Clause 1 of that Interpretation stipulates that all Hong Kong residents of Chinese blood line (*jus sanguinis*) who were born in Chinese territory (including Hong Kong) (*jus soli*) possess Chinese nationality and are Chinese citizens, according to the Nationality Law. As such, “Chinese compatriots” (the exact term used in the Interpretation) holding British passports⁵⁰ and those who acquire British nationality through the British Nationality Selection Scheme⁵¹ are still regarded as Chinese nationals.⁵² The provisions regarding the first two categories of HKPR in Article 24(2) of the Basic Law cover these previous Hong Kong British subjects. The NPCSC Explanations 1996 agree with the long term policy stance held by China that Hong Kong has been historically part of Chinese territory and that the local Chinese inhabitants are Chinese compatriots. A change of nationality is only recognized if one has acquired the status by settling in a foreign country and formally renounced his Chinese nationality.⁵³

⁴⁹ Explanations of Some Questions by the Standing Committee of the National People’s Congress Concerning the Implementation of the Nationality Law of the People’s Republic of China in the Hong Kong Special Administrative Region (15 May 1996)

⁵⁰ These refer to the British Dependent Territory Citizen passports which became invalid after 1 July 1997 by the Hong Kong Act (British Nationality) Order 1986. These passports were replaced by the British National (Overseas) passports for the locally born previous British subjects who wished to maintain their British status after the Handover.

⁵¹ The scheme was introduced by virtue of the British Nationality (Hong Kong) Act 1990 to allow 50,000 families to acquire full British citizenship. Gina Clayton, *Textbook on Immigration and Asylum Law*, 4th ed. (Oxford: Oxford University Press, 2010), 79.

⁵² Explanations by NPCSC (15 May 1996), clauses 2 and 3

⁵³ PRC Nationality Law, art. 11.

Chinese nationals, citizens, residents and compatriots

A note has to be made that, apart from “nationals” or “citizens” (中國公民), there are also more rhetorically used categories, for example *renmin* (人民, people) and *tongbao* (同胞, compatriots), in the PRC political and legal discourses. *Renmin* is a very general term referring to the people of the whole nation. Despite that Hong Kong permanent residency is inclusive and embraces both Chinese and non-Chinese nationals, the term *xianggang tongbao* (香港同胞, Hong Kong compatriots) is very often used to address the Hong Kong people by the state leaders and officials. The commonly used English translation—Hong Kong compatriots—does not bring out the full meaning of the Chinese term. *Tongbao* literally means “common or same cell”, referring to a common ancestry or blood tie. Such affectionate term likens the tie of fellow countrymen to fraternity, tie as close as siblings. The term does not only appear in speeches of the state leaders and officials for propaganda and political purposes, but is also used in formal policy and legal documents. Its common and wide usage without a formal legal definition has caused some ambiguity. For example, if an official document is addressed to *xiangong tongbao*, should it be only taken literally as addressing only to the Hong Kong residents with Chinese blood tie? Or, should it be interpreted to include those who are legally Chinese nationals but not ethnically Chinese?⁵⁴ And what about those who are categories (4), (5) or (6) HKPRs and who are not Chinese nationals?

⁵⁴ For example, a foreign national or stateless person may be naturalized to become a Chinese national by virtue of Article 7 of the PRC Nationality Law. Zhang and Chen, *Issues of Nationality of the Hong Kong Residents*, 48.

Same nationality, different residency and rights

Notwithstanding the existence of a territorial border in between Hong Kong and the Mainland, and the need for the Mainland residents to fulfill certain legal requirements to settle in Hong Kong, Chinese nationality is the common legal identity among Hong Kong Chinese permanent residents and the Mainland residents. Categories (1), (2) and (3) HKPRs under Article 24(2) of the Basic Law are all Chinese nationals under the PRC Nationality Law. In strict legal sense, HKPR is but a category of residency, not a state citizenship, and should be understood in the context of Hong Kong as part of China. However, some kind of local-belonging/ civic consciousness has in fact emerged since 1960s (after the riots) and the differences between Hong Kong and Mainland, in terms of institutions, lifestyle, social and institutional values etc. have grown wide. The history of Hong Kong and, paradoxically, “one country, two systems” help sustain a sense of citizenship distinct from the rest of China. The rights-based nature of the Hong Kong residency does give the individual more autonomy and freedom. One distinct practical difference is that Hong Kong Permanent Residents holding a HKSAR passport enjoy visa-free access/ visa-on-arrival from more countries (152) from across the world,⁵⁵ comparing to just 52 countries for ordinary Chinese passport holders. Also, human rights are basically guaranteed by virtue of Chapter III of the Basic Law and the Bill of Rights Ordinance and the International Covenant on Civil and Political Rights which remains effective in HKSAR by virtue of Article 39 of the Basic Law. Rights are judicially enforceable. In this sense, Hong Kong residents’ freedoms and rights

⁵⁵ <http://www.immd.gov.hk/eng/service/travel_document/visa_free_access.html>
[01-25-2016]

are better protected institutionally, comparing to their fellow countrymen.

Is Law Relevant in Constructing the Hongkonger's Identity

A moral of equal respect and concern

The legal category of Hong Kong Residency is a product of political and legal negotiations out of the unique history and constitutional context of Hong Kong. It is the key to define Hongkonger's legal identity and everyday life. It defines membership to Hong Kong as a community and the membership it outlines is diverse, inclusive and is a reflection of Hong Kong as an open, international city. Hong Kong residency is also rights-based. All permanent residents, and the non-permanent residents as well, are supposed to enjoy the same constitutional rights, except in the area of elections, and freedoms on equal par due and are equal before the law. Given this legal framework, a diverse citizenry based on equal respect and concern is envisioned. And such a vision calls for a moral of "equal respect and concern" that could guide our reading of the relevant provisions in the Basic Law.

The need for this moral was salient in the right of abode cases (*Ng Ka Ling and others*) in which the Mainland born children to Hong Kong permanent residents demanded for the equal exercise of the constitutional right of abode by descent. However, not everyone would share this moral vision. In that case, the Court of Final Appeal's decision may be seen as an attempt to moral-read the residency provisions: giving primacy to the constitutional right of abode of the Mainland born children to Hong Kong Permanent

Residents and treating them as equals under the same constitutional residency provision. The State (including the HKSAR Government) did not share the vision and rejected the decision; and see the case as a matter of control over Mainlanders’ migration and re-settlement. The society and the people at large concerned more about social stability than the demand of morality and constitutional rights.

Sociologist Agnes Ku suggested that there was a pre-existing cultural framework in operation which contributed to the rejection of the Mainland born children of Hong Kong residents: a Hong Kong identity built on a sense of superiority versus an economically and culturally backward “other” .⁵⁶

Anthropologist Gordon Mathews observed that Hongkongers’ self-identification has three clusters of meaning: (a) “Chineseness plus affluence/ cosmopolitanism/ capitalism; (b) Chineseness plus English/ colonial education/ colonialism; and (c) Chineseness plus democracy/ human rights/ the rule of law.”⁵⁷ Rights and law appeared to be a constitutive aspect of the Hong Kong identity. If this schema can be used to reflect on Hong Kong people’s reaction to the right of abode cases, it was actually affluence/cosmopolitanism/capitalism — not rights and the rule of law—that reigned. The rights/ rule of law aspect, despite many proclaim it as a “core value” Hongkongers hold dear, is an ideal and fragile basis in the Hongkonger’s cultural identity.⁵⁸

The localism discourses

⁵⁶ Ku, “Hegemonic construction, negotiation and displacement,” 265.

⁵⁷ Gordon Mathews, “Heunggongyah: On the Past, Present and Future of Hong Kong Identity,” *Bulletin of Concerned Asian Scholars* (1997, Vol. 29 No.3), 3-13.

⁵⁸ *Ibid.*, 11.

Localism is a recent buzzword in the local politics and public discourses which can be seen as a kind of consciousness emphasizing priority to the local, self-governing and a basic stance against interventions from the outside. In the wake of China's growing influences and interventions, the fear for "Mainlandization",⁵⁹ and the worry about the future of Hong Kong in the light of the approaching expiry of the pledge of "one country, two systems", localism consciousness discourses have heightened. Along the spectrum of discourses—one end being "Hong Kong as a part of China" with the other end being "Hong Kong as apart from China",⁶⁰ there are at least three distinct propositions, namely Hong Kong as a polis; Hong Kong as a nation; and Hong Kong reformation.⁶¹ The issue of belonging—who belong to Hong Kong and who count as Hongkongers? – is critical but yet no promising proposition has emerged from these discourses.

What do Hongkongers commonly share that make Hongkongers/ Hongkongese a collective identity? One narrative on the identity of Hongkongese or Hongkongers (香港人, *xianggangren*)⁶² is a Cantonese speaking persons born and/ or

⁵⁹ It describes the process to assimilate Hong Kong into the "one country" and making the city more an integral and homogenous part of China.

⁶⁰ Mathews, "Heunggongyahn: On the Past, Present and Future of Hong Kong Identity," pp. 3-13.

⁶¹ 陳雲,《香港城邦論：一國兩制，城邦自治，是香港生死攸關之事》(香港：天窗出版社，2015) [Chin Wan, *On Hong Kong as Polis: One Country, Two Systems and the Self-government of Polis are Matters of Life and Death for Hong Kong* (Hong Kong: Enrich Publishing, 2011)]; 二零一三年度香港大學學生會學苑 編,《香港民族論》(香港：香港大學學生會，2015) [Undergrad H.K.U.S.U. 2013, ed., *On Hong Kong as a Nation* (Hong Kong: HKUSU, 2015)]; 方志恆 編,《香港革新論》(台北：漫遊者文化事業，2015)。[Fong Chi Hang Brian, ed., *On Hong Kong Reformation* (Taipei: Azoth Books, 2015)]

⁶² The Oxford English Dictionary gives the definition of Hongkongese or Hongkonger as "a native or inhabitant of Hong Kong".

brought up in Hong Kong sharing some common experiences and culture, or even values belonging to Hong Kong.⁶³ Law—including both the legal provisions and the judicial opinions—has, on the other hand, offered a framework that may serve as a foundation of Hongkongers. However, this framework does not always come on good terms with the socio-cultural identity that localism discourses has constructed. There is a gap between what the law says (requirement of justice) and what the people says about local belonging and identity. *Ng Ka Ling and Others*,⁶⁴ *Chong Fung Yuen*,⁶⁵ *Vallejos Evangeline Banao*,⁶⁶ and *Kong Yunming*⁶⁷ are

⁶³ 曹曉諾，〈香港人的背後是整個文化體系〉，二零一三年度香港大學學生會學苑編，〈香港民族論〉（香港：香港大學學生會，2015），頁 51-61。[Cao Xiao Nuo, “There is a whole system of culture behind Hongkongers,” in Undergrad H.K.U.S.U. 2013, ed., *On Hong Kong as a Nation*, 51-61.]

⁶⁴ *Ng Ka Ling and Others v Director of Immigration* (1999) 2 HKCFAR 4

⁶⁵ *The Director of Immigration v Chong Fung Yuen* (2001) 4 HKCFAR 211. The case granted the right of abode to persons of Chinese nationality born in Hong Kong regardless of the parents residency status based on the common law approach interpretation of Article 24(2)(1) of the Basic Law, has been criticized as responsible for the trouble of the influx of Mainland women seeking to give birth in Hong Kong public hospitals. Chong Fung Yuen, who has acquired Hong Kong permanent resident status and been living and educated in Hong Kong, was teased as the origin of the “locust catastrophe”. 〈攻破居港權第一人 引發來港產子潮 莊豐源：我不是蝗蟲〉，〈蘋果日報〉，2011 年 5 月 1 日 [“First person to break the right of abode and bring flocks to give birth in Hong Kong, Chong Fung Yuen: I am not locust,” *Apple Daily* 1 May 2011] <<http://hk.apple.nextmedia.com/news/art/20110501/15214738>> [2016-01-19]. “Locust” is a derogatory metaphor/ dehumanizing language used by some to describe Mainland visitors to Hong Kong.

⁶⁶ *Vallejos Evangeline Banao v Commissioner of Registration and Another* (2013) 16 HKCFAR 45. It was a case concerning about the application for permanent resident status by a foreign domestic helper from the Philippines who had come to Hong Kong and worked for over 20 years. Her applications to the government were rejected and she filed a lawsuit. The Court of First Instance decided for her, i.e. she should have been given permanent resident status. On appeal, however, the Court of Appeal and the Court of Final Appeal rejected the case.

⁶⁷ *Kong Yunming v The Director of Social Welfare* (2013) 16 HKCFAR 950. In *Kong Yunming*, a judicial review case which declared that the seven-year residency

cases that to some extent illustrate the gap and tension. If Hongkongers were only conceived in a narrow, restrictive sense, the diversity and inclusiveness as to place of birth and nationalities that the residency legal provisions allow would be ignored and the possibility, or even the necessity, to imagine and construct a more embrative and diverse Hong Kong citizenry in a globally connected city would be killed. We need to appreciate the unique nature and history of Hong Kong residency.

Law's role in constructing collective identity

If an inclusive, rights-based citizen's identity is the purpose of the project of constructing Hongkonger's identity, what role can law play?

For one thing, law provides the basic authoritative language (e.g. international conventions, constitutional provisions and statutes), and processes and ways (e.g. the judicial process) to seek for justice and

requirement set for the Comprehensive Social Security Assistance (CSSA) Scheme application unconstitutional, the Court of Final Appeal has taken the literal meaning of the term 'Hong Kong residents' in Article 36 of the Basic Law to include both Hong Kong Permanent Residents and (non-permanent) Hong Kong Residents, thereby relaxing the access right to the CSSA. The Court of Final Appeal decided in favour of the appellant—a “new immigrant” yet to attain permanent residency status whose husband in Hong Kong died one day after she had arrived. The decision is unpopular and has drawn wide criticisms. The “locust” metaphor was invoked again in some social media and chatrooms accusing new immigrants/ Mainlanders for exploiting the welfare system. Jason Y. Ng, “Kong vs Hong Kong,” *South China Morning Post*, 3 January 2014

<<http://www.scmp.com/comment/blogs/article/1396436/kong-vs-hong-kong>>
[2016-01-19].

identity recognition.⁶⁸ For another, besides the instrumental values, law is also a branch of rhetoric, as James Boyd White sees it.⁶⁹ White puts forward that law is a rhetorical activity in which people engage in speech and argument. Law as rhetoric is to be distinguished from law (or governmental activities) as bureaucratic process functioning according to the means-ends rationality.⁷⁰ He invites us to think about law not as an objective reality, but as a process of rhetorical activity which would engage people and is capable of creating collective identity, community and culture. He coins the term “constitutive rhetoric”⁷¹ whose ultimate subject is justice.⁷² Law, in this sense, is a set of resources—legal rules, judicial opinions, maxims, general understandings, conventional wisdom and all other technical and non-technical resources—for thought, speech and argument on occasion people considered as legal. People (lawyers and others) base on them to define one’s position, develop argument and persuade others to accept.⁷³

Can a more persuasive narrative on Hongkonger’s identity, based on law and the moral of equal respect and concern, be constructed, against the tendency of emerging xenophobia, selfishness and hatred, on which no genuine collective identity and

⁶⁸ Matthew Zagor, “Recognition and narrative identities: is refugee law redeemable?” in Fiona Jenkins, Mark Nolan, Kim Rubenstein, eds., *Allegiance and Identity in a Globalised World* (Cambridge University Press, 2014), 311-353, 321-322.

⁶⁹ James Boyd White, “Rhetoric and Law: The Art of Cultural and Communal Life,” in *Heracles’ Bow: Essays on the Rhetoric and Poetics of the Law* (The University of Wisconsin Press 1985), 28-48. Rhetoric refers to as the activity and art of persuasion by using speech and writing (language). Here, White does not take the pejorative sense in which it is sometimes being understood: “ignoble art of persuasion”, “a false art”, propaganda or advertisement. (31-32)

⁷⁰ *Ibid.*, 32-33.

⁷¹ *Ibid.*, 34-35.

⁷² *Ibid.*, 31.

⁷³ *Ibid.*, 33.

community can ever build?⁷⁴ To build a collective identity, people need to engage. People need to engage in reflecting, talking, imagining, associating and creating based on rules, principles and ethics. Civic and community engagement plays an important role,⁷⁵ so as a clear and strong moral voice in times of need.

Is There a Role for the Catholic Church?

Catholic faith cares deeply about the humanity: the dignity and well-being of the individual and human's communion with God and his/ her fellows. Human individual is created in the image of God and is unique in creation.⁷⁶ The individual is not a thing, for he possesses the dignity of a person, and is capable "of self-knowledge, of self-possession and freely giving himself and entering into communion with other persons" and is called by grace to a covenant with God "to offer him a response of faith and love that no other creature can give in his stead."⁷⁷ Human's own nature unites the spiritual and material worlds. The individual lives in this world and associates with others. The Church is concerned about the human

⁷⁴ Ibid., 38-39. White quoted the great literary work *Paradise Lost*, among others, to illustrate the power of constitutive rhetoric in community construction and the need for ethics and justice, in comparison with rhetoric used as a dishonourable art of persuasion "[T]he poem shows that no community can be built upon the language that [Satan and the rebellious angels] use, a language of selfishness and hatred...even by figures with such enormous capacities of imagination and will as [the author of the poem] represents the angels to be."

⁷⁵ 吳達明,〈法治教育, 培養什麼?〉, 戴耀廷 編,《法治@教育》(香港: 次文化堂, 2013), 101-106。[Simon T M Ng, "What does Rule of Law Education Cultivate?" in Benny Y T Tai, ed., *Rule of Law @ Education* (Hong Kong: Subculture, 2013), 101-106.]

⁷⁶ *Catechism of the Catholic Church*, no. 355,

<http://www.vatican.va/archive/ENG0015/_PIB.HTM> [01-02-2016].

⁷⁷ Ibid., no. 357.

conditions in this world, although our conditions are not always promising and sometimes are even in deep crises. And the Church’s role “has always had the duty of scrutinizing the signs of the times and of interpreting them in the light of the Gospel.”⁷⁸

After the HKSAR Government decided to ask the NPCSC to reinterpret the residency provisions in May 1999, Cardinal John Baptist Wu issued a pastoral letter entitled *God is Love*.⁷⁹ He began his letter by a quote from the *Holy Bible* (Epistle to the Galatians):

“You were called to freedom, only do not use your freedom as an opportunity for the flesh, but through love be servants of one another. For the whole law is fulfilled in one word, you shall love your neighbor as yourself.” (Gal 5:13-14)

In it, he briefly reviewed the migratory nature of the Hong Kong society and how the society would welcome Mainland refugees even at times with no strong economy and firm social structure. He appealed to the kindness, generosity and benevolence of the Hong Kong people in helping to solve the question of Mainland born children to Hong Kong parents. He also saw the importance of resolving the problem locally and what far-reaching implications there would be if NPCSC was invited to do the job for Hong Kong.

The pastoral letter was not only a message of faith to the Church members, but also a message of public morality. Yet he invited

⁷⁸ *Pastoral Constitution on the Church in the Modern World*, no. 4, http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_cons_19651207_gaudium-et-spes_en.html> [01-02-2016]

⁷⁹ Cardinal John Baptist Wu, *Pastoral Letter God is Love*, 6 June 1999, <http://www.catholic.org.hk/v2/en/message_jw/y1999_4_god.html> [01-02-2016]

Christians to see the right of abode incident in the light of the Gospel and extend it to the wider community:

“The whole of the Christian life is like a great pilgrimage to the house of the Father, whose unconditional love of every human creature we discover anew each day. This pilgrimage takes place in the heart of each person, extends to the believing community and then reaches to the whole of humanity.”⁸⁰

In critical time, when reasoned judicial justice was about to be overruled and when the vast majority of the society denied the rights of the children of some of its members simply because they were Mainland born, the pastoral letter served as a clear moral voice upholding the ethics of dignity and equal respect and concern, in an unfavourable situation. In simple, plain language intelligible to ordinary people, the pastoral letter sent out a powerful and persuasive message, by referring to Bible and Hong Kong’s history, laws and values, and tried to engage the readers, i.e. everyone in the Hong Kong society, to look at the problem in new perspective: the affected children are part of us!

Law provides the resources for us to imagine and construct a local belonging identity of Hongkongers. However, legal provisions only provide the basic “scaffolding” for the legal identity (permanent and non-permanent residencies). This identity would not turn into a civic identity without the moral force of treating every member with equal respect and concern. No free, inclusive and loving society would be possible without this morality. The Church, with her roles as prophet, teacher and servant, would have a big role to play.

⁸⁰ Ibid., paragraph 2.

〔摘要〕每個人都生活在某一處境中，受制於歷史和各種政治、法律和社會制度。個人的身份、權利、自由和義務，很大程度上受這些世俗制度界定和規範。最近，有關香港人身份的討論漸趨熾熱。然而，它的法律角度卻往往被忽略。究竟法律如何為香港人身份下定義？本文指出，香港的居留權法律為誰屬香港提供了基本架構，它為建構香港人的公民身份奠定基礎。「香港人」是具包容性和以權利為本的，而所有香港人都享有憲制賦予的共同權利和自由。這種具廣泛包容性的法律身份，同時需要一種平等地尊重和關懷每一個人的公共倫理觀予以配合。因此，以法律身份為基礎的論述會比其他身份論述優勝，例如只基於語言文化分類（如講廣東話和廣東文化）的論述。然而，要求一種平等地尊重和關懷每一個人的倫理對現時面對的狹隘、自我中心的本土論述氣氛未嘗不是挑戰，而作為人性尊嚴的護衛者，以及肩負起先知、教師和僕人角色的天主教會，在當中可扮演一定的角色，特別是作為一股道德力量。