

Governance and Citizenship in Asia

Betty Yung
Kam-por Yu *Editors*

Ethical Dilemmas in Public Policy

The Dynamics of Social Values in the
East-West Context of Hong Kong

 Springer

Governance and Citizenship in Asia

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Foreword

This book is very unique in several aspects. First, it is edited by two Hong Kong-based scholars, Betty Yung and Kam-por Yu, who are also long-time observers and serious researchers on the local public policy processes, including formulation, implementation, evaluation, and reassessment.

Second, the chapters are written by local scholars who all have been adopting a multiplicity of disciplines to study public policy, ranging from philosophy to law and from social policy to public administration.

Third, this book represents the first attempt by Hong Kong scholars who seek to comprehend the dynamic and complex interrelationships between ethical dilemmas, social values, and public policy in Hong Kong. It demonstrates that Hong Kong as a Special Administrative Region of the People's Republic of China (PRC) since July 1, 1997, has been encountering a series of policy debates that are shaped by conflicting social values and ethical issues. The closer economic relationships and human interactions between Hong Kong on the one hand and the PRC on the other have been increasing the intensity and ferocity of such policy debates, especially as the territory has a cosmopolitan society where the values from the East are constantly in conflicts with those from the West.

Fourth, this book uses a variety of case studies to examine the highly contentious nature of public policy in Hong Kong. They embrace the issue of euthanasia; the law on abortion; the policy toward compensated dating; sexual morality and Internet policy; the societal debate over mainland women giving birth in Hong Kong; the question of equal opportunity in the local education system and examination; the issues of poverty and public assistance; the policy toward public health care; the contentious debate over the construction of the Express Rail Link; and the government's attempt at introducing Goods and Services Tax. These cases have not only highlighted the contentious nature of public policy making, implementation, evaluation, and reassessment in Hong Kong, but they also symbolize the first attempt by a group of very dedicated, insightful, and thoughtful local scholars to use many examples in providing an in-depth understanding of the complex interrelationships between ethical pluralism and public policy.

Fifth, all the authors in this book have adopted critical and philosophical perspectives to examine various policy cases, arguing that public engagement, citizen participation, and democratic deliberation are necessary in the process of improving the content and context of public policy in Hong Kong. Through public engagement and citizenship education, the content and context of public policy can be improved further. Therefore, this book is composed of not only of experienced local scholars but also of public intellectuals who seek to make the society of Hong Kong better through public policy deliberation and discourse.

Without any doubt, this important work is a path-breaking one that adopts multidisciplinary and interdisciplinary perspectives to comprehend the dynamics of ethical pluralism and public policy. It will surely stand the test of time in the study of public policy in general and our profound understanding of Hong Kong's policy debates in particular.

November 2015

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Chapter 1

Introduction: Ethical Dilemmas, Social Values, and Public Policy: The Context of Governance and Citizenship

Betty Yung

Abstract Public policy affects everyone in society. There are winners and losers in each public policy or public policy action. Not only should public policy makers balance out winners and losers in public policy so that there will not be ‘permanent losers,’ they should also strike a balance between immediate, short-term ‘happiness’ and future, long-term ‘happiness.’ The search for ‘good governance’ is a continual human pursuit. Having sensible social values, defining the good, together with sound procedural and managerial values as means, will better safeguard ‘good governance.’ Building on the nascent scholarly attention to the role of values in governance, this book will examine a number of case studies of ethical dilemmas in public policy from the perspective of social values, giving food for thought for how to achieve good governance. The ability to analyze public policy issues rationally and make constructive suggestions to improve public policy will be an important characteristic of a good citizen, and sound citizenship education cannot be devoid of the social value dimension.

Public policy affects everyone in society. Public policy is ‘whatever governments choose to do or not to do’ (Dye 1987, p. 1; quoted in Smith and Larimer 2009, p. 3). Anderson (1994) defines policy as a ‘purposive course of action or inaction undertaken by an actor or set of actors in dealing with a problem or matter of concern’ (quoted in Smith and Larimer 2009, p. 3). Smith and Larimer (2009) elaborate that ‘[p]olicy is not random but purposive and goal oriented; public policy is made by public authorities; public policy consists of patterns of actions taken

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over time; public policy is a product of demand, a government-directed course of action in response to pressure about some perceived problem; public policy can be positive (a deliberately purposive action) or negative (a deliberately purposive decision not to take action' (pp. 3–4).

We are affected by public policy of our government, at least indirectly, if not directly. For example, the government may decide to increase the disability allowance for the disabled in the coming year. If you are a disabled person eligible to get the disability allowance, you will benefit directly from such policy change. Most others are healthy people without disability; however, this does not mean that they are not affected by such policy move. The increase in disability allowance may involve tax increase (if there is no corresponding economic growth to generate increased governmental revenue or there is no budgetary surplus to finance this) and this affects the taxpayers indirectly. Even if one is not a taxpayer, the increased expenditure on disability allowance increase will imply comparatively less government expenditure available to other uses such as travel allowances, education, and medical services which will imply that everyone in society is affected explicitly or implicitly, though to different extent, depending on the policy change involved. In light of the pervasiveness of the impact of public policy, we should pay attention to public policy issues as we are being affected directly or indirectly. Thus, the ability to analyze public policy issues rationally and make constructive suggestions to improve public policy will be an important characteristic of a good citizen or a good voter, not only leading to better protection of individual interest concerned, but also contributing to the general good of society.

A public policy can serve different purposes, for example, more legitimate and overt ones such as reduce income and wealth gap, alleviate the plight of the underprivileged, unite the country, and stimulate economic growth. But public policy can also have covert purposes which are not very high-sounding, such as maintain the established position of the privileged, keep the ruling elite in power, benefit the ruling elite and their associates, and help the ruling party win the next election. It should be noted that, very often, a single public policy does not serve a single purpose. Also, legitimate, overt goals may not be incompatible with covert, self-interested ones, such as the legitimate goal of stimulating economic growth may improve the livelihood of the people in general, thereby reduce opposition to the ruling elite, thus may in the end contribute to achieving the covert self-interested goal of the ruling elite in keeping themselves in power.

Regardless of what the covert aims may be, a *good* public policy should target at and be able to serve the public. According to Ng and Ho (2006), 'public policy should be about enhancing happiness or the welfare of the people, now and in the future...we tend to use the term "happy" to refer to current feelings or short-term well-being and use the term "welfare" to refer to longer-term well-being' (p. 1). Even if we agree that enhancing happiness and welfare of the public is the legitimate goal of a good public policy, the issue involved may still not be a simple one. Very often, the public is not a single united entity, but a body with different parts, with differential interests and concerns—what is happiness to a certain group may

be unhappiness for other groups,¹ for example, the demonstrators facilitated by the police through blockade of certain lanes along the route of demonstration may be 'happy' since their freedom of expression is respected and facilitated; however, the drivers and those shopkeepers adversely affected by the road blockade may be 'unhappy.' That is, there are winners and losers in each public policy or public policy action.

From the perspective of public policy makers, in their design of a certain public policy, they should aim at the general happiness of the majority in society, while at the same time not threatening the basic human rights of the minority such as threatening the right to life, confiscation of private property without compensation, deprivation of freedom. In addition, there should not exist a 'permanent minority' (i.e., a certain group of people is always the minority who are the 'unhappy' losers in every or most of the public policy decisions) in all public policies taken as a whole. That is, on the whole, one may sometimes be the winner and sometimes be the loser in different policy decision on average. According to Galston (2006), '[w]hile many individuals are capable of devotion of to their fellow citizens and to the common good some of the time, and few are capable of that behavior most of the time, any political program predicated on the belief that most citizens are capable of it most of the time is bound to run aground' (p. 544). Public policy should, on the whole, balance out winners and losers at different times and generally target at having the majority as the winners most of the (but at different) time; thus, in general, most, if not all, on average, are 'happy' and have their welfare protected.

Not only should public policy makers balance out winners and losers in public policy so that there will not be 'permanent losers,' they should also strike a balance between immediate, short-term 'happiness' and future, long-term 'happiness,' such as whether giving \$6,000 to each citizen for immediate consumption or to use the resources to finance long-term medical services improvements or retirement protection schemes for the public. In addition, a balance should be struck between the 'happiness' of the present generation and that of future generations which is most obvious in environmental policy such that the depletion of resources and pollution by the present generation for 'happiness' will 'decrease' the 'happiness' of future generations.

Usually, there are different ways to strike such balances, instead of one single right policy solution. That is, there may exist a scope of acceptable policy options (with different acceptable option representing different acceptable ways to strike a balance among conflicting preferences and values), instead of a point beyond dispute. However, options beyond such acceptable scope may become problematic. How is such scope of acceptable policy options delineate? Most probably, this is done by appealing to general human needs, hopes and fears as well as values that underscore the smooth functioning of society, enabling human beings to live

¹Tsang (Chap. 10 of this book) highlights that the interests and concerns of Choi Yuen villagers may differ from those of the construction, retail, and travel industry practitioners (who may have economic gains from the job opportunities created) in the Express Rail Link controversy.

together peacefully in society. ‘There is...no doubt that there is a lot of commonality among human beings. This is partly because we belong to the same species and partly because we live in the same world, though with significant economic and cultural differences’ (Ng and Ho 2006, p. 2). Such commonalities among humans underline the range of policy solutions that are acceptable to any human society.

Exactly which policy solution within the range of acceptable policy options is adopted by a given society, very often, rests on (and is a reflection of) the values, including social values, held by the society concerned. Democratization is viewed as the legitimate development of a polity only if its citizens place values on political equality and freedom. If citizens of such polity place higher value on economic development than political equality and freedom, then such citizens may tolerate one-party rule if it brings about great economic progress, even though little or no progress is made in the direction of democratization.

Values and Social Values

One of the main foci of this book is social values in public issues and public policy. Before there is any fruitful discussion on the concept of ‘social values,’ one needs to have a clear understanding of what ‘values’ are. According to Woodruff and Diseta (1848: 645), a value is ‘a generalized condition of living which an individual feels has an important effect on his well-being’ (Van Deth and Scarbrough 1995, p. 23). Such individual attachment of importance may be regarded as a personal value (which may or may not be influenced by the societal standard at large). Such value is related to the notion of preference, with a ‘value system’ being what a person or a society ‘gives high priority or importance when making choices’ (Beckett and Maynard 2011, p. 129). Values epitomizes the ‘desirable end state that people strive for or aim to uphold, such as freedom, loyalty, or tradition’ (Malle and Dickert 2007, p. 1011), denoting the sociopsychological sense of ‘values’ (Ibid.). There is another sense of ‘value,’ the economic one (Ibid.), which is what a good or service is worth in monetary sense, such as ‘the value of this book is \$100,’ which is determined by demand and supply, that is, the interactions between consumers and producers in an economy. It should be noted that something of high economic value may not be given high value in the sociopsychological sense by a person or society and vice versa (though, very often, the two coincide). For example, a person may value loyalty to his long-term employer as a desirable end that he refuses to change his job to work for the rival company which promises to pay him astronomic salary. A person may value his freedom as an end that he refuses to sell himself to be a slave, no matter how much he is paid. In fact, it is the value that the American society places on freedom and equality as an end that slavery was outlawed in 1865 even though there was economic value of the slavery system to the American economy. It is the sociopsychological sense of ‘values’ that this chapter and this book focus on.

This sociopsychological sense of values may be loosely classified into different types, including personal values (such as the value one places on writing diary as an expression, value one places on traveling around the world), family values (such as filial piety, assisting family members in need), moral values (such as honesty, love our fellowmen, not to lie), aesthetic values (such as value placed on the beauty of a person, a picture), and social values (such as sex equality, respecting human rights).

Having examined 'values,' let us examine 'social values.' According to Wei (2009), '[a] society is an entity where people interact. The relationships among people in the society are "social relations". The judgements of right and wrong are about "social values"' (p. 54). What are the bases of 'social values'? This is related to human flourishing in a societal context which rests on (1) human psyche and physique that underlies the fundamental conception of human flourishing; (2) what are essential for the continual and well functioning of the society which humans are situated and social relations thus derive; and (3) the social, economic, political, and technological conditions under which a particular society is situated. For (1), if one is beaten by the police for no reason when one is walking down the street, one will naturally not be flourishing well, but is physically hurt and psychologically indignant because of the unjust treatment. This justifies the social values of justice, particularly in regard to circumscribing the arbitrary use of force by the police toward citizens. For (2), if one imagines a society in which everyone will try to kill anyone who disagrees with him/her in any minute way, then the whole society will disintegrate and cannot function and operate well. This necessitates the social value of tolerance (at least a certain degree) of divergent views in our interactions with other members of society. For (3), as more and more women are educated and enter the labor market in recent decades, women are not classified as secondary earner in two-income families, or may even be the sole breadwinner in female-headed single-parent families and families with househusbands. With the changing socioeconomic status of women and diverse family patterns as compared to the past, pay equality between male and female employees doing the same job is embraced as a justified social value in recent years in many societies as manifestation of the greater issue of sex equality.

One fundamental issue related to the discussion of social values is the question of whether social values are universal (apply to all human community without variations) or relative (varies from community to community). The answer varies with different nature of various social values that rests on different source bases (highlighted above). For social values that rest on (1) human psyche and physique and (2) what are essential for the continual and well functioning of human society (as discussed above), they tend to be universal since they are essential for human flourishing in any society, without which human beings will not be flourishing and the society concerned may disintegrate. As for (3) social values that rest on the social, economic, political, and technological conditions under which a particular society is situated, they may be relative and vary with changing societal conditions. As the societal conditions change, this category of social values also changes. For example, with the introduction of the Internet which revolutionizes

communication, there is more obvious social value placed on instantaneity, simultaneity, and interactivity in major aspects of human and social life, such as human communication, social network, way of conducting business, education, and the way of viewing knowledge and information. These three categories of social values are not discrete ones—they are overlapping with one another, with blurred, rather than clear-cut boundaries. However, they are loosely categorized merely to facilitate discussions here.

The above analysis of social values is in line with Wei's (2009) distinction between 'core social values' and 'non-core social values.' According to Wei (2009), the "core social values" are those reflecting basic social relations' which are and need to be 'durably stable,' thus preventing social disintegration (p. 56). Wei's 'core social values' correspond to categories (1) and (2) discussed above and thus tend to be universal, 'independent of change of social relations,' and 'proactive, deeply affecting basic social relations' (Ibid.). The 'non-core social values,' according to Wei, are 'reactive' (Ibid.), responding to change of social relations (which in turn rests on societal changes and circumstances), corresponding to category (3) discussed above which are relative in nature. Thus, social values may be universal or relative in nature, depending on the characteristics of the social value in question.

Social values are often 'operationalized' into social norms and practices, for example, the value human placed on stable, intimate human relations has been 'operationalized' into institution of family in nearly every society, with norms and codes of behavior for different members in the family. However, the nature, form and types of family change with different developmental stage of society (for example, there emerge single-parent families, dual-earner families, same-sex families in postmodern societies), yet, the institution of family (though in different forms) survives as it may be in line with basic human psychological and physical need of stable, intimate relations, thus the social value placed on such relations.

Social values are transmitted through socialization, especially at the younger age, through social norms and practices in families, schools, and society at large. However, the socialization is not absolute in the sense that one will never question the social values embraced in his/her own society and culture. Cultures and societies are interacting, with values and ideas exchanged and interpenetrating one another. Very often, one would start questioning values one has been socialized into accepting when one meets someone from a different culture and society or when societal conditions of one's society change with the passage of time. Under such circumstances, the 'non-core social values' will be evaluated through appealing to 'core social values' as a measuring rod and adapted to the new societal conditions. When a certain non-core social value is challenged by the majority of the members in society, then, this may bring about reform of social values in the society concerned. For example, feminism and gender equality started off in the West. With globalization, people in other societies interact with the West, thus leading to the raising of women's status in Asian countries and emerging in some Islamic countries in recent decades since the people in Asian and Islamic societies are challenged to re-evaluate their social values concerning gender through increased

intermingling of ideas and people between the West and the non-Western world. That is, the 'non-core values' related to gender are re-evaluated in light of the 'core value of equality' which is being extended from equality among males alone in the past to equality among both males and females alike in recent times.

Very often, social values in a society conflict with each other in a social issue. For example, the value placed on freedom of expression may clash with the value of keeping sex as a private matter and within the family context in the case of deciding whether censorship over pornography should be more relaxed or tightened up. In resolving such value conflicts, one or the society concerned has to prioritize different social values. At the societal level, there may be disagreements among societal members over the prioritization of conflicting values or over how a balance should be struck among values at odds with one another.² Through discussion and persuasion, it is hoped that a consensus can be reached. Very often, the consensus represents the views of the majority of the members of the society concerned at a particular moment. With the passage of time and with changing societal conditions, such consensus or prioritization of conflicting values may vary and this will bring about reform in certain 'non-core social values' or social norms, such as the societal tolerance of pornography has increased with time in many societies, with more emphasis on freedom of expression and less on viewing sex only in the context of family as compared with the past.

From Social Values to Public Policy

Besides social issues, social values may come into conflict with one another and other values (not social in nature) in the case of reaching a public policy decision. The value placed on development (which may reduce poverty, thereby human suffering) may be in conflict with the value placed on maintaining environment-human balance in the discussion of whether an infrastructural project is to be implemented. The value being placed on increasing welfare for the poor may involve the need to increase tax, thereby adversely affecting investment which may bring about economic development that is considered of value to many. The value placed on heritage and social network preservation in old urban and rural areas may be in conflict with redevelopment and development policy. Similar to cases of value conflict in a social issue, value conflicts involve the prioritization of different values (social or otherwise) involved in public policy. However, there may be disagreements over how a balance should be struck among different conflicting values. Furthermore, there may be dispute among members of society over what values are considered relevant to the discussion of certain policy issue. For example, the

²For example, Cheng and Ming (Chap. 3 of this book) point out the pro-choice camp and the pro-life camp have been disagreeing over the issue of abortion [in which the value placed on choice (on the part of women) clashes with the value placed on life (on the part of the fetus)], without reaching a consensus.

preservation of the rural life or the freedom to lead a rural life may be considered by some Hong Kong people to be irrelevant or a non-issue to the discussion of whether to build the Express Rail Link (an infrastructural project in Hong Kong that will have adverse impact on rural dwellers in the Choi Yuen village), while this is considered by the Choi Yuen villagers and their supporters to be highly critical to reaching of a policy decision concerning such project.

In a democratic polity, very often, a public policy decision reflects the consensus of the majority over value conflicts involved in a policy issue as revealed in the votes in a referendum or votes and decisions of elected political representatives. Usually, an individual does not have a simple clear-cut stand for a certain policy decision, such as supporting A option and opposing all non-A options in a policy, but supporting A option, but tolerating (or not rejecting or strongly against) certain non-A options, while definitely against B option in a policy concerned. If the decision outcome in public policy making lies within the realm of support and tolerance of the majority of the members of the society, the policy decision will gain legitimacy and will not meet strong opposition, leading to the repeal of earlier decision. In a non-democratically elected polity, if the policy decision is within the sphere of support and tolerance of the majority, it may also gain 'legitimacy' (though not procedural legitimacy in the form of votes and elections) in the form of passive acceptance, without strong protest (which may make the implementation of the policy decision difficult and may lead to subtle or overt restructuring and reorientation of the policy decision) against the policy decision.

It should be noted that a policy decision (resting on a consensus on a certain balance struck between conflicting values, including social values) represents the majority views of the time, putting pressure on the minority who hold divergent views. However, this does not mean that the minority views will remain a minority forever. Some critical minority will continue to promote and 'advertise' their views in their advocacy work, trying to convert the views of the majority to their side. For example, feminist movement advocating equal voting rights for women also started off as views held by a minority group in the late eighteenth century, but succeeded to spread their standpoints to the majority with the passage of time. In fact, women's suffrage was internationally recognized as a legitimate right of women in the United Nations 1979 Convention on the Elimination of All Forms of Discrimination Against Women. However, it should be pointed out that not all minority views can be successfully 'sold' to the majority with the passage of time, but only some can be so, usually those buttressed by sound universal core social values (such as equality, justice, and satisfying human needs), instead of resting on self-interest alone.

Values, including social values, are important in defining the societal problem that necessitates policy solutions. For example, child labor becomes a problem when the society views and places value on education of the young and believes that the legitimate place for the young is the school. The increase in divorce rate is seen as a societal problem if the society places value on long-term commitment, on the part of partners, in marriage. 'The policy process begins with perception of a problem and ends with some sort of resolution or termination of a policy' (Smith and Larimer 2009, p. 31). Only if a societal 'problem' is defined by societal values

will there be actions to devise public policy in an attempt to tackle the ‘problem’ concerned.³

Not only do values, including social values, define the problem to be tackled, but also they select the ‘best’ policy response (viewed from the society concerned) to such problem, that is, they identify the exact policy option to be adopted within the scope of acceptable (to human societies) policy solutions (which have been discussed earlier in the chapter). For example, Sweden adopts a high tax rate and high welfare provision solution, while Hong Kong adopts a low tax rate and higher dependency on self-reliance as their different approach to social risks. Such different approaches, with its own pros and cons, are a reflection of societal values of the society concerned.

Social values may serve as standards and criteria for public policy decisions (Jordan 2008). Sound public policy should rest on certain social value(s), such as justice, equality, and rights. Social values can also be adopted as appropriate standards for evaluating existing policies (Ibid.) and serve as the basis for suggestions for future improvements, such as how to make the housing policy in Hong Kong more just, whether legislating against discrimination against homosexuals in Hong Kong in light of equality, etc. However, the actual operationalization of social values into public policy allows variations that may be an issue of disagreement. For example, providing public rental housing to the poor is generally considered just by the Hong Kong people (Yung 2008). However, there may be disagreements over how to define who is poor that ‘deserves’ public rental housing provision from the government. How long will the waiting time for public rental housing be reasonable and just? Such operationalizations will be controversial.

Though values and social values held by a society may change with time, the pace of change may be quite slow. The values that are quite resilient to change will limit the choice of policy solutions to societal problems, very often, making only incremental policy changes politically feasible. This is what is called ‘path dependency’ in public policy which refers to the phenomenon that past policy (which rests on past societal values) makes certain ‘competing policy options unattractive because of high potential political or economic costs’ (Peters and Pierre 2006, p. 7) with unchanged (or only slightly changed) societal values giving rise to inertia, involving high political cost (in the form of strong opposition) in radical policy changes.⁴ This gives rise to the trend that past policy limits the pace, nature, and scope of future policy changes, with societal values (with their comparative slow pace of change) serving as its backdrop.

³For example, Mok (Chap. 6 of this book) discusses the problem of Mainland pregnant women giving birth in Hong Kong is delineated by the value Hong Kong people placed on defending their border, ensuring control over who can cross the border and become an ‘insider,’ safeguarding the interest of ‘local’ Hong Kong people, etc. Such values and concerns of the Hong Kong people over the issue call for governmental attention and action to tackle the ‘problem.’

⁴For example, Shae (Chap. 9 of this book) suggests that the health protection scheme (as a voluntary insurance scheme) represents a radical change from the current Hong Kong healthcare system (mainly financed by government revenue) which makes it controversial, arousing heated debates from different sectors of society.

Ethical Dilemmas, Governance, and Citizenship in Asia: From the Perspective of Social Values

The search for ‘good governance’ is a continual human pursuit. According to United Nations Economic and Social Commission for Asia and the Pacific (UNESCAP), ‘good governance’ has eight major characteristics, namely (1) participation; (2) consensus oriented; (3) accountability; (4) transparency; (5) responsiveness; (6) effectiveness and efficiency; (7) equity and inclusiveness; and (8) rule of law (UNESCAP 2013). Of the eight listed characteristics, except (7), most are either procedural [such as (1), (2), (3), (5), and (8)] or managerial [such as (4), (6)] in nature, valued mostly *instrumentally* as a *means* to hopefully, but not necessarily, the good. For example, Nazi Germany and Imperialist Japan were very ‘efficient and effective’ in carrying out their atrocities and invasion, especially in view of the fact that they are not large in terms of geography, resources, and population. Similarly, a citizenry with ‘evil’ intentions (such as exterminating the minority) may devise evil ‘laws’ basing on ‘evil’ consensus under a government that is transparent and accountable to the ‘evil’ citizenry. Thus, having effective means (including sound procedures and managerial targets) in ‘governance’ does not necessarily guarantee ‘good governance’; it depends on whether something valuable intrinsically or valued as an end is achieved in the end. The characteristic (7), equity and inclusiveness, is different from the other procedural and managerial targets in the sense that they are social values that are *intrinsically* valuable, defining something that tends to be valuable *as an end* (i.e., the good).

Besides equity and inclusiveness, there are other social values relevant to governance, such as freedom, equality, rights, tolerance, respect, and autonomy. Having sensible social values, defining the good, together with sound procedural and managerial values as means, will better safeguard ‘good governance.’ According to Kooiman and Jentoft (2009), ‘[m]etagovernance ... raises questions regarding how values, norms and principles underpin governance system and governance approaches’ (p. 818), i.e., ‘governance of governance.’ ‘[G]overnance cannot operate without a reasoned and coherent set of meta-governance norms and principles’ (Kooiman and Jentoft 2009, p. 824) and ‘[m]etagoverning is an essential part of governance’ (p. 823). The kind of government and its policies are largely the product of the synergy resulted from different actors in society (including media, civil society, political institutions, politicians, and bureaucracy) which ultimately rests on the quality of the citizens and the values they hold. Very often, public policies are a reflection of and the embodiment of societal values. In a way, citizens ‘get’ the kind of government and the policies that they ‘deserve’. Good citizens with sensible values are the best guarantee of good government and good governance, ensuring the latter is in line with the former.

There is budding scholarly attention recognizing the need to emphasize social values in governance, especially in Asian societies, in addition to procedural and managerial targets:

...[T]he governance agenda is now moving into a new phase...the consequences of policies of privatization, reregulation and deregulation are now presenting a new set of challenges to East Asia societies in which issues of fairness and social cohesion at least sit more prominent alongside concerns with competitiveness and economic efficiency (Mok and Forrest 2009, p. 18).

Most scholarly works on governance focus on the institutional framework and interactions or specific policy developments, with little attention on how values work in governance.

Building on the nascent scholarly attention to the role of values in governance, this book will examine a number of case studies of ethical dilemmas in public policy from the perspective of social values, giving food for thought for how to achieve good governance. An ethical dilemma occurs when there is uncertainty and doubts about what is the appropriate or right thing to do (Weber 2008). This emerges when (1) there is a conflict between two, equally valid ethical principles or values (Ibid.), such as the conflict between the duty to reduce suffering and the duty to preserve life gives rise to an ethical dilemma in the case of euthanasia⁵ and (2) there is a conflict within an ethical principle or value (Ibid.) such as the moral obligation of maximizing happiness and minimizing pain will give rise to an ethical dilemma if Act 1 brings about happiness to Group X and pain to Group Y, while Act 2 will bring about similar amount of happiness to Group Y, while leading to pain to Group X, making one facing a really hard choice between the two acts.⁶ In such cases of ethical dilemma, holding onto one principle, value, or option will be incompatible with (or even detrimental to) another which may be similarly, if not equally, valuable or valued.

The case studies of ethical dilemmas at the policy level discussed in this book are embedded in the context of Hong Kong governance. Hong Kong has long been a place where East meets West; case studies in the Hong Kong context will epitomize the synergy and dynamics of East–West social values involved and how they are integrated and blended together in Hong Kong public policy.⁷ In addition, the transfer of sovereignty of Hong Kong from Britain to China in 1997 ushers in a period during which new ethical dilemmas in public policy emerge, exemplifying different social values at work (especially in the political context of the semi-democratic polity in transition to universal suffrage). For example, after the handover, the concern of deeper interaction and integration with Mainland China looms larger in Hong Kong as compared to the past, issues (such as the building of the Express Rail Link [linking Hong Kong with the Mainland], Mainland pregnant

⁵For example, Chan and Tse (Chap. 2 of this book) consider the conflict between the intrinsic value of life and the respect of autonomy in the case of euthanasia, while Cheng and Ming (Chap. 3 of this book) consider the conflict between the right to life and the right of controlling one's own body in the case of abortion.

⁶For example, Tsang (Chap. 10 of this book) and Yung (Chap. 11) consider different understandings of the same principle or value such as justice and public interests.

⁷For example, Cheng and Ming (Chap. 3 of this book), in discussing abortion law in the Hong Kong context, analyze the issue from both the Western and the Confucian perspectives.

women giving birth in Hong Kong etc., become hot and controversial subjects that arouse heated debates which involve different social values, thereby serving as perfect case studies for the analysis of social values at the policy level.⁸ Furthermore, as Hong Kong is evolving toward the postmodern era in recent years (at a much later time than the Western countries), Hong Kong governance in this specific period sees various social values in flux, with the more traditional values (such as family values, value on livelihood and development), gradually giving way to emerging new values (such as freedom to choose one's way of life, heritage preservation, more concern about rights, and justice and equality).

Thus, case studies of ethical dilemma in different policy areas in Hong Kong governance from the perspective of social values will also have an international appeal, especially the case that the social values discussed are comprehensive, involving East and West, new and old, traditional and democratic, in different policy areas in the particular semi-democratic political context of Hong Kong, marking a difference from other similar literature which merely focuses on one or two social value(s) or merely concentrates on a specific policy area, mostly in the context of Western developed countries (that have a different value system from the East–West context of Hong Kong).

Public policy and governance in Hong Kong are chosen as example of Asian governance, forming the discussion focus of the book. Asian countries are diverse, rather than a homogeneous whole (Yung 2012, p. 268); thus, there will be variations within governance in different Asia countries. Nonetheless, Asian governance, especially in East Asian countries, displays certain degrees of convergence, and Hong Kong is no exception to this. Economically, Hong Kong and other Asian countries, especially East Asian countries, have industrialization and the accompanying economic take-off taking place at a later time frame and within a shorter time span as compared to the West. Politically, though at different phases of development, democratization in Asian countries, including Hong Kong, takes place at a later time frame as compared to the West, with many Asian countries still experimenting with their comparatively 'nascent' democracy with trial and error. Socially, welfare in Asian states, especially East Asian states, including Hong Kong, has a high 'productivist' and 'developmental' flavor, with social policy being subordinate and instrumental to economic growth (Hwang 2011), emphasizing self-reliance and family provision. Historically, Hong Kong and many parts of Asia had a colonial past, with a colonial legacy that has deep impact on the present-time developments. Culturally, Hong Kong and other East Asian states share a common Confucian heritage. All these commonalities shared among Hong Kong and other Asian countries, especially East Asian countries, in different arenas, to a certain extent, shape the values and social values held by the citizenry, circumscribe feasible policy options, and influence policy choices in Hong Kong as well

⁸See Mok (Chap. 6 of this book) for a discussion of the problem of pregnant women from Mainland China giving birth in Hong Kong and Tsang (Chap. 10) for a discussion of the issue of the Express Rail Link.

as Asian governance. Thus, Hong Kong is chosen as a case of Asian governance for the analysis of social values.

The changing societal context due to recent and forthcoming socio-economic-political transformations in Hong Kong calls for a renewed conception of ‘citizenship,’ amid fluxional values and social values. Citizenship can be defined objectively as a legal status or subjectively as involving a sense of belonging and identity (Savigny 2007, p. 80). Marshall (1950; quoted in Savigny 2007, pp. 80–81) defines his threefold citizenship in terms of three essential rights: civil rights (including property rights, right to freedom of thought, speech, association, and religion), political rights (including the right to vote and stand for public office), and social rights (i.e., rights embodied in the institution and policies of the welfare state). Civic citizenship is already in place in Hong Kong, with civic rights and basic freedoms guaranteed by law since the latter part of the colonial period. As for other aspects of citizenship in Hong Kong, it is developing and evolving with changing circumstances. Politically, Hong Kong is in a stage of transition from a semi-democratic polity to one with universal suffrage. The specific design for the mechanism for universal suffrage will determine to what extent Hong Kongers may enjoy equal political rights, thereby the extent and nature of their political citizenship. As for social citizenship, Hong Kong has become a postmodern society, with general affluence, yet with greater income and wealth inequality. There have been increasing calls for greater equality, social inclusion, and redistribution as a right. Subjectively, the younger generation of Hong Kongers were mostly born and bred in Hong Kong; their outlook is different from the transient mentality of the older generation of refugees from China who merely treated Hong Kong as a ‘Borrowed place; Borrowed time’⁹ refuge. Thus, the new generation of Hong Kongers has a stronger sense of belonging and has a deeper concern for the developments of Hong Kong toward a better place to live in, forming a stronger ‘subjective’ sense of citizenship. Because of these recent and future imminent societal changes, the emerging social values pertaining to the evolving and new discourse on citizenship in Hong Kong are in flux, thereby necessitating reflection, reconsideration, and reorientation for their deepening in Hong Kong society.

This book aims at facilitating the above process, encouraging readers to reflect on case studies of ethical dilemmas in public policy from the perspective of social values in the Hong Kong context, serving as good reading and reference material for citizenship education, not just within classroom (acting as teaching materials, especially for general education courses at universities and the liberal studies curriculum in secondary schools) but outside classroom as food for thought for general citizens, thereby making citizenship education not merely a classroom activity, but also a lifelong engagement. This is especially important for Hong Kong in its transition to universal suffrage, changing from a bureaucratic-oriented public policy model to a more deliberative policy practice, with the public more

⁹This is coined in Hughes (1976). *Hong Kong: Borrowed Place—Borrowed Time*. London: Andre Deutsch.

empowered. This makes democracy education (as a form of citizenship education) important, necessitating citizens' understanding and acceptance of social values such as respect for the individual, equality, freedom, and tolerance for diversity which are critical for the successful operation of any democracy (Yung 2010). Reflecting on ethical dilemmas in public policy with reference to social values will extend the focus and the vision of the readers beyond common understanding of the structure and the operations of the institutional framework and specific policy developments. In short, sound citizenship education cannot be devoid of the social value dimension. The book chapters also aim at encouraging readers to view the controversial policy issues (that have an ethical dimension) from the perspectives of different stakeholders, thereby engaging in interactive learning (Kooiman and Jentoft 2009, p. 931) [with other members of society] concerning citizenship education at the societal level, with different value systems and expert advice examined, different opinions and options identified, and different possibilities for consensus explored, fostering a sense of belonging and shared citizenship. This process will 'produce' better voters and citizens. A citizenry with sensible social values as policy inputs is the best guarantee of good governance since rational targets, achievable by wise means, carried out by sound institutional mechanisms, acceptable to most people, will have the greatest possibility to be in place. In fact, governance can be made a learning process (Kooiman and Jentoft 2009, p. 830), with different participants and stakeholders learn from each other in interactive learning in the policy discussion and process, reflecting and learning from the experience, forming an 'alternate' form of citizenship education at the societal level which this book may help to facilitate. In this way, governance, citizenship, and citizenship education are intertwined. The context for citizenship and governance has become more complex, and citizens must think beyond governmental institutions, the interests of political actors and stakeholders, thereby taking social values into consideration, especially in ethical dilemmas at policy level (which is the focus of this book).

Nature and Pedagogy of the Book

This book is interdisciplinary in nature, with each chapter integrating two or more disciplines (namely philosophy, politics, public policy, or law) to examine a public issue or affair in Hong Kong. The approach to each topic will be incrementally elevating in nature. The editors of this book hope to stimulate readers' interest in analyzing concrete public policy and affairs issues as well as facilitate readers in viewing these issues from more theoretical and abstract perspectives. Each chapter will examine a case study in Hong Kong governance that centers upon the following framework. Each chapter will start with a public affairs issue that involves an ethical dilemma at the policy level (rather than at the personal level which often forms the focus of most literature in moral philosophy and applied ethics), then

move on to consider the social values at work behind, its implications on the individuals concerned and the society at large, through academically rigorous investigation of the issue. The issue of how to resolve the value conflict in each dilemma through striking a balance among discordant social values will be examined in each chapter. The role of the government and the relevant policy (representing a proposed resolution or compromise among social values in tension in each ethical dilemma) that should be in place will also be considered. It is hoped that the readers will not just have a better knowledge of the ethical dilemma discussed after reading the chapter, but also have a deeper understanding of the social values and philosophical and theoretical issues that underpin the matter concerned as well as its policy implications. The discussions will mainly be theoretical, philosophical, and reflective in nature, rather than at the empirical, operational, and practical level.

The book chapters are divided into two parts, with two subthemes. The first part is related to 'Ethics, Social Values and Public Policy.' Lee (2012) points out that citizenship education in Asia focuses more on morality than on politics, and in many Asian countries, moral education is equated with civic/citizenship education. However, moral and ethical issues, especially controversial ones arising out of advanced technology, particularly medical technology, not only have individual moral connotations, but also have societal and policy implications, often acting as a divisive force for two or more camps supporting opposing moral stands on the controversial issues (such as the pro-choice camp versus the pro-life camp over the issue of abortion), making legislations and public policy decisions extremely difficult, if not impossible. Thus, a mature citizenry need to reflect on these controversial ethical and moral issues (not only as part of moral education, but also as part of citizenship education), being able to make moral decisions as well as able to take political stand and give valuable policy input toward these ethical issues, since politics and policy cannot be detached from ethics. As a book on governance and citizenship education in the context of Hong Kong as an Asian example, the first part of the book will discuss controversial ethical dilemmas and issues that have deep implications on public policy making (from the perspective of conflicting social values), thereby governance.

The second part of the book is related to 'Citizenship, Social Values and Public Policy.' It takes a more Western approach to citizenship, being politically oriented and more concern about citizens' rights and responsibilities (Lee 2012). This part concerns with how citizenship is defined, rights related to emerging social citizenship in Hong Kong as well as duties of citizens. It examines how such issues and ethical dilemmas in public policy related to citizenship affect public policy making and governance in Hong Kong by examining the clashing social values behind.

This chapter is the introduction. It starts with a discussion of public policy and social values and then moves on to examine the connection between them in relation to ethical dilemmas in public policy in the context of Hong Kong governance and citizenship. It outlines the aims, nature, structure, and pedagogy of the book.

Part I: Ethics, Social Values, and Public Policy

The chapters in Part I are concerned with ethical dilemmas or controversial ethical issues that have policy implications. Part I starts with issues that involve moral decisions that are more individual or personal in nature, affecting fewer people, to issues that have more social consequences, concerning more people.

In Chap. 2, Chan and Tse start with the story of ‘Bun Zai,’ a quadriplegic person who openly demanded the legalization of euthanasia in Hong Kong in 2003, triggering off widespread media coverage and public attention on the issue of euthanasia in Hong Kong. The authors then move on to discuss why people are fearful of death and dying and relate this to the examination of views supporting and opposing euthanasia, focusing on the conflicting social values, such as the value on respect of personal autonomy and choice, the value on the respect of human life, the value on the reduction on human suffering, and relatives’ and acquaintances’ value on the continual life of the person concerned. Alternatives to euthanasia are further discussed in the latter part of the chapter. Such discussion not only will facilitate individual moral judgment on the issue of euthanasia, but will also have input on public discourse on the issue, thereby on related policy making.

Cheng and Ming discuss the justification of abortion and the abortion law in Hong Kong in Chap. 3. The authors evaluate the justifiability of abortion under different circumstances, e.g., abortion on demand, abortion in case of pregnancy that threatens the mother’s life, and abortion in case of underage pregnancy from both the Western and the Confucian perspective on different social values. They conclude that even though there is the trend of abortion being legalized in more and more countries, indicating people value more and more individual autonomy, abortion should be the last resort even in case of unwanted pregnancy in view of its risk of injury to the physical and mental health of the mother. The ethical issue of abortion as expressed in Hong Kong laws reflects how ethics, law, and policy are intertwined.

Chapter 4 on compensated dating is written by Sin. This chapter will discuss questions from the perspective of different social values, such as: ‘What is compensated dating?’, ‘Is it different from prostitution?’, ‘Is there anything wrong with compensated dating?’, ‘How should we respond to such phenomenon in our society?’, ‘How should the government respond to such issue?’, and ‘What are the implications on sex education policy?’

Photo scandal of Edison Chen has been a recent hot issue not only in Hong Kong, but also in Mainland China and other countries because of the involvement of a number of celebrities. In Chap. 5, Ying discusses questions, such as ‘Is there anything wrong with taking and keeping sexually explicit photos of oneself and one’s sexual partner when there is mutual consent?’, ‘Has Edison Chen done anything wrong?’, ‘What exactly are the issues involved in the case of photo scandal of Edison Chen?’, ‘Is there anything wrong in looking and transmitting personal photos that are illegitimately obtained?’, and ‘Did the government and the court

handle the case in an appropriate way? Why?'. The chapter discusses this topic in relation to the value on the right to privacy and value on autonomous sex between consenting adults. The discussion reflects how sexual morality has a bearing on Internet policy and policy concerning privacy.

Part II: Citizenship, Social Values, and Public Policy

Part II starts with the discussion over issues of how citizenship is and should be defined. Then, it moves on to discuss citizenship rights in different policy contexts, followed by the discussion of issues related to duties of a citizen.

In Chap. 6, Mok analyzes the issue of Mainland women giving birth in Hong Kong from the utilitarian, the liberal as well as the communitarian perspectives on the morally justified way of viewing and handling 'immigrants' or 'outsiders' in general, highlighting different values held by people of different place of origin, the social value on privileging 'insiders,' value on assisting others in need, value on integrating 'new comers,' etc. This chapter represents an attempt to apply philosophical reasoning to practical issue analysis, throwing new lights onto a hot policy issue faced by Hong Kong.

In Chap. 7, Lee discusses the court case of Equal Opportunity Commission challenging the Education Department's policy regarding allocating secondary school places to primary school graduates, focusing on the social value of equality, especially sex equality and racial equality in the context of education policy. This chapter discusses issues such as 'What is equality?', 'What is sex equality?', and 'What is equal opportunity?' This chapter explores these issues in relation to educational policy and the impact of the court decision on this case from the perspectives of law, equality, human rights, and governance.

Chapter 8, which is written by Cheng, is on Comprehensive Social Security Assistance (CSSA), a social security safety net in Hong Kong. This chapter explores the issue of poverty and evaluates the official interpretation of the underpinning philosophy of the CSSA Scheme from different perspectives, outlining the value placed on welfare. It relates the issue to the 'politics of moral engagement' as the basis of a just society. This chapter highlights the importance of social rights in social citizenship.

Shae evaluates, in Chap. 9, the Voluntary Health Insurance Scheme (VHIS), a government subsidized supplementary finance scheme, which is likely to be introduced in Hong Kong. The author argues that VHIS will bring about a radical change in the current healthcare system in Hong Kong and it will fall short of achieving its objective of containing escalating healthcare cost, highlighting the value on helping those in need, the value placed on risk-pooling etc. He concludes that there is a lack of vision in healthcare planning and reform in Hong Kong and this has serious implications on social rights and social citizenship.

Chapter 10, written by Tsang, examines the contentious Express Rail Link Project which will link Hong Kong and the Mainland. This chapter discusses the

controversial issues related to the building of the Express Rail Link in relation to different value conflicts: individual rights versus public interest, value judgments in public policy as well as paternalism versus democratic decision. This discussion may act as stimulus for reflection concerning the rights and duties of citizenship.

Paying tax is often considered a legitimate duty of a citizen. In Chap. 11, Yung discusses taxation in Hong Kong in relation to the social value of justice. This chapter starts from Hong Kong government's recent attempt to introduce Goods and Services Tax (GST) in Hong Kong and examine its implications on justice and the problem of narrow tax base as well as tries to find out how to devise a more just and viable taxation system in Hong Kong.

The last chapter, Chap. 12, is the concluding chapter which highlights the contributions of the preceding chapters to the theme of social values and public policy and how these are related to citizenship and governance. In this chapter, Yu examines the role and scope of public power, varieties of social values, and the various approaches that can be adopted to handle multiple values, concluding that closer interaction between public policy and public engagement is essential for good governance, thereby making sound citizenship education fundamental to good public policy making.

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Part I
Ethics, Social Values and Public Policy

Chapter 2

The Case of Ah Bun: Euthanasia and Other Alternatives

Ho Mun Chan and Chun Yan Tse

Abstract This chapter begins with the story of “Bun Zai,” a quadriplegic person who openly demanded the legalization of euthanasia in Hong Kong in 2003, triggering off widespread media coverage and public attention. The controversy about the legalization stems from the conflict among the rival views on value of life, pain and sufferings, and the meaning of death. After a discussion of these views, the moral arguments for and against euthanasia are examined, which shows that the moral disagreement in regard to euthanasia arises from the set of conflicting values and moral considerations, including the intrinsic value of life, autonomy, well-being of the patient, and the social consequence of legalizing euthanasia. As this moral disagreement cannot be settled, the latter part of the chapter discusses public policy alternatives to the legalization of euthanasia based on a compromise among the conflicting values and moral considerations.

The Case of Ah Bun

Tang Siu-bun (鄧紹斌), also known as “Ah Bun” or “Bun Zai” (斌仔), was a quadriplegic person who demanded for the right to die with dignity. In 1991, at the age of 22, Ah Bun was a student of the Northcote College of Education. His spine was severely injured after a failed backward somersault in a rehearsal for his graduation performance. Although his life was eventually saved, he became paralyzed from the neck down. After the accident, he was confined to his bed. He was

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not even able to breathe but had to rely on mechanical ventilation (Chong 2010; Evans 2010).

Staying in Queen Mary Hospital for more than ten years, on March 23, 2002, Ah Bun heard of a news about the UK court ruling that a quadriplegic woman has the right to end her life by withdrawing life-sustaining equipment (Tang 2007, pp. 111–2). In 2003 and 2004, he used a chopstick in his mouth to type letters to Tung Chee-hwa, the then chief executive of Hong Kong, and members of Legislative Council, demanding the legalization of euthanasia (Evans 2010).

Widespread media coverage and debate were triggered by Ah Bun's alarming appeal, even though assisted suicide is illegal in Hong Kong and the Legislative Council decided not to legalize euthanasia in May 2001. Many people, including legislators and celebrities, were very sympathetic to Ah Bun's situation. They visited Ah Bun and donations poured into pay his medical expenses (Tang 2007, pp. 141–3). A team of professionals for his rehabilitation was set up by the Hospital, and more advanced life-supporting equipment was installed (Ibid, p. 155). The facility of his living environment was also improved. He did not need to rely on positive pressure mechanical ventilation all the time, and so he could talk to other people during the day. With the assistance of Jockey Club Rehabilitation Engineering Centre, The Hong Kong Polytechnic University, Ah Bun, could control the computer more easily and communicate with friends by using a laser mouse (wearing on his face like glasses) instead of a chopstick (Lam 2004; Tang 2007, pp. 160–3).

In 2005, Ah Bun started writing his autobiography, and the book titled *I Want To Have Euthanasia* was published in 2007.

After spending 19 years in Queen Mary Hospital, on August 19, 2010, Ah Bun was discharged to live in his new home at Sham Shui Po. He changed his mind and did not want euthanasia at that moment. But he still held the belief that being able to choose to live or to die is a basic human right that should be guaranteed (Evans 2010). Unfortunately, he died of an acute infection in December 2012 (AM730 2012).

How Bad Is Death and How Good Is Life?

The case of Ah Bun may lead us to ask the following philosophical and ethical questions. Is it ever possible that someone is better to die than to live? What is the meaning of death? Is it something that is always bad? What is the meaning of life? Is the meaning of life entirely determined by its quality? Does life have value in and of itself?

Ah Bun's quality of life was significantly improved after his poor conditions had been widely known in the community. Yet there are patients who are so unfortunate that they cannot even move the head to control the computer and are in other conditions worse than that of Ah Bun before the improvement. If it is impossible to improve the conditions of these patients, will it be better for them to die than live? Is death always a bad thing?

Many people are fearful of death, but the fear often stems from the concern about the sufferings that they have to go through before they die. Such a fear is not of death itself but of the dying process. Dying can be painful. Even though such pain can be managed quite effectively these days, it is still sad to see that your body and mind are deteriorating when you are dying. It is natural to be fearful of the *dying process*, but how about death itself?

Some people may believe that death is something harmful, but you no longer exist after you die. How can death harm someone who no longer exists? Also death is not something that you can experience. As Epicurus says in his *Letter to Menoeceus*, “Death is nothing to us, since when we are, death has not come, and when death has come, we are not” (Long and Sedley 1987). When you are still alive, you are not dead, and when you are dead, you no longer exist. In either case, you cannot experience death. So as Wittgenstein (1961) says, “Death is not an event in life: we do not live to experience death” (*Tractatus*, 6.4311).

Sometimes death can be a good thing. A soldier may sacrifice his life for his comrades by using his body to cover a grenade that is about to explode. To sacrifice yourself for a good cause is an honorable death. It is something morally admirable (殺身成仁, 捨生取義。). Sometimes death may be the only way out to avoid humiliation (士可殺, 不可辱。). So death may not be so bad after all.

Having said that some people still believe that death is something bad although death does not harm you. Your close friends and relatives will feel very sad after you die.¹ Some may say that people are hurt because death is an eternal departure, but it is worse than that. Suppose a very close friend of yours says that he will devote the rest of his life to conduct research in the Antarctic Circle and you are absolutely sure that you will never see him or have any contact with him again. This does not sound as bad as hearing that he is dead. The difference between death and eternal departure is that people are deprived of the opportunities to live like other human beings after they die. This does not happen to your close friend because he still survives as a human being in Antarctic Circle. Death in itself is something bad because it is a *deprivation*. Many people are fearful of death for this reason.

Not being here or there can be something bad. Absence can be regretful. You may feel bad if you cannot attend your son’s graduation or wedding ceremony. This is something that you may not be able to do after you die, and there may be many other similar regrets resulted from your non-existence. For example, you

¹Established social relationships with regard to the loss of life will be very important in making moral decisions concerning certain ethical dilemmas in Confucian ethics. For example, Cheng and Ming (Chap. 3 of this book) point out that abortion in the case when the fetus threatens the health (and may cause death of the mother) is acceptable in Confucian ethics since the pregnant women have established social relationships with other members of the community (who may feel sad if she dies); thus, her well-being should be prior to that of the fetus who is merely a potential member of the community with no established social relationships with other members (implying that even if the fetus is not born, the resulted social disharmony will be comparatively less than the loss of life of the pregnant woman).

may die prematurely so that many things that look valuable to you may not have been achieved. Even though you have made some achievement in your life, after you die, you do not know and have no control of what will happen to your work and reputation and cannot defend yourself if you are misjudged. These regrets arise from the deprivation of a future life resulted from death. They can create a horror of non-existence which makes us feel fearful of death. So death in itself is something bad. It is a good thing only under some special situation in which the good achieved by killing yourself outweighs its badness.

Some religion has the conviction that there is the eternal life after death. This may give us some consolation. Yet there is no guarantee that God will let us go to Heaven on the Judgement Day, we may not survive after all, or have to go to hell. Also, it is scientifically and philosophically controversial that the soul can survive after death. Some philosophers even think that even if there is the eternal life after death, such life can be boring and not meaningful.² You do not need to strive for anything if you are immortal. In the long run, everything you wish, however small the chance, can happen since your life is infinitely long. An eternal life can be repetitious because the life span is so long that you will run out of new ideas and have to repeat what you have done again and again.

According to Heidegger, the anxiety stemming from the thought that you will die can bestow meaning to life (Heidegger 1962). Since your life span is limited, you should try to make the best out of it; otherwise, you may not be able to achieve what you find meaningful. It is very popular to converse the Confucian saying “If you do not understand life, you do not understand death” (未知生，焉知死?) as “If you do not understand death, you do not understand life” (未知死，焉知生?). This captures what Heidegger says well, but the original Confucian statement does not mean that we should avoid talking about death and focus on how to prolong our lives (長壽). Confucius says that if he can know the Tao in the morning, it is alright for him to die in the evening (朝聞道，夕死可矣). To Confucius, if you do not know whether life has meaning, what’s the point to have a longer life, and if you have already had a meaningful life, does it really matter even if you have a shorter life? The Confucian statement and its converse are not contradictory and indeed compatible.³ If they are both true, it only means that you cannot understand death without understanding life and vice versa. Confucius’s point is that it does not really matter when and how you die if you do not know the meaning of life.

²Wittgenstein writes “Not only is there no guarantee of the temporal immortality of the human soul, that is to say of its eternal survival after death; but, in any case, this assumption completely fails to accomplish the purpose for which it has always been intended. Or is some riddle solved by my surviving forever? Is not this eternal life itself as much of a riddle as our present life? The solution of the riddle of life in space and time lies outside space and time” (*Tractatus*, 6.4312).

³The two sentences can be captured by the form of “If P , then Q ” and its converse “If Q , then P .” From a logical point of view, they are not contradictory, and if they are both true, it means that you cannot understand death without understanding life and vice versa. It is similar to the case that “If a number is divisible by two, it is an even number” and “If a number is even, it is divisible by two” are both true. The understandings of being even and being divisible by two are inseparable from one another.

Now, if it is not so bad that we are mortal, why shouldn't we be allowed to kill ourselves if we are suffering from some terrible disease? After all, we are allowed to or sometimes even should kill ourselves for something very honorable, why should we not be allowed to end our miserable lives by euthanasia, killing ourselves or suicide with the assistance of a physician or somebody else? Some religion has the conviction that life is a gift from God, it belongs to Him, and so we do not have the right to end it. Also, people with such a conviction may think that an honorable death is different from killing yourself to avoid the pain and sufferings because they are a test of your faith in God, and so you should not terminate your life to avoid them because you do not have a right to do so.

For those who uphold a secular point of view, they may still accept the principle of the sanctity of life. According to this principle, even if the quality of our lives is very low, life itself still has its intrinsic value. After all we should not arbitrarily kill any life, even if it is an animal or a plant, without good reason. Yet the key question is how much weight we should assign to the intrinsic value of human life. Can it be trumped if my quality of life is extremely poor? Here, we have to face a brute fact that from a philosophical point of view, there is no definite answer to this question, and yet from the point of public policy making, it is unavoidable that the government has to strike the balance somewhere.⁴

There are many such examples in biomedical ethics, animal ethics, environmental ethics, and other areas of applied ethics. Philosophers can have endless debates about abortion and the moral status of embryos and fetuses.⁵ They can keep on and on to discuss who are the parents and children arising from the use of different human reproductive technologies (HRTs), including artificial insemination by donor, surrogacy, and human cloning, and whether they should be made legally permissible under some specific circumstances, if any. However, public policy makers just cannot wait too long for a resolution. They need to develop a set of clear and well-defined laws and regulations for determining under what conditions, if any, abortion or the use of various HRTs is permissible. They cannot drag on and on and let the issues unsettled. They have to fill up the regulatory loopholes or vacuum so that there can be settlements should disputes arise. Having said that, it does not follow that philosophers do not have an important role in the public policy-making process. They play a key role in working out the justifications for various positions so that different stakeholders of the community can have a more fruitful deliberation of the ethical issues and arrive at better compromises.⁶

As policy solutions are often results of compromises, they often sound inconsistent. For example, in the case of abortion, even though early abortion is regarded as legally permissible under some circumstances in response to the voice of the pro-choice advocates in some society, the pro-life voice is also heard such

⁴For more discussion on public policy and the need to strike a balance, see Yung (Chap. 1 of this book), pp. 3–4 in particular.

⁵For detailed discussion on abortion, please refer to Cheng and Ming's chapter on abortion (Chap. 3 of this book).

⁶For a further discussion of this point, see Wolff (2011).

that late abortion (abortion of fetuses older than around 24–26 weeks) is made illegal. In the case of animal and environmental ethics, though there is the law against hunting and cruelty to animals in many societies, it is still legal to kill livestock for food. The key problem that public policy makers are facing is how to strike a balance among different points of views of the stakeholders. In doing so, they have to take into consideration the rationale of these views, the interests of various stakeholders, and the desirability of various policy options from a practical point of view so that the result will be widely acceptable by different walks of life in society; otherwise, the policy adopted will not be feasible and sustainable. The point at which the balance is stricken is also affected by the cultural and social conditions of different communities and that is why there are often different policy solutions to the same ethical issues in question around the world.⁷

The following discussion of euthanasia and other alternatives indeed can be a good illustration of the above account on the relationship between public policy and ethics.

Different Kinds of Euthanasia

Euthanasia for patients with advanced irreversible illnesses having pain and suffering is a frequently debated issue in the community. However, there is often confusion in the concepts and terminologies involved. Different people have different definitions for the terms used in the discussion.

Euthanasia could be defined narrowly or broadly. According to the broad definition, “euthanasia” means the intentional killing of a patient, by an act or omission, as part of the medical care. An action can be either an act or omission. If a parent has deliberately let his/her child starve to death, in a way s/he has done nothing, but this is an omission and can be even worse than the act of killing the child.

Euthanasia in the broad sense includes both active and passive euthanasia. “Active euthanasia” means the killing is achieved by a direct act to kill. Passive euthanasia means the killing is achieved by omission of treatment. Euthanasia, active or passive, can be voluntary or not, depending on whether the killing has got the informed consent of the patient. If an act of euthanasia, be it active or passive, is not voluntary, it can be either non-voluntary or involuntary. It is non-voluntary if the patient killed either is not capable of making the request, or has not done so. Involuntary euthanasia means the killing is against the wishes of the patient.

According to the narrow definition, “euthanasia” is the same as “active euthanasia.” In its narrowest sense, the term means that the direct act of killing has got the informed consent of the patient. The categorization of different kinds of euthanasia is summarized in Table 2.1.

⁷Yung (Chap. 1 of this book) points out that societal values help to select the exact policy option (within a wide range of acceptable policy solutions) to be adopted by the society concerned to tackle certain policy issues, including policy to deal with ethical issues.

Table 2.1 Categorization of different kinds of euthanasia

Euthanasia	Active (narrow sense)	Voluntary (narrowest sense)
		Non-voluntary
		Involuntary
	Passive	Voluntary
		Non-voluntary
		Involuntary

Regarding active euthanasia, it is morally unacceptable if it is non-voluntary, because the wish of the patient is not known, and it may be against his/her wish to kill him. In the case of involuntary active euthanasia, the patient does not want to die. So it is against the patient’s wish. The act violates the principle of autonomy and can be regarded as a case of murder.

The most hotly debated form of euthanasia is voluntary active euthanasia. In the medical and legal field, when the term is used without qualification, euthanasia usually signifies “voluntary active euthanasia.” According to the Professional Code of Practice of the Medical Council of Hong Kong (2009), euthanasia is defined as “direct intentional killing of a person as part of the medical care being offered.” Such euthanasia is illegal throughout the world with the exception of the Netherlands, Belgium, and Luxembourg, where active voluntary euthanasia has been legalized since 2002, 2002, and 2009, respectively. Additionally, physician-assisted suicide⁸ has been legally permitted in Oregon State, Washington State, and Vermont State, and California of USA since 1997, 2009, 2013, and 2016, respectively. On the other hand, for many years, Switzerland has allowed assisted suicide (not necessarily physician assisted) based on altruistic motives.

In the 1990s, the public prosecutor in the Netherlands would not prosecute physicians for euthanasia if they have adhered to a number of requirements. In 2002, the Euthanasia Act was passed. The Act allows euthanasia in patients with “no prospect of improvement, and were experiencing unbearable suffering.”⁹ In 2001 and 2005, 2.8 and 1.8 deaths out of 100 deaths, respectively, were the result of euthanasia

⁸In the case of physician-assisted suicide (PAS), the patient kills himself/herself with the lethal drugs provided or the apparatus set up by a physician. It is different from euthanasia in the sense the patient is not killed by the physician. Some people think that this is less morally controversial because it is the patient who kills himself/herself, while some maintain that it is against the professional ethics of medicine because physicians have the duty to save lives, cure patients, and alleviate their pain and sufferings, but not to help them commit suicide. The legalization of PAS will also lead to the legalization of voluntary active euthanasia. If an attempt of a PAS is not successful because the dosage of the lethal drugs is not strong enough or with some other errors, the patient may suffer a lot and also be incapable of taking further action to end his or her life quickly. Provided that voluntary active euthanasia is legalized as well, the physician can step into help the patient ending his/her life. For further discussion of the ethical issues of PAS, see Warnock and Macdonald (2008) and Dworkin et al. (1998).

⁹One should note that the patient eligible for euthanasia in the Netherlands is not necessarily terminally ill, nor suffering from physical pain. More details of the law could be found in <http://english.justitie.nl/currenttopics/pressreleases/archives2002/-euthanasia-and-assisted-suicide-control-act-takes-effect-on--april-.aspx>.

(and assisted suicide) in the Netherlands (Van der Heide et al. 2007). It is alarming that the proportion was so high (Keown 2002).

Regarding passive euthanasia, the example of killing by omission given earlier, i.e., a parent deliberately letting his/her child starve to death, is obviously morally unacceptable. On the other hand, with the advances in medical technology, there are situations when forgoing certain forms of life-sustaining treatment is morally acceptable. Though this is sometimes still labeled as passive euthanasia, forgoing life-sustaining treatment in appropriate circumstances is legal in most parts of the world. What constitutes an appropriate circumstance and how the decision is to be made will be discussed in a later section. This chapter would go on first to discuss voluntary active euthanasia.

Reasons for Voluntary Active Euthanasia

There are a number of reasons to support the legalization of voluntary active euthanasia. First, one may argue that we should respect the patient's personal choice to end his/her life to relieve his/her suffering because the autonomy of a person has to be duly respected. Second, there are hard cases in which the unbearable pain and suffering of a patient cannot be effectively alleviated by pain management and palliative care, despite forgoing burdensome/futile life-sustaining treatment and palliative care. Active euthanasia may well be the last resort. Third, one might argue that the intrinsic value of human life is duly respected if active euthanasia must be voluntary and used only as a last resort for hard cases. According to this view, providing such euthanasia under an exceptional circumstance does not constitute a denial of the sanctity of life because the intrinsic value of life is not absolute and so can be trumped by other moral considerations. Finally, some severely ill patients, such as those who suffer from quadriplegia, are not able to kill themselves even when the option of physician-assisted suicide is available because they are not able to put the lethal drug into their mouths or press the button to switch on the lethal injection. Voluntary active euthanasia seems to be the only way out for these patients to relieve their sufferings. It seems unfair if they are deprived of this option of ending their lives simply because they are in a more miserable situation.¹⁰

¹⁰Cheng and Ming (Chap. 3 of this book) discuss that a minimal level of mental and physical health is important for a meaningful life and abortion is acceptable if the fetus is known to have serious physical incapacities (because of the low possibility of leading a meaningful life after birth). Similarly in the case of euthanasia, the option to end one's life may be acceptable if the patient concerned is facing serious terminal illness, with intense sufferings, thereby little or no prospect of leading a meaningful life.

Reasons Against Voluntary Active Euthanasia

However, there are also a number of reasons against the legalization of voluntary active euthanasia. First, with modern palliative care, pain and suffering of the great majority of patients can be controlled. In many situations, a request for euthanasia is a request for relief of symptoms. Second, licensing killing in non-war situations has significant impact on societal values. The licensing may lead to the belief that the life of the disabled or those who suffer physically or psychologically from severe illness is less valuable because on the one hand voluntary active euthanasia is applicable to them, but on the other hand, direct killing of other people with their consent is morally impermissible. This differential treatment is based on the view that these patients have no promising future and so their lives are less worthy such that killing them under some circumstances is morally acceptable. Yet this view is discriminatory because lives in whatever conditions should be treated as equally valuable. Third, there could be implicit pressure on the chronically ill and the vulnerable groups to choose euthanasia, especially in a Chinese society like Hong Kong, because they might think that their choices of staying alive may lead to wastage of scarce healthcare resources or a burden to their family. Fourth, there may be negative implications on resource allocation to the chronically ill and terminally ill. Since voluntary active euthanasia is a quick and easy solution, there may be much less effort for developing palliative care and hospice services which can alleviate the pain and sufferings of the chronically or terminally ill and can be a good alternative to euthanasia. Finally, the legalization of voluntary active euthanasia can create a “slippery slope.” Once the barrier to euthanasia is broken, abuses are prone to occur because it is difficult to ascertain that the request for euthanasia is entirely voluntary and no better alternative is available. The legalization implies that under some circumstances, killing those who suffer from severe illness is something good and acceptable. It may give an excuse to end their lives even when their wishes are not so certain. The legalization of voluntary active euthanasia may subsequently lead to more and more non-voluntary active euthanasia in practice. That has already happened in the Netherlands, where euthanasia is extended to infants (Verhagen and Sauer 2005).

Alternatives to Voluntary Active Euthanasia

The above discussion shows that the controversy about the legalization of voluntary active euthanasia arises from a set of conflicting values and moral considerations, including the intrinsic value of life, autonomy, well-being of the patient, and the social consequence of the legalization. Supporters of voluntary active euthanasia base their arguments on the value of autonomy and the concern about the well-being of the patient, while opponents base their arguments on the intrinsic value

of life and the negative social consequences arising from the legalization of voluntary active euthanasia. It is difficult to come to a conclusive answer to the question of which position is right. Different stakeholders in society may uphold different views, and it will be divisive if either of the rival views is adopted to formulate public policy in regard to the end-of-life decision making. Just dragging on and on in an endless theoretical debate about the pros and cons of euthanasia provides no practical alternatives to alleviate or relieve the pain and sufferings of patients with advanced irreversible illness. From a practical point of view, policy makers have to work out alternatives to voluntary active euthanasia based on a compromise among the conflicting values and moral considerations upheld by various stakeholders. These alternatives will be more feasible and widely supported by people in different walks of life. In the following sections, we will discuss the alternatives adopted in Hong Kong.

Palliative Care

Euthanasia is to end a patient's pain and suffering by killing him/her. However, with appropriate treatment, most symptoms can be adequately controlled without resort to killing the patient. It is true that many terminally ill patients suffer from a lot of physical symptoms. They may also suffer from psychological and spiritual distress. Modern palliative care, which is a specialized field of health care to help the terminally ill patients, addresses the suffering of the patient with a holistic approach. The service is provided by a multidisciplinary team of doctors, nurses, social workers, counselors, and other professionals. With the appropriate use of analgesics and other modalities of medical treatment, coupled with psychological, social, and spiritual support, most terminally ill patients could attain a peaceful death. Sometimes, strong narcotics are used as analgesics to control pain. These are very effective and safe if appropriately used and in most cases do not lead to shortening of life. In the rare situations when the symptoms cannot be controlled adequately (the "hard cases" discussed under the earlier paragraph "Reasons for Voluntary Active Euthanasia"), palliative sedation may be given as a last resort (Cherny et al. 2009). The patient is given sedation to reduce the awareness of the symptoms. Though the life of the patient will likely be shortened by this, palliative sedation is not active euthanasia and obviates the need for active euthanasia.

Modern palliative care was pioneered in the UK in the 1960s as a response to the plight of the terminally ill. Now, palliative care is developed in many parts of the world, including Hong Kong. Unfortunately, because of resource limitation in some parts of the world, not all needy patients could have access to appropriate palliative care and are suffering needlessly. However, the community should consider providing more resources to help the terminally ill rather than resorting to euthanasia.

Forgoing Life-Sustaining Treatment

Palliative care is to relieve the suffering of the patient rather than to hasten death. On the other hand, palliative care accepts that death is an unavoidable fact and does not aim to prolong the dying process meaninglessly.

Because of advances in medical technology, even for a terminally ill patient, there could be many treatment modalities that can prolong life. These are classified as life-sustaining treatments (LSTs) and include, for example, dialysis, mechanical ventilation, and cardiopulmonary resuscitation. For the terminally ill patients, these treatments have the potential to postpone the patient's death, but the underlying terminal illness would not get better. While the biologic life of the patient is prolonged, the patient could become unconscious because of the underlying illness or because of brain damage during resuscitation measures. The patient could also have pain and suffering from the complications of the treatment or from the underlying illness. The prolongation of life could thus be regarded as a prolongation of the dying process and may not be appropriate. Modern medical practice considers that it is sometimes appropriate to forgo the LST in these terminally ill patients (British Medical Association 2007, p. 3). Forgoing LST in appropriate circumstances is medically and legally distinct from euthanasia in its narrowly defined meaning. In contrast to the latter, the former is legally acceptable in most parts of the world including Hong Kong. Many medically advanced countries in the world have issued guidelines on this, and the Hospital Authority of Hong Kong has issued the guidelines in 2002.

Forgoing LST is considered appropriate when it is the wish of a mentally competent and properly informed patient, or when the treatment is considered *futile* (Beauchamp and Childress 2001, p. 141). But what counts as futile, and what counts as treatment? We will have further discussion of these concepts below.

Respecting the wish of the patient involves the ethical principle of "autonomy." One cannot force treatment to a patient who has refused it, as long as the patient is mentally competent and properly informed when the decision is made, even though the treatment is considered by others as beneficial to the patient. Legally, forcing such treatment to a patient may constitute an offense of battery.

Forgoing futile LST implies the acceptance of the fact that human is mortal. On the one hand, this approach recognizes the intrinsic value of life and so rejects the direct intentional killing of a person as part of the medical care being offered. On the other hand, it does not regard the intrinsic value of life as absolute and does not fight death to the very end because the well-being and the autonomy of the patient have to be taken into consideration.

The determination of *futility* involves the ethical principles of "non-maleficence" (do no harm) and "beneficence" (do good). To determine whether a treatment is futile, one has to balance the burdens and benefits of the treatment toward the patient (British Medical Association 2007, p. 14), asking whether the treatment is in the best interests of the patient. However, the determination of futility is not easy. Other than cases of physiologic futility, which means that the chance

of sustaining life by the treatment is minimal, the determination of futility involves quality of life considerations and can be value-laden. The decision-making process in most cases is therefore not a pure medical decision, and one should consider the wishes, values, and preferences of the patient (Department for Constitutional Affairs 2007, Chap. 5).

In Hong Kong, if the patient is not mentally competent and does not have a guardian, the doctor in charge may legally make medical decisions for the patient, based on the best interests of the patient (Hospital Authority 2002). However, as most decisions on futility of LST are value-laden, the patient's family should be consulted for their views about the patient's best interests and to see whether they have any information about the prior wishes and feelings, values, and beliefs of the patient. To make a decision, the healthcare team should try to build consensus with the family if possible.

Forgoing LST could mean withholding or withdrawing the treatment. One should note that there are no legal or necessary morally relevant differences between withdrawing and withholding LST (British Medical Association 2007, p. 19). Allowing withdrawal may safeguard those patients whose benefit from LST may appear uncertain at first. For these patients, if withdrawal is not allowed, LST may be withheld because of the worry of prolonged suffering if the LST turns out only to prolong the dying process without leading to meaningful recovery. If withdrawal is allowed, LST could be tried first, only to be withdrawn when there is no meaningful recovery from the treatment.

Though artificial nutrition and hydration are legally classified as medical treatment, the withdrawal of such is controversial, because some people would consider this as basic care. Except when death is imminent and inevitable, or it is the wish of a mentally competent patient, some guidelines on LST require special procedural safeguards before artificial nutrition and hydration can be forgone (British Medical Association 2007, p. 17). It is most important to understand that forgoing LST in appropriate circumstances does not at all mean abandoning the patient. Basic care, symptom control, care, and concern should always be offered.

Advance Directives

Sometimes, what is in the best interests of a mentally incompetent patient is difficult to decide, especially if the prior view of the patient is not known. In recent years, the concepts of advance care planning and advance directives are promoted in various parts of the world, so that the wish of the patient could be made explicit before losing capacity (Capron 2009). An advance directive is an expression by a mentally competent adult person of how s/he wishes to be treated when s/he becomes mentally incapacitated. There are two kinds of advance directives: an instructional directive and a proxy directive.

An advance instructional directive (a living will) usually comprises instructions about what kind of LST that a patient wishes to refuse when s/he becomes mentally incapacitated under some specified circumstances. In Hong Kong, a valid and applicable instructional directive is legally binding and should be followed (Hospital Authority 2010). For an advance instructional directive to be valid, firstly, it must be clear. Secondly, at the time of making the directive, the patient has to be mentally competent and properly informed and has to understand the consequence of the instruction. To be applicable, the present clinical situation must be a condition specified in the directive, and there are no unforeseen events that lead to the clinical deterioration, like an accident or foul play.

An advance proxy directive (enduring power of attorney for health care) expresses the patient's wish to appoint another person, usually a family member, to make healthcare decisions on his/her behalf when s/he becomes mentally incapacitated under some specified circumstances. A proxy directive is not legally binding in Hong Kong even if it is valid, but that is not the case in some other jurisdictions, including USA, and some territories in Australia. UK also recently changed the law to allow this.

In Hong Kong, the term "advance directive" is usually used in a narrow sense to mean an instructional directive for the refusal of LST. This usage will be followed in the discussion below.

The legal force of a valid advance directive stems from a respect of the autonomy and the bodily integrity of the patient. Treatment against the wishes of a patient could be regarded as an offense of assault or battery. Similar to a contemporaneous refusal, if the validity of the advance directive is not in doubt, the advance directive should be followed even though the treatment is considered by others as beneficial to the patient.

Advance directives are useful tools for healthcare professionals to understand and ascertain the wishes of the patient and so can serve to promote patient's best interests. However, it should be noted that an advance directive is only a tool to document the decision of the patient to refuse certain LST. If a patient faces an incurable disease, it is important to have an adequate process of communication among the patient, the family members, and the healthcare team regarding what kind of care is considered appropriate when the patient becomes mentally incompetent. This communication process, called "advance care planning," allows improved understanding, reflection, and decision making regarding end-of-life care (The NHS End of Life Care Program 2008). The signing of an advance directive is only one of the outcomes of the advance care planning process.

Advance care planning is an integral part of palliative care and should be promoted to suitable patients with advanced progressive diseases, in anticipation of progressive deterioration, before death is imminent. At this moment, advance directives are seldom practiced in Hong Kong. The Hospital Authority of Hong Kong has issued guidelines on advance directives in 2010. With more community education, the concept of advance directives may be more understood and accepted by the general public.

An Important Note on Terminology

In public debates and in bioethics literature, the term euthanasia often carries a broader meaning. Forgoing life-sustaining treatment (LST) is often considered as one form of euthanasia, labeled as “passive euthanasia.” Different ethicists define “passive euthanasia” differently. Some define the term as all forms of forgoing LST, while some define it as forgoing LST with the intention to shorten life which can be regarded as killing the patient by omission. It should be noted that, legally and medically, forgoing LST is distinct from active euthanasia. The former, if carried out under appropriate circumstances (when it is the wish of a mentally competent patient or when the treatment is futile), is legally acceptable in most parts of the world including Hong Kong. To avoid any unnecessary confusing connotations, the term “passive euthanasia” is not recommended by the medical and legal field, and the term is not used in relevant guidelines and legislations in many Western countries and Asian regions (including Hong Kong, Taiwan, and Singapore) on the issue. Forgoing LST is itself a complex ethical issue, and what constitutes futility is not easy to define. Some situations are non-controversial, like forgoing cardiopulmonary resuscitation in a dying patient with advanced cancer, which is being practiced everyday in Hong Kong, whereas some situations are controversial, like the withdrawal of ventilator support in a conscious quadriplegic patient. It would not help public discussion if the term “passive euthanasia” is used indiscriminately without a clear definition, especially when non-controversial cases of forgoing LST are referred to as “euthanasia.” They are not cases of killing the patient but allowing them to die naturally. The patient just dies of some life-threatening disease which is something unavoidable. The use of “euthanasia” may blur, for no good reason, the distinction between active euthanasia and forgoing futile LST which is a necessary sequel to advancement of medical technology. Without such forgoing, many dying patients would have to go through various meaningless futile treatments that only add suffering before they are certified dead. Since there is a distinction between forgoing futile LST and active euthanasia, the acceptance of former does not necessarily mean the acceptance of the latter.

The terminology issue in the Chinese community is further compounded by the loose usage of the Chinese term 安樂死, which is sometimes used to describe the state of the dying process or even palliative or hospice care, besides euthanasia in the standard sense or forgoing LST (Tse and Pang 2006, p. 171).

Such a loose usage of the term euthanasia or 安樂死 leads to difficulties in public discussion. Public opinion in support of euthanasia may actually include support for forgoing futile LST and support for palliative care. This confusion is totally unnecessary and should be avoided.

Conclusion

In this chapter, we have seen that although under some circumstances death is not always worse than life, it does not follow that voluntary active euthanasia is morally permissible. There are rival views about the legalization of voluntary active euthanasia, and the controversy stems from a set of conflicting values and moral considerations, including the intrinsic value of life, autonomy, well-being of the patient, and the social consequence of legalization.¹¹ There is no simple and clear answer to the question of whether voluntary active euthanasia should be legalized. A practical solution, as in the case of Hong Kong, is to develop alternatives to legalization based on a compromise among the conflicting values and moral considerations so that there are effective ways to alleviate or relieve the pain and sufferings of patients with advanced irreversible illness.

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¹¹For another discussion taking a similar set of values into consideration, see Cheng and Ming (Chap. 3 of this volume).

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Chapter 3

The Justification of the Abortion Law in Hong Kong: A Comparative Study

Kam-Yuen Cheng and Thomas Ming

Abstract Abortion presents a moral dilemma from the perspectives of both Western and Confucian traditions. This chapter will examine how the law of Hong Kong compromises the conflicting rights and values involved in abortion. In Hong Kong, although abortion is legally permissible under certain conditions, abortion on demand is outlawed. We argue that, in order to justify this legal restriction, the law has to consider the fetus as a potential person, who has a right to life, which is close to, but not up to, that of a full-blown person. However, such restriction is incongruent with Confucian ethics, which emphasizes the harmony of the family and the community. At least, Confucian ethics would allow abortion based on social or economic reasons.

Introduction

The moral permissibility of abortion is a very complicated issue because it involves many difficult questions: Is the fetus a person? If so, when does the fetus become a person in the process of gestation? If the fetus is a person, can its right to life override the mother's right of controlling her own body? Does the voluntariness of pregnancy matter to the permissibility of abortion? If so, why?

There is no consensus to the answers of the above questions. That explains why the debate between the pro-choice camp (supporting abortion by appeal to the choice of the woman concerned) and the pro-life camp (opposing abortion in

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defense of the life of the fetus) has been going on for so many years. In Hong Kong, abortion is legally allowed if the pregnancy threatens the mother's life. Or, it is allowed if the gestation is with 24 weeks and meets one of the following conditions: (a) the pregnancy threatens the physical or mental health of the mother, (b) the pregnancy results from rape or the mother is under 16, and (c) the fetus has serious medical problems or birth defects, such as Down's syndrome (Section 47A). Any other instance of abortion on demand (including abortion based on social or economic reasons, e.g., the mother is divorcing or her family is not able to support the forthcoming child) is outlawed in Hong Kong.

First of all, why does the law require that abortion is permissible only if the pregnancy is 24 weeks or less, except where abortion is necessary as a lifesaving measure? We should note that the law was made in the 80s. Based on the technology of that time, a fetus having prenatal age of 24 weeks or beyond was considered viable on its own.¹ Thus, the law is made in the spirit of prohibiting killing a fetus at a stage of independent existence.

This chapter will only briefly discuss the history of abortion laws in Hong Kong; the main discussion is rather to examine whether it is morally justified to maintain such laws. We will see whether the abortion laws are morally justified in both Western and Eastern (or Confucian) ethics. Abortion presents a moral dilemma for both traditions. From the Western perspective, abortion involves the conflict between the mother's right of autonomy and the fetus's right to life. From the Eastern tradition, abortion involves the conflict between individual value (i.e., the life of the fetus) and the family or community value (i.e., the harmony of the family or the community).² This chapter will see how the abortion laws in HK compromise between these rights and values. In the following, we will first examine each of the above conditions under which abortion is legally permissible; hence, we will also show how the Government should respond to the questions listed in the beginning of this chapter.

Before our discussion of the abortion laws starts, we want to clarify a confusion in ethics. Some people may think that the moral permissibility of abortion depends on whether abortion is a killing or letting-die.³ Given that the duty to save another's life is much weaker than the duty not to kill (Brody 1972; Quinn 1989), abortion is more likely to be morally permissible if it is a letting-die. Nonetheless, on the one hand, killing may also be morally permissible in some cases. For example, if a trolley is heading toward several people who are trapped on the main track, it is permissible to redirect the trolley from the main track into a side track on which

¹Today, the viable state is around 22 weeks' gestation.

²Chan and Tse (Chap. 2 of this book) highlight a similar conflict between individual value (i.e., the intrinsic value of life of a terminally ill patient) and the family and community value (i.e., the healthcare burden such patient may impose on family and society, thereby causing disharmony) in the case of euthanasia.

³For a discussion of the possible moral difference between killing and letting-die in this book, see the section in Chan and Tse's chapter on active and passive euthanasia. Chan and Tse also discuss the difference between withdrawing and withholding medical treatment.

a person is trapped although, in this case, redirecting the trolley will kill the one. On the other hand, it is impermissible to let a patient die in order to harvest his organs for transplant so that we can save several people. Therefore, whether abortion is a killing or letting-die is not the main issue in deciding its moral permissibility. In fact, we agree with Rachels (1975) that the difference between killing and letting-die is not morally significant in itself. In other words, an action being an instance of killing and another an instance of letting-die is not sufficient to effect moral difference between these two actions.

Abortion on Demand

The reason why abortion on demand is outlawed in Hong Kong is more of a pragmatic one than for the reverence of life. Before the abortion law was amended in 1981, the Working Group on the Law Relating to Abortion actually considered of bringing in legal abortion on demand. But the group concluded that “this could unleash a suppressed demand for abortion far beyond the capacity of the facilities of the Medical and Health Department, which may cause other services of the Department to suffer” [Report of the Working Group 1977, quoted in Liu (1992, 28)]. So abortion on demand was not introduced because of a lack of resources. On the other hand, Liu points out that “the practice of abortion had general acceptance within the Chinese community” (1992, 283). So she concludes:

In light of the domestic law on abortion and the prevalence of abortions outside the statutory framework, the foetus does not have a legal right to be born or a legal right to life (1992, 287).

In fact, in most places of the world, the fetus does not have a legal right to life. Liu suggests that the right to life movement is to a large extent rooted in the Western religious idea that the fetus is *ensouled* by God at the moment of conception (1992, 284–285).

To outlaw abortion on demand is to limit the mother’s ability to control her body, i.e., to limit the autonomy of the mother. Hence, the restriction of the mother’s autonomy in banning abortion on demand must have an overriding moral justification. It seems that we cannot avoid granting a certain right to life to the fetus. This concession is inevitable unless we take the hard line to insist that the fetus is just like a tumor or outgrowth of the mother’s body. Yet, granting a right to life to the fetus does not mean that the fetus has same right to life as a full-blown person. We can well agree that the life of a full-blown person is more valuable than that of the fetus. That is to say, the right to life is gradational, rather than a matter of all or nothing.

Given that the concept of rights comes from Western ethics, we can still ask how Chinese moral philosophy would respond to the abortion problem, viz. does Confucian ethics allow abortion on demand? In very general terms, Confucianism reveres human life. According to this view, “of all things born between Heaven and Earth, human beings are the most valuable. 天地之性人為貴” (*Xiaojing* 孝經

or *The Book of Filial Piety*) and “Of all creatures, man is the most highly endowed. 人為萬物之靈” (*Shujing* 書經 or *The Book of Documents*).⁴ Even though the fetus is not a full-blown human being, it is a stage a full-blown human being must go through. So its value can be derived from that of a full-blown human being. On the other hand, Confucian ethics also emphasizes the harmony of family and community, which may be threatened by the birth of an unwanted child. Since we do not have classical Confucian texts discussing any issues resembling the abortion case,⁵ we need to extrapolate the most plausible response from them. Suppose that the mother already needs to take care of several children and that her family cannot bear the burden of an additional child. Forbidding her to have abortion will thus destroy the harmony of her family and even that of the community. (If her family cannot support the child, the other community members need to.) Furthermore, it is evident that the fetus is not yet a member of the family or of the community: From the perspective of Mengzi, the fetus does not yet have the four sprouts (*siduan* 四端) of humanity. Given the prioritizing of maintaining familial or communal harmony and the dubious status of the fetus, it would be fair to say that Confucianism has no strong objection to abortion on the grounds of reducing disharmony. That is the reason why Liu points out that “the practice of abortion had general acceptance within the Chinese community,” given the fact that Confucianism is regarded as the dominant moral code of Chinese. This is evidenced by the fact that in other Chinese societies, including China, Singapore, and Taiwan, abortion based on social or economic reasons is legally permissible.⁶

In sum, although Confucian ethics values all forms of life, and human beings particularly, a human fetus is not yet a member of the family or of the community. Given that this tradition gives priority to familial or communal harmony, it will not object to aborting a fetus whose future birth will cause disharmony. So, in this aspect, the abortion law is incongruent with Confucian ethics.⁷

Pregnancy that Threatens the Mother’s Life

When the pregnancy threatens the mother’s life, not to abort the fetus is tantamount to letting the mother die. Hence, the dilemma in this case involves the conflict between the life of the mother and that of the fetus. We can morally justify the law to the effect that abortion is permissible when the pregnancy threatens the mother’s

⁴Even though the fetus is not a full-blown human being, it is a stage a full-blown human being must go through. So its value can be derived from that of a full-blown human being.

⁵The reason is that abortion is not a real option (because of medical and technical limitations) until modern time. In the past, the closest equivalent to abortion was infanticide.

⁶In China and Singapore, there is even no need to give any reasons in order to have abortion.

⁷Although Liu (1992, 282) argues that the wide wording of the abortion law may provide adequate scope to accommodate the practice of abortion on economic ground, no one has ever succeeded in challenging the law based on this interpretation.

life only if the fetus's right to life can be overridden by that of the mother. In other words, we need to have a reason to see the mother's life as more valuable than the fetus's. Maybe we could consider the fetus as a *potential person*, who has a right to life close to, but not up to, a full-blown person. As discussed before, the right to life can be gradational. To say that the fetus is a potential person is equivalent to say that his right to life is not on a par with that of a full-blown person.

As said, Confucian ethics has an easier task at hand even though the issues of right to life and killing remain murky. According to Ivanhoe (2010), “[t]he pregnant woman is a member—a “sister” within Confucian society—who has a history and many connections with other members of our larger community” (43). By contrast, the fetus has no social history and is only a potential member of the community. So killing the fetus will create fewer disharmonies than letting the mother die. In the jargon of Confucianism, not letting the mother abort, given the circumstances, is not practicing benevolence (*ren* 仁) since everyone must have the compassion (*bu ren ren zhi xin* 不忍人之心) to feel the plight of the mother.

Pregnancy that Threatens the Physical or Mental Health of the Mother

According to the law, abortion is permissible when “the continuation of pregnancy would involve risk ... of injury to the physical or mental health of the mother, greater than if the pregnancy were terminated” [Section 47A (1)].⁸ So, from the perspective of rights, we can say that not only is the life of a fetus less valuable than that of a full-blown person, it is also less valuable than a full-blown person's health.^{9, 10}

The permission of abortion in this case is also consistent with the Confucian view. The mother's physical or mental health will have direct impact on her relation with her family members and other community members. For instance, the mother may need to be taken care of by her family members or medical staff for an extended period of time if she continues her pregnancy. So Ivanhoe states the Confucian view as follows:

If there are good reasons to believe that carrying [the] fetus to term will significantly harm the pregnant woman, by threatening her health, undermining her ability to pursue reasonable life goals, or severely damaging her relationships with other members of society, this may offer good grounds for terminating the pregnancy (2010, 43).

⁸Liu points out that “[s]uch a formulation can, however, be interpreted as allowing abortion on demand: statistics show that maternal mortality is greater than the mortality rate from abortion during the first trimester” (1992, 281). But no one has ever succeeded in challenging the law based on this interpretation.

⁹Accepting this will provide a strong reason to accept stem cell research for medical advance.

¹⁰For a discussion of the variety of values and the possible ways to handle multiple values, see Yu's chapter in this book, pp. 205–206 in particular.

Involuntary and Underage Pregnancy

The law does not state explicitly that abortion is permissible if the pregnancy results from rape or the pregnant woman is under 16. Rather, it provides that:

If a registered medical practitioner is in doubt as to whether the continuation of woman's pregnancy would or would not involve risk of injury to the woman's mental or physical health greater than if her pregnancy were terminated, there are two cases in which he may presume that the balance of the risk points to termination: firstly, where a woman is under 16, and secondly, where the woman is a victim of a certain sexual offence... (Liu 1992, 282).

So the permissibility of abortion in the case of involuntary or underage pregnancy is in fact grounded on a medical reason: The victim or the underage mother would be under severe stress and mental anguish if she is forced to bear the fetus to term (even if we assume that they do not need to take care of the baby after birth).

One may think that the legal permissibility of abortion in this case can also be justified by appeal to the concept of responsibility. In the case of voluntary pregnancy or the case in which the pregnant woman is mature enough to consent to sexual relation, she needs to bear the consequence of her behavior. Since she knows that sexual relation may lead to pregnancy, and given that the fetus is a potential person, she has the responsibility to bear it to term.¹¹ But there is a problem: Although it is clear that she has the responsibility if she has not used contraceptives, does she have the responsibility if she has used contraceptives properly? Consider the following case. You well know that even using the road properly you may still be injured or killed in traffic accidents because there are drunk drivers and because machines can fail. If you are injured in a traffic accident without violating any traffic laws, do you need to be responsible for your injury?¹² If the answer is "no," then a pregnant woman who has performed proper contraception should not be responsible for her pregnancy either. Since abortion is outlawed in this case, the law cannot be justified by appeal to responsibility.

As discussed above, Confucian ethics considers the mother's mental health and her relation to her family and community as more important than the life of the fetus. Forcing a rape victim or an underage mother to bear the fetus to term will be detrimental to her mental health and social relation: In a typical Chinese family, an illegitimate child and a mentally unsound daughter are a source of threat to familial harmony. We may, thus, conclude that abortion is morally permissible in the case of involuntary or underage pregnancy under the Confucian tradition.

¹¹Regarding pregnancy resulting from incest, in most cases, the mother is either underage or a rape victim. Consequently, she does not need to bear the responsibility of bearing the fetus. Hence, abortion is permissible.

¹²Thomson (1971) has a more detailed discussion in this issue.

The Fetus that Has Serious Medical Problems or Birth Defects

The provision to the effect that abortion is permissible when the fetus has serious medical problems or birth defects is introduced to the law in order to

[S]ave a woman from the stress of bearing an abnormal child she would rather not have, and a family from the distress and burden of having an unwanted handicapped member which with advances in medical knowledge can be predicted in certain circumstances [*Hong Kong Hansard*, 19 November 1981, 204, quoted in Liu (1992, 282)].

So the reason for introducing this provision is, again, a medical one: It is for the sake of the mental and physical health of the mother and her family members.

Again the Confucian view will justify this provision as an abnormal child will threaten the mental health of the mother and the harmony of the family and community. But based on Confucian ethics, we can also justify this provision for the good of the fetus. According to this view, the *raison d'être* of the state is to promote a meaningful or flourishing life for each individual.¹³ The state must have a conception of meaningful life in order to make policies. And it is reasonable to say that in order to acquire a meaningful life, one has to attain a minimal level of physical and mental health. So if the medical problems of a fetus are so serious that it has no hope to acquire a meaningful life, for example, it will have very low cognitive abilities and need continuous intensive care in the future, and abortion will be permissible.¹⁴ Some may object that this view also implies that it is not wrong to kill a child with serious medical problems or birth defects. This may be true for a newborn baby who has no ability to form any social connections.¹⁵ But for a disabled child who is still able to establish a certain kind of social connections with other members of the family and the community, killing him or her will bring disharmony to the family and the community. So the Confucian view would reject infanticide even in this case.

Challenge to the Law

Warren (1973), an ethicist in the Western tradition, also argues for abortion on demand. She contends that any rights of an actual person must be higher than any rights of a potential person.¹⁶ Consider her thought experiment argument. Suppose an astronaut is captured by some Martians (imaginary inhabitants of Mars) who

¹³This is also true for Aristotle's virtue ethics.

¹⁴Of course, whether choosing abortion or not is up to the mother. To force the mother to abort the fetus will harm her mental health and cause disharmony to her family.

¹⁵Recall that gestation is a process of gradual development. No sharp line in psychology and physiology can be drawn between a fetus just before birth and a newborn baby.

¹⁶She thinks that the fetus and the newborn baby are potential persons.

intend to use some of his body cells to clone human beings. Suppose further that the process of cell taking is very safe and lasts for only a few seconds. Also, the clones in the future will be treated fairly. If the astronaut escapes, he will deny the right to life of those potential persons. But we would still think that the right of autonomy of the astronaut overrides any rights of those potential persons. Therefore, the mother's right of autonomy has priority over the right to life of the fetus in all circumstances.¹⁷

Of course, the body cells of the astronaut have right to life only if they are potential persons. But we cannot simply claim that they are not potential persons or have no right to life at all because they require an unnatural and extraordinary process, i.e., cloning, to survive. Some babies need to stay inside an incubator or have an extraordinary operation to survive. If staying in an incubator or having an operation does not deprive a baby of her status of a person, why should going through a cloning process deprive a body cell of its status of a potential person? We also need to notice that it is quite difficult to determine what is natural or unnatural, ordinary or extraordinary, especially in the era of biotechnology. Avoiding digressing too far from the main issue, we conclude from the above-thought experiment that even if we grant that the fetus is a potential person, that in itself does not mean that we have sufficient reason to justify the prohibition of abortion on demand.

Conclusion

Hong Kong outlaws abortion on demand. Nonetheless, we have canvassed some representative arguments to show that such law is incongruent with Confucian ethics, which would, at least, allow abortion on sound social or economic reasons. That explains why many HK women who have unwanted pregnancy go to Mainland China to have abortion. In the meantime, abortion (on demand) becomes legalized in more and more countries, e.g., USA, Australia, Austria, the Netherlands, Russia, France, Germany, and the Asian countries aforementioned. This trend does not indicate that we have less reverence for life now than in the past. We need to remind ourselves that regardless of emotional or religious factors, it is still a question, social or philosophical, whether the fetus has any right to life at all or whether its right to life can override any rights of an actual person. Hence, the stated trend only shows that we value more and more individual's right of autonomy, which has become a universal value.

¹⁷Although Warren's argument is more like a science fiction, we cannot reject her argument by simply pointing out that her thought experiment can never be true because many phenomena described by scientific theories, e.g., gas laws, also can never be true.

However, as a reminder, as long as we grant the fetus to a certain extent a right to life or regard it as potential community member, it is morally wrong to employ abortion as a major method of birth control. It is simply callous to kill a being for trivial reasons (e.g., neglect of the use of contraception), whose life has intrinsic value.¹⁸ In addition, we cannot underestimate abortion's risk of injury to the physical and mental health of the mother. Therefore, abortion should be the last resort in the case of unwanted pregnancy.

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¹⁸The same argument applies to killing and eating animals.

Chapter 4

Compensated Dating: An Ethical Analysis

William Sin

Abstract In this paper, I analyze the moral problems in relation to the practice of compensated dating in Hong Kong. I identify three features which are often involved in the activity of compensated dating. The first is prostitution. If the trade of compensated dating involves an exchange of money for sex, then people may rightly question the moral permissibility of this practice. Secondly, the actions of compensated dating may involve sex activities between teenagers and adults. Thirdly, critics claim that the workers of compensated dating may be motivated by a mistaken view of the worth of things. In this paper, I have explained why these three criticisms are indefensible. I believe that the government's policy in regard to the education of the teenagers, youth development, and the support it provides for workers of compensated dating should be reviewed.

Compensated dating (“enjo kōsai”—short for “enke”) is a practice that originated in Japan, as adult men pay teenage girls for their companionship (Wikipedia 2014b). Though the concepts of “dating” or “companionship” will not presuppose sex transaction, in the context of Hong Kong, the practice of compensated dating often involves an exchange of money for sex (or for activities with such flavors in the interaction).¹ It is worth noting that the original practice of compensated dating in Japan may not involve an element of prostitution. Workers who engaged in compensated dating were mainly expected to accompany businessmen to have entertainments in karaoke bars, clubs, or other venues (Mamoru 1997, pp. 75–6. In Japanese.

¹Swader and Vorobeva (2015), however, stipulates that the exchange in compensated dating does not involve monetary payment, but “monetary gifts” (323). On this line of description, compensated dating may be variously called “gift-for-sex bartering” (Swader et al. 2012), as well as (the following are cited by Luke 2006) “sugar daddy relationships” (Silberschmidt and Rasch 2001), “semi-prostitution,” “informal sex work,” “noninstitutional” sexual exchange, and “transactional sex.”

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Quoted in Wikipedia; McLellan 2011). In this paper, the term “compensated dating” means particularly the relevant type of activity which tends to involve sex service. This stipulation is made in relation to the social problem that has arisen in Hong Kong since 2000.²

There is no doubt that the actions involved in compensated dating are morally questionable. But what are the moral problems of this practice? In this paper, I identify three features in regard to the activity of compensated dating. The first is prostitution. If the trade of compensated dating involves an exchange of money for sex, then people may rightly question the moral permissibility of this practice.³ Secondly, the actions of compensated dating may involve some elements of child–adult sex; that is, the workers of compensated dating are often teenage girls below the age of consent, whereas the customers are usually matured men. It is morally problematic for an adult to engage in sexual activities with a person who is below the age of consent. Thirdly, teenage workers of compensated dating may be motivated by a mistaken view of the worth of things. The teenage workers often engage in compensated dating for the sake of ostentatious goods. However, the value of the female workers’ bodies may be incommensurably higher than that of a smart phone or that of designers’ clothes.

According to the line of argument I provided in this paper, the moral status of the actions of compensated dating may be dependent on the moral statuses of the actions in regard to prostitution, to sex activity between teenagers and older adults, and to the soundness of the view that workers of compensated dating are affected by a mistaken understanding of the worth of things. Here, to state my view, I do not believe that the practice of compensated dating is intrinsically wrong. This is not to say that we may deal with the practice of compensated dating with an easy going attitude in society. There are circumstantial factors which make an activity morally problematic when it is widely performed in society. If we may distinguish between the circumstantial factors and the intrinsic ones, we shall see more clearly the nature of the problem in relation to the rise of compensated dating as a social phenomenon.

This paper has three sections. In the first section, I explain why prostitution is not intrinsically objectionable. Its aim is to layout my understanding of the moral considerations in regard to prostitution. The second section discusses the moral problem of sexual activity between a teenage person and an adult. I will explore the matter from two perspectives. One is the sexual interaction between a teenage woman and a much older man, and the other is that of between two teenage

²The trade of compensated dating has mushroomed when Internet communication became popular. It captured the society’s attention as Wong Ka-mui—a worker of compensated dating—was murdered in 2008. See “香港性產業” [Sex Trade in Hong Kong] in Wikipedia (2015).

³This is related to the norm that sex is not to be exchanged for money. There are other sex norms, such as sex as a private matter and in the family context discussed by Yung (Chap. 1 of this book) in her discussion of pornography, not to involve in promiscuous sex and limiting sex to long-term and stable-relation partner discussed by Ying (Chap. 5 of this book) in his analysis of Edison Chen’s photo scandal.

persons, where one of the participants has just reached the legal age of consent. I will argue that in both cases, there is no defensible argument in objection to the practice of the respective sexual activities.⁴

In the third section, I respond to the criticism regarding the problem of mistaken values. One interpretation of this criticism is the claim of materialism (CM); on this view, the workers of compensated dating have been ignorant of the worth of things as they use the trade as a means to obtain luxury goods or brand-name products. In regard to this point, I raise two worries. One is that the content of CM is itself unclear; the other is that the critics may have underestimated the importance of brand-name goods in teenagers' minds.⁵ I argue that the judgement of the objective value of brand-name goods is not independent of the symbolic meanings which the goods may carry for teenage people.

Finally, two reminders are in order. First, not all workers in the industry of compensated dating are below the legal age of consent; many may fall under a more senior age group. My discussion of compensated dating will have relevance to them insofar as their practice of this activity will involve prostitution or that they take part in the activity in order to acquire luxury goods; otherwise, my discussion will have no bearings on these participants' situation.

Secondly, the tone I set for this paper is philosophical and critical. I will play the devil's advocate on this issue as critics of compensated dating usually take for granted the moral wrongness of the activity itself. I adopt this approach because I believe that the foundation of public policies will be strengthened through exchanges of solid arguments about values.⁶ The objective of this paper, from this perspective, is to clarify and challenge the grounds of the moral criticisms in objection to the actions of compensated dating.

Prostitution

With regard to the practices of compensated dating in Hong Kong, they often involve an element of prostitution. If we could show the wrongness of the actions of prostitution, we might identify a reason why the practice of compensated dating is morally unacceptable. However, I doubted whether we can do so in regard to all cases of prostitution.

⁴My argument applies to those teenagers who are between the age of 12 and 16, but not anyone below 12.

⁵This is related to values held by the teenage subculture. A detailed discussion of values and social values by Yung is found in Chap. 1 of this book.

⁶Yung (Chap. 1 in this book) further points out that discussion and exchanges by different stakeholders and participants of public policy can also be a learning process, with all those involved learning from each other in the policy discussion, which ensures that sound policy-decisions (acceptable to the majority in society) are made.

Prostitutes provide sex services to people who are not their marital partners in return for money or other material goods. However, the working conditions of different types of prostitutes are greatly diverse. Whereas the high-end prostitutes in New York hotels can earn up to USD 5500 an hour, the majority of prostitutes in poor countries receive less than a dollar a day and they usually work in an environment with terrible hygienic conditions (Schrager 2008). Apart from the diversity in payment and working conditions, different prostitutes also work under different kinds of business models and engage in different types of sexual activities with customers too (Prostitution: Havoscope Blackmarkets 2014).

Now, as the types of prostitution vary greatly, it is possible that the objectionable factors which we identify in one variety may not be found in another. In many cases, the exchange of sex for money may not be the issue which causes most concerns. In reality, the problems in regard to prostitution include a variety of extrinsic factors, such as oppressions from pimps and policemen, severe health risks, the risks of rape and robbery, and the stigma that society imposes on them and on their children.

Needless to say, many of these factors can also be found in the case of compensated dating. But the problems that the workers of compensated dating face are mixed with other factors too, including the facts that many of them are teenage girls, and they are working independently of the middlemen.⁷ I will return to the issue of teenage sex later in the paper. For the moment, I will discuss the charge that the work of prostitution is intrinsically problematic.

Feminist critics of prostitution may argue that, quite apart from the harms that are originated from unfavorable social circumstance, most forms of prostitution are intrinsically degrading. On their view, the activity of prostitution distorts an agent's self-identity. Pateman states: "Sexuality and the body are, further, integrally connected to conceptions of femininity and masculinity, and all these are constitutive of our individuality, our sense of self-identity. When sex becomes a commodity in the capitalist market so, necessarily, do bodies and selves" (Pateman 1983, pp. 561–5). In other words, as customers receive sex services from prostitutes, they are consuming the sex workers' bodies and ruining their self-identities. It is, therefore, unfair that people with money and power can consume such intimate features of a person in commercial transactions.

I have two objections to Pateman's argument. First, the supposed close connection between sex services and contents of personal identity is not uniquely found in the occupation of prostitution. If Pateman's argument may explain the wrongness of prostitution, it also renders a variety of businesses ethically problematic. To use Satz's examples, individuals may sell their manuscripts or their paintings, which may be immersed with the authors' or artists' identities (Satz 2010, p. 120). Yet, it does not seem morally problematic for individuals to conduct these transactions.

⁷Various sources in Hong Kong and overseas mention this feature in regard to the practices of compensated dating. Swader takes it as a characteristic aspect of compensated dating. See Chui (2009), Ming (2009), Tong (2009), Swader and Vorobeva (2015: 324), Swader et al. (2012).

Secondly, it is unclear whether a person's sense of self-identity is as determinately fused with her gender and body as Pateman supposes. A person may identify herself with a range of her features (her tallness, slimness, color of her eyes, beauty of her face, etc.), as well as other qualities of her background (class, profession, geographic origin, food habits, sports interests, taste of music, etc.). According to Sen's view, a person does not "just 'discover' her identities, as if it were a purely natural phenomenon". Rather, the person is "constantly making choices, if only implicitly, about the priorities to be attached to [her] different affiliations and associations" (Sen 2006, p. 5). In fact, if we look at the case of the salespersons' smiles or the politicians' handshakes, a person may act in a friendly manner to a stranger without intending to befriend her. People are capable of adjusting their sense of self in their interaction with strangers. If this argument is accepted, prostitutes may not suffer significant distortions or losses in self-identities even if they take part in the business.⁸

There are further questions to address in relation to these arguments. Perhaps the use of private body parts of persons is fundamentally different from that of their hands. It might not be good that people have to perform such psychological detachments from time-to-time. For one thing, people may not achieve flourishing if they cannot deal with one another in an honest and sincere manner in most times of their lives. For another thing, if there is a constant need for people to detach from the situation of their work, it may indicate the existence of domination of one social group over another. However, I have to put these issues aside for another occasion. For the purpose of this paper, I shall sum up my view regarding the ethics of prostitution as follows: There is a multitude of circumstantial issues (bullying, discrimination, rapes, extortion, etc.) which accounts for the moral problem arising from the trade of prostitution. If a sex worker can engage in prostitution under a circumstance that is free from such risks and concerns, it will be unclear if this person's actions are as morally impermissible and degrading as before.

Sex Between a Teenage Person and an Adult

What are the moral concerns for an adult male to have sex with a girl who is below the age of consent (and who shares no blood relation with him)?⁹ To begin with, we should clarify the range of age when a girl is to engage in compensated dating with an adult. It is one thing for the adult to have sex with a teenager; it is

⁸A similar point is also made by Satz: "How do we decide which of a woman's attributes or capacities are essential to her identity and which are not? In particular, why should we consider sexuality more integral to self than friendship, family, religion, nationality, and work?" (2010, p. 120).

⁹I would separate the discussion of the supposed moral wrongness of incest from that of child-adult sex in general.

another thing for him to engage in sex activity with a toddler. In addition, we should consider whether the “adult” participant in question is someone who has just reached the legal age of consent and the two parties in reality may not differ greatly in terms of biological and psychological maturity.

For the sake of argument, in this paper, I shall use the term “teenage girl” to refer to those females who are above the age of 12 and below 16.¹⁰ Now, I shall put aside the case of “teenager–adult” sex when one of the parties has just reached the legal age of consent for discussion later in the paper. For the moment, I shall focus on the case of adult-child sex when one party is a much older mature adult, and the other a young teenager. My question is: What is the moral problem with the sexual transaction here?

When a teenage girl has sex with a much older man, the most pertinent issue is, I think, the worry of exploitation and manipulation: In view of the great inequality in intelligence, maturity, financial capacity, and physical strength between the two parties, the male participant can easily use his superior power to exploit the relationship and manipulate the younger female. However, note that this argument does not provide a fundamental objection to the sexual interaction in question. Holders of this argument may have nothing to say to the male participant who has not allowed the asymmetry to influence the sexual relation between the two.

It will be unreasonable for us to uphold that any sexual exchanges between the two parties should be morally forbidden as long as there is a possibility for one party to exploit the other. In ordinary cases of employment, big companies and corporations can exploit unskilled labors in many ways; yet, it is still possible for the two parties to engage in contractual terms which are not exploitative in nature. Take the example of marriage, we will not forbid couples to get married even when one side has a greater intelligence, wealth, and power than the other. So, the mere existence of an asymmetry in power between two parties will not make it morally unjustifiable for them to engage in transactions with one another.

In spite of this, critics may still object to the sexual activities which take place in the context of a teenager–adult relationship. Sex activities may cause severe consequence to the female participant, such as sexually transmitted diseases (STD), and pregnancy, etc. If the female participant is immature, either cognitively or psychologically, then the older male should inform her of the risks and other sorts of harms that she could suffer; he should restrain from having sex with her unless she understands the meaning and other dangerous implications of this activity. Thus, critics may argue that if an older male is to have sex with some much younger female who does not fully understand the risks of the action, and this older male performs the action solely for the sake of sexual pleasure, he is being inconsiderate, if not manipulative.

This argument, however, excludes too much. Many sports activities, such as skiing, squash, or climbing, can bring serious harm to the participants. It does not follow that an older adult should not engage with a teenage player in the games. So, insofar as the activity is done with reasonable precaution, and the activity brings enjoyment to both parties, or can satisfy some further aims (such as the

¹⁰I bear in mind the obvious fact that many teenage girls above the age of 16 may also engage in the practice of compensated dating.

fulfillment of financial needs) of either party, it is unclear why people should not be morally allowed to take part in the activity.

I shall note a research conducted by Kilpatrick in 1992. Kilpatrick interviewed 501 females in Georgia, USA, about their early sex experiences. It was found that 55 % of them had some forms of sex contact at an age as early as 14, and 83 % of them had sex experience before 17. Among this larger group, although 17 % of the interviewees felt offended by the actions of their then sex partners, the majority of them reported that the experience was pleasant. This is the case regardless of the age of the female when this happened (Kilpatrick 1992). This indicates that a person can engage in sex activities at a young age without incurring harmful consequences.

Before I turn to the next section, I shall say a few words in regard to the second category of teenager–adult sex, which is about sex relations between peer teenagers, when one of them was just over the age of 16. There is a significant difference between this group of participants and the participants in the first category when older males have sex with teenage females. The crucial concern in regard to the sex activity between teenagers is not about the avoidance of manipulation of one party by another; it is about how a society can best deal with the process of sexual maturity in the lives of teenage persons.

It is true that the legal age of consent has to start somewhere determinately in a teenager's life. But it is not necessary that the respective punitive measure for the practice of child–adult sex should apply indiscriminately to all of its offenders. In Hong Kong, according to the Crime Ordinance, Section 123:

A man who has unlawful sexual intercourse with a girl under the age of 13 shall be guilty of an offence and shall be liable on conviction on indictment to imprisonment for life.

Also, in Section 124, if a man is to have unlawful sexual intercourse with a girl under the age of 16, he shall be guilty of an offence and shall be liable on conviction on indictment to imprisonment for five years. Here, note that while it can be monstrous for an adult person to attempt to have sex with a small child, it is a totally different matter for teenage partners to experiment and have sexual activities between themselves. Youngsters do not suddenly become mature with regard to their sexual identities on the day they become a legal adult. Youngsters will develop a need and a curiosity for sex on a gradual basis; the pace of this development will grow irrespective of whether they have reached the legal age of consent or not. Thus, there is a question of what society should do, in terms of legal arrangements, of educational and youth policies, to enable the youngsters to move into adulthood smoothly, and possibly with enriching and dignified sexual experiences.

In many of the European countries, although the legal age of consent is also set at around 14 to 16, there is a range of legal provisions to make sure that teenagers are given protections, as well as ample rooms to engage in sex explorations with others. In Finland, Italy, and the Netherlands, for instance, if both participants of the sex acts are between the age of 12 and 15, or if they do not differ greatly in age, the sex interaction between them does not constitute a crime. In Germany, it

is not a crime for a man who is above the age of 21 to have sex with a teenage girl, unless she files a complaint against him in regard to the sex act.

We can compare these measures in Europe with the conservative measures in the USA and see how well the two regions protect teenagers from unplanned pregnancy and STD. In the USA, as in Hong Kong, the authority tends to use legal prosecutions and the propaganda of sex abstinence to deal with teenagers' interest in sex activities. But, for a thousand pregnancy cases, 80 of them in the USA are *teenage women* between the age of 15–19; in Europe, the rate of pregnancy for the same age group of women is between 8.7 (The Netherlands) and 20 (France). In regard to STD, the rate of contraction for teenage men in the USA is 0.75 %; in Europe, it is between 0.14 % (Germany) and 0.49 % (France). In addition, for the rate of contraction of syphilis, for every 100,000 teenagers, there are 571.8 cases in the USA, whereas in Europe, on the same basis, there are between 7.7 cases (France and The Netherlands) and 12 cases (France) (Wells. Ed. 2006; Wikipedia: Age of Consent 2014a).

What do these data tell us in regard to the issue of compensated dating in Hong Kong? Priests, policemen, and politicians, as well as workers from voluntary organizations in youth services have been emphasizing the importance of enabling teenagers to acquire self-confidence and to learn to treasure their bodies, as well as to establish a proper attitude toward sex. But the question is how these goals can be achieved if the teenagers are not given the trust, the space, the knowledge, and the clinical support that they need to engage in sexual explorations—not to mention that the conservative view regarding the value of sex and bodies, which is presupposed in these goals, is itself hard to validate. In fact, if teenagers cannot find support from society's major institutions, their curiosity and need for sex will not evaporate, but will be driven underground.¹¹ The rise of cases of compensated dating in recent years may be seen as an instance of this kind of underground activities.

Mistaken Values?

In this section, I will discuss the criticism that workers of compensated dating have mistaken the value of things as they use compensated dating as a means to acquire luxury goods, such as designers' clothes or smart phones (Apple Daily 2009; Chui 2009).

When we reflect upon the matter of compensated dating, it may be hard to pin down the exact objection which is made by the critics. The criticisms regarding mistaken values may be understood in terms of two different claims:

¹¹Arrangements which support the teenagers will include, for example, an ample supply of different contraceptive devices, professional guidance on sex and medical information, and provisions of confidential counseling services, as well as provisions of private spaces for teenage couples to engage in intimate activities.

1. The Claim of Materialism (CM): It is wrong to engage in compensated dating to obtain brand-name goods or luxury goods; or,
2. The Claim of Imprudence (CI): It is wrong to engage in compensated dating because it is a dangerous activity, i.e., the workers may lose their lives, may contract STD, or get unplanned pregnancy.

Here, neither CI nor CM can provide fundamental objections to the practice of compensated dating. With regard to the CI, it does not even contain a moral criticism. CI is about the fact that workers fail to adopt sound strategies to protect themselves. Thus, with regard to those workers who take reasonable safety measures in their work, the argument of CI will have no force on them (Ziteng and Wuyelan 2010).

In fact, personal security as such does not provide us with any unique objection to the practice of compensated dating itself. Breakups between lovers may incur harmful consequences too (Ziteng and Wuyelan 2010: p. 125); a person's participation in intimate relations in itself can lead to unplanned pregnancy or contraction of STD, whether it occurs in the context of a one-night stand, ordinary romantic relations, or prostitution. We cannot hold that workers of compensated dating have more reason to refrain from the activity of compensated dating than the other activities which I mentioned above.

Now, as to the claim of CM, it also does not provide a fundamental objection to the performance of compensated dating. A worker may engage in compensated dating in order to fulfill her basic needs.¹² Most important, even if workers provide the services in order to acquire luxury goods, we have to clarify the nature of the mistake which was supposedly made by them.

The objection which is put forward in CM is compatible with a variety of interpretations. First, there is the Loss View. That is, the value of smart phones is far more inferior than that of the female workers' bodies. The teenage workers, thus, suffer losses from their sexual transactions. Secondly, there is the Incommensurability View. That is, the value of the female workers' bodies cannot be measured in light of the value of the brand-name goods. Then, teenage workers may never be profited from this type of transaction no matter how much they earn in monetary terms.

The problem with the Loss View is that, if the workers charged a higher price for their service, they would have corrected this mistake. However, this certainly does not address the critics' concern as they argue that workers in the trade of compensated dating are mistaken about the worth of things. The alleged concern is not about the determination of the right price for the workers' bodies, but about the fact that these people suffer a loss of dignity per se, which may fall under the claim of the Incommensurability View.

However, I think the Incommensurability View is going nowhere either. If the values of two things are incommensurable with one another, one thing will be neither

¹²Teenagers from a relatively lower class background may take part in compensated dating to earn a living. See Ziteng and Wuyelan (2010).

greater than, less than, nor equal in value to the other thing.¹³ The critics of compensated dating clearly suppose that the workers' bodies are far more superior in value than the luxury goods that they earned from performing sex labor. But if the critics really hold this view, the Incommensurability View cannot adequately represent their criticism in CM. But, what exactly is the claim that the workers' bodies do not have a price, and yet they are more superior than any amount of monetary returns?—It is not clear if such a claim is plausible at all. But a more important question is whether the claim provides a fair evaluation of the values which are upheld by workers of compensated dating.

There is an evaluative limit in the case of compensated dating which holders of CM have paid inadequate attention. That is, among the youngsters, the ownership of luxury goods is not merely for an ostentatious purpose. Rather, as a constitutive part of the norms of appearance among members of a certain youth group, the having or lacking of those goods can play a key role to determine the youngsters' social standing. If certain members are unable to appear in accordance with the requirement of such norms, they may fail to receive respect or recognition from other members of their group.¹⁴ Of course, whether someone will win the admiration from other members, or will receive humiliation, is also dependent on a cluster of other factors, including a member's personality, intelligence, or physical strength.

In short, there are different perceptions of values between teenage workers of compensated dating and critics of their activities. First, on evaluating the worth of things, while critics think that brand-name goods are more inferior than the worth of a person's body, the workers may believe otherwise.¹⁵ Secondly, the critics may believe that the practice of compensated dating undermines the workers' dignity and harms them; not all of the workers can see this harm. Some may enjoy the sex activities and some may take the work as a way to meet people and communicate with them.¹⁶

Finally, I will discuss the idea in regard to the maintenance of social order.¹⁷ Like the discussions in regard to the justification of homosexuality or adultery,

¹³Griffin, James. 1996. *Incommensurability: What is the problem?* Unpublished manuscript.

¹⁴Sen: "For example, to be able to 'appear in public without shame' may require higher standards of clothing and other visible consumption in a richer society than in a poorer one (as Adam Smith noted more than two centuries ago). The same parametric variability may apply to the personal resources needed for the fulfillment of self-respect" (1999, p. 71).

¹⁵This represents the disagreement over the conflict between the values of luxurious goods and the values of a person's body. For a discussion of value conflicts and how to resolve them in public policy, please refer to Yung's discussion in Chap. 1.

¹⁶See Ziteng and Wuyelan (2010: p. 12). See also McLellan's study in regard to Japan's situation: "Now many young girls, according to their own statements, look upon prostitution merely as a way of making money to enable them to have greater purchasing power and subsequently, the right social standing." (2011, p. 7).

¹⁷For a discussion of the argument to invoke policy intervention to preserve the integrity of the community, see Mok's chapter in this book, pp. 103–105 in particular.

I believe that many critics object to the practice of compensated dating because of their concern about the importance of maintaining *status quo* in society. Regulations of sex activities play a key role in determining the structure of families and other relations among members of society. Now, if members of the younger generation are unable to see the supposed evil of using their bodies in a certain way, critics may argue that this loss of belief threatens the cohesion of society (Devlin 1965, p. 10).¹⁸

A problem with this view is that it has presupposed an empirical claim in regard to the impact of social change, but the claim itself is not well supported by evidence. People's ethical beliefs, as well as the way that they connect with one another, do not remain static with the passage of time. Elements of the structure of major social institutions may alter in one way or other (Cf. Hart 1963, p. 50). In contemporary society, families are getting smaller; the span of marriages becomes briefer than before; people are forming groups and communicating with one another on WhatsApp, Twitter, and Facebook. The emergence of these new modes of connection between people has contributed to the alteration of society in subtle ways, which may change people's general attitude toward sex and their views about the acceptable ways of using bodies anyway. We may not know whether these changes will benefit or worsen humankind in the long run.

In conclusion, in this paper, I discuss the moral problems with regard to the practice of compensated dating. I believe that the critics' arguments are indefensible. They include the moral criticisms of prostitution, the unacceptability of teenager–adult sex, and the criticism of the teenagers' mistaken values. What would be the practical implication of my view? I do not support the adoption of a *laissez-faire* policy for the practice of compensated dating. I believe that even if the practice is free of intrinsic moral problems, it may still be practically unwise for teenagers to take part in it—as unwise as it is for amateurs to ski on steep hills when the weather is not stable. In reality, workers of compensated dating have to fight against evils on all fronts, including the threat of violent customers, STD, as well as a range of oppressions, misunderstandings, and disrespect from mainstream society.¹⁹

¹⁸Yung (Chap. 1 of this book) points out that values and social values may change with time. With the younger generation holding sex values that differ from the older one, sex norms and values of society will gradually change, though with resilience. Ying (Chap. 5 of this book) discusses how Edison Chen and his sex partners “violate” sex norms and values of Hong Kong society, arousing discussion and gossips, thus giving rise to a scandal, and indirectly challenging sex values in society.

¹⁹Those who view that compensated dating is morally not problematic may be a minority at present. Whether this minority can become a “critical minority” (as discussed by Yung in Chap. 1) that can successfully promote and “advertise” their views remains to be seen.

A government's public and educational policies, if they are to be effective, must be directed by rational arguments, based on facts and grounded on defensible moral claims. Now, it is dubious if the respective authority in Hong Kong has obtained adequate understanding of the situation in regard to compensated dating; the approach of legal prosecution, together with conservative sex education, has failed to address the needs and concerns of teenagers in general. These limits show that the authority's educational and youth policy in relation to compensated dating needs revisions in major respects.

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Chapter 5

Private Sphere Versus Public Sphere: Photo Scandal of Edison Chen

Ludwig Ying

Abstract Photo scandal of Edison Chen has been a hot issue not only in Hong Kong, but also in Mainland China and other countries because of the involvement of a number of celebrities. On public policy level, this raised questions and discussions about (1) the right to privacy, (2) the right to free speech, especially on the Internet, and (3) the ethical dilemma caused by the inevitable conflict between these two social values. On the other hand, the relevant discussions also reflect how sexual morality has a bearing on Internet policy and policy concerning privacy. In this chapter, the investigation would be conducted under the following topics: (1) Is there anything wrong with taking and keeping sexually explicit photographs of oneself and one's sexual partner when there is mutual consent? (2) Has Edison Chen done anything wrong? (3) What exactly are the issues involved in the case of photo scandal of Edison Chen? (4) Is there anything wrong in viewing and transmitting personal photographs that are illegitimately obtained? (5) Did the government and the court handle the case properly? Why?

Introduction

In early 2008, sexually explicit photographs of Hong Kong actor Edison Chen (陳冠希) with various women (most of them were Hong Kong actresses or pop singers) were distributed illegally over the Internet. Eventually the seemingly unstoppable circulation went so wild that many Hong Kong people (even those of mainland Internet users) admitted that they have seen some of them on the Web. The incident caused much gossips and tremendous media attention both locally and internationally. On public policy level, this raised questions and discussions about (1) the right to privacy, (2) the right to free speech, especially on

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the Internet, and (3) the ethical dilemma caused by the inevitable conflict between these two social values. Afterward, Edison made a public apology and claimed the authorship and copyright of the photographs, stating that his private photographs have been stolen and published on the Web without his consent. And during the process, Hong Kong Police took strong actions and arrested 10 people in connection with the photographs distribution, which raised suspicions over violations of privacy and free speech rights of Internet users. In this chapter, the following questions will be discussed: (1) Is there anything wrong with taking and keeping sexually explicit photographs of oneself and one's sexual partner when there is mutual consent? (2) Has Edison Chen done anything wrong? (3) What exactly are the issues involved in the case of photo scandal of Edison Chen? (4) Is there anything wrong in viewing and transmitting personal photographs that are illegitimately obtained? (5) Did the government and the court handle the case properly? Why?

Is There Anything Wrong with Taking and Keeping Sexually Explicit Photographs of Oneself and One's Sexual Partner When There Is Mutual Consent?

Let us begin with a comparatively simple question: Is it okay to take and keep sexually explicit photographs of oneself and one's sexual partner when there is mutual consent?

Nude human body was esthetic object throughout Western art history. (While in Eastern art history it is a bit complicated, that apart from some certain ages in some certain places, generally speaking nude body was considered indecent and inappropriate to be displayed in arts.) We all agree that there is some beauty on our body worth exploration and appreciation. And generally we do not feel offended if we were shown art works of naked bodies. The art works express esthetic ideal of artist and was not primarily designed to produce sexual arousal in the viewers. However, it is totally another thing in case of sexually explicit photographs showing bodies of real men and women. By "sexually explicit," we can mean quite differently from culture to culture and from time to time. Borrowing an example from Caroline West (West 2004), the display of a female ankle in Victorian times surely counted as sexually explicit, while it is problematic whether displays of bared breasts still count as sexually explicit in contemporary Western cultures.

According to Caroline's analysis, "some material seems clearly to count as sexually explicit in many contexts today: in particular, audio, written, or visual representations of sexual acts (e.g., sexual intercourse, oral sex) and exposed body parts (e.g., the vagina, anus, and penis—especially the erect penis)" (West 2004). Let us content with this delineation of "sexually explicit" for our further reflection and note that a good portion of the photographs in Edison's scandal lied in it. Moreover, we can call those photographs of Edison "pornographic," which refers to sexually explicit material that is primarily intended to be sexually arousing,

rather than to serve some artistic or educational purpose (Martin 1995, p. 259). Although it was not testified by Edison's own words, while the photographs seem to have not high esthetic or pedagogical values, quite the contrary, he might like to keep the photographs for his own self-interest only so that he could look at them conveniently for his own pleasure whenever he likes. As the pictures recorded the sexually intimate relations between Edison and the women concerned, showing nude bodies and sex organs explicitly, they are sexually arousing. Conservative thinkers, as well as most of the judges and lawyers, use "pornography" as a close synonym for "obscenity" in the sense of something that offends prevailing community standards of morality and decency (Devlin 1968; Sandel 1984). And on public policy level, the debate over whether pornography should be censored is still alive today.¹

However, according to Edison Chen's declaration (Press conference on 21 February 2008), the captioned photographs were taken only for private use and was stolen afterward and made public without his consent. Therefore, it was not his intention to cause offense against the society. And if he was not responsible for the distribution of the photographs (this will be further discussed in the following sections), he was innocent (at least of the distribution) judging from the legal point of view. Let us assume that taking sexually explicit photographs for private use only is perfectly legal because no harm would be produced in the public sphere. But had Edison done something morally wrong in taking such photographs?

Anyway, if sexually explicit photographs were taken and kept between consenting adults without coercion, is it morally okay? The answer, as it is not difficult to deduce, is positive. Firstly, it is just our human nature to have sexual desire toward bodies of the opposite sex (or the same sex in the case of homosexuality) and enjoy gazing upon them. Secondly, in case of any two sexual partners, it comes just natural to allow ones to look at each other's bodies, no matter during sexual intercourse or not, out of love or confidence in relationship. Thirdly, it makes no significant difference in moral sense if any one of them wants to take photographs instead of just looking, provided that the photographs should be looked and kept by these two persons and within the period of their relationship only. So privacy is important here. And it seems perfectly fine to take and keep sexually explicit photographs of oneself and one's sexual partner when there is mutual consent. (But how long should the photographs to be kept? How about after the end of the relationship? This is a question that should be clarified in the mutual consent.)

Nevertheless, there was something particular in Edison's photo scandal. Taken between years 2003 to 2006, a number of women appeared in the photographs,

¹Yung (Chap. 1 of this book) points out that policy often reflects the consensus of the majority of the members of the society concerned at a particular moment and thus may change with time. For example, societal tolerance of pornography has increased with time in many societies, with more emphasis on freedom of expression and less on viewing sex only in the context of family as compared with the past; thus, there has been decreasing censorship of pornography. The debate over such issue is an ongoing one, and there may be future adjustments over how the balance is to be struck in these societies.

and 7 of them identified to be celebrities (Cecilia Cheung, Gillian Chung, Bobo Chan, etc.). Question raised that whether Edison was sexually promiscuous. Clinical psychologist Lee Po-nang once commented that Edison's behavior reflected a certain degree of "hunting" mentality toward women, narcissistic and self-centered by itself, manipulates women as mere sexual objects (Next Magazine 2008, issue 934, p. 38). It was suspected that Edison enjoyed having intimate relationship with different celebrities and felt proud and heroic at his "collection" of those women. In other words, it is a very unhealthy propensity, to speak psychologically. Hong Kong media coined the label "stamp collection (集郵)" to signify such kind of behavior.

Has Edison Chen Done Anything Wrong?

In the above discussion, "mutual consent" is crucial. Did the women voluntarily give their consent with full understanding of what Edison Chen was doing? This is problematic. Did they know Edison had some more sexual partners simultaneously? (This perhaps would seriously alter their view of Edison to the point that no consent would be made with him.) On the other hand, did they really understand why Edison would like to keep the sexually explicit photographs? And did they really know whether Edison would be careful enough and try his very best to keep the photographs secret and safe? And did they also consent that the photographs were to be kept for an indefinite period? Although we have no idea what the answers of these questions are, but we can make the point clear that whether the women have been misled or they were given false promise, and then, they did not have genuine consent. If so, Edison was not innocent at all taking and keeping those photographs.²

Moreover, we can say Edison had done several things wrong.

Within several years of time, Edison Chen had a good number of female sexual partners enjoying sex within quite the same period of time (not just the 7 women mentioned before, as according to Sing Tao Daily, 26 February, 2008, Police found another 10,000 photographs in Chen's residence, contained at least 5 more anonymous celebrities), and some of the women had boyfriends or even fiancée (as in the case of Cecilia Cheung) on their own during that period. But Edison still knowingly had intimate relationship with them. We need not bother ourselves going through the troublesome discussions whether sex without love, pre-marital sex, or multiple sexual partnerships is permissible morally or not here. Just looking at the fact that Edison knowingly seduced the women to break their commitment to their own boyfriends or fiancée, it is immoral. (Certainly, the women involved bear their responsibility and blame too.)

²The writer would like to thank Dr Kam-por Yu for his comments on this point.

The second fault made by Edison dates back to 2006, and it is a careless technical mistake. He sent his personal computer to a shop in Central for repairs, which contains the pornographic photographs. Edison claimed afterward that all the image files in the computer were deleted before. Surely, even though he really did delete the files, there was still high opportunity that technician could retrieve the deleted files if they were not overwritten or damaged at all. Eventually an estimated 1300 sexually explicit photographs of Chen and numerous female celebrities were accessed and secretly copied by one or more of the shop's employees (Sing Pao Daily, 4 February 2008). And this triggered the nightmare that these photographs were distributed on the Internet gradually from January 2008 onward.

From January 27 onward, some of these photographs were posted by unknown persons on some major Hong Kong forums on the Web. The scandal shocked the Hong Kong society and received high-profile media attention. Gossips went around the town fiercely. In the beginning, both Gillian Chung's management agency and Cecilia Cheung's solicitor reacted immediately, challenged the authenticity of the photographs, denounced the upload as a "malicious, immoral, and irresponsible act," and filed Police reports (Apple Daily, 29 January 2008; China Press, 30 January 2008). At this stage, many people believed accordingly that the scandal was a malicious slander, and the initial media consensus was that the photographs were hoaxes (Apple Daily, 29 January 2008). Edison Chen kept silent and escaped from the media and flew to Boston to stay with his girlfriend, Vincy Yeung (one of the women captured in his scandal photographs). But as more photographs with details and higher resolutions were disclosed, some photographic experts and the Hong Kong Police said that upon careful examinations, the photographs were unlikely to be composites (The Electric New Paper, 3 February 2008). On February 4, Edison appeared in a 90-s video clip and apologized to those who might have been affected by the posting of the photographs, still without commenting on the authenticity of the photographs. Many local newspapers headlined the photo scandal extensively and consecutively during the first fortnight of February 2008, showing some of the photographs, while relegating coverage of the quite serious 2008 Chinese winter storms to secondary prominence during Chinese New Year. Although the Hong Kong Police used strong measures to stop the circulation of the photographs on the Internet, but as time went by, the circulation did not stop, and the photographs spread even farther to Mainland China. Not until February 21, Edison returned to Hong Kong and held a press conference in which he made a formal apology to the women concerned and their families and all the people of Hong Kong and confirmed finally that the photographs belonged to him and were private, and stated that they were obtained without his consent and then made public (Edison Chen, Press conference 21 February 2008). Afterward, his lawyer emphasized that any reproduction of the photographs whether in whole or in part would constitute copyright infringement (The Standard, 22 February 2008). Eventually, this announcement stopped effectively the publication of the photographs. As the chairman of the Internet Society Hong Kong Chapter (ISOC HK), Charles Peter Mok once stated, there were some similar scandals in foreign countries that the persons involved were also obliged to stand out quickly and declare

copyright of the photographs in order to stop circulation and prevent further hurts caused (Oriental Daily, 17 February 2008). Therefore, it was clear that Edison did not try his best to prevent the spread. Quite the contrary, he chose escape and did not show enough care (through real actions, of course) and commitment (remember their “consent,” if any) to the women. Considering Edison Chen’s long period of escape and postponement of the copyright claim, much more hurts were produced definitely. Edison was responsible for this postponement.

Finally, Edison was suspected that both his “apologies” (the 90-s video clip and the press conference mentioned above) were for legal purposes and better public image only and not sincere after all. Both were short and strategic, filled with official and legal jargons, carefully designed in order to avoid legal responsibilities. According to Cecilia Cheung in a television interview one year later (iCable, 27 February 2009), after the photographs were taken, she worried about the photographs a lot and repeatedly asked Edison about the photographs. And Edison just told her not to worry, but has not done anything to reduce her worry. Since the incident came to light, Edison did not return calls. No direct person-to-person apologies to the women concerned were ever made by Edison. She accused him of hypocrisy in a bid to win the public’s forgiveness while hurting others caught up in the scandal (IOL news, 28 February 2009). Judging from all the above, Edison Chen did not act quite responsibly. If he has some care and respect of the women, would he still keep all the photographs only for his own pleasure and expose the women to such substantial and unnecessary risk?³ Regrettably, his words in the press conference, “I failed as a role model,” was quite true.

What Exactly Are the Issues Involved in the Case of Photo Scandal of Edison Chen?

Nevertheless, this photo scandal was not the personal business of Chen and the women concerned only. Once the photographs spread in society, they generated social as well as legal impact. So what exactly are the issues involved?

1. First of all, the scandal stimulated hot discussions by commentators and educators about sexual morality. As a matter of fact, Hong Kong society is comparatively conservative in sexual matters. Although it can be called as an international metropolis, traditional Chinese thought, especially that concerning sex and marriage, still plays a certain role here in the mind of common people. Surely we are no longer as stern as before toward the issue of pre-marital sex,

³The women involved are subjected to risk mainly because of the sex norm that sex is a private matter and naked body, especially that of women, is usually not to be shown in public, lest there will be negative sanctions. Sin (Chap. 4 of this book) discusses other norms related to sex in his analysis of the issue of compensated dating.

for example. We are more open-minded and tolerant. On the other hand, chastity, commitment, and loyalty to one's partner or spouse are still valued and respected. Extramarital affairs are not welcomed. Multiple sexual partnerships are something that traditional values could not accept, and most Hong Kong people disapprove of it.⁴ (Surely such views are somewhat culturally relative, but there are certain basic values that most of the people around the world would comply. For example, Edison's irresponsible behaviors mentioned in the last section would be disapproved even if the event took place in the West.)

There are strong philosophical reasons why we have to link up sex and love and remain faithful in exclusive long-term relationship. According to philosopher Roger Scruton, it concerns having a good and self-fulfilling life:

Erotic love involves an element of mutual self-enhancement; it generates a sense of the irreplaceable value, both of the other and of the self, and of the activities which bind them. To receive and to give this love is to achieve something of incomparable value in the process of self-fulfillment. It is to gain the most powerful of all interpersonal guarantees; in erotic love the subject becomes conscious of the full reality of his personal existence, not only in his own eyes, but in the eyes of another (Scruton 1986, p. 337).

Sex without love cannot achieve anything human or even spiritual. While within love relationship sex becomes an expression of the mutual affirmation between lovers, which makes our life more promising and flourishing. Love requires a thorough and long-term union (not only sexually, but of the whole person) which elevates our life. Scruton's viewpoint is quite compatible with our traditional thought.

Certainly, we can enumerate counterarguments to this train of thought, and no universally accepted point of view about this issue has yet been produced. For example, Russell Vannoy provided famous philosophical defense of sex without love (Vannoy 1980).

However, the present writer considers the following concluding remarks of Mike W. Martin most enlightening:

[...] there is no universal obligation to link sex and love in any one way. Instead, there are many permissible moral ideals concerning sex that individuals may choose among in seeking self-fulfillment. (The choice, we hope, would be made wisely, on the basis of self-understanding.) These are moral ideals in that they express visions of valuable forms of human relationships, ones that may in different ways combine affection, caring, mutual understanding, mutual respect, honesty, and mutual commitments. Moreover, once embraced, some of the ideals generate obligations (Martin 1995, p. 224).

⁴Yung (Chap. 1 of this book) points out that Hong Kong is evolving toward the post-modern era in recent years and thus has social values in flux, with the more traditional values gradually giving way to emerging new values. Therefore, there is intensified re-evaluation and re-orientation of social values in Hong Kong recently, such as there is re-examination of the values and norms concerning sex related to the case of Edison Chen's photo scandal. For a discussion of the communitarian argument for the preservation of social and cultural values of a society, see Mok's chapter in this book (pp. 103–106).

In our liberal culture, no one would deny the value on autonomous sex between consenting adults. But one also has to ensure that the “moral ideal” one embraces is psychologically healthy as well as morally worthy (life flourishing). No matter what moral ideals one embraces, one has to be true to it, stick to it, and responsible to keep one’s commitment. Bearing this in mind, Edison’s seemingly irresponsible lifestyle was not good. Moreover, his “stamp-collection” behavior was suspected that he treated other women as means to satisfy desires only. Using others as means only is immoral, according to Kant’s ethics. And this is subordination of women. Sexually explicit material that subordinates women was fiercely objected by some feminists (e.g., MacKinnon 1984, 1987), as this kind of material violates women’s right to equality.

Because Edison’s photo scandal triggered such a big and long-lasting shock to Hong Kong society, people worried that the moral fabric of this society would be undermined and youth would be influenced badly. Certainly, there is always another side of the same coin, that this scandal may nevertheless provide an opportunity for Hong Kong society to reflect more deeply on sex morality. It became a challenge to educators how to stimulate critical reflections and provide suitable guidance for youth to have right attitudes and mature judgments to the scandal.⁵

2. Secondly, the reaction of the celebrities concerned caused debates over the moral codes of show business practitioners. In the beginning, all women concerned, and their management agencies denied determinedly the authenticity of the photographs. Surely all the women knew perfectly in their hearts that they had actually taken such pictures, but still accused the pictures as composites—as this was the only way to save their public image and survive their reputation, if successful. Some criticized this kind of reaction hypocritical. For example, even after Gillian Chung delivered her well-known apology on February 11, 2008 (“I was very naïve and silly. But I have now grown up.”), some parents blamed her in an open letter for hypocrisy and deceiving their trust to let their children be her fans (China News, 13 February 2008).

It is true that many of us deem celebrities to be the role model of the youth and have high expectations on their examples. But upon careful examination, perhaps there is something wrong structurally in our entertainment industry which is really problematic: To be a successful star in the industry, one has to have very good public image, try to fulfill people’s expectations (some of them old-fashioned and some of them even irrational), or else would be forsaken by the public audience. To attract more fans, some stars choose concealing some of

⁵Yung (Chap. 1 of this book) highlights that one would start questioning values one has been socialized into accepting when one meets someone from a different culture and society or when societal conditions of one’s society change with the passage of time. Edison Chen’s photo scandal challenges the Hong Kong society to rethink and re-evaluate its values and norms over sex in the changing societal context.

his/her personal matters (e.g., past history, marital status) or even provide false information. This enlarges the gap between the public images and the real private lives of them, which opens a Pandora's Box: It may stimulate the public interest in gossiping about and peeping into the celebrities' private lives, and facilitate the business of tabloid newspapers and magazines. This is good news for paparazzi, but not for a mature and healthy society.

Therefore, commentators from the opposite side pointed out that the parents above were perhaps too demanding on some particular persons. Celebrities telling lies about their private lives are morally wrong. But the public's untiring curiosity to invade and dig into celebrities' privacy and the eagerness to pretend to be the judge on their private lives are equally (or even more) wrong. It is basic liberal ideology which most of us and the Western world share that there is a realm of human freedom, i.e., the private sphere of each person, that must be kept beyond the reach of other people and even governments. We all have the right to keep our private life intact and secret, provided that we do not hurt anyone else.⁶ And celebrities have this right too, which we have no license to intrude. If we do intrude out of some herd curiosity, we are not only morally wrong, but also politically and legally wrong. We are not moral saints to pass judgments on other people's private life, least of all to intrude and cause unnecessary harms to them.

3. Thirdly, as mentioned before, some governmental actions raised questions of whether they were too strong or not. As early as on January 31, 2008, 29-year-old Chung Yik-tin was arrested for allegedly uploading one image. The next day he was arraigned but denied bail (The Standard, 2 February 2008). Although afterward even more images continued to be disclosed on the Internet by persons other than Chung, and some more persons were arrested due to heavier involvement in the spread of the photographs, the latter persons were allowed out on bail. The denial of bail for Chung Yik-tin sparked controversy over the selective application of the law. Legislator Ronny Tong accused the Police of humiliating a suspect by their excessively hasty actions (Ming Pao, 14 February 2008). Interestingly, the picture posted by Chung was later classified by the Obscene Article Tribunal (OAT) as "indecent" but not "obscene," so Chung was unconditionally released from detention on February 15, and charges against him were dropped. Some people suspected the arrest was unjust and criticized that Chung became the "scapegoat" used by the Police and court to threaten the "netizens" and deter them from further circulation of the photographs (Apple Daily, 16 February 2008). Furthermore, question aroused whether keeping the photographs for private use was illegal or not, while the Police's answers to this were ambivalent and inconsistent. This caused controversies and accusations that the Police was sowing confusion and

⁶For further discussion of the role and scope of public power, see Yu's chapter in this book, pp. 199–201.

creating an atmosphere of “white terror” among “netizens.” Did the Police and the court handle the case properly? Moreover, this photo scandal showed that sexual morality has a bearing on Internet policy and policy concerning privacy. What should our government do on the level of public policy? This will be discussed further in the following two sections.

4. Is there anything wrong in looking and transmitting personal photographs that are illegitimately obtained? Some people claimed that it was their freedom to do so. While there are others who claimed that privacy was more important that freedom of speech should not be the reason to intrude. If our freedom hurt somebody without good reasons, then what should be limited and controlled was our freedom. This causes an ethical dilemma in these social values.⁷ The issue of freedom of speech versus privacy is so important that we shall leave the following section entirely for discussion.

Is There Anything Wrong in Viewing and Transmitting Personal Photographs That Are Illegitimately Obtained?

In order to answer this captioned question, let us first examine the arguments posed by liberal thinkers defending a right to pornography and afterward see how these arguments could be applied to the case of Edison’s sexually explicit photographs.

According to Caroline West’s analysis (West 2004), liberals have traditionally defended a right to pornography (the negative right of consenting adults not to be prevented from making, publishing, exhibiting, distributing, and consuming pornography in private) on three main grounds:

1. On the grounds of freedom of speech. For liberals, freedom of speech is extremely important that they believe mentally competent adults must not be prevented from expressing their own convictions. And this includes sexual topics and pornography. But certainly the freedom of speech is not unlimited, and we can look at classical liberal philosopher John Stuart Mill for guidance: “The only principle for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others” (Mill 1975, p. 15). This is commonly known as “harm principle.” And that means in this case, if the speech causes sufficiently great harm to others, then it is not right to express it and the government may have a legitimate interest in regulating it. But if we view and distribute pornography privately and cause no harm to others, it is our right to do so.

⁷Yung (Chap. 1 of this book) discusses that social values may sometimes conflict with each other, leading to ethical dilemmas, and the society concerned has to prioritize the conflicting values, thereby deciding how to strike a balance between the conflicting values at a particular time.

2. On the grounds of a right to privacy. The distinction between public sphere and private sphere is fundamental to liberalism. To quote Mill again, “The only part of the conduct of any one for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute.” (Mill 1975, p. 15). In public sphere, our actions are regulated by morality and social justice, while in private sphere we are free from the threat of coercive pressure or interference by the state and other individuals, and free to explore and indulge our own personal tastes and convictions, as a basic belief of liberals is that every competent adult is in the best position to judge what is in his or her own best interests which no outer authority should interfere. Our privacy should be kept intact, only with the exception when our private activities cause significant harm to others (“harm principle” mentioned above). Again, if we view and distribute pornography privately and cause no harm to others, it is our right to do so.
3. On the grounds that pornography is comparatively harmless. It seems that viewing and distributing pornography privately caused no significant harm to others, provided that the pornography in question was produced by consenting adults without coercion. But there were counterarguments to this, for example by feminist Catherine MacKinnon that pornography is a cause of sexual crime (MacKinnon 1992). However, as a matter of fact, no conclusive experiment had successfully proven this, and there is disagreement among social science researchers (Donnerstein et al. 1987; Copp and Wendell 1983; Itzin 1992). Some even said that pornography can act as a catharsis or release for harmful, pent-up sexual urges (Berger et al. 1991). Ronald Dworkin once remarked, “[...] in spite of MacKinnon’s fervent declarations, no reputable study has concluded that pornography is a significant cause of sexual crime: many of them conclude, on the contrary, that the causes of violent personality lie mainly in childhood, before exposure to pornography can have had any effect, and that desire for pornography is a symptom rather than a cause of deviance” (Dworkin 1993, p. 38). So at least empirically no relation between pornography and harm to others has been established by sound scientific methods.

Both freedom of speech and right to privacy are important social values that we use to adhere to. These three lines of argument are so persuasive and easy to understand that many people today still use them to defend the legitimacy of pornography viewing and distribution. So how these arguments could be applied to the case of Edison’s photographs? Do they justify looking and transmitting these photographs?

Quite the contrary! If we stick to the social values advocated by the liberals, we can infer from these grounds that we should not look and transmit the photographs:

1. The principle of free speech defends the right to pornography only if no significant harm is caused. By “harm” it means either (a) to directly cause physical violence to others or (b) to deliberately or negligently violate sufficiently

important interests or rights of others (Dyzenhaus 1992; Feinberg 1987). The difference between Edison's photographs and ordinary pornography is that the former were private properties which recorded the private life of people involved and not for display to any third party. It is sure that the person who stole and posed the photographs on the Internet can be regarded as causing harm to the people in the photographs—this person takes their private properties and exposes their private life to the public, without their consent. But how about the other people who looked the photographs on Web or even forward the photographs to friends? Did they cause any harm? Remember that the photographs were stolen goods from Edison's personal computer. It is common sense that we should not possess or transfer theft stolen from other people; otherwise, we violate the property right of those people concerned, and hurt their interests. And it was apparent true that the disclosure of the photographs caused great harm to Edison and the women, in the sense that their interests hurt and privacy intruded. If we agree that we should not intrude other people's private sphere, looking at private photographs taken in their private life and directly peeping into their private life (for example seeing through windows into celebrities' bedrooms) makes no moral difference. In the case of seeing through windows, the celebrities would get hurt and feel unhappy if they know the peeping. (Even if they do not know, the successful peeping would encourage further peeping which produce more hurts.) So unless we do not know that those photographs were theft and private photographs of some private life (in the case of Edison's scandal, we could not proclaim this anymore after Edison claimed his property rights of the photographs publicly), we act wrongly in viewing them. If we forward them, we are making the immoral exposure of some private life even more widely. Therefore, we should not look and transmit them.

2. The principle of privacy justifies viewing and circulating pornography only if no significant harm is caused, just the same as the principle of free speech. Moreover, intruding other people's privacy is causing harm, which is not morally good. Therefore, if viewing and circulating Edison's photographs cause great harm to Edison and the women concerned, we should not do it. And as discussed in the above paragraph, the present writer deems no difference in infringing a person's privacy by direct seeing and by looking at a photograph (knowing that the photograph was intended private and records some private life). Perhaps, some people have different ethical standard to things happening on the Internet, but they cannot yet provide any persuasive reasons justifying that difference. On the other hand, it is plainly ridiculous and self-contradictory trying to protect our own privacy in looking and transmitting Edison's photographs while sacrificing the privacy rights of Edison and the women concerned. Why should our privacy be valued higher than that of Edison's?
3. On all the above-mentioned grounds that looking and transmitting Edison's photographs violate the interests and privacy of the people concerned and significant harm would be caused, it is not right to do so.

Even though we are free in our private sphere, according to harm principle we are not free to use or transfer stolen goods or anything illegitimately obtained. It violates the interests of the original owner. In particular when these goods were personal photographs that were intended private, we are obliged not to look or transmit them in order to ensure other person's privacy not to be disturbed and intact. Therefore, even if we take the stance of liberalism, looking and transmitting private photographs that are illegitimately obtained are still morally wrong.

Did the Government and the Court Handle the Case Properly? Why?

On February 2, 2008, then Commissioner of Police Tang King Shing warned in a radio interview (RTHK) that anyone with the scandal pictures on their computer could be in breach of the law, even if there was no record of distribution. In view of the above analysis, his comment might seem appropriate. But it was not the case. First of all, on February 2, the authenticity of the photographs had not yet been testified, so it had nothing to do with copyright issues. On the other hand, according to the law "Prohibition on publishing obscene articles" (Hong Kong Government, 7 July 2000), it belongs to criminal case only if there exists "publishing" of obscene or indecent articles. The spirit of this law corresponds to the idea that we should have a right to pornography in our private sphere. Keeping pornographic photographs (except child pornography) is not illegal anyhow. So Tang's comment naturally led to immediate objections. For example, legislator Leung Kwok-hung (Long hair) protested and urged Commissioner Tang to clarify. Controversies and accusations raised that the Police was sowing confusion and creating an atmosphere of "white terror" among "netizens."

Interestingly to note, it was also the tradition of liberalism to object, on public policy level, censorship of pornography. Apart from the arguments of last section, liberal thinkers point to the risks involved in censoring: It is believed that censorship laws targeting pornography may be used to censor other unpopular material, including educational, artistic, and political works. This "slippery slope" of further censorship would make people reluctant to say or publish anything that might be construed as pornography, resulting in a general "chilling effect" on expression. Remember that OAT once controversially classified Michelangelo's "David" as indecent (South China Morning Post, 21 February 2008), which shows that the worries of liberals are not groundless.

A few days later, in order to clarify the Police's standpoint, then Assistant Commissioner of Police Wong Fuk-chuen remarked that it was not a crime to keep pictures oneself and transfer them to friends (in private sphere, that is to say), but those who had posted the images to the Internet (which would be deemed as a publication) could be in breach of the Hong Kong law (Sing Pao Daily, 5 February 2008). Surely this clarification goes better with the spirit of the Law and the social values of liberalism.

In Chung Yik-tin's case, although he had really published one picture on the Internet, but considering that some other persons were arrested later due to heavier involvement in the spread of the photographs and they were allowed out on bail, and there was not any evidence that Chung had anything to do with the theft of the photographs; the court's denial of bail for Chung seemed unfair. And this sparked controversy over the selective application of the law. Sometimes, selective application of the law is unavoidable; for example, it is not practical to demand the Police to ticket every traffic offender. Some traffic offenders being prosecuted could be an effective deterrent to lawbreakers. But the Police were accused of favorable bias toward show business and celebrities, while failing to investigate other cases of nude photographs being published without their subject's permission. And this was double standard (South China Morning Post, 9 February 2008). Anyway, as Police originally prosecuted Chung of publishing obscene material, they have to drop charges against him and release him after the picture was later classified by the OAT as "indecent" but not "obscene." This at least was a procedural mistake that Police arrested and charged a suspect before there was a sufficient evidence. In a survey published by the SCMP, some 48 % of people surveyed believed the Police had created unnecessary fear among the Internet community, and a similar percentage were dissatisfied with the Police handling of the case (South China Morning Post, 16 February 2008). After some investigations, the Police arrested a computer technician Sze Ho-chun and a few more people who were testified to be related to the theft of the photographs. (But there was no evidence that these people have uploaded the photographs to the Internet.) Sze, being the main thief, was convicted on May 13, 2009, of obtaining access to a computer with dishonest intent, and received a custodial sentence of eight and a half months (The Standard, 14 May 2009).

To conclude, on public policy level, citizens should have a right to pornography in private sphere. Surely the rise of Internet has made it more difficult for governments to regulate the content of globally available sexually explicit images. And governments in developed countries tend to take a more tolerate stance, except those concerning child pornography where abuse and harm are indisputable (Smits 2009). But in Edison Chen's photo scandal, something is different. We have to bear in mind that the photographs are stolen goods. Originally, they were private properties not to be disclosed. Morally speaking, we should not look and transmit them. Legally speaking, after Edison claimed his rights on them, anybody publicizing or reproducing them commits the copyright infringement.⁸

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⁸The issue here is analyzed from the moral, policy, and legal perspectives, representing a multi-perspective and interdisciplinary approach, as highlighted by Yung (Chap. 1 of this book) to be a special characteristic of this book.

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Part II
Citizenship, Social Values
and Public Policy

Chapter 6

The Ethics of Admission and Rejection of Immigrants—the Case of Children Born in Hong Kong to Mainland Parents

Francis K.T. Mok

Abstract In this chapter, the question over the admission or rejection of children born in Hong Kong to Mainland parents will be examined with reference to three major moral considerations: (i) consequential calculation of utilities; (ii) liberal commitment to the elimination of undeserved inequalities; and (iii) communitarian concern over the preservation of integrity of the community. It will be argued that contrary to our intuition, utilitarian calculation would not necessarily in favor of rejection of outsiders as long as our calculation is impartial and the utilities of all parties concerned are taken into consideration. And the communitarian argument against admission of Mainlanders would not be as compelling as it appears if we could adopt a broader understanding of “our” culture and pay attention to the fact that “their” social and political dispositions are getting closer, but not farther, to the mainstream in Hong Kong. However, the liberal commitment, though undoubtedly in favor of admission of Mainland immigrants, would only justify our (limited) obligation to admit but not their unconditional right to enter.

Introduction

Simply speaking, border serves to create boundary between countries. Or in the case of Hong Kong, some kind of border is still in place to separate Hong Kong as a Special Administrative Region from the rest of China. With the existence of borders naturally comes the distinction between insiders, those who are considered “one of us,” and outsiders, those whom we find foreign to us. As we all know, the importance of being insiders is that their survival and well-being should become the concern of those who are within the border, although the form and degree of concern differs from country to country. Those who have a cosmopolitan outlook

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may argue that our objects of care and concern should transcend national boundaries and be extended to all mankind. There is some truth in the claim made by the cosmopolitans. However, it is still a common belief that we have stronger moral and political obligations toward those who share the same territory with us. If that is the case, it matters enormously, both morally and politically, for someone to be treated as insider rather than outsider. It follows that it is of critical importance whether the people of one country have an inherent right to control their border by refusing the entry of outsiders and under what conditions outsiders may be admitted and to become insiders.¹

If border or border control is inevitable, so is population flow. By population flow, we may refer to the admission of new members who undergo the change from outsiders (i.e., foreigners) to insiders (i.e., residents or citizens). That is what we call the process of immigration or admission of immigrants. It may also be in the form of people giving up their original membership, changing from insiders to outsiders, taking up a new membership and becoming insiders of the country which admit them as immigrants. In most countries, border control is predominantly on deciding who may come rather than controlling who may go. Almost all countries who have the resources and capacity would try to maintain tight border control, be it for economic, political, or military reasons. And it is almost a universal rule that the more developed and prosperous a country is, the more attractive it is in the eyes of potential immigrants from less developed countries. The irony is that the degree of border control insiders want to exert is often in direct proportion to the gravity of need and desire of outsiders to get in. What's more, it is almost without exception that when a country is becoming more democratic and the government more accountable to the people (i.e., the insiders), rejection of outsiders and stringent control in the admission of immigrants would become more or less the default positions of most political actors.

Without doubt, from a political (or democratic) point of view, it is just natural for constituents, as insiders, to take the existence of borders and the necessity of border control for granted. And it is politically expedient for a country to reject immigrants who might become economic burden and source of social problems and to admit as long as the incoming population is going to be assets rather than liabilities. However, what is politically expedient and what is morally justifiable may not always coincide. What is politically safe and correct may not have solid moral foundation. Appeal to democracy can certainly provide us with a decision mechanism by which politically legitimate decisions regarding admission or rejection of immigrants are made. But what we need is not only a legitimate decision mechanism but also a set of normative criteria or considerations morally defensible decisions have to meet. In other words, in defending a particular policy decision, apart from appealing to the concrete political support it may command, we

¹Territorial border serves as a dividing line between "they" and "we" here. Discrimination may also divide "they" from 'us' within borders. For detailed discussion on discrimination and equal opportunities, please refer to Lee's discussion (Chap. 7 of this book).

need to make sure that it can be justified with reference to sound moral considerations. The aims of this chapter were (i) to have an overview of the moral considerations that are relevant to the policy debates over the admission or rejection of immigrants, (ii) to highlight the ethical dilemmas arising from the rival moral considerations, and (iii) to demonstrate how immigration policy could be shaped or steered by the social values we treasure. The moral arguments deployed by the two rival parties, those who are willing to admit immigrants and those who tend to reject, will be introduced and critically assessed. What we need to note right at the very beginning is that not only those who are in favor of admission of immigrants would speak in terms of justice and morality; those who want to defend the border against entry of immigrants would also defer to moral concerns and principles of justice. Talk of morality need not commit us to be unconditionally generous to outsiders or to adopt an entirely open-border policy. In fact, some kind of border control, if subjected to appropriate constraints and conditions, could be morally defensible. I will test the defensibility of this position, and if so what the appropriate constraints are, with reference to the case of children born in Hong Kong to Mainland parents.²

The Population of Hong Kong

In the last century or so, the social and political history of Hong Kong can be punctuated by episodes with drastic changes in the size of population. From before the World War II to the 1980s, people from the Mainland just came to Hong Kong, either legally, non-legally, or illegally when they found it sensible to leave China; and they crossed the border and left whenever they felt it safe to return home. Whereas, starting from the early 1980s to the handover in 1997, we witnessed a wave of emigration through which many people leaving Hong Kong for good (though some of them were returning in the last decade or so) and taking up new membership in countries which they believed could provide better economic prospects or political protections. In a way, those who were residing in Hong Kong had accustomed to population flow, either in the form of influx of immigrants or brain drain. However, having developed a clear identity of being Hong Kong people, more and more local residents were ready to take Hong Kong as their home. They were no longer indifferent to population flow, especially the incoming population who wanted to share their home. They were beginning to have the mentality of defending their home and protecting their property, both material and non-material,

²Some people may not want to recognize Mainlanders who want to come to Hong Kong as immigrants because what separates Hong Kong from Mainland is not a national border. However, immigrants are understood broadly here as all those people who are outsiders who want to cross the border between Hong Kong and Mainland and to settle in Hong Kong. It is in this sense Mainlanders are considered as immigrants.

Table 6.1 Size of population of Hong Kong from 1931–2009 (Hong Kong 2008; Lam and Liu 1998, Chap. 2)

Year	Size of population (million)
1931	0.88
1941	1.60
1945	0.6
1947	1.80
1950	2.24
1960	3.07
1971	4.00
1980	5.00
1994	6.00
2009	7.00

Originally published in *Immigration and the Economy of Hong Kong*, p. 10, Table 2.1 © 1998 City University of Hong Kong. Used by permission of City University of Hong Kong Press. All rights reserved

against outsiders especially those from the Mainland.³ More importantly they started to believe that they have the *right to reject* those they believe do not qualify and the *right to decide* who may be admitted and on what terms. Ironically, as the social, economic, political, and legal ties between Hong Kong and the Mainland have become closer than ever after 1997, people of Hong Kong have become all the more keen and even desperate in imposing border control over the flow of people from Mainland to Hong Kong, perhaps except those who come here to invest and to consume. There has been outcry in recent years of eliminating the policy loopholes which make it possible for Mainlanders to become people of Hong Kong and reinforcing the physical barrier which they believe is vital to the preservation of the distinctiveness of Hong Kong. Before we go on to evaluate the arguments in support of the right to decide and the reinforcement of barriers, let us first take a brief look at the profile of the population of Hong Kong from 1931 to 2009.

As seen from Table 6.1, the population has been increasing in most of the times except the early 1940s when almost a million people left Hong Kong as a result of the Japanese occupation starting from the end of 1941. However, the population increased dramatically by more than one million from 600,000 in 1945 to 1.8 million in 1947. It can be attributed to the end of World War II and the civil war in the Mainland started almost immediately after the Japanese was defeated. At the beginning of the 1950s, shortly after the establishment of the People's Republic of China, the population of Hong Kong was over 2 millions. In the three decades from 1950 to 1980, the population of Hong Kong on average increased by one million in every

³After China's resumption of sovereignty over Hong Kong in 1997, the relationship between Hong Kong and China is prescribed by the principle of 'One Country Two Systems,' under which Hong Kong is permitted to retain its original capitalistic way of life and Mainlanders are not free to go to and to stay in Hong Kong without prior arrangement agreed by the Beijing government and the Hong Kong government.

Table 6.2 People of Hong Kong born in Mainland (Cheng and Wong 2004, p. 122)

Year	Percentage of population born in Mainland (%)
1931	64.3
1961	50.5
1971	41.6
1981	39.6
1991	34.4
2001	32.5

ten years. It can be explained by the large number of Mainlanders who desperately wanted to leave China because of the never-ending political movements and social upheavals. Of course, the lenient admission policy, or the lack of enforcement of stated policy, of the Hong Kong government was also responsible for the massive growth in population. The quota system regarding the legal entry of Mainlanders in Hong Kong can be dated back to the early 1950s. But, as we all know, until the early 1980s, most Mainlanders “reached” Hong Kong as illegal immigrants. Instead of being repatriated to China, these illegal immigrants, in the number of millions, were allowed to stay in Hong Kong, given identity cards, and eventually becoming legal residents. Border control was first tightened in November 1974 when the Hong Kong government introduced the so-called touch-base policy according to which only those illegal immigrants who managed to reach the urban areas and later gained a home with relatives or otherwise found proper accommodation would be permitted to stay, whereas those who were captured in the border region would be repatriated. The lenient and flexible admission policy finally came to an end in October 1980 when the “touch-base” policy was abandoned. All illegal immigrants, once captured, would be repatriated since then. With the strict enforcement of border control and active efforts made in arresting illegal immigrants, the pace of population growth was slowed down a little bit. It took Hong Kong almost 15 years to have the population size increased by another million. In more or less the same period, we witnessed a wave of emigration triggered by the uncertainty over the future of Hong Kong and the possibility of Hong Kong being returned to Communist China. It was estimated that at least 200,000 people emigrated to Western countries from 1986 to 1990 only (Chan et al. 2004, p. 22). It is safe to say that starting from the Sino-British negotiations over the future of Hong Kong until the handover in 1997, the society was bothered more by the outgoing population than the incoming population, legally or illegally, from Mainland (Table 6.2).

Two Major Cases Concerning the Right of Abode of Mainlanders in Hong Kong After 1997

The issue of Mainlanders residing in Hong Kong resurfaced after 1997. Arguably, the most severe constitutional crisis and social cleavages in Hong Kong since the handover were triggered by the attempts made by Mainlanders to claim their right

of abode in Hong Kong.⁴ The root cause of the problem is the interpretation of Article 24 of the Basic Law, which is regarded as the mini-constitution of Hong Kong after 1997. Both the Mainlanders who contend that they have a right of abode in Hong Kong and the people of Hong Kong who think otherwise believe that they have the backup of the Basic Law, as long as the article concerned is properly interpreted. However, the court tended to rule in favor of the Mainlanders in two landmark cases.

In January 1999, the Court of Final Appeal ruled (in *Ng Ka Ling v Director of Immigration*) that a child born to Hong Kong Permanent Residents is entitled to a right of abode in Hong Kong according to Article 24 of the Basic Law, irrespective of whether the parents were already Hong Kong Permanent Residents when the child was born. It implies that even if the parents were Mainlanders when a child was born, the child may also claim the right of abode in Hong Kong as long as one of his/her parents subsequently became Hong Kong Permanent Resident. It was expected that a large number of Mainlanders would be qualified to claim their right of abode in Hong Kong because of the ruling. The HKSAR government at that time estimated that up to 1.6 million people would have the right of abode and a capital expenditure of 710 billion would need to be spent in the next ten years for the provision of basic services. In order to avoid the disastrous consequences of admitting a huge number of people, the HKSAR government invited the Standing Committee of the National Peoples' Congress to provide an authoritative interpretation of Article 24, which in effect served to reverse the judgment previously made by the Court of Final Appeal of Hong Kong. On the one hand, the general public was shocked by the estimates made by the government and the huge economic burden as a result of a drastic population growth; on the other hand, many people were extremely uneasy with the decision to overturn the supposedly "final" judgment made by the Court of Final Appeal by an external non-judicial body. The entire society was caught between the dilemma of maintaining a viable population size and preserving the independence of the judiciary.

In 2001, the Court of Final Appeal made another decision (in *Chong Fung Yuen v Director of Immigration*) with far-reaching consequences. It was about a boy who was born in Hong Kong to parents of Chinese nationality who were not Hong Kong Permanent Residents. The court ruled that the boy was also entitled to a right of abode in Hong Kong in accordance with Article 24 of the Basic Law. The implication is that children of Mainlanders can stay in Hong Kong and be treated as Hong Kong Permanent Residents as long as they are actually born in Hong Kong, whether or not their parents have the right of abode in the first place is irrelevant. It was not a particularly controversial case when the ruling was first made. However, more and

⁴Yung (Chap. 1 of this book) points out that the transfer of the sovereignty of Hong Kong in 1997 ushers in a period during which new ethical dilemmas in public policy emerge, exemplifying different social values at work, with the right of abode issue being an example of this. The issue of Mainland pregnant women giving birth in Hong Kong (which emerges after 1997 because of content of the Basic Law that comes into effect after 1997) being discussed in this chapter is an extension of the right of abode issue.

more Mainlanders realized that this ruling is actually providing them a fast and safe way to secure the right of abode in Hong Kong for their children. All they need to do is to get the pregnant mothers cross the border as visitors or tourists and have their children born in Hong Kong. According to the classification of the HKSAR government, there are two types of babies born this way:

Type I babies: babies born by Mainland woman in Hong Kong and whose father is a Hong Kong permanent resident

Type II babies: babies born by Mainland woman in Hong Kong and whose father is not a Hong Kong permanent resident

According to statistics cited in the newly released *Steering Committee on Population Policy Progress Report 2012* (referred to hereafter as *The Report*), the number of Type I babies has been quite steady: starting from 7109 in 2001, reaching a peak of 9879 in 2005, and then declining steadily to 6110 in 2011. However, the number of Type II babies has skyrocketed over the years. There were only 620 Type II babies in 2001, but the number increased almost 60 times to 35,736 in 2011. There were altogether 95418 live births in Hong Kong in 2011, 37.5 % of them or 35,736 were Type II babies and 6.4 % or 6110 of them were Type I babies (*The Report*, 2.15, p. 25). In other words, Type I and II babies taken together accounted for almost 44 % of the babies born in Hong Kong in 2011; or for every two babies born in Hong Kong, one was born to Mainland mothers. With this tremendous growth in new born babies, demand for obstetric services has also reached a critical level. In view of the growing number of Mainland mothers giving birth in public hospitals, hence making it difficult for local mothers to secure delivery places in public hospitals, starting from April 2007 local women would be given preference to deliver in public hospitals and bookings by non-local (mainly Mainland) mothers would be entertained only if there is spare service capacity. In April 2011, the Hospital Authority went further to suspend booking for obstetric services by non-local women till the end of 2011. But the consequence was that the number of non-local mothers making emergency deliveries at the Accident and Emergency Department (A & ED) of public hospitals increased from 796 cases in 2010 to 1657 cases in 2011 (*The Report*, 3.22, p. 41). Such a desperate attempt to have their babies born in Hong Kong was posing threat to the safety of the mothers and their babies, and at the same time creating extra pressures on the medical personnel concerned. What's more, local mothers have to compete with Mainlander mother for delivery places in private hospitals which may not have motivation in giving preference to local mothers. In 2011, there were a total number of 48,924 deliveries in private hospitals; only 15,459 were by local mothers, 33,465 were by non-local mothers. To make sure that obstetric services are accessible to local mothers, the government decided that the delivery quota for non-local women be capped at 35,000 for the year 2012, with 3400 delivery quota allocated to public hospitals and the remaining 31,000 places to be shared among private hospitals (<http://www.info.gov.hk/gia/general/201202/08/P201202080336.htm>). In view of growing public discontent, the newly elected Chief Executive Mr. C. Y. Leung announced shortly after the election that the booking for delivery places at both

public and private hospitals by non-local women will be suspended in 2013 (*The Report*, 4.8, p. 58).

The sizable number of babies born in Hong Kong to Mainland parents, if entitled to right of abode in Hong Kong, would eventually become an important source of demand for not just obstetric services but many other services such as child health services, education services, and social welfare services. For instance, among the 72,200 new registrations in 2011 in all the Maternal and Child Health Centres (MCHCs) operated by the Department of Health, as many as 31 % of them were babies born to non-local mothers (*The Report*, 3.25, p. 42). In light of the expected competition for resources between locals and this particular group of immigrants (especially the Type II babies) who appear to have no intimate connection with Hong Kong (except their birth here), there has been a strong voice calling for the abolition of the rule, by whatever means,⁵ that birth in Hong Kong (to people of Chinese nationality) alone is a sufficient condition of acquiring the right of abode.

The division and conflict between locals and Mainlanders as witnessed in this latest battle over the right of abode in Hong Kong are ultimately a reflection of our disagreements over the nature and function of the border (dividing Hong Kong and Mainland) and the conditions under which people may be permitted to cross it.⁶ People of Hong Kong, the insiders in this case, may take this opportunity to reflect on their rationales in defending the border and their criteria in selecting or rejecting Mainlanders, the outsiders, who want to be a part of Hong Kong. In subsequent sections, I will first introduce the various moral considerations that the more inclusionary position and the more exclusionary position may appeal to respectively. Next I will have a closer examination of those moral considerations, to judge whether they can provide strong support to the positions being defended, and to explore how they can contribute in shaping an immigration policy that is politically viable, economically sustainable, and ethically defensible.

Consequentialist Considerations

In the two cases described above, no matter they are Mainlanders whose parents have later become Hong Kong Permanent Residents (i.e., the right of abode issue in the late 1990s) or babies born in Hong Kong but whose parents are Mainlanders

⁵By amending Article 24 of the Basic Law or asking the Standing Committee of the National People's Congress to have an interpretation of this article.

⁶Though the border is not a national border, and the Mainlanders permitted to settle in Hong Kong are not exactly immigrants but are officially called Mainland New Arrivals, there is real and effective border control over the flow of population between Hong Kong and Mainland which is comparable to the control of immigrants between two countries. So the common political and moral considerations behind immigration control may also apply in the case of border separating Hong Kong and Mainland.

(i.e., the Type II babies issue in recent years), both the people and the government tend to resist people from the Mainland to come, to settle, and to share “their” Hong Kong. The negative attitude of the people as well as the exclusionary policy of the government was largely found on a consideration of consequences.⁷ First of all, there is nothing wrong with taking consequences into consideration, which is perfectly in line with our intuition. And it is counterintuitive in policy making if we do not bother to ask what would happen if the policy in question were put into practice. By consequences we may refer to the utilities, positive or negative, that can be identified, counted, measured, or felt by individuals concerned. And the utilities that are considered to be critical to public policy making may include preferences, for or against a policy option, as expressed by individuals or pleasure and pain as experienced by individuals affected by the policy option. But no matter how we want to define utilities, be it a matter of preferences or desires or feelings, it is safe to say that the overall level of utilities brought about by a policy option are more or less determined by the resulting increase/decrease in a list of items including at least basic rights and freedom, employment or unemployment rate, educational opportunities, level of social welfare, financial reserve or deficit, and accessibility to medical and health care. The utilities or the relevant consequences of a policy option would of course be higher or predominantly positive if it is conducive to job creation, respect of individual freedom, provision of welfare and decent social services. As the satisfaction of citizens and the political success of policy makers are hinged on the generation of an overall positive utilities or consequences, no wonder consequential considerations matter most in politics. Arguably, it is a matter of instinct for policy makers and citizens affected to prefer a policy option which can bring higher utilities or better consequences. And it has been taken for granted that consequentialist considerations should prevail in politics in general and political evaluation in particular. However, our primary concern is not the necessity or inevitability of consequentialist considerations as *political considerations* but the appropriateness and adequacy of consequentialist considerations as *moral considerations*. In short, our question here is to what extent counting of consequences or calculation of utilities could inform us the moral status or the moral permissibility of a policy option.

The group of moral thinkers who identify themselves as the utilitarian are of the view that consequential considerations in general and calculation of utilities in particular can provide us the essential tools and formulas in determining the moral thing to do or in evaluating the morality of different policy options. Their reasoning is that utilities possessed or experienced by individuals have intrinsic moral worth and there is nothing morally wrong with the promotion of self-interest or the maximization of individual utilities. Next, if the self-interest of an individual is morally valuable, the aggregate interests of all individuals concerned taken together should be even more valuable. They then go further to suggest

⁷A closely related concept to consequentialist considerations is “public interest”. For a discussion of this concept, see Tsang’s chapter in this book, pp. 173–174.

that the promotion of aggregate interests of all individuals concerned is not only morally permissible but indeed the moral thing to do. If that is the case, a policy option is at least morally defensible, if not morally obligatory, if it can bring about the greatest net positive utilities (i.e., the best balance of positive over negative utilities).

Having adopted a utilitarian mind-set, those who are in favor of a policy against immigrants from the Mainland would argue with confidence that such a policy is not only politically mandatory but also *morally required* because rejection of Mainlanders can best serve the purpose of utility maximization (or alternatively admission of Mainlanders would lead to the worst balance of utilities). Both the HKSAR government and the society at large keep reminding us of the grossly negative and even disastrous consequences of admitting Mainlanders. The following comment made by Mr. Timothy Tong, the then Deputy Secretary for Security of the HKSAR when the Court of Final Appeal made the landmark ruling on January 29, 1999, is representative:

A practical and disturbing consequence of the judgment was the extension of the right of abode to a very large number of people, both in terms of absolute numbers and, more importantly, in terms of the implications on Hong Kong's resources and services to absorb the additional permanent population (Tong 2004, p. 64).

According to the estimates made by the HKSAR government,⁸ the “disturbing” consequences the Hong Kong society had to bear include the following:

- An extra \$108 billion has to be spent on building 180,000 public rental flats, 100 schools, and five hospitals in a few years time in order to accommodate the first batch of 700,000 Mainlanders who would get the right of abode;
- The unemployment rate would be increased by 10 % by 2002;
- The class size of over half of the schools would be increased from 40 to 45;
- Those who want to make their first appointment for specialist clinics would need to wait from the present 11 weeks to about 25 weeks by 2009;
- Social security expenditure would be increased by 4 billion per annum in the next ten years.

By the same token, those who are reluctant to grant right of abode to Type II babies are also appealing to the adverse impact of the delivery of babies by Mainland mothers on the provision of services to locals such as:

- Difficulty of local mothers in finding delivery places in public and private hospitals;
- Provision of child health services to the new born babies (in 2011, the child health services participation rate of non-local residents was 52.9 %) (*The Report*, 3.25, p. 42);

⁸“Assessment of Service Implication in Relation to the Judgment of the Court of Final Appeal on the Right of Abode Issue Tabled at the Legislative Council,” May 6, 1999, reprinted in Chan et al. (2000), pp. 274–287.

- Provision of free or heavily subsidized education services to those babies who would return to Hong Kong to study (the government estimated that 92 % Type I babies and 52 % of Type II babies would return before the age of 21) (*The Report*, 3.27, p. 27);
- Provision of rental housing services to those who are eligible (it is estimated that half of the new arrivals live in public rental housing) (*The Report*, 3.13, p. 37).

Considering the apparently negative consequences that would be brought about by the coming of Mainlanders, some people of Hong Kong may find it morally defensible to impose a stringent border control against Mainlanders and admit only those who are talented and/or financially independent. Without doubt, there would be a lot of negative utilities, especially from the perspective of the local Hong Kong people. However, a sincere utilitarian would not be overwhelmed by the various kinds of burdens, expenses, and inconveniences as listed above in counting the aggregate utilities resulted from the admission of Mainlanders. In the admission or rejection of immigrants, apart from asking how would the local people suffer immediately, a genuine utilitarian would also look at how would the outsiders benefit if being admitted and how would the local people benefit in the long run. In other words, those who are true to utilitarianism would take into account (i) the utilities gain and loss as experienced by all parties concerned which include not only the locals but also the potential immigrants; and (ii) the change in aggregate utilities in the longer term as well as in the short run.

If the locals have something to lose in admitting Mainlanders, those Mainlanders who are being admitted would certainly have something to gain. Sometimes, what are utility losses to locals such as additional expenses on education and medical care services would be tremendous utility gain to immigrants from Mainland where those services are always in short supply. However, there are a number of things that Mainlanders, in settling in Hong Kong, may share with the locals but without reducing the amount available to any parties. They include, for example, the long list of freedom and fundamental rights already enjoyed by people of Hong Kong. Mainlanders may be able to enjoy not just monetary benefits and social services but most importantly the basic rights and freedom which cannot even be openly claimed in the Mainland. According to a study commissioned by the Central Policy Unit to the Sun Yat Sen University, the most important reason cited by the Mainland women choosing to give birth in Hong Kong is “to circumvent China’s birth control policy,” which is commonly known as the “One-child policy”⁹ (*The Report*, 3.17, p. 39). This finding suggests that from the Mainlanders point of view, the moment they step into Hong Kong’s territory (even before they have the right of abode) they are free to exercise the right to reproduce

⁹This policy was recently relaxed. The National People’s Congress of China approved by the end of 2013 that urban couples would be allowed to have a second child if one parent is an only offspring. And Zhejiang has become the first province where the relaxation was practiced. However, there still a long way to go before the Mainlanders can exercise a full right to reproduce.

(together with the right against forced abortion, which is sometimes a means for achieving birth control in the Mainland), a basic right the locals have already taken for granted. And the babies born in Hong Kong, endowed with the right of abode, would then be able to enjoy a long list of rights including freedom of speech, freedom of the press, freedom to reproduce, freedom to protest, rule of law, political participation, open trial, religious freedom, etc. In a word, they have everything to gain in coming to and staying in Hong Kong. As a true utilitarian, one needs to be impartial so that the utilities gain by the outsiders (who may become insiders) would also be counted; and we need to be egalitarian in such a way that the weight of the utilities gain/loss of the outsiders would be counted equally as that of the insiders. Once we strictly observe these twin requirements of being an authentic utilitarian and making sure that the predominantly positive utilities gained by the Mainlanders would be counted fairly, the aggregate utilities of a policy which is in favor of admitting Mainlanders (by, e.g., enforcing the judgment made by the Court of Final Appeal in 1999 or continuing to permit the existence of Type II babies) would not necessarily be negative. What's more, if we believe that the tremendous gain in utilities by the incoming Mainlanders can more than compensate the moderate utility losses suffered by the local Hong Kong people, the aggregate utilities could even be positive. The implication of this possibility is that utilitarian calculation, if done in an *impartial and egalitarian* manner, would not necessarily be in favor of stringent border control and rejection of immigrants from the less developed places.

Moreover, a committed utilitarian would tend to adopt a longer time frame and to exhaust all possible utilities gain and loss that might arise from different policy options. An apparently undesirable option may become acceptable or even highly attractive if we are willing to extend the time frame and to consider more long-term impacts of that option. For example, the HKSAR government has been appealing to consequential considerations in shaping her policy and position regarding the admission of immigrants. And it was always criticized that only the utilities of the locals were considered and the utilities taken into consideration were biased toward the economic side. In *The Report*, the government explicitly declared that its policy is to serve the following purposes:

- To secure and nurture a population which sustains our development as a knowledge-based economy (1.1);
- To improve the overall quality of our population as a knowledge-based economy and world-class city (1.1);
- To maintain our position as Asia's world city (1.2);
- To reinforce our competitive advantages by nurturing local talents as well as attracting those from outside of Hong Kong (1.2).

With this in mind, we have no difficulty in explaining the government's seeking interpretation of the Basic Law in 1999, resulting in the abolition of the right of abode of nearly a million Mainlanders, and suspending the booking from Mainlander mothers in 2012, effectively leading to the eventual disappearance of Type II babies. But the strange thing is that upon a more careful reading of *The*

Report, we can detect a significant change of tone and attitude. Yes, as a political gesture, the government may still have to openly assert that local people should be given priority in public services provision and it is never the intention of our policy to attract Mainland women to give births in Hong Kong (except those who are especially talented and resourceful). At the same time, in *The Report* the government is inviting us to consider the following medium- and long-term changes the entire society has to confront, the sooner the better:

- Fertility rate¹⁰ continues to fall from 1296 per 1000 women in 1989 to 1108 per 1000 women in 2010 and then down to 936 in 2039 (2.1–2.2, pp. 6–7);
- Percentage of aging population, that is population above the age of 65, will increase from 25 % in 2029 to 28 % in 2039 (2.4, p. 8);
- Elderly dependency ratio¹¹ will increase sharply from 172 in 2010 to 454 in 2039 (2.5, p. 10); the overall economic dependency ratio¹² is expected to rise from 869 in 2010 to 1140 in 2029 (2.7, p. 14); the overall economic dependency ratio will first reach 1042 in 2020 when the economically inactive persons would outnumber those who are active (3.47, p. 55);
- The total labor force will have slight increase from 3.73 million in 2010 to 3.91 million in 2021 before it falls to 3.85 million by 2029 (2.6, p. 11).

In light of these pessimistic projections, the HKSAR government is beginning to consider the long-term beneficial effects that could be brought about by the eventual return of Type I and Type II babies. It is perfectly clear that, like many other places, the population of Hong Kong is aging rapidly in the coming decades. Assuming that the extremely low fertility rate could not be reversed in the near future, Hong Kong certainly needs to attract or to “import” a sizable number of economically active and productive population from outside to replenish the labor force and to share the burden of taking care of the elderly. It is against this backdrop that the HKSAR government starts to consider the *instrumental value*¹³ the Type I and II babies may serve and “to address how these Mainland births can be turned into an asset for our community” (4.6, p. 57). It follows from this change of mind that schooling and support of those children, which were previously considered as burden and “public cost,” is now regarded as “long-term investment for Hong Kong’s future” (4.6, pp. 57–58). Another thing that caught the attention of the government is the impressive socioeconomic profile of the parents of Type II babies. The survey commissioned by the government indicates that “41 % of them had monthly household income of \$40,000 and above, with 60 and 59 % of fathers and mothers had tertiary education respectively” (3.27, p. 43). Contrary to what

¹⁰We need a fertility rate of 2100 births per 1000 women to reach the replacement level.

¹¹The number of persons aged 65 and over per 1000 persons aged between 15 and 64.

¹²The ratio of the economically inactive population to 1000 economically active persons.

¹³To consider the instrumental value of allowing Mainland babies to stay in Hong Kong is to think in terms of the positive functions they can perform or the benefits they can bring to Hong Kong, that is, to conceive them as an instrument to promote the betterment of Hong Kong.

people used to believe, the babies and their families, when coming to Hong Kong, do not really need to live on welfare and to rely heavily on the government. Besides, they can bring resources, talents, and labor that we desperately need to keep Hong Kong competitive and sustainable. No wonder the government is urging us to adopt “a more embracing attitude to the return of Type II children for secondary education in Hong Kong” so that these children can become “useful human resources of Hong Kong in future” (4.12, p. 61). Apart from the more resourceful families who can afford to deliver their babies in Hong Kong, the one-way permit (OWP)¹⁴ holders, who usually come from a more modest background, are now viewed positively by the government because they can be expected to play a role in “mitigating the problems of an ageing population” and contributing to the “sustainability of our economic growth” (3.14, p. 37).

Make no mistake that the HKSAR government has ceased to be utilitarian. Just the opposite, the change of tone, attitude, and strategy that we can witness in *The Report* is precisely a product of a more impartial and comprehensive type of utilitarian calculation in which the interests of most concerned parties were taken into account, the expected negative as well as positive utilities they would bring about in a timeframe of decades were considered. Contrary to conventional belief, rational calculation and balance of utilities may require us to continue to allow Mainland mothers to give birth in Hong Kong and to facilitate the babies born this way to return to Hong Kong to study, to work, and to become an integral part of the future labor force. Put another way, those who are in support of admission of immigrants from Mainland could also appeal to consequential considerations in defending the moral merit of their position.

In the above, I have demonstrated how we can arrive at a morally defensible immigration policy with reference to the moral consideration which place sole emphasis on the maximization of aggregate utilities. The rather unexpected conclusion is that if we are committed to an impartial and comprehensive calculation of utilities which may emerge in a reasonable period of time, we may have to endorse, on moral ground, a policy that is in favor of, not in opposition to, the admission of Mainlanders. However, those who want to maintain a tight border control need not be disappointed. They can always fight back and to reverse a utilitarian verdict which is always tentative because calculation of utilities is by definition non-exhaustive and never-ending. There is always a chance that a stringent policy guarding Hong Kong against Mainlanders would gain the upper hand when there are new utilities (gain and loss) to be counted and/or new way of weighing different utilities. That is probably why both sides of the debate would at first be tempted to defer to consequential considerations which could lend them moral support, though on a case-by-case basis.

¹⁴As agreed between the HKSAR government and the Mainland authority, a quota of 150 Mainlanders per day is permitted to settle in Hong Kong. Those who get the permission are granted the one-way permit (OWP) to Hong Kong.

It may be a merit of the utilitarian mode of thinking and decision making which is always sensitive to all relevant consequences, responsive to the interests of all parties concerned, and as a result would never lead to an immutable conclusion that certain policy option is beyond moral reproach. But ironically, having fully realized this feature of the utilitarian line of thought, some would no longer want to appeal to consequential considerations in seeking moral justification of their preferred policy option. As discussed above, those who tend to reject newcomers would find that calculation of utilities, if done comprehensively, would undermine, not reinforce, their position. If they want to stick to the policy of stringent border control against Mainlanders, they would need to commit to an obviously partial calculation of utilities which is biased toward the established interests of the locals. As a result, they would have a strong tendency to search for a (non-consequential) justification which can lend them moral support but without appearing to be partial or biased. However, the interesting thing is that even those who are willing to admit newcomers would prefer not to rely on consequential considerations which may only be able to provide them with contingent support. In fact, those who tend to reject as well as those who tend to welcome outsiders would not want to see that the moral justifiability of their position is uncertain, based on calculation of utilities which could never be exhausted, and to be decided on a case-by-case basis. Regardless of the policy bias, either toward the admission or the rejection of Mainlanders, they naturally want to build their position on solid moral ground so that the defensibility of their position is stable rather than contingent. Those who want to adopt a more inclusionary policy regarding outsiders have an added objection against the appeal to consequential considerations. Their prime objection is that following the logic of utility calculation, Mainlanders, even if admitted rather than rejected, would only **be treated as instrument** that contributes to aggregation of social utilities but not be respected as individuals whose preferences and interests are intrinsically valuable. What makes them uncomfortable is the mentality that immigrants were admitted as only *a means to serve a collective end* and they could be rejected once they are not serving any useful social purposes.¹⁵ That is why they also want to look for moral considerations according to which the support of admission of immigrants is principled and the worth of the individual preference and interests of the immigrants admitted can be recognized. In other words, both parties would want to search for a kind of justification that

¹⁵Tsang (Chap. 10 of this book) raises the issue of rights in the discussion on whether the interest of the Choi Yuen Villagers is to be sacrificed as a means to serve collective end or public interest in his discussion of the Express Rail Link controversy. However, there is no guarantee of equal citizenship rights in a community—the Choi Yuen Villagers do not enjoy the same rights as indigenous inhabitants in New Territories. That is why this non-indigenous inhabitant village of Choi Yuen is more likely to be abolished which raises the issue of whether this is morally and politically justifiable. Some may think that the issue of rights in the case of immigrants here may not be as prominent as in the Choi Yuen Village case since immigrants are “outsiders” (with newly acquired citizenship) whose rights (at least certain rights) have not yet been ratified in the Hong Kong community.

enable them to argue that their position is prescribed, or at least permitted, directly by certain moral principles or considerations, without having to wait for the actual calculation of utilities or to be bothered by the never-ending emergence of new utilities that should be counted.

In subsequent sections, several *non-consequentialist* moral considerations will be introduced and discussed. I will first introduce a liberal defense of stringent border control which appeals to freedom of association among insiders. Then, we will consider an equally liberal objection that to defend our border is actually to sustain our moral luck over outsiders and ultimately is to perpetuate the injustices maintained by borders. Finally, we will assess the relevance and weight of the communitarian argument that in admitting newcomers we should pay attention to the potential impact on the integrity and cultural distinctiveness of the host community.

Border Control as an Exercise of Freedom of Association

Those who are reluctant to admit immigrants might wonder why they need to defend themselves as if they do not enjoy a presumption of innocence in guarding the border within which like-minded people joining and staying together to live their preferred way of life. They would contend that their choices over whom they want to associate with or to keep a distance should be respected rather than suspected. One philosopher who argued along this line in defending a stringent border control is Christopher Wellman (Wellman 2008). He began by asserting that state's freedom to choose its members is analogous to individual's marital and religious freedom of association or a golf club's control over its membership. His reasoning is that "just as an individual has a right to determine whom (if anyone) he or she would like to marry, a group of fellow-citizens has a right to determine whom (if anyone) it would like to invite into a political community" (Wellman 2008, pp. 110–111). By the same token, "if no one doubts that golf clubs have a presumptive right to exclude others," he believed that "there seems no reason to suspect that a group of citizens cannot also have the right to freedom of association..." (Wellman 2008, p. 114). By the use of the above analogies, the case for a state's right to control immigration, Wellman argued, is just natural and straightforward. In developing his argument he obviously made two assumptions: (i) there is a normative link between freedom of association of individuals and that of the group; if the former is defensible, so is the latter; (ii) freedom of association entails essentially the freedom to refuse association; hence, "a state's freedom of association entitles it to exclude all foreigners from its political community" (Wellman 2008, p. 111). The state's right to freedom of association is straightforward because this right, as an expression of right to self-determination and autonomy, is in his opinion "not something that requires an elaborate justification" (Wellman 2008, p. 114). However, Wellman did provide some justifications. First of all, state's right to freedom of association, especially the right to choose and

to exclude immigrants, is integral to the definition of the self of the group which is prior to the subsequent exercise of right to self-determination by the group. Secondly, considering that local citizens have “special distributive responsibilities” (Wellman 2008, p. 115), that is special obligation to take care of the well-being of their fellow citizens, it is therefore reasonable that they should be given a choice over the outsiders they would like to admit whether admission entails social and economic support. Wellman stressed that he was offering a deontological defense because he was appealing to a basic right to freedom of association which should be normally enjoyed by individuals as well as groups, instead of a consequential defense which cares only about promotion of best interests of the group or communitarian defense which places strong emphasis on the preservation of distinctive culture or character of the society (Wellman 2008, pp. 116–117).

The above defense provided by Wellman should have strong appeal to many Hong Kong citizens who already have a strong belief that they and they alone, have an exclusive right to share Hong Kong and, as a result, should have control over who are qualified to share Hong Kong with them. They do not need to do any calculation of utilities; they do not need to identify the features of the distinctive culture they are trying to protect. All they need to do is to assert a simple right to choose whom they want to associate with. Once we are convinced that borders are necessary and borders are meant to divide people, we would naturally agree with them that people inside the border, in exercising their freedom of association, should have the right to control the border, to choose who to admit and who to reject. State border-dividing countries would be seen as natural as walls separating homes or the roads and barriers separating golf clubs. What’s more, if those who are not admitted to a marital relationship, a religious cell, or a golf club, has no reason to complain, so would those who are rejected entry to another state.

Obviously, the cogency of Wellman’s argument rests upon the analogy he made use of. On the one hand, we can all agree that it is of vital importance for one to be admitted or accepted in a marital relationship, and those who are repeatedly rejected would feel bad and frustrated; but on the other hand, we tend to think that those who are rejected have only themselves to blame and it is not such a big deal even if one ends up remaining single. In the case of marital associations, we may well agree with Wellman that the frustrations and discontent of those who are not admitted should not override our general right to choose who we want to establish an intimate relationship. Similarly, those who fail to apply for membership of a golf club, which are free to impose stringent rules on applicants, would be disappointed. But that is not the end of the world because they can apply for other golf clubs, try another sport, or develop other hobbies. If that is the case, their disappointment should not trump the club members’ freedom of association, including the freedom to refuse application for association. The crux of the matter here is whether or not the same conclusion can be made regarding the application for admission to a state. Some may argue that we need to face the reality: We need to take borders for granted and to accept that people cannot be completely free to choose where they go or whom they can associate with. There is some truth with this claim. However, we need to distinguish between two senses of taking borders

for granted. First, we take borders for granted in the sense that we inevitably have to begin with borders; and it is acceptable that they continue to exist even though those who are rejected will be disappointed and frustrated. That is how we usually regard the borders separating families, religious organizations, and sport clubs. Second, we take borders for granted in the sense that we consider the existence of borders as an inevitable starting position but *without* agreeing that it is acceptable for the insiders to stick to this position and to guard the border at all costs. There is a good reason to take state borders for granted in this second sense because failure to get admitted by a state, as compared to the failure to get admitted by a golf club, would lead to potential harm (Fine 2010, pp. 345–352) instead of mere disappointment. It is potentially harmful because those who are rejected from entry to a state would probably end up staying in a place where deprivations, injustices, and oppressions are prevailing. Though the insiders do not mean to harm anybody, if the direct and inevitable result of their choices to exclude is that some outsiders “are unable to live a minimally decent life” (Fine 2010, p. 347), Wellman’s defense of insiders’ freedom of association would look pale. If it is between our right to self-determination and others’ disappointment and frustrations, the former should of course prevail because there is no such thing as a right against getting disappointed. However, our right to self-determination should cease to be overriding if it is competing with others’ right against unjust treatment. In light of the huge disparity between Hong Kong and Mainland in terms of social, economic, and political attainments, the right of Hong Kong people to exclude (in virtue of their freedom of association) is losing appeal, whereas Mainlanders’ claim to enter Hong Kong as a matter of justice is gaining weight. When the inequalities between two places separated by a border are escalating, doubts over whether borders are there to be guarded or to be crossed would grow accordingly. No matter how hard we still want to take the existence of borders for granted, we are less and less able to close our eyes (and our doors) when confronted by the inconvenient truth that border is more than a geographical arrangement that separates people “naturally” but also a distributive mechanism that “effectively” determines the life chances of people. In the next section, we will have a closer look at the implications of this “truth”.

Border Control as a Perpetuation of Brute Luck and Injustices

In the above, I have shown how potential harm that may result from the rejection of immigrants would cast serious doubt over insiders’ right to freedom of association, especially the discretion to exclude others from entry into “their” territory. But in view of the *perennial and huge inequalities* that are sustained, if not created, by borders, there emerges a stronger attack of border control which not only challenges insiders’ right to exclude but go further to justify their obligation to admit.

Let us begin with the following observation made by Loren Lomasky:

A baby born a few miles north of the Rio Grande will, by virtue of this natal location, enjoy prospects substantially different from and very likely much superior to those of someone born a few miles south. She will be the beneficiary of a more commodious arena for economic activity to which she will be permitted easy access because of the citizenship this accident of birth confers (Lomasky 2001, p. 57).

We may not be familiar with Rio Grande. We may not know exactly how this river separating Texas from Mexico brings about substantial differences in prospect and opportunities between Americans living in Texas and Mexicans born on the other side of the border. But we should know perfectly well that it makes a huge difference for Chinese born south or north of the river dividing Hong Kong and the Mainland. Anyway, the point here is that enormous social, economic, and political inequalities may result from an “accident of birth.” Certainly we may all agree that where we were born and what kind of membership or citizenship we were given is the default position we have to start with. It is a matter of accident because it cannot be planned; it is considered something natural because it is not the result of human intervention. To be born on this side or that side of the border is, some would say, *a matter of luck* or a product of *natural lottery*. The critical question here is how we should address this problem of luck (if it is a problem) and what we should do with people affected by the lottery results.

There is a saying that since no one has been doing any planning or distribution intentionally, whatever results from this natural or accidental distribution, though necessarily favorable to some and unfavorable to others, could not be judged as either right or wrong. It just happens; it has been the case ever since we have borders; and that is something we have to take as given. However, whether or not we need to take distribution of membership (in one country rather than another) as given depends on what we think are the moral implications of distributions resulted from luck or natural lottery. For sure, no one is to blame for an “original” distribution of membership that someone was born in Hong Kong while another in, for example, Guangzhou. On the one hand, such a distribution is beyond moral judgment because it is a product of brute luck; on the other, the fact that it is a matter of luck makes the distribution *arbitrary* from the moral point of view.¹⁶ Two implications follow from this understanding: First, there is no moral obligation to stick to or to sustain the original distribution; second, in view of the huge inequalities created by this distribution of membership, not to do anything to bridge the resource gap is to intentionally sustain the state of gross inequality, which is tantamount to *injustice*. The original distribution of membership, which is largely beyond human control, may be morally neutral; whereas strict border control and stringent criteria of admission, which are artificially enforced, should be subject to moral evaluation. The ones born in Guangzhou may not be able to complain about the “natural” fact that they were born in the northern part of the border, but they have legitimate

¹⁶The view that a distribution resulted from luck is morally arbitrary can be attributed to the theory of justice constructed by John Rawls in his *A Theory of Justice* (New York: Harvard University Press, 1971).

Table 6.3 A brief comparison between Hong Kong and Mainland China

Items	Hong Kong	Mainland
GDP per capita (2010)	US\$ 31590	US\$ 4382
Education attainment (2010)	52.3 % attained secondary level; 25.4 % attained post-secondary level	8930 per 100,000 attained college or above; 14,032 per 100,000 attained senior secondary level
No. of hospital beds per 1000 population	5.0	City: 5.33 County: 2.44
No. of doctors per 1000 population (2010)	3.1 (including Chinese medicine practitioners)	City: 2.97 County: 1.32
No. of nurses per 1000 population (2010)	5.6	City: 3.09 County: 0.89

doubts whether there are “morally relevant factor that can justify advantages [to Hong Kong people and disadvantages to Mainlanders] consequent on mere contingencies of geography” (Lomasky 2001, p. 57). And they would wonder why they cannot be permitted to cross the border in search for a minimally decent kind of life; being confined to that part of the border is to many Mainlanders a denial of the opportunity to get out of poverty (Kukathas 2005, p. 211).

To understand the real differences sustained by the border-dividing Hong Kong and Mainland, we only need to have a quick look at the following facts and figures¹⁷ (Table 6.3):

It is pretty clear that despite the tremendous economic growth in Mainland China in the last few decades, there are still significant differences in various aspects of the socioeconomic well-being between people of Hong Kong and Mainlanders. As long as there are substantial differences between the two sides of the border, those who are worse off have a strong motivation and also a legitimate reason to cross the border and to join those who are better off. The artificial segregation of people and the deliberate perpetuation of differences are not to be allowed if we believe that one’s life chances should not be determined predominantly by one’s location of birth. It follows that Hong Kong people who were, by accident, born in the more prosperous part of China should not take full advantage of their luck by claiming aggressively their right to exclude, thereby sustaining the injustices inflicted, albeit unintentionally, on those born on the other side of the border. Instead, they should feel obliged to admit Mainlanders who, out of undeserved bad luck, have been suffering from the huge differences in well-being. Border control, rather than something to be taken for granted, has become something morally suspicious because it is in effect a perpetuation of both undeserved advantages and undeserved disadvantages resulted from arbitrary distribution of membership. Admission of immigrants, especially the Mainlanders close to us,

¹⁷Compiled from the following: *Hong Kong: The Facts*; *International Monetary Fund*; *6th National Population Census*.

can easily be justified morally by two related non-consequentialist considerations: (i) reduction of the effects of luck and (ii) realization of fair, if not equal, starting points. Such a policy in favor of admission is nothing new to Hong Kong. In fact, we had already practiced such a liberal policy in the 1960s and 1970s without realizing that it was found on some liberal conception of justice.¹⁸ Perhaps a sizable number of us were outsiders at that time and did not find it legitimate to claim any rights to reject others from entering “our” territory. That is a time when we still believed that the border-dividing Hong Kong and the Mainland was not to be defended but to be crossed; and those who, upon reaching Hong Kong, were relatively safe and free from hunger did not think that they had the right to reject others to share the safety and subsistence which were in limited supply in Mainland.

However, those who are still in support of insiders’ freedom of association and right to exclude may put forward two objections: one objection that applies to the rejection of immigrants in general; another objection that is peculiar to the Mainland women (and their families) who want to give birth in Hong Kong. First of all, those who tend to reject immigrants, like Wellman, are not at all ignorant of the huge inequalities and potential injustices first created by borders and then reinforced by stringent border control. They may also recognize the need to bridge the gap between the worse off and the better off. But their central claim is that admission of immigrants from less developed states or cities is not the only way of bridging the gap. Their argument rests upon a distinction between the *duty to aid* and the *duty to admit*. Wellman acknowledged the problem of inequalities as usually witnessed in countries or cities divided by borders and conceded that the more affluent ones, in virtue of distributive justice, have a duty of care toward the less fortunate ones. Again, he appealed to the analogy between family and state:

Just as relatively wealthy families are required merely to transfer some of their wealth to others [without letting them to join their families], why cannot wealthy countries fully discharge their global distributive duties without including the recipients in their political union, simply by transferring the required level of funds abroad? (Wellman 2008, p. 121)

His reasoning is that states can choose between “exporting justice” and “import [ing] unfortunate people” (Wellman 2008, p. 129). That is, an affluent state may first try to grant aid to the worse off or to exert diplomatic pressures to the corrupted and unjust regimes that made their people suffer. Only when the former strategy fails to work then a state may be obliged to admit those unfortunate people into her territory. In principle, both strategies may be considered. But in practice, especially in the case of the border between Hong Kong and Mainland, the strategy of exporting justice would be met with numerous insuperable difficulties. First of all, the prerequisite of an effective provision of aid is a fair and efficient mechanism of aid distribution so that the aid can be delivered to those who are in

¹⁸This is a discussion of justice across borders. For discussion of justice within borders, i.e., within a community, please refer to Tsang’s chapter (chapter 10 of this book) which analyzes the Express Rail Link controversy in relation to justice and Yung’s chapter (chapter 11 of this book) that examines justice in a tax system.

need. However, we cannot expect that such a mechanism exists in a corrupted and unjust regime. If the regime could not be relied on in the delivery of aids, it would be even harder for us to persuade her to accept external checks and monitoring in the provision of aids. And it is not realistic to expect that she would easily cooperate with external bodies or alter the ways she treats her citizens in view of external pressures. The special relationship between Hong Kong and Mainland can testify perfectly, instead of serving as a rebuttal, to the above difficulties. Judging from the real experiences of numerous Mainlanders admitted, actively or passively, legally or non-legally (e.g., under the touch-base policy) to Hong Kong in the last 50 years or so, we can safely say that direct admission was a simple and effective way of rescuing them from dangers and destitution and providing them with a real opportunity to start their life afresh.

The second objection is targeted upon the admission of Mainland mothers to give birth in Hong Kong and to allow their children to become permanent residents. The objection is that those families are already the better off by any standards. According to *The Report*, 41 % of the Type II babies were from families with monthly household income of \$40,000; and almost 60 % of the Type II parents had tertiary education (3.27, p. 43). It compares favorably not only to their fellow Mainlanders but also to the average Hong Kong families whose median monthly domestic household income is only \$18,000 (as at 2010). In short, they are certainly not the ones to be rescued and specially protected through admission to Hong Kong. And it would not be exaggerating to say that they have benefited, rather than suffered, from the good, rather than bad, luck of being born in Mainland; otherwise they would not be able to afford the market (or at least unsubsidized) medical expenses of choosing to deliver in Hong Kong hospitals. If there are no effects of bad luck to be eliminated, there is of course no point of admitting them to Hong Kong from the liberal point of view. Besides, it is not only unnecessary to allow those who are better off in Mainland to move to Hong Kong, doing so would even create another kind of injustice. By admitting Mainlanders with resources, skills, and qualifications, those people who could not leave China would be worse off still because of the brain drain. “Equalizing opportunity for the few,” Miller maintained, “may diminish opportunities for the many” (Miller 2005, p. 198).

Without doubt, the economic gap between Hong Kong and Mainland has been significantly narrowed, especially if we look at the Mainlanders permitted to live in cities. But Mainlanders, irrespective of their socioeconomic profiles, may continue to appeal to the idea of elimination of effects of luck in defending their case of seeking entry into Hong Kong. The reasons are twofold. First, those who are well-off may argue that despite the economic gain they managed to acquire in Mainland, they continue to suffer in at least one important aspect which is unique to Mainlanders but never to people of Hong Kong—the duty to comply with the coercive population control policy or the denial of the right to reproduce. As mentioned before, when asked why they want to come to Hong Kong to deliver, the most important reason cited by the Mainland mothers is “to circumvent China’s birth control policy (i.e., the one-child policy)” (*The Report*, 3.17, p. 39). To Mainlanders, the border separating them from Hong Kong may no longer be a

barrier against economic advancement; the border control that imposed on them jointly by the Hong Kong and the Mainland government is still something many of them want to challenge in search for social and political freedom. It is certainly desirable that the economic gap is being bridged, but it can never make up for the social and political gaps that have not yet been bridged. As long as there are real differences between Hong Kong and Mainland in terms of, for example, reproductive freedom, not to mention other civil and political rights, border control would continue to be considered as an unjust arrangement blocking Mainlanders from searching for a minimally decent system with genuine respect of fundamental human rights.

Second, the objection against admitting middle-class Mainland babies (and their families) cuts both ways. While it makes perfect sense that those who can afford to deliver in Hong Kong (especially those who deliver in private hospitals) are the least “qualified” group of Mainlanders, we are obliged to admit, if we consistently apply the reasoning of the egalitarian liberals introduced above, we may need to agree that we have stronger moral obligation to admit those Mainland mothers who can neither afford to deliver in a decent hospital in Mainland nor manage to escape from the potentially inhumane enforcement of population control policy by village officials. In other words, this second objection is not against Mainland mothers as such; it is on the one hand an objection against the admission of babies born to middle-class mothers (and families), on the other it is a reminder of our obligation to help the worse off who suffered most from undeserved bad luck.

To reiterate, insiders’ right to exclude cease to be an unconditional and compelling one considering the fact that borders and border control are important sources of unjust distribution of resources. However, we need to note that insiders’ substantial setback is not automatically translated into outsiders’ total victory. It is because the need to reduce effects of luck or undeserved inequalities would only call for insiders’ *limited obligation to admit* but without affirming outsiders’ *unconditional right to enter*. The obligation to admit is bound to be a limited one because there should be a limit beyond which a country could not be asked to admit more immigrants. What I mean is certainly not a political limit. Instead, it is a limit *inherent* from the liberal ideal of reducing inequalities and promoting opportunities. As long as the number of immigrants trying to get in is so big that the originally safe, efficient, and fair system would fail to function, the incoming population would not have much to gain and the liberal ideal of admitting and helping the worse off would then be defeated.

Border Control as Preservation of Integrity and Cultural Distinctiveness of the Community

In the above, I have reviewed two arguments in support of the rejection of Mainlanders: one appealing to consequential considerations; another relying on the freedom of association and the right to exclude. Both of them are subject to

more or less the same charge—*lack of impartiality*. The consequential defense is criticized mainly for its biased calculation of utilities which take into account only the negative utilities of admitting outsiders without fair assessment of the positive utilities that could be brought about by immigrants. Those who defend stringent border control in virtue of insiders' freedom of association analogous to that among family members or club members is problematic because they are ignorant of the harm and extreme inequalities inherently created by the very existence of borders and sustained by border control. Now let us turn to a third defense of insiders' right to exclude and their discretion to impose border control which is committed to avoid any naked bias against outsiders. This line of defense can aptly be described as communitarian in two respects: (i) it rejects the individualistic idea that the rights, freedom, and opportunities of individual immigrants are the only things that matter; (ii) what it tries to defend is the integrity and viability of the community rather than the physical border. No one would deny the importance of equal rights and fair opportunities. However, the communitarians contend that the value and significance of state membership, no matter it is naturally endowed or artificially acquired (e.g., through naturalization), is that members can identify with a distinct and stable community, form an intimate kind of bonding and attachment with it and develop a strong commitment to fellow members.

As argued by Michael Walzer, distinctiveness of any groups or communities could only be created and sustained when some kind of "closure" is permitted and the state is given "authority to make its own admissions policy, to control and sometimes to restrain the flow of immigrants" (Walzer 1983, p. 239). His reasoning is that insiders should be given sufficient time and discretion to define and to consolidate the shape of the community, and the power to control the entry of outsiders who may alter significantly the shape that is emerging. Otherwise, it is possible that "there could not be communities of character, historically stable, ongoing associations of men and women with some special commitment to one another and some special sense of their common life" (Walzer 1983, p. 255). By distinctiveness, David Miller was referring to the "common public culture" (Miller 2005, p. 199) distinctive to the community concerned that those insiders may want to defend. He argued that people of any community have a legitimate interest in preserving their public culture which is constituted by cultural values, political values, religious beliefs, languages, and cultural heritage. And restriction of immigration would be justifiable if it is necessary for maintaining the "cultural continuity over time, so that [insiders] can see themselves as the bearers of an identifiable cultural tradition that stretches backward historically" (Miller 2005, p. 200). Communitarians have a good reason to believe that their defense of border control is *impartial* because control is not meant to protect the established interests of particular group of insiders at the expense of potential immigrants but is necessary for preserving the distinctiveness, common public culture, and cultural continuity of any community that people may want to join. In other words, even potential immigrants would agree to the general principle that flow of immigrants should be limited and at the discretion of insiders if they find it important that the country they want to join or to stay is one that has a distinctive culture and tradition with which

they can share and identify. If there is a country almost anybody may freely come and go, the communitarians may wonder if anybody would call it home; even if it is a place people prefer to stay, it would not be a place where people can develop strong bonding and attachment.

Let us grant that a country with cultural character, tradition, and continuity could not be a country without borders and control of population flow, especially the incoming population. But the kind and degree of border control we need to enforce in virtue of this cultural consideration are still not clear. Do we need to be highly selective and to admit only those immigrants who already share a great deal of our public culture? It depends on the following three considerations:

1. Between a narrow and a broad understanding of public culture:

If we adopt a narrow understanding of public culture by limiting the cultural elements constitutive of the public character of the community to the values, language, religion, morality, and habits that are recognized and treasured by the mainstream or the majority, we would probably come to the conclusion that most immigrants are different from the public culture and we should think twice before admitting them. However, public culture, if understood broadly, may include a wider set of values, a diversity of languages, religious beliefs, moral outlook, and customs that are actively practiced in a country. Some would even argue that liberalism, in particular its concern with toleration and respect of diversity, is in fact an integral part of our public culture (Carens 1987, p. 345). The idea of public culture could therefore be seen as unifying concept (Miller 2005, p. 201) that binds the culturally diverse members in a society together, rather than as a divisive language to magnify the differences between insiders and outsiders. If so understood, cultural consideration need not be a critical concern in the admission of immigrants.

2. Between culture as a decisive criterion and culture as a selection criterion:

Even if we adopt a narrow understanding of culture and start with the premise that there are significant differences between the public culture of the host country and that of the potential immigrants, there are at least **two strategies** we may follow in addressing those differences. The first strategy is that the (narrowly defined) culture is used as decisive criteria so that all immigrants from cultures different from it will be automatically vetoed. Appeal to cultural consideration is meant to reject those alien to our culture. The second strategy is that culture is used as selection criteria to assess the cultural distance between potential immigrants and the mainstream society. The primary aim is not to reject others or to make our society more homogenous but to give priority to those close to us. Assuming that there are more outsiders (from less developed countries) than we could possibly admit, we may, for the practical concern of social integration, want to give the quota to those who are culturally close to us, without having any negative judgment over differences or those who are different from us.

3. **Between preservation of the prevailing culture and preservation of the dominant status of the prevailing culture:**

There is a saying that we sometimes need to preserve the prevailing culture by rejecting immigrants who would pose a threat to it. However, we need to clarify which of the two possible preservations we are talking about: (i) to preserve the prevailing culture in the sense of protecting it from attack, erosion, or marginalization; (ii) to preserve it in the sense of preventing others from competing with it. The latter is actually to preserve the dominant status of the prevailing culture and would therefore tend to reject all potential immigrants who look different. Whereas the former is only to make sure that the prevailing culture is viable and able to coexist peacefully with other cultures brought by immigrants. The policy implication is that we only need to reject those who are illiberal and explicitly hostile to the prevailing culture, rather than rejecting all those who are just different, unless we do not favor cultural diversity and competition.

With the above distinctions in mind, when we try to invoke cultural considerations in defending our border, we need to remind ourselves the following: (i) whether our conception of culture is so narrow that some cultural differences are artificially created and magnified; (ii) we may have special attachment to those who share the same culture but without having the intention to reject all those who are culturally different from us; (iii) we may only need to reject those immigrants whose culture is obviously hostile to us but at the same time welcome the existence and even competition of other cultures.

The final issue is how the above cultural considerations would affect our judgment and policy over the admission or rejection of Mainlanders. First of all, on the cultural side, no matter it is understood narrowly or broadly, it is hard to argue that there are significant cultural differences between Hong Kong people and Mainlanders. They may differ from us in the more trivial matters such as manners, etiquettes, eating habits, or dialects. But, on the fundamental issues, we have pretty strong consensus: we have no dispute over the use of Chinese language as an official language; we have more or less the same moral outlook; we do not want any official religion; we share the same history, etc. As a result, it is not a wise strategy to appeal to cultural considerations in trying to reject immigrants from the Mainland. Just the opposite, considering that there are more people who want to get admitted than we could accommodate, we have a good reason, in virtue of cultural consideration, to give priority to Mainlanders but not to, for example, domestic helpers from other Asian countries. Other things being equal, that is, assuming that they suffer equally from the effects of luck, we may prefer admitting Mainlanders. In so doing, we only see cultural similarity as an added advantage but without taking cultural differences as something negative. If one day less and less Mainlanders want to come, we may give the priority to domestic helpers as long as we believe that though they are “different” from us the culture they bring in would not undermine our prevailing culture.

Perhaps the real worry of Hong Kong people in admitting Mainlanders is that in spite of our common cultural background, there might be significant differences

between us in political values and orientations. The figures as revealed in Robert Chung's surveys on the political values and attitudes of new arrivals from Mainland are instructive (Chung 2004). By compiling the data collected in 77 tracking surveys under the Public Opinion Program of University of Hong Kong conducted from 2002 to 2003, he compared the political attitudes of three groups of people: (i) the new arrivals (new immigrants born in China and have stayed in Hong Kong for less than 7 years); (ii) the China born (born in China but have lived in Hong Kong for more than 7 years); and (iii) Hong Kong born. He tried to capture the respondents' political inclinations by testing their trust in the government, their satisfaction with the performance of the government, and how they evaluate some of the most well-known Chinese political leaders. The results are as follows (Table 6.4):

Three major observations can be made:

1. Except the evaluation of Deng Xiaoping, there were significant differences between the new arrivals (figures shown in the first column) and the Hong Kong born (figures shown in the third column) in their political values and inclinations.
2. The Hong Kong born tended to be more critical and skeptical toward the government, whereas the new immigrants were clearly more sympathetic to the authority. For instance, among the new arrivals only 19.8 % of them were not satisfied with the performance of the Hong Kong government while 47.5 % of the Hong Kong born who were not satisfied. It was found that 30.7 % of the Hong Kong born did not trust the Beijing government but the corresponding figure of new arrivals was only 16.9 %.

Table 6.4 The political views of three categories of Hong Kong people

	New arrivals (%)	China born (%)	Hong Kong born (%)
<i>Question 1: Trust in the HKSAR Government</i>			
Trust	56.5	46	33.7
Do not trust	14.8	23.1	34.1
<i>Question 2: Trust in the Beijing Central Government</i>			
Trust	47.9	46.8	34.3
Do not trust	16.9	21.2	30.7
<i>Question 3: Satisfaction with the overall performance of the SAR Government</i>			
Satisfied	35.4	25.9	20.3
Not satisfied	19.8	38	47.5
<i>Question 4: Would you say Deng Xiaoping has accrued more merits or demerits in the development of China?</i>			
More merits	67.3	68.3	69.7
More demerits	4.5	3.7	3.5
<i>Question 5: Would you say Mao Zedong has accrued more merits or demerits in the development of China?</i>			
More merits	34.7	26.8	25.1
More demerits	18.6	26.1	28.2

3. The most interesting observation is that in almost all five aspects the inclinations of the China born have become closer to that of the Hong Kong born than the new arrivals. For instance, 26.8 % of the China born agreed that Chairman Mao accrued more merits than demerits. It was close to the figure of 25.1 % for Hong Kong born rather than the figure of 34.7 % for the new arrivals. Similarly, the percentage of China born who were satisfied with the performance of the HKSAR government (25.9 %) was much closer to that of the Hong Kong born (20.3 %) than that of the new arrivals (35.4 %).

Two very different conclusions can be drawn from the above. The pessimists would probably conclude that there are substantial differences in political values between Hong Kong people and Mainlanders. Admission of Mainlanders who are generally conservative and tolerant of authoritarian type of governing, they worry, would undermine the core values of Hong Kong, in particular the value of freedom, checks and balance, and accountability. However, the optimists may have a different reading of the above figures. Based on the marked changes in inclinations of the China born they can defend that given sufficient time and confidence, new immigrants may eventually come to appreciate and acquire the political values and attitudes of the host country. Cultural impact of immigration is therefore two-way rather than one-way. While it is entirely possible that prevailing culture will be undermined by immigrants, it is equally possible that the value system of immigrants is transformed by the prevailing culture. That is probably why Scheffler was of the view that it is not reasonable to try to “insulate either the host country or the new immigrants against cultural change” (Scheffler 2007, p. 102). Instead of excluding Mainlanders believed to have different political inclinations, if we are confident enough, we may aim at making them understand, appreciate, and pick up our political values upon their arrival.

Conclusion

In the above, I have assessed a number of arguments that were put forward to support or to oppose the admission of immigrants. Those arguments were discussed and evaluated with reference to the recent case of Mainland mothers giving birth in Hong Kong. By way of conclusion, let me reiterate two important points regarding moral evaluation of policy options. First, moral evaluation is not simply to find out where we should stand but also on what moral basis we support or oppose an option. As illustrated above, we may appeal to more than one moral consideration in defending a policy in support of the admission or rejection of Mainlanders.¹⁹ The point of moral evaluation is not primarily to question whether we should admit or reject but more importantly to assess the cogency and adequacy of the

¹⁹For further discussion of the plurality of moral considerations and the ways to handle such plurality of moral considerations, see Yu’s chapter in this book, pp. 205–208.

moral considerations underlying our admission or rejection policy. Second, in light of the plurality of moral considerations, a legitimate and sustainable population policy may need to address the concerns of the utilitarian, the liberal, and the communitarian regarding the number of immigrants to be admitted, the pace, as well as the composition of the quota. For instance, even if we share the liberal ideal of eliminating the effects of luck, we may not necessarily want to maximize this ideal by opening up the border or admitting as many immigrants (from less developed countries) as possible until the society exhausts her capacity. We may respond to the call for reduction of inequalities created by border by, for example, allocating a majority of the admission quota to the worse off while reserving a minority of the quota to the well-off or the well-educated as a response to the utilitarian concern. And among the quota reserved for the worse off, even though we care about *our* culture or cultural distinctiveness, we need not filter out at first those who are from a “different” culture, we may instead be more open and confident and let those who have a different cultural background come to mix with us, to pick up our culture, or to participate in creating *our* common culture.

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Chapter 7

From the Case of Sex Discrimination to the Ideas of Equality and Equal Opportunities

Man Yee Karen Lee

Abstract *Equal Opportunities Commission v Director of Education* marks an important milestone in the history of Hong Kong's anti-discrimination movement. Prompted by a decades-old public policy allocating secondary school places to primary six students it believed to be discriminatory against girls, the Equal Opportunities Commission (EOC) successfully challenged the now defunct government practice under the Sex Discrimination Ordinance (SDO). Based on this symbolic and educational decision, this chapter will begin by summarising the fact of the case, followed by an analysis of the claims in question and the meaning of sex discrimination. It will then discuss the value of equality, including its various rationales including “formal equality”, “treating like alike”, and “equal opportunities”. It will argue that, despite its universal appeal, equality as a policy justification can be both elusive and politically sensitive. Citing examples from Hong Kong and overseas jurisdictions, this chapter argues that an apparently benign anti-discrimination measure can in some cases generate difficult ethical dilemmas and controversies. Drawing on the plights of ethnic minority students in Hong Kong, this chapter will end with an observation that substantive equality requires proactive measures to help those whose existing disadvantages prevent them from competing fairly in society.

Introduction

Equal Opportunities Commission v Director of Education (the EOC case, 2001), initiated by the Equal Opportunities Commission (EOC) set up in 1996 to promote equal opportunities, is an important milestone in Hong Kong's anti-discrimination movement. The case arose from a long-standing government practice allocating

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secondary school places to primary six students that was said to have favoured boys at the expense of girls. That prompted the EOC to lodge a judicial review against the Director of Education pursuant to the Sex Discrimination Ordinance (SDO). It succeeded. This decision was both symbolic and educational. In ruling that the policy where all primary six students were assigned to different scoring regimes on the basis of their sex—that potentially affected their chances in entering the secondary schools of their choice—as sex discrimination, the court helped elucidate the concept of equality as well as catalysed a major policy reform concerning all students in Hong Kong.

In this chapter, I will begin by summarising the fact of the *EOC* case, followed by an analysis of the claims in question and the meaning of sex discrimination. I will then discuss more broadly the idea of equality, including its various rationales including “formal equality”, “treating like alike”, and “equal opportunities”. I will argue that, despite its universal appeal, equality as a policy justification can be both elusive and politically sensitive. As examples from Hong Kong and overseas jurisdictions will show, even a purportedly benign anti-discrimination measure can in some cases generate difficult ethical dilemmas and controversies. In the light of the challenges facing ethnic minority students in Hong Kong, this chapter will end with an observation that substantive equality requires proactive measures to help those whose existing disadvantages prevent them from competing fairly in society. For the purposes of this chapter, the terms “sex” and “gender” will be used interchangeably, and in some cases, “he” and “his” may be used in referring to both sexes.

The Background

The Director of Education (the Director), working under the remit of the Education Ordinance, has been responsible for allocating secondary school places to all primary school leavers in Hong Kong. Before the disputed matter first came to light in 1998, the allocation mechanism, called the Secondary School Places Allocation System (“the SSPA system”), had been in place since 1978. The rationale behind this system lay mainly in the benefits of promoting gender balance in coeducational schools and of maintaining a merit-based regime in which the most academically qualified students were allowed to go to the more elite secondary schools. At the same time, the Director took notice of the so-called late-bloomer effect that according to some overseas studies, boys were understood to be maturing at a slower pace than girls. According to this theory, girls in general do better than boys at the earlier stage of their schooling. Therefore, in order to maintain a balanced ratio between the number of boys and girls in each coeducational secondary school, the Director had adopted a measure comprising a scaling mechanism, a banding mechanism, and a quota system all based on gender. The following shows how the system worked.

First, all students were subject to grading. In the case of primary six students making the transition to secondary schools, a scaling mechanism was used to

determine each student's individual SSPA score in comparison with his or her cohorts. Each SSPA score comprises two components: first, the marks students had achieved through a series of internal assessments (IAs) during the last two years of primary school for determining their academic merits under the SSPA system; second, the scores individual primary schools gained through the same students' participation in the Academic Aptitude Test (AAT), previously held to test the verbal and numerical reasoning of all primary six students in Hong Kong. The AAT had been understood to benefit boys, though it transpired later that only the top 30 % boys actually did better compared to girls. Still, based on an assumption that girls often outperform boys in the IAs due to the "late-bloomer" effect, the Director introduced a gender factor into the scaling mechanism. In practice, it meant deducting marks from the scaled IA scores of those girls attending coeducational schools and adding marks to those boys attending the same schools.

Alongside the above "gendered" scaling regime, a banding mechanism was introduced to place students into one of the three bands according to their final SSPA scores, with Band One being the highest. The band of each student would in turn determine the band of the secondary school to which a student would be assigned. It was consistent with the government policy that the stronger the academic ability of the student, the higher the band of the school to which he will go. Nevertheless, operating under the "late-bloomer" influence, this banding system subjected male and female students to different band-cutting scores. As a result, a boy would be eligible to enter a school of a particular band albeit with a score comparably lower than that of another girl in his school. For example, to get into a Band One school, a girl might need to have a final SSPA score of 80 %, while a boy in the same school might achieve the same with 75 %.

Finally, there was a quota system. According to the Education Department, the above scaling and banding measures helped provide students a balanced education by exposing them to peers of the same as well as the other sex. Hence, to ensure the presence of approximately the same proportion of boys and girls in any coeducational settings, the Director administered a gender quota limiting the number of male and female students to be admitted to a certain school. As it turned out, an otherwise qualified student might, because of his sex, be denied entry to a school of his first choice because the quota for a particular sex at that school had already been filled. It was on the basis of the combined effects of the above measures that the EOC launched a judicial review against the Director, alleging that the SSPA system operated to discriminate against individual students on the basis of their sex and was unlawful under the SDO.

The Claim of Sex Discrimination

The EOC took issue with the SSPA system in treating girls less favourably on the ground of sex. In an investigation report released before the legal action commenced, the EOC pointed out that, under the banding mechanism, girls generally

needed a higher score to make it to a certain band than boys did. Because the band to which a student belonged basically determined the band of the school he would be placed in, the policy resulted in making fewer girls enter the school of their first choice, while their male counterparts, thanks to the lower band-cutting scores set for them, had a better chance of going to a school they favoured most. Further, the EOC claimed that both the gendered scaling mechanism, which deducted girls' IA scores to be added to that of the boys' under the SSPA system, and the gender quota for school admissions were policies that unfairly harmed the interest of girls and therefore discriminatory under s25(c)(ii) of the SDO. Looking at the system as a whole, the less favourable treatment accorded to girls was that as a group they stood a lesser chance in getting into a school of their choice.

In defence, the Director argued that the impugned measures, while gender-based, when taken together helped neutralise the advantage that girls allegedly have over boys in gaining scores in the IAs, i.e., females in general mature earlier and hence perform better academically than males at the age of puberty. Therefore, instead of treating one sex more favourably than the other, those policies sought to advance equality between boys and girls, and did not constitute direct discrimination. Alternatively, even if the gender-based elements in the SSPA system were discriminatory, the Director contended that they were nevertheless justifiable under s48(a) of the SDO which provides that an otherwise discriminatory act will be legal if it is "reasonably intended to ensure that persons of a particular sex ... have equal opportunities with other persons" in the relevant circumstances. In other words, the mechanism was said to be comparable to the so-called affirmative action practised in many countries which allows members of certain minority groups better access to employment and education.

The court was not convinced. First of all, it found that those gender-based measures amounted to direct discrimination under s5 of the SDO as they treated individual students differently on the basis of sex. Regarding the exception under s48, the court acknowledged the legislative intent on qualifying the right to sex equality but said any such restrictions must be "reasonably intended" to bring out "equality of opportunity". On the question whether the SSPA regime was reasonable according to this qualification, the court cited a number of local and foreign authorities which adopted a "proportionality test" in assessing the constitutionality of government acts. This test asks three questions: "Whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective" (the *EOC* case, para 123).

In considering the above questions, the court made the following observations. First, no international consensus emerged regarding the purported developmental differences between boys and girls, not least the fact that the Director had failed to offer any specific research to support the late-bloomer theory. In fact, the EOC in its earlier report had already disproved it as out of date, citing expert views that

while girls acquire speech and cognitive skills earlier than boys, their general differences in academic achievements are due primarily to the educational settings and other factors unrelated to sex (EOC 1999, Chap. 4, paras 24–25). If inherent differences do exist, current research in the USA suggests that boys and girls develop intellectually in different areas rather than at different rates. Second, evidence showed that despite the gender-based measures, girls in general consistently outperformed boys in both IAs and AATs except for the latter's top 30 %. In other words, the only beneficiaries of the policy—purported to be benefiting boys as a group—were the said top 30 % male elites. As such, the court found that as a long-term policy, the SSPA system was “entirely disproportionate”, given its detrimental effects on girls at the service of a minority of boys (the *EOC* case, para 129).

Another question arose from the Director's assertion that given the opportunity, boys would be able to catch up with girls in their senior secondary school years. But as the court observed, not only was “clear and convincing evidence” lacking in support of this, but facts also proved otherwise. According to statistics, girls have consistently maintained their better overall performance in the two now defunct public examinations, i.e., HKCEE (Certificate of Education Examination) and HKALE (Advanced Level Examination), and up to university level. As for the purported benefits of gender quotas, the court also saw no persuasive argument in proving that their existence could ensure that “coeducation, as a system, works to best effect” in the light of their discriminatory impacts on students.

The above judicial analysis revealed that the purported rationale of the SSPA system stood on inconclusive, if not shaky grounds. Its lack of tenability loomed larger in the light of, in the court's words, “the institutionalised unfairness” inherent in the gender-based mechanism which, on an indefinite basis, perpetuated an advantage “in favour of one gender at the intended expense of the other”. The resulting substantial injustice was all the more apparent when one considers that freedom from discrimination is a fundamental right of each individual regardless of group affiliations and that numerous students would have their academic careers disadvantaged simply because of their sex (the *EOC* case, paras 79–80). Hence, the court ruled that the Director had failed to demonstrate that the direct discriminatory effects of the SSPA system were justified under s48. Applying the proportionality test, the court found that the measures taken were irrational and disproportionate in achieving the purported objectives and were unconstitutional.

In so ruling, the court noted the Director's concern about a possible claim of indirect discrimination from boys because under a gender-neutral system, a majority of them would be scored down by girls, thus having a lower chance to get into the better secondary schools. Nevertheless, the court said that it was up to the Director to take all reasonable remedial actions “short of entrenched discrimination, in favour of boys, to ensure that boys are given equal opportunities with girls” (the *EOC* case, para 141). At the end, the crux of the matter lay in the “institutionalised discrimination” that the SSPA system had created and the Director's failure to substantiate the “late-bloomer” argument with sound evidence.

What Is Discrimination in the Context of Sex?

The controversies surrounding this case help illustrate the fundamental concepts and elements underlying sex discrimination. Under the SDO, sex discrimination can be committed either directly or indirectly. Direct discrimination occurs when, for example, as between two persons A and B, on the ground of B's sex, A treats B less favourably than he treats or would treat a person of B's opposite sex. In the context of the *EOC* case, the SSPA system was held to have directly discriminated against predominantly female students by treating them less favourably than male students because of their sex. Other examples of possible direct sex discrimination include hiring only male waiters in high-end and well-paid restaurants (Neumark et al. 1996) and, arguably perhaps, providing women-only train compartments as already happening in countries such as Japan, India, and Indonesia and as proposed by some women groups in Hong Kong (MTR Corporation, Jan 2011).

Indirect discrimination, on the other hand, is a subtler concept. In the context of sex discrimination as between A and B, it may arise when A applies to B a requirement that A applies or would apply equally to a person of B's opposite sex; but the effect is that the proportion of persons of B's sex who can comply with that requirement is considerably smaller than that of persons of B's opposite sex. Whether there is discrimination depends on first, whether A can show that the requirement imposed is justifiable irrespective of the sex of the person to whom it is applied, and second, whether such requirement is to B's detriment because B cannot comply with it. A possible example is where an employer required candidates for a purely clerical position to be at least five-foot-six tall. This could be an act of indirect discrimination if first, substantially fewer women than men qualified for this requirement; second, the employer failed to justify such requirement as "gender-blind"; and that many women suffered for failing to comply with it. Of course, some occupations do demand particular attributes of their applicants, and therefore, context is important. Under the SDO, as in the case of other anti-discrimination provisions in Hong Kong, "genuine occupational qualification" can be a justification when some employment conditions apparently prevent certain individuals or groups from being eligible. For example, a female may not be fit for a job that requires constant physical contact with male coworkers (SDO, s 12(2)).

The Nature of Equality

Equality as "Treating like Alike"?

While there seems to be a formula in determining whether there is discrimination under a specific law, what amounts to "equality" in general does not often yield a forthright answer. Despite its apparent universality, the value of equality can be understood in different ways in different contexts. First of all, the modern idea of

gender equality is largely based on Aristotle's classical theory of "treating like alike", i.e., treating people in similar situations similarly (Aristotle 1925, V. 3 II3Ia–II3Ib).¹ At a time when slavery was socially accepted, Aristotle believed that human beings are essentially born unlike, and hence, equality demands that only people who are of the same classification should be treated in the same way. This so-called formal concept of equality still influences how most people see justice today (Lee 2010, pp 79, 83). In the context of sex equality, men and women are deemed alike and hence should be treated equally. Indeed, nowadays, few would object that men and women should receive equal pay for doing the same job, in the same way all Hong Kong citizens attaining the age of 65 should be entitled to elderly discounts in public transport regardless of their sex.

The "Levelling-Down" Objection of Formal Equality

Despite its apparent objectivity, the idea of "treating like alike" can be problematic. In practice, it may translate into a policy that treats everyone the same. Yet, this does not necessarily accord with the essence of equality, i.e., respecting every person with equal worth. In particular, its appearance of equality is immediately called into question when one considers the pitfalls of formal equality. It is because merely treating everyone the same has potential to lead to the "levelling down" of the well-being of all (Parfit 1998, p. 10). In extreme cases, it may result in an absurd situation where both the privileged and underprivileged groups are treated equally bad.

A notorious example in American history is the 1971 case of *Palmer v Thompson*. At a time when society was still steeped in racial segregations, a local government decided to close all formerly white-only public swimming pools after the practice had been ruled discriminatory by a lower court. Agitated by such a policy, the black litigants sued all the way to the Supreme Court arguing that this apparently "equal treatment" in fact perpetuated deep-seated inequalities against black citizens. In an infamous judgment, the court dismissed the appeal, holding that there was no discrimination because everyone—black or white—was barred from the pools. This case aptly illustrates that focusing on consistent treatment alone sometimes risks overlooking the substantive values underlying equality, which is according every human being with equal dignity. The ethical dilemma that arose was obvious in another famous case. In 2009, the Supreme Court heard similar grievances from a group of litigants claiming discrimination. The difference was, this time, those who claimed to have lost out were white firemen who failed to get promoted because the local authority had decided to abandon an otherwise properly administered open promotion exercise, after seeing no black

¹For a related discussion of the formal concept of justice and the Aristotelian idea of "treating equals equally", see Tsang's chapter in this book, pp. 168–170.

or Hispanic candidates pass the test and being threatened with litigations for that (*Ricci v DeStefano*). As a result, both white and ethnic minority firemen were equally worse off. The above examples show that an apparently egalitarian policy not grounded in substantial values is prone to distort equality and, often, to the detriment of minority groups because of their existing disadvantages in society.

The Politics of Treating like Alike

A more fundamental objection to “treating like alike” lies in the fact that human beings are similar in some aspects while significantly different in many others (Westen 1982, p. 544). For example, in general everyone shares biological functions such as the five senses, digestion, and respiration as a member of the human species; at the same time, individuals can be very different to varying extents, in terms of height, weight, eyesight, and skin colour. Therefore, it may be more accurate to say that people are both alike and unlike. Because not all personal characteristics are relevant for the purposes of equal treatment in all situations, deciding which one matters and in which circumstance rarely yields a one-size-fits-all answer (Fredman 2002, p. 7). For example, while every Hong Kong permanent resident over the age of 18 is entitled to register as voter, not every one of them can apply to become a police officer. Those who are colour-blind, or mentally or physically disabled, to name a few, are not qualified to join the police force. We generally do not call it discrimination. It is because while being colour-blind or disabled should not be a distinguishing factor for the purposes of equal treatment in most occasions, such distinction is, however, relevant to the consideration of whether one is suitable to become a police officer.

The crux of the matter, therefore, hinges on what amounts to permissible differential treatment as opposed to unjustifiable discrimination. As mentioned, very few would say it is discriminatory to disqualify the colour-blinded from joining the police force. History, however, shows that what amounts to discrimination today was once acceptable in history. Past discriminations against some historically disadvantaged groups are a case in point. In the USA, for a long time, society used to justify less favourable treatments for women and blacks on the grounds that they were not the equals of men and whites (Fredman 2002, p. 5). In particular, racial segregation was rife and blacks were barred from attending the same schools or sharing the same public facilities with whites. The court once played a part in perpetuating such blatant discrimination. In the infamous 1896 case of *Plessy v Ferguson*, the Supreme Court held that providing blacks and whites with separate railway carriages did not violate equality, as long as both groups were equally entitled to travel in their designated compartments. At the time, the court was aware of the deeply racist white supremacy this policy helped reinforce. But the 8:1 majority distinguished between political and social equality, opining that while blacks and whites deserved equal political rights, they were, however, socially unequal. Therefore, “[i]f one race be inferior to the other socially, the

Constitution of the United States cannot put them on the same plane” (*Plessy v Ferguson*, p. 552). This “separate but equal” doctrine had subsisted for the next five decades, until the same court finally held it unconstitutional in the landmark case of *Brown v Board of Education* in 1954. At the end, one may argue that the decision on who is alike for equal treatment is sometimes a political and arbitrary one, “reflecting the balance of opinion in society at a particular time” (Fredman 2002, p. 67).

The Elusiveness of “Equality”

However “universal” the value of equality appears to be, what it entails in practice remains contextual. As mentioned, what is seen as discrimination today could once pass as normal practice. For example, there was little equality to speak of in the classical times. Plato, Aristotle’s teacher, also believed that men were born unequal. Hence, slavery was justifiable because slaves were intellectually inferior to their masters (Vlastos 1941, pp. 289–292). Similarly, women were once considered to be less rational and capable than men. For a long time, women were not allowed to own property. Even in the USA, they were not allowed to vote until 1920, when the 19th Amendment to the US Constitution was passed, which states “The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex”.

As civilisation progressed, many old prejudices have become a thing of the past. Today, sex and race are no longer regarded as legitimate reasons to distinguish people for the purposes of equal treatment.² But the difficulties in deciding which groups deserve the law’s attention have not completely gone away. Not only is who deserve to be protected sometimes a political decision, what counts as a “discriminatory” practice is also subject to political realities. In Hong Kong, the controversy surrounding the Race Discrimination Bill—now Race Discrimination Ordinance—is a case in point. During public consultations over the legislative proposal in 2009, disputes arose as to whether new immigrants from Mainland China should be protected under the new law. Public opinions were split, particularly over the fact that they are of the same “race” as fellow Hong Kong Chinese. But more importantly, public concern largely turned on the social implications such a measure may bring to society, for example, over employment and education. Public pressure was such that including Mainland new immigrants in the bill risked a political backlash. At the end, the government, while acknowledging that

²Yung (Chap. 1 of this book) points out that some social values are relative and vary with time, particularly social values that rest on the social, economic, political, and technological conditions under which a particular society is situated. As the societal conditions change, this category of social values also changes, affecting our views on appropriate treatment of people of different sex and race.

Mainland immigrants as a group are vulnerable to discrimination, decided to exclude them from the bill on the grounds that such discrimination is “social” rather than “racial” (Hong Kong Human Rights Commission 2009, Part B).

To a certain extent, what is equality is sometimes in the eye of the beholder. Even a supposedly “benign” public policy can, in some cases, be regarded as “discriminatory” by an insider. The controversies across Europe over Muslim women’s donning of veils are a case in point. The French government, for example, has banned women from wearing face veils in public since April 2011, on grounds that it would help free women from oppression and achieve sex equality (*BBC News*, 11 Apr 2011). However, for Muslim women who believe in the spiritual values of the veils and the protection they offer, the policy is religious discrimination in disguise (Lee 2008, pp. 308–309). At the end, questions over who should be protected under anti-discrimination law, and to what extent, often entail something more than an objective assessment.

The “Inequality” of Affirmative Action

The propensity of being politicised does not necessarily render anti-discrimination measures mere window-dressing. In fact, many governments have adopted policies that emphasise “equal result” instead of “equal treatment”. As the court in the *EOC* case affirmed, equality does not mean that every person must receive identical treatment (the *EOC* case, para 6). What concerns the law is whether one is being treated less favourably because of certain irrelevant personal distinction such as sex and race.

Affirmative action is one of those measures seeking to achieve equality by giving extra assistance to some historically disadvantaged groups. For those who take equality as a “substantive” value, affirmative action embodies fairness by acknowledging the pre-existing disadvantages of particular groups who are doomed to lose out from an unequal starting point. For example, ethnic minority children from poor and illiterate family backgrounds are often trapped in a cycle of intergenerational poverty that hampers their upward social mobility. As the late American philosopher Ronald Dworkin observed, “The difference between a general racial classification that causes further disadvantages to those who have suffered from prejudice, and a classification framed to help them, is morally significant” (Dworkin 1986, p. 314). It is on this basis universities that practise affirmative action allow a certain proportion of ethnic minority applicants, who otherwise would not have made it, to enrol in degree programmes under relatively lower thresholds.

This approach not only avoids the shortcomings of formal equality, but also helps enhance social participation of disadvantaged groups such as women or racial minorities who, due to historical inequalities, have missed out in the competition for resources and remained socially inferior; hence the popularity of affirmative action programmes in the USA through which a certain proportion of

disadvantaged groups have guaranteed access to major public institutions such as education, politics, and civil service (Fredman 2002, p 126). By deliberately imposing gender or race sensitive criteria for the purposes of benefiting members of certain sectors, affirmative action ensures they are fairly represented in privileged positions long dominated by men and whites. Today, apart from the USA, race quotas for university admissions remain widely used in countries with a less prosperous indigenous population such as South Africa, New Zealand, and Malaysia. Yet, despite the laudable goal of tackling underrepresentation of certain minority groups in tertiary education, such policies have been controversial due to the accompanying ethical dilemmas.

A major objection to affirmative action lies in its so-called reverse discriminatory effects (Fredman 2002, pp. 126–130). In this respect, the position of the minority and the majority is “reverse”, such that the latter alleges that because of government policies seeking to benefit the former, they as a group suffer discrimination on the basis of their identity such as sex or race. According to this argument, by giving preferential treatment to certain groups solely because of their “identity”, the government in effect deprives members of all other groups the same opportunity just because of their identity. Such an argument appeared in the *EOC* case. As discussed, the Director of Education somehow regarded the gender-based SSPA system as a form of affirmative action, on the basis that boys as a group were disadvantaged because of the late-bloomer effect. However, not only did the court reject this theory, but it also applied a merit-based approach in denouncing the SSPA system as discriminatory against girls—the alleged dominant group in this context—citing the fact that many of them consistently outperformed boys throughout secondary and university education.³

The alleged reverse discriminatory effect of affirmative action makes it a hotly disputed subject even among those who believe in racial justice in South Africa and the USA—two major countries that have ever practised systemic racial segregation, or apartheid in the former’s context. In South Africa’s University of Cape Town, even black students who benefit from the policy asked, “Are we here because we are black or because we are intelligent?” (*New York Times*, 22 Nov 2010). At the same time, a sociology professor and fellow prisoner with Nelson Mandela for a decade argued that the ideals of non-racialism mean that government should cease using racial benchmarks in evaluating how well a university is doing in maintaining equality (*New York Times*, 22 Nov 2010). The matter gets more complicated when the issue of class comes in. It is because even within the black community, there is a yawning gap between those who have and those who have not. Therefore, middle-class black students who graduated from elite high schools as whites are said to be the major beneficiaries of special university

³Yung (Chap. 1 of this book) highlights that values, including social values, may conflict with each other on a social and policy issue. In the controversy over affirmative action and the case of SSPA system, for example, the value placed on merit and the value placed on giving extra assistance to the disadvantaged may conflict with each other.

quotas, while many of their impoverished black countrymen languish at the bottom of the social ladder. As a result, both the majority of poor black students and a proportion of less well-off white students may stand to lose out under the race-based regime of affirmative action.

Affirmative action is equally, if not more, controversial in the USA (Epstein, 29 Jun 2009). For more than a decade, society has been debating over the constitutionality of affirmative action programmes adopted in many state universities. Under this policy, a certain percentage of university places are reserved for students from underrepresented ethnic groups, including Hispanics, African Americans, and Native Americans, who will receive extra scores for the purposes of admission. But this race-based criterion has been subject to criticisms, in particular from white students who claim they are being discriminated because of their race. Today, a number of states including California and Michigan have banned affirmative action in university admissions. Even in states that maintain the policy, judges are increasingly critical of its initial appeal as a way to achieve racial diversity (*Fisher v University of Texas at Austin*). While it does not suggest an imminent policy change, it signals a tendency towards exploring other race-neutral alternatives that can help students from low socio-economic backgrounds without the appearance of reverse discrimination.

Can Equal Opportunities Create a Level-Playing Field?

In the light of disagreements over public policies that allegedly favour some groups at the expense of others, “equal opportunities” emerged as an alternative with its colour- or gender-blind agenda. It has, indeed, become the mainstream notion of equality today. In theory, this doctrine aims at creating a level-playing field so that every member of society can compete on an equal basis regardless of personal history or background. In practice, it entails, for example, anti-discrimination legislation that prohibits differential treatments on grounds ranging from sex, age, and disability, to sexual orientation and religious and ethnic backgrounds. Hong Kong, following the footsteps, albeit slowly, of the UK that in 1975 passed the Sex Discrimination Act, began to enact anti-discrimination law in 1995. To date, Hong Kong has four anti-discrimination ordinances, covering sex, disability, family status, and race. The first of its kind, the aforementioned SDO aims at, among other things, “promoting equality of opportunity between men and women generally” (SDO, Long Title).

Anti-discrimination law, however, cannot easily address all the ethical dilemmas inherent in equality. A question worth considering is: Can equalising opportunities between people really help achieve equality? In essence, “equal opportunities” means giving all individuals an equal chance to compete and thrive on their merits. It would work perfectly if each of us was born to the same sort of family, received similar upbringing, and endowed with comparable levels of talents. In the reality of “unequal circumstances”, however, a strict adherence to

equal opportunities risks overlooking the very fact that some people are simply unable to compete no matter how “equal” the external environments are (Williams 1967, p 120). Hence, the apparently merit-based recruitment or admission criteria may be mere smokescreens for the underlying “unequal opportunities”. It is because those who missed out on education due to past disadvantages are likely to lag behind (Fredman 2002, p 15). That explains why, in the past, many African Americans seeking even non-skilled employments were doomed to fail in written tests “equally applied to all” (*Griggs et al. v Duke Power Company*).

This casts doubts as to whether opportunities are really equal if the same standard is applied to people “who are unequal because they have been deprived of the opportunity to acquire ‘merit’” (Hepple 1990, p 413). At this juncture, George Orwell’s famous line in his 1945 political satire *Animal Farm* springs to mind: “All animals are equal, but some animals are more equal than others”. As procedurally fair as “equal opportunities” appear to be, it is not a panacea for alleviating inequalities for those individuals whose pre-existing predicament, be it race or sex or whatever, prevents them from reaching the common starting point. Worse, putting them in the same contest as every other may even help perpetuate the embedded inequalities that “equal opportunities” originally intended to avoid (Fredman 2002, pp. 14–15). That may explain why, nearly two decades after the end of apartheid, black students in South Africa’s poorest townships are still struggling to match their white and middle-class black counterparts (*New York Times*, 22 Nov 2010).

Therefore, mere adherence to equal opportunities is insufficient in tackling inequalities. To live up to the spirit of equal opportunities, government should devise ameliorative measures that empower members of disadvantaged groups and make sure they have “a genuinely equal chance of satisfying the criteria for access to a particular social good” (Fredman 2002, p 15; Williams 1967, p 126). They include education and training programmes, and family-friendly measures that cater to the needs of people who, because of their pre-existing limitations, have failed to get access to resources that apparently are open to all. In the Hong Kong context, the plight facing many ethnic minority students is a case in point.

Creating Equal Opportunities for Ethnic Minority Students in Hong Kong

Thanks to the *EOC* case, the gender-based secondary school allocation regime was eventually laid to rest. But there is no room for complacency. Society is still grappling with inequality issues concerning another group of students. For some years, members of the ethnic minority communities have been airing their grievances over education and employment due to their limited Chinese language skills. The problem partly lies in the quality of Chinese education that they receive, whether they are studying in mainstream or designated schools for ethnic minorities. For those who desired to integrate with local students or were unable to get into the designated schools, they found themselves attending mainstream schools with

little Chinese language support. For those who study in the designated schools, their Chinese curriculum is often at a more rudimentary level compared to that of their local counterparts. Either situation results in disparities when these students are competing for further education or employment opportunities in Hong Kong. Because Chinese competency is a prerequisite for admissions to local universities and the civil service, ethnic minority secondary students who failed to obtain a minimum Chinese score in public examinations often find themselves in limbo. As a result, on average, only a handful of them can find a place in publicly funded local universities. According to Lam Woon-kwong, EOC's former chairperson, in 2011, only 17 non-Chinese-speaking local students who sat the HKALE gained admission offers through the Joint University Programmes Admissions System (JUPAS), compared to a total of 19,210 offers made to all applicants in the main round (*South China Morning Post*, 29 Dec 2011).

The statistic lent support to the ethnic minority's long-standing claim that the current system has been failing them. Taking a piecemeal approach, the government responded with some interim measures. For example, in 2010, it asked local universities to recognise the results of those ethnic minority students who chose to sit the less stringent Chinese test under Britain's General Certificate of Secondary Education (GCSE) for admission purposes (*South China Morning Post*, 25 Jul 2010). The Hong Kong Police Force has also made a positive move in increasing opportunities for ethnic minority citizens to join the civil service. In May 2011, it announced that applicants for police constables would gain extra marks for proficiency in foreign languages other than English. Besides, candidates who failed the HKCEE Chinese examination would be allowed to take a more practical standard government test for recruitment purposes (*South China Morning Post*, 19 May 2011).

The above measures appeared to have pointed in the right direction. But according to the EOC, a set of long-term and comprehensive policies is required to address the root of the ethnic minorities' predicament: the lack of Chinese proficiency. On 11 July 2011, the EOC released a report compiled by its Working Group on Education for Ethnic Minorities (the Working Group), set up in 2010 to collect views from community stakeholders (EOC 2011). According to the report, the lack of Chinese competency among most ethnic minority students posed a major barrier to their academic advancement. In this context, Chinese proficiency is a "relevant" aspect of personal distinction, and the low Chinese standard of many ethnic minority students due to their pre-existing disadvantages as non-Chinese speakers is an equality issue.

The Working Group made a number of recommendations for the way forward. It believed that ethnic minority students deserve extra attention and assistance under the education system. For example, additional Chinese support should be given to those attending mainstream schools. More importantly, the Working Group supported reviewing the policy of designated schools so as to facilitate integration between local and non-Chinese youngsters. In the long run, it supported the development of an alternative Chinese curriculum and qualification regime for ethnic minorities that would be recognised by local universities and employers. Hence, it proposed a Chinese Proficiency Programme and Testing System

(CPPTS) with reference to the International English Language Testing System (IELTS). Ideally, “the CPPTS could provide an alternative language qualification for educational advancement as well as a benchmark for language proficiency required by different trades and job groups” (EOC 2011, para 31).

After much foot-dragging and amid escalating dissatisfaction from equality advocates over the lack of progress (*South China Morning Post*, 18 Sept 2013), the Chief Executive’s 2014 Policy Address apparently signalled a major policy change. According to the Chief Executive, starting from the next academic year, ethnic minority students will take a new subject called “Chinese as a second language”. Schools offering the curriculum will receive extra government support in terms of resources and teacher training. In longer term, an applied Chinese language subject will be introduced in phases for ethnic minority students at senior secondary level, allowing them to gain a qualification that can be recognised by local employers and tertiary institutions. The ultimate aim is to give ethnic minority students the same opportunity to sit Chinese language examinations under the Hong Kong Diploma of Secondary Education (HKDSE) on a par with their Chinese counterparts (*South China Morning Post*, 15 Jan 2014).

These latest initiatives, if materialised, will come closer in realising the value of “equal opportunities”. Instead of allowing everyone to compete freely, it acknowledges that without an extra helping hand, some people may never be able to enter the race in the first place. While we can never eradicate inequalities, public policies that are grounded in the substantive value of equality would go a long way towards making a genuinely level-playing field for all.

Conclusion

Equality is a universal human value (Universal Declaration of Human Rights 1948, Art 1). Yet throughout history, societies have been mired in discriminations that saw women, blacks, and other social and religious minorities endure inequalities of various extents. Today, equality has become the fundamental ground for public policies seeking to address all manner of unreasonable discrimination. But as this chapter has tried to argue, equality tends to yield different interpretations according to social and political realities. So much so that a supposedly benign policy to liberate Muslim women, for example, may be regarded as religious discrimination.⁴ And without considering the pre-existing disadvantages of certain groups, the slogan of “equal opportunities” can ring hollow, or worse, help perpetuate inequalities in a structurally unequal society.

The law has a role to play in setting the minimum standards of behaviours. As the *EOC* case has showed, enforcing anti-discrimination law can help move

⁴Here, the apparent conflict between the values of religious freedom and sex equality is an example of conflict of values over a social issue as discussed by Yung in Chap. 1 of this book.

society forward. State intervention is vital. In the reality of “unequal circumstances”, government has a role to bring in measures that allow everyone to develop themselves from an equal starting point. But to make lasting changes, law and public policies need support from civil society.⁵ As we can see from the *EOC* case and the case study on ethnic minority students, concerted efforts from NGOs, public institutions, and the wider community can make a difference. While boys and girls are now free to develop their full potentials in schools, the picture will certainly be more complete if all young people in Hong Kong, regardless of their ethnic or social backgrounds, have the same opportunities to shape their own futures.

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⁵This is in line with what Yung says in Chap. 1 of this book that the kind of government and its policies are largely the product of the synergy resulted from different actors within society, including civil society. For further discussion of the importance of civic engagement, see Yu’s chapter in this book, pp. 208–211.

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Chapter 8

Is the Public Assistance Programme Adequate in Hong Kong? From Value-Neutrality to Moral Engagement in the Politics of Policy Research

Yuk Tin Carl Cheng

Abstract This is an attempt to assess the adequacy of the views for and against the state provision of welfare by examining the system of public assistance in Hong Kong that will also open up reflections concerning the politics of policy research. In order to articulate the considerations that underlie different interpretations of the system, we shall look into a debate that the government rejected the recommendations of a research on the adequacy of public assistance rates in Hong Kong concerning reforming the Comprehensive Social Security Assistance scheme. The analysis points out that failure to articulate the normative grounds that motivate the acceptance or rejection of the reform of the public assistance scheme may be the result of (1) the adoption of the principle of objectivity and (2) the outcome of a conception of politics which puts emphasis on the principle of liberal neutrality.

‘Poverty is a major issue in Hong Kong’. Prof. Stewart MacPherson and Lo Oi Yu once commented in a research report titled ‘A Measure of Poverty’ (MacPherson and Lo 1997). Eighteen years later, one may still remark poverty is a burning issue in the community. If one reviews the Gini coefficient¹ (a popular measure of income equality) of household income in Hong Kong in the last thirty years, one finds an increase from 0.43 in 1971, 0.45 in 1981 and 0.48 in 1991 to over 0.533 in 2006 (Wu 2009). According to some social commentators, this would indicate a

¹“The Gini coefficient is a figure indicating the general distribution of income, calculated from household income data. If income of all households is at the same level, the Gini Coefficient will be zero whereas it will be one if all the income of all of society goes solely to one household. Empirically, the Gini Coefficient would always lie between 0 and 1.” Kwok Kwok Chuen, *Income Distribution of Hong Kong and the Gini Coefficient*.

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trend of growing income disparity, some may even suggest that these figures indicate that Hong Kong is moving from a alerting zone (0.4–0.5) to one that is dangerous in terms of political stability (above 0.5).² Anthony B.L. Cheung, then non-official member of the executive council of the SAR, in an article titled ‘Hong Kong: A City of Unhappiness’ stated that Hong Kong is an affluent city that suffers from the pain of growth. Not only is the relative income disparity on the rise, despite GDP growth, income levels for many have stayed stagnant (Cheung 2011). According to the estimate of the Hong Kong Council of Social Service, using one half of the median family income as the poverty line, the overall poverty rate for the first half of 2012 was 19.4 % (HKCSS 2013). In other words, under this estimation, there are over 138 thousand people living under the poverty line.

Facing these distressing figures, it is not surprising that there are calls for the government to intervene. However, the response of the SAR government to the issue of poverty may reveal a very different picture of the situation. Donald Tsang, the chief executive of the SAR government, in his 2010–11 policy address stated that ‘Short-term benefits offered by the Government *cannot bridge the wealth gap. They are only relief measures for exceptional times.* The Government mainly employs a three-pronged strategy to address the issue of poverty. First comes investment in education, which facilitates poverty alleviation through social mobility. Next comes employment support, which includes enhancing the quality of the workforce and ensuring reasonable wage levels for workers. Finally, there is social welfare. Assistance is given to families in need to help them cope with difficulties and maintain a reasonable standard of living’ (Tsang 2010, italics my emphasis).

In the above passage, Donald Tsang, the former chief executive, expressed a very important position of the government on the issue of poverty. He stated that ‘short-term benefits offered by the Government *cannot bridge the wealth gap. They are only relief measures for exceptional times*’. In other words, he is reframing the issue of poverty as an issue of relative wealth or as he put it a ‘wealth gap’. Besides, in stating that the *short-term* benefits provided by the government are only *relief measures for exceptional times*, the chief executive is implying that the government hold no responsibility for long-term provision for those who suffer from the so-called wealth gap.

Some may hope that Leung Chun Ying’s approach to poverty may represent a significant break from Donald Tsang’s approach. One of the reasons for this hope may be that, in his Manifesto for the Chief Executive Election 2012, Leung has placed poverty alleviation on his pledge on social welfare. Besides, poverty alleviation is still an important issue raised in his Policy Address 2014, and public may be looking forward to the introduction of changes in old age living allowance, low-income working family allowance etc.

However, one should be cautious that Leung Chun Ying’s statement in no way contradicts Donald Tsang’s understanding: ‘Our poverty alleviation policy is to encourage young people and adults to become self-reliant through employment,

²See Wu (2009), pp. 1035–1036.

while putting in place a reasonable and sustainable social security and welfare system to help those who cannot provide for themselves' (Leung 2014). Furthermore, considering other statements from his two Policy Addresses, we still clearly see an emphasis on economic growth and strong reservation on redistribution through taxation: 'Hong Kong needs sustained economic growth to address issues such as poverty, housing, an ageing society, environmental protection and the upward mobility of our young people' (Leung 2014). 'A welfare policy underpinned by heavy taxation is not a viable option, taking into account the economic structure and mode of social development in Hong Kong' (Leung 2013). Seen in such light, whether Leung Chun Ying's approach to poverty really represents a significant departure from the previous chief executives is yet to be seen.³

It is not surprising that concerned critics are disappointed by such statement. However, to assess the adequacy of the official stance of the SAR government on the issue of poverty, we need to attend to some questions that are seldom addressed. One may concede that poverty is a major issue in Hong Kong, but this does not imply that one acknowledges that the government has the responsibility to address this issue. To give a clear answer to this question of responsibility, one need to ask the following questions: '(1) how should one frame the issue of poverty; (2) given different readings of the issue, will we have different answers to the question whether the government has the responsibility to alleviate this situation; and (3) if it does, how far should the government be responsible in the first place?' These questions lead us to interpretive issues and normative claims concerning social values and public policy that are not often articulated in public discussions.⁴

Public assistance is one of the significant strategies that have been employed by the government to face the issue of poverty. In this essay, we will deliberate some of the reasons for and against the state provision of welfare by examining the system of public assistance in Hong Kong. In order to articulate the considerations that underlie different interpretations of the system, we shall look into a debate that the government rejected the recommendations of a research on the adequacy of public assistance rates in Hong Kong concerning reforming the Comprehensive Social Security Assistance (hereinafter as CSSA) scheme.⁵ According to the author's observation, in a sense, the parties in the debate talked pass each other. It seems that we are witnessing serious ethical and political disagreements in this

³Yung (Chap. 11 of this book) points out that there should be public discussion to reach a consensus on whether there should be higher levels of welfare which necessitates increased taxation in Hong Kong, rather than relying on paternalistic assumptions and the equating of the absence of prominent dissent [towards the present taxation system] with approval.

⁴For a discussion of the relationship between social values and public policy, see Yung's chapter (Chap. 1, pp. 7–9) and Yu's chapter in this book, pp. 197–199.

⁵Poverty and social security have been a concern of the community for years. In recent years, the Hong Kong Council of Social Service and other concerned scholars have investigated different issues related to the public assistance system. Yet, the MacPherson's report is a significant and rigorous study of the adequacy of the basic rate of the system, and the debate pertaining to the research may help us to reflect on the seldom explored issue of the politics of policy research.

debate. The author would further claim that significant moral and political premises are suppressed in the controversy. In a way, the parties stopped short at asserting their positions without further articulating the normative grounds that motivate their acceptance or rejection of the reform of the public assistance scheme. To begin with, we have to give a brief description of the public assistance scheme in Hong Kong and the background of the MacPherson Report.

A Brief Review of the Public Assistance Scheme in Hong Kong and the MacPherson Report

The objective of social security in Hong Kong is to ‘provide for the basic and particular needs of those groups in the community who are in need of financial or material assistance’. (Social Welfare Department 2010) The social security system serves as a safety net for individuals or families vulnerable to suffer from financial hardship because of conditions such as old age, disability, illness, unemployment and low earnings. The CSSA scheme, designed to bring the income of such vulnerable groups up to a prescribed level to meet their basic needs, is administered by the Social Welfare Department (SWD). It is non-contributory⁶ but means-tested.⁷

The public assistance scheme set up in 1971 was replaced by the existing CSSA scheme in 1993. In that year, a need to review the then existing public assistance rate was expressed by the director of the Hong Kong Council of Social Service (Sequeira et al. 1996). This concern arose because the basic rates of the scheme were low and were seen as inadequate. In fact, concern groups and political parties had been pressing the government to substantially increase the level of CSSA payment then. As a response to public pressure, the LegCo Welfare Services Panel requested the Council to conduct an independent review of the rates of payment under the scheme. The research, conducted from mid-1993 to mid-1994, was the effort of a research team headed up by Prof. Stewart MacPherson (hereinafter as MacPherson Report).

The research set out to answer a major research question: ‘what basic rates of public assistance are needed to meet the minimum acceptable standard of living in Hong Kong’ (MacPherson 1994). Two major studies were done: (1) a stratified random sampled survey of the actual standard of living of CSSA recipients, and (2) a major budget standards project. Basic rates are recommended based on the budget standard research after reviewing a number of approaches (including the

⁶Calling the scheme non-contributory means that people are entitled to benefit based on a contingency, such as disability, with no requirement for contributions and irrespective of the level of their resources (Walker 2005).

⁷That is to say, whether an individual or family is eligible for the scheme is based upon whether the individual or family’s income or other resources fall short of a prescribed standard (Walker 2005).

subsistence approach, the basic needs approach, the relative poverty approach and the budget standard approach) and their inherent advantages and difficulties.

In the review, MacPherson stated that the principle of subsistence means that the payment of benefits is confined to meeting no more than the costs of physical survival. But the report pointed out that this approach is fraught with both theoretical and practical difficulties such as the difficulty of determining nutritional requirements, the availability of foodstuffs, food-beliefs, dietary customs and conventions, questions of taste and food preference. Another approach reviewed is the basic needs approach. For this approach, 'basic needs' is defined as the minimum standard of living which a society should set for the poorest group of its people. The satisfaction of basic needs means meeting the minimum requirements of a family for personal consumption: food, shelter and clothing. It implies access to essential services, such as safe drinking water, sanitation, transport, health and education and the satisfaction of needs of a more qualitative nature: a healthy, human and satisfying environment, and popular participation in the making of decisions. However, MacPherson stated that this approach also suffers from similar difficulties of the subsistence approach. In operationalizing what counts as basic needs, 'difficult and inescapable value-judgments have to be made, in the context of each country's social and economic circumstances, to establish the criteria and components of Basic Needs, and to measure progress towards their attainment' (MacPherson 1994).

Relative poverty,⁸ a perspective developed by Peter Townsend, was the third option reviewed. Relative poverty is conceptualized as a situation where material consumption and social participation in a wide range of customary social activities are inhibited by lack of resources. MacPherson claimed that this approach was a very rough and ready proxy for poverty or social exclusion; however, how the cut-off point is defined may still be quite arbitrary (not until considerable research has been taken to determine the causal connection of particular cut-off point and social participation) and the assumption that the statistics required for calculation is available, accurate and periodically updated may not be true. As for the budget standard approach, it is a method of assessing poverty by reference to the calculated cost of an agreed basket of goods. The adequacy of the benefit levels is

⁸“Two very broad concepts of poverty are being utilized today by statistical agencies and researchers throughout the world, responding to different concerns. One is the concept of *absolute poverty*, understood as the minimum set of resources a person needs to survive. The other is the concept of *relative poverty*, a measurement of the resources and living conditions of parts of the population in relation to others. Absolute poverty is a matter of acute deprivation, hunger, premature death and suffering. In practice, it may be difficult to measure it in a consistent way, since the dividing line between acceptable and unacceptable deprivation is not just biological, and can change from society to society. The consensual understanding, however, is that absolute poverty is an intolerable situation, requiring prompt corrective action. The measurement of relative poverty, on the other hand, is clearly a matter of social equity, and is associated with the development of policies for the reduction of social inequalities and the creation of mechanisms to compensate for the more extreme differences in wealth, living conditions and opportunities.” The United Nations Statistical Commission, *The Statistical Measurement of Poverty*.

determined by the calculated results of this basket of goods. MacPherson believed that this method has the merit of being transparent so that the budget is open to scrutiny and can be modified in the light of changing circumstances (MacPherson 1994).

MacPherson and his team stated in their report that the CSSA rates need to be at a level that provides a minimum acceptable standard of living. Such a minimum must be defined in terms of the lifestyles of ordinary people in Hong Kong. The minimum levels are those which allow people to take part in social relationships and follow the customary behaviour expected of them in Hong Kong. This applies to the child at school, the mother, the grandparent, the aunt or the community member. They must take into account of social as well as physical needs and must be based on the prevailing standards, values and lifestyles of Hong Kong. The budget standard method was used to calculate how much is enough to meet these minimum levels of food, of clothing, of transport, of fuel, of social activities and other essential costs.

The following consequences of inadequate rates of public assistance were found:

1. The recipients were found to suffer from extreme restrictions on social activity and participation in the normal activities of ordinary people in Hong Kong.
2. Household possessions were found to be meagre, and the recipients also lead a life that diets are minimal, social activity is almost eliminated, and clothing and footwear are at extremely low levels.
3. When one focus on the different impacts on different age groups, the social effects of inadequate assistance rates found to be serious, especially for children. Suffering from the inability to participate in normal activities in the community, the schoolwork, social development and psychological adjustment of these children are all affected.
4. For almost half of these households, there was no expenditure on entertainment or social activities whatsoever.

The research, in MacPherson's eyes, *a scientific analysis of the issues and a reasoned basis for new rates* (MacPherson 1994, p. 8), concluded that the rates of social assistance were far too low, especially for children and single parents. The effects of poverty were said to be deeply damaging. The MacPherson Report stated that poverty in Hong Kong was not a matter of individual failure or family dysfunction. It is rather a consequence of the effects of socio-economic change on particular vulnerable groups.

The recommendations were rejected by the Health and Welfare Branch because they thought a budget standard approach⁹ was inappropriate and that the financial

⁹Budget standard is defined as 'a detailed list of goods and services which, when priced, represents a particular standard of living. Therefore, the Budget standards Method was another method...used to determine whether current rates of Public Assistance, set by the government, were adequate in providing a decent standard of living for the poor in Hong Kong.' (Sequeira et al. 1996, p. 56)

implications of raising the rates to the recommended levels would be damaging to the Hong Kong economy (Sequeira et al. 1996).¹⁰ The Report on the Review of the Comprehensive Social Security Assistance was released by the Social Welfare Department in 1996. In a paragraph of this report, it stated clearly that ‘The administration did not accept the recommendation in Dr. MacPherson’s report because his approach in determining a “minimum acceptable standard of living” was a *radical departure from the philosophy and established policy of the CSSA scheme*’ (Social Welfare Department 1996).

A Re-examination of the Controversy of CSSA Review: The Possibility of Internal Criticism

If we attend to the development of this review of the CSSA scheme, one may be puzzled by the discrepancies between certain statements of the MacPherson Report and the responses of the government. The research conducted by Prof. MacPherson claims to be a *scientific analysis of the issues and provided a reasoned basis for new rates subject to public scrutiny*. However, in the official review report, it is stated that ‘the administration did not accept the recommendation in Dr. MacPherson’s report *because his approach in determining a “minimum acceptable standard of living” was a radical departure from the philosophy and established policy of the CSSA scheme*. Based on this discrepancy the following questions naturally arise: “Why did the research conducted by Prof. MacPherson, which claims to be a *scientific analysis of the issues and provided a reasoned basis for new rates subject to public scrutiny*, fail to convince the review committee?” “What was the philosophy and established policy of the CSSA scheme?” “What makes MacPherson’s report such a radical departure from this philosophy and established policy?”

Here, we may be touching some of the suppressed normative issues that did not surface in the debate. But before we proceed, we have to note that in making the claim that MacPherson Report was a radical departure from the philosophy and established policy of the CSSA scheme, the administration not only rejected Prof. Stewart MacPherson’s recommendations, it is also claiming that the existing arrangement is an adequate realization of the philosophy of setting up the scheme. We may reconstruct the committee’s claim as stating that (1) the CSSA scheme has a philosophy of its own, (2) this philosophy is realized in the

¹⁰In the Report on the Review of the Comprehensive Social Security Assistance, it is stated that the new set of CSSA standard rates for different age groups were substantially higher than the existing ones (p. 8). Besides, it is also stated that in assessing the financial implications of improvements to CSSA standard rates, not only the current number of clients and the projected normal growth based on trends but also the additional number of people who would become eligible for CSSA as a result of the increased rates. (p.15) There are also concerns of the significant increases in able-bodied adult rates would create a disincentive to work. (p. 12)

existing established policy, and (3) based on this understanding, one can judge that MacPherson's approach deviates from this philosophy and its realization. If that was what the review committee meant, one may see a possibility of internal criticism. By 'internal criticism', the author means that in evaluating the adequacy of the existing arrangement of the scheme, one need not apply criteria external to the scheme, but by examining whether the arrangement violated or failed to give adequate realization of the principles and ideals that it claims to serve and realize (cf. Warnke 1993).

To further appreciate this possibility, we may learn from Michael Sandel in asking questions about the telos (that is the purpose) of the social institutions and the virtues and goods that these institutions promote to assess their moral status. As shown in his *Justice, What's the right thing to do?*, Sandel articulated such a possibility by examining the issue of recognition in debates about justice concerning same-sex marriage.

In his analysis, Sandel first pointed out that instead of two positions on the recognition of same-sex union, there are in fact three options:

1. Recognise only marriages between a man and a woman.
 2. Recognise same-sex and opposite-sex marriages.
 3. Don't recognise marriage of any kind, but leave this role to private associations.
- (Sandel 2009)

In the light of this analysis, Sandel then asked an inspiring question about our preference to cast the debate around the first two options. That is, why the debate around same-sex union focus on the either-or options of (1) recognizing only marriages between a man and a woman and (2) recognizing same-sex and opposite-sex marriages. From this Sandel challenged us to scrutinize whether the real issue surrounding debates of same-sex union concerns freedom of choice, or *was it a different question, that is, whether same-sex unions are worthy of honour and recognition, is the kernel that underlies the controversies*. If we consider the issue in such light, Sandel suggested that we also need to further ask the question 'If marriage is a honorific institution conferring recognition and honour, then what virtues and/or higher goods does it honour?' Asking this sort of questions 'is to ask about the purpose, or telos, of marriage as a social institution' (Sandel 2009). Here, Sandel drew our attention to the possibility that if we consider social institutions as embodiment of the ideas and ideals that the community cherishes, we could ask whether the existing arrangement is an adequate realization of these ideas/ideals.¹¹ Seen in this light, we may further articulate the reasons that the various parties argue for or against the existing arrangements in the debate regarding the reform of CSSA.

¹¹Ideals are reflection of values. For a detailed discussion of values and social values, please refer to Yung's discussion in Chap. 1 of this book.

Against the Official Interpretation of the Philosophy of the Existing CSSA Scheme: The View of a Critic

Following Sandel's example, we may apply such an analysis to the puzzles that we observed in the different conclusions drawn by the MacPherson Report and the CSSA review committee. Seen in such light, the disagreement as mentioned above may reveal suppressed normative issues that shaped how the different parties interpret the purpose or telos of public assistance as a social institution. Thus, the disagreement may be seen as the result of a disagreement of underlying social values.¹² To further articulate the reasoning that leads to the different conclusions, let us start with one of the criticism of the present system. In an essay discussing social security and poverty in Hong Kong, Raymond Ngan concluded: 'the safety net as promised by CSSA for the poorest households in Hong Kong is only a subsistence living at a level not being starved to death. It is predominately a safety net geared to meet physical needs, notably food, shelter and clothing, rather than to accommodate social needs. It does not take into consideration that poor people are social beings expected to perform socially demanding roles as workers, parents, students, friends and class mates. It has marginalized the poor, including their young dependents, towards the spheres of all kinds of social and economic activities. Not only is a sense of stigma imposed upon recipients of CSSA, they are also denied of the opportunities for a "normalized" common living enjoyed by most people in society and at their children's school' (Ngan 1996).

Ngan further characterized the government's approach to social security as a residual and conservative approach, where 'poverty is treated as a personal problem and individual failure. Structural causes of poverty in a capitalist society are left unattended to...Social security is a residualized to cater for the basic subsistence living of the unfortunates and the vulnerable social groups such as the elderly, the disabled, and those who are unable to stand on their own feet' (Ngan 1996). It is clear that Ngan did not agree with the government's approach to social security. He charged the existing policy as (1) failing to take into consideration that poor people are social beings expected to perform socially demanding roles; (2) marginalized the poor; (3) sustained a sense of stigma imposed upon recipients of CSSA; and (4) denied CSSA recipients the opportunities for a 'normalized' common living enjoyed by most people in society.

To assess these criticisms of the official interpretation of the CSSA scheme, we may first need to articulate an understanding of the purpose of the present system. As we noted earlier, if we consider social institutions as embodiment of the ideas

¹²Yung (Chap. 1 of this book) points out that there may be disagreement among members of society over the prioritization of social values and what values are considered relevant to the discussion of certain policy issue. Sin (Chap. 4 of this book) highlights that there may be disagreement over the prioritization of the value placed on one's body (on the part of critics of compensated dating) and value placed on luxurious goods (on the part of teenagers) over the issue of compensated dating.

and ideals that the community cherish, to practice internal criticism, we need to ask whether the existing arrangement is an adequate realization of these ideas/ideals. Seen in this light, we may need to articulate the reasons that support the philosophy and established policy of the CSSA scheme.

The scheme is stated to provide for the basic and particular needs of those groups in the community who are in need of financial or material assistance. But we may ask a further question: Why should the government provide such a scheme. Underlying the criticisms of Ngan is the belief that poverty is not a personal problem and individual failure. In charging that the structural causes of poverty in a capitalist society are left unattended to as a criticism of the existing policy, Ngan is implying that he believes that the government has the responsibility to assist those who suffer undeserved hardship not of their own making. In other words, the unfortunates and the vulnerable social groups are seen as suffering from the moral failure of the government to intervene. Some may even name this as social injustice.

Following Ngan's analysis, we need to take note that there is *an issue of attribution of responsibility* here. We may agree that we do observe hardship and suffering, but why should we assume that the government has such responsibility to help those living in distressing situations in the first place one may ask. Based on the foregoing analysis, we observed the different conclusions drawn by the MacPherson Report, Ngan and the CSSA review committee may be an expression of their different answers to the question whether the government has the responsibility to tackle the issue of poverty.¹³

Arguing for the Official Interpretation of the Philosophy of the Existing CSSA Scheme: The Insights of Hayek

Is this a matter of social injustice and a moral failure of the government? Could the government defence its position against such charges? On this occasion, Hayek's arguments not only may provide a forceful defence against the critics of the government, they may help to rebut some of the presumptions that these critics made. As we have noted in the preceding passages, Ngan criticized the government for failing to attend to the structural causes of poverty in a capitalist society like Hong Kong. In making such criticisms, Ngan is presupposing that attending the structural causes of poverty in a capitalist society is the responsibility of the government. But why should this be so? If we consult Hayek's analysis, we would see that Ngan is assuming certain answers to two questions that Hayek raised.

In *The Mirage of Social Justice*, under the section: 'the inapplicability of the concept of justice to the results of a spontaneous process', Hayek wrote: 'It is now

¹³Yung (Chap. 11 of this book) discusses that how far the government is to be responsible for the welfare of the people, especially poor people, should be determined by public discussion, thereby reaching a consensus on the welfare level and the accompanying tax level.

necessary clearly to distinguish between two wholly different problems which the demand for “social justice” raises in a market order. The first is whether within an economic order based on the market the concept of “social justice” has any meaning or content whatever. The second is whether it is possible to preserve a market order while imposing upon it (in the name of “social justice” or any other pretext) some pattern of remuneration based on the assessment of the performance or the needs of different individuals or groups by an authority possessing the power to enforce it’ (Hayek 1976).

For Hayek, the answer to each of these questions is a clear ‘No’. To appreciate why Hayek answered these questions in the negative, let us examine Hayek’s arguments in more details. To begin with the first question, why did Hayek stated that it does not make sense to apply the concept of ‘social justice’ to the distribution brought about by the market order. To understand Hayek’s position, we have to note that Hayek pressed us to deliberate a more fundamental question before giving a direct answer to the question whether the government is responsible for the provision of public assistance, namely ‘What are the conditions that the application of moral concepts like “just” or “unjust”, “responsible” or “irresponsible” are appropriate and justified?’ The significance and relevance of this question for the present discussion is that if we misapply these concepts we may be creating conceptual confusions and attributing moral evaluations that are neither necessary nor justified.

Regarding this issue, Hayek clearly pointed out that applying moral categories like ‘just’ or ‘unjust’ to state of affairs may be an example of category mistake. He claimed that only human conduct or rules governing them could be said to be ‘just’ or ‘unjust’:

Strictly speaking, only human conduct can be called just or unjust. If we apply the terms to a state of affairs, they have meaning only in so far as we hold someone responsible for bringing it about or allowing it to come about. A bare fact, or a state of affairs which nobody can change, may be good or bad, but not just or unjust. To apply the term ‘just’ to circumstances other than human actions or the rules governing them is a category mistake. (Hayek 1976);

Based on this clarification, we can examine how Hayek conceives the market. For Hayek, the free market system is a special case of spontaneous process. By ‘spontaneous process’, he means ‘when order is achieved among human beings by allowing them to interact with each other on their own initiative – subject only to the laws which uniformly apply to all of them – we have a system of spontaneous order in society’ (Hayek 1960). Hayek further remarked that the market system is a game of catallaxy, that is, it a nonzero sum game that wealth is created in the process (Hayek 1976). Based on this understanding of the market system as the game of catallaxy, Hayek thinks that ‘There is no need morally to justify specific distributions (of income or wealth) which have not been brought about deliberately but are the outcome of a game that is played because it improves the chance of all. In such a game nobody “treats” people differently and it is entirely consistent with respecting all people equally that the outcome of the game for different people is very different. It would also be as much a gamble what the effects of any

one man's efforts would be worth if they were directed by a planning authority, only that not his knowledge but that of the authority would be used in determining the success or failure of his efforts' (Hayek 1976).

Given that (1) only human conduct or rules governing them could be said to be 'just' or 'unjust' and (2) the market system is a nonzero sum game that wealth is created in the process, and that the outcome of the game for each will, because of its very character, necessarily be determined by a mixture of skill and chance, no wonder we find Hayek made the following remark:

Our complaints about the outcome of the market as unjust do not really assert that somebody has been unjust; and there is no answer to the question of who has been unjust...

There is no individual and no cooperating group of people against which the suffer would have a just complaint, and there are no conceivable rules of just individual conduct which would at the same time secure a functioning order and prevent such disappointments. (Hayek 1976, emphasis added)

In sum, Hayek challenged us to examine whether the idea of 'social justice' is applicable to the outcomes of a free market economy. If the deplorable situation of the poor is the result of a spontaneous process, then it may be bad but it has nothing to do with injustice. That is to say, if the poverty experienced by the vulnerable groups is the outcome of a process that is not the intended consequence of someone's action, then no one should be responsible for it. Calling this situation a situation of injustice is applying a mistaken category to the situation.

Furthermore, for Hayek, this is more than an example of category mistake. Hayek claimed this conceptual confusion has fuelled what he called 'the mirage of social justice', creating conditions that in order to ensure certain pattern of distribution through a centralized agency, coercion is exerted on the citizens thus bringing about grave injustice by suppressing freedom and denying what one deserves. The interventions of the government to bring about social justice, Hayek claimed, may also disrupt the market system and in turns impeding the economic growth that makes possible the improvement of the well-being of the members of the society in the first place. These are the reasons why Hayek gave a negative answer to the second question 'whether it is possible to preserve a market order while imposing upon it some pattern of remuneration based on the assessment of the performance or the needs of different individuals or groups by an authority possessing the power to enforce it'.

Given the preceding analysis, we can see that Hayek's arguments question the basis of criticisms made by critics like Ngan. Following Hayek's arguments, not attending to structural causes of poverty in a capitalist society may not be unjust or even a problem. The distribution brought about by the market may not be unjust if so long as the free market is intact and the result is the outcome of a fair game that no one should be responsible. Rather, seen in the light of Hayek's analysis, forcing to ensure certain pattern of distribution may be a case of coercion that suppresses freedom and denying what one deserves, thus bringing about grave injustice.¹⁴

¹⁴For discussions of other conceptions of justice, please refer to Tsang's chapter (Chap. 10 of this book) and Yung's chapter (Chap. 11 of this book).

Re-examining the Controversy Around the MacPherson Report: From a Condition of Inarticulacy Towards a Politics of Moral Engagement

As we noted earlier, we may be puzzled by the different conclusions drawn by the MacPherson Report and the CSSA review committee. Given the preceding discussing of the view of critics like Ngan and the defence of the official position that Hayek's arguments provide, we may further unveil the puzzle. The author would argue certain normative premises were suppressed in the debate that the parties seem to be talking past each other in a condition of inarticulacy. In the author's view, this may be connected to widely shared assumptions about objectivity and the scientific status of social inquiry.

As we noted earlier, MacPherson claimed that 'the report is a scientific analysis of the issues and a reasoned basis for new rates' (MacPherson 1994, p. 8). In appealing to being value-neutral, MacPherson seems to express the common belief that in being objective and thus uncontroversial, he may secure the result not coloured by ideological positions. We may see more clearly this understanding in his discussion of the issue of funding and conflict of interest. On this issue, MacPherson and his team stated that 'In doing social research, a strong effort should be made to follow some of the fundamental principles laid out in scientific methodology, one of which is to design a study with as much objectivity as possible. The question of funding raises several issues pertaining to potential conflict of interest' (Sequeira et al. 1996). In the above passage, MacPherson and his colleagues expressed their understanding of the connection of science, social inquiry and objectivity: social research that claims to be scientific should strive to be objective.

We may also find more indication of this understanding in MacPherson's review of the different approaches in defining poverty. As we noted in the previous passages, MacPherson claimed that one of the shortcomings of the basic needs approach is that in operationalizing the concept of basic needs '*difficult and inescapable value-judgments have to be made*, in the context of each country's social and economic circumstances, to establish the criteria and components of Basic Needs, and to measure progress towards their attainment'. In making this claim, MacPherson is appealing to an understanding that we should avoid value-judgments in social research. This may be seen more clearly if we contrast this evaluation with his assessment of the budget standard approach. In assessing the budget standard approach, MacPherson claimed that one of the merits of this approach is that it is transparent so that the budget is open to scrutiny. What MacPherson seems to be implying is that for the budget standard approach no difficult and inescapable value-judgment is required. The author believes that this is counted as a merit because it matches with MacPherson's understanding that scientific social research should be objective, that is, to maintain value-neutrality as far as possible.

But why should we accept this normative standard of objectivity in assessing the status of social research? Pertaining to this question, Charles Taylor has nicely

captured this meta-theoretical position in one of his seminal papers 'Neutrality in political science': 'The belief was that political science had freed itself from philosophy in becoming value-free and in adopting the scientific method... For scientific method is, if nothing else, a dispassionate study of the facts as they are, without metaphysical presuppositions, and without value biases... Those who could hold that political philosophy was dead, therefore, were those who held to a conception of the social sciences as *wertfrei*; like natural science, political science must dispassionately study the facts. This position received support from the views of the logical empiricists who had, for philosophers, an extraordinarily wide influence among scientists in general, and among the sciences of man in particular. Emboldened by their teaching, some orthodox political scientists tended to claim that the business of normative theory, making recommendations, and evaluating different courses of action could be entirely separated from the study of the facts, from the theoretical attempt to account for them' (Taylor 1985).

In the above passage, Taylor is pointing out that mainstream social researchers presuppose that scientific study should be value-free and there should be a clear dichotomy of empirical research and normative deliberation. But in this same essay, Taylor questioned whether this is indeed possible since certain value-slope is built into the framework of the empirical theories because of their often implicit assumptions about human nature: 'Thus the non-neutrality of the theoretical findings of political science need not surprise us. In setting out a given framework, a theorist is also setting out the gamut of possible politics and policies. But a political framework cannot fail to contain some, even implicit, conception of human needs, wants, and purposes. The context of this conception will determine the value-slope of the gamut, unless we can introduce countervailing considerations' (Taylor 1985).

Building on Taylor's insight, we may unearth the moral and political assumptions built into the MacPherson Report by contrasting MacPherson's account with that of Hayek's. As noted before, MacPherson claimed that his research was a *scientific analysis of the issues and provided a reasoned basis for new rates subject to public scrutiny*. However, we would try to show, in defining a minimum acceptable standard of living by the budget standard method, MacPherson is presupposing certain moral/political assumptions that may not be acceptable to all.

What MacPherson is trying to do with the budget standard method is 'the assurance of a given standard of life, which is determined by comparing the standard enjoyed by a person or a group with that of others'. In his view, CSSA rates need to be at a level that provides a minimum acceptable standard of living defined in terms of the lifestyles of ordinary people in Hong Kong. The minimum levels are those which allow people to take part in social relationships and follow the customary behaviour expected of them in Hong Kong. To some, this may seem reasonable and non-controversial; however, this seemingly innocent definition conceals assumptions that Hayek may find questionable.

For Hayek, adopting this budget standard approach in defining poverty may mean conflating two very different senses of security:

'Here, however, an important distinction has to be drawn between two conceptions of security: a limited security which can be achieved for all and which is, therefore, no privilege, and absolute security, which in a free society cannot be achieved for all. The first of these is security against severe physical privation, the assurance of a given minimum of sustenance for all; and the second is the assurance of a given standard of life, which is determined by comparing the standard enjoyed by a person or a group with that of others. The distinction, then, is that between the security of an equal minimum income for all and the security of a particular income that a person is thought to deserve' (Hayek 1960).

As seen in the above passage, Hayek does not reject the provision of a welfare safety net so long as its basis is clear. The purpose of such limited social security is to provide a minimum level of sustenance to prevent destitution and social unrest. Hayek is very clear that this should not be equated with any attempt to develop social justice. Drawing on Hayek's arguments, one may defend the official position against critics such as Ngan and MacPherson that they are trying to turn a social assistance scheme of a limited security like CSSA into one that is of a scheme of absolute security. Not only that MacPherson Report is not a value-neutral account, it built into its normative assumptions that justify the recommendations that he made. Based on the government's acceptance of providing a limited security, MacPherson is trying to reinterpret the CSSA scheme and transforming it into a scheme that secure absolute security. In a sense, he is also implicitly attributing a greater responsibility for the government to shoulder. Giving an affirmative answer to the question 'should the government secure the living standard of the poor', he fails to distinguish as Hayek does the situation that the government might be responsible from the one that it is not. Not attending to structural causes of poverty in a capitalist society may not be unjust or even a problem as Hayek maintained if the free market is intact and the distribution of the market is the outcome of a fair game that no one should be responsible. In this light, no wonder the administration did not accept the recommendations in MacPherson Report because his approach in determining a 'minimum acceptable standard of living' was a radical departure from the philosophy and established policy of the CSSA scheme.¹⁵

Though Hayek's work may help us to articulate further reasons that may help the administration to rebut the charges of the critics, we have to subject Hayek's consideration to scrutiny. Is Hayek's argument defensible? On this issue, Raymond Plant recognized that Hayek place great emphasis on the view that the outcome of the free market is not the intended result brought about by the individuals participating in the market. However, Plant questioned whether Hayek has played down the issue of the responsibility of the members of the political community for the *unintended yet foreseeable result* of the allocation of the market:

¹⁵Disagreement over what CSSA should aim to achieve and the related CSSA level reflects divergence in values and value-judgments, revealing the close relationship between values and public policy. For a detailed discussion of social values and public policy, please refer to Yung's chapter (Chap. 1 of this book) and Yu's chapter (Chap. 12).

- (a) if as an empirical fact those who enter the market with least will tend to end up with least (with exceptions for random individuals);
- (b) if this is known to be the case as a foreseeable general outcome even though it is not intended;
- (c) if there is an alternative course of action available, namely some redistribution in the interests of social justice; (Plant 1991)

In the preceding analysis, Plant tried to establish that even though we concede the point that the outcome of the free market is not the intended result brought about by the individuals participating in the market, we could still sensibly speak of the issue of *responsibility to the unintended yet foreseeable result* of the allocation of the market. That is to say, only if we presume that the de facto resource allocation is given and needs no further justification could we successfully evade the issue of social justice. For Hayek, this may not be a significant issue as Plant noted that Hayek presumes a trickle-down theory of economic development that in the long run the benefits of economic growth will be extended to large numbers of people in society.

Surely, one could question the validity of a trickle-down theory of economic development that Hayek presumed,¹⁶ but Plant made an insightful remark that brought us to another fundamental issue that we may overlook. As Hayek admitted that the outcomes of markets are in principle not subject to any principle of just distribution and luck and windfall are indispensable to these outcomes, Plant raised the question that whether this will be a rich enough defence of markets to secure their acceptance. Should we let luck and contingency in the allocation of the market system to determine the well-being of the members of our community? Is this a sign of our maturity to respect the market system as a game of catallaxy or is it an expression of our collective moral failure? In a way, these questions compel us to reflect how we should face luck and contingency in our collective life, how we should understand the nature of community, and what obligations and responsibility do we have to our fellow citizens.¹⁷ These issues open up discussions of interpretive issues pertaining to the telos of institutions, social values and public policy that go beyond the scope of this essay. It also helps us to see the significance of the question of the purpose or the telos of public assistance as a social institution.

¹⁶One may question the validity of a trickle-down theory of economic development by attending to the empirical data that show whether economic growth has brought increasing prosperity to all, or at least the majority as promised by the theory. One may also question this theory of economic development by challenging the presuppositions of this theory like Fred Hirsch's thesis of 'social limits to growth'. As Plant noted Hirsch argued that for an important class of goods, that is, what Hirsch called 'the positional goods', cannot be consumed more and more widely without altering the value to those who consume the goods. If that is the case, the assumption of the trickle-down theory that all goods can trickle down to ever wider group of consumers without altering the economic value of these goods is questioned. See Plant (1991, p. 94–97).

¹⁷Mok (Chap. 6 of this book) discusses our responsibility and obligation as fellow men in relation to brute luck of those across the border (i.e. Mainland China as another community 'distinct' from Hong Kong) in his analysis of the issue of Mainland pregnant women giving birth in Hong Kong.

Before this essay comes to an end, the author would like to make one further remark on the politics of policy research. Recapitulating our analysis of MacPherson's claim to provide a scientific analysis of poverty, MacPherson's study was not value-neutral but presumed important normative assumptions in his study. However, it is understandable that MacPherson would try to adopt a value-neutral stance. As Sandel pointed out when law and politics get entangled in moral and religious disputes, there is legitimate concern of the dangers of coercion and intolerance that may result. So MacPherson may not be just following a fundamental principle of scientific methodology in striving to be objective. He may implicitly adopt a conception of politics as based on the principle of liberal neutrality that we commonly share.

Given the analysis in this paper, the author would make the remark that how we should approach deep ethical and political controversy is an issue that is seldom addressed in the local community. Taking the principles of scientific objectivity and liberal neutrality for granted may be an answer that is commonly accepted as shown in MacPherson's case. Seen in this light, a politics of moral engagement that Sandel advocated may provide a worthy alternative to one that upholds the ideal of liberal neutrality. Recalling the case of same-sex union we discussed in the previous section, we have to answer the question of what virtues and higher goods the institution of marriage is supposed to recognize and honour. However, on this issue, one could not remain neutral towards competing conceptions of the good life. Though, concern of the dangers of coercion and intolerance that may result when law and politics get entangled in moral and religious disputes is legitimate, Sandel pointed out that avoidance often means suppressing moral disagreements. So, instead of upholding the principle of liberal neutrality and to exorcise moral and religious questions in public debates, Sandel would rather like to see fellow citizens engage and confront their moral intuitions and political convictions in public deliberation, and to challenge, contest, listen and learn from the convictions of others.

In the light of Sandel's analysis, we may come to see the dispute between the critics of the CSSA scheme and the official stance as an inarticulate debate. This debate is not a case only of historical interests; instead, this is exactly what happened and is still happening in the local context. The criteria of distribution that the CSSA research attempt to settle could not be divorced from normative assumptions we hold about issues of social justice, the nature of community, the extent of mutual moral obligations and responsibility in a community. Adopting the ideal of liberal neutrality could not help us to attend to this level of questions. In this light, a politics of moral engagement that Sandel advocates is significant to acknowledge the need to articulate our visions and imaginations, we have to ask hard questions of what virtues and higher goods the institution of public assistance is supposed to recognize and honour just as Sandel's analysis of same-sex union shows. So, instead of upholding the principle of liberal neutrality and to exorcise normative questions in public debates, we as fellow citizens have to engage and confront our moral intuitions and political convictions in public deliberation, and to challenge, contest, listen and learn from the convictions of others. As Sandel suggested

a politics of moral engagement is a more promising basis for a just society, it may also serve as a basis for genuine public deliberation of deep ethical disagreements/dilemmas regarding social values and public policy.

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Chapter 9

The Poverty of Vision: A Critique of Hong Kong's Healthcare Policy

Wan-chaw Shae

Abstract What is the role of the government in the provision of healthcare services to its people? Should the government shoulder a lion's share in the funding of healthcare services or should it be left to individuals' responsibility? What are the arguments in favor of a largely publicly funded and public provision of healthcare services? Perhaps these issues can never be settled in the abstract and can only be evaluated in the contexts of specific social, economic, and political conditions. This paper addresses these issues through a critical discussion of the Voluntary Health Insurance Scheme recently put forward by the Hong Kong Special Administrative Region government. It analyzes the government's arguments for the need of reform as well as the rationale for this Scheme and further argues that the major shortcoming of Hong Kong's healthcare policy—and indeed most of Hong Kong's social policies both before and after 1997—is a characteristic lack of moral vision. Its apparent unwillingness if not inability to articulate a set of moral objectives and principles upon which a particular piece of social policy is or could be founded lies at the heart of the government's difficulties in mustering social support in its policy initiatives.

Keywords Voluntary Health Insurance Scheme · Healthcare financing · Healthcare policy · Hong kong hospital authority · Moral community · Private health insurance · Social values · Welfare state

Introduction

By all likelihood, Hong Kong is about to introduce what may be regarded as the most important and drastic piece of health care reform since the establishment of the Hospital Authority in 1990, namely the Voluntary Health Insurance Scheme

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(hereafter VHIS)—a government subsidized supplementary finance Scheme that aims at encouraging those who want to have ‘better’ protection (and be able to afford it) to participate in a voluntary insurance Scheme. As this is likely to have a significant and far-reaching effect on social values and public interest, it has attracted many comments—both positive and negative—from different quarters of society. This paper adds to this debate by arguing that the implementation of the VHIS will amount to a radical change of the current system and that the VHIS will most definitely be falling short of achieving the manifest objective of containing escalating healthcare costs. A serious rethinking of what kind of public healthcare system we want and how it is going to be financed is long overdue.

Rethinking the Welfare State and Hong Kong’s Healthcare Policy

The welfare state has for some time been criticized by those on the left as a partial solution to the internal contradictions of a capitalist society. Against the background of a capitalist economy, the welfare state has been regarded as a product of class struggle, or at least the result of a compromise between labor and capital, and as an attempt by the state to balance the tensions generated by the twin requirements of capital accumulation and political legitimation (O’Connor 1973; Gough 1979; Offe 1984; Adams 1985 etc.). According to this view, the welfare state is a product of a social system that is itself self-contradictory, and it therefore shoulders a contradictory mission. On the one hand, it has to win the hearts and minds of the people, to reduce the impact of social polarization and class antagonism so that the logic of capital could operate smoothly and continuously. But the hearts and minds of the people could only be ‘bought’ at a price, and the welfare provisions have to be financed by higher and higher levels of taxation. Higher tax, in turn, intrudes the smooth operation of profit accumulation, generates popular discontent, and raises people’s expectation of the government’s performance and responsibility, resulting in state overload and a reduction of economic performativity.¹ Some Marxists even regarded the occurrence of such a vicious cycle as evidence of the coming of ‘late capitalism,’ implying the days of capitalism as a viable social system are numbered. This approach must be credited as a response and corrective to the earlier functionalist analysis of the welfare state and the so-called logic of industrialism.² It also

¹For a detailed discussion on the major considerations in tax design, please refer to Yung’s chapter (Chap. 11 of this book).

²According to the functionalist view, the welfare state arose as a response to the interrelated processes of industrialization, urbanization, the nuclearization of the family, etc., which led to a number of social problems such as family disintegration, poverty, rising suicide, and crime rate. In this perspective, the provision of welfare and the professionalization of social service personnel are perceived as ‘natural,’ proper, and often by-and-large adequate solutions to the problems caused by industrialization; hence, it is also called the logic of industrialism or convergence theory. For representative statements of the functionalist school and the logic of industrialism, see Kerr et al. (1960), Wilensky and Lebeaux (1965), and Mishra (1973).

renders the traditional debate between free marketism and state interventionism obsolete (or at least gravely incomplete when couched in pure theoretical terms), as the state has been forced to intervene by market forces themselves in the first place. However, it also leaves many questions unanswered. Chief among these is the issue of welfare state heterogeneity (Esping-Anderson 1990; Aspalter 2003). For while almost all developed countries have some sort of welfare system, they have developed different models or paths of welfare provision over the course of time. Partly in correspondence to these different paths/models, different countries have also put forward different justifications for the provision of welfare. In other words, the welfare state is not a more or less 'natural' outcome of industrialization or capitalism, but an instrument for the achievement of certain political objectives, and these political objectives are often couched in terms of some moral visions aiming to make the society better in one way or another.

In contradistinction to Marxists and other leftists, proponents of the welfare state had no intention to overturn capitalism. In fact, one of the characteristic features of the welfare state is to redistribute social resources within the parameters of a capitalist economy. The social resources being redistributed can be direct monetary payments and service provisions, or in terms of maintaining equal opportunities and a fairer playing field. Apart from being a 'redistributive mechanism,' the welfare state is also a key component in the building of a 'moral community' (Titmuss 1970; Moon 1988; Walzer 1988; Ignatieff 1990; Marshall and Bottomore 1992). To the leading proponents and analysts of the welfare state in the postwar period such as Titmuss and Marshall, the most fundamental purpose of the welfare state was never merely a simple redistribution of social resources, nor even the provision of help and services to those in need. Rather, the ultimate rationale for the welfare state was the establishment of a 'moral community' and the reinforcement of social values different from that of the market logic. This 'moral community' was to be built on the principles of altruism, reciprocity, mutual aid, and social cooperation, so as to alleviate the hazards of uncertainty and risk brought about by both nature and capitalism (e.g., old age, sickness, and unemployment). It also emphasized that society should be operated according to some principles of fairness and in a relatively open manner, or at least providing a level playing field (e.g., popular education and public health care).³

Of course, no governments would redistribute scarce social resources for no reason. And in reality, each of the Western welfare societies had their own considerations in developing the ways they did. But no matter what these considerations were, welfare provisions were almost always justified by some sort of 'moral calls' based on the importance of mutual interdependence and common interest of all social members. Ultimately, it is these moral calls that gave meaning and soul to

³Yung (Chap. 11 of this book) suggests that justice of a tax system essentially needs to be examined in relation to the size of the government which determines the degree of government intervention in the redistribution of wealth and income through provision of different public services, especially to the needy, in the society.

the policies of redistribution, and it is only by the articulation and delineation of such moral visions that popular support could be garnered.⁴ On the other hand, the redistribution of social resources as well as the construction of a moral community must also be premised on the demarcation of eligible recipients. These two dimensions of the welfare state are at times complementary to each other, but may also come into conflict against each other. The issue of whether specific welfare entitlements should be based on some sort of universal citizenship rights or on a more selective basis remains a precarious and inescapable issue for all welfare states.

Whether Hong Kong is a welfare society or not remains an open question⁵, and most attention has been devoted to debating whether Hong Kong's welfare system is comprehensive enough vis-a-vis that of Western welfare states (Chan 2002; Lee 1996; Lee 2000). Unfortunately, there has never been a clear-cut definition of 'welfare state' or 'welfare society,' nor is there any universal criterion of measurement (Robson 1976; Titmuss 1968). From a certain analytical point of view, all political communities are *ipso facto* welfare societies, as all societies provide some form of service or protection to its members, no matter how uninstitutionalized or minimal it may be (Walzer 1983). What is perhaps more worthy of attention is whether a government or society—in providing social services to its members—also offers specific justifications for its provisions, and whether these justifications make sense to or resonates with its members. Why did the government wanted to provide this service at this particular point in time? What were the short-term and long-term goals and objectives behind such provisions? On what ethical principles and moral visions were these goals and objectives based upon? How did the government balance the often contradictory demands of its moral vision with practical constraints?

It has been noted that before the Second World War, the British Hong Kong colonial government regarded Hong Kong as nothing much more than 'a borrowed time and a borrowed space' and as such had little intention to intervene in the affairs of the local Chinese community (Wilding 1997). Most of the welfare services were provided by Western missionaries and local Chinese philanthropists. It was only well after the end of the Second World War and only because of the rapid and dramatic changes in the social, economic, and geopolitical environments that the government was beginning to shoulder more responsibilities and even so only gradually and reluctantly. The guiding governing philosophy remained that of a *laissez-faire* policy. Thus, Catherine Jones, in concluding her study of Hong Kong's history of social policy, lamented that Hong Kong's 'particular social policy story hardly matches up to the stuff of western legend. It lacks uplift. There are no grand themes, too few rousing speeches, not enough "great names" or "historic event" to celebrate. There is too little sense or pretence of collective mission, let

⁴The relevance and importance of "moral visions" is also demonstrated in Cheng's discussion of social welfare policy (Chap. 8 in this book). See in particular pp. 131–132, pp. 142–143.

⁵I do not have the intention of comparing and analyzing the differences between a 'welfare state' and a 'welfare society.' In general, this paper adopts the more common term of 'welfare state.' When referring to Hong Kong, however, the term 'welfare society' is used in line with the spirit of the 'one country, two systems' principle.

alone lasting achievement. It is a tale dominated by anti-heroes and anti-heroics, with not even the prospect of a “proper ending” to come’ (Jones 1990: 283). In making such a comparison, Jones no doubt romanticized the development of Western welfare states and committed the error of over-emphasizing the role of great men and women in history. Nevertheless, there is some truth in her characterization of Hong Kong’s development of social policy, not just in the colonial era but also in the post-colonial period as well. For while the Hong Kong Special Administrative Region (HKSAR) government now prefers to speak of ‘big markets, small government’ than ‘positive noninterventionism,’ the belief in the effectiveness of ‘trickle-down effect’⁶ of economic growth in addressing issues of widening social inequality and poverty remains as deep-rooted as ever.⁷ It is precisely for this reason that more and more people subscribe to the view that the government’s policies are always biased in favor of business interests.

In short, both in its colonial and post-colonial times, the Hong Kong government has never provided a full-scale official narrative with regard to the vision, ideals, principles, and objectives of its various social policies. Even on the most simple (and most fundamental) issue of whether there is any notion of ‘citizenship rights’ behind many of the government’s welfare provisions, or if such provisions are entirely some sorts of emergency relief, there is no clear-cut position, not to mention the rationales and justifications behind them. To say this is not to say that there are no significant turning points in the history of Hong Kong’s social policy development, only to highlight the government’s tendency to avoid controversial issues, and to cover-up the full consequences of its policy proposals, rather than to initiate a genuinely open dialogue and debate with its people. Often times, in the lack of a clear policy framework, inconsistencies and even contradictory measures are being proposed at the same time, and unfortunately, this is exactly the situation in the area of public healthcare policy.

From Healthcare ReFinancing to the Voluntary Health Insurance Scheme (VHIS)

Among the numerous pieces of reform in the area of health policy introduced in recent years, the VHIS is undoubtedly the most significant (although it is still not implemented yet). After 20 years of consultation and negotiation, the reform in healthcare finance is about to be finalized. As early as 1993, the government

⁶This refers to the belief that economic growth, rather than a redistribution of income and wealth (either directly through a progressive taxation system or indirectly through the provision of various subsidies and social services), is the most effective method to fight against poverty. The linchpin in the argument is that as the size of the economy grows, everyone will benefit from it one way or another in the long run.

⁷Tsang (Chap. 10 of this book) discusses ‘trickle-down effect’ in relation to the Express Rail Link controversy.

released a consultative document named *Towards Better Health* (also known as *The Rainbow Report*). It proposed 5 reform proposals, including the following: (1) the percentage subsidy approach (i.e., those who are better off should be subsidized less); (2) the target group approach (i.e., introduction of semiprivate rooms in public hospitals and itemized charging); (3) the coordinated voluntary insurance approach; (4) the compulsory comprehensive insurance approach; and (5) the prioritization of treatment approach (Health and Welfare Branch 1993: 27). Semiprivate rooms in public hospitals were implemented the following year, and since 2002, the government has gradually increased the fee levels in many public health services. Apart from these, however, the rest of the proposals did not receive much public support.

Since then, the government has released a consultative document in public health every several years, including *Improving Hong Kong's Health Care System: Why and for Whom?* (Harvard Team 1999. Also known as the Harvard Report); *Lifelong Investment in Health: Consultative Document on Health Care Reform* (Health and Welfare Bureau 2000); *Building a Healthy Tomorrow: Discussion Paper on the Future Service Delivery Model for Our Health Care System* (Health and Medical Development Advisory Committee 2005); *Your Health, Your Life: Healthcare reform Consultative Document* (Food and Health Bureau 2008a); and the latest *My Health, My choice: Healthcare Reform Second Stage Consultative Document* (Food and Health Bureau 2010). While the exact foci of these documents varied somewhat, the first parts of these consultative documents are often repetitive, emphasizing the necessity of change in financing public health due to escalating cost. The alleged factors causing this rise in healthcare cost are, according to these documents, an aging population, advances in medical technology, and health services being over-subsidized by the government. The proposed recommendations are also similar, with the overriding aim of finding ways to refinance the public healthcare sector in order to reduce its financial burden on the public purse. Nevertheless, it was not until the consultative document '*My Health, My Choice: Healthcare Reform Second Stage Consultation Document*' in 2010 that the government has arrived at the conclusion that voluntary health insurance should be the way ahead.

The key features of the proposed voluntary Health Protection Scheme (hereafter HPS) proposed in this document included premium (transparent age-banded premium schedule for each individual plan); benefit coverage (hospital admissions or ambulatory procedures, specialist services); benefit limits (based on packaged charging for common procedures according to standardized diagnosis-related groups (DRGs), or itemized benefit schedule where packaged charging is not available); and co-payment (standardized co-payment arrangement for inpatient and ambulatory procedures, e.g., 20 % for the first HK\$10,000, 10 % for the next HK\$90,000, and 0 % beyond HK\$100,000). Insurers must accept enrollees with preexisting conditions subject to a one-year waiting period, with partial reimbursement in the second and third years of subscription. A high-risk reinsurance pool will be established to enable high-risk individuals to get health insurance without exclusions and with a cap on premium loading. Premium loading cannot exceed a cap of three times that of the published premium rate. The government has also

pledged to draw HK\$50 billion (roughly US\$6.4 billion) from the fiscal reserve to support this plan, mainly for the high-risk pool, in support of the old, and to attract young new enrollees. At this stage of development, some of the details of the HPS had not been finalized yet, as the government was still in the process of negotiation with the various stakeholders. In particular, some of the more important gray areas include the following: whether outpatient clinics would be covered; exactly how this HK\$50 billion will be used; will the government inject further money after this initial sum of HK\$50 billion is exhausted; as well as whether the HPS is linked to a savings plan (and if so, how). On the other hand, the government has already stated that it would not dictate the level of fees charged by insurance companies, doctors, and hospitals in the private sector.

In a later consultation document (Food and Health Bureau 2014), the government has renamed the HPS as Voluntary Health Insurance Scheme (hereafter VHIS), as the latter is a better reflection of its objectives and nature. Apart from this change of nomenclature, this document also provides more details of the proposed Scheme, including the proposal of a ‘Standard Plan’ with 12 minimum requirements that insurers selling individual hospital insurance must comply with (though group hospital insurance would be exempted from having to meet these requirements). One of the minimum requirements is that insurers must provide to consumers a Standard Plan with guaranteed acceptance with a premium loading cap of 200 % and coverage of preexisting conditions. For those high-risk individuals that the insurer would charge a premium loading of more than 200 % of its standard premium, insurers can transfer such high-risk policies to a high-risk pool (hereafter HRP) upon policy inception; thereafter, all premiums payable and claims and liabilities under the policy will be accrued to the HRP, to be supported by public funding.

The exact details of the latest version of the VHIS need not concern us here, suffice it to say that it does not and cannot alleviate the public’s concerns, and would rather increase their future burdens. For an average person in the street, the most important question about the VHIS is how much protection it can provide and at what cost. As we all know, insurance companies operate on a commercial basis, which is to say that they are basically and most fundamentally profit-driven. Our newspapers and popular magazines are not short of stories about the difficulties, barriers, and frustrations people faced when trying to claim for their reimbursement. And most of the protections offered by health plans are simply inadequate to pay for long-term illnesses. The VHIS is targeted at the middle-level income groups, in the hope that a substantial proportion of the middle class would be attracted to the services provided by the private hospitals. As the middle class is the one social group that sees itself as having contributed most to government revenue but unable to benefit from most government benefits, it is likely they would regard the HPS/VHIS as a further reduction of their rights (Food and Health Bureau 2008b), especially given that the level or amount of tax incentive is unlikely to be attractive. Although the government has promised that our public healthcare system will not be affected by the VHIS, it is clear that the public is not convinced. As a matter of fact, the increase of waiting time and rise of

fees in public hospitals (especially in certain drugs) in recent years has created tremendous financial pressure on the middle class (particularly for those with severe or long-term illnesses), and there is widespread concern that the situation could only get worse with the implementation of the VHIS. On the other hand, it has also been raised that the use of package charging such as DRGs would drag down the quality of service and treatment offered by healthcare service providers in the private sector as private service providers would not provide more expensive services/drugs than the level of reimbursement as stipulated in the DRGs or other similar arrangements (Lee 2010).

At the same time as the public is questioning the adequacy of the protection offered by the HPS/VHIS, feedback from the insurance industry is also lukewarm. Their concern is that if the proposed plan does not provide any room to the insurance companies for the selection of customers regardless of their medical histories, and if they do not have discretionary power to determine premium loading, then this is bound to have an adverse impact on their profitability. This is especially damaging to small-sized insurance companies (*Oriental Daily News*, 13/7/2011:A28). Legislative Councilor from the functional constituency of the insurance industry, Mr. K.P. Chan, even expressed that the HPS/VHIS is a ‘low-profit, highly restricted and high-risk’ plan, so much so that the insurance industry could only support it ‘with tears’ (*Ming Pao Daily News*, 12/7/2011:A6).

While both the general public and the insurance companies are not supportive of the HPS/VHIS, their concerns are very different and fundamentally at odds with one another. The former’s concern is about the adequacy of protection as well as their affordability, whereas the latter’s foremost concern is about profitability and their freedom of choice in the selection of customers. Such a contrast is not surprising; it reflects the fundamental differences and contradictions between two different logics or conceptions of fairness. As pointed out by Stone (1993), ‘[t]he private insurance industry ... is organised around a principle profoundly antithetical to the idea of mutual aid, and indeed, the growth and survival of the industry depends on its ability to finance health care by charging the sick and to convince the public that “each person should pay for his own risk”’ (Stone 1993: 29). In determining the premium and the benefit limits, the private insurance industry adopts an ‘actuarial fairness principle’ that is very different from the ‘solidarity principle’ of mutual aid that characterizes most social provisions.

The notion of fairness based on the solidarity principle, on the other hand, is organized around certain conceptions of need and citizenship rights and attempts to break the linkage between the amount one pays for health care and the amount of health care one receives (as well as the linkage between premium level, medical history, and potential risks) that characterizes market exchanges. Not only do these two principles have a different understanding of what fairness entails, but they also embodied two competing ‘visions of community.’ ‘Actuarial fairness—each paying for his own risk—is ... a method of organizing mutual aid by fragmenting communities into ever-smaller, more homogeneous groups and a method that leads ultimately to the destruction of mutual aid’ (Stone 1993: 29). In other words, the ‘pooling of risks’ in private insurance is achieved by fragmenting society into

ever-smaller pools of people with similar risk levels, thereby fostering in people a sense of their differences instead of commonalities. Consequently, people are encouraged to think for themselves as separable individuals, rather than to see themselves as interdependent members of the same community.

This means that the protection rendered by private insurance companies is actually based on a deep contradiction. On the one hand, they provide some protection to those in need (or more precisely, to those who have paid for their protection) by a pooling of risks among the policyholders. In this, they approximate some degree of mutual help. On the other hand, commercial insurers have the freedom to select their clients, group them, and price them differently according to their different risk levels and scope of coverage. In the part on the pooling of risks, they look like social insurance, but in the determination of charges, they categorize people according to their ‘insurability,’ i.e., they calculate their clients’ risk levels based on their current health conditions, medical history, age, sex, ethnicity, occupation, lifestyle, habits and hobbies, and increasingly, even genetic makeup. Actuarial fairness implies that if insurers did not charge their policyholders differently according to their different risk levels, this would result in ‘unfairness’ as it would amount to a ‘forced subsidy from the healthy to the less healthy’ (Clifford and Iuculano 1987: 1811). Such perceived unfairness is, however, precisely the objective of a more social conception of justice which aims to provide equal coverage to all based on their needs.⁸ The treatment of high-risk groups in the VHIS attempts to provide an intermediate position between these two positions without being able to satisfy either.

According to the proposed VHIS, high-risk people will be protected by a ‘high-risk pool,’ so as to enable them to obtain health insurance without exclusions and with a cap on premium loading, while not inflating the premium level for the non-high-risk people. Nevertheless, high-risk individuals may still have to bear up to three times that of the published premium. This reflects the underlying contradiction between what Stone called the ‘actuarial fairness principle’ and the ‘solidarity principle.’ Although the government has tried to balance the interests of different stakeholders, the ‘actuarial fairness principle’ adopted by the commercial insurers will inevitably result in a screening of policyholders. Those with the least need for medical care will be selected and welcomed, while the most needy will be barred from joining by the high premium level. The VHIS is only able to bridge this gap by means of the provision of a high-risk pool that in effect protects the commercial insurers with public money, as the government acknowledged that ‘if insurers are mandated to accept such [high risk] individuals and the loading is capped without proper mitigating measure, they may not be able to collect adequate premium income to offset the claims payout’ (Food and Health Bureau 2014: 16–17). Needless to say, the logical consequence of the VHIS would be a drastic increase

⁸There are detailed discussions of justice in other chapters of this book. Cheng (Chap. 8 of this book) discusses justice in relation to CSSA; Tsang (Chap. 10) examines justice in relation to the Express Rail Link controversy, while Yung (Chap. 11) analyzes the issue of tax justice.

of social expenditure on health care and also a drastic widening of the gap in the access to and usage of healthcare services among different social classes. Even if the government is willing to inject additional resources into the health care system it may still not be able to alter this scenario.

Voluntary Health Insurance Scheme: Why and for Whom?

Despite the government's tremendous effort to persuade the public about the merits of this VHIS, it has nevertheless failed to convince the public both with regard to the necessity and direction of change. From the point of view of cost-effectiveness, Hong Kong has one of the best (if not the best) vital statistics such as life expectancy at birth and infant mortality rate among all advanced societies, yet Hong Kong only spends about 6 % of its GDP on healthcare expenditure (about half of it from public expenditure). This is far below that of OECD countries' average of 9.3 %, not to mention the US's 16.4 % (OECD 2015). True, public health expenditure has been rising steadily in recent years, having increased almost 10 times from HK\$5.67 billion (or 8.7 % of total government expenditure) in 1988/89 (just before the establishment of the Hospital Authority) to HK\$52 billion (or 17 % of total recurrent government expenditure) in 2014/15. At the same time, however, the government's fiscal reserve also rose dramatically, reaching HK\$819.5 billion (about US\$105 billion) by the end of March 2015 (Tsang 2015), even excluding the Foreign Currency Reserve Assets that is in excess of US\$343 billion (Hong Kong Monetary Authority 2015)! No wonder that the overwhelming public response to all the previous rounds of consultation exercises has been that of maintaining the current tax-financed model with minor adjustments. Unfortunately, the government has refused to listen and even attempted to manufacture public opinion in favor of reform by means of government-directed consultation forums and opinion polls. Indeed, it is only in the face of strong opposition that the government has shifted its preference from a mandatory insurance-cum-health savings plan to one of voluntary insurance plan. This shift may be a face-saving exercise (an honorable way of retreating) or just a change in tactics, i.e., in the hope that a voluntary plan would have less opposition and that once implemented, it would open up more room for further change.

The questions we need to ask are as follows: Why do we need this VHIS? Who will benefit and who will lose by this change? And why is the government so eager for change? Ever since *The Rainbow Report* (Health and Welfare Branch 1993), the government has repeatedly suggested that the current finance model of public health service is increasingly unsustainable due to the twin pressures of an aging population and rising cost in health technology.⁹ At the same time, almost every consultative document also alleged that there is a critical imbalance between the

⁹Yung (Chap. 11) points out that healthcare financing will be a prominent issue in future Hong Kong in light of the aging population, alongside the evaluation of the tax system.

public and private sectors in health care, with the public shouldering a lion's share that is increasingly unbearable. These reports have also suggested several ways to address this issue, all revolving around ways of drawing a boundary for public responsibility in health care. They have, however, fell short of asking—let alone answering—the most important and fundamental questions, i.e., what role should the government play in providing affordable public health care? Where should the boundary between public and private provision of health care lie? Is public health care a form of 'citizenship rights,' or is it a 'safety net' intended only for those who could not afford it in the private market of health care services? The closest answer comes from a single sentence in *The Hospital Authority Ordinance* (hereafter *The Ordinance*), which states that in the setting of 'fees for the use of hospital services by the public', the Hospital Authority should have 'regard to the principle that no person should be prevented, through lack of means, from obtaining adequate medical treatment' (Cap 113 of The Hospital Authority Ordinance, Section 4, #d).

Obviously, this is a very crude answer (Gould 2001). First, what constitutes 'adequate medical treatment'? Does it refer to the most basic and minimal level of treatment, or state-of-the-art treatment? What about those terminal and/or incurable diseases, and does 'adequate medical treatment' entail doing 'as little as necessary' or 'as much as desirable'? Then, there is the question of who decides, the Hospital Authority, the hospital management, the doctor-in-charge, the patient, or the patient's family? Nor does *The Ordinance* offer a more precise definition of 'lack of means.' Indeed, the wordings of the statement offer nothing close to what a 'principle' is supposed to achieve; instead, it is at most a rule of thumb guideline that leaves ample room for the doctors' and HA's discretion. Most importantly, *The Ordinance* left it unclear as to whether public health service is a form of citizenship rights, and the fact remains that over the past decades, the government has subsidized around 95 % of the costs in public hospitals, with the corollary that most people simply took it for granted that they have such a right, or at least a reasonable expectation for something like this. From the government's point of view, this is exactly a cause of concern, as many well-to-do patients also prefer seeking treatment in public hospitals. Indeed, the government has tried to find a new way of interpreting *The Ordinance* that could serve as a way out.

Thus, *The Rainbow Report* started with the premise 'that no one should be denied adequate medical treatment through lack of means' (Health and Welfare Branch 1993: #1.11) and then went on to stipulate three 'considerations' in the setting of the level of fees and charges, i.e., 'that public hospital and clinical services should be heavily subsidized'; that 'while fees should be generally affordable, patients should make some contribution to the costs of the services'; and finally, 'increases in fees and charges should not be of a magnitude which could cause undue public concern' (ibid.). By the time when *The Harvard Report* was published in 1999, things started to change. It tried to identify a governing philosophy for Hong Kong's public health system, pointing out that health care could be provided on the basis of need, reflecting an egalitarian ideology, or at the other end, it may be based on a libertarian ideology with an emphasis on individual

liberty and choice. However, it decided to settle for an invocation of a ‘general consensus’ on the ‘guiding principle’ that ‘[e]very resident should have access to reasonable quality and affordable health care. The government assures this access through a system of shared responsibility between the government and residents, where those who can afford to pay for health care should pay’ (Harvard Team 1999: #5.1). The next consultative document *Lifelong Investment in Health* went another step further. While reaffirming the belief ‘that everyone should have equitable access to quality health care for comparable needs ... [and that t]here must be a safety net for the financially vulnerable’ (Health and Welfare Bureau 2000: #12f) and that the government has ‘no intention of reducing Government commitment to the financing of the public health care system’ (#113), it also reiterated that ‘[t]hose who have the means should bear an affordable share of the medical expenses they have incurred’ (ibid. #12g). This was justified on the grounds that ‘good health cannot be achieved without the individual’s personal actions and contributions through early planning for the individual’s long term health care needs and the adoption of health-promoting behaviors and lifestyles. Health is also an individual responsibility’ (#129). Clearly, if individuals were to take more responsibility for their health care, then presumably governmental responsibility would be lightened.

It was not until 2005 that the government has (finally?) found an operational reinterpretation of *The HA Ordinance. Building a Healthy Tomorrow* stipulated that in order ‘[t]o ensure that our limited resources are being utilized in the most appropriate manner and for those in genuine need of such service, we believe that our public health care service sector should target its services at the ... [four] areas [of]—acute and emergency care; for low income and under-privileged groups; illnesses that entail high cost, advanced technology and multi-disciplinary professional team work; and training of health care professionals’ (Health and Medical Development Advisory Committee 2005: #6). Now this still does not provide clear definitions of ‘the most appropriate manner’ in the utilization of our limited resources and ‘those in genuine need’, as well as clarify what the government would do if ‘those in genuine need’ do not belong to ‘low-income and under-privileged groups.’ But regardless of the inadequacies of this formulation, this has become the benchmark of the government’s subsequent formulation of its public health policy, with the inevitable consequence that the realm of the public health arena is shrinking (which does not necessarily imply that the government is spending less on health).

Your Health, Your Life (Food and Health Bureau 2008a) actually contains some contradictory messages as to the government’s role in public health care. This contradiction is embedded even in the opening message from Dr. York Chow, then undersecretary for Food and Health Bureau. He wrote that ‘Hong Kong is a caring and compassionate society. We will continue to uphold the treasured principle of our healthcare policy that no one should be denied adequate healthcare through lack of means. To this end, we have looked at how the current safety net can be strengthened to provide better assistance to the unfortunate members of our society who have their means outstripped through having to shoulder costly

medical treatment’ (Food and Health Bureau 2008a: i). But the gist of the document is actually not so much about providing ‘better assistance to the unfortunate members of our society’ as pushing the not-so-unfortunate members of our society out of public health care. On the one hand, the document states that the vision for our healthcare system ‘is to achieve a healthcare system that improves the state of health and quality of life of our people, and provides healthcare protection for every member of the community’ (ibid.: iii, #4); while on the other hand, for most people, such health care need not come from the public sector, as it went on to say that ‘[w]e want to reform the healthcare system so that it can develop on a sustainable basis and ... continue the partnership between the Government and you in sharing the financial commitment for your better health’ (ibid.: iii–iv, #5). In other words, the government’s ‘long-established’ and ‘treasured principle’ in public health—that no one should be denied adequate health care through lack of means—is going to be nothing more than a ‘safety net’ reserved ‘for the low-income and under-privileged groups’ (ibid.: iv, #6c). It is by now pretty obvious that while the government is still bound by the principle stated in *The Ordinance*, in reality the public health system is slowly building up barriers to those who fall outside its newly defined targeted clientele.

In the Preface of *My Health, My Choice*, Dr. Chow is even more explicit in enlarging the role of the private sector in health care; this passage is worth quoting at some length as it contains some contradictory positions, it stated that the government:

needs to ensure equitable access and provide safety net for all, through a robust public system supported by public funding. It also needs to provide adequate choices for you, our fellow citizens, through a private sector that is equally professional and transparent to consumers in both quality and service fees... We have listened carefully to your views: you value your voluntary choice for public or private healthcare; you treasure the public healthcare system as the equitable safety net; and yet you want more choices and better protection in private healthcare. We believe the Government can play an active role. We have thus formulated proposals for a Health Protection Scheme (HPS), a Scheme for standardizing and regulating voluntary private health insurance, that aims to provide you with better choices for lifelong protection... We will continue to uphold the public healthcare system as the safety net for the whole population. By enabling more people to access private healthcare, the HPS will relieve the pressure on the public healthcare system so that it could better focus its resources on target service areas and population groups, especially low-income families, underprivileged groups and other needy patients. The proposed HPS would thus benefit everyone, both those opting for private healthcare and those taken care of by the public system. It would also complement the service reforms underway and help enhance the long-term sustainability of our healthcare system (Food and Health Bureau 2010: i–ii).

What is most disconcerting and confusing in this passage is Dr. Chow’s conception of the relationship between the public and private sectors and the principles underlying the roles of the two sectors. What exactly is his conception of a public healthcare system? He said that he has ‘listened carefully’ to the views of the people that people ‘treasure the [existing] public healthcare system as the equitable safety net.’ Surely time and again people have indicated that they do treasure the existing public healthcare system and its underlying principle of

equity of access. What is less sure is whether they support the idea that public health care should be *limited* to those ‘underprivileged groups’ as a ‘safety net’ measure. Again, there is little doubt that people do ‘want more choices and better protection in private healthcare,’ but certainly not at the expense of a weakened public healthcare system. One is left unclear as to the most fundamental role of Dr. Chow’s conception of public healthcare system: Is it ‘to ensure equitable access and provide safety net for all, through a robust public system supported by public funding,’ or just one ‘for standardizing and regulating voluntary private health insurance’? Of course, it is the responsibility and duty of any government to monitor and regulate the private insurance industry, and there is no need to lure the insurance industry into accepting its regulatory ambit by offering them an expanded market, but this should be a separate exercise from the provision or otherwise of a public healthcare system. Placing these two together in a single consultation document or reform exercise would simply create unnecessary uncertainty and confusion.

Even more confusing is that in almost every consultation document and related exercises, the government has emphasized that it will not shed its responsibilities for providing a public healthcare service and often pledged to commit more public money into it as if to make sure that there should be no misunderstanding of its continuing commitment (e.g., Food and Health Bureau 2008a: ii). One is forced to wonder, if the government is so committed to protecting our public health care system, that there seems to be no limit in injecting further funding into the HA and then why initiate a whole series of reform in the first place? The government’s central justification of the need for healthcare finance reform has always been that the current system is not financially sustainable in the long run. But if the current system is not sustainable in the long run, then the only logical course of action is to cut down on public health expenditure and delineate more clearly the limits of public health service in accordance with the drop in subsidy, full stop. One could argue that the increase in public healthcare expenditure is only a temporary measure to reduce public resistance to reform, but this argument has been repudiated by the government’s own action, as it has expanded its expenditure year after year since the government first talked about the need for reform (and indeed, ever since the establishment of the HA). In so far as the VHIS does not or cannot solve the issue of escalating public health expenditure, one has to conclude that it has deviated from the government’s original justification of reform (Ho 2011).

My Health, My Choice is at crucial moments quite honest, if self-contradictory, on this point. It explained that the point in mobilizing private resources to provide supplementary financing health care is to ‘ease pressure on the public sector, thereby strengthening the role of public healthcare to focus resources on targeted service areas and population groups’ (Food and Health Bureau 2010: 55, #5.23b), but then almost immediately admitted that ‘we do not expect that the HPS will lead to any substantial reduction in long-term health expenditure’ (ibid.: 57, #5.28a). It even predicts that ‘the HPS should help expand the size of private funding for healthcare ... thereby increasing the overall financing available for the healthcare system’ (ibid.: #5.28b). Shae (2008) had earlier suggested that any

attempt to create a ‘more balanced’ role between the public and private sectors would simply lead to a fierce competition for healthcare professionals. And as supply of Hong Kong’s healthcare professionals is in great shortage and largely controlled by the professional bodies, this competition for manpower will create a ‘revolving door’ for the healthcare professionals, resulting in an uncontrollable escalation of costs. Some Legislative Councilors have also raised a similar point (*Ming Pao Daily News*, 12/7/2012:A6). Experience and data from other countries also point to the same conclusion, i.e., that private health insurance causes medical inflation.¹⁰

In short, the HPS/VHIS is full of contradictions. It wants to relieve the pressure on the public health sector, but keeps on injecting more and more resource into it. The government is worried (or says it is worried) about medical inflation, but is implementing measures that causes further medical inflation. It would be naive to assume that the government is not aware of these contradictions; one could argue that all these are part of the government’s plan, for the real purpose of the HPS/VHIS, we are told, is ‘to provide a platform that channels private funding ... into private healthcare services ... the HPS should help enhance the long-term sustainability of the entire healthcare system as a whole’ (ibid.: 55, #5.23). In other words, it is not the government’s intention to limit the development of medical services. Quite the contrary, it wants to expand both the public and private health sectors—so that they can have enough resources and ample room for further expansion—but with both public and private funding. As to whether the people of Hong Kong need such expansion, whether such ‘expansion’ would actually provide enough protection for them, whether people could afford them in the first place, or whether this is the most cost-effective way of using social (not just public) resources for health care, these are not the government’s primary concerns. The government has already pledged to committed HK\$50 billion additional resources to develop this market, in the hope that it would attract enough people to join the VHIS. This of course raises the issue of accountability in the use of public money, and there is also concern that when enough people have joined the VHIS, this ‘supplementary finance’ would become an ‘alternative finance’ to the existing financial model (Fung 2010). Needless to say, the greatest beneficiaries of this plan would be the private insurance companies and health service providers in both private and public sectors.

There is another deep issue elicited by the government’s propensity to adopt the language of choice, which reflects its conviction to equate medical service as market commodities (Catherley 2011a). As in the market for other commodities, it is assumed that consumers will make the most ‘rational choice’ according to his own preferences and spending power. In this scenario, the role of the government is simple, i.e., to maintain the ‘openness’ such that no one is able to monopolize either the demand or supply of the commodity in question. In the Preface of *My Health, My Choice*, Dr. Chow addresses citizens as consumers who value the ‘freedom to choose’ between private and public healthcare services. But can

¹⁰See the discussion in Fung (2010) and Catherley (2011b). See also Muntaner et al. (2011) and Stone (2008).

the HPS/VHIS really provide us ‘with better choices for lifelong protection’? As discussed earlier, packaged charging for common procedures may provide more transparency in fees and charges, but this is not the same thing as a ‘better protection.’ A more basic issue is whether market mechanisms can function as effectively in the market for medical service as in other markets, and the answer from most scholars in this field is a clear negative. The reasons are clear and overwhelming: (1) There is little elasticity in the demand for medical service; (2) most people are not knowledgeable enough to assess and evaluate the quality of service they receive; (3) the market in medical service is often dominated and controlled by a few large providers, and the relationships between private insurance companies, private hospitals and clinics, doctors, and drug companies are too complicated and interconnected; (4) there is also asymmetry in the flow of market information (again often controlled by service providers); (5) people are often helpless in controlling the factors that affect their health conditions, such as work environment, climate change, food, and air quality ; and (6) externalities such as contagious and infectious diseases render market mechanism inappropriate (Hsiao 1994; Rice 1997, 1998; Light 2000 etc.). In addition to the above factors that contribute to a ‘market failure’ in medical service, there is also a need for the government to consider providing public healthcare service as a kind of ‘public good’ such as maintaining social justice or enhancing economic productivity (Daniels 1985, 2008; Ruger 2010 etc.).

Conclusion

Hong Kong’s social welfare policy has often been criticized for its lack of proactive long-term planning. This is at best a half truth. In so far as healthcare finance reform is concerned, the government has studied the issue and initiated discussions on various proposals for at least two decades. What is missing in all these initiatives is not a lack of planning, but a lack of vision. Not only has it failed to convince the public the necessity of reform, it has also failed to meet the expectations of the public and offer a clear vision of the role of public healthcare system. Most importantly, the government has missed a golden opportunity to evoke a spirit of a moral community founded on the principle of solidarity that it desperately needs to strengthen its legitimacy from the people. Instead, the government has once again sided with the vested interests and proposed a plan that is at odds with existing values and principles. If implemented, the HPS would certainly undermine our entire public health system as we know it (Yeung 2011).

In the Legislative Council’s Panel on Health Services meeting on August 8, 2011, many members and representatives of various healthcare professions have expressed their discontent of the HPS to Dr. Gabriel Leung, then undersecretary for the Food and Health Bureau. According to news report, Dr. Leung insisted on the necessity of reform as well as on the correctness of direction of reform and claimed that the HPS/VHIS has received support from two-thirds of those who

expressed their views in polls conducted by the government. He even accused those who opposed the HPS/VHIS were ‘trying to have it both ways (‘shu da ying yao’¹¹)’ (*Hong Kong Economic Journal*, 9/8/2011:10). I believe Dr. Leung’s figure is based on the data contained in Food and Health Bureau (2008b), where #5.55 stated that: ‘voluntary insurance with incentives consistently ranked as the most supported proposal (71 % supported whereas only 13 % opposed) amongst all the supplementary financing proposals’ (Food and Health Bureau 2008b: 32). One could argue that it is the government itself who wants ‘to have it both ways,’ for the ‘options’ given to the respondents were actually biased and loaded in favor of the government’s predisposed position, i.e., increase taxation to maintain the existing system (35 % supported and 42 % opposed), increase user fee (47 % supported and 35 % opposed), mandatory private health insurance (44 % supported and 31 % opposed), and mandatory medical savings account (58 % supported and 25 % opposed). Given such choices and phrased in such terms, it is only natural that voluntary insurance should receive most support. But even this report admits that ‘[t] here was broad consensus in the community that the public healthcare system should continue to serve ... the population as a whole’ (ibid.: iv, #27) and that ‘[t] he public and respondents were generally supportive of increasing the Government’s recurrent expenditure for healthcare’ (ibid.: vi, #37). It is therefore misleading for the government to say that the HPS/VHIS has received majority support from Hong Kong citizens. In the end, the report used *Article 107* of *The Basic Law*¹² as an excuse for introducing supplementary financing into our public healthcare system. I hope it is by now clear that this is nothing more than an excuse, for even leaving aside the issue of the government’s record of adherence or compliance to *Article 107*, using public money to support private insurance is certainly not supported by this article. Indeed, the entire consultation process reveals that such consultation exercises are at best gimmicks and at worst insults to people’s wisdom. The main problem with the proposed reform is a lack of vision, which is important both for gaining support and providing clear orientation and direction. In a political climate where the government lacks legitimacy from its people, it should consolidate its moral appeal by working for the welfare of its people. One way of doing this is to strengthen its public healthcare system by invoking a sense of solidarity. The cost of not doing so would be increasing its own ‘ungovernability,’ ultimately raising havoc for the principle of ‘one country, two systems.’

¹¹The Chinese expression literally refers to one’s attitude in a gambling game and can roughly be translated as ‘having it both ways’ or ‘heads I win, tails you lose,’ i.e., if you win, you accept the results; if you lose, you reinterpret the results to your own favor. In either case, you keep your own money and demand for the prize. The undersecretary may be referring to some Legco members’ attitudes to the opinion polls—if the poll results are favorable, they will use the poll results. If the poll results are not favorable, they will talk about something else.

¹²*Article 107* of *The Basic Law* states that: ‘Hong Kong Special Administrative Region shall follow the principle of keeping the expenditure within the limits of revenues in drawing up its budget, and strive to achieve a fiscal balance, avoid deficits and keep the budget commensurate with the growth rate of its gross domestic product.’

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Chapter 10

A Philosophical Analysis on the Reasons Against the Building of Guangzhou–Shenzhen–Hong Kong Express Rail Link

Sui Ming Tsang

Abstract The building of Guangzhou–Shenzhen–Hong Kong Express Rail Link (XRL), which will link Hong Kong and the Mainland, has stirred a huge controversy. In this chapter, we will consider the arguments for the building of it, such as whether it is cost-effective and in accord with public interest. The in-depth analysis of these terms will expose the inadequacies of these concepts and highlights the importance of social justice as policy justification. On the other hand, moral arguments against the building of it will also be evaluated. For example, whether it is procedurally and substantively just or unjust to build XRL will be discussed. The role of government in a just society is also the focus of this chapter. Nozick and Rawls' views will be discussed and applied to the understanding of the building of XRL. Through illumination of the role of government and important concepts such as justice, readers can determine whether the building of XRL fulfills the requirement of social justice. This discussion may act as stimulus for reflection concerning the rights and duties of citizenship.

Introduction

The building of Hong Kong Section of Guangzhou–Shenzhen–Hong Kong Express Rail Link (XRL) commenced in 2010. According to her official Web site, it includes four parts, namely

- (1) West Kowloon Terminus;
- (2) Approximately 26-km long tunnel;
- (3) Emergency rescue station and stabling sidings at Shek Kong; and
- (4) Associated ventilation buildings, emergency access point, and the associated ventilation shafts and adits/accesses for the tunnel.

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The estimated completion date is 2015. According to the official Web site, it can ‘materialize the idea of one hour living cycle between Hong Kong and the Pearl River Delta region.’ It connects with the 16,000-km national high-speed railway network and helps Hong Kong link to Mainland China, which is full of development potential. Hong Kong citizens can develop their own business and have a better future and wider perspective.¹ Moreover, the XRL is environmentally friendly because ‘full length of the XRL alignment in tunnel can minimize the impact to the environment and local communities.’ It will also boost consumption and tourism as its West Kowloon Terminus is in urban area with dense population and economic activities so the convenient transport facilities will bring visitors to their destinations easily.

However, the building of 26-km long XRL gave rise to much controversy. It also triggered heated debate and mass protest against government. People question XRL’s effectiveness and emphasize the ecological and environmental damage and the negative impact on the life of Choi Yuen Tsuen. More importantly, as argued by some post-80 s and social critics, the whole project is procedurally and substantially unjust. Since justice is one of the important values in the decision making of public policy, the construction plan should be revised or even abandoned. In the following discussion, we will examine these arguments mainly in light of justice. The reason is simple: Values in governance include not only efficiency and public interests; social justice is also an important yardstick.

We will first define what justice is and then take it as a reference point to bring other concepts and issues into discussion. After that, we will argue against those who think that efficiency and public interest are the only important consideration. After clearing the path, we will discuss in what way the building of XRL violates both procedural and substantive justice.

What Is Justice?

Although many discourses on XRL refer to justice, the exact meaning of justice is contested. According to Aristotle, justice is to give one his/her due. He writes, ‘it (justice) considers that those who are equal should have assigned to them equal things. But here there arises a question which must not be overlooked. Equals and unequals—yes; but equals and unequals in what?’ (Aristotle 1997). This is like what Rawls calls the concept of justice. But what is his/her due? For example, Aristotle points out that some criteria like fair amount of goods should be distributed, viz between too much and too little. Just in distributions should also accord with some sort of worth, viz distributing something worthless is not just (Aristotle 1997). On the other hand, he also mentions that it should be related to

¹Yung (chapter 1 of this book) points out that the issue of closer integration of Hong Kong with Mainland China looms larger after the transfer of sovereign in 1997, with the Express Rail Link controversy as an epitome of this.

the performance of particular functions, for example, a superior flute should not be distributed to those who are better born as it is irrelevant to flute playing. 'The reason is that where people differ from one another there must be a difference in what is just and proportionate to their merits' (Aristotle 1997). Better born is not a merit in this context. Therefore, the superior instrument should be reserved for the superior artist.

We can find that the concept of justice is just the general structure, but the conception of justice is the particular specification of the concept, which gives the concept detail (Swift 2001). That means even if we share same concept of justice, but still we can have different conceptions of justice. Actually, there are many different conceptions of justice in contemporary literature. The most famous conceptions are Rawls's 'justice as fairness' and Nozick's 'justice as entitlement.' These ideals certainly are in conflict with each other. For example, Nozick is against the end-state approach which means that he is against any particular pattern of distribution. To Nozick, what really matters is whether the holder has a legitimate title in the property with reference to rules of ownership, transfer, and the rectification of illegitimate transfers. As for Rawls, he thinks that justice is a matter of social contract which the contractor would agree if they are put into a veil of ignorance in the original position. The veil of ignorance does not allow them to know their particular nature, such as their sex, social class, intelligence, and talent. Most importantly, Rawls argues that principles of justice will be agreed in the original position (Rawls 1999).² In Nozick's view, Rawls's approach is not historical and is patterned.

If we adopt a different approach, we may have very different ideas of justice. Certainly, it will influence our particular judgment of public policy hugely. For example, Nozick finds it is good enough if none's right is violated during the transaction process, and it implies that redistribution to curb inequality is not necessary. The state should not do more than a night watchman. However, Rawls thinks that the basic structure should maximize the position of the worst off, which means that even if no right is violated, the state should do something to attain the maximin. Maximin is a conservative rule in decision theory which asks one to choose the alternative whose worst outcome is better than the worst outcome of other alternatives (Freeman 2000). Rawls thinks that the parties in original position will apply maximin rule in original position.

Rawls also insists on the distinction between concept and conception of justice. In his influential book, *A Theory of Justice*, Rawls distinguishes the concept of justice as meaning a proper balance between competing claims from a conception of justice as a set of principles for identifying the relevant considerations which determine their balances (Rawls 1999). How to achieve the proper balance? Rawls proposes his 'general conception of justice' as all social values like liberty and opportunity are to be distributed equally unless an unequal distribution is to everyone's advantage (Rawls 1999). It means that inequalities are unjust only if

²Please refer to the section 'The role of Government in a just society' for further discussion of the difference principle.

it cannot benefit all. On the other hand, he defines justice as consistent with efficiency, but justice is still prior to efficiency (Rawls 1999).

On the other hand, as pointed out by some philosophers like Miller, justice should also raise concern about the dimension of need and desert. For example, it fits our intuition that the sick should be given proper medical care, and it is exactly the requirement of need. And a brilliant writer deserves literature prize, and it is the consideration of desert. Different needs and desert may justify different unequal distribution, but to what extent and what kind of need and desert justify is the problem. Traditional approach takes justice as ‘giving to each his/her due.’ But there are too many different interpretations of ‘due,’ which lead to different conceptions of justice. Justice concerns the distribution of social benefits and burdens. The controversial point is, how? For example, how the rich should be taxed and who is eligible to be offered the social welfare? What should be included as social benefits and burdens is also an important question. Liberties, rights, and wealth may be included but not friendship. The reason is because we think that liberties, rights, and wealth are public goods, but friendship is not. It will disrupt the meaning of these private goods if it is distributed by the state or government. However, it is expected to be difficult to provide criteria to determine how different kinds of goods should be distributed.

Justice and the XRL

We may find it surprising that in ordinary discussion, many literatures using the word ‘justice’ without distinguishing its different meanings. They would like to put all arguments against building XRL into the category of ‘injustice’ or taking justice simply equivalent to morally right (Xie 2009).

According to Simon Blackburn, justice can be distinguished as distributive and retributive. The former refers to ‘the just distribution of benefits and burdens’. The latter refers to ‘regaining an equality that justice overturned’ (Blackburn 1994). In the issue of XRL, we mainly focus on distributive justice. What does distributive justice mainly concern about? Blackburn explains,

A common basis is that persons should be treated equally unless reasons for inequality exist; after that the problems include the kind of reasons that justify departing from equality, the role of the state in rectifying inequality, and the link between a distributive system and the maximization of well-being (Blackburn 1994: 195).

This brief explanation highlights several points about justice that we should consider. First, justice means equal treatment, other things being equal. We call this as egalitarian demand.³ It inspires us to consider whether building the XRL

³For an extended discussion of various understanding of the concept of equality, including ‘formal equality,’ ‘treating likes alike,’ ‘equal opportunities,’ and ‘substantive equality’, see Karen Lee’s chapter (Chap. 7 in this book).

will widen the disparity of the rich and the poor or benefit the better off more than the worst off. Therefore, it relates to wealth and resource distribution. On the other hand, we are also concerned about whether the government give the Choi Yuen Tsuen villagers equal concern and respect in her decision-making process.

Second, justice is related to state or government, as it is the most powerful institution which is able to do distribution. We have to consider the role of Hong Kong government in the XRL controversy. Can a government really be neutral? In building an infrastructure, what rationale should government adopt in order to be fair to all?⁴

Third, a distributive system has to consider the utility or total well-being brought forth. If a distributive system brings equally bad consequences, we would not like call it as a 'just distribution.' That is why we still have to consider the effect or outcome of building XRL, such as its efficiency and whether it can bring about public interest. Rawls thinks that the distinctive role of conceptions of justice is to specify basic rights and duties to determine the appropriate distributive shares. However, conceptions of justice unavoidably will affect the problems of efficiency, coordination, and stability (Rawls 1999). That is why we would like to know the relationship between the distribution (building XRL as a kind of distribution) and utility. It should be noted that taking consequence into account is different from maximization of utility or efficiency. The former takes utility as one of its consideration, but does not find that it is always overriding and the only value. Williams points out that alternative to consequentialism is not necessarily that there are some actions one should do or one should not do, *whatever* the consequences. A less strong version of alternative to consequentialism is that some *types* of actions one should do or one should not do, *whatever* the consequences (Smart and Williams 1973). Consequences or utility is one of the consideration but not the only one. However, consequentialism takes utility as the only value and demands the agents to maximize utility in order to be just or moral. Rawls is clearly different from utilitarianism as he recognizes the importance of different values like equality and liberty.

Ethical dilemmas can occur when there are conflicts of above values. But, sometimes it is just apparent. Contextual analysis is required to find out the main problem of particular social policy. Apart from above concern about substantive distribution, we have to consider whether the process of making a decision is just or appropriate. Does the government give fair chance of hearing different views and provide sufficient information to the public? Is voting in the Legislative Council a fair and transparent process? This is concerned about procedural fairness. It means that the decision making must satisfy a fair procedure which is independent of the result.

⁴Of course, not only justice is related to government or state, but also market is involved. I owe this suggestion to Professor Chow Po Chung.

Is the XRL Efficient?

Many supporters of XRL claim that since building XRL is efficient and conducive to public interest, it should therefore override the consideration of justice. In this section, I will argue that this attempt is questionable.⁵

As we know, the Railway Project costs are HKD \$62.4 billion (in 2009 prices). To determine whether it is efficient, we also have to consider what the target of building of XRL is, as efficiency is determined by means–end relationship. For example, if we would like to determine the most efficient way to go to CUHK, different means like by MTR or by bus are to be accessed according to this goal. So what is the goal of building XRL?

According to the government, the XRL can bring many job opportunities, 11,000 during the construction and 10,000 after the construction. On the other hand, the XRL can benefit finance, travel, and retailing a lot. It can also increase the numbers of tourists from Mainland China by 10 % and result in 30 billion dollars consumption by 2016.

However, some critics point out that the XRL is the most costly one in the world (Lai 2009). This is mainly because of the XRL's long tunnel. But if we agree that the XRL is worth building, we may consider whether we can find a lower cost building method. It then becomes only a technical issue. But the understanding of cost in dispute cannot be confined to monetary value. For example, if building the XRL without tunnel reduces cost hugely but it damages a lot of agricultural areas and historical heritage, people can still object to the XRL by saying that it 'costs too much.' If different people have different conceptions of costs, we cannot determine whether the XRL is efficient or not as we have different ends. In current discourse, we take it for granted that monetary benefit is axiomatically given special privileges. But we have different values and a society has many different goals. Why economic development can always be overriding? For example, one critic Leung Man To asks why preserving village life cannot be considered a kind of development (Leung 2010). His point is exactly that we should not restrict the term of development as economic development. Activist Chu Hoi Dick points out that protecting our environment is very important especially the building of the XRL tunnel may disrupt the underground water in New Territories. He also reminds that our environment is also valuable besides economic benefits. All these discourses show the discussion of whether the XRL is efficient has uncritically presupposed a single value, viz monetary benefit. Monetary benefit, important as it may be, should be considered with social values.

What if we put all these values into consideration and try to balance them? To achieve this, first, the government is responsible for using reliable and transparent information to convince the public that the XRL is worthwhile. But in reality, the

⁵This is an example of what Yung (Chap. 1 of this book) points out that there may be disagreements over how different values are to be prioritized and how the balance is to be struck among conflicting values in a social issue.

government seems to be a salesman rather than a neutral party to help citizen to make a rational choice. It means the government is not trying to give an option for us to choose, but try to impose that to us. Second, we should have a fair and transparent procedure to let us to determine a collective decision even if different people have different weighting on different values. Especially, the expenditure of this huge amount of public money should go through a process of consultation. However, many critics have blamed that the whole procedure is too rush.⁶ Moreover, it should be noted that those values can be incompatible and is impossible to get a perfect balance. For example, building a tunnel for XRL unavoidably brings irreversible negative impact to the environment. We have to make a wise choice here.

What Is Public Interest?

According to the definition of *The Concise Oxford Dictionary of Politics*, 'public interest' is defined as the common interest of persons in their capacity as members of the public. For example, building reservoirs and hospitals are in accord with public interest as they can all use it if they are the members of the society. If a businessman makes profit, he/she may share the profit to his/her employees. However, not all members of society can share the interest, so it is not public interest.

Public interest can also be defined as the aggregation of the individual interests of the persons affected by a policy or action under consideration (McLean 1996). For example, if building a park can make A happier, B more healthy, and C more relaxed, the aggregated interests of A, B, and C are public interest.

The term public interest has invited some skeptics. The first definition cannot tell us how to identify what public interest is. How about playing firework everyday which every citizen can enjoy? People may find that it is trivial and wasting money. It illustrates that public interest requires more criteria rather than just can be shared by all citizens. For example, a restaurant is open to all public but it does not mean that it is in public interest to build it.

The second definition leads us to think about who should constitute the public. For example, whether building a park is for public interest depends on who uses that park, and these people who use the park may not be in the same group. We cannot find a group which comprises all the people, and thus, some group or people will be excluded. Who should be excluded and why they can be excluded

⁶According to an interview with Dr. Leung Kai Chi, one representative of Professional Common mentions that the proposal of Kam Sheung Road is to give pressure to government to provide more information to general public as the government has to show that their proposal is better than their. Dr Leung admits that their proposal is rather rush and not well-planned, but it also shows that the government with so many experts and resources is not willing to be more transparent.

from the 'public'? How can we define it and who can define it? These are thorny questions. The term of public interest is not only vague but maybe even politician's smoke screen.

Another question is the interests of minority. Does 'public' mean that the majority can override the interest of the minority? If yes, it leads us to consider the shortcomings of utilitarianism. For utilitarianism, number matters because the pleasure or utility of each affected by that specific action multiplies the number of people can determine whether an action is right or wrong. But if we adopt the language of rights, the above rationale will become problematic. Even if 600 million people consider that the XRL should be built, it does not mean that the rights of those villagers of Choi Yuen Tsuen should be sacrificed even if they are minority. The real issue is whether they have rights to live there. And if the demolition of village is necessary, the question is whether they should be compensated. We may consider two definitions of right and wrong provided by two important contemporary philosophers. Scanlon and Habermas both claim that a rule should get no reasonable rejection or get full agreement (after rational discourse) from those affected. These formulations show the rationale that we should consider every individual's interests separately. Utilitarianism's terminology like number and utility cannot capture the essence of right and wrong. The language of rights shows that the uncritically use of public interests as justification can violate individual interests.

Here, I do not propose to reject all the use of the term 'public interest.' However, we can find that the concept of public interest can be so murky and confusing. So is it justified or convincing enough to use this buzzword to support the construction of the XRL? We had better deal with the problem by considering the interest of different stakeholders carefully or in Marxian term, clarifying which class can benefit from the building of XRL.

But Barry may be right to say that 'even if many of the writings about the concept are confused it does not follow that the concept itself is' (Barry 1967). He explains why the term is so popular as political justification is that 'the state is expected to produce affluence and maintain civil liberties but not virtue or religious conformity, a society which has no distinction between different grades of citizen, and a society with larger complex organizations exhibiting a high degree of rank and apathy' (Barry 1967). Public interest becomes a good tool of political justification or legitimation. But it should be noted that justice is also an important dimension of political justification.

Barry's point also leads us to the question what should the government do. Does it only need to maintain civil liberties and does it only need to produce affluence? What happens if they are in conflict?

In the following discussion, we will investigate the role of government in a just society. By portraying the ideal of justice, we can evaluate what our SAR government does in reality. Lastly, we will discuss the difference between procedural justice and substantive justice and evaluate their importance, respectively.

Should Government Demolish Choi Yuen Tsuen?

Besides using the economic term, we can evaluate whether demolishing Choi Yuen Tsuen is just or unjust, i.e., using moral terms. Choi Yuen Tsuen is affected by the construction of the XRL, as the emergency rescue station and stabling sidings are proposed to be built at Shek Kong. The first question certainly is whether it is necessary to build the station there, as Shek Kong has many lands available like Shek Kong Camp according to the XRL Concern Group. The criteria of choosing that site can be technical and utility-oriented, but it can also be considered with regard to the ideal of equality and fairness, for example, according to what procedure does the government determine the site, and whether the procedure is itself fair and transparent. Moreover, does this decision promote equality or bring out more inequality of wealth or other social goods such as equal opportunity to lead one's life?

We also have to consider that many Choi Yuen Tsuen villagers have lived there for 40 years; they are used to the simple life of farming and the close relationship of neighborhood. The demolition of the village not only brings physical damage, but also results in the destruction of community values.

Choi Yuen Tsuen residents initially took the stance of 'no moving, no demolition.' However, after the approval of the construction of the XRL by Legco, the problem turns to what the government should compensate for their loss.

If only with monetary compensation, the continual of the way of living is not guaranteed because that requires agricultural land and rebuilding a new village. That is why the villagers asked for land to reconstruct the village and the license for farming.

Does the government have the responsibility to provide land to Choi Yuen Tsuen residents? Some argue that the government should be neutral and should not promote any way of living. But can government be neutral in this case? The government explains that it is not possible for government to give lands to villagers, and therefore, she can only give compensation to let villagers buy land by themselves (Ng 2011). Even if the government has this limitation, does it mean that giving monetary compensation has done enough to villagers? Should she help coordinate the reconstruction of Choi Yuen Tsuen if she is just? What should she consider when an infrastructure is constructed? That is why we have to consider what the role of just government is.

The Role of Government in a just Society

We can deal with this question by comparing two prominent theories of justice, namely Nozick's libertarianism and Rawls's liberalism. For Nozick, the government should be as minimal as possible, which means that government should take the role of night watchman to provide security only. But for Rawls, he wants to

justify a set of basic liberties so that citizens can have freedom to pursue their own conceptions of the good life. For Rawls, redistribution is a necessary means to achieve this goal.⁷

If we consider the case of building XRL from their perspectives, we may have to consider whether building XRL is basic infrastructure. The answer is obviously not. It may be beneficial but far from necessary. However, if we use taxpayers' money to build, we can consider it as a kind of redistribution by government. It is because some get more benefit from building XRL like many property owners near the XRL terminus and some may take it as burden, like those Choi Yuen Tsuen villagers.⁸ As we have mentioned before, social justice is concerned about the distribution of social benefits and burdens and that is why justice is also involved here.

Against redistribution, in his most famous book *Anarchy, State, and Utopia*, Nozick criticizes the end-result principles or end-state principles (Nozick 1974). He has two reasons for doing so. First, he thinks that the end-result principle does not respect the actual history of transactions and entitlements. Nozick says:

In contrast to end-result principles of justice, historical principles of justice hold that past circumstances or actions of people can create differential entitlements or differential deserts to things. An injustice can be worked by moving from one distribution to another structurally identical one, for the second, in profile the same, may violate people's entitlements or deserts; it may not fit the actual history (Nozick 1974: 155).

Second, he thinks that any egalitarian principle is patterning. A distribution is patterned if it accords with some patterned principle, e.g., moral merit and IQ. Nozick notes that it ignores those who provide goods for distribution, as patterning is recipient-oriented:

To think that the task of a theory of distributive justice is to fill in the blank in "to each according to his _____" is to be predisposed to search for a pattern; and the separate treatment of "from each according to his _____" treats production and distribution as two separate and independent issues (Nozick 1974: 159–160).

But most importantly, he thinks that all distribution principles should always be with continual interference, which unavoidably violates the individual's actions and choices. It also seriously violates personal rights.

However, putting Nozick's theory to the context of building XRL, we may even use Nozick's argument against the building of the XRL. It is because if a taxpayer is not for the integration of Hong Kong to Mainland through the building XRL, he/she will find that using taxpayer's money to build the XRL violates his/her personal rights. Social benefits do not only involve social welfare but also benefit from government's infrastructure. But it is a quite radical position as building of infrastructure can be socially useful and economically beneficial. It is more fruitful

⁷For a detailed discussion of 'what is good governance' and the role of the government in this, please refer to Yung's chapter (Chap. 1 of this book).

⁸This is an example of what Yung (Chap. 1 of this book) points out in that there are often winners and losers in a policy decision.

if we consider who has the priority to enjoy the benefit from building of infrastructure from the moral point of view.

On the other hand, assuming that the actual history or entitlement does not violate any moral principle, Nozick's 'open gate theory' has no complaint to the huge disparity between the rich and the poor. However, we know that the disparity can bring adverse effect to our society and individual, say social harmony and self-esteem. It is weird if we ignore this and insists on saying that it is acceptable.

If we do not want to adopt Nozick's approach, we may turn to Rawls's idea of liberal equality, and we can consider the issue from the perspectives of both utility and equality. Rawls's first principle states that every person has an equal right to basic liberties (Rawls 1999). 'Basic liberties' include political rights such as the right to vote, to run for office, to due process of law, and to free speech and mobility. Kymlicka summarizes them as 'the standard civil and political rights recognized in liberal democracies' (Kymlicka 1990). Rawls's second principle of justice has two parts: the principle of fair equality of opportunity and the difference principle. The first part states that social and economic inequalities are justified if all offices and positions are open to all under conditions of fair equality of opportunity. The second part states that inequalities must be to the greatest benefit of the least advantaged. Rawls considers government as a means to protect our basic liberties, and we should choose a basic structure which allows social and economic inequalities only if it can maximize the benefit of the worst off.

As pointed by Freeman, Rawls's difference principle's application has interesting development recently. He points out that 'the difference principle is consciously to be applied to each and every act of legislation, at least when laws have any tangible effects on the prospects of the worst off. If proposed legislation is likely to make the least advantaged worse off than some feasible alternative, then legislators are required to reject it in favor of that alternative' (Freeman 2000: 232). That is why even building XRL is far from a basic structure, we may still think that building XRL is justified only if (1) the worst off can fare better than not building it and (2) the worst off can get the maximum of what he/she can get by building XRL. The (2) is very difficult to achieve in reality, but (1) is probably the rationale behind those who advocates building XRL, even though they can admit that it benefits the rich people more.

The difference principle seems to be less radical than egalitarianism. Egalitarianism is often criticized by a so-called leveling down objection. And Rawls's difference principle can avoid the leveling down objection. If there is no benefit by levelling down the better off to make society's distribution more equal, it seems to be irrational to say yes to leveling down. An equal distribution but brings disaster to all people is not desirable. The difference principle has the virtue of avoiding 'levelling down,' as it allows inequality if it can benefit the worst off. It does not demand equality no matter the consequences.

Those who oppose enforcing equality attack its comparative structure. They hold that some of these comparisons are driven by petty concerns such as envy. They also assert that there is no point to conduct comparisons, as proven by the so-called isolated earth case. For example, note the following chart (Table 10.1).

Table 10.1 Isolated earth case

Scenario	A	B
Group 1's benefit	20	80
Group 2's benefit	10	10

Table 10.2 Gap and maximin

	A	B	C
The worst off	10	11	8
Average	15	20	9

Transforming the situation from A to B would widen the gap between Group 1 and Group 2. But provided that Group 2 is not harmed by this transformation, why should we be against it? Does egalitarianism find any reason to transform from situation B to A?

Rawls proposes the difference principle to tackle this problem. B can be preferred to A even though the gap is wider if the worst off can have maximin. Therefore, in Table 10.2, C is not preferable as the worst off cannot get the maximin (maximin is 11) even the gap is narrower than those in A and B.

After above discussion, we know that the difference principle tries to accommodate different considerations together. We may consider these scenarios with the help of following analysis: (a) not building the XRL; (b) build the XRL and compensate the villagers for demolishing their village; (c) build the XRL but bypass the village; and (d) build the XRL, demolish the village, and rebuild the village elsewhere.

Certainly, the number is hypothetical, but I hope it can more or less mirror the situation. Even if we assume that building XRL in average can benefit the citizen, we still have to think about in what way we should deal with the worst off. We may try to find out an option which more or less attaining the maximin of the worst off provided that it does not harm the average a lot. The Rawlsian principles may favor some the options more than the other on the basis of the benefit for the least advantaged group. Therefore, in Table 10.3, the option build the XRL but bypass the village maybe chosen, even though it cannot bring the maximum benefit in average.

After above abstract discussion, it should be noted that we do not determine public policy by only one principle. There may be more principles involved. It can involve equality, utility, and other values such as liberty. For example, a particular policy may generate benefit to all citizens equally but the utility may be too low.

Table 10.3 Average and Choi Yuen Tsuen Villager's benefit in different scenario

Option	No XRL	Build XRL, demolish the village, and compensate the villagers monetarily	Build XRL and Rebuild the village	Build the XRL but bypass the village
Average	100	150	144	145
Choi Yuen Tsuen Villagers	20	10	18	21

Or a policy can bring huge benefit, but it will violate people's liberty or rights, say the government confiscates private lands in urban area to build public housing.⁹

The conception of just society and the role of government thus are expected to be various. And sometimes, people may be willing to sacrifice one value to get other, say sacrifice the ideal of equality to get more benefit.

It is also questionable whether the difference principle has met the demand of equality, as the difference principle also allows a trade-off between equality and utility. It only concerns the maximin, not the relative position of the worst off, but still it is a more stringent requirement than just considering from the idea of the trickle-down theory. The reason is that the difference principle gives priority to the worst off, which means that the distribution can be determined as just or not by considering whether the worst off get the maximin. However, the trickle-down theory, a dominant discourse now, is not a theory targeting the worst off and equality.

The trickle-down theory assumes that economic growth can flow down from the top to the bottom, indirectly benefiting those who do not directly benefit from a particular policy. And the trickle-down theory is the most popular discourse for those who support building infrastructure like XRL. They believe that we do not need to give special consideration to the worst off. It is because even if the XRL cannot directly benefit the worst off, it is believed that building XRL ultimately can help the poor indirectly such as providing more job opportunities to them. So even if the benefit distributed can be highly uneven and mostly likely to benefit the rich more, it is still justified. However, as mentioned by Chu Hoi Dick, building the XRL without considering the negative impact to agriculture and industries which is so essential to low-income classes actually harms the worst off (Chu 2011).

Procedural Justice

A debate between the chairman of Federation of Hong Kong Industries (FHKI), Cliff Sun (孫啟烈), and activist Chu Hoi Dick (朱凱迪) illustrates two important concepts for us to further consider the issue of the XRL. Chu complains that the government can use functional constituency, which mainly cares the interest of business class and is not open to all Hong Kong citizens equally, to let the construction of XRL be approved in the Legislative Council.¹⁰ Therefore, even if we

⁹This reflects what Yung (Chap. 1 of this book) highlights that values may clash with each other in a public policy, necessitating prioritization of the values, often involving disagreements over how a balance should be struck between the conflicting values, leading to heated debates.

¹⁰In 2010, Hong Kong's Legislative Council had 60 seats. 30 of the 60 were directly elected by the people which is called geographical constituencies. As for the remaining seats, they are called functional constituencies which represent different sectors of the community such as insurance, transport, accountancy, agriculture, and fisheries. There are two main problems of functional constituencies which is still here till now: (1) the demarcation of functional constituencies seems to be arbitrary and controversial. (2) The size of electorate and electoral method in each seat of functional constituencies varies. It is not in accord with the spirit of equal suffrage.

know that the approval is not a democratic and fair decision, we cannot help but let it approve legally. Procedural justice is thus not fulfilled.

Sun defends that functional constituency can help those Hong Kong economic interests voice out, and therefore, it is really functional. Chu questions why functional constituency has one more votes and it touches the issue of political equality.¹¹ Political equality, under the context of representative democracy, means that every citizen has participatory parity to choose their own representative to determine public policy.

Therefore, even if we concede that functional constituency has certain contribution, it does not help to rid of the challenge of tyranny of business class. It also raises the suspect of collusion between the government and the business.

Some skeptics of the XRL even believe that the XRL just benefits the rich, especially the Terminus is built in West Kowloon, where the future cultural district will be located. It certainly can boost the property market in that district and attracts those rich mainlanders come to buy property in West Kowloon. This is the reason why some people like The Professional Common suggest that building the Terminus in Kam Sheung Road can bring more benefit to the residents of New Territories. Moreover, the station building there is less expensive, and the money saved can be used for other better goals such as building more public housing. However, this idea is finally banned (Xun 2010).

Certainly, the determination of locale of the Terminus involves many different considerations such as the cost and technical plausibility. Whether building the Terminus in Kam Sheung Road can benefit the whole New Territories is also debatable, say East New Territories cannot enjoy the XRL directly.¹² However, for the sake of the argument, if we consider the issue only from the perspective of distribution, it is like the government use taxpayers' money to subsidy the rich rather than the poor, as the rich can benefit more from the XRL than the poor.

On the other hand, some people find that the building of the XRL has not gone through enough consultation. Legislator Emily Lau Wai-hing points out that the government has not done enough consultation. Many important issues like one-stop customs and immigration checkpoint have not been discussed fully before the government asks the Legislative Council to approve the building of the XRL. Moreover, the duration of consultation is reported to be the shortest among the recent projects of infrastructure building. In this short period of consultation, has the government provided enough information for those affected and Hong Kong citizen to make a rational decision? A scholar from Department of Urban Planning and Design, Ng Mee Kam, points out that the government should provide more information, such as the benefit of XRL to Hong Kong people to convince those affected that building of the XRL is necessary and fruitful, especially the consultation period is so short. All of these reveal that the procedural justice in this case to a large extent has not been fulfilled.

¹¹Functional Constituency voters can also vote in geographical constituency. It implies that some voters have two votes while others have only one. It obviously violates 'one man, one vote' basis.

¹²I owe this point to Dr Leung Kai Chi.

Procedural refers to rule or mechanism to instruct agent, an individual or an institution to assign benefits or burdens to others (Miller 1999). Most people against building XRL find that procedural injustice can result in distributive injustice; however, these two concepts are not conceptually equivalent. It is because in theory, there can be impartial and intelligent decision maker help us to derive a perfectly just and efficient distribution. We do not need any 'just' procedure.

However, Miller thinks that the distinction is still important, even sometimes they can overlap, he says:

...there is indeed a justice of procedures that can be identified independent of the outcomes to which these procedure lead; and it is an important requirement of social justice that a society's institutions and practices should comply with this. In most cases, however, outcomes can also be judged as just or unjust independent of the procedures that gave rise to them, and so one main quality we will look for procedures is precisely that they should be well calculated to produce just results...But there is no reason to build this up into an all-or-nothing choice between the two kinds of fairness (Miller 1999: 94).

Miller thinks that we should consider justice to its own qualities and outcomes, such as equality, desert, and need. It is because even if our Legislative Council is perfectly democratically formed and it has a highly fair voting system, the procedure still cannot guarantee the just result, viz procedural and outcome justice cannot always converge. It is because the legislators can make wrong judgment (cognitive fallibility). The background conditions may cause inadvertent bias (Miller 1999). In Hong Kong, the Basic Law has defaulted an economic system facilitating capitalism which make perservation of argicultural life difficult. Surely, this does not mean that procedural justice is not important. It is because different procedure has different tendency to justice. Totally, unfair procedure is unlikely to guarantee a just outcome. What Rawls says is worth noting, 'clearly any feasible political procedure may yield an unjust outcome. In fact there is no scheme of procedural political rules which guarantees that unjust legislation will not be enacted. In the case of a constitutional regime, or indeed of any political form, the ideal of perfect procedural justice cannot be realized. The best attainable scheme is one of imperfect procedural justice. Nevertheless some schemes have a greater tendency than others to result in unjust laws' (Rawls 1999: 173). Hong Kong should put its first step to build up its procedural justice in Legislative Council to help ensure the outcome justice, for example, to make the voting procedure more fair by abolishing its current procedures for voting on bills and increase the representativeness of the legislator by abolishing functional constituencies or modifying its election procedure.¹³

¹³*Basic Law* Annex 2 mentions that 'the passages of motions, bills or amendments to government bills introduced by individual members of the Legislative Council shall require a simple majority vote of each of the two groups of member present: members returned by functional constituencies and those returned by geographical constituencies through direction elections and by the Election Committee.' It means that the bill introduced by those members of direction elections can be easily rejected.

Conclusion

Philosophy can help us clarify some important terms such as justice, public interests, and the role of government, but the clarification of these terms cannot give us determinate answer on a particular issue like the building of XRL. However, philosophy plays a useful role here, as it reveals the complexity of the issue and it can help to avoid unreflectively upholding the sacred word ‘justice’ or by suppressing all skeptics and critics by using the term ‘public interest.’ If we really know the complexity of these key terms, it will invite more in-depth discussion or argumentation rather than just spinning or manipulation. Moreover, we also hope the readers know in what ways the building of XRL is not fulfilling the requirement of social justice.

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Chapter 11

Justice and Taxation: From GST to Hong Kong Tax System

Betty Yung

Abstract Since the goods-and-services tax (GST) is a consumption tax, those with the same level of consumption will need to pay the same amount of GST, regardless how rich they are. To tax people according to their levels of consumption is to treat unequals (rich and poor with the same level of consumption) equally, thus unjust according to Aristotelian conception of justice. The GST reform intended primarily to broaden the tax base, yet to the detriment of tax justice, involving great administrative cost and discouraging consumption generally should not be an early step to take. Other more just and viable alternatives to GST should more justifiably be implemented before any discussion of the introduction of GST should be seriously considered. The issue of tax justice cannot be assessed by merely considering one specific tax, but must be evaluated in the context of other taxes in the tax system. From a broader perspective, justice in a tax system should not be isolated from how the tax revenue is to be used by the government. Justice, as a social value in public policy, is an indispensable consideration in the design of any tax system. Yet, it is far from the only one. In fact, there may be trade-offs among justice and other important considerations in tax design which leads to tax policy dilemmas. A delicate balance should be maintained among various conflicting considerations as a way out of such dilemmas.

In July, 2006, the Consultation Document, *Broadening the Tax Base: Ensuring Our Future Prosperity*, was issued. It states that “[o]verall, the Government believes that good-and-services tax (GST) is the best option to broaden Hong

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Kong's narrow tax base, while not compromising our competitiveness" (The Government of HKSAR 2006). From this, questions may be raised: Is Hong Kong tax base narrow? Why is a "narrow tax base" a problem? Are "broadening the tax base" and "not compromising competitiveness" the main or the only considerations in a tax reform? Finally, is GST the "best" and the "only" means to broaden the tax base and to reform the Hong Kong taxation system?

Rationales for Introducing GST

First, let us explore whether Hong Kong's tax bases is narrow. The standard answer to this is "Yes, it is," by taking a strict forward definition of "tax." In 2007–08, out the 3.5 million of total working population, only 1.3 million pay Salaries Tax, accounting for merely 37 % of the total working population (Bauhinia Foundation Research Centre 2008, p. 32). Reliance on high-income individuals for salaries tax is also increasing. In 2011–12, the top 200,000 salaries taxpayers contributed as great as 81.7 % of the salaries tax, whereas in 1997–98, they contributed less, only 71.6 %, though still very significant (Financial Services and the Treasury Bureau 2014, p. xiii). As for the profits tax, the burden is mainly borne by a minority of taxpaying corporations—the top 800 taxpaying corporations, out of a total of more than 70,000, pay about 65 % of the total profits tax revenue (Bauhinia Foundation Research Centre 2008, p. 32). There has been a trend of increasing reliance on a few top-paying corporations as the source of profits tax revenue. In 2011–12, the top-paying 700–800 corporations paid 64.4 % of the overall profits tax revenue, as compared to 61 % in 1997–98 (Op.cit.). From this, Hong Kong's source of tax revenue is highly dependent on a significant minority of taxpaying working individuals and corporations.

Besides salaries tax and profits tax, land premium is another significant source of government revenue. In 2006–07, profits tax accounted for 25 % of the total government revenue, while salaries tax and land premium each accounted for 13 % of the government revenue (*Hong Kong Yearbook 2007*). According to Wong and Luk (2007), "[l]and premium can be considered as a land tax in disguise" and they defined tax as "a compulsory payment from citizens to government, backed by government's coercive power, which is not for direct exchange of goods and services" (p. 188). Since the government asserts ownership of all land and has monopoly control of land supply (ibid.), no person in Hong Kong can escape the burden of paying partly the land premium to the government, through the paying of housing cost, and indirectly through shouldering the land cost of production for the goods and services purchased. If we accept that the land premium is a "land tax in disguise," then the "tax base" of Hong Kong is not narrow, as everyone shoulders the burden of the "land tax."

No matter whether one counts land premium as tax, thereby affecting whether the tax base can be rightly regarded as narrow, and the government revenue is highly subjected to economic fluctuations as the three major sources of

government revenue, namely salaries taxes, profits taxes, and land premiums, will decrease significantly at bad economic times—salaries and profits will decrease greatly (with high unemployment rate and businesses closing down) and land prices, thus land premiums, will decrease or there may even be no land sales at all when the economy is bad. This becomes even more serious in view of the increasing reliance on profits tax, salaries tax, and land premium, on the part of the government, to finance its expenditure (Financial Services and the Treasury Bureau 2014, p. 10). Thus, Hong Kong's highly concentrated sources of government revenue will be a focus of concern, especially when revenue diminishes at bad economic times, while recurring government expenditure cannot be decreased or even runs at higher levels, such as in the form of higher unemployment CSSA expenditure. Thus, there is a need for tax reform so that there is a more stable source of government revenue to facilitate long-term government planning.

Is GST the sole and the best option for tax reform? In the consultation document afore-mentioned, the government sees “broadening the tax base” and “not compromising competitiveness” as prominent concerns for the introduction of GST as tax reform. The GST is a form of consumption tax. As everybody consumes, everybody will need to shoulder GST. If we take the narrow definition of taxation (disregarding “land tax in disguise”), only a minority of earners and corporations are at present paying salaries tax and profits tax, respectively. With the introduction of GST, everybody falls into tax net and becomes a taxpayer. Thus, the introduction of GST can broaden the tax base of Hong Kong. As for the “maintaining of competitiveness,” it is the intention of the government to introduce GST, while decreasing direct taxes simultaneously, especially profits tax, so as to increase the attractiveness of Hong Kong to foreign investment and overseas talents, thereby enhancing the competitiveness of Hong Kong. “One of the main reasons for broadening the tax base would be to reduce Hong Kong's reliance on direct taxes, such as Profits Tax, and thereby improve the competitiveness of our tax system” (The Hong Kong Government of SAR 2006, p. 70).

GST and the Social Value of Justice

Besides broadening the tax base to ensure a stable source of government revenue and the economic concern of attracting foreign investment and talents, another very important consideration in the design of a tax system or tax reform is justice (which is an important social value in public policy, including tax policy). According to Aristotle, justice is to treat equals equally and unequals unequally. “...The unjust is unequal, the just is equal...if they are not equal, they will not have what is equal, but this is the origin of quarrels and complaints—when either equals have and are awarded unequal shares or unequals equal share” (Aristotle 1998, p. 112). This Aristotelian conception of justice is in line with the concepts of vertical and horizontal equity in the discussion of taxation. “[V]ertical equity is what fairness demands in tax treatment of people at different levels of income

(or consumption, or whatever is the tax base), and horizontal equity is what fairness demands in the treatment of people at the same levels” (Murphy and Nagel 2002, p. 13)—the former refers to people with different incomes should pay different amount of tax, while the latter refers to people with “the same incomes... should pay the same amount of tax” (Op.cit., p. 37). Not many people will disagree that it will be just to treat those who are rich differently from the poor in the question of justice, asking the former to pay more tax than the latter (vertical equity), and to treat those who are equally rich equally, that is, asking those who with the same level of richness to pay same level of tax (horizontal equity). We usually accept that one’s income level and asset level as indicators of how rich one is. Since the GST is a consumption tax, those with the same level of consumption will need to pay the same amount of GST, regardless how rich they are—it should be noted that a rich person can choose to have low levels of consumption (similar to the level of the poor) and save more. To tax people according to their levels of consumption is to treat unequals (rich and poor with the same level of consumption) equally, thus unjust according to Aristotelian conception of justice.

The Marxian conception of justice can be summed up in the slogan “From each according to his ability, to each according to his needs” (Marx 1959, p. 22). When applied to taxation, since the poor need to retain more resources for the satisfaction of their own basic needs, thus it would be just if less proportion of their income (or their assets) is to be taxed (with the very poor even exempted from taxation), while increased proportion of the income (or assets) of the rich is to be taxed since the rich has greater surplus to pay higher taxation. Such a tax is a progressive tax, with the tax rate increases as the amount of tax base (namely income or assets here) increases; that is, larger proportion of income (or assets) will be taxed as income (or assets) increases.

As for GST, it is generally a regressive (rather than progressive) tax; that is, as one becomes richer, the proportion of income (or assets) to be taxed decreases. Since the GST is a consumption tax, and the poor tends to consume a larger proportion of their income (and save less or even nothing) while the rich tends to consume less proportion of their income (and save more), a GST at a constant rate (say 5 % as suggested) as a consumption tax will be regressive (Slemord and Bakija 2008, p. 207; Mccffery 2002, p. 40; Murphy and Nagel 2002, p. 112), resulting in the poor paying a larger proportion of their income in form of tax than the rich. The regressivity of the Hong Kong tax system after the introduction of GST will be even augmented with the government intention to decrease tax rates of direct taxes (including salaries tax and profits tax), thereby reducing the burden of the “comparatively affluent” of direct taxation and making the comparatively poor fall into the tax net by paying the GST. Despite the proposed compensation measures,¹ the fundamental regressivity nature of the GST is not altered. In the

¹The CSSA household will receive a supplement equals to estimated GST. There will be a \$500 GST credit for water and sewage charges per household and a \$3000 credit for rates per household. The low-income households will receive a GST allowance of \$2000 per year (The Hong Kong Government of the SAR 2006).

Public Consultation on Tax Reform: Final Report, the government states that “[w]hile the public generally understands that GST is effective in broadening the tax base, they have expressed some concerns about the tax. These concerns include: GST is regressive and would add to the financial burden of low-income earners and widen the wealth gap.... We have proposed a number of tax relief and compensation measures to address the regressivity of GST.... Despite such efforts, we have been unable to remove their worries” (The Hong Kong Government of the SAR 2007).

Introducing GST in Hong Kong will in effect lead to the situation that everyone will be a taxpayer of explicit tax (leaving the question of “land tax in disguise” aside), extending the tax net limited to the minority at present to all. This brings into question what Slemrod and Bakija (2008) called “transitional equity” or transitional justice in tax system changes—there will be losers who “lose in part because they have entered into some long-term commitments that made sense only because of the old system” (p. 96). In the case of GST, the losers will be those (of comparatively lower income or profit level) who need not pay explicit tax, but suddenly are required to pay tax in form of GST after the reform. They feel unjustly treated in this transition as their long-term reasonable expectations (that they are not required to pay tax) based on past experience are in jeopardy with the unexpected tax reform of introducing GST. Usually, the more radical the reform, with greater changes from the past situation, the greater will be the question of transitional justice, especially in cases with deep-rooted long-term expectations of continuity. Having a longer period of gestation for a tax reform, or indeed any public policy reform, will help alleviate the transitional justice problem as the public expectations based on the past may be altered gradually with more discussion of possible changes during the gestation period for change.

Very often, it is not merely *normative* justice that matters in public policy, including tax policy and reform, but also *perceived* justice that may have an “egocentric bias” (quoted by Hite and Roberts 1992). “Messick and Sentis (1983) ... studied fairness judgments and concluded that there is an “egocentric bias”. Participants in their studies tended to judge extra compensation for themselves as being more fair than the same compensation when it was paid to someone else” (Hite and Roberts 1992, p. 117). As the majority tend to be the loser by falling into the tax net (though with the compensation measures, the actual situation may be less serious than perceived), the *perceived* degree of injustice will be magnified by the “egocentric bias,” partly accounting for the united front against GST, leading to the ultimate abortion of the attempt to introduce GST in 2007.² The government also acknowledged the lack of public support for the proposed GST in the public consultation on tax reform in 2006 (Financial Services and the Treasury Bureau

²Other chapters in this book also discuss justice issues; for example, Tsang (Chap. 10 of this book) examines the issue of justice in relation to the building of the Express Rail Link, and Cheng (Chap. 8 of this book) looks at justice issues involved in the debates concerning the philosophy of CSSA.

2014). It should be emphasized that ideals as well as personal interest of the majority count in the successful implementation of any public policy reform, noticeably a major tax reform. “Statesmen have the responsibility to evoke public motives by appealing to decency as well as greed Politicians are always most comfortable when appeals to self-interest and to moral rectitude can be made out to coincide” (Murphy and Nagel 2002, 180–181).

Just and Viable Alternatives to GST

A tax reform should not be designed to achieve one aim, such as just to broaden the tax base, but should be planned to maintain a balance between a few legitimate, though often conflicting, goals, (namely broadening the tax base, enhancing tax equity or justice, minimizing administrative cost related to taxation, maintaining growth and competitiveness of the economy, affecting choice in order to encourage or discourage certain acts, and minimizing tax evasion and avoidance) which essentially lead to dilemmas in tax policies. Thus, the GST reform intended primarily to broaden the tax base, yet to the detriment of tax justice, involving great administrative cost and discouraging consumption generally should not be an early step to take.³ Other more just and viable alternatives to GST should more justifiably be implemented before any discussion of the introduction of GST should be seriously considered.

What are some of the just and viable alternatives? The present tax regime of Hong Kong does not tax all forms of income—income from work and rental income are taxed, while income from investment (dividends), income from savings (interest), and offshore income are not taxed (Littlewood 2010). This is to treat equals unequally that is treating income (from different sources) differently, taxing some source of income, while leaving others untaxed. A person with large income from investment and savings is not taxed, while a person with income from work is taxed. This is unjust by the Aristotelian conception of justice which involves treating equals equally. If all sources of income are taxed, the tax base will be broadened, while enhancing tax justice since new taxes on dividends, interest and offshore income will be introduced and tax revenue will not be mainly relying on tax on salaries and on profits.

Besides treating equals equally, justice also involves treating unequals unequally. The tax rate of corporations in Hong Kong is 16.5 % from all corporations with different levels of profits. The tax rate for property tax is 15 %, regardless of the level of income gained from property. The property rates level is 5 % for all properties of different rateable values. This is to treat unequals equally and is unjust by the Aristotelian standard of justice. To improve vertical equity and tax

³This is an example of what Yung (Chap. 1 of this book) points out that there may be clashes of values in a public policy.

justice, the Hong Kong taxation system can be made more progressive, taxing at increasing rates as profits and income increase. “To most people—those who favor a progressive tax system, tax justice means taxing according to ability to pay and that means that taxes should be progressive” (Pasquariello 1985, p. 44).

In line with Aristotle’s assertion to treat equals equally, Hong Kong should consider introducing capital gains tax, that is, tax levied on gains realized at the sale of assets, such as stocks and property, that are bought at a much lower price. Such capital gains will be a source, often a large source, of income, especially in a buoyant stock and property market. At present, such source of income or gain is not taxed, while income from work and rental income are taxed. This is to neglect a large source of income from the tax net. Thus, the introduction of capital gains tax not only can broaden the tax base, but also is in line with tax justice and may help curbing speculation in unstable stock and property markets.

In 2005, the SAR government abolished the estate duty (a tax charged on the value of the property of the deceased which is to be passed to others in connection with his/her death), mainly because it was considered to be undermining Hong Kong booming assets-management business (Littlewood 2010), an act to stimulate business activities, thus growth of the economy. Aristotle also asserts the desert principle in justice—justice means awarding people according to their merit and deserts. “This is plain from the fact that awards should be “according to merit”; for all men agree that what is just in distribution must be according to merit in some sense....” (Aristotle 1998, p. 112). Putting effort or having talents may be considered merit or desert criteria. The institution of inheritance is a source of income or wealth gained not by one’s own effort and talent, on the part of the younger generation, thus can be considered unjust by the Aristotelian just principle of deserts (Yung 2008, p. 67). The estate duty as a type of inheritance tax, especially a heavy one, in effect is in line with the just principle of deserts since it reduces “the unjust effect of gaining great income and wealth without striving for it” (Ibid.). Reintroducing estate duty can also broaden the tax base.

Values and Choice in Public Policy

On one hand, the abolition of the estate duty can encourage economic activities in asset management, thereby facilitating economic development. On the other hand, the institution of estate duty may enhance justice (as inheritance is against the just principle of deserts) and broaden the tax base. From this, we can see that very often in public policy, including tax policy, various desirable ends are incompatible and there are trade-offs among various ends in public policy dilemmas. For example, the introduction of tax on dividends and interest as well as making the tax system more progressive, though in line with justice and may broaden the tax base, may run the risk of making Hong Kong less competitive as a financial center as well as in attracting talents and investment, thereby having some negative effects on the economy, leading to dilemmas in tax policy. Thus, there are

trade-offs among different goals.⁴ To minimize the negative impacts of one single tax reform (e.g., the introduction of the dividend tax alone) which necessitates a significant degree of reform (e.g., at a very high rate) in order to achieve a desirable end (e.g., to broaden the tax base), a package of tax reforms (Littlewood 2010, p. 259) with a few simultaneous tax system adjustments, each carried out to a lesser degree (e.g., at lower rate), yet making differential impacts on various competing goals, with each operating at diverse and different, if not opposite, directions, thereby neutralizing the negative impacts of each as a way out of the tax policy dilemmas.

Undoubtedly, the introduction of new taxes and making the tax system more progressive as means to broaden the tax base and making the tax system more just will compromise the competitiveness of Hong Kong in attracting foreign investment and overseas talents. However, since Hong Kong has a low tax regime, with the rates of taxation among the lowest in the world (Littlewood 2010, p. 7), there is still much room for introducing new taxes and making the tax system more progressive in order to make the tax system more just and broaden the tax base, without much detrimental effects on competitiveness. In addition, Hong Kong should improve on its non-tax factors in maintaining its attractiveness toward foreign investment and overseas talents, such as maintaining stability, reducing pollution, controlling escalating living costs and costs of production, maintaining rule of law, improving the language proficiency, and training of the working population. All these non-tax factors combined will still make Hong Kong an attractive and lucrative place for foreign companies and talents to invest, work, and live, though it mildly increases its tax levels. Stressing merely on low tax as an attraction for foreign investment and overseas talents would be like “concentrating too much on one tree, while neglecting the whole forest.” The whole ecosystem of the forest is, in fact, more important.

Issues Beyond Taxation

The issue of tax justice cannot be assessed by merely considering one specific tax, but must be evaluated in the context of other taxes in the tax system (Murphy and Nagel 2002); for example, a GST in countries with highly progressive income and profits tax will be less regressive on the whole, with the latter offsetting the regressivity of the former, making the whole tax system on the whole quite just. From a broader perspective, justice in a tax system should not be isolated from how the tax revenue is to be used by the government. Though the issue of justice of a tax policy may be important in its own right, how tax revenue is used as government expenditure to achieve overall societal justice is ultimately more important (Ibid.).

⁴This is an example of clashes of goals and values in public policy highlighted by Yung (Chap. 1 of this book).

The tax policy of taxing the poor lightly while using the total government revenue from all sources to make great redistribution of resources to the poor (in the form of different public services and social security benefits) possible may still be just in accordance with the Marxian conception of justice “To each according to his needs,” overall speaking. According to Sugin (2004), “[t]he less that the government is able to integrate separate programs in an overall distributive scheme effectively, the greater redistributive burden of the tax system must bear” (p. 2013).

This leads us to the question of what the functions of taxation are. Paying tax is often considered a legitimate duty of citizens. Taxation may serve two main functions: (1) to raise resources for the provision of public goods and services, e.g., building infrastructures such as roads and provision of public security services in the form of police and army service; and (2) to achieve redistribution of resources in society, thereby distributive justice, e.g., resources from the rich are levied in the form of tax, with the tax revenue obtained used for the provision of social security benefits to the poor. Essentially, the taxation system and the size of government are interrelated—if more tax revenue is collected, a larger size government (i.e., a government being involved in the provision of more public services and redistributive functions) can be supported by the tax revenue collected.

Hong Kong has a low tax regime, with total tax revenue as a percentage of GDP low by international standard as shown in Table 11.1, with merely 13.2 % in 2009–10. Even taking into account other government revenue sources (in addition to taxation), including land sales, the total government revenue as a percentage of GDP of Hong Kong is low, only 19.6 % in 2009–10, even lower than the tax revenue as a percentage of GDP (2009) of all the countries indicated in Table 11.1. With lower government and tax revenue in Hong Kong (and without public borrowing), the government that can be made possible by such source of finance will tend to be small size in comparative terms. The general public expenditure as a percentage of GDP is merely 18.9 % in 2009, much lower than the general

Table 11.1 Total tax revenue as a percentage of GDP (2009)

Country	Total tax revenue as a percentage of GDP
Hong Kong	13.2 % ^a (19.6 % ^b)
United States	23.3 %
Korea	23.6 %
Japan	27.0 %
Canada	31.4 %
United Kingdom	32.3 %
Germany	36.1 %
Sweden	44.0 %

^aIn 2009–10 fiscal year

^bTotal government revenue as a percentage of GDP in 2009–10 fiscal year—total government revenue includes total tax revenue, revenue from land sales and investments, and fees and charges etc. Source Compiled from: OECD Tax Database (Retrieved at: <http://www.oecd.org/tax/tax-policy/tax-database.htm>); *Hong Kong Yearbook 2010* (Retrieved at: <http://www.yearbook.gov.hk/2010/en/>)

Table 11.2 General government expenditure as a percentage of GDP (2009)

Country	General government expenditure as a percentage of GDP
Hong Kong	18.9 % ^a
Korea	30.45 %
Japan	37.08 %
United States	42.18 %
Canada	44.05 %
United Kingdom	51.64 %
Germany	47.50 %
Sweden	55.16 %

^aPublic expenditure as a percentage of GDP in 2009–10 fiscal year

Source Compiled from: OECDiLibrary (2011) *Government at a Glance 2011* (Retrieved at: http://www.oecd-ilibrary.org/sites/gov_glance-2011-en/03/04/index.html?itemId=/content/chapter/gov_glance-2011-10-en); *Hong Kong Yearbook 2010* (Retrieved at: <http://www.yearbook.gov.hk/2010/en/>)

government expenditure as a percentage of GDP of other countries indicated in Table 11.2, reflecting a much smaller government when compared to other developed countries.

Recently, there have been demands for greater public services, which incorporate greater government expenditure, such as the demand for small class teaching, increased public elderly institution places, increased subsidized university places, provision of public pension scheme, and improved public health services. Though the government may be operating at a surplus at times, the satisfaction of all such demands, which often involve the increase of welfare level to standards comparable to western welfare states, will necessitate the increase in taxes since Hong Kong's total government revenue as a percentage of GDP in 2009–10 is merely 19.6 %, still not enough to run a government of the size of Korea (with general government expenditure as a percentage of GDP of 30.45 % in 2009), not to say, the Swedish government (with general government expenditure as percentage of GDP of 55.16 % in 2009). Merely demanding to increase government provision of services, without the accompanying need to increase government and tax revenue will not be very constructive to public decision making. The analysis of the Working Group on Long-Term Fiscal Planning causes even greater alarm. It suggests that under the assumption of an average real GDP growth rate of 2.8 % per annum from 2014 to 2041 and even with no policy changes and no service improvements, the mere two key variables of demographic changes and price changes will give rise to a structural budgetary deficit,⁵ with the government expenditure exceeding government revenue in about 15 years' time (Financial and the Treasury Bureau 2014). Under this scenario, government revenue is projected

⁵Structural budgetary deficit exists when there are underlying structural imbalances between government revenue and expenditure, regardless of the developments of business cycles.

to grow at 4.5 % per annum, while government expenditure is projected to grow at 5.3 % per annum (Ibid.), with the latter exceeding the former. All these lead the Working Group to conclude that “there can be no denial that Hong Kong can ill afford to continue increasing spending beyond the pace of economic growth and revenue” (Ibid., p. 196).

In fact, tax reforms cannot be detached from the discussion of the size of government (i.e., how far government should intervene into different aspects of life through provision of different public goods and services) favoured by the general public of Hong Kong. The size of the government cannot be isolated from the discussion of social justice; that is, how far the government should intervene to ensure “To each according to his needs,” satisfying the needs of the poor and disadvantaged in society. Equally important is how to ensure justice in the way taxes are levied in order to finance the government of the size favoured by the public. Thus, there should not be merely public discussion on whether GST should be implemented or not, but on how the government expenditure and the taxation system can be integrated to give expression to justice in society as a whole. “The government naturally interprets the absence of dissent [toward the taxation system] as approval, but it might also be due to the lack of democracy and the consequent futility of expressing contrary views” (Littlewood 2010, p. 14). With the institution of universal suffrage in future, there may emerge a consensus over the level of taxation and public expenditure.

Before the thorough discussion on the appropriate size of the government and the accompanying tax reforms are implemented to improve the Hong Kong tax system, the fact that Hong Kong’s present government revenue relies mainly on salaries tax, profit taxes, and land sales (which all are often badly affected in bad economic times) makes it necessary for the Hong Kong government to maintain a considerable fiscal reserve to provide for the “rainy days” when the government is operating at a deficit (with expenditure exceeding the revenue) in bad economic times, i.e., cyclical budgetary deficit⁶ (aside from the predicted future structural budgetary deficit problem discussed earlier), such as Hong Kong’s budget was running at a deficit in five consecutive years between 1998 and 2004, with the fiscal reserve being drained⁷ (Financial Secretary 2013), though being alleviated by attempts to increase taxation and cut expenditure to minimize deficits in those years. No one knows for sure when and how long next major economic depression may come and how serious the budget deficit may be. Thus, ensuring that there is considerable fiscal reserve to prepare for the next economic cycle is to play safe before any major tax reform (that can enable the government to have a more stable source of revenue) is fully implemented.

⁶Cyclical budgetary deficit is related to business cycles. It occurs when the government is having a deficit budget in periods during which the economy is experiencing contractions during business cycles.

⁷During the six years from 1998–99, some \$200 billion of the fiscal reserves was used up (Financial Services and the Treasury Bureau 2014).

Hong Kong is having an aging population. The proportion of population aged 65 or above will increase from 12 % in 2006 to 26 % in 2036 (Census and Statistics Department 2007). The elderly dependency ratio⁸ would increase from 18.3 % in 2012 to 49.7 % in 2041 (Financial Services and the Treasury Bureau 2014). With less percentage of working population in future, there will be less people in the tax net and the tax base may even be narrower in future, with less tax revenue collected, whereas public expenditure will increase with the aging population in the form of increased healthcare provision and increased elderly services and income transfer (though the provision of services to the young may decrease). The Working Group on Long-Term Fiscal Planning warns that “longer term fiscal pressures on health and social welfare spending given an aging population must not be overlooked” (Financial Services and the Treasury Bureau 2014, p. 12), with “demographic change ...pos[ing] a drag on...revenue growth and simultaneously bring pressures on the expenditure front” (Ibid., p. 106). Thus, “new revenue sources should not be ruled out” (Ibid., p. 168). Therefore, in view of the aging population, a thorough discussion for the directions for tax reform that maintain a balance among various considerations, such as tax justice, maintaining Hong Kong competitiveness, stable and sufficient source of income, broadening the tax base, and low administrative cost (thereby resolving dilemmas in tax policy), is imminent.⁹ Besides approaching the aging population problem from the angle of taxation, it is possible to explore alternative ways to finance increasing expenditure associated with aging population, such as exploring healthcare finance methods, identifying alternative means of financing healthcare which may complement the present tax-financed public healthcare services.¹⁰

Conclusion

Justice, as a social value in public policy, is an indispensable consideration in the design of any tax system. Yet, it is far from the only one. In fact, there may be trade-offs among justice and other important considerations in tax design (essentially leading to tax policy dilemmas), such as the need to maintain competitiveness of an economy and the avoidance of high administrative cost. Thus, a delicate balance should be maintained among various conflicting considerations as a way out of such tax policy dilemmas. Discussion of tax policy should not be detached from the consideration of the level of government expenditure which in turn determines

⁸Elderly dependency ratio is the ratio of those aged 65 and above to those aged 15–64.

⁹Balance is necessary when multiple factors have to be taken into consideration. See Yu’s chapter for a discussion of multiple values and ways to handle multiple values. What Yung calls “broader perspective” (p. 185, p. 189) is a perspective that takes more relevant factors or values into consideration.

¹⁰For a detailed discussion of healthcare financing, please refer to Shae’s chapter (Chap. 9 of this book).

the size of the government since it is the amount of tax revenue collected that ultimately makes government of a certain size possible. It is precisely this type of public discussion that Hong Kong needs, hoping to reach a consensus. Ultimately, it is the integration of public expenditure and tax policy that gives expression to societal justice, facilitating prosperity and good life for all in society.

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Chapter 12

Conclusion: Social Values, Public Policy, and Citizenship

Kam-por Yu

Abstract This chapter takes stock of the contributions made by the preceding chapters in this book to the theme of social values and public policy and the extent to which they are relevant to citizenship and governance. The chapters in this book together argue very strongly that social values occupy a central place in understanding and evaluating public policy. The chapters in Part I of this book can all be taken as attempts to find out how far the boundary of public power should be pushed back or pulled in, or how far public power should be invoked to intervene matters that may be seen as causing worries or concerns at least in the eyes of some people in the society. The chapters in Part II explore how far different social values should be appealed to in justifying or criticizing various public policies. This chapter further investigates more generally various approaches that can be used to handle multiple values and the challenging issue of taking different and competing social values into consideration at the same time. Finally, this chapter examines how the discussion in various chapters in this book is relevant to citizenship and governance.

Public Policy and Social Values

What is the relation between public policy and social values? A common answer to this question is that the government should uphold the “principle of neutrality” as far as possible and avoid taking side in debates over values. Some would go further and say that public policy should be made on objective grounds, supported

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by facts and data. This approach is sometimes referred to as “management by numbers.”¹

The chapters in this book say very loud and clear that the above claim is a myth. Public policy is in fact closely related to social values. Actually, social values are at the core of public policy, in terms of design, persuasion, and evaluation.

Carl Cheng in his chapter on social welfare policy provides a very good illustration on the relevance of social values to public policy. The MacPherson Report, which re-examines Hong Kong’s CSSA scheme (Comprehensive Social Security Assistance), claims to be “a scientific analysis of the issues and provided a reasoned basis for new rates subject to public scrutiny” (MacPherson 1994: p. 8; Cheng 2016: p. 134), but the proposal was rejected by the Hong Kong government on the ground that it was a “radical departure from the philosophy and established policy of the CSSA scheme” (Cheng 2016: p. 135). There has been a clash of values, and this is possible only because the two sides (i.e., the government and the MacPherson Report) hold values, and they hold different values.

Carl Cheng’s chapter illustrates not only that social values cannot be avoided in the discussion of public policy, but also that they are actually at the center of public policy deliberation. How much social security should be provided to the needy people in the society? Should it be the bare minimum for survival, or should it be enough for the people to function as a member of the society? Such questions cannot be answered without putting social values in the center of the discussion. Is it a justice issue? Even if the poverty of the poor is not brought forth through the intended actions of other individuals, isn’t their predicament the result of a capitalist system and market economy, which is a matter of collective choice? If so, are the people in the society collectively responsible? Even if the value of justice is not appealed to, people can still appeal to care, which is also a very strong feeling people have to their fellow human beings in the society.

Carl Cheng’s discussion of Hong Kong’s social welfare policy makes it clear that social values are highly relevant in determining the criteria and components of the so-called basic needs. Upholding the principle of neutrality will not help us to stay away from the values, but only lead us to assume some values without consciously recognizing them or justifying them.

Shae Wan-chaw’s chapter on healthcare policy again demonstrates the relevance of social values to public policy. He considers how different values, need-based and liberty or choice-based, lead to different directions for healthcare policy.² Shae argues that the major problem with Hong Kong’s healthcare policy is the poverty of vision: “the Hong Kong government has never provided a full scale

¹Very often, the interpretation of numbers, data, and facts for policy making involves values, social values, and value judgements. Francis Mok’s chapter serves as an illustration (Mok 2016). See the last part of this section.

²*The Harvard Report* (Harvard Team 1999) pointed out that “healthcare could be provided on the basis of need, reflecting an egalitarian ideology; or at the other end it may be based on a libertarian ideology with an emphasis on individual liberty and choice” (Shae 2016: pp. 157–158).

official narrative with regard to the vision, ideals, principles and objectives of its various social policies” (Shae 2016: p. 151). The poverty of vision is also the poverty of values.

Without a clear and strong vision, there cannot be a clear direction and sufficient gravity to consolidate general support. As well said by Shae, “welfare provisions were almost always justified by some sort of ‘moral calls’ based on the importance of mutual interdependence and common interest of all social members. Ultimately, it is these moral calls that gave meaning and soul to the policies of redistribution; and it is only by the articulation and delineation of such moral visions that popular support could be garnered” (Shae 2016: pp. 149–150).

Francis Mok’s chapter on Hong Kong’s immigration policy also raises powerful attacks on the so-called “management by numbers” approach. It is not really a value-free approach, but rather the utilitarian approach in disguise. The problem with this approach is that it overemphasizes one particular value (utility/consequence) and overlooks or ignores other relevant values, and even for the one single value that is enshrined, it is given a very narrow interpretation (economic costs and benefits, etc.). In contrast, Francis Mok examines the issue with reference to (1) consequential calculation of utility; (2) commitments to justice and equality; and (3) preservation of integrity of the community. In the last aspect, he talks about the core values and the treasured lifestyles of the Hong Kong people. His account demonstrates that a discussion of the topic can be benefited not by avoiding to talk about value issues, but by having a more comprehensive and in-depth discussion of the relevant values involved.

The authors in this volume collectively present a strong case for the claim that public policy making is not value free, and more often than not, disputes on public policy are not just disputes about facts and expected outcomes, but disputes about social values. The disputes cannot be fully or adequately understood without understanding the social values involved.³

Role and Scope of Public Power

Public policy is a way of using public power. If we agree that there should be a limit for the use of public power, then we also have to agree that there is a proper role and scope of public policy, and the proper role and scope of public policy

³The rigorous examination of the justifications and implications of our social values belongs to the subject of philosophy, which has different academic emphasis and orientation from the subject of public policy. Philosophy looks for alternatives, and thrives on disagreement, whereas public policy is conservative, pragmatic, and thrives on consensus (Wolff 2011: p. 3). Public policy making has the following characteristics: (1) there must be a policy, even each has its shortcomings; (2) it must start from where we are; (3) it looks for consensus (Wolff 2011: p. 5). In spite of the connection between philosophy and public policy, public policy tends to be more local, contextual, and evolving than philosophy is supposed to be.

has to be within the proper role and scope of public power. The question is, what should be the role and scope of public power?—If public power should not be unlimited, then to what extent and in what way should it be limited?

Let us first imagine what it would be like if public power is not limited. At one time, the King of England was said to have unlimited power, so that he could arrest people and killed them, at his own whims.⁴ At one time, the Communist Party of China also seemed to have unlimited power, so the Party could send fresh college graduates to Xinjiang to help to develop the area, stop a young man and a young woman from seeing each other, and confiscate any private property from a person's home. Of course, some people will say that such power should not be owned by the King or the Party. But some people may go further and say, such public power should not exist at all. According to this view, there is some domain, for example, the private life of the individual, that is outside the jurisdiction of the political power.

Should people have a right to end their own life? Is there a right to pornography? Is abortion simply a matter of the choice of the pregnant woman? Can sex between two consenting adults be illegal? On the appearance, it might seem that the issues of euthanasia, abortion, compensated dating, indecent photographs are very marginal issues so far as public policy is concerned. Actually, they are important issues that can test the boundary of public power. The chapters in Part I of this book can all be taken as attempts to find out how far such boundary should be pushed back or pulled in, or, in short, how far public power should be invoked to intervene the matter at stake.

Is euthanasia just a personal choice, or it is within the jurisdiction of political power, or is it a choice that the society as a whole has to make? Chan and Tse, in their chapter on euthanasia, take both the individual and the public policy perspectives into consideration. People often say: "Life is better than death." But is this a judgment that each individual has to make, and different individuals can have different judgments (or the same individual can have different judgements in different contexts)? Or is it a judgment for the society as a whole to make? Is choosing to live or die a matter of personal choice, or is it a social value that is so important that the society as a whole has to take a stand?

Compared with euthanasia, abortion may be a more complicated issue, as it involves not just one person, but at least two, or arguably so. If abortion is mainly a woman's decision about what should happen to her body, then it seems that the issue of abortion should properly be left to the pregnant woman to decide. However, if abortion is conceived as terminating the life of another human being, then it makes more sense to say that the state has a ground to intervene. Cheng and Ming, in their chapter on abortion, argues that "in order to justify this legal restriction, the law has to consider the fetus as a potential person, who has a right to life, which is close to, but not up to, that of a full-blown person" (Cheng and Ming 2016: p. 39).

⁴The Magna Carta of 1215 set a limit to the legitimate power of the King of England.

In effect, they argue that the abortion law in Hong Kong should be revised to make it more in line with our social values, including the individual's right of autonomy, and family values.

Next, we move to sexual values. Should we say that sexual values belong to the private domain, not the public domain, to be monitored and sanctioned by public power? Our society has moved a long way and come to accept that homosexuality, at least in private, is a personal matter and should not be subject to public sanction. But is this true for our sexual morality as a whole? In our society, practices such as polygamy are prohibited, and prostitution is restricted or regulated by the law. This shows that our sexual values are not entirely outside the jurisdiction of political power. Where should the limit be drawn? How about emerging practices such as compensated dating or sharing indecent photographs on the Internet? Are they matters that deserve extra attention and require serious response?

We say that we live in a liberal society, but how liberal can it be? Sexual morality is an important part of social morality, which has an important place even in a liberal society. As a result, we can say that sexual morality is a test case for a liberal society. William Sin, in his chapter on compensated dating, examines whether there are good arguments for censuring it, as many people in our society in fact do. He argues, "Now, if members of the younger generation become unable to see the supposed evil of using their bodies or sex organs in a certain way, critics may argue that this loss of belief may threaten the cohesion of society" (Sin 2016: p. 59). In a society with changing values, we can no longer appeal to the prevailing social values, but have to engage in philosophical discussion and see whether one position can be better justified than another.

The case of the "photo scandal" of Edison Chan is examined in Ludwig Ying's chapter. The public sensed that something wrong has happened, but it is not so easy to point out exactly what is wrong in the matter. Is it the sex part, or the photograph-taking part, or the photograph-sharing part? Ying argues that "mutual consent" is crucial (Ying 2016: p. 65). Is mutual consent good enough to protect individuals (i.e., the women involved) engaging in activities that may be regarded as harmful or bad in the eyes of other people? If there is mutual consent, can we say that there is no victim? And if there is no victim, can we say that there is nothing wrong? As Ying points out, "Because Edison's photo scandal triggered such a big and long-lasting shock to Hong Kong society, people worried the moral fabric of this society would be undermined and youth would be influenced badly" (Ying 2016: p. 70). Again, we are led to the questions: What is a good life, and what is a good society? Does the government have a role not just to rectify the wrong, but also to promote the good?

Such are important questions that have to be answered. But it seems that they cannot be answered readily by just one grand philosophical theory, and they cannot be answered without the participation of the people who are leading the life, forming the society, and perhaps also shaping the government.

Varieties of Social Values

In the 1980s, when Hong Kong was scheduled to return to China in 1997, the Hong Kong people were ensured by the Chinese government that the prosperity and stability of the territory were to be maintained for at least fifty years after the handover. Prosperity and stability were upheld as two most important values for the Hong Kong people. The literary writer Lu Xun (1881–1936) was well known in identifying three values that are most important to modern Chinese people: first, survival; second, sufficiency; and third, development (一要生存, 二要溫飽, 三要發展).⁵ “Survival” refers to acquisition of the means of subsistence; “sufficiency” refers to a minimally decent level of well-being; and “development” refers to a progressive promotion of well-being beyond such minimal level. All such values can be grouped broadly under the category of utilitarian or consequentialist values. When people talk about “the betterment of Hong Kong,” “public interest,” and “long-term benefit of the country,” they are also thinking within such a framework. It is not surprising that many discussions on the pros and cons of public policy appeal to utilitarian or consequential grounds.⁶

As pointed out by Francis Mok in his chapter on Hong Kong’s immigration policy, “the exclusionary policy of the government was largely founded on consideration of consequences” (Mok 2016: p. 89). The consequentialist approach has been particularly influential in public discourse in the context of Hong Kong and mainland China. The Tiananmen crackdown was justified by the proestablishment camps on the ground that it brought stability and economic development in China.

Competing values which have gained wide recognition in the modern world include liberal values such as equality, justice, human rights, the rule of law, and freedom of choice. Such values have gained strong roots in a modern international city like Hong Kong, and they have become what the Hong Kong people would call the core values of Hong Kong.

One basic idea of this set of modern values is that people as human beings or citizens are not resources to be used to achieve respectable or not so respectable political goals. There are legitimate interests and liberties of individuals to be protected, and such legitimate interests and liberties of individuals are valuable in themselves, and not just in so far as they can contribute to the total good. Tsang Sui-ming’s chapter uses the building of the Guangzhou–Shenzhen–Hong Kong Express Rail Link (XRL) as an example and argues for the inadequacy of the concept of utilitarian consideration and the importance of social justice in public

⁵Lu Xun, *Huagai Ji*. The same expressions appear in both the short pieces “Sudden Thoughts” (1925) and “Communications from Beijing” (1925).

⁶In spite of the weaknesses of utilitarianism as a personal morality (counter-intuitive and too demanding), utilitarianism has a number of merits as a public philosophy (a philosophy that can serve as a basis for public policy): it is impersonal, objective (calculating), and flexible (consequentialist). (Goodin 1995: pp. 6–10) Even if it is not adequate as a public philosophy, it cannot be discarded or rejected completely. Utilitarian consideration is also a good starting point in evaluating a public policy.

policy making and justification. Both Karen Lee and Tsang Sui-ming invoke the value of justice in their chapters. They are both inspired by the Aristotelian definition of “justice,” which requires “treating equals equally.” This conception of justice does not require giving everyone equal treatment, but at least giving everyone equal consideration—equal care and equal respect.⁷ Attempts to make the concept of justice more objective, neutral, or scientific, such as the emphases on “formal equality” (Lee 2016: p. 117), “equal opportunity” (Lee 2016: p. 115, p. 122), “procedural justice” (Tsang 2016: p. 171), and “actuarial fairness” (Shae 2016: p. 154), actually make the concept less adequate as a social value or human value. As Karen Lee points out, the value of equality is not achieved by treating everyone equally in the negative way (Lee 2016: p. 11). Equality, as a social value, has positive content. It implies equal dignity, equal care, and not equal denial or equal indifference. Shae considers the concept of actuarial fairness, which holds that it is fair to charge different insurance fees for different people, who have different genetic propensities to have health problems. Actuarial fairness (Shae 2016: p. 154) is a very narrow understanding of fairness. It is very different from a more social conception of justice (Shae 2016: pp. 154–155).⁸

Another value commonly appealed to is individual liberty or personal choice. We see the role of this value in discussion ranging from euthanasia to healthcare policy. As pointed out by Shae: “There is another deep issue elicited by the government’s propensity to adopt the language of choice, which reflects its conviction to equate medical service as market commodities. As in the market for other commodities, it is assumed that consumers will make the most ‘rational choice’ according to his own preferences and spending power. In this scenario, the role of the government is simple, i.e., to maintain the ‘openness’ such that no one is able to monopolize either the demand or supply of the commodity in question” (Shae 2016: p. 161). The government policy paper is called “My Health, My Choice” (Shae 2016: p. 159). Choice is rightly an important value in this context only if (1) the market logic works for distributing healthcare services and (2) consumers of healthcare services make rational choice. As pointed out by Shae, both assumptions are dubious (Shae 2016: p. 162). There is little elasticity in the demand of medical services, the market is dominated by a few providers, and there are externalities such as contagious diseases that render market mechanism inappropriate. So market does not really work for medical services. On the other hand, people are not knowledgeable enough to assess the quality of services, and there is

⁷Ronald Dworkin argues that different versions or species of liberalism share one common ultimate principle—the principle of “equal consideration”, which implies “treating people as equals”, as “entitled to equal concern and respect”. (Dworkin 1978: 125; Dworkin 1977: 180).

⁸Actuarial justice is more concerned with not taking advantage of an individual, and not requiring one person to subsidize another person, for example, people who have higher chance to get genetic disease should be charged higher insurance fee; otherwise, they will be subsidized by policyholders (the insured) who have lower risks, and such “subsidy” is regarded as unfair to the policyholders who have lower risks. This is a narrow conception of justice because it is totally individual-based, and it assumes that justice is just about fair trade.

asymmetry of information between the service providers and the service users. So the consumers of healthcare services are not really in a position to make rational choice (Shae 2016: p. 162). The above shows that there are huge problems in holding personal choice as the prevailing value, at least in some areas of public policy, such as the area of healthcare policy.

What is good? One answer is that there is no objective good, and good is the result of choice. It is not the case that something is good that people choose it, but rather because people choose it that it is good. According to this logic, the good thing is to let people choose what they want, and different people can choose differently. The question is, how far should people be left to choose what they want, and is there a limit to the freedom of choice except other people's freedom to choose the same? How about if people choose to die rather than to live (Chan and Tse 2016), or if they choose to use sex to earn money (Sin 2016)? Should such matters be left to individuals to decide, and different individuals can have different choices, or they are issues that the society has a genuine interest in and the government has a role and duty to intervene or to rule out certain choices?

Can it be argued that a decision or action that only affects oneself is only a personal matter, and should be left for the person concerned to make the decision or to take the action, and it is outside the domain where public policy can be legitimately applied? How about decisions and actions that only affect two persons? According to the logic of honoring personal choice, the key to the matter is informed consent.⁹ If there is informed consent between the two parties involved, then both of them are making individual choice, and it is not for a third party to say whether the choice made is right or wrong, provided that the two parties concerned are making genuine personal choice. If interactions between two persons are justified so long as there is informed consent, does it mean that compensated dating (Sin 2016), physician-assisted suicide (Chan and Tse 2016), and making and distributing pornography (Ying 2016) are all justified provided that there is genuine informed consent?

Respecting personal choice and informed consent are important values in our society. But obviously they are not the only ones. So the issues cannot be examined merely in terms of whether there is free choice or genuine informed consent, other relevant values also have to be taken into consideration.

Our society has ruled out certain choices, even if informed consent is involved, for example, selling oneself into slavery, polygamy, and selling of human organs. The grounds for forbidding such choices are not consequentialist. People who enter into such contract believe that they will gain from such transactions, and even if it is assumed that they may still be harmed, the reasonable solution is to give them extra protection rather than to forbid people from making such choices. Is it justified to base public policy on the ground of social values? Polygamy is not allowed because it is against our social value, but should we then rule out

⁹For a discussion of the values, importance, limitations, and internal conflicts of the concept of "informed consent", see Yu (2015: pp. 99–101).

same-sex marriage as well? What is the ground to allow only monogamy as the only acceptable form of marriage except that it is *our* social value?

We do not just see ourselves as individuals each pursuing his/her own goals, and we also see ourselves as members of the same society who owe much to each other, from which our identity and meaning of life can be derived. Shae's chapter, for example, refers to concepts such as "moral community" (Shae 2016: p. 149) and "solidarity principle" (Shae 2016: p. 154).

It is not the aim of this book to settle the above disputes. But this book does demonstrate that there are a number of values that are in the core of public policy debates. Such values cannot be reduced to one another, and they may conflict and compete with one another. The first step that has to be done is to put them into perspective, and the next step is to put them in their proper places.

Handling Multiple Values

As there are multiple values, which may point to different directions, they may be in conflict with one another and compete for our attention and recognition. In the case of euthanasia, "the controversy about the legalization of euthanasia arises from a set of conflicting values and moral considerations, including the intrinsic value of life, autonomy, well-being of the patient, and the social consequence of legalizing euthanasia" (Chan and Tse 2016: p. 23, p. 31). In the case of population policy, "in light of the plurality of moral consideration, a legitimate and sustainable population policy may need to address the concerns of the utilitarian, the liberal, and the communitarian regarding the number of immigrants to be admitted, the pace, as well as the composition of the quota. For instance, even if we share the liberal ideal of eliminating the effects of luck, we may not necessarily want to maximize this ideal by opening up the border or admitting as many immigrants as possible until the society exhausts her capacity. We may respond to the call for reduction of inequalities created by border by, for example, allocating a majority of the admission quota to the worse-off while reserving a minority of the quota to the well-off or the well-educated as a response to the utilitarian concern" (Mok 2016: p. 109).

What then should be done when there is a conflict of values?

One possible answer is **prioritization**. That is, some value is regarded as more important or fundamental than another and should be considered and taken care of first. For example, in Rawls's two principles of justice, equality of basic liberties is regarded as lexically prior than utilitarian consideration.¹⁰ After the equality of basic liberties is secured, utilitarian consideration can be applied, but such pursuit should not be made at the expense of the respect of equality of basic liberties.

¹⁰Rawls's two principles of Justice (Rawls 1999: p. 266) can be understood as putting utilitarian consideration under the conditions that the following values have been upheld: (1) equality of basic liberties; (2) improved welfare of the least advantaged; and (3) equal opportunity.

Another possible answer is **compartmentalization**. Different domains are identified, and different values can prevail in different domains. For example, people talk about the distinction between the public and the private, or the political and the personal.¹¹ It can be argued that the issues discussed in Part I belong basically to the private domain, and hence, the role of public policy is basically to protect the freedom, privacy, etc., of the individuals concerned and protect them from harms caused by other people, but the issues in Part II belong to a much greater extent to the public domain, and hence, the government has a more active or even proactive role to promote positively some social goals or goods. However, the problem with prioritization is that one value is not always more important than another. It is at worst arbitrary and at best too rigid to place one value as always prior to another value. The problem with compartmentalization is that the division between the domains is not clear cut, and even in the same domain, we may still have to consider different values.

A related approach is **contextualization**. It can be argued that different values have different importance at different stages of development or in different societies with different traditions or historical backgrounds. For example, satisfaction of basic needs and economic development may be regarded as more important in an underdeveloped society, and liberty and equality may occupy a more central place in an affluent society. Procedural justice may be upheld regardless of price in a well-functioning society but can be compromised in a society under serious and imminent problems such as terrorist attack or life-threatening epidemic.

Another alternative is **restriction**. Some goals are worth pursuing, but not to be pursued in full swing and at all costs. They should only be pursued to a certain extent or within certain constraints. For example, it can be argued that public interest should be promoted within the boundary of respecting individual rights. As Mencius said, “Only when there are things a man will not do is he capable of doing great things” 人有不為也，而後可以有為 (*Mencius* 4B8; Lau 1984: p. 161). First, we have to find out what should not be done. Then, from the remaining possibilities, we find out what should be done. According to this view, the moral task has a deontological part as well as a teleological part. It includes both rule-following and goal-pursuing. One part sets a limit on the other part. Shae, in his chapter on healthcare policy, observes that the proposed solutions are all common in that “all revolving around ways of drawing a boundary for public responsibility in health care” (Shae 2016: p. 157). That is to say, the public has a limited responsibility for the health care of other people. Shae insightfully points out that such a boundary should be located with a moral vision couched in terms such as “citizenship rights” (Shae 2016: p. 157), “solidarity principle” (Shae 2016: p. 155), and “moral community” (Shae 2016: p. 149).

However, if we agree that there are multiple relevant values that have to be considered together at the same time, then none of the above frameworks with clear and simple logic seem to be able to provide a generally applicable solution.

¹¹Walzer (1983) argues that there are different spheres of justice, and the ethical consideration should be different for different spheres.

Different ways leading out of value conflicts may not be incompatible, and each of them may have its applications for some particular issues or within a certain scope or context. To take multiple values into consideration and to give all of them due recognition is what is commonly called **balance** or striking a balance. This is a framework that seems to have more general application.¹²

Chan and Tse, in their discussion on euthanasia, considers that the competing and conflict values, including value of life, autonomy, well-being of the patient, and social consequence of legalizing euthanasia, are all important and should be upheld as far as possible. As a result, they advocate a compromise: advanced directive, which, according to them, strikes a better balance than legalizing euthanasia. As they said, “The key problem that public policy makers are facing is how to strike a balance among different points of views of the stakeholders. In doing so, they have to take into consideration the rationale of these views, the interests of various stakeholders, the desirability of various policy options from a practical point of view so that the result will be widely acceptable by different walks of life in society, otherwise the policy adopted will not be feasible and sustainable. The point at which the balance is stricken is also affected by the cultural and social conditions of different communities and that’s why there are often different policy solutions to the same ethical issues in question around the world” (Chan and Tse 2016: p. 28). “From a practical point of view, policy makers have to work out alternatives to voluntary active euthanasia based a compromise among the conflicting values and moral considerations upheld by various stakeholders. These alternatives will be more feasible and widely supported by people in different walks of life” (Chan and Tse 2016: p. 32). Alternatives such as palliative care, forgoing life-sustaining treatment, and advance directives, according to Chan and Tse, can strike a better balance than legalizing euthanasia.

A concept that is closely related to the successful or reasonable use of balance is **proportionality**. To balance A and B, we may have to accept having less of B for the sake of A, or vice versa. But to what extent? It is a matter of judgment. But the principle is that we do not give up too much of one value for too little of another value. In order to meet the requirement of proportionality, three conditions have to be met: “(i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective” (Lee 2016: p. 114). The Secondary School Places Allocation System has detrimental effects on girls as a whole at the benefit of only a minority group of boys, so the price that has to be paid is out of proportion (Lee 2016: p. 115).

Even if the proportionality test is satisfied, and the specific public policy is justified, it is not the end of the story. There are winners as well as losers in each

¹²The Confucian approach to handle multiple values also emphasizes on balance and complementarity of opposite and competing values, but it tends to affirm both values at the two ends rather than distancing from them, and it can be more accurately described “all-partial” than “impartial” (Yu 2010b: pp. 34–36).

public policy or public policy action (Yung 2016a, p. 3). It would be a better balance if the losers, who are getting what they do not deserve, can get some **compensation**. In the case of building the XRL, assuming that (a) it is beneficial to Hong Kong as a whole to build the XRL and (b) villagers of Choi Yuen Tsuen have a right to live there, there is a conflict with the consequence-based approach and the rights-based approach in public policy. What then is to be done? If both utility and justice are taken into consideration, then the villagers should be compensated substantially. The better balance of the two concerns seems to be making a special arrangement to them to move to a new place to rebuild their village instead of just paying them for their loss at a “market price” (Tsang 2016).

Ethical Pluralism and Public Engagement

Though there are plural and different values, they are not all equal, at least not in the eyes of the people of a particular society. When the return of Hong Kong to China was announced, the Chinese political leaders guaranteed that “Horse racing and dancing as usual”. According to them, these kinds of capitalist entertainment and lifestyle are important to Hong Kong people. But very likely Hong Kong people would give very different answers when they are asked what they most love about Hong Kong. In the past, it was not uncommon that economic prosperity was regarded as most important by the average citizens. But the younger generation of Hong Kong people may give quite different answers in providing a list of values that are most close to their hearts. Hong Kong people now tend to identify some modern and global values as their core values, such as rule of law, freedom of expression, and social justice. The challenge to governance is particularly huge if there is a big discrepancy between values held dear by the people or at least a substantial fraction of the people and the values the government and its public policy are serving.

There is an ancient Chinese saying, “The common people are stupid and divinely wise (at the same time).” (百姓愚而神) What it means is that the common people are the ultimate authority to tell what end results are good, but they are not smart enough to tell at the beginning what policy can lead to the desirable results. In the last analysis, the common people are what the governance and public policy are for: If they say that the governance or public policy after it has been thoroughly tried is bad, then it must be bad. But if you ask them at the beginning, what kinds of governance or public policy can lead to the desirable results, they may not have any ideas, and even if they have some ideas, they may not be good ideas. So the ancient Chinese philosophers distinguish between “public sentiments” (民情) and “public opinions” (民意). Public sentiments are divinely wise. They represent the ultimate authority, and must be respected, and should never be offended.¹³ On the other hand, public opinions are more often than not, stupid

¹³For a discussion of Confucian ethics as *qing* (情)-based, see Yu and Tao (2014).

rather than wise, and the leaders should come up with better opinions than public opinions, in order to be the leaders. What is said in the above is tantamount to saying that for the importance and priority of the social values, the leaders cannot make the decisions along and they have to learn from the citizens. The leaders are given the task to find the best ways to realize those values that are held dear by the citizens.

Some values are more well-founded or more justified than others in a given context—in the eyes of the people of a particular society at a given time. As a result, they are more able to convince people and win people over, at least at that particular time. Public engagement, as dialogue of different values in a given context, may be very constructive, with the more well-grounded and well-justified values (in the eyes of the people of a given society at a particular time) emerging out of the process, facilitating policy making that will be better received by the public.

How can we get hold of the pluralistic values of a society? Not by upholding our own governing philosophy, and imposing it on the society, but by assimilating the pluralistic values through consulting different perspectives—which are good at representing different values that are valid to different extents.¹⁴

In the case of healthcare policy, while the government has spent a lot of effort to convince the people, yet the people are still not convinced. “Despite the government’s tremendous effort to persuade the public about the merits of this HPS, it has nevertheless failed to convince the public both with regard to the necessity and direction of change” (Shae 2016: p. 156).

Citizens have an interest in public policy for a number of reasons. First, the policy may have an effect on their own personal or social life, e.g., whether abortion is permitted in the society (Cheng and Ming 2016); allocation of secondary school places (Lee 2016); and alternative Chinese curriculum for ethnic minority students, which will affect the education and career prospect of ethnic minority students (Lee 2016). Second, the policy may shape the society in a way that people have strong feeling about; e.g., whether a village should be demolished to make way for the Express Rail Link, even though they are not living in the village (Tsang 2016). Third, the people may want to see themselves as having a say in choosing the public policy, e.g., choosing for Hong Kong in admitting immigrants from mainland China (Mok 2016).

The reception of a public policy cannot be separated from people’s perception of it, and the perception of different people of the same policy can be very different. The same policy may have different effects on different groups of people. Some may be benefited. Others may have to bear extra cost. Profit tax, estate tax, salary tax, and consumption tax will affect different groups of people differently (Yung 2016b). The perception of the people cannot be known without their involvement.

Even if we are confined to the utilitarian approach, which regards the government’s role as promoting public interest on the basis of knowledge and calculation,

¹⁴For a discussion of a Confucian approach to resolve value conflicts by learning from different perspectives, see Yu (2014: pp. 76–80).

the participation of the citizens is also essential. There are two major utilitarian approaches—preference utilitarianism and welfare utilitarianism. In order to find out which policy option can maximize preference satisfaction of the citizens, it is necessary to know what their preferences are. For cases such as the Express Rail Link and the immigration policy, the preferences of the citizens may not be obvious at the beginning. For welfare utilitarianism, the so-called “all relevant consequences” or “interests of all parties” (Mok 2016: p. 95) have to be collected from various sources or channels.

In a society with pluralistic values, a broad perspective is needed to formulate a generally acceptable policy option. Citizen participation is needed in working out the broader perspective (Yung 2016b). Taking the case of reform in the taxation system, as pointed out by Betty Yung, a governmental, administrative, and economic-oriented perspective of taxation is just a narrow perspective. To take into account other social values, such as social justice and care, it is necessary to adopt a broader perspective, which takes different social values into consideration, and requires multiple inputs from different sectors of the society.

According to the analysis of Yung, the government’s perspective focuses only on two concerns: (1) broadening the tax base; (2) maintaining competitiveness (Yung 2016b: p. 185). However, from citizenship’s point of view, other possible implications of the change in the taxation system are worthy of concern and worry, such as increasing the burden of the lower class and shrinking the size of the middle class. Public engagement is useful in broadening the perspective, which has a higher chance of leading to a more comprehensive and balanced policy option (Yung 2016b: pp. 194–195).

As social values are highly relevant to public policy, and they are too important to be left in the hand of the experts or the government officials, they have to be endorsed by the citizens at large. It is for this reason that public engagement and citizenship education are relevant to public policy making.

The values cannot just be assumed or arbitrarily adopted. They have to be justified and subject to open scrutiny. This could be done only when people spell out clearly their moral intuitions and political convictions, subject them to the scrutiny of other people, and listen and learn from the convictions of others (Cheng 2016: pp. 145–146).

Public engagement is useful not only to make the policy option more reasonable, but also more acceptable. As noted by Karen Lee, “To make lasting changes, law and public policies need support from civic society. As we can see from the EOC case and the case study on ethnic minority students, concerted efforts from NGOs, public institutions, and the wider community can make a difference” (Lee 2016: p. 126). In the discussion of the XRL case, Tsang’s chapter also demonstrates the growing demand for public engagement in effective governance and public policy making.

If we agree on the importance of public engagement in public policy making, in order to make them justifiable and acceptable, then we also have to think of a way to make public engagement more institutionalized; otherwise, public engagement may be ineffective, costly, and divisive. In the case of Hong Kong, it can be said

that in recent years, there has been a higher degree of public engagement, in the sense that the people are more outspoken in voicing out their opinions, disagreement, and even resentment of the government. As there are limited institutionalized mechanisms for the divergent views and sentiments to be effectively reflected in the public decision-making process in a well-balanced way, the disputes within Hong Kong society can only get escalated. When faced with serious dispute on issues such as public order legislation, national security legislation, and constitutional reform, the Hong Kong society was deeply divided. Instead of learning from different perspectives and looking for a generally acceptable solution, the Hong Kong SAR government under the leadership of the then Chief Executive Tung Chee Hwa joined one side of the dispute and argued against the other side. It added a lot of heat to the dispute and finally provoked the demonstration on July 1, 2003, with half a million participants (Yu 2010a: p. 28). As pointed out by one commentator: “The SAR government should be the most important stabilizing force in the society. If it joins one side of the conflict to fight against another side, it can only seriously worsen the original social conflict” (Lian 2005: p. 37).

Public engagement as dialogue of values can be more institutionalized through the implementation of true democracy in Hong Kong. Without democracy, not only will public engagement not very effective, but can become a source of unrest and strife in the society. But if the value issues are resolved by giving certain values a hegemonic say in the polity, then the frustration and resentment can only grow bigger in the society with the passage of time.

For our society to function better, there has to be closer interaction between public policy and public engagement. For public engagement to be more institutionalized, there has to be true democracy which allows public opinions and sentiments to be taken seriously, at acceptable social cost and with adequate effectiveness. For the society to make good use of democracy, there has to be a good spread of democratic education, which puts emphasis on rational discussion and civilized debates, including disagreements over value issues contained in public policy. With such a view on public policy and public engagement, the citizens are not just passive beneficiaries of public policy, but actors who have authority (both in the sense of legitimate power and authoritative inputs) to define the goals and directions of the public policy. As a result, citizenship education can no longer be separated from public policy making.

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