

CHAPTER 7

Factors and Trends: Economic and Social Influences on Legal Aid

This Chapter, and the Chapter to follow, seek together to illuminate the institution of legal aid in Hong Kong by reference to the environment in which legal aid services operate and develop. In this Chapter, factors affecting economic and social development in Hong Kong, be it in the long run or on a periodic basis, are highlighted, with discussion on possible effects on the availability and development of legal aid services. The question of a relationship between economic development and legal aid services (whether viewed from the supply side or the demand side) is examined by reference to legal aid statistics. Further, trends or emerging issues on the economic, social and public finance fronts are also identified. In the next Chapter, the focus of examination and discussion is the actual operation of the institution of legal aid in Hong Kong in the light of the matters discussed here.

A. Hong Kong's Growth and Development: A "Maturing" Economy and Society

Although an economist has been heard to say that "in the long run, we are all dead", succeeding generations of economists have studied how the Hong Kong economy has grown and developed.

The Hong Kong economy has over the years developed from one based upon labour intensive and export oriented light industries to a "maturing" economy based upon its position in the globalized service industry, particularly its banking and financial services, with ever stronger connectivity and integration with the manufacturing based economy of China Mainland. The Hong Kong economy is also increasingly catering for, and relying on, a consumer market, especially the portion of the market for high-end products and services, due to the greater affluence of its population both in terms of number of consumers and their purchasing power, and also of visitors, whether for business or otherwise.

A "maturing" economy undoubtedly induces higher needs for legal services. An economy based on the provision of services is highly legalized; transactions carry legal consequences and are often themselves subject to regulation by law. Examples of such transactions are legion. A company is itself a legal construct. The listing and trading of a company's shares, in nature rights given a monetary value, involve multi-level and sophisticated regulation by dedicated bodies on the basis of legislations, regulations, rules, codes of practice and guidelines. People interact with one another with greater frequency and often not face-to-face. Legal relations are created to define, delimit and

determine the consequences of such interactions. A deed in mortgage to facilitate borrowing is a typical example of a relationship based on law.

A “maturing” economy with a significant commercial and consumer base is asset owning. The various forms and consequences of owning an asset again generate legal relations. The mortgage deed is again an example of how the ownership of a property is arranged by agreement so that funds may be moved for the mutual benefit of the parties to the deed.

A “maturing” economy in intimate connection with the rest of the world through the globalized network of trade in goods and services must conform to certain accepted standards in order to be predictable to the trading partner on the other side of the world. One set of such standards relates to the provision of modalities for the effective settlement of disputes involving basic guarantees of a fair hearing.

All of the above contribute towards heightened aspirations on the part of the inhabitants not only for legal services but also for quality legal services and the access to them. People living in Hong Kong aspire for a legal system that not only serves the needs of commerce but also takes care of their personal needs and guarantees their individual rights. It is widely believed that a “maturing” economy implies a “maturing” society and the availability of legal aid is an indicator for that other maturity.

Rapid economic development in Hong Kong in the last 50 years has transformed the territory from an entrepot to a labour intensive manufacturing centre, and then to a service-oriented economy, with consequences to the social structure. Hong Kong has evolved from a society based upon a relatively abundant supply of manual or low skilled labour hired by a small number of capital holders or entrepreneurs to a society where non-manual workers play a gradually greater role in wealth creation.

The expansion of opportunities to receive education, developed first by the introduction of compulsory schooling and followed by public investment in vocational and higher education, has enabled Hong Kong to have its own locally trained class of professionals (such as doctors, lawyers, teachers and engineers) and managers, as well as an expanding pool of well-educated non-manual workers earning more than subsistence salaries and having greater job security.¹ These professionals, managers and well-to-do workers together constitute an emerging, if not already established, middle class that has moved up the social ladder in relation to their parents.

The growing middle class, it can be observed, is relatively affluent and wealth generated from first trade and industry and then financial services accrued or trickled down to them as profits or salaries, and has fuelled not only saving and consumption but also acquisition of self-occupation real property for an ever-increasing portion of the population. Ever since its emergence in the 1970s, the middle class has grown to compose largely of locally born residents who, especially after 1997, have decided to take root in the territory and raise their own families, feeling that they have a stake in the wellbeing of the community.

Being educated and exposed to the exchange of ideas in the open information society that Hong Kong partakes with other parts of the world, the growing middle class is opinionated and not afraid to express their views through participation, if necessary, in

1 Lui Tai-lok and Wong Chi Cheng (eds), *Observations on the Situation of the Hong Kong Middle Class* (Hong Kong: Joint Publishing (Hong Kong), 2003) pp 4-5.

protests and social action. Unlike their parents, who passively received welfare with grateful hearts if and when it was offered to them by the Government, many middle class Hong Kong residents are aware of their rights and entitlements and are increasingly willing to seek out, protect, and safeguard them, whether through individual or group action, including litigation.

B. Legal Aid Services from the Economic and Social Points of View

At any one time, the supply of and demand for legal services fluctuate due to many factors, some of which are possibly economic and others social. In the long run, demographic and economic factors will play a substantial part in shaping demand, since an increase in the population must mean greater human interaction, and economic development must mean a greater number in the volume of trade or service transactions, and accordingly, greater incidence in having disputes. This, however, is not to say that ingrained social preferences have no part to play.

LEGAL AID SERVICES STUDIED ECONOMICALLY

Professor Ho Lok-sang has examined legal aid services from the economic point of view. Referring to overseas studies, Ho considers that legal aid, like health care, is subject to both supply side and demand side moral hazard. Supply side moral hazard describes the tendency of professional lawyers, like doctors, to supply more services than are needed in order to benefit financially. It has been shown abroad that the greater the number of solicitors, the more the volume of legal aid work.² Although no study has been undertaken of the existence of any such relationship in Hong Kong, it is nonetheless worthy to note that the size of panels of counsel and solicitors set up by virtue of the Legal Aid Ordinance³ has been slowly expanding. At present the number of counsel and solicitors in each panel meeting minimum experience requirements stands at 361 counsel and 1,763 solicitors respectively in the civil legal aid panels and 368 counsel and 737 solicitors in the criminal legal aid panels. On the other hand, the number of counsel and solicitors in the panels expressing interest in doing civil and criminal legal aid work is 723 counsel and 2,176 solicitors. Compared with the size of the two branches of the legal profession, it can be observed that while about three quarters of the members of the Bar and about 40% of members of the Law Society in private practice are prepared to receive legal aid assignments, less than half of the members of the Bar and about one-third of members of the Law Society in private practice have met the minimum experience requirements. Therefore, the present situation appears not to suggest the growth of the Hong Kong legal profession as a factor generating more legal aid applications.

2 Ho Lok-sang, *Principles of Public Policy Practice* (Boston, Dordrecht and London: Kluwer Academic Publishers, 2001) pp 72-73. See, in addition, Bevan, Holland and Partington, *Organizing Cost-Effective Access to Justice* in Paterson, Alan and Goriely, Tamara (eds), *Resourcing Civil Justice* (Oxford: Oxford University Press, 1996) pp 281-303. Cf Cape, Ed and Moorehead, Richard, *Demand Induced Supply? Identifying Cost Drivers in Criminal Defence Work* (Legal Services Research Centre, UK, 2005) (<http://www.lsrc.org.uk/publications.htm>).

3 I.e. Cap. 91, Laws of Hong Kong.

It should be recognized, however, that lawyers are inevitably agents publicizing the availability of legal aid to members of the public who may not otherwise be aware of such a service provided out of public funds. Unless all providers of legal aid services are made to be salary earners and therefore money-neutral and market-neutral in their approach to work, the supply side moral hazard is not to be solved. Rather, there is a social interest in maintaining an independent legal profession not subject to control by a government or public agency. This serves to illustrate the proposition that legal aid is a social phenomenon and the importance of perception in shaping at least the demand side of legal aid.

That legal aid is a social phenomenon can be approached from the fact that each legal aid application is a human decision. Humans are capable of compromise, forebear and forgive and not all disputes end up in litigation. Humans make decisions according to what they know or think about a matter or situation. In other words, human decisions are affected in a not insignificant part, by perception.

Demand side moral hazard, according to Ho, describes the tendency that legally aided persons, like patients, may demand more services than they would have under cost/benefit considerations in the social context. Excessive utilization of legal aid services would particularly be so if they were perceived as “free” or nearly “free” (such as requiring only payment of a token administration fee).⁴

On the other hand, public ignorance of the availability of legal aid inhibits application. Public perception of legal aid as being costly, cumbersome and difficult also inhibits application.⁵ Indeed claims recovery agents are said to misinform the public about publicly funded legal aid services to persuade members of the public rely on their services. Public perception or social consciousness of legal aid as an entitlement or welfare benefit will on the other hand encourage application. The same effect may occur if because of changing social attitudes or through publicity campaigns, members of the public agree that injustice ought not to be tolerated, and must be righted by taking the culprit to court, and learn of the generous assistance legal aid services provide to qualifying litigants.

Having identified and evaluated the broad factors relevant to changes in the demand for legal aid above, legal aid statistics particularly those relating to civil litigation are examined to see if in the real world any of these factors offer an explanation for changes in the demand for legal aid.

LEGAL AID STATISTICS AND CHANGES IN THE ECONOMY

An analysis of the statistical data of legal aid applications does not readily yield indicators mirroring socio-economic trends. There was a gradual increase in civil legal aid applications, starting from 13,928 in 1985/86, reaching the 20,000 mark in 10 years' time. The figure climbed sharply to a peak of 31,578 in 1999 and then downwards to 17,729 in 2004. The fluctuations in between, such as, a surge in applications between 1996 and 1999, are more likely to be attributed to right of abode claims and expansion of

4 Ho Lok-sang, *Principles of Public Policy Practice* (Boston, Dordrecht and London: Kluwer Academic Publishers, 2001) pp 72-73.

5 Legal Aid Services Council, *Legal Aid* (Issue 8, July 2005) pp 9-10.

coverage of legal aid in terms of financially eligible litigants than to changes in the social and economic environment in which legal aid services are provided.

Breaking the total number down by categories also does not reveal any underlying trends. Legal aid applications for the pursuit of personal injuries claims rose from fewer than 1,800 in 1985/86 to a relatively stable band of between 3,500 and 5,000 in the decade between 1995 and 2004. The relative stability of the number of potential personal injuries claims in those 10 years does not support any correlation that one can postulate between economic upswings and hence expansion in employment and productive activity, and the incidence of accidents. The number of applications for legal aid associated with wages claims also does not offer much evidence, although it experiences a surge after the resumption of Chinese sovereignty in July 1997, with a 40% increase of referrals from the Labour Department of companies winding up between November 1997 and April 1998. This is indicative of the vulnerability of Hong Kong to the Asian Economic Crisis unleashed by currency devaluations of neighbouring economies.⁶ Unlike the cases in the 1970s which often required the lawyers of the Legal Aid Department to go to court to obtain interim orders to secure the machinery and equipment of the company, the cases in the 1990s usually resulted in settlements or winding-up petitions for the purpose of obtaining ex-gratia payments from the Protection of Wages on Insolvency Fund. Since 1 July 1999, however, cases referred from the Labour Department which do not require winding-up or bankruptcy proceedings and which can be dealt with by referral to the Protection of Wages on Insolvency Fund Board are identified, and the applicants given suitable advice on what is needed to satisfy the Fund Board, that it is uneconomical to present winding-up or bankruptcy petition in court, before referring them onward to the Fund Board. By mid 2004, the Labour Department and the Legal Aid Department agreed that in order to facilitate speedier ex-gratia payment, it would not refer wages claims to the Legal Aid Department if bankruptcy or winding-up proceedings against the employer have begun or completed with the granting of a bankruptcy or winding-up order, or if the employer is a limited company with fewer than 20 employees and undergoing voluntary liquidation.⁷ These arrangements, together with an improving economy in the last 2 years, have resulted in a drop on the record of wages claims handled by the Legal Aid Department.

The discussion above indicates that legal aid application and grant statistics have not provided support for any correlation between the demand for legal aid services and fluctuations in the economy. It may be that the period of study is too short to recognize any underlying trend or cycle. It may also be that institutional factors, such as the financial eligibility limits and contribution levels, play a more significant part in affecting the decision whether an application for legal aid should be made.

6 The extent of the vulnerability can be appreciated by reference to the statistics on personally insolvency or bankruptcy cases. They numbered 25,328 in 2002 (which was 5,664 more than the number of bankruptcy orders made in the previous eight years between 1994 and 2001 combined). The figure was 24,922 in 2003 but fell significantly in 2004 to 13,593. See <http://www.info.gov.hk/oro/statistics/statistics.htm>.

7 See Legal Aid Services Council, *Legal Aid* (Issue No 10) (January 2006) p 10.

C. Hong Kong's Economic and Social Transformation

Hong Kong has been in the midst of economic structural change since the 1980s. This has been a process of transforming the economy from one based upon labour intensive light manufacturing and import and export trade oriented services that boosted the economic lift-off of the territory in the 1960s and the 1970s, to one based upon knowledge and information intensive services provided to producers of nowadays that has made the territory one of the world's "global cities".

As Hong Kong enters the 21st century, the vulnerability of different parts of the working population has become more exposed under a number of major trends. Ho has identified 5 major trends characterizing the new millennium and impacting on the choices of policy makers between benefits and danger. These are: (a) Globalization and the intensifying competition it brings; (b) Technological breakthroughs bringing benefits in longevity and the processing and transmission in information; (c) Increasing inequality in income and wealth distribution, both as between countries and across the population in a country; (d) Continuing unrest in transitional economies; and (e) Increasing interdependencies, making one to see the economy holistically.⁸

Of these 5 major trends, the workforce in a "maturing" economy will be more affected by that of globalization, especially as it is intensified by advances in information technology and of inequality in income and wealth distribution.

Hong Kong is not materially different. Its manufacturing industry was dispersed or "hollowed out" in the course of the 1990s to China Mainland. About 70% of the foreign capital investment into the Pearl River delta region of the Mainland between 1985 and 1999 originated from Hong Kong financing over 20,000 factories and employing 10 million people.⁹ The secondary sector, with manufacturing and construction being its main components, contracted from 31.7% of Hong Kong's gross domestic product in 1980 to 12.4% in 2002,¹⁰ and further to 9.5% in 2004.¹¹

During the decade between 1991-2001, the working population engaged in manufacturing was in substantial decline, from 28.2% of the total working population to 12.3%.¹² Laid-off workers would have to find new jobs in the burgeoning services sector which expanded from 67.3% of the territory's gross domestic product in 1980 to 87.4% in 2002.¹³ Economic structural changes, involving the movement of workers from one

8 Ho, Lok-sang, *Principles of Public Policy Practice* (Boston/Dordrecht/London: Kluwer Academic Publishers, 2001) p 201.

9 Enright, Michael J, Chang, Ka-mun, Scott, Edith E, and Zhu, Wen-hui, *Hong Kong and the Pearl River Delta: The Economic Interaction* (Hong Kong: The 2022 Foundation, 2003).

10 Enright, Scott and Chang, *Regional Powerhouse: The Greater Pearl River Delta and the Rise of China* (Singapore: John Wiley & Sons (Asia), 2005) p 18 (Table 2.2).

11 See Census and Statistics Department, *Frequently Asked Statistics: Gross Domestic Product (GDP) by Economic Activity at Constant (2000) Prices* in http://www.info.gov.hk/censtatd/eng/hkstat/fas/nat_account/gdp/gdp8_index.html (accessed on 9 October 2005).

12 Chiu, Stephen W K and Lui, Tai-lok, *Global City, Dual City? Globalization and Social Polarization in Hong Kong since the 1990s* (Hong Kong: Hong Kong Institute of Asia-Pacific Studies, Chinese University of Hong Kong, 2004) (Occasional Paper No 144) p 13.

13 Enright, Scott and Chang, *Regional Powerhouse: The Greater Pearl River Delta and the Rise of China* (Singapore: John Wiley & Sons (Asia), 2005) p 18 (Table 2.2).

industry to another,¹⁴ could not and have not been smooth. Restructuring the economy to a service based one to make available suitable jobs locally for the workers left behind (whether with or without further training) has been a testing task for industries and the Government. With re-training, they may become employed in the services sector (particularly in the “wholesale, retail, import-export trade, restaurant, hotels” sub-sector, the “transportation, storage, communications” sub-sector, and the “community, social, and personal services” sub-sector), providing manpower to not only the trade related services but also services provided to the local market of consumers who derive their purchasing power from income obtained through a different kind of service-providing, whether locally or by way of export, namely the rendering of producer services, the many different services that facilitates the development of the means of production, such as financing, insurance, banking, and business professional services.

Working Population by Industry (in percentage)¹⁵

	1961	1971	1981	1991	2001	2004
Manufacturing	43.0	47.0	41.3	28.2	12.3	5.2
Construction	4.9	5.4	7.7	6.9	7.6	8.4
Wholesale, retail and import/export trades, restaurants and hotels	14.4	16.2	19.2	22.5	26.2	31.7
Transport, storage and communications	7.3	7.4	7.5	9.8	11.3	11.4
Financing, insurance, real estate and business services	1.6	2.7	4.8	10.6	16.1	15.3
Community, social and personal services	18.3	15.0	15.6	19.9	25.5	27.3
Others ^a	10.5	6.3	3.9	2.1	1.0	0.8

- a. Others” include such industries as “Agriculture and fishing”, “Mining and quarrying”, “Electricity, gas and water” and industrial activities inadequately described or unclassifiable.

Enright, Scott and Chang point out, by reference to a multiyear study of multinational firms in the Asia Pacific region, that “Hong Kong is the most important city in the Asia Pacific for regional co-ordination, central management, market planning, regional strategy settling, regional finance, and senior personnel management activities of multinational companies”.¹⁶ Entrepreneurs also invest heavily abroad from their Hong

14 Lui, Francis T, *Hong Kong's Economy Since 1997* in Chan, Ming K and So, Alvin Y (eds), *Crisis and Transformation in China's Hong Kong* (Armonk, NY and London: M E Sharpe, 2002) p 247.

15 See Census and Statistics Department, *Hong Kong 1981 Census Main Report: Volume 1 Analysis* (1982) p 138; Census and Statistics Department, *Hong Kong 1991 Population Census: Main Tables* (1992) p 95; Census and Statistics Department, *2001 Population Census: Summary Results* (2002) p 55.

16 Enright, Scott and Chang, *Regional Powerhouse: The Greater Pearl River Delta and the Rise of China* (Singapore: John Wiley & Sons (Asia), 2005) pp 22-23.

Kong headquarters with the assistance of producer service providers here.¹⁷ The portion of the population engaged in the provision of such knowledge and information intensive services, classified under the categories of “managers and administrators”, “professionals and related”, and “clerical”, now consists of more than half of the working population, rising from 21% in 1981 to 39% in 1991, and reaching 47.8% in 2001.¹⁸ Their services are often exported or engaged on a cross-border basis.

Managers and professionals are often asked, at recruitment and increasingly at advancement, whether they are willing and ready to work in China Mainland or abroad. About 6% of the working population or 190,000 persons were working in the Mainland in 2002, as compared to 1.3% or 37,000 persons in 1989.¹⁹ A very recent survey of the Central Policy Unit estimates that about 290,900 Hong Kong residents resided or stayed substantially in the Mainland in the 6 months before the fourth quarter of 2004. About 70% of this group of Hong Kong residents was male and over 40% of them was between 30 and 49 years of age. Among those employed (i.e. 57.2% of them), 51.9 % was classified as “managers and administrators, and professionals and associate professionals”, and 32.3% was engaged in the manufacturing sector.²⁰ It is also common to find managers crossing the border on Tuesday to the manufacturing hubs in China Mainland and work in the Mainland throughout the rest of the week before spending the weekend in Hong Kong.

It is not difficult to recognize the potential for novel legal problems with this mode of cross-border living. Some of them have been the subject of court proceedings, as illustrated below.

Tsui Chung Fai was a Hong Kong resident employed by a Hong Kong company as a senior quality controller in Shanghai. His employment was terminated. He claimed for arrears of wages, end of year pay and annual leave pay in the Labour Tribunal in Hong Kong. The Labour Tribunal made an award upholding the claim but the employer appealed to the Court of First Instance arguing that the Labour Tribunal had no jurisdiction to entertain Tsui’s claim since the contract of employment took place wholly outside Hong Kong, and it was not an overseas contract defined in the Contracts for Employment Outside Hong Kong Ordinance.²¹ Chu J hearing the appeal dismissed it on the ground that the Labour Tribunal had jurisdiction to hear and determine the claim which was a claim for a sum of money arising from the failure of a person to comply with the Employment Ordinance²² which applied to all contracts for employment whether or not they were to be performed in or outside Hong Kong.²³

17 Hong Kong has consistently been the largest foreign investor in the Asia Pacific after Japan and the largest foreign investor into China Mainland: *Ibid* pp 21-22.

18 Census and Statistics Department, *Hong Kong 1981 Census Main Report: Volume 1 Analysis* (1982); Census and Statistics Department, *2001 Population Census: Main Report – Volume 1* (2002).

19 Census and Statistics Department, *A Graphic Guide on Hong Kong’s Development (1967-2002)* (2003) Table 2.9.

20 Central Policy Unit, The Government of the HKSAR, *Thematic Household Survey in the Fourth Quarter of 2004: Characteristics of Hong Kong Residents Having Resided/ Having Stayed Substantially in the Mainland: Summary Report* (October 2005) paragraph 1.8.

21 I.e. Cap. 78, Laws of Hong Kong.

22 I.e. Cap. 57, Laws of Hong Kong.

23 *Tsui Chung Fai v Kwok’s Fashion Co Ltd* [2004] 4 HKC 211 (Court of First Instance).

Hui Pak Sang was a Hong Kong resident, employed by a Hong Kong company as a production manager. The company required him to be stationed in its factory in Dongguan, China Mainland from Monday to Saturday. He lived in factory accommodation in Dongguan. The company provided transportation for him and other Hong Kong resident co-workers on Monday morning to take them from Shenzhen railway station to Dongguan and in the afternoon of Saturday to take them from Dongguan to Shenzhen railway station for return to Hong Kong. If he worked late on Saturday and missed the employer-provided transport, he would arrange his own transport to Shenzhen and be reimbursed the cost by the employer. On Saturday, 26 August 1995, he was required to work overtime and finished work at about 10 pm. He hired a taxi to go from Dongguan to Shenzhen to meet his girlfriend but the taxi collided with a road marker in the suburbs of Shenzhen and he suffered fatal injuries. His father, claimed, with legal aid, employees' compensation on behalf of himself and other dependents. A District Judge dismissed the claim, having not been satisfied that the accident arose out of and in the course of the deceased's employment. The Court of Appeal allowed the father's appeal against the dismissal, holding that it was not material that in that evening the deceased was travelling to Shenzhen to meet his girlfriend there. What mattered was that Shenzhen was the place in China Mainland where the deceased's course of employment began and ended and he remained in the course of employment until he left for Hong Kong. The Court of Appeal also held that the father was entitled to rely on section 5(4)(g) of the Employees' Compensation Ordinance,²⁴ which extended the course of employment to an employee who travelled outside Hong Kong as long as the travel was with the permission of the employer and for the purposes of and in connection with his employment.²⁵

Li Wai Ming was a Hong Kong resident employed by a Hong Kong company as an air-conditioning technician in Jieyang City in China Mainland. His duties involved supervising short-term workers recruited in Jieyang City to work on air-conditioning projects. On 22 April 2001, he was beaten to death by two such workers while sleeping in a warehouse he rented on behalf of his employer for the purpose of storing air-conditioners and other equipment. His father sued, with legal aid, on behalf of his estate and dependents, his employer in Hong Kong for damages for bereavement, loss of dependency, and loss of accumulation of wealth, claiming that the employer was in breach of its implied duty under the employment contract, its duty of care in negligence, and its duty as an occupier of the warehouse premises; and that it was vicariously liable for the murderous act of the two short-term workers. The Court of First Instance found the employer to be liable both under contract and negligence but held that the deceased was contributory negligent by 20%. Damages in the total amount of HK\$700.00 odd plus interest were awarded.²⁶

C and D were wife and husband respectively living in Hong Kong. The wife was a Chinese national.²⁷ There was one child of the marriage. There were differences between the parties to the marriage and the wife petitioned the Hong Kong court for divorce on the basis of the husband's unreasonable behaviour. The divorce petition was undefended and a decree nisi was issued. The wife moved to live in Shanghai with her son. Issues of

24 I.e. Cap. 282, Laws of Hong Kong.

25 *Hsu Shu Chiao v Lung Cheong Toys Ltd* [2002] 1 HKC 479 (Court of Appeal).

26 *Li Hoi Shuen v Man Ming Engineering Trading Co Ltd* (unreported, 13 January 2006, HCPI 8/2004) (Court of First Instance).

27 The extent of cross-border marriages may be illustrated by the report by the Census and Statistics Department that in 2004, about one-third of the 41,300 odd recorded marriages in Hong Kong were marriages between a Hong Kong resident male and a Mainland Chinese female; see *Hong Kong Economic Journal* (17 September 2005) p 4.

ancillary relief became complicated with issues arising out of properties in a number of jurisdiction including Hong Kong and China Mainland. The wife issued proceedings for divorce in a People's Court in Shanghai, presumably to deal with the disposition of properties in Shanghai, and the husband sought an injunction restraining her from continuing the Shanghai proceedings.²⁸

The real life problems drawn from the illustrative cases described above indicate the stretch of issues that cross-border economic integration and exchanges between Hong Kong and China Mainland have generated. Similar problems have of course occurred as between Hong Kong and other parts of the world, given the sizeable expatriate community in the territory and there are in place rules, principles and procedures that can be applied to like cases. The same may not be easily the case as between Hong Kong and the Mainland. This is because both jurisdictions exist within the same state and the usual manner of solving jurisdictional and procedural conflicts across state borders, namely subscribing to multilateral baseline setting treaties, is not available. Talks between the Hong Kong and Mainland authorities on mutual recognition and enforcement of judgments have dragged on since 2002 for 3 years. In the meantime, the difficulties persist and immediate needs may have to be resolved through litigation on both sides of the border. Such litigation often involves the resolution of difficult points of law and also references to the law of a different jurisdiction, the evidence of which has to be provided by fee-charging experts. Unlike the members of the expatriate community, those who have to litigate across the border between Hong Kong and the Mainland are not well-resourced in life and often their resort to quality legal services to resolve the complicated legal issues they got entangled into is legal aid in Hong Kong.

D. Socio-economic Trends and Consequences

Both the economic development and the more fundamental economic transformation outlined above carry with them implications affecting different sections of the population, depending on their standing within the community. Each of these implications may in turn ripple into other disparate subject matters pushing and pulling on the demand for, and the supply of, legal aid services. The implications discussed in this Section are: social polarization, the widening income inequality and the deepening poverty; the greying population, the declining fertility rate and rising immigration; and their combined effect on public finances.

a) Social polarization, widening income inequality and the deepening of poverty

Chiu and Lui have documented the process of social polarization of Hong Kong in the 1990s as the territory changed from an industrial colony to a producer service driven global city.²⁹ It is observed that social polarization is "clearly observable in the changes

28 *C v D* (unreported, 12 November 2001, FCMC 1444/2000) (Family Court).

29 "Producer service", in this connection, refers "not only to production firms narrowly defined but also those to all other types of organizations" and therefore to the firms in insurance, banking, financial services, real estate, legal services, accounting, consultancy and professional associations that serves the multi-national corporations at the major nodes of their networks, of which Hong Kong happily is one, or the corporation headquarters of regional corporate networks of Hong Kong origin; see Chiu, Stephen W K and Lui, Tai-lok, *Global City, Dual City? Globalization and Social Polarization in Hong Kong since the 1990s* (Hong Kong: Hong Kong Institute of Asia-Pacific Studies, Chinese University of Hong Kong, 2004) (Occasional Paper No 144) pp 3-4, 8.

in occupational structure. The polarization is *both relative and absolute*. Following the changes in the sectoral distribution of the labour force as a result of Hong Kong's development into a global city,³⁰ the relative share of the occupational groups at both the top (such as the managerial and professional occupations) and the bottom (such as the elementary occupations) have increased, as well as their absolute numbers".³¹

Income polarization, said to be driven by occupational polarization, is also observed, and Chiu and Lui summed up Hong Kong's income polarization to be "the combined effect of the widening gap between top and bottom income earners and the redistribution of the labour force from the manufacturing sector, characterized by lower inequality, to sectors (financing, insurance, real estate and business services, and community, social and personal services) with significantly higher inequality".³² The social structure has evolved into a shape resembling an hour glass (i.e. with a squeezed middle), contributed both by the transformation of income into capital at the expense of jobs, and the increased migration into Hong Kong of families established earlier on in China Mainland by Hong Kong residents.³³

Since 1986, the income gap between the rich and poor, represented by the gini coefficient, has widened, i.e. from 0.453 in 1986 to 0.518 in 1996, and further to 0.525 in 2001.³⁴ Observers generally consider that the greater the value of the coefficient, the greater the inequality in income distribution in the relevant community. While one has to be cautious in the use of the gini coefficient as an indicator, since it does not take account of the effects of taxation and social benefits, both of which are considered to be capable of reducing income inequality and should not be used singly to evaluate poverty (as both the rich and the poor may become richer simultaneously), one can still safely perceive a trend of widening income inequality over the last 15 years.

Widening income inequality carries with it economic and social consequences. A significant economic consequence may be the worsening of the uneven distribution of

30 Occupational polarization is, it must be remembered, a dynamic process. Job security in sectors other than the manufacturing industry is increasingly less guaranteed or threatened by outside forces. Further integration of Hong Kong's economy with the Pearl River Delta and with the global economy will threaten local employment, as the support services of finance and service organizations are re-located to China Mainland and other parts of the world. The movement of shipping lines to the burgeoning port facilities in the Pearl River Delta region and other parts of the Mainland will adversely affect jobs in the trading and logistics sector, a majority of which are unskilled. See The Better Hong Kong Foundation and McKinsey & Company, *Unemployment in Hong Kong: Myths and Realities* (6 October 2005) (which observes that not only unemployment has become increasingly entrenched but also the threats to jobs of Hong Kong's economic integration with the Pearl River Delta region are real).

Further, as talents in the Mainland and elsewhere rise in their career ladders, it is understandable that in time, managerial and professional staff from Hong Kong need not be a necessary component in the human resource chain to ensure an effective and efficient operation of the organization. The job squeeze might in time have to be felt by the more knowledge-based portion of the work force.

31 Chiu, Stephen W K and Lui, Tai-lok, *Global City, Dual City? Globalization and Social Polarization in Hong Kong since the 1990s* (Hong Kong: Hong Kong Institute of Asia-Pacific Studies, Chinese University of Hong Kong, 2004) (Occasional Paper No 144) p 17.

32 Ibid, pp 19-20, 24.

33 Ibid, p 49.

34 Legislative Council Secretariat, *Fact Sheet: Gini Coefficient* (FS07/04-05).

the tax burden. Hong Kong's taxation system is simple and is primarily based upon the taxation of salaries and profits. Taxing the population on this basis carries the consequence that in case where the affluence of economic growth is not adequately distributed through wages to local employees or through consumption locally, with the result that the rich and the poor do not become richer simultaneously or at a comparable rate, a larger part of the tax burden would increasingly be borne by a narrower sector of the population who are more mobile and have better means to reduce their taxation risks. Resting public finances on the achievements of a smaller number of people is not necessarily a prudent course to take.

Widening income inequality may also affect the pattern of local consumption. If increasing wealth is concentrated in the rich in this age of affordable international travel, consumption of durable goods and luxurious services locally is merely one choice among many. If the less well off members of the community are not getting richer by way of income at as much pace as the top 10 percentile of the population, their consumption pattern may not improve towards the higher end products and services. Cooling in consumption of the locals affects the returns of local service industries including retail and restaurant sub-sectors, and in turn the income and job security of workers in those sub-sectors, and indirectly, the general revenue.

Hong Kong has no official poverty line. However, the discussion above concerning economic restructuring indicates the potential for reduction in income in a larger portion of the population and also for more persons to become structurally unemployed, i.e. being unable to find alternative employment suiting the knowledge and skills they have.³⁵ A likely, if not already on-going, expansion of the working poor and the underclass of unemployed and unemployable people means a greater pool of qualifying residents for publicly funded services in Hong Kong, including legal aid.

b) Demographic Pressures

The post-war baby-boomers born in the 1950s are entering their 50s in the beginning of the 21st century. Birth control programmes, self-concern on their capacity of raising children and greater attention to self-fulfillment have all contributed to smaller families. One generation later, the sons and daughters of the baby-boomers have even fewer babies, making Hong Kong one of the parts of the world having a low, if not the lowest, birth rate.

Hong Kong's fertility rate has been in constant drop in the last 30 years. The number of live births per 1,000 women over lifetime has declined from 3,459 in 1971 to 927 in 2001.³⁶ The decline below 2,000 live births per 1,000 women over lifetime is significant. It means that, on average, each Hong Kong woman has ceased to produce two offspring over her lifetime to continue the line of herself and her spouse or partner. Hong Kong has in this way, since the early 1980s, ceased to have the capability of producing the "replacement population" naturally. In explaining the significant drop in fertility rate of local women before and after the handover, the Government indicated that it was associated with a number of factors "like marriage postponement, increased prevalence

35 See The Better Hong Kong Foundation and McKinsey & Company, *Unemployment in Hong Kong: Myths and Realities* (6 October 2005).

36 Census and Statistics Department, *A Graphic Guide on Hong Kong's Development (1967-2002)* (2003) Table 1.6.

of spinsterhood, postponement of low-order live births, curtailment of high-order births, increased divorce rate and unfavourable economic climate”.³⁷

It is likely that this decline of the fertility rate of Hong Kong women will continue since Hong Kong women have been delaying marriage and accordingly in most cases, delaying the age of the first live birth over the last three decades, though the Census and Statistics Department, quoting the examples of other matured economies, suggests that the total fertility rate will rise gradually after reaching a trough.³⁸ The presently applicable (2001) median age of female at first marriage is 27.5³⁹ and the median age of women at first live birth 29.4, having risen from 22.9 and 23.4 in 1971.⁴⁰ However, the decline of the fertility rate is not expected to be rapid as the Census and Statistics Department observes that the rate of marriage postponement has more or less stabilized; that further rapid increase in spinsterhood is unlikely;⁴¹ that the curtailment of high-order live births is expected to persist; and that the fertility level is likely to rise gradually as the economy recovers.⁴²

This may be only part of the picture. Another, though not the remainder, part of the picture is that at least a portion of Hong Kong men have been having their babies across the border in China Mainland. These children of Hong Kong residents, born in the Mainland, are gradually absorbed into the population through migration under a permit system maintained by the relevant authorities in the Mainland. Giving priority to the imperative of family reunion, the Mainland Chinese spouses of Hong Kong residents are also allowed to resettle in Hong Kong under the same permit system. More than 700,000 persons migrated into Hong Kong under the permit system between 1991 and 2005, though there is a 36% decline within last five years in the number of migrants newly arriving at Hong Kong, which tends to confirm Siu’s observation that the relative contribution of newly arrived migrants from the Mainland to net migration into Hong

37 Census and Statistics Department, *Hong Kong Population Projections 2004-2033* (2004), paragraph 4.2.

38 Census and Statistics Department, *Hong Kong Population Projections 2004-2033* (2004) paragraph 4.9.

39 The median age of female at first marriage has been up-dated to 28.1 in 2004; see Census and Statistics Department, *Press Release: Statistics Advisory Board Reviews Government Statistical Work* (24 November 2005).

40 Census and Statistics Department, *A Graphic Guide on Hong Kong’s Development (1967-2002)* (2003) Table 1.8.

41 The Statistics Advisory Board appears to hold a different view, having found an apparent pattern of gender imbalance in terms of a shortfall of never married males, in particular for those in the age bracket of 40-49, when compared with never married females 3 years younger (taking account of the usual age difference between brides and grooms). The decrease in the proportion of now married females, it is observed, has been a major cause of the drop in fertility rates, apart from the decline in marital fertility rates; see Census and Statistics Department, *Press Release: Statistics Advisory Board Reviews Government Statistical Work* (24 November 2005). Yip, Siu Fai Paul was more direct in stating that there was a marriage squeeze in Hong Kong, with many women never finding a husband, and in estimating that if the pattern continued, more than 20% of Hong Kong women “will have no choice but to remain single for life”: Yip, Siu Fai Paul, *Squeezed out of the marriage game*, *South China Morning Post* (22 October 2005) A15.

42 Census and Statistics Department, *Hong Kong Population Projections 2004-2033* (2004) paragraph 4.3.

Kong is in fact decreasing.⁴³ Nevertheless, the socio-economic characteristics of most newly arrived immigrants from the Mainland are such that they will at least in the short term, if not in the medium term as well, be recipients of publicly funded social services before they can become economically active and generate revenue into Government coffers. Siu also analyzed statistical data, collected in the 1990s, on family characteristics of newly arrived migrants from the Mainland. He found that about 40% of Hong Kong residents married in the Mainland with spouse still there were aged 50 or above. Such Hong Kong residents were predominantly men, though the proportion of women was on the increase. He further found that that “Hong Kong residents who are family members of the new arrivals tend to be employed in low-status jobs and to receive lower income than the general population. They are not affluent”.⁴⁴

Population growth is the result of the interaction of factors, the chief of which are net migration and natural increase. To fall below 1,000 live births per 1,000 women over the lifetime, as the recent figures show, may be a signal of terminal contraction in population, unless there is replenishment by way of immigration. As the significance of migration from China Mainland gradually declines and natural increase is unlikely to reverse dramatically into a rising trend, the long term population projection is merely of a slowly rising population, with less than 1% growth every year.⁴⁵

In economic terms, it is the structural development of the population that deserves greater attention, since the working population provides the base for economic growth and the sustainable source of government revenue. While the working population is growing year by year, this is attributed to the steady increase in the labour force of persons in the 30-39 and the 40-49 age groups, i.e. those born in the 1950s and 1960s. Thus the outgoing Commissioner for Census and Statistics, Mr. Frederick Ho, indicated his concern upon his retirement from Government service that “in 8 to 10 years’ time, the ageing problem will enter a spiraling trend, with an increase of 4% every 4 to 5 years. By 2033, people aged 65 or above will comprise 27% of the population”.⁴⁶ The decline in the fertility rate means also that as the present population of fertility age gets older it is more likely that an increasing portion of them will have to be self-supporting as opposed to being supported by working children. Those who cannot do so will become dependent on publicly funded benefits.

Given that the working population in the 20-29 age group remains relatively steady, it can be postulated that, unless there is an expansion in the working population in the 50-59 and the 60-69 age groups in the coming two decades, to be achieved perhaps by pushing up the retirement age, there will be a narrowing of the economic base of Hong Kong, while at the same time, with an ageing population indicated by a projected rise of median age from 38 to 46 in 20 years, the demand on public expenditure especially in the

43 Census and Statistics Department, *A Graphic Guide on Hong Kong's Development (1967-2002)* (2003) Table 1.11; Siu, Yat-ming, *New Arrivals: A New Problem and An Old Problem* in Chow, Chuen Ho Larry and Fan, Yiu Kwan (eds), *The Other Hong Kong Report 1998* (Hong Kong: The Chinese University Press, 1999) pp 202-204; *Number of One Way Permits a New Low in Five Years* in *Ming Pao Daily News* (17 August 2005) A22.

44 Siu, Yat-ming, *New Arrivals: A New Problem and An Old Problem* in (eds), *The Other Hong Kong Report 1998* (Hong Kong: The Chinese University Press, 1999) pp 225-226.

45 See Census and Statistics Department, *Hong Kong Population Projections 2004-2033* (2004) paragraph 2.2.

46 *South China Morning Post* (10 August 2005) A3.

areas of health services, elderly care and welfare is expected to increase.⁴⁷ Future pressures on public resources that cannot, on demographic grounds, be expected to be on an accelerating trend of growth might create fiscal competition having significant effects on the continuing commitments of the Government in providing all categories of publicly funded services, including legal aid services.

c) Impact on legal aid

Public funding of litigation by way of legal aid is subject to a means test of financial resources at the disposal of the applicant to fund his own litigation in private. The divergent economic development in Hong Kong's different social sectors as a result of economic restructuring tends to mean that there will be more qualifying litigants if the financial eligibility limits are kept at the present levels and reviewed in accordance with shifts in both consumer prices and actual litigation costs.

In mapping its direction and strategy, the Legal Aid Services Council in early 2003 identified as a relevant factor the public's perception of legal aid, whether positive (as induced, for example, by publicity programmes and press reporting) or negative (as induced, for example, by cases of alleged misuse which might give rise to the perception that legal aid was not meeting the real needs of the community or was provided over-generously).⁴⁸ Legal aid, being a social phenomenon, is, as discussed above, prone to human decisions based upon perception. However, it can safely be said that whatever one's perception or consciousness about legal aid (be it, a "welfare" service, a "fairness-ensuring mechanism" or a "human right"),⁴⁹ the socio-economic factors discussed above are expected to lead to a greater pool of potential qualifying applicants and thus, all other things being equal, stronger demand for legal aid in the future. Escalating perception of legal aid as a must for a working legal system will in addition fuel demand for expansion of the scope and ready availability of publicly funded legal aid.

On the other hand, the same set of socio-economic factors point to a narrower base of working or income generating population and a more mobile, flexible and dispersed manner of doing business, making public finance returns in the future more precarious. When seen together in the broader picture of the popular demand for all forms of public services, it is not alarmist to raise the prospect of a "fiscal crisis" in the provision of legal aid, forcing the public to rethink fundamental tenets of legal aid that are highlighted in this Document. This is the topic for discussion in the next section.

d) Budget constraint

Legal aid expenditure is constantly rising. A review of the Government's Estimates of its General Revenue Account of the last 20 years shows that overall departmental expenditure of the Legal Aid Department has risen from HK\$56 million in 1983/84 to HK\$669 million in 2003/04, a 12-fold increase. The budget of the Duty Lawyer Service

47 See Census and Statistics Department, *A Graphic Guide on Hong Kong's Development (1967-2002)* (2003) Table 2.1; and Census and Statistics Department, *Hong Kong Population Projections 2004-2033* (2004) Table 1.

48 See Legal Aid Services Council, *Annual Report 2002-2003*, pp 29-32.

49 See Chapter 8 below.

has also expanded 7 times from HK\$13.9 million in 1983/84 to HK\$96.6 million in 2004/05.

Given that the legal aid services provided by the Legal Aid Department are provided both in-house and by assigned lawyers in private practice, any analysis of the department's expenditure requires separating the "legal aid costs" relating to assigned lawyers and the remainder. Having conducted this exercise, it can be seen that "legal aid costs" has risen from HK\$33 million in 1983/84 to HK\$429 million in 2003/04, a 13-fold increase. On the other hand, personal emoluments of the Department have increased 10 times, from HK\$22 million in 1983/84 for an establishment of 317 posts to HK\$222 million in 2003/04 for an establishment of 560 posts.

Various factors have contributed to the rise of "legal aid costs", including changes in legislation, expansion of the scope of legal aid, increase in legal aid cases as a result of upward adjustment of the financial eligibility limits, higher legal costs allowed on taxation of costs by the courts, increase in the number of complex cases, and the increase in the average number of aided persons per case. In the case of England and Wales, Goriely and Paterson stated that it was "very far from proven that supplier-induced demand accounts for the recorded increases" in legal aid spending there, which doubled in real costs every 7 years. Major changes in social attitudes and legislation are at least likely contributory factors.⁵⁰

A sense of proportion may be achieved if one expresses the combined expenditure for publicly funded legal aid services as a percentage of the total recurrent expenditure in the Government's General Revenue Account and to the capacity of the Hong Kong economy. Although the combined publicly funded legal aid expenditure rose from 0.438% to 0.521% of the Government's total recurrent expenditure between 1995/1996 and 1999/2000, there has been a gradual decline since 1999/2000 and the figure for 2004/2005 stands at 0.378%. On the other hand, the combined publicly funded legal aid expenditure hovered between 0.04% and 0.07% of the gross domestic product of Hong Kong within the same period, with the figure for 2004/2005 staying at 0.05%. By comparison, the Department of Justice has consistently spent more than the Legal Aid Department, the Duty Lawyer Service and the Legal Aid Services Council combined. Government spending on security related programmes, including the disciplined forces and the Security Bureau, has remained constant at around 10% of its total expenditure.

A comparison may be made with the legal aid spending of other countries, though in doing so, one has to bear in mind country differences such as population, income and general economic conditions, and coverage of legal aid schemes. By comparing with data quoted in the Law Society of England and Wales' Consultation Paper on the Future of Publicly Funded Legal Services in 2003,⁵¹ one can see that Hong Kong's annual spending on publicly funded legal aid is HK\$669 million (or 171 million) in comparison to 12.6 billion (or HK\$24,440 million) spent in England and Wales. Hong Kong's annual publicly funded legal aid expenditure is less than that in Germany, France and Scotland and stands in favourable terms with the level of expenditure of Norway (157 million) and Finland (142 million), well developed countries of comparatively smaller population. In

50 Goriely, Tamara and Paterson, Alan, *Introduction: Resourcing Civil Justice*, in Paterson, Alan and Goriely, Tamara (eds), *Resourcing Civil Justice* (Oxford: Oxford University Press, 1996) p 19.

51 Law Society of England and Wales, *The Future of Publicly Funded Legal Services: A Consultation Paper by the Law Society*, (February 2003) Annex F.

terms of amounts spent per capita, Hong Kong is in the same league as Norway, Ireland and Finland at a range between 116.8 and 18.

When focusing on legal aid services expenditure, it is easy to forget the other side of the balance sheet. The Legal Aid Department's services do receive income, which is accounted as revenue in the Government's General Revenue Account. An examination of the Department's annual reports shows that the Department has received an annual income in the order of HK\$200 million for the past 7 years. A substantial portion of the said income is returned from assigned out cases under the Ordinary Legal Aid Scheme presumably as taxed legal costs on a party and party basis, and much of it from personal injuries or related litigation. The majority of the said income presumably is placed into general revenue, relieving up to one-third the burden of the taxpayer over the provision of publicly funded legal aid services.⁵²

On the other hand, unlike many countries, the Government does not impose an arbitrary cap on total legal aid costs or on the legal costs of a particular legally aided case. Similarly in some jurisdictions, legal aid for civil cases is severely limited. Finally, Hong Kong is probably the only place where legal aid for the "sandwich class" has been successfully operated on a self-financing basis.

The Hon Moses Cheng foreshadowed in 1992 that a comprehensive review of legal aid should cover a "value for money study" on the efficiency in the deployment of resources and comparison of services provided in-house and those provided by private practitioners; an examination on the assignment system to ensure fairness among legal practitioners; a review of the proportion between professional and non-professional staff.⁵³ The Director of Audit apparently did a similar study when he conducted in 2001 a value for money audit on legal aid services.⁵⁴ The Legal Aid Services Council, having examined the report, expressed the view that it had unduly focused on expenditure.⁵⁵ The Council in particular took issue with the Director's treatment of the negative total entry under the Ordinary Legal Aid Scheme as a deficit, pointing out that the Ordinary Legal Aid Scheme was never meant to be a self-financing scheme and suggested that "net costs" would be more appropriate. This comment also invalidated the Director's consideration that "there is a need to limit the deficit by containing the size of legal aid expenditure" (on the basis of which the Director recommended the mandatory use of mediation in matrimonial disputes, more comprehensive professional development of in-house lawyers to enable them to handle more general litigation in-house, and consideration of introducing franchising and contracting, and conditional fees arrangement to help keep legal aid costs down). In response to the report, the Council agreed only to consider the more particular topics of cost control and monitoring of case progress.

52 A small portion of the said income, in the region of several million dollars, represent legal costs and administration fee for the Supplementary Legal Aid Scheme and the said sum is placed into the Supplementary Legal Aid Fund.

53 *Reports of the Sittings of the Legislative Council of Hong Kong (Session 1991/92)*, pp 3940-3941.

54 I.e. Director of Audit's Report No 37 (which was tabled before the Legislative Council in November 2001). The Public Accounts Committee of the Legislative Council held a public hearing on this report and then in February 2002, published a report on the Director of Audit's report (Public Accounts Committee Report No 37).

55 See Legal Aid Services Council, *Annual Report 2001-2002*, pp 29-57.

The present circumstances do not mean a *carte blanche* for unrestricted expansion of legal aid. The foregoing discussion in this Chapter on the socio-economic forces shaping the economic trends of Hong Kong in the future does not present a fairy tale-like prospect of “living happily ever after”. Rather, the very sluggish natural increase and the slacking migration from China Mainland might be signs for a future “fiscal crisis” as a result of the crumbling capacity of the shrinking working population to support all the public services that a greying population originally expect to be maintained at the current and ever better levels. The Government, when faced with a structural fiscal deficit in the last 5 years, has resorted to a 5% expenditure cut across the whole range of public services provided by government departments and subvented organizations.⁵⁶ Priorities may have to be made by the Government on the graver occasion of the “fiscal crisis”, contributed by factors that are demographic and economic-structural in nature. The classes of the working poor and the unemployed or unemployable underclass may have more immediate needs for social services to be satisfied than those for legal aid. In such circumstances and given the perception of litigation expense as a usually uncommon need, the bargaining power of those responsible for providing legal aid services to ask for increased provision or even the same level of provision at resource bidding within the Government may be overshadowed by articulate demands for other publicly funded services such as education, health care and social welfare.

The Government represented that financial prudence was one of the reasons for rejecting the proposal of the Legal Aid Services Council for the establishment of an independent legal aid authority. Under the heading *Funding Accountability*, the Chief Secretary for Administration stated in 1999:

“To meet policy objective, funding for legal aid is at present non-cash limited, i.e. supplementary provision may be sought if the approved provision in the Estimates is inadequate to cover the legal aid costs arising from eligible legal aid applicants. In line with well established practice of prudent management of public money, the Administration cannot undertake to provide unlimited funding support for an entity fully separate from and independent of government. Research also revealed that in common law jurisdictions where legal aid services are operated by independent bodies, such as Canada, Australia and New Zealand, the budgets of the bodies are invariably capped. The Administration does not believe that such an approach would be in the best interest of those who need legal aid.”⁵⁷

On the other hand, the extent to which the Chief Secretary for Administration has considered the revenue generating capacity of the Legal Aid Department in litigation and the effect of such revenue has in reducing the burden of public resources in the provision of legal aid, is unknown.

56 The Legal Aid Department was affected by the Enhanced Productivity Programme of the Government and had to adopt measures to achieve a target cumulative savings of 5% on the baseline expenditure of the department from 2000 to 2003, while ensuring that the quality of legal aid services would not be affected. It was also affected by the Financial Secretary's initiative in his 2000 Budget to reduce the total civil service establishment. Existing vacancies and new posts for which funds were provided in the 2000/2001 Draft Estimates were deleted as a result: Legal Aid Services Council, *Annual Report 2000-2001*, pp 53-55.

57 Letter of the Chief Secretary for Administration to the Chairman of the Legal Aid Services Council dated 6 October 1999, reproduced in Legal Aid Services Council, *Annual Report 1999-2000* p 41. Other reasons indicated in the letter include matters of accountability, the need for an independent legal aid authority not clearly established, staff morale, and service delivery.

The alarm bells were sounded in the early 1990s in England and Wales by the Lord Chancellor, Lord Mackay of Clashfern, of the unwillingness on the part of the British Government to continue unlimited funding of legal aid services. Delivering the Shimizu Lecture at the London School of Economics in December 1990, Lord Mackay indicated that whilst he considered it part of his role to “be alive to and to seek to eliminate such barriers as exist to access to justice for all”, that should not be confused:

‘with the idea that to ensure access to justice, all you need to do is make available additional public funding. [No] Government can make unlimited funds available for any of its programmes, however fundamental they are to the health and well being of society. As I said to the Bar Conference in September, “Justice is priceless, but it must not be too pricey if it is to be accessible. To be accessible it must be affordable to the individual both as taxpayer and litigant”.’⁵⁸

In 1994, Lord Mackay’s management statement to the Legal Aid Board confirmed that “the overall cost of legal aid must be made affordable and controllable; and legal aid should be targeted towards those whose need is greatest”.⁵⁹ Resources were to be and had been limited.⁶⁰ In September 1997, Sir Peter Middleton GCB presented a report to the Lord Chancellor, which contained an outline of 4 principles on which the role of legal aid was set against the background of limited resources:

- Firstly, legal aid should be the servant of civil justice, not its master. In particular, legal aid should work with the grain of the justice system and be organized in a way that reinforces its objectives. It should contribute to ensuring that disputes are settled in the best forum, and to the efficiency with which they are handed;
- Secondly, legal aid should not support a level of access that goes beyond what a private paying party would consider appropriate and proportionate to the expected redress in a case;⁶¹
- Thirdly, legal aid should be efficient in its own right: spending should be carefully targeted and costs minimized in relation to the benefits; and
- Fourthly, it is reasonable and legitimate for the Government to reach a decision on how much legal aid the country can afford, and to put a legal aid system in place which enables it to adhere to that decision. The issue is not whether to limit expenditure, but how to devise a legal aid scheme under which decisions about resources, priorities and targeting are taken in a transparent and accountable way.⁶²

Based on these 4 principles, Sir Peter sought to identify 3 main problems of the then English legal aid scheme: (a) the rapidly growing cost of the scheme and the lack of

58 Lord Mackay of Clashfern, *Litigation in the 1990s* (1991) 54 *Modern Law Review* 171, 176.

59 See Legal Aid Board, *Legal Aid Board Corporate Plan April 1994-March 1997* (1994) p 1.

60 See Lord Chancellor’s Department, *Legal Aid – Targeting Need*, Cmnd 2854 (1995); and Lord Chancellor’s Department, *Striking the Balance: The Future of Legal Aid in England and Wales*, Cmnd 3305 (1996).

61 Sir Peter considered that arguably the current scheme over-provides in this respect. First it allows those who qualify financially to spend almost unlimited amounts, while those just above the limits get nothing. Second, the merits test of civil legal aid generally requires cases to have at least a 50% chance of success – whereas most people paying privately would want much better prospects before they risked litigation.

62 Middleton, Sir Peter GCB, *Report to the Lord Chancellor* (September 1997) paragraph 3.1.

satisfactory mechanisms for controlling that growth; (b) the inability to target resources on priority areas and thus address areas of unmet need within existing resources; and (c) poor value for money.⁶³ He expressed the view that “the perversity of the then English legal aid scheme was that legal aid was most readily available to those who resort to the courts – the most expensive part of the system” and suggested that legal aid should instead be extended to fund advice agencies, law centres, alternative forms of dispute resolution, direct financial help to litigants-in-person, and representation in appropriate cases before tribunals or at coroners’ inquests.⁶⁴ On the other hand, Sir Peter expressed support to the proposal that the availability of legal aid resources should be taken into account in applying the merits test in view of the fact that most people, businesses and public authorities had to cope with limited resources. It was thought that, by adjusting the merits test in this way, the most effective options would be selected from the available resources.⁶⁵ Changes should, in his opinion, aim to ensure that people with legal aid pay as much as they can afford towards the costs of their case (so that the taxpayer should not be asked to subsidize people who can afford to contribute but who do not consider their cases important enough to do so); to encourage them to think carefully and responsibly about starting and pursuing the case; to let people know from the start how much they might have to pay; to minimize the extent to which legal aid puts other litigants in a less favourable position; and to ensure that the administrative processes involved are economic and efficient.⁶⁶

Sir Peter’s expression of support for the modification of the merits test so as to take account of the availability of legal aid resources signals a compromise of the principle against rationing of justice that Chief Judge Learned Hand cautioned New York lawyers in 1951. It represents the jettisoning of the principle for legal aid to be available to all who have a reasonable cause to litigate but cannot do so due to a lack of means. By reference to the case of England and Wales, it can be suggested that if Hong Kong were to avoid facing such a dilemma, the expansion of legal aid would have to be prudently contemplated.

The spiralling of legal aid costs in other common law jurisdictions over the last few decades has induced those jurisdictions to adopt cost-control measures through capping and cutting budgetary provisions. Such measures, some of which have had drastic effects, include: (a) service cut; (b) control on expenditure of individual cases; (c) standard fees/ fixed rates; (d) contracting; (e) conditional fee arrangement; (f) alternative forms of dispute resolution; (g) expansion of small claims resolution; (h) more use of staff lawyers; and (i) strengthening of means testing requirement.

Legal aid, being a social phenomenon as opposed to physical phenomenon, cannot, like health services, be capable of predictability with precision, using for example, demographic projections. The above discussion however suggests that the costs of the provision of legal aid will remain rising. It has been said that policy making involves the management of expectations within the social context. The next Chapter proposes to picture the operation of publicly funded legal aid services in Hong Kong in the relevant social environment, and to consider how and to what extent the present legal aid framework is capable of meeting needs in that environment.

63 Ibid, paragraph 3.2.

64 Ibid, paragraphs 3.6, 3.7.

65 Ibid, paragraph 3.30.

66 Ibid, paragraph 3.37.