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**Educational Disadvantage and Discrimination for
Pakistani and Nepalese School Students in Hong Kong:
The Possibilities of Judicial Review and Legal Redress**

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Shahmim Khan Khattak
4152247

Supervisors: Prof. Volker Wedekind and Dr. Thamir Venthana
Ananthavinayagan

School of Education
University of Nottingham

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Education is not an end but a means to an end. From my life experience, education changes the life of a person, and it helps EMS to break away from the destiny of being deployed to low-skilled jobs done by their parents or grandparents. Furthermore, it allows them to enter the circle of elite, professionals and meritocrats one day, and it helps them to earn more respect in the society of Hong Kong, where the South Asians are particularly being discriminated against.

Abstract

This thesis focuses on how Pakistani and Nepalese school students in Hong Kong are educationally disadvantaged or discriminated against under the education policy and examination system of Hong Kong. The research was undertaken from a legal perspective to explore the possibilities of judicial review and legal redress, which is an important way of addressing these inequalities. The thesis research includes doctrinal and non-doctrinal legal research covering interviews with different stakeholders from schools and in-depth analyses and interpretations of international treaties and domestic laws, local and other common law jurisdictions' court judgements.

Ethnic minority groups in Hong Kong account for about 8% of the total population. The Hong Kong Special Administrative Region government (HKSAR government) is under an obligation to guarantee the constitutional right of equal access to education to all students without discrimination. However, there is evidence from policy documents and literature that ethnic minority students (EMS) are not sufficiently supported to learn Chinese at all levels, from kindergartens to secondary schools.

The EMS suffer prejudice when they have to compete with the Chinese students on the same Chinese examination paper in primary schools and the prejudice continues when the EMS are unable to catch up with the Chinese language standard in the secondary schools. As a result, when the EMS reach secondary school, they are arranged to study a General Certificate of Secondary Education (GCSE) Chinese subject, which is significantly lower in standard having its equivalent to a Primary 2-3 level. Lastly, unlike the Hong Kong Diploma in Secondary Education Chinese subject (primarily intended for Chinese students), which is awarded clear and higher conversion points for admission, public universities discriminate against the GCSE Chinese subject by awarding it either unclear or no conversion points.

This thesis finds out whether these discriminations are legally actionable in a Hong Kong Court by way of judicial review.

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Glossary of Acronyms

AAT	Academic Aptitude Test
ApL(C)	Applied Learning (Chinese)
BORO	Hong Kong Bill of Rights Ordinance
CA	Central Allocation
CESCR	The United Nations Committee on Economic, Social and Cultural Rights
CF	Consent Form
CityU	City University of Hong Kong
CRC	Convention on the Rights of the Child
CUHK	The Chinese University of Hong Kong
DDO	Disability Discrimination Ordinance
DE	Director of Education
DP	Discretionary Place
DSS	Direct Subsidy Scheme
ECHR	The European Convention on Human Rights
ECtHR	The European Court of Human Rights
EDB	The Education Bureau
EdU	The Education University of Hong Kong
EMI	English Medium of Instruction
EMP	Ethnic Minority Parent(s)
EMS	Ethnic Minority Student(s)
EOC	Equal Opportunities Commission
GCE	General Certificate of Education
GCSE	General Certificate of Secondary Education

HKBU	Hong Kong Baptist University
HKDSE	Hong Kong Diploma of Secondary Education
HKSAR	Hong Kong Special Administrative Region
HKU	The University of Hong Kong
HKUST	Hong Kong University of Science and Technology
IB	International Baccalaureate
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
IGCSE	International General Certificate of Secondary Education
IA	Internal Assessment
IS	Information Sheet
JR	Judicial Review
JUPAS	Joint University Programmes Admissions System
LAD	Legal Aid Department
LingU	Lingnan University
MOI	Medium of Instruction
NCS	Non-Chinese Speaking
OECD	Organisation for Economic Co-operation and Development
PolyU	The Hong Kong Polytechnic University
RDO	Race Discrimination Ordinance
SDO	Sex Discrimination Ordinance
SSPA	Secondary Schools Places Allocation

TSA	Territory-wide System Assessment
UGC	University Grants Committee
UNHRC	The United Nations Human Rights Council

Chapter 1: Introduction

Introduction

Each country or city in the world has its own ethnic minority groups, and Hong Kong is no exception. As an international city and a former British colony for one and a half centuries, Hong Kong has positioned itself as a city with cultural and linguistic diversity. Such diversity is embodied by official recognition and emphasis on biliteracy and trilingualism. However, the city is accused of being far from inclusive despite the diversity (Resolve, 2018). The detrimental effects of a lack of inclusivity are epitomised by the institutionalised education disadvantage suffered by ethnic minority students (EMS). Whilst inclusion is realised and practised by society, the authority has the obligation and power to ensure progress.

The Hong Kong Special Administrative Region government (HKSAR government) was formed on the 1st of July, 1997 following the end of the British colonial rule over Hong Kong since 1842. Being a party to international treaties such as the International Covenant on Civil and Political Rights 1966 (ICCPR), International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR), International Convention on the Elimination of All Forms of Racial Discrimination 1966 (ICERD), and Convention on the Rights of the Child 1989, the HKSAR government bears the responsibility for ensuring equal access to education for all students. The HKSAR government is obliged to guarantee these educational rights under domestic laws such as the Basic Law and the Hong Kong Bill of Rights Ordinance (BORO) (Cheng and Cheung, 1995).

A number of anti-discrimination laws were passed and enacted before 1997. To facilitate the implementation of the anti-discrimination laws, the Equal Opportunities Commission (EOC), a statutory body, was set up in 1996 to eliminate various kinds of discrimination in Hong Kong (Hong Kong Information Service Department, 2015).

Despite that, the following quote came from Ricky Chu, the Chairperson of the EOC in 2019, more than two decades since the establishment of the EOC is worthy of our attention:

“It is not about how much hard work ethnic minority students put in; it is about how the system places them at a disadvantage by default. The government can always avoid fundamental reform, but when it comes to inequality in education, there is no time for a

piecemeal change. Ethnic minority youth is hurting, and so is society at large” (Chu, 2019).

Words of Ricky Chu, which clearly exhibited clear characteristics of ‘discrimination’, should have sounded alarm bells in the society as he was the then head of the EOC, a department set up to make every effort to monitor all legally actionable discriminations under the four anti-discrimination laws in Hong Kong, which are sex, race, family status and disability discriminations.

This thesis research shows that EMS continue to be disadvantaged in Hong Kong society. Since 1997, a drastic and dramatic change to the language policy, shifting the supremacy of the English language to the Chinese language, has disadvantaged EMS in their academic studies and in competition with the local Chinese students.

So far, there has not been a single court case or litigation brought against the HKSAR government to rectify or eliminate such disadvantage or inequality under the Race Discrimination Ordinance (Cap. 602) (RDO), the Basic Law, the Hong Kong Bill of Rights Ordinance (Cap. 383) (BORO), international treaties, or domestic laws.

This thesis examines the “educational disadvantage and discrimination” that EMS may have been facing. With my legal background as a barrister in Hong Kong, I take a lawyer’s perspective to study the feasibility of bringing a test case in a Hong Kong Court on the basis of any educational disadvantage or discrimination suffered by the EMS, a case which would be the first of its kind in the Hong Kong Judiciary. I shall use the words or phrase “disadvantage” or “discrimination” interchangeably in this thesis.

Ethnic Minority Students

The HKSAR government described the ethnic minorities as the “persons of non-Chinese ethnicity” under the Thematic Report: Ethnic Minorities 2011 Population Census prepared by the Census and Statistics Department. Under this Report, ethnic minorities comprise Indonesians Filipinos, Whites, Mixed, Indians, Pakistanis, Nepalese, Japanese, Thais, other Asians, Koreans and others. Table 2.1 in Chapter 2 indicates the proportion and percentage of these ethnic minorities in Hong Kong.

While Hong Kong has many ethnic minorities, this thesis focuses on EMS who are Pakistanis and Nepalese only, as Chapter 2 reveals through research and findings that they are at the lower end of the socio-economic stratum with weak family support in Chinese language learning.

In any event, without reference to ethnicity, the Education Bureau (EDB) uses the term Non-Chinese Speaking (NCS) students under government policy documents with the following definition:

- (a) Students who have learned the Chinese language for less than 6 years while receiving primary and secondary education; or
- (b) Students who have learned the Chinese language for 6 years or more in schools, but have been taught an adapted and simpler Chinese Language curriculum not normally applicable to the majority of students in our local schools. (The Joint University Programmes Admissions System, no date a).

Nevertheless, throughout this thesis, I will refer to the Pakistani and Nepalese students as EMS (including students who arrived in Hong Kong or who are born in Hong Kong) to emphasise that most of these students are from ethnic minority groups, and they suffer a range of educational disadvantages or discrimination compared with the majority of the Chinese students when Chinese learning is involved in their curriculum. In this thesis, references to the term “EMS” in the singular shall include the plural, and vice versa, where the context requires.

Based on the above definition of an NCS student, a Chinese student who returns to Hong Kong from overseas countries or who studies in private schools or international schools in Hong Kong may be qualified as an NCS student. Under these circumstances, these Chinese students are entitled to take an alternative Chinese language examination such as the General Certificate of Secondary Education Chinese subject (GCSE Chinese subject) which is between primary 2 to 3 standard in order to fulfill the minimum admission requirement to the public universities whereas the typical Chinese students in Hong Kong who do not fall under either of the above definitions are obliged to take a Hong Kong Diploma in Secondary Examination Chinese subject (HKDSE Chinese subject) which is secondary form 6 by standard to meet this admission requirement. On the other hand, NCS do not include students from mainland China, who are treated as native speakers of Chinese including Putonghua and Cantonese.

Comparatively, the GCSE Chinese subject is a much easier examination by standard, which caters for the needs of the EMS, and the HKDSE Chinese subject is a much more difficult examination for the Chinese students.

Therefore, students of any ethnicity who are studying in international schools with family resources in Hong Kong are not the subject of my main focus. It is because their studies are not subject to the local curriculum and they need not be concerned or worried about the difficulties of the Chinese language. Besides, further university studies in overseas countries are a feasible option for them after their graduation from the private schools or international schools.

I will now analyse why Chinese language became a particular problem for the EMS after 1997 when the sovereignty of Hong Kong was returned to China. After this historic handover, the emphasis of language shifted from English to mother-tongue Chinese language education, as a result, the education curriculum has been designed for local students with the assumption that their mother tongue is Chinese or they have high Chinese standard and ability.

Based on the experience of supporting the EMS in Chinese language learning over the past years, apart from the daily traditional classroom teaching, various measures or support have been introduced to help them improve their Chinese language proficiency by the HKSAR government or non-government Organisations (NGOs) with the subsidy of EDB.

For example, a Supplementary Guide to the Chinese Language Curriculum for NCS Students (Supplementary Guide) was developed in 2008 (Education Bureau, 2008) to support the Chinese language curriculum framework, consisting of different curriculum modes such as:

- a) 4-week Summer Bridging Programme provided to EMS in primary schools during the summer holidays which lasts no less than 60 hours. Through the programme, it aims to facilitate the EMS's adaptation to the use of Chinese in classroom learning. Cultural activities, field trips, dramas and language games may be arranged as part of the learning process;
- b) Induction Programme which is run by NGOs with the subsidy of EDB. This programme offers 60 hours of induction to newly-arrived EMS to assist them in social-adaptation, basic learning skills and Chinese counselling;

- c) Initiation Programme, a full-time programme that lasts for 6 months for newly arrived EMS to improve their basic subject learning ability and to foster their personal development and social adaptation.

(Education Bureau, 2024)

While these support measures are commendable, the Supplementary Guide was criticised as laying down mainly guidelines and principles in Chinese teaching and there was no concrete teaching methodology or textbooks that could be referenced until 2013 (Oxfam Hong Kong, 2014).

Teachers reportedly find the Supplementary Guide to be basic and insufficient and feel that the EDB should play a leading role in developing a core curriculum (Carmichael, 2009, pp.22-23).

Similarly, the Hong Kong Unison considered that the Supplementary Guide mainly provides guideline, what the teachers and students need is a systematic Chinese curriculum that runs through the whole study period from kindergarten to secondary six level (Hong Kong Unison, 2020a).

It was not until September 2014 that the HKSAR government introduced the “Chinese Language Curriculum Second Language Learning Framework” (the Learning Framework) and the “Applied Learning Chinese subject” (ApL(C)) to help EMS overcome difficulties in learning Chinese (Education Bureau, no date b).

According to the EDB, the Learning Framework serves as a tool to assist teachers in curriculum planning, learning, teaching, and assessment. Teaching materials are provided to schools for teachers’ reference, allowing them to tailor the content to students’ needs. Additionally, the ApL(C) has become an alternative subject to the GCSE Chinese subject for NCS students and it is also recognised by public universities as an alternative Chinese qualification which fulfills the admission requirement.

However, as will be discussed in Chapter 2, the Learning Framework does not seem to be specifically designed to meet the needs and learning characteristics of EMS. In any case, the

effectiveness or ineffectiveness of the Learning Framework will be discussed in great length in the next Chapter.

In a similar vein, as will be discussed in Chapters 2 and 4, the ApL(C) closely aligns with vocational training, which primarily prepares the EMS to engage in the service industry, such as hospitality, catering, and tourism.

The history and status of the Chinese languages in Hong Kong before and after 1997 will be further explained in Chapter 2. For the purpose of clarity, the term “Chinese language” used throughout this thesis refers to the traditional Chinese writing and oral Cantonese language practised and used in Hong Kong. The traditional Chinese writing adopted in the Hong Kong curriculum requires more horizontal and vertical strokes to be drawn when writing a Chinese character, whereas simplified Chinese writing is written with fewer strokes. In other words, the former is more complicated and difficult to learn. On the other hand, Cantonese is a dialect spoken by people in Guangdong province, China, a place which is in the neighbourhood of Hong Kong. Cantonese continues to be the predominant dialect spoken by local Chinese individuals in Hong Kong.

In this Chapter, I first briefly explain the background of my research and point out particularly some of the difficulties or hurdles which the EMS have been facing in their academic studies in Hong Kong and how the Chinese language plays a significant role in creating or causing these problems. Secondly, I discuss my intent, motivation and reasons for conducting this thesis research. Thirdly, I introduce the research questions, explaining the reason how and why their contents are framed as such and what information or data is required to respond to them; I describe the different methodological approaches I adopted in the research. Finally, I briefly set out the structure and content of the thesis chapter by chapter.

The Background of My Research

As far as education is concerned, no matter how few in number the ethnic minority groups are, a responsible government has to make every effort to ensure equal access to education is provided not only to her own people, but also to all EMS who live under the same roof with the Chinese students. As will be shown, the HKSAR government is legally obligated to do so, yet the effectiveness of such remains questionable. On the other hand, the EDB estimated that there were about 26,200 NCS students in 2022/23 attending publicly-funded primary and

secondary schools and kindergartens, accounting for around 3% and 5% of the overall student population in these schools respectively (Education Bureau, 2024).

Based on the 2016 Population by-census, there were about 55,000 EMS over the age of 3 in 2016 among a population of 584,383 ethnic minority people (Census and Statistics Department, 2017, p. 57). Excluding foreign domestic helpers, there were 263,593 members of ethnic minorities in Hong Kong, making up 3.6% of the whole population. Their children aged 3 or above account for about 20.9% of this group (Census and Statistics Department, 2017, p. 52).

Difficulties and hurdles for the EMS in relation to the Chinese language

These children became students in an education system which saw a dramatic change in language policy, shifting from English to Chinese when the sovereignty of Hong Kong was returned to China in 1997. Without taking the interests of the EMS into consideration and without consultation with the ethnic minority groups, which are the stakeholders in this issue, the HKSAR government introduced the mother-tongue Chinese language policy in Hong Kong after the handover. As a result, most secondary schools which in the past used English as Medium of Instruction (EMI) shifted to using Chinese as Medium of Instruction (CMI).

Before 1997, there was no need for EMS to learn Chinese and the Chinese language was not a requirement for admission to civil service. Nowadays, the Chinese language is a compulsory subject for the EMS in the internal assessment of the primary school, which affects and determines the promotion of primary school students to secondary schools (Education Bureau, 2021a). It has also become a compulsory subject under the admission requirement of public universities and the recruitment requirement of the civil service of the HKSAR government after 1997.

The difficulty of the Chinese language for non-native speakers will be analysed in Chapter 2. On the premise that the Chinese language is a difficult language to learn for foreigners, the increasing dominance of the Chinese language after the handover puts EMS at a more significant disadvantage when they are required to take the same Chinese language exam papers with Chinese students in primary school. So begins the first obvious and early discrimination against EMS. EMS have more difficulty in entering the secondary schools where most or more of the high achievers are studying; they have fewer choices to study in an EMI school rather than CMI school where they may benefit more from EMI. In other words,

the equality gap between EMS and the Chinese students in Hong Kong significantly widened after the 1997 handover.

This apparent disadvantage deepens when EMS comes near the door of public universities after they graduate from secondary schools, as the Chinese language is a compulsory subject for entry into these universities. Since the HKDSE Chinese subject required from Chinese students is “too difficult” for the EMS, the public universities, in agreement with the EDB in 2009, started to accept an alternative Chinese language qualification such as the GCSE Chinese subject from the EMS as the minimum requirement for the Chinese subject (Curriculum Development Council and Hong Kong Examinations and Assessment Authority, 2017). Nevertheless, the grading of this alternative Chinese language qualification is subject to a lower or ambiguous points conversion by the public universities, as compared with the HKDSE Chinese subject to assess student applicants. If students’ access to universities is restricted in this way, it affects their education and, in the long run, hinders their social and economic mobility.

My intent, motivation and reason for conducting this thesis research

I have been working as a barrister as my legal profession for nearly three decades in Hong Kong. This is why my research, while focusing on the academic experience, disadvantages, and discrimination of the EMS, takes a lawyer’s perspective. Moreover, my background motivated and inspired me to conduct in-depth research on the aforementioned problem. Through working experience and expertise that I earned in different careers and fields, I wish to form an objective and fair understanding of the situation of the EMS’ academic studies in Hong Kong and to restore their rights to some extent by way of judicial process before my retirement.

As a mixed-race Hong Kong-born half-Pakistani and half-Chinese person, my father, who came from Pakistan to Hong Kong in the late 1940s to work for the British Garrison as a services contractor, treated all his children like foreigners instead of Chinese in Hong Kong when we were born. Therefore, after studying in kindergarten and primary 1 with Chinese students learning Chinese, my parents arranged for me to study in an international primary school in Hong Kong where I started to study in English with foreign students and I did not have the opportunity in the 1960s to learn the Chinese language again.

Having resided in Hong Kong for over 60 years, the changes in my upbringing have enabled me to see and approach the sphere of my research from a personal perspective. The turning point for my linguistic development happened upon my graduation from primary school. My mother, who is a Chinese national, transferred me to an Anglo-Chinese secondary school due to her concern that I should learn Chinese at an early stage in order to be able to earn a living in a Chinese community in future. This decision brought me from a primary school with an international setting and multi-ethnicity to a local school with all Chinese students and it gave me the benefit of seeing the different cultures of two worlds. However, my language background must be clearly distinguished from Pakistani students whose parents are both from Pakistan as this forms the root and basis of the home environment, which affects a child's learning. I studied Chinese in kindergarten. Together with my older brother and three sisters, we spoke Cantonese as our daily language at home and learnt Chinese from our Chinese mother. We had been surrounded by Chinese relatives from the maternal side since our childhood. In other words, one should not be misled by my dual ethnicities and consider me as a typical EMS sharing the common characteristics of the Pakistani and Nepalese students under this thesis.

My background is a clear indication of how important a Chinese parent's role is in a child's Chinese language learning process since my mother is an educated lady with a high academic standard in the subjects of Chinese literature and history when she was a student in China before her arrival in Hong Kong as a refugee in the 1950s following the liberation of China. As young as the age of 4 to 5, our Chinese mother nurtured my brother, sisters and me and she began teaching us Chinese calligraphy, Chinese poems written by ancient and famous Chinese poets and so on. In view of this, my achievement in the Chinese language should not be treated as a rare success among the EMS, and it should instead be viewed as a typical example of how a mother has managed to assist her children in overcoming all difficulties in learning Chinese under home environment with parental support.

Racial discrimination and poverty are also studied in this thesis as they fall under the socioeconomic background of the Ethnic Minority Parents (EMP) and EMS. From a rational perspective, the more EMS is being discriminated against either culturally, socially or economically, the more important and urgent it is for the government to look after the underprivileged and the marginalised in society. I will elaborate on these issues with findings

and data in my thesis to support the fact that Pakistani and Nepalese students fall under the most vulnerable group of EMS in Hong Kong.

With nearly half-a-century of working experience in Hong Kong, having been a junior policeman, an English teacher, a business entrepreneur in Pakistan and Hong Kong, a school manager for a secondary school, the host of television programmes, an appointed Deputy Magistrate at the Magistrates' Court and now a barrister-at-law, it is hoped that the diversity of these various life experiences enables me to conduct this research from broad and different perspectives to complete this thesis.

Research Questions

The educational disadvantage or discrimination described above appears to have been triggered by the change of the language policy of the HKSAR government, which introduced the mother-tongue teaching curriculum in Hong Kong. In this respect, I have designed four Research Questions in this thesis and in response to them, I will provide all the relevant data and information with analysis to fill the gap of knowledge and to make a contribution to the legal vacuum to determine whether or not the educational disadvantage or discrimination the EMS have encountered is subject to judicial review (JR) or legal actions.

Four research questions were formulated to guide my research:

Research Question 1:

Following the handover of Hong Kong to China on the 1st July, 1997, did the Hong Kong Special Administrative Region government (HKSAR government) change the English and Chinese language policy to an extent which affects the right of access to education of the Ethnic minority students (EMS) in Hong Kong?

Simple as this first research question is phrased, how much or how little are EMS affected by the change of language policy in Hong Kong depends on a number of interrelated factors. These range from the socioeconomic and cultural background of EMS and their parents, the difficulties of the Chinese language with or without sufficient teaching or teachers' support, the HKSAR government policy and the education system of Hong Kong.

In this respect, comprehensively, the relevant data and information related to the above issues have been gathered, presented and analysed in Chapter 2 “The background of EMS, the education system and the government policy”.

On the other hand, the change in language status between English and Chinese has further consequences throughout the secondary school studies up to the public universities’ admission. To the EMS, the struggle to learn the Chinese language ends up with a qualification of GCSE Chinese subject upon graduation from secondary schools, a subject which is very low in standard of up to primary 2 to 3 level in Hong Kong and is subject to discrimination in assessment in public universities’ admission. The non-transparency of the public universities’ admission and assessment system poses difficulties in data collection. Following a meticulous analysis and study of barely available data, a discriminatory points conversion system against the GCSE Chinese subject can be observed. This will be discussed in Chapter 3 “Opportunity, Inequality against Ethnic Minority Students from Chinese Incompetence on Path of Education”.

Research Question 2:

What is the understanding and awareness of the Ethnic minority students (EMS) about the international treaties and domestic laws which safeguard their right of access to education?

There must be a reason why discrimination persisted for years and still exists today. To explore why, the stakeholders, that is, EMS should be directly approached and their views be sought under interviews to confirm the accuracy or discrepancy of the literature review and survey. The experience of these EMS is contained in Chapter 4.

Chapter 4 also discusses the methods and methodologies which I adopted in this thesis as far as the qualitative research by way of semi-structured interviews with school principals, teachers and EMS is concerned.

Lastly, the chapter ends with the concept or principles of “equality”, “minority rights” and “justice as fairness”, paving the way for Chapter 5 and Chapter 6 that delve into legal contexts applying international laws and domestic laws respectively.

Research Question 3:

Has the HKSAR government fulfilled her obligations under the international treaties and / or domestic laws in ensuring the Ethnic Minority Students (EMS) to have equal right of access to education with Chinese students after 1997?

Discrimination under any social policy, economic policy or educational policy may inevitably exist in any country or city. As a party to the international treaties, the HKSAR government received comments or concerns issued by the Human Rights Committees of the United Nations from time to time as a reminder or warning of any possible breach or room for improvement under the international treaties. In other words, discrimination on its own may not always be legally actionable in court unless it first breaches a law. After that, a test of legitimacy, justification and proportionality needs to be applied to determine whether the discrimination is legally actionable in Hong Kong court.

In this regard, Chapter 5 deals with the international treaties which affect Hong Kong and Chapter 6 deals with domestic laws. Both Chapters invoke Court judgments from overseas countries and Hong Kong for legal analysis to determine whether or not the circumstances of EMS are subject to legal action. Further, the mechanism and process of JR is fully explained as the most likely means or legal avenue to pursue the educational issues of the EMS in Hong Kong.

Research Question 4:

Have the Ethnic Minority Students (EMS) incurred any discrimination at any stage of their academic studies which is legally actionable in law in a Hong Kong Court? Do the following existing examination assessment, Chinese subject requirement and / or the points conversion system of the public universities constitute a ‘discrimination’ which is legally actionable in a Hong Kong Court?

- a) Internal assessment of core subjects, including Chinese language for all primary school graduates including EMS;
- b) Public universities’ compulsory entrance requirement of HKDSE Chinese subject for local students and acceptance of alternative Chinese language qualifications, such as GCSE Chinese subject for EMS;

- c) Different points conversion system on HKDSE Chinese subject and GCSE Chinese subject as an assessment for public universities' entrance.

These are the overarching research questions that went to the heart of the legal issues, targeting the internal assessment in primary school, the requirement for a Chinese subject in the HKDSE, and finally, the points conversion system at the public universities that is used to assess student applicants in their application for a bachelor's degree programme.

As stated above, a study is carried out to determine whether these disadvantages and discrimination are legally actionable in law and judicially reviewable in a Hong Kong court. Inevitably, the Black-letter methodology is adopted to conduct extensive and intensive legal research and study of statutes with a collection of overseas and local court judgments for analysis. Nevertheless, the legal perspectives cannot be artificially severed from government policies and all socioeconomic developments in society. Therefore, a socio-legal methodology with doctrinal and non-doctrinal research has been adopted by me in this thesis. This will be elaborated in the legal contexts of Chapters 5 and 6.

Chapter 7 consolidates the legal context of Chapters 5 and 6 to counter arguments and defences from legal counsel representing government or public bodies subject to judicial review, thereby evaluating the prospect of success of the judicial review.

Chapter 8 is a discussion Chapter that discusses the limitations of this thesis and its contribution to knowledge. With my legal experience of having appeared before a full bench of five judges in the Court of Final Appeal to handle different cases in Hong Kong, it is hoped that a test-case is brought to the Hong Kong court to fill the gap of the educational discrimination before my retirement.

Chapter 2: The background of Ethnic Minority Students, the government policy and the education system of Hong Kong

Introduction

This chapter lays down the cultural and socioeconomic background of Ethnic Minority Students (EMS) and their Ethnic Minority Parents (EMP), followed by a discussion of the language development and policy before and after the colonial era. This paves the way for the analysis of the Primary School's Internal Assessment (IA) affecting all EMS before their promotion to secondary schools and their under-achievement in Chinese language in secondary schools, which affects their academic assessment when they apply for admission to the public universities. To this end, it is necessary to investigate what equal rights to access education entail.

The concept of “equal rights of access to education” in Chapter 1 has various definitions and interpretations and this will be explored in Chapter 4, following the analysis of the interviews of the stakeholders in the educational field.

According to Opheim (2004), “educational equity” refers to an educational and learning environment in which individuals can consider options and make choices throughout their lives based on their abilities and talents, not on the basis of stereotypes, biased expectations or discrimination. The achievement of educational equity enables females and males of all races and ethnic backgrounds to develop the skills needed to be productive, empowered citizens. It opens economic and social opportunities regardless of gender, ethnicity, race or social status. In summary, the activity will explore “equity of opportunities” in a broad sense. It will acknowledge existing inequities in access, participation, achievement and educational outcomes and the creation of a fair learning environment for all, regardless of socioeconomic background, place of residence, ethnic background, and gender.

Clearly and succinctly, “educational equity” stated above refers to free choices to be made by individuals based on their abilities and talents under the creation of a fair learning environment regardless of socioeconomic background or ethnic origin. This explains why we need to be concerned with a fair level-playing field for all students, including Chinese and non-Chinese students in Hong Kong.

Regarding the socioeconomic background of the Pakistanis and Nepalese, their contrast with other ethnic minorities in Hong Kong is evident from two censuses and statistics conducted in 2011 and 2021 respectively (Census and Statistics Department, 2012; Census and Statistics Department, 2022).

The Socioeconomic and Educational Profile of Ethnic Minorities in Hong Kong

Population

Hong Kong, as a multicultural society, is home to people of various ethnicities. Table 2.1 shows that in 2011, 6.4% of Hong Kong's population were ethnic minorities. Of this, 6.4%, which accounted for 451,183 persons in number, 29.5% were Filipino, and 29.6% were Indonesian, while Pakistani and Nepalese accounted for 4.0% and 3.7%, respectively (Census and Statistics Department, 2012, p.7). In 2021, there was a 2% increase in the proportion of ethnic minorities in the Hong Kong population to 619,568 in number, to which increasing numbers of Pakistani and Nepalese contributed 3.9% and 4.8% respectively.

Table 2.1: Hong Kong Population (2011 and 2021)

Ethnicity		Percentage	
		2011	2021
Others		94.6%	91.6%
Ethnic Minorities		6.4%	8.4%
	Pakistani	4.0%	3.9%
	Nepalese	3.7%	4.8%
	Indonesians	29.6%	22.9%
	Filipinos	29.5%	32.5%
	Indians	6.3%	6.9%
	Thais	2.5%	2.1%
	Mixed	6.4%	8.8%

	Whites	12.2%	9.9%
	Japanese	2.8%	1.7%
	Koreans	1.2%	1.4%
	Other Asians	1.6%	1.7%

Source: (Census and Statistics Department, 2012, p.7; Census and Statistics Department, 2022, p.20)

Note: Mixed refers to an individual with a Chinese and a non-Chinese parent.

Table 2.2 shows the age structure (number and shares) of Pakistani and Nepalese children and young persons in the two ethnic minorities. From this Table's information in 2011, we can see there was a high percentage of these two ethnic minorities below the age of 15, namely, 7,148 persons accounting for 39.6% of the Pakistani population, 3,562 persons accounting for 21.6% of the Nepalese population respectively and this young generation was likely to have gone through the primary, secondary and tertiary education in Hong Kong recently. Chinese, under this table, fell under 94.6%. Importantly, 6,372 Pakistani and 5,802 Nepalese were below the age of 15 in 2021. Compared with the data in 2011, the number of these two ethnic minority groups could not be said to be negligible.

Table 2.2: Age Group (2011 and 2021)

	Below 15		15 – 24	
	2011	2021	2011	2021
Pakistani Origin	7,148 (39.6%)	6,372 (26.1%)	2,130 (11.8%)	5,524 (22.7%)
Nepalese Origin	3,562 (21.6%)	5,802 (19.5%)	2,521 (15.3%)	3,612 (12.2%)

Source: (Census and Statistics Department, 2012, p.27; Census and Statistics Department, 2022, p.29)

Poverty

The information from the Census and Statistics records in 2011 and 2021, under Table 2.3, shows the median earning capacity of Pakistani and Nepalese. Having said that, through literature in the public domain, a comprehensive understanding of the socioeconomic and cultural background of EMS and EMP can be further established.

Most Pakistani and Nepalese people residing in Hong Kong were second-generation immigrants whose parents came to settle down here by joining the civil service as police, civil servants or serving in the British army as Gurkha soldiers in the colonial period half a century ago (Kwong and Tsoi, 2015).

In 2011, about 24% of 113,815 South and Southeast Asians, comprising 36,298 households, lived in Hong Kong under the poverty line. While the median income for Hong Kong overall was HK\$12,000 in the year 2011, five ethnic groups, including Pakistanis and Nepalese, fell under this level and were earning HK\$10,000 per month (The Hong Kong Council of Social Service, 2014, p.3).

This means that one in every five ethnic minority people lived under the poverty line according to the *Hong Kong Poverty Situation Report on Ethnic Minorities 2016* (Hong Kong Special Administrative Region Government, 2018). The poverty rate of Pakistanis was recorded to be 51.1% and the Nepalese at 16.4% and the average poverty rate of the whole population was 20.4%. In the case of the Pakistani community alone, the poverty rate significantly rose from 27.4% in 2001 to 51.1% in 2011 (The Hong Kong Council of Social Service, 2014, p.4).

The *Hong Kong Poverty Situation Report on Ethnic Minorities 2016* further echoes the fact that Pakistanis had the highest proportion of large households with many children among ethnic minorities. Their average household size was 4.6 members with an average number of 2.6 children, and they had a median monthly household income of HK\$13,700 on the basis of 1.1 members as a working household (Hong Kong Special Administrative Region Government, 2018, p.49).

Lastly, I would like to compare the changes in the earning capacity of Pakistani and Nepalese between 2011 and 2021 after going through the above literature.

Table 2.3: Median Earning Capacity in Hong Kong dollars per month for both sexes of the ethnic minorities (2011 and 2021)

	2011	2021
White	\$46,000	\$61,500
Japanese	\$36,000	\$38,750
Korean	\$30,000	\$39,810
Indian	\$19,000	\$22,000
Other Asians	\$15,000	\$20,000
Mixed	\$11,500	\$19,000
Pakistani	\$10,000	\$15,000
Nepalese	\$10,000	\$17,000
Thai	\$ 6,000	\$11,000
Indonesia	\$ 3,580	\$4,630
Filipino	\$ 3,580	\$4,700

Source: (Census and Statistics Department, 2012, p.88; Census and Statistics Department, 2022, p.102)

Note: Mixed refers to an individual with a Chinese and a non-Chinese parent.

Median monthly income of HK\$3,580 for both the Indonesian and Filipino minorities can be simply explained by the fact that it was the minimum statutory pay to domestic helpers under the law in 2011 (Census and Statistics Department, 2012, p.88). These wages appear to be low as compared to the income of the Pakistani and Nepalese. However, domestic helpers are provided with free accommodation and food by their employers according to the laws of Hong Kong, and they leave their families behind when they come to work in Hong Kong. In contrast, the Pakistani and Nepalese must raise their families under the high cost of living in Hong Kong.

In a lapse of 10 years, the monthly wages for domestic helpers as of today in Hong Kong have risen to HK\$4,630 with a monthly food allowance of HK\$1,121 (if food is not provided),

according to official information (Hong Kong's Information Services Department, 2022). Owing to the wage policy of Filipino and Indonesian domestic helpers, Filipinos and Indonesians appear to have the lowest median income; however, Pakistanis and Nepalese struggle the most to survive in Hong Kong. Pakistanis and Nepalese, following Filipino, Indonesian, and Thai, inclusive of the aforementioned domestic helpers, became the ethnic groups with the lowest median income in 2011 and 2021. With merely HK\$10,000 more than those domestic helpers, the self-reliant Pakistanis and Nepalese were heavily burdened by the food and housing expenditure. With reference to Table 2.3 Median Earning Capacity above, the monthly income of the White, Japanese and Korean have risen from HK\$30,000 - HK\$46,000 to HK\$38,750 - HK\$61,500 over the decade, whereas the monthly income of the Pakistani and Nepalese have only risen from HK\$10,000 to HK\$15,000 - HK\$17,000.

Apparently, for the past two decades, there has been a wide gap in income between the Pakistani, Nepalese and Indian, Korean, Japanese and White. This helps to explain why so far, there has been no research or findings in the past which report any unfair treatment encountered by Korean, Japanese or White students during their academic studies with the local students in Hong Kong. These students largely study in international schools that adopt a non-local curriculum. This enables these students to apply for admission to public universities as foreign students, thus bypassing the compulsory admission requirement for a Chinese subject (Groves and O'Connor, 2020, p. 211).

Secondly, after completion of their post-secondary education in Hong Kong, further studies in overseas universities are clearly an alternative for these students. By adopting either of these alternatives, a student educated in Hong Kong under these favourable circumstances does not have to face the pressure or worries of Chinese subjects, Chinese examinations, Chinese language qualifications, etc. However, most of these privileges are not available to EMS from Pakistan and Nepal as the school fees of the private international schools in Hong Kong are beyond their means.

Falling under the very low-income group, Pakistani and Nepalese people have lived in extreme poverty in Hong Kong. The analysis further revealed that Pakistani and Nepalese households were larger, and more than one-third of Pakistani families had 3 children or more. Furthermore, the Pakistanis were one of the largest ethnic groups receiving Comprehensive Social Security Assistance (CSSA) from the Hong Kong Special Administrative Region government (HKSAR

government) (Commission on Poverty, 2013), which evidently shows their economic situation falls behind other ethnic groups.

Employment generates income. As far as the occupations of the Pakistanis and Nepalese are concerned, the 2011 Census (Census and Statistics Department, 2012, p. 72) gives a clear indication of what the socioeconomic background of EMP was like, it shows that a large proportion (38.4%) of the working male Pakistani were employed in “Elementary occupations” and by this term, it is defined as:

“Including street vendors, domestic helpers, cleaners, messengers, private security guards, watchmen, freight handlers, lift operators, construction labourers, hand packers, food preparation assistants, agricultural and fishery labourers” (Census and Statistics Department, 2012, p.137).

Likewise, Ku, Chan, and Sandhu (2005) observed that ethnic minorities were mainly employed in low-income fields, such as construction workers, caretakers or security guards. One of the reasons for this phenomenon was due to their poor command of the Chinese language and other cultural barriers (Crabtree and Wong, 2010). For example, the language barrier not only hindered the social contact and integration between the ethnic minorities and the Chinese people, but it also created an atmosphere of not speaking to each other between the two groups under the linguistic barrier (Centre for Civil Society and Governance, The University of Hong Kong and Policy 21 Limited, 2012). In fact, the Chinese language was described as ‘the core difficulty from which all others flow’ according to the report submitted to the United Nations on Economic, Social and Cultural Rights (2004). This shows the *de facto* exclusion of Nepalese and Pakistani from achieving social upward mobility through getting a higher income job, notably owing to the reason of language barrier.

Furthermore, despite the fact that a majority of the Pakistani and/or Nepalese ethnic minorities are deployed in low-income, low-skilled occupations, it was said that the South Asians who were educated in Hong Kong before 1997 have found their employment prospect worse than their fathers’ generation and it was difficult to maintain their living standard, not to mention that their upward social mobility was becoming out of the question (Centre for Civil Society and Governance, The University of Hong Kong and Policy 21 Limited, 2012, p.ii).

Discrimination

Apart from coming from a comparatively poor socioeconomic background and falling under one of the lowest income groups, EMS have also been subject to racial discrimination if we carefully study the culture and attitude of people from different perspectives.

Census and Statistics Department (2009) indicates only about 56-67% of Chinese parents were willing to send their children to schools where there was a majority of ethnic minorities from South Asia or South East Asia. Another study also revealed that there had not been a high degree of integration between local Chinese and South Asians and these people from different races lived in two separate communities without much interaction (Centre for Civil Society and Governance, The University of Hong Kong and Policy 21 Limited, 2012, p.ii).

Further, the Pakistani community was being discriminated against and marginalised in Hong Kong with respect to education, job-seeking and employment conditions. The Pakistani community was metaphorically signified in the idiomatic term “Ah Cha” under the Hong Kong culture (Crabtree and Wong, 2012). To my knowledge and experience, the term “Ah Cha” is widely perceived as a discriminatory and derogatory term meaning “inferior” against people from Pakistan or India in Hong Kong. Pakistani and Indians often find this form of address a great insult to their race and it is equivalent to using the N-word against black people.

On the other hand, Chan and Chan (2006) found that the Chinese people least trusted the Pakistanis and Indians and they were also least willing to work with these ethnic minorities. As such, various negative social stereotypes against these ethnic minorities further hinder their inclusion into the Chinese society.

Language

The spoken languages and written languages in Hong Kong are referred to as “trilingualism” and ‘biliteracy’ by the Education Bureau (EDB) in Hong Kong (Education Bureau, 2017). As stated in Chapter 1, the Cantonese language is the oral Chinese spoken by most of the Chinese population in Hong Kong. Putonghua is the oral Chinese used and spoken as the official language in Mainland China. These two oral languages and the oral English language are referred to as “trilingualism”. As far as the written language is concerned, Hong Kong adopts traditional Chinese characters in writing and school teaching, whereas China adopts simplified characters. The former is more complicated with more strokes and the latter is simpler with

fewer strokes in writing. Traditional Chinese writing, together with written English, is referred to as ‘biliteracy’.

Table 2.4 is an indication of the usual language spoken by a percentage of the ethnic minority group and it does not refer to the mother tongue spoken by them in 2011 and 2021. This means in the first column, 87.8% have indicated their usual language, not their mother tongue, in daily life, and the rest of this percentage, that is, 12.2%, did not indicate any one of the three tabulated languages to be their daily and usual language.

Table 2.4: Proportion of ethnic minorities aged 5 and over able to speak selected languages/dialects as their daily language (2011 and 2021)

	English		Cantonese		Putonghua	
	2011	2021	2011	2021	2011	2021
Indonesian	14.8%	12.8%	70.4%	72.4%	2.6%	4.4%
Filipino	83.5%	78.5%	4.1%	7.0%	0.2%	0.3%
Indian	37.2%	44.5%	4.6%	7.0%	-	1.0%
Pakistani	9.4%	15.4%	5.5%	9.7%	0.0%	0.2%
Nepalese	5.3%	9.3%	2.3%	6.2%	-	-
Thai	7.1%	6.3%	73.0%	69.6%	0.2%	0.1%
Japanese	17.2%	15.6%	3.9%	7.7%	1.0%	0.5%
Korean	19.1%	29.6%	6.8%	5.7%	1.3%	1.0%
White	72.5%	79.1%	14.9%	7.1%	0.4%	0.4%
Chinese	0.7%	0.8%	93.5%	93.5%	1.4%	2.4%

Source: (Census and Statistics Department, 2012, p.44; Census and Statistics Department, 2022, p.45)

Table 2.4 reveals the comparative weakness of Pakistani and Nepalese groups in English and Cantonese languages. It is evident that the Chinese had an overwhelming percentage of 93.5%

over the ethnic minorities in using Cantonese as their daily language. On the other hand, among the ethnic minorities, only 5.5% of Pakistani and 2.3% of Nepalese, compared to Indonesian with 70.4% and Thai groups with 73.0%, who used Cantonese as their daily language in 2011. There had been roughly 4% improvement for Pakistani to 9.7% and Nepalese to 6.2% in 2021, but the language weakness remained comparatively low. The observation which can be made here is that there is a real possibility that this weakness and low usage in Cantonese has an adverse effect on the Pakistani and Nepalese students' academic competition within the same school with the Chinese students whose mother-tongue is Cantonese when the medium of instruction is primarily Chinese in CMI schools.

Educational Profile.

According to Fermi Wong, founder of Hong Kong Unison, only 1% of EMS were admitted into universities each year, whereas among Chinese students, it was 20% (South China Morning Post, 2012). Hong Kong Unison is a Non-governmental Organisation in Hong Kong working for the welfare of ethnic minorities and it has been closely monitoring the HKSAR government's policies and acts in the particular area of education since the handover.

Similarly, only 1.3% of EMS aged 15 and above were in full-time post-secondary education according to the Census and Statistics Department's announcement in 2011 (Census and Statistics Department, 2012, p.54). Tables 2.5, 2.6, 2.7 and 2.8, sourced from the Hong Kong Institute of Education (2013), also indicate clearly the high drop-out rates of Pakistani and Nepalese before Form 5 and their low admission rates into public universities in 2011.

Table 2.5: Students leaving school before Form 5 between the age of 13 and 19 (2011)

Ethnic Origin	Drop-out rates by percentage
Pakistani	15.6%
Nepalese	20.6%
Chinese	6.4%

Source: (The Hong Kong Institute of Education, 2013)

Table 2.6: University Education Among Young Aged 19 – 22 in 2011

Ethnic Origin	Studying or Completed University Education(%)
Pakistani	4.3%
Nepalese	7.7%
Chinese	28.6%

Source: (The Hong Kong Institute of Education, 2013)

Table 2.7: Children between 3 and 5 years old without schooling (2011)

Chinese	8.5%
Pakistani	16.1%
Nepalese	14.6%

Source: (The Hong Kong Institute of Education, 2013)

The Tables above reveal that ethnic minorities are educationally under-achieving. This significantly limits their educational opportunities, employability and social integration.

Table 2.8: Education attainment of ethnic minorities aged 15 and over, 2021

	No- schooling/ Pre-primary	Primary	Lower Secondary	Upper Secondary	Post Secondary
Indonesian	0.7%	15.9%	35.4%	37.1%	10.9%
Filipino	0.4%	3.1%	13.0%	48.9%	34.6%
Indian	2.5%	4.5%	8.7%	26.2%	58.1%
Pakistani	8.8%	14.0%	13.4%	38.7%	25.1%
Nepalese	7.2%	8.7%	12.2%	49.6%	22.2%
Thai	8.2%	37.0%	17.8%	21.6%	15.4%

Japanese	0.5%	2.5%	0.6%	16.3%	80.1%
Korean	0.3%	1.1%	1.3%	10.0%	87.3%
White	0.4%	0.9%	2.1%	13.8%	82.9%
Other Asians	2.5%	7.7%	17.4%	29.3%	43.1%

Source: (Census and Statistics Department, 2022, p.64)

Until recently, Table 2.8 in 2021 seems to have seen progress of 25.1% of Pakistani and 22.2% of Nepalese studying at the post-secondary level, but this includes vocational training or other degree-equivalent courses provided by other institutions beyond the public universities in Hong Kong.

History and Status of English and Chinese Languages in Relation to Ethnic Minorities

Based on the figures released by the Census and Statistics in 2011 and 2021 from the HKSAR government, over 90% of Hong Kong's population was ethnic Chinese and less than 10% of the population was made up of various ethnic minority groups. Despite that, the history of language in Hong Kong reflects that the English language had been predominantly used over the Chinese language until the handover in 1997. Before Hong Kong was handed over to China in 1997, the English language was used commonly or solely by the official or in public settings despite the equal status of Chinese and English as the official languages in Hong Kong under Section 3 of the Official Languages Ordinance (Cap. 5) in 1974.

After the handover, English may be used as an official language in addition to the Chinese language under Article 9 of the Basic Law, a constitutional law of Hong Kong which came into effect on the 1st July, 1997. This significantly marks the downgrade of the English language as the former official language and the upgrade of the Chinese language as parallel.

Medium of Instruction (MOI): Chinese as Medium of Instruction (CMI) versus English as Medium of Instruction (EMI)

Three months before the political handover of Hong Kong to China, the Department of Education proposed a compulsory CMI policy in all secondary schools which triggered strong protests from schools, parents and students and the colonial government finally made a concession and revised the policy which enabled 307 schools to become CMI schools with

exemptions granted to 114 schools (Education Department, 1997)

Subsequently, under pressure of infringement on academic freedom, a fine-tuning policy was introduced by the Education Bureau (EDB) (2009) under its circular in 2009, allowing secondary schools to have the flexibility to adopt diversified MOI teaching modes as long as they could fulfil several criteria, that is, students having the ability to learn and the teachers having the ability to teach in English, coupled with adequate measures and structured strategies from school. What the EDB had in mind when launching the compulsory CMI policy in 1998 was, no students would be disadvantaged regardless of their English standards if the learning was performed through one's mother tongue which was a legitimate and most effective medium of learning (Poon, 2013, pp.35–37, 43).

Further, Anita Poon (2013) provided a quick and easy-to-understand overview of what a CMI and EMI school's teaching was like as a result of her observations. The English language was used exclusively for highly capable English students and English mixed with Chinese was used for average English-capable students. Lastly, English was used first, followed by a Chinese explanation for the students who were not so competent in English in an EMI school. The scenario in a CMI school was just the reverse. Before 1997, the colonial government exempted EMS in government-aided schools from learning Chinese and they were also not required to fulfill any Chinese language requirements for admission to local universities and becoming civil servants. However, after the handover, Chinese became a requirement for admission to universities and becoming civil servants (Oxfam Hong Kong, 2014).

Moreover, mainstream government and subsidized schools are free but most primary schools use CMI, however, adequate language support for linguistic minority students is not provided (Carmichael, 2009).

In primary school assessments, all subjects except English were examined in Chinese. In view of this, students' Chinese ability is very important as this determined the banding of the students when they graduated from primary schools to secondary schools because the IA results were a strong factor to be considered which decided what type of schools they would be admitted to (Carmichael, 2009, p.10).

The literacy in Chinese among EMS remained at a low level when they studied in mainstream CMI primary schools as they were unable to keep up with local Chinese students, with insufficient language support in school (Hong Kong Unison, 2016). Furthermore, EMS tended to have a lower English level when studying in a CMI primary school where the language of instruction in classroom was mostly Chinese. Another reason why EMS could not catch up with their Chinese was that they had no one at home to assist them in their Chinese homework and EMP could hardly afford to pay for private tutors for their children (Carmichael, 2009, p.14).

In other words, apart from the subject of the English language, all secondary schools adopting the CMI are obliged to teach all academic subjects in the Chinese language. So Chinese, regarded as a secondary language in the colonial period, has now become an essential and mainstream language not only in the academic field but also in the employment field in Hong Kong. Unfortunately, EMP and EMS were not consulted and their positions were not thoroughly considered when the language policy was changed significantly from EMI to CMI.

The Chinese proficiency of EMS was a major obstacle to their advancement in education. Educators, non-governmental organisations, parents, and students opined that there was a lack of support and resources provided to EMS in studying Chinese (Equal Opportunities Commission, 2011). Nevertheless, even after learning Chinese for many years, the Chinese ability of EMS still significantly lagged behind Chinese students of the same age (Loh and Tse, 2009).

Medium of Instruction (MOI): Putonghua as Medium of Instruction for Chinese Subject (PMI-C)

This thesis does not examine PMI-C in classroom settings. However, given its increasing importance and popularity after the 1997 handover, a brief description of its development in Hong Kong is provided below.

In short, the EDB has not established any clear and strict guidelines for schools to determine which Chinese language should be used as the MOI when teaching a Chinese subject. It can be taught in Putonghua, the official language of China, or in Cantonese, the dialect spoken by the local people in Hong Kong.

In any case, the HKSAR government's intention was to strongly support and encourage the learning of Putonghua.

As a result, the Standing Committee on Language Education and Research (SCOLAR), a statutory body now fully funded by the HKSAR government, was established in 1996 to promote language education and research in Hong Kong. Its purpose is to advance and advise the HKSAR government on “Biliteracy and Trilingualism” education in the region to maintain linguistic diversity and enhance the global competitiveness of students (Education Commission, 1996).

As of now, the PMI-C issue remains unresolved in Hong Kong, leaving schools to determine how much they should adopt the MOI based on teachers' experiences, along with the abilities and needs of their students. There is ongoing debate about whether PMI-C effectively enhances students' proficiency in Chinese (Wong and Lam, 2022).

The proportion of secondary schools implementing PMI-C was approximately 20%, whereas the proportion of primary schools implementing PMI-C was about 40% (I-Cable, 2022).

Consequently, the current development of the PMI-C is somewhat similar to the practices of CMI and EMI in Hong Kong, where schools are granted a degree of autonomy to modify the MOI (Wong and Lam, 2022).

While the future of PMI-C remains uncertain, concerns that its further implementation may disadvantage EMS, who already struggle with studying the Chinese language, are justified. EMS have to learn both Putonghua and Cantonese simultaneously, two languages with distinct accents that can be challenging for non-native speakers but are more familiar to Hong Kong's Chinese students.

Fortunately, the Discretionary Places (DP) Admission and Central Allocation (CA) System, mentioned in this and the next Chapter, can help mitigate the situation. These systems allow EMP and their children to find out whether a school employs CMI, EMI, or PMI-C prior to the selection and allocation process. This, at least, for the time being, gives the EMP and EMS an

opportunity to consider whether they should opt for or avoid the PMI-C schools before enrolment.

After concluding the discussion on MOI, I will now explore the specific challenges related to the Chinese language for EMS.

The Difficulties of the Chinese Language for Nepalese and Pakistani Students

Chinese was considered by Everson (1998) to be particularly challenging for learners who speak English or other languages, as recognising and reading Chinese characters poses a great difficulty for English speakers. Similarly, reading and writing Chinese is the main problem for South Asian students. A report commissioned by the Equal Opportunities Commission (EOC) (2011) found that learning written Chinese was often too difficult for EMS and they gave up if they did not receive sufficient help in the process of learning (Centre for Civil Society and Governance, The University of Hong Kong and Policy 21 Limited, 2012, pp.10-12). Generally, this was how written Chinese is perceived by those trying to learn it because of the nature of its written orthography: it had thousands of Chinese characters which were written in different strokes and it was not a language with an alphabet that could be learnt with phonics and phonetics in pronunciation (De Courcy, 2002; Ye, 2013). Learning Chinese was very difficult from the observations of a wide range of different scholars or authors (Allen, 2008; Bell, 1995; Everson, 1998; Guder, 2005; McGinnis, 1999):

“Chinese orthography is a major factor in the difficulty of learning to function in Chinese. That being so, writing is the most time-consuming activity for the learner”
(Walker, 1989).

Chinese characters require students to learn three aspects simultaneously: the pronunciation sometimes represented in pinyin using the Roman alphabet, the written form, and the meaning. Pinyin is the official romanisation system of Chinese characters based on their pronunciation. Its literal meaning is “spell sound”, meaning the spelling out of Chinese words and phrases with letters from the English alphabet.

Because the standard orthographic form does not readily indicate how Chinese characters are to be pronounced, the complexity of the writing system makes learning the Chinese language challenging, especially for learners whose first language is more closely alphabetic.

“Chinese thus presents orthographic learning challenges to readers of English and other alphabetic languages. Studies of both Chinese in foreign language and Chinese as second language contexts report that recognising Chinese characters is the most challenging reading task for English speakers” (Chang et al., 2014).

Cheng and Chiu (2018) claimed that ‘given the complexity of the Chinese writing system, Chinese as a Secondary Language or Chinese as a Foreign Language imposes enormous challenges on beginning learners with an alphabetic first language’.

The standard of reading and writing Chinese Characters required from primary and secondary school students

To non-native speakers who have never had the opportunity to learn Chinese, it may be difficult to grasp just how challenging the language can be. With this in mind, I examine how Hong Kong students learn Chinese, highlighting the challenges and complexities of the learning process.

The study of Chinese characters is divided into recognition of characters and writing of characters to assess the progress and standards of primary and secondary school students based on the curriculum guides issued by the EDB (2017):

- a) Primary School (primary 1 – primary 6)
 - Recognition: 2,500 – 3,000 characters
 - Writing: 1,500 – 2,000 characters

- b) Secondary School (secondary 1 – secondary 6)
 - Cumulative Recognition: 4,500 – 5,000 characters
 - (with retention of earlier-learned content from primary school)

In fact, the EDB acknowledges the difficulty of writing Chinese characters for the EMS in their curriculum guides:

“To learn an alphabetic language, students may start with alphabets and use them as the basis of spelling. However, learning Chinese is entirely different. In general, NCS

students do not have concepts of strokes, stroke order and components of the Chinese characters. They may easily see Chinese characters as individual pictures. For some characters, the printed form may differ from the handwritten form, which requires careful recognition to differentiate” (Education Bureau, 2008).

Below is an example of how each Chinese character is written, featuring a series of horizontal and vertical strokes, to demonstrate the difficulty it presents for beginner learners or non-native speakers:

Pakistan - 巴基斯坦

Nepal - 尼泊爾

Student - 學生

Judicial Review - 司法覆核

As demonstrated above, the word ‘Pakistan’ consists of four Chinese characters, while the others comprise two to four characters used to describe a noun in English.

This provides a basic overview of the complex process of learning to read and write Chinese characters, as primary student graduates are expected to read at least 2,500 characters and to write at least 1,500 characters upon their promotion to secondary schools.

Overall, the above literature, findings or curriculum guides issued by the EDB support the argument that Chinese is a very difficult language for foreigners and EMS to learn, let alone master, without strong support from the government, schools, teachers and family. This needs to be distinguished from the English language, which has a sound system of alphabets, phonics and phonetics.

On the other hand, the level of difficulty of Chinese can be contrasted by the General Certificate of Secondary School Chinese subject (GCSE Chinese subject) commonly taken by the EMS upon their graduation from secondary school, a subject which is equivalent to primary 2-3 level.

In fact, the GCSE Chinese subject is probably considered to be an interim measure, as it is rather basic, requiring students to know only 400 Chinese characters which cannot adequately

reflect the Chinese proficiency that EMS in Hong Kong would need to achieve (Carmichael, 2009, p.24).

Lastly, the actual experience of the stakeholders in learning the Chinese language with great difficulty is explored in Chapter 4.

Teachers' Lack of Experience and/or Qualifications

The Faculty of Education, University of Hong Kong (Shum *et al.*, 2011) conducted research about Chinese language teaching to EMS in Hong Kong and disclosed that local teachers were not adequately prepared to teach EMS, including Pakistani and Nepalese, who have different cultural and linguistic backgrounds.

Other research paints a similar picture, for example, Carmichael (2009) found that no educational theory or policies underpinned the HKSAR government's provisions for Chinese language support for EMS in Hong Kong and teachers were not trained in appropriate methodologies for teaching Chinese as a second language to these students.

A survey on the motivations and strategies of Southeast Asian students concluded that the mainstream language was important to immigrant children and youth for their access to education and future careers, so Chinese language policies should assure further resources and better access to quality education for South Asians in the trilingual environment (English, Cantonese and Putonghua) in Hong Kong (Shum *et al.*, 2011).

The lack of a proper policy on Chinese as a second language for the Pakistanis and Nepalese, the lack of cultural sensitivity of teachers and the low expectation of teachers for these ethnic minority groups were revealed to be the barriers to language acquisition by these students. Additionally, there was no clear curriculum for the schools teaching EMS to rely on and there are no suitable textbooks or materials specially designed for EMS (Shum *et al.*, 2011, p. 64).

The Problems of Ethnic Minority Parents (EMP)

Studies also highlighted difficulties arising from the challenging communication with EMP. Kennedy and Hue (2011, p. 7), in a study of 30 teachers interviewed in three secondary schools, revealed that teachers realised the importance of Southeast Asian parental involvement in children's studies and communication with the school, but that they perceived problems

because of a lack of the ability to communicate in Chinese, lack of availability to see teachers, having a lower expectation of their children's academic work and putting religious practice in priority to academic studies. On the contrary, the EOC (2011) concluded it was untrue that the EMP had a lower expectation of the children's education and the real situation was that most EMP showed concern over the educational plans for their children.

Similarly, Tsung and Gao (2012) found that South Asian parents realised that Chinese language learning was important for social participation and advancement. However, parents were often helpless because they lacked linguistic, cultural, economic and social resources. It is often a typical situation that South Asian families with insufficient economic resources cannot afford extra tutorial classes. At the same time, the parents are not able to assist with their children's academic work due to their limited ability and low educational standards. Hong Kong Unison (2019a) conducted a survey which compared 187 Chinese parents and 189 EMP in Hong Kong with the following findings:

- Many EMP have suffered social, economic and cultural barriers and disadvantages in the past. There has been inequality of access to advancement and EMS have been receiving education in a less favourable environment compared to Chinese students.
- It is not true that EMP are less concerned than Chinese parents with the education prospects of their children. On the contrary, they have similar expectations. However, their cultural knowledge limits their ability to articulate accurately their concern and expectations.
- EMP know far less than Chinese parents about tertiary education and this seriously affects their ability to lay down any plan for their children's education.
- EMP have lower Chinese proficiency and poorer social networks which are barriers to acquiring information and knowledge to learn more about the education system in Hong Kong.
- The major obstacle which the EMP in Hong Kong faces is language which deprives them of a thorough understanding of the education system and the complex rules and requirements under the system.
- Chinese parents do not face such barriers and difficulties. They have a much broader social network and better cultural knowledge than EMP and they do not have any language barrier. Therefore, they are in a more favourable position to formulate study plans and strategies on behalf of their children more effectively.

The Constitutional and Mainland Affairs Bureau of the HKSAR government (2003), in fact, admitted that a major obstacle to learning for EMS was due to the Chinese language which was not the mother-tongue of EMS. Given these situation and circumstances, I now examine the policy context of the HKSAR government to find out what appropriate measures have been adopted and should be adopted to ensure equal access to education for EMS.

The Policy Context

Having reviewed the challenging experience and difficulties faced by EMS in different domains, I will turn to discussing the educational policies and their key support measures.

Various measures were introduced by the HKSAR government under the Supplementary Guide in 2008 to the Chinese language curriculum (Supplementary Guide) to assist EMS, and some feedback has already been discussed in Chapter 1.

I will now explore the “Chinese Language Curriculum Second Language Learning Framework” (Learning Framework) in two stages – pre-implementation and post-implementation - which the HKSAR government has attached great importance to since its introduction in 2014.

In fact, the aim or end goal of the Learning Framework is to help EMS transition to mainstream Chinese Language classes and ultimately enable them to successfully take the HKDSE Chinese subject (Equal Opportunities Commission, 2019; Education Bureau, no date b).

Pre-implementation of the Learning Framework

The education of EMS in Hong Kong has been a hotly debated issue. Numerous academic studies and surveys have examined Chinese language education policies for these students, highlighting various comments and criticisms.

For instance, the HKSAR government was urged to formulate a comprehensive “Chinese as a second language” policy with a long-term objective. Loper (2004, p.30) suggested that the EDB should have considered and should still consider providing Chinese as a Second Language courses within schools that conduct teaching in CMI to better prepare EMS for more opportunities in education and employment. However, despite repeated requests to the EDB to adopt the ‘Learning Chinese as a Second Language’ policy, the EDB insisted that the current

Chinese curriculum was suitable for EMS, provided that certain adaptations have been made by teachers.

On the other hand, a survey conducted between the Hong Kong Unison and the Hong Kong Professional Teachers' Union in 2007 revealed that a majority of teachers considered that the current Chinese curriculum designed for Chinese students was unsuitable for EMS, and teachers struggled to develop their own curriculum and teaching materials without adequate support from the EDB for EMS (Hong Kong Unison, 2010).

Kapai (2012) commented that the cultural and linguistic problems of EMS are deep-rooted and cannot be resolved without a thoughtful and long-term pedagogical plan in Hong Kong.

Stephen Fisher, the Director General of the charity Oxfam in Hong Kong and a former Director of the Social Welfare Department, was of the opinion that bureaucracy and the lack of strong voices for ethnic minority communities were barriers to change in education policy. In his further opinion, Pakistanis, Indians, and Nepalese, many of whom were second or even third generation in Hong Kong, still faced the problem of being unable to read or write, even if some of them knew how to speak (Ngo, 2013).

Before 2013, there were reportedly no territory-wide, standardised, or ongoing assessments of Chinese language proficiency among EMS. With no relevant framework to guide instruction on what should be taught, teachers had to independently adjust and develop suitable materials to accommodate the diverse backgrounds of EMS (Oxfam Hong Kong, 2020).

In Hong Kong, arranging classes by age is a common practice in schools. However, it is also a frequent occurrence to find both newly-arrived EMS and EMS born and studied in Hong Kong since kindergarten studying in the same class. To address these complex circumstances, schools have designed their own school-based curriculum to cater to the needs and abilities of EMS (Oxfam Hong Kong, 2016).

On the other hand, a weak mastery of Chinese hampers the EMS in absorbing the information taught in each subject. It impedes their social and psychological development as well as their thinking skills. Ultimately, it curtails the EMS's chances of receiving tertiary education in the future (Oxfam Hong Kong, 2014).

Finally, the Chief Executive of the HKSAR government in his yearly policy address of the government acknowledged the problems of ethnic minorities' integration into society and the barrier of Chinese language to their educational achievement.

In dealing with these problems, the Chief Executive announced the following:

“Many ethnic minorities in Hong Kong were born and brought up here. Some of them are less successful in integrating into the community because they are unable to read and write Chinese more effectively, we will enhance support measures in schools. We hope that it will nurture a new generation of people who call Hong Kong their home regardless of origin, race and religion” (Hong Kong Special Administrative Region Government, 2013).

Further, in his 2014 policy address, the Chief Executive made it clear that the HKSAR government would progressively take various steps to enhance support measures for EMS. I will refer to and focus on the most relevant ones only (Hong Kong Special Administrative Region Government, 2014):

- The HKSAR government will strengthen support for ethnic minorities. It will seek to remove the barriers that hold them back from realising and fulfilling their aspirations.
- Providing a Learning Framework for non-Chinese speaking primary and secondary students with supporting learning and teaching materials to facilitate their effective learning of Chinese as a second language to enable them to bridge over to mainstream Chinese language classes.
- Funding will be provided from 2014 to 2015 to enable schools to hire additional teaching assistants and enhance all modes of support for Chinese language learning:
- Providing an ApL(C) subject at senior secondary levels to be pegged at Levels 1 to 3 of the qualifications framework as an alternative qualification for NCS students in order to enhance their employability;

- Providing enhanced funding support to schools to facilitate implementation of the Learning Framework with effect from the 2014/15 school year. The additional funding can enable schools to regularise effective modes of support for Chinese language learning of NCS students, including providing intensive support and adopting split-class teaching mode, to help NCS students bridge over to mainstream Chinese classes. Besides, schools may employ ethnic minority teaching assistants for better communication with NCS parents to enhance home-school cooperation.

In relation to funds, the EDB had, starting from the 2014/15 school year, allocated about HK\$200 million per year to step up the education support for EMS in learning the Chinese language through, among others, the implementation of the Learning Framework in primary and secondary schools (Education Bureau, 2020). According to the EDB, under the Learning Framework, teachers could design school-based curricula, as well as adapt and develop teaching materials for EMS with different learning needs to learn Chinese progressively. Similarly, starting from 2014/15, schools admitting 10 or more EMS receive additional funding ranging from HK\$0.8 million to HK\$1.5 million per year (Legislative Council Panel on Education, 2019). Truly, the government has finally implemented measures in the past few years to provide recurrent funding to improve Chinese language education, to implement the Learning Framework and to promote the integration of NCS students and their Chinese learning. In 2018-2019, the HKSAR government also earmarked HK\$500 million for these purposes and education was considered one of the priorities (Oxfam Hong Kong, 2020, p. 20).

Apparently, the HKSAR government has had high expectations that the Learning Framework will significantly address the Chinese language problem faced by EMS since 2014.

As a consequence, the HKSAR government introduced the “Learning Framework” and a subject of ApL(C) in the 2014/2015 school year to support EMS in learning Chinese. The Learning Framework is a measure which provides additional funding support to schools to support EMS in learning Chinese and enhances teachers’ professional development in teaching Chinese as a second language.

In fact, ApL(C) was introduced as an alternative to the GCSE Chinese subject for EMS. Both qualifications are accepted by public universities and meet their admission requirements (Education Bureau, no date b).

However, there was feedback from the EOC that the ApL(C) focused narrowly on language training in the hospitality and service industry (Equal Opportunities Commission, 2019). It comprises smaller, career-oriented subjects aimed at providing more vocational training and career-related skills to EMS (Oxfam Hong Kong, 2014).

These observations regarding ApL(C) are supported by the interviewed principals in Chapter 4, who serve as the gatekeepers of EMS in various schools. It seems that both the ApL(C) and the GCSE Chinese subject are equally low in standards, but the former is more focused on vocational training, while the latter is an academic subject.

The ApL(C) offers a simpler analytical approach compared to the more complex Learning Framework. Its effectiveness directly determines whether the EDB's initiatives under this framework have succeeded or failed over the past decade.

Post-implementation of the Learning Framework

Studies in the public domain have assessed whether the Learning Framework, following its implementation, has effectively improved the Chinese proficiency of EMS.

The Legislative Council passed a motion urging the EDB to provide teachers with more unified and suitable teaching materials and guidelines to alleviate the unnecessary administrative burden on them, thereby allowing them to focus on enhancing teaching and learning in class (Legislative Council Subcommittee on Rights of Ethnic Minorities, 2016).

Oxfam Hong Kong *et al.*'s (2020, pp. 40-41) interviews with principals and teachers with a collection of completed 121 principal questionnaires and 1,230 teacher questionnaires revealed that some principals expressed the opinion that the Learning Framework only broke the Chinese students' learning content into small pieces and was not tailor-made to meet the needs and learning characteristics of EMS.

Nevertheless, what should concern us in particular are the findings published by the EOC, a statutory body established to combat discrimination in Hong Kong. The EOC's reports have

revealed significant gaps and problems within the Learning Framework which I have summarised in the following manner.

The EOC strongly urges the HKSAR government to consider various options to provide a level playing field for EMS in tertiary education and the job market. A report conducted by the Working Group of EOC in 2019 revealed fundamental gaps in the Learning Framework identified by experts engaged by the EOC, which prevented the Learning Framework from serving as a Chinese-as-a-second-language curriculum, as intended by the EDB.

These gaps include:

- (a) the absence of a complete Chinese as a second language learning system in terms of curriculum, teaching and learning materials as well as examinations and assessments;
- (b) absence of trained teachers to cope with ethnic minority learners;
- (c) the Learning Framework is not practical enough and it focuses on theories which are too broad for teachers to comprehend;
- (d) most Chinese subject teachers learnt Chinese and were taught to teach Chinese as a first language to Chinese students;
- (e) Textbooks published by different publishers are used by different schools;
- (f) EMS at the grassroots level are not able to have after-school tutorials and paid classes.

Two years later, based on empirical findings from a series of dedicated studies conducted with feedback from experts, important stakeholders, and racially disadvantaged groups, the EOC further reiterated the following gaps in the Learning Framework through a written submission to the Legislative Counsel in 2021:

- (a) unclear indicators to measure the progress of the Learning Framework;
- (b) insufficient teacher training and support;
- (c) available Chinese examinations are either too hard or too low in standard for EMS;
- (d) limited knowledge and access to information for ethnic minority parents (EMP) in school choice and examination options for EMS;
- (e) need for more integration in schools;
- (f) lack of continuing Chinese learning opportunities beyond secondary school;
- (g) inadequate support for ethnic minority parents (EMP) and ethnic community.

Lastly, the recommendations provided to the HKSAR government by the EOC in 2021 to address the gaps are as follows:

“Develop a comprehensive Chinese-as-a-second-language curriculum that includes a specific pedagogy, along with all necessary tools for teachers, textbooks, and teacher training” (Equal Opportunities Commission, 2021).

In conclusion, the efforts made and the support measures introduced by the EDB up to the Supplementary Guide in 2008 and the Learning Framework in 2014 are commendable and sincere.

Nonetheless, educating EMS is particularly complex, as these students enter schools in Hong Kong to study a challenging Chinese language at various ages, with differing learning levels and diverse linguistic backgrounds.

In any case, government policy reflects the aim and foresight of a government to improve the livelihood, standard of living, and standard of education of its people while the laws and statutes are there to complement and support the implementation of the policies.

In terms of legal contexts, I shall fully explore them in Chapters 5 and 6. In the meantime, through the following introduction of educational and academic structure, we will see that the educational options available to EMS in Hong Kong are largely limited to government or subsidized schools due to the limitations of their low socio-economic status.

The Education System and Admission Policies of Schools in Hong Kong

Therefore, it is essential to understand the academic structure, types of schools, recruitment criteria and admission policies of different schools to understand what process an EMS must go through in admission from kindergarten to secondary schools. Throughout my research, I have found that EMS encounter discrimination not only in university admissions but also from the first day in Hong Kong’s education system until their graduation from secondary school. This phenomenon has persisted for over two decades since the handover of Hong Kong to China in 1997.

The admissions to kindergartens and secondary schools are introduced below and I will leave the IA of the primary schools and the admission to public universities to Chapter 3 where I will

do a full analysis of these two issues affecting EMS under the heading of “Primary School’s Internal Assessment (IA)” and “Admission Requirements of Universities”.

Kindergarten

Children between the ages of 3 and 6 can be admitted to kindergartens run by non-profit institutions or by private enterprises. The Free Quality Kindergarten Education Scheme was introduced in the 2017-2018 school year, and it extended free education in Hong Kong from 12 years to 15 years, making early childhood education available for the poorest families. In other words, a student in Hong Kong, if he does not choose to study in a private school, is entitled to 3 years of free education from K1 to K3 in kindergarten, followed by 6 years of education in primary school and 6 years in secondary school (Education Bureau, 2021b).

The first day of a child’s kindergarten study is the golden period for EMS to build up the most important foundation for language acquisition. In 2018, a survey was conducted by the statutory body EOC (2018) with 179 kindergartens which joined the newly implemented Free Quality Kindergarten Scheme. This survey revealed that 11.7% of kindergartens declined applications from EMS at the admission stage and about 20.5% of the kindergartens took Chinese language proficiency as a selection criterion for admission, over 30% of the surveyed kindergartens with EMS responded that they did not provide support to help the students learn Chinese. Hong Kong Unison, a non-governmental charitable organisation established in 2001, whose primary task is to advocate policy changes for ethnic minorities and aim at achieving equality in education for EMS, conducted a number of relevant surveys involving EMS.

A telephone survey in 239 kindergartens in Hong Kong was conducted by Hong Kong Unison (2015a, pp.1, 8-10) between December 2014 and April 2015 to find out the admission requirements for applicants who are EMS. It was revealed that more than 60% of these kindergartens conducted admission interviews in Chinese, less than half expressed willingness to make adjustments or conduct the interviews in English for EMS, only 10% of kindergartens would provide interviews in Cantonese or English.

The varying Chinese language ability among EMS was said to be the difficulty experienced by a number of 70 kindergartens out of 102 responses collected from another survey. Only 7% of the kindergartens approached stated that they did not encounter any difficulties (Hong Kong Unison, 2012). Most kindergartens required the applicant to speak and comprehend Cantonese

during the interviews. It is thought to be an impossible task for a 3-year-old EMS, whose mother tongue was not Cantonese, to attend an interview which required an understanding of Chinese (Hong Kong Unison, 2015b, pp. 8–9).

A student's ability to learn two or three languages in early childhood and kindergarten education was crucial to a student's linguistic development for schooling in CMI Schools (Chomsky, 2005; Hau, 2008). However, most kindergartens did not have formal support measures or structures to help EMS with Chinese in school. This seriously impeded the progress of learning and development of the Chinese language from the early days of EMS' childhood (Hong Kong Unison, 2020b, p. 6). This further results in a ripple effect towards EMS' later learning journey beyond the kindergarten stage.

Primary and secondary schools

Students are entitled to 6 years of free education in primary school and 6 years in secondary school. This free education provided by the HKSAR government is available in government schools or aided schools. These schools accommodate EMS with low socioeconomic backgrounds. The system in Hong Kong is complex: there are seven types of schools (Education Bureau, 2020).

Government schools

Schools which are fully aided and operated by the HKSAR government and where a tuition fee is not required. The staff and teachers in government schools are civil servants employed by the EDB. A small number of schools in Hong Kong are government schools. In 2019, there were 34 government primary schools, 31 government secondary schools, 421 primary aided schools and 359 secondary aided schools (Education Bureau, 2020).

Aided-schools (or subsidised schools)

Aided schools are run by local charitable and religious organisations and are fully subsidised by the HKSAR government. Some miscellaneous expenses may be collected from students studying in senior secondary school. This thesis employs “aided schools” and “subsidised schools” as interchangeable terms (Education Bureau, 2020).

Direct subsidy scheme schools (DSS)

Private schools operate with subsidies from the HKSAR government for the purpose of enhancing the quality of education of the school. DSS schools enjoy a high degree of autonomy in designing their own curriculum and determining school fees. School fees of DSS schools may range from a few thousand to over a hundred thousand Hong Kong dollars per year (Education Bureau, 2020).

Private schools

Schools that receive no subsidy from the HKSAR government. They are free to determine and charge tuition fees and devise their own curriculum (Education Bureau, 2020).

The above four types of schools adopt local curricula, and they prepare their students for local examinations. Upon completion of Secondary 6, students take the HKDSE before their entry into universities.

On the other hand, the following three types of schools adopt non-local curricula.

English Schools Foundation (ESF) Schools

The ESF is a public body established under the ordinance in Hong Kong, and it is the largest EMI international school organisation in Hong Kong, with 23 kindergartens, primary and secondary schools in Hong Kong. The schools adopt a United Kingdom curriculum and it admits English-speaking students.

Hong Kong has 54 primary and secondary international schools, including 17 of which are operated by the ESF (English Schools Foundation, 2024). These schools offer different non-local curricula, including the national curriculum of the United Kingdom, the United States, Australia, Canada, Japan, Singapore, Korea, Germany, France and others such as the International Baccalaureate (IB) programmes.

Private Independent Schools

This is another category of private schools in Hong Kong, but they are receiving grants from the HKSAR government with an undertaking to receive not less than 70% of students as local Hong Kong students. Most private independent schools offer non-local curriculum (Education Bureau, 2020).

As far as EMS are concerned, the government schools and the aided schools in Hong Kong are or probably are the only two school avenues to which they will gain admission in order to enjoy free education due to their very limited family resources.

**Admission to Government, Government-aided and DSS Primary and Secondary schools
Discretionary Places (DP) admission.**

For primary school applications, parents can apply for their children to only one government or aided school through DP system. Unsuccessful applicants proceed to the Central Allocation (CA) system.

For secondary school applications, EMS may apply to up to two secondary schools. Their academic performance under the Secondary School Places Allocation (SSPA) system will be considered.

Under these systems, students are considered on an individual basis under a point system or the school's educational philosophy, taking into consideration the student's performance, language proficiency, academic achievement, religious background, whether he or she has any parents or siblings studying at the same school. However, the schools are under no obligation to disclose why a student is admitted or rejected according to the EDB (2021).

Similarly, there is no way for an EMS to find out why he or she is not admitted into a school he or she applies to. Prestigious or reputable schools have a much higher expectation of the academic performance, calibre, and background of the student applicants.

Central Allocation System

Student applicants who cannot get a place in a primary or secondary government or aided school through DP admission must go through the CA system. Both applicants are entitled to submit a list of up to 30 school choices to the EDB.

The assignment of a place is based on random selection, taking into consideration several factors, including the proximity of the school "net", that is, the residential address of the applicant to the school.

Realistically speaking, whether a student enters a primary or secondary school through the DP admission or the CA system, the concern for EMP and / or EMS is the reputation and prestige of the schools. This ultimately questions the equality and fairness in academic competition between Chinese students and EMS.

This comes to the end of the introduction of the education system and academic structure of Hong Kong. With this background information and knowledge in mind, we will proceed to approach the two core issues in Chapter 3, that is, the IA, which EMS have to go through in the primary school stage to determine which secondary schools they should go to and the admissions to the public universities in which a Chinese language qualification is a compulsory requirement. These core issues are the determinants of prejudice, which trigger a full argument of educational disadvantage and discrimination, leading to the full legal analyses in Chapters 5 and 6.

Conclusion

The socioeconomic status and income of the families of the Pakistani and Nepalese EMS are low in Hong Kong. Whether they are born in Hong Kong or have come to Hong Kong to settle down here from different countries, government schools and government-aided schools with a local curriculum seem to be their only choices to complete their primary and secondary education. Private schools and international schools with a General Certificate of Education (GCE) or IB curriculum are beyond their means and resources. Under various limitations, academic structure and education system, the EMP will become aware of their children's destiny in Hong Kong sooner or later: EMS have no choice but to study Chinese under difficult circumstances.

The onset of discrimination against EMS is seen on the first day of kindergarten education. Some kindergartens decline admission of EMS, citing difficulty in teaching EMS in the class and Chinese speaking is required in interviews for three-year-old EMS as a selection device (Hong Kong Unison, 2015a). Therefore, EMS suffer discrimination as early as the time they seek admission to kindergartens. To compound the problem, the Chinese curriculum has always been designed to teach Chinese students without specific attention paid to the needs of EMS. With the complexity of horizontal and vertical strokes in Chinese characters and a lack of phonetics or phonics to pronounce Chinese words, Chinese is a difficult language to learn for foreigners and the situation is aggravated by the lack of parental support and guidance at

home with very limited resources to hire private tutors to assist EMS. Moreover, the adequacy of experienced and qualified teachers to teach EMS is questionable.

Despite the great importance of the Chinese language, which is essential for social integration and employment, EMS are destined to study the GCSE Chinese subject, equivalent to primary 2-3 level, to fulfil the minimum requirement on Chinese for the public universities' admission entrance.

Ironically, the HKSAR government requires students to take a GCSE Chinese subject before entering tertiary education; however, this GCSE Chinese subject is deemed to be insufficient for further study and for work and its elementary standard is unable to prepare EMS to participate in Hong Kong socially, academically or professionally (Burkholder, 2013).

Currently, the EMS' standard in Chinese remains low. The GCSE Chinese subject is almost their only option to meet the alternative Chinese language qualification requirements for admission to public universities. Since 2014, when the HKSAR government began implementing more proactive measures to support EMS in Chinese language learning, there has been no clear improvement in their Chinese proficiency.

Despite the fervent promotion of mother-tongue language education after the handover in 1997, later modified amidst significant protests from schools and parents over academic freedom concerns, the HKSAR government has not yet introduced innovative, fully adaptive teaching methods to support EMS in Chinese language studies, both before and after 2014.

Capitalising on years of experience of hardship and difficulties faced by the EMS in learning Chinese after 1997, it is imperatively required for the HKSAR government to formulate a "Chinese as a Second Language Curriculum" for the EMS, a curriculum which is distinguished from the traditional Chinese language curriculum which has been principally designed for the Chinese students only.

Chapter 3: Opportunity, Inequality against Ethnic Minority Students from Chinese Incompetence on Path of Education

Introduction

Chapter 2 revealed the inherent unfairness of the academic system of Hong Kong, from kindergarten to secondary schools, against ethnic minority students (EMS) in Hong Kong. This chapter delved further into two broad issues, the Internal Assessment (IA) of Primary Schools of subjects including Chinese for the students' promotion to secondary schools and the admission requirements to public universities in which an assessment of a points conversion system of the General Certificate of Secondary Education Examination Chinese subject (GCSE Chinese subject) of EMS and the Hong Kong Diploma in Secondary Education Examination Chinese subject (HKDSE Chinese subject). This Chapter analyses whether these two issues have caused any educational disadvantage and discrimination to EMS until the moment they reach tertiary education in Hong Kong.

In sequence, the IA in primary schools will be explained and explored first to find out what effect the Chinese subject has towards EMS before they are promoted to secondary schools.

- a) Overview of Secondary School Admission Methods in Hong Kong
- b) Chinese Subject in Primary Schools' IA
- c) Importance of Chinese Proficiency in Discretionary Places

After that, the path and process to admission to public universities will be introduced in detail and these include:

- a) The concept and system of the Joint University Programmes Admissions System (JUPAS);
- b) Entrance requirements of universities in relation to the Chinese language qualification and other subjects;
- c) The introduction of a point conversion system for the Chinese subjects;
- d) The introduction of a new subject: Applied Learning (Chinese) (ApL (C)); and
- e) The process of appeal under JUPAS.

Primary schools' Internal Assessment (IA) for admission to secondary schools: Secondary Schools Places Allocation (SSPA)

The Hong Kong Special Administrative Region government (HKSAR government) makes arrangements for primary school students to enter different secondary schools under the SSPA system. SSPA consists of two stages, namely Discretionary Places (DP) and Central Allocation (CA) (Education Bureau, 2021a, p. 3). Pupils who wish to participate in SSPA will have their primary schools' IA results in primary 5 and primary 6 forwarded to the Education Bureau (EDB) for processing and classification into 3 bands (Education Bureau, 2021a, p. 4).

As briefly outlined in Chapter 2, the DP stage, students and parents may apply to up to two secondary schools of their choice. Secondary schools will select applicants by criteria of their choice, which is required to be made public (Education Bureau, 2021a, p. 3). While students who are accepted by their desired schools during the DP stage secure their places before the final IA, the fate of the remaining students depends on the results of the CA. Despite the explicit criteria such as students' indication of will, banding, and availability of S1 places, CA is widely known as the "big lucky draw" for these criteria are too general and unpredictable that not all students are admitted to their desired schools. In 2019, only 74% of students participating in CA were allocated to their top three desired schools (Hong Kong Special Administrative Region Government, 2019).

In summary, both DP and CA are conducted based on the banding of students deduced from the IA, except for the additional admission criteria and higher autonomy in selection by secondary schools during the DP stage. With respect, the classification of these three bands largely decides whether the primary school students go to the most, less or least prestigious secondary schools in Hong Kong.

Chinese Subject in Primary Schools' IA

Schools admitting most Band 1 students will be labelled by all the parents as "Band 1 schools", schools admitting under-achievers or below-average students (Chan, 1999, pp. 179–180) are labelled as "Band 3 schools", with Band 2 in the middle for the average students. The contrast of these three bands determines the quality of teaching and students and the prestige of the schools. As far as EMS are concerned, the reality is schools in the Band 3 category have a high proportion of students who are EMS (Cheung, 2015) and most EMS are relegated to a handful

of “Band 3” secondary schools (Poon and Lin, 2015). It is due to a requirement for Chinese language in the primary school’s IA since Chinese, together with English, Mathematics and General Studies are the four core subjects whose marks will be assessed and given heavy weight (Loper, 2004, pp. 3, 10). Inevitably, EMS will perform less well on the Chinese exam paper than the Chinese students whose mother-tongue is Chinese and the contents of the Chinese exam paper are one and the same for all primary school students (Wang, 2022, p. 6).

Band 1 schools, with their prestige and reputation, require high academic achievement for admission. Students who are not good in Chinese, such as EMS and those with undesirable academic performance, are often assigned places in schools which traditionally accept EMS and these are usually “Band 3 schools” in Hong Kong (Loper, 2004, p. 5). Burkholder (2013) remarked that most EMS end up in a handful of “Band 3” (the lowest band) secondary schools in Hong Kong.

In fact, primary schools need to prepare EMS to achieve the same level as the Chinese students when they reach primary 5 so that they can participate in the IA of the same set of Chinese examination papers as Chinese students for the SSPA. Some teachers expressed this as unfair as the Chinese language result would drag down the overall learning performance of EMS, making it impossible for them to attend better schools (Oxfam Hong Kong *et al.*, 2020, pp. 14–16). Some teachers expressed that even if they tried hard to teach EMS, it would be challenging to help EMS catch up with the level of Chinese students, which discouraged teachers. A majority of principals or teachers confirmed that despite adopting some special teaching measures, it is still difficult for EMS to reach the same language abilities as the Chinese students from the same grade before the SSPA (Oxfam Hong Kong *et al.*, 2020, pp. 14–16).

A simple table below tells us clearly to what extent EMS are affected in their admission to Band 1 secondary schools on the basis of their primary schools’ IA as the marks of each of the six subjects (including Chinese as one of the 4 core subjects) is subject to a different weighting before the final calculation of the scaled marks:

Table 3.1: Internal Assessment for submission of scores by primary schools

Subject	Marks on paper	Weighting	Scaled Marks
Chinese (core)	100	9	900
English (core)	100	9	900
Mathematics (core)	100	9	900
Liberal Studies (core)	100	6	600
Visual Arts	100	3	300
Music	100	2	200

Source: (Education Bureau, 2021a)

Note: The above table denotes that one mark achieved in Chinese becomes 9 marks in overall calculation, that is, one mark on the Chinese exam paper times a weighting of 9 = 9 scaled marks

In other words, if a student scores full marks on the Chinese exam paper, he or she will achieve 900 scaled marks for assessment by the EDB. In view of this, it is imaginable to what extent it will affect an EMS in his admission to Band 1 and Band 2 secondary schools in Hong Kong. Thus, a clear hurdle appears in sight in the early stage of academic studies while EMS are in primary schools.

Importance of Chinese Proficiency during DP Stage

DP takes place in March of the pupil's matriculating year before the final primary school's IA. SSPA-participating secondary schools may reserve up to 30% of their Secondary 1 quota for DP (Education Bureau, 2021a, p. 3). The EDB granted schools the freedom to set their admission criteria. Most schools take into account academic performance, conduct, extracurricular activities, and interview performance when selecting students. Some schools also give weight to auxiliary factors such as family connection with the school or the sponsoring bodies, as well as religious background (Sir Ellis Kadoorie Secondary School (West Kowloon), 2025; Ying Wa Girls' School, 2025). Most schools do not separately handle EMS applications.

Since secondary schools are forbidden from conducting any form of written test, they are entitled to retrieve DP “rank order list” from the EDB (2008, pp. 1–2) which records students’ academic achievement in their previous IA, in which the result of Chinese Language is given higher weight as a core subject as aforementioned.

Apart from the inherent academic result disadvantage from the aforementioned Chinese IA, EMS also suffers a disadvantage from their relatively low Chinese proficiency revealed during interview stages. It is not uncommon for schools, such as Baptist Lui Ming Choi Secondary School (2022) and Sacred Heart Canossian College (2025), to put Chinese and English language proficiencies as separate admission criteria. Although it is not known whether schools give extra weight to the IA results in Chinese and English subjects or language proficiency performance during the potentially bilingual interviews, the existence of Chinese proficiency as an admission criterion is already imposing adversity against EMS.

Mechanism of Joint University Programmes Admissions System (JUPAS)

JUPAS was launched in the early 1990s in Hong Kong and the scheme enables local secondary school students, on the strength of their results obtained in the Hong Kong Diploma of Secondary Education (HKDSE), to apply for admission to a full-time bachelor’s degree programme offered by any one of the nine universities. These nine universities are shown in Table 3.1 below. Eight of these participating universities, except Hong Kong Metropolitan University (formerly known as the Open University of Hong Kong), receive grants and funds from the HKSAR government through the advice of the Universities Grants Committee (UGC) and are generally referred to as UGC-funded universities. The UGC is a non-statutory advisory body set up by the HKSAR government to advise the government on the development and funding needs of the funded universities (University Grants Committee, 2017).

For convenience, I shall refer to these nine universities under JUPAS as ‘public universities’. For the admission requirements of each public university, I examined, studied and compared all the official websites of the universities thoroughly. Their data will be analysed in this chapter (Joint University Programmes Admissions System, no date a).

Table 3.2: Public Universities

Name of institution	Type
The University of Hong Kong	Public
The Chinese University of Hong Kong	Public
The Hong Kong University of Science and Technology	Public
City University of Hong Kong	Public
The Hong Kong Polytechnic University	Public
Hong Kong Baptist University	Public
The Education University of Hong Kong	Public
Lingnan University	Public
Hong Kong Metropolitan University	A self-funded Public

Note: Hong Kong Metropolitan University was financed by the HKSAR government at one time between 1989 and 1993. After that, it became a self-financed institution, enjoying further autonomy, and receiving subsidies or loans from the government from time to time.

Chinese Language Qualification for Public Universities

It is a compulsory and minimum requirement for students studying under the local curriculum to submit the result of a Chinese subject examination under HKDSE. I refer to this subject as “HKDSE Chinese subject” throughout this thesis. Starting from 2008, the Legislative Council Panel on Education, confirmed that the public universities would accept alternative qualification(s) in Chinese subject from EMS on condition that two conditions are fulfilled (Legislative Council Panel on Education, 2008):

- a) The applicants have learnt the Chinese language for less than 6 years while receiving primary and secondary education. This caters specifically for applicants who have a

late start in the learning of the Chinese language (e.g. due to their settlement in Hong Kong well past the entry-level) or who have been educated in Hong Kong sporadically;
or

- b) The applicants have learnt the Chinese language for 6 years or more in schools but have been taught an adapted and simpler Chinese language curriculum not normally applicable to the majority of applicants in local schools.

This acceptance of an alternative Chinese qualification by public universities is said to be a significant step toward addressing the need for higher education of students who are non-Chinese speaking and who may have genuine difficulties in meeting the general Chinese Language qualification required by the public universities from the Chinese students.

The alternative qualification(s) in Chinese subjects include the General Certificate of Education (GCE), General Certificate of Secondary Education (GCSE) and International General Certificate of Secondary Education (IGCSE), etc. Under the local curriculum, EMS are taught the GCSE in Hong Kong which is equivalent to the Chinese language of about primary 2-3 standard (Kapai, 2012). Therefore, throughout this thesis, I will only refer to and focus on the GCSE Chinese subject when I wish to draw a comparison between this subject and the HKDSE Chinese subject.

Non-JUPAS Student Applicant

Students who are studying in international schools in Hong Kong or students who are from foreign countries are treated as non-JUPAS applicants when they apply for admission to one of the public universities. The rationale for this is, unlike the local students, they are studying a non-local curriculum, such as the GCE or the International Baccalaureate (IB), European curriculum and so on.

In practice, non-JUPAS applicants enjoy either of the two benefits below when they apply for admission to any one of the public universities:

- a) There is no need to have a Chinese language qualification, an English language qualification is sufficient for subjects that do not require Chinese; or
- b) A second language, not necessarily the Chinese language, is required.

The obvious advantage enjoyed by non-JUPAS students over EMS is that they do not have to fulfil the minimum requirement for the Chinese language qualification by submitting a Chinese subject under GCSE, GCE, IGCSE, etc. This is the situation even though the non-JUPAS students and EMS in Hong Kong are both students from ethnic minority backgrounds.

It is ironic that the benefits mentioned above are also available to non-JUPAS applicants who happen to be ethnically Chinese and receive education in Hong Kong in an international school or in an overseas country. This practically means that any EMS from Hong Kong who is not able to afford the expensive school fees of the international schools is not able to enjoy benefits that are available to non-JUPAS applicants only. For example, the school fees for primary schools and secondary schools run by the English Schools Foundation are between HK\$132,500 and HK\$173,900 per year, depending on which stage of the primary or secondary school studies (English Schools Foundation, 2024). Similarly, the fee for private universities is also beyond the means and resources of EMS' families and the fees are set at an average of about HK\$80,000, which is double the fees charged by public universities per year (Joint University Programmes Admissions System, no date a). By contrast, the tuition fee for the public universities is uniformly set at HK\$42,100 per annum for most bachelor's degree programmes. Besides, there are government support, grants or loans to university students for the public universities. In view of all these practical circumstances, EMS can only expect to attend public universities in Hong Kong.

Table 3.3 lists out all the private universities in Hong Kong.

Table 3.3: Private Universities

Name of institution	Type
Hong Kong Shue Yan University	Private
Hong Kong Chu Hai College (former Chu Hai College of Higher Education)	Private
The Hang Seng University of Hong Kong (former Hang Seng Management College)	Private
Tung Wah College	Private

Saint Francis University (former Caritas Institute of Higher Education)	Private
The Technological and Higher Education Institute	Private
Centennial College	Private
Hong Kong Nang Yan College of Higher Education	Private
Hong Kong College of Technology	Private

Private universities in Hong Kong, albeit with relatively lower admission requirements and ranking (QS Top Universities, 2023), are not accessible to EMS either because of the higher tuition fee, selection of Chinese language as the teaching medium, or the limited range of specialties.

Admission Requirements of Universities in Relation to the Chinese Language Qualification and Other Subjects

In order to understand how admission requirements function, it is necessary to first describe the structure of the schooling curriculum that leads to the HKDSE. The HKDSE examination is taken after the completion of secondary school and its academic results are recognised by the public universities. Based on the gradings of the subjects, the public universities consider and assess the student applicants for admission to the public universities.

The HKDSE was introduced in Hong Kong in 2012 by the Hong Kong Examinations and Assessment Authority to replace the Hong Kong Certificate of Education (O level) and the Hong Kong Advanced Level Examination (A-Level) (Hong Kong Examinations and Assessment Authority, no date a). Subjects are classified into 3 categories, namely, Category A, Category B and Category C. There are 24 senior secondary subjects, among these, Chinese language, English language, Mathematics, Liberal Studies are the four core subjects in addition to 20 elective subjects under Category A. These elective subjects, for example, include Physics, Chemistry, Biology, History, Geography, etc. (Hong Kong Examinations and Assessment Authority, no date a).

However, Liberal Studies has been replaced by a new subject named ‘citizenship and Social Development’ effective from 2024 HKDSE. According to the Hong Kong Examinations and Assessment Authority (2021), Citizenship and Social Development adopts a pass-fail grading scale but it has limited effect on this thesis given the time gap in research and the 2024 HKDSE.

Category B includes several Applied Learning subjects, which are treated as elective subjects. The Applied Learning courses offer studies with emphasis on practice and theory linked to the professional and vocational fields, for example, these subjects include Business, Engineering, Applied Science, Media and Communication, etc (Hong Kong Examinations and Assessment Authority, 2021, pp. 12–23). Category B includes the subject ApL(C), which was introduced in the school year 2014/15 by the Legislative Council Panel on Education (2008), and became an acceptable alternative Chinese language qualification which fulfils the minimum requirement of public universities.

Lastly, Category C consists of foreign languages, namely, French, German, Hindi, Japanese, Spanish, and Urdu. However, Bigexam’s (2022) statistics revealed that only 39 out of 446 schools in Hong Kong offer the above foreign language subjects. Besides, foreign languages are treated as elective subjects, and they are not an alternative Chinese language requirement for public universities. For easy reference, Table 3.4 summarises all subjects under the three categories.

Table 3.4: A summary of all subjects under the 3 categories

Category	Subjects included under the Category
Category A	24 new senior secondary subjects including 4 core subjects
Category B	Applied learning subjects including ApL(C), which is accepted as an alternative Chinese language qualification by public universities under JUPAS
Category C	Other Language subjects which are treated as elective subjects

To be eligible to apply for admission to one of the public universities, a student studying under the local curriculum HKDSE must submit his academic results from the 4 core subjects unless he is an EMS fulfilling the two conditions and this enables him or her to submit an alternative Chinese language qualification (Joint University Programmes Admissions System, no date a). Regarding the elective subjects, some public universities need to see the academic results of the best five subjects and some need to see the best six. This means that some university programmes require the results of the core subjects to be combined with one or two elective subjects.

The Hong Kong Examinations and Assessment Authority has announced that students may take a maximum of eight subjects, i.e. the four core subjects and four elective subjects in the HKDSE, as long as the fourth elective subject is one of the subjects of Visual Arts, Music, Physical Education, Ethics and Religious Studies or a subject in category B or category C (Hong Kong Examinations and Assessment Authority, no date b). Therefore, the students can choose up to four elective subjects for study according to their interests and ability. Through this selection of elective subjects, it is hoped that the best five or the best six subjects required by various public universities can be satisfied (Hong Kong Examinations and Assessment Authority, 2021, p.1).

After introducing the four core subjects with one to two elective subjects as required by the public universities, there is a minimum requirement for grading from all these subjects. Subjects under the local curriculum HKDSE are given “level” as grading as opposed to the GCSE, GCE, IGCSE subjects which are given “grade” due to their foreign syllabus status. Some universities require one elective subject, such as Lingnan University, whereas others require two, such as the University of Hong Kong (HKU) (Lingnan University, no date; Joint University Programmes Admissions, no date).

Table 3.5: Minimum admission requirements for Level in 4 core subjects

Core Subjects	Minimum Level
Chinese Language	3
English Language	3

Liberal Studies	2
Mathematics	2

The above table indicates the minimum level required for each subject by the public universities. Furthermore, there is a formula to calculate ‘points’ through the conversion of the level into points from all the HKDSE subjects. It is this point conversion system of the two Chinese subjects taken by the Chinese students and EMS which triggers intensive research that results in an analysis of discrimination and educational disadvantage against EMS in their application for admission to public universities.

The Point Conversion System of the Chinese Subjects

The level of the subjects is converted into points as below:

Table 3.6: Points conversion of different levels in HKDSE subjects

Level of the subject	Converted into points
Level 1	1 point
Level 2	2 points
Level 3	3 points
Level 4	4 points
Level 5	5 points
Level 5*	6 points
Level 5**	7 points

Source: (The University of Hong Kong, 2018)

Level 3 for the HKDSE Chinese subject is treated as a minimum for an admission to public universities. Therefore, this invites the question of what the minimum grading required from a GCSE Chinese subject and from the ApL(C) are. More importantly, are these two Chinese subjects subject to the same point conversion system as the HKDSE Chinese subject? The point

conversion system and various modes of grading of the different Chinese subjects can be complicated especially as there have been a few universities following the change in the grading of the GCSE. Starting from 2017, the scale of grading of GCSE Chinese subject was reformed from A*, A to G and U (Unclassified) to 9 to 1 and U (Unclassified) (Pearson Education Ltd, 2017). In other words, A* used to be the highest grade, and 9 is now the highest grade for this Chinese subject.

Table 3.7: New grading scale for GCSE subject

New GCSE Grading Structure	Past GCSE Grading Structure
9 8 7	A* A
6 5 4	B C
3 2 1	D E F
Unclassified	Unclassified

Source: (Pearson Education Ltd, 2017)

I compiled 9 tables and attached them under Appendix 8 to this thesis in order to give a clear idea as to what minimum grade is required from each public university from the GCSE Chinese subject and the ApL(C) (Joint University Programmes Admissions System, no date a). For the sake of completeness, I also put down the minimum grade required from IGCSE, GCE O Level, A-Level and Advanced Level Chinese subjects, but there is no need to elaborate on these subjects as our focus is on GCSE Chinese subject which is taught in the local curriculum and is generally taken by EMS in Hong Kong. As I said before, we will also focus on the ApL(C), another alternative Chinese language qualification accepted by the public universities since 2014/15.

In sum, by comparing these 9 tables in Appendix 8, a conclusion can be reached that some public universities require a minimum grading of grade E or grade 3 from the GCSE subject and some public universities require grade C or grade 4 from the same subject. This does not make much difference in my analysis as we are most concerned with how many points a grade D-E, grade 3-4 under the GCSE Chinese subject can earn compared to the same level in the HKDSE Chinese subject. After all, the easiest way to find out whether there is any discrimination is to determine how many converted points are awarded to the highest level in HKDSE Chinese subject and the highest grade in GCSE Chinese subject respectively.

As a point of interest, there is no answer to this mystery because none of the public universities gives any information anywhere on their websites that the converted points of the highest grade of the GCSE Chinese subject is equivalent to the HKDSE Chinese subject despite the information that 7 points or 8.5 points (with a few universities as a recent reform in points conversion) are explicitly said to have achieved by a student achieving the highest level 5** HKDSE Chinese subject.

Nevertheless, fulfilling the minimum result requirement does not guarantee that student applicants will be accepted into public universities. Diverse and flexible as the description of ‘institutions’ programmes will consider not only the HKDSE Examination results’ may seem (Joint University Programmes Admissions System, no date b), the core of JUPAS is its competitive basis that all universities admit students in a merit-based manner according to their HKDSE results, i.e. the better the HKDSE results are, the higher the admission opportunity is (The University of Hong Kong, no date; The Chinese University of Hong Kong, 2023; The Hong Kong University of Science and Technology, 2022; City University of Hong Kong, no date; The Hong Kong Polytechnic University, no date; Hong Kong Baptist University, no date; The Education University of Hong Kong, no date; Lingnan University, no date).

Category A

There are 7 levels in a subject under Category A and HKDSE Chinese subject is within this category. Level 5** is the highest level for this subject and Level 1 is the lowest. Each level is given one point under the point conversion system. The multiplying of each level by a ‘weighting’ is beyond the scope of our analysis. Simply put, Level 5** achieves 7 points and Level 1 achieves only 1 point. Below Level 1 is the ‘unclassified’ level.

The above is the traditional calculation for point conversion by the public universities. However, HKU, the Chinese University of Hong Kong (CUHK) and the Hong Kong Polytechnic University (PolyU) reformed their points conversion system since 2018/19 with the effect that Level 1 to 4 achieves 1 to 4 points respectively, Level 5 achieves 5.5 points, Level 5* achieves 7 points and Level 5** achieves 8.5 points (The University of Hong Kong, no date ; The Chinese University of Hong Kong, 2023; The Hong Kong Polytechnic University, no date). The Table in Appendix 9 provides information on the point conversion under all levels in public universities under JUPAS.

Category B

ApL(C) under Category B is awarded “Attained” or “Attained with Distinction” and any performance below the standard of “Attained” is “Unattained” (Hong Kong Examinations and Assessment Authority, no date b).

As shown in Appendix 8, the minimum requirement for the ApL(C) by all public universities is “” (Joint University Programmes Admissions System, no date a). Specifically, the PolyU states that this “Attained” or “Attained with Distinction” will be regarded as obtaining a Level 2 or Level 3 in HKDSE Chinese subject (The Hong Kong Polytechnic University, no date).

The Introduction of a New Subject: Applied Learning (Chinese) (ApL(C))

This is a relatively new subject introduced by the EDB to assist EMS in learning practical Chinese language. From 2014 to 2015, the ApL(C) courses were introduced to EMS. EMS, who are eligible to take the GCSE Chinese subject, are also eligible to consider and choose to take the ApL(C) instead of the GCSE Chinese subject or in addition to the GCSE Chinese subject. These courses are provided by course providers approved by the EDB with no public examination (Joint University Programmes Admissions System, no date a).

Briefly speaking, ApL(C) aims at training EMS in practical language skills, which links to a broad vocational field and an area of the hospitality industry such as wining and dining, hotel industry and customer services. In other words, from the HKSAR government’s perspective, assisting EMS in developing their career-related competencies and using Chinese as a

foundation in the workplace is the ultimate aim of introducing the ApL(C) (Curriculum Development Council and Hong Kong Examinations and Assessment Authority, 2009).

The Process of Appeal Under JUPAS

A right to appeal against a decision of a court is a constitutional right under Article 11(4) of section 8 of the Hong Kong Bills of Rights Ordinance (Cap. 383). All public universities are ‘public bodies’ established under legal statutes. Their decision-making has a profound influence on student applicants for university admission and the education system of Hong Kong. EMS should not be uncertain or discouraged in any stage or process of Chinese language learning and they have the right to know why the HKSAR government cannot do better to elevate their standard of Chinese and why the GCSE Chinese subject and ApL(C) they study is subject to a ceiling of assessment by the public universities. It is important to find out whether there is an available appeal process or mechanism for any EMS who does not know why he failed in his application for admission to a university programme with any of the public universities. Regrettably, the present process or mechanism of appeal of public universities is that either there is no appeal or that appeal is wholly discouraged. An EMS can almost never find out why his or her application for admission is rejected by public universities. The actual experience of academic difficulties will be elaborated in Chapter 4.

An appeal system does not seem to be available with most of the universities. The Hong Kong Baptist University (HKBU) is the only university out of the public universities which says, “*In case of any appeal or disputes regarding undergraduate admissions, please write to us via email...for further assistance*” (Hong Kong Baptist University, no date). The City University of Hong Kong (CityU) discourages appeals unless a student applicant can provide significant new written information for their consideration (City University of Hong Kong, no date). Table 3.8 is a clear indication as to how an appeal is handled and there is in fact no convenient avenue to appeal as a whole under JUPAS.

Table 3.8 Appeal Processes

(1)The University of Hong Kong (The University of Hong Kong, no date) “Submit questions” and “live chat questions” buttons are available but no information on appeal process can be read on the website. No frequently asked questions about the appeal process.
(2)The Chinese University of Hong Kong No information on appeal is available.
(3)The Hong Kong University of Science and Technology No information on appeal is available for local students but information for appeal through email for students holding international qualifications is shown on website
(4) City University of Hong Kong (The City University of Hong Kong, no date) In the frequently asked questions, the question “<i>Can I appeal if I am denied admission?</i>” can be read and the answer to the question is “<i>We strongly discourage appeals unless you can provide significant new information in writing for our consideration. Our admission decisions are based on a careful and thorough review of each application in comparison with the entire applicant pool. It is unlikely that we will reverse our original decision</i>”.
(5)The Hong Kong Polytechnic University No information on the appeal process can be read on the website.
(6)Hong Kong Baptist University (Hong Kong Baptist University, no date) At the bottom of the Contact Page, it reads “<i>In case of any appeals or disputes regarding undergraduate admissions, please write to us via email at ar@hkbu.edu.hk for further assistance</i>”.
(7)Lingnan University (8)The Education University of Hong Kong (9) Hong Kong Metropolitan University of Hong Kong (Lingnan University, no date; The Education University of Hong Kong, no date; Hong Kong Metropolitan University, 2019) Only “<i>contact information for inquiries</i>” is available for these three universities.

Conclusion

An EMS who is studying under the local curriculum is obliged to study and take an examination of the GCSE Chinese subject. Chapter 2 detailed that the Chinese language is a difficult language for EMS with no parental guidance and support and whose usual language or mother-tongue is not Chinese. After the handover in 1997, Chinese became a compulsory subject for admission to public universities. When the government realised it was extremely difficult, if not impossible, for EMS to take the HKDSE Chinese subject, the GCSE Chinese subject was recognised to be an alternative Chinese language qualification for public universities in 2008. However, it was soon understood that the GCSE Chinese subject was equivalent to primary 2 to 3, and therefore, career-related ApL(C) was introduced in 2014/15 to provide another alternative to the students. The offer of alternatives, though for a seemingly good reason to accommodate diversified capabilities of students of different origins, is unable to place their Chinese level anywhere near their native Chinese counterparts. The benefits of the introduction of the ApL(C) remain questionable.

Further, it is not transparent how public universities treat the GCSE Chinese subject as compared to the HKDSE Chinese subject under their assessment for university entrance requirements. The points converted from the grading of HKDSE Chinese subject are easily understood to be 7 points for the highest Level 5** except for three universities which recently changed the maximum to 8.5 points. The gradings of “Grade E / Grade 3” or “Grade C / Grade 4” were accepted by different public universities as fulfilling the “minimum requirement”. However, none of the official websites of public universities tell us how many points these grades can achieve. Similarly, none of the official websites of the public universities tells us whether the highest grading in the GCSE Chinese subject and the HKDSE Chinese subject are equivalent in points under the conversion system. Similarly, the availability of the subject ApL(C) from 2014/15 did not put an end to the mystery of the points conversion for the GCSE Chinese subject. On the contrary, the result of “attained with distinction” in the ApL(C) is recognised by public universities to be a fulfilment of the minimum requirement. By exception, the PolyU states that the result “Attained with Distinction” in this subject is regarded as obtaining a Level 3 in HKDSE Chinese subject. This example clearly confirms the conjecture that the alternative Chinese subjects taken by EMS are “inferior” or lower in points assessment by public universities, putting EMS’ chances of being admitted to universities in jeopardy.

Although public universities sometimes conduct interviews with student applicants, the points conversion is no doubt a crucial assessment and criteria for admitting or rejecting student applicants. EMS are kept in the dark, and they have difficulty finding out why they are not admitted to any university programmes they apply for. Further, there is no transparency under the admission policies of the public universities, nor were there any public statements or announcements made by any of the public universities on how the GCSE Chinese subject and the ApL(C) are fairly treated with the HKDSE Chinese subject. As such, real prejudice exists as these two Chinese subjects for EMS are not given equal status and marking as the HKDSE Chinese subject of the Chinese students by the public universities when the universities have to assess different Chinese subjects submitted by Chinese students and EMS for the purpose of seeking universities admission. Having set the scene of the background of EMS, the Chinese language education and examination in primary and secondary schools and finally, the points conversation issue in the public universities in the first three Chapters, I conducted further research by meeting with EMS, their principals and teachers to verify and confirm their circumstances in the next chapter.

Chapter 4: The Experience of Stakeholders and the Minority Rights

Introduction

One aspect of uncovering educational disadvantages that may give rise to discrimination is to explore the concerns, experiences, and knowledge of the stakeholders regarding the education of ethnic minority students (EMS), which may directly or indirectly affect their interests and legal rights.

For this purpose, I approached the stakeholders and set up meetings and interviews with the principals and teachers who have had experience in management or teaching in schools where there is an intake of EMS. I also interviewed EMS directly to understand the situation of their academic studies of Chinese in Hong Kong. These interviews helped me address all my research questions stated in Chapter 1.

In relation to the four research questions under this thesis research, the collective response from the interviewed EMS, principals and teachers directly or indirectly answered the following questions:

- a) How much has the Hong Kong Special Administrative Region government (HKSAR government) done after 1997 to assist EMS in Chinese language learning?
- b) How much do EMS know about their educational rights under the law?
- c) Did the HKSAR government fulfil her obligations under the law in this aspect?
- d) What is the position of the General Certificate of Secondary Education Chinese subject (GCSE Chinese subject) and Applied Learning (Chinese) (ApL(C)) and their effect on admission to public universities?

This Chapter is arranged in two parts: in the first part “Methods and Methodology”, I explain the methods and methodological approach which I adopted to seek and collect the views of the stakeholders under a structure of qualitative interviews. In the second part, I discuss my findings under six themes in collecting, analysing, and interpreting the data I collected from these stakeholders.

The first three themes derived from the interviews of the EMS are:

- i) Chinese language learning;

- ii) experiences of general discrimination;
- iii) understanding and awareness of legal rights.

The other three themes derived from the interviews of principals and teachers are:

- iv) government support and resources;
- v) perceptions of the problems for EMS in learning Chinese;
- vi) the public universities' admission requirements.

Methods and Methodology

The methodology is essentially the broad approach that addresses how to find information, organise it and interpret it to reach a result in a research (Coomans, Grünfeld and Kamminga, 2009). On the other hand, a data collection method is used to answer the research questions and interviewing is one of these methods.

Doctrinal and Non-doctrinal legal research

This thesis has strong characteristics of legal research as it studies and finds out whether there is educational disadvantage and discrimination against EMS which amounts to a legally actionable claim against the HKSAR government in Hong Kong Court. However, the law does not operate in a vacuum as the social norms, values, customs and habits in society have to be taken into consideration in conjunction with the law which monitors and controls human behaviour in an orderly society. Therefore, I need to balance doctrinal legal research focusing on the analysis of legal principles, laws and court judgments and non-doctrinal legal research focusing on the social dimension, socioeconomic transformation to which laws play an interactive role. I will fully elaborate on the methods and methodology of these doctrinal and non-doctrinal legal research in Chapters 5 to 6 where I will come to an extensive analysis of the legal system in the Hong Kong context.

On the other hand, I bear in mind the convenience as well as the limitations of conducting research with the World Wide Web page which has dramatically changed conventional research work in the last two decades. I reminded myself that surveys, journals and literature from scholars may not be entirely available on the Internet.

Fortunately, the education of EMS in Hong Kong has been a controversial and debated issue for the last two decades. This enabled me to access the local literature with less difficulty.

Following a collection of data from different primary and secondary sources to build up my library, I probed into my research by conducting a series of interviews with the stakeholders as part of my qualitative research.

Basis for Selection of Qualitative Methods

Qualitative and quantitative research are two of the basic types of research, but their objectives differ. Quantitative research is a process of scientific investigation to find out data through a quantity to support the theories of a phenomenon or explain social phenomena, whereas qualitative research investigates human behaviour and attitude towards a particular subject (Kothari, 2004, pp. 1–23).

In principle, there are three ways of considering qualitative methods: the researcher's view of the subject matter, the nature of the research questions and the practical reasons with reference to the nature of the qualitative methods.

For the purpose of my in-depth socio-legal research, it is important for me to understand the life experience of EMS who need to assimilate and integrate into a society in which over 90% of the population is Cantonese-speaking Chinese people. To achieve this purpose, I consider qualitative interviewing as an effective method to collect such data for my analytical purpose with reference to Patton (1985) as follows:

“Qualitative research is an effort to understand situations in their uniqueness as part of a particular context and the interactions there. This understanding is an end in itself, so that it is not attempting to predict what may happen in the future necessarily, but to understand the nature of that setting – what it means for participants to be in that setting, what their lives are like, what’s going on for them, what their meanings are, what the world looks like in that particular setting – and in the analysis to be able to communicate that faithfully to others who are interested in that setting.”

Criteria for Selection of Stakeholder Participants for my interviews

As explained in Chapter 2, I have selected Pakistani and Nepalese EMS as my research participants because these two groups, compared to other ethnic minorities in Hong Kong, have lower socioeconomic status. These are EMS who cannot afford to take the non-Joint University Programme Admissions Systems (non-JUPAS) route which allows them to escape from taking

the Hong Kong Diploma of Secondary Education Chinese subject (HKDSE Chinese subject). In other words, these EMS are the group of students who require the HKSAR government's intervention and support in assisting them to cope with the HKDSE Chinese subject. I approached the stakeholders such as EMS, principals and teachers to conduct qualitative research face to face.

Fortunately, through my voluntary work as a school manager for a secondary school for 4 years until 2018, I managed to have some connection networks with schools and principals. Through some of the school principals I became acquainted with, interviews were conducted with eight EMS from three different schools, six school principals and two teachers.

Age of EMS

In response to my research questions, I need to explore the experience of EMS and the experience of the school principals and teachers in the following areas:

- a) any possible hardship or hurdles which EMS may have had to face during their academic studies and competition with the Chinese students;
- b) EMS' awareness and understanding of their educational rights under the laws;
- c) the effect of the GCSE Chinese subject on EMS.

In this respect, the age and maturity of the students, years and experience of EMS' academic studies in Hong Kong is my consideration to determine who my interview participants should be. On this basis, through the arrangements of various school principals, I managed to approach and interview all my eight student participants over the age of 18. Out of these EMS, only two of them came to Hong Kong from Pakistan and Nepal when they were 18 and 17 years old respectively, the others were born or grew up in Hong Kong when they were children. Hence, these examples enabled me to study the various backgrounds of the interviews from a different perspective.

Initially, I planned to include parents of EMS in the interview list since I wish to explore their practical experiences and difficulties in raising their children in Hong Kong. However, I gradually realised its difficulty when I understood from the school principals that parents of EMS were often unwilling to take part in such interviews. Fortunately, the home environment of EMS and whether they have received parental support in their Chinese language study could be and had been obtained through interviews with EMS.

I created a pseudonym for each interviewee based on their given name or family name. Coincidentally, all the 8 EMS who attended my interviews were female in gender. However, for the purpose of this thesis research, the gender of EMS does not make a difference as long as they opt to study a GCSE Chinese subject or ApL(C) to public universities in order to meet the minimum admission requirement of the public universities. I focus on the Chinese subject learning experiences between EMS and Chinese students to explore discrimination.

Qualitative Interviews

In qualitative research using interviews, the researcher must decide on one of three broad approaches: structured, semi-structured or unstructured interviews. Lincoln and Guba (1985) suggest that structured interviews are useful when the researcher is aware of what s/he does not know and, on this basis, questions are designed to obtain the answer or knowledge required, whereas an unstructured interview is suitable when the researcher is not aware of what s/he does not know, and as a result, the researcher relies entirely on what the respondent tells him.

First, in a structured interview, each interviewee is usually asked the same question in the same way so that the neutrality of the interviewer's role is demonstrated, leaving little room for deviation, prompting, providing personal views or improvising (Fontana and Frey, 1994). Structured interviews permit comparability between responses. However, even "*with the most carefully designed and tested questions, it is too imprecise to allow exactly uniform communications*" (Ornstein 1998, p. 63). Therefore, structured interviews leave little room for the participants to speak freely and broadly as they need to fit themselves into boxes or frames which the researcher has predetermined.

Unstructured interviews are entirely open-ended allowing the respondent to raise whatever comes to mind about a broad topic. Since I was interested in specific aspects of the respondents' experience of education, I decided upon semi-structured interviews.

The semi-structured interview is characterised by providing an opportunity for the researcher to explore different forms of understanding of the individuals (Bryman, 1988). The researcher decides which questions to ask and in what order. It is inevitable that the researcher brings values, assumptions, beliefs or even biases to the research so it is important to monitor them as the research progresses. During the interviews, I was free to probe beyond the answers. I

viewed the interviews as exploring how my stakeholders understood and experienced what happened to them:

“The idea that interviewees may be ‘answering’ questions other than those we are asking them, and making sense of the social world in ways we had not thought of, lies behind many qualitative interview strategies. The logic that we should be receptive to what interviewees say, and to their ways of understanding, underpins much of the ‘qualitative’ critique of structured survey interview methods” (Mason, 2002, p. 231).

I have adopted semi-structured interviews to encourage new and open ideas from the participants, free from the rigidity of a structured interview. At the same time, it manages to keep the participants’ open discussion responding to questions within a frame or specified area (see Appendix 4 and Appendix 5 for the Interview Questions).

Ethical Conduct of the Interviews

Prior to all the interviews, ethical approval for my research was obtained from the University of Nottingham, and this written approval is exhibited in Appendix 1 of this thesis. In particular, qualitative research, through interviews, involves interaction and exposure to personal experiences. Therefore, the research aims and the interviews must be divulged to the gatekeepers and all the interviewees. Informed consent with sufficient information was prepared and provided beforehand. Purposely, I requested all principals who supported my thesis research to arrange and recommend students over 18 years of age to be the participants of my interviews for two reasons: First, these students attained the age of majority in Hong Kong and they themselves can make an informed decision to participate in the interviews. Second, they are more mature to tell us about their experience of studying in Hong Kong (Cap. 410 Age of Majority (Related Provisions) Ordinance).

Information Sheet (IS) and Informed Consent (IC)

The IS (Appendix 2) provides the participants with the basic and important information about why this thesis research is done. In addition, the Consent Form (CF) (Appendix 3) lays down all the ethical considerations, such as understanding the purpose of the research, freedom to participate and withdraw, confidentiality, etc.

To ensure the consent for interview was given after an informed decision was made based on the understanding of all relevant information and ethical matters, I served the IS and CF before the interview to the gatekeepers of EMS, that is, the principals or teachers, so that they had an opportunity to study the materials themselves. Following that, before my interview with any participant, I produced and went through the IS and CF again with them and reminded them that they could exercise any of their rights at all material times. Since the nature of my interviews explored the experiences of EMS in relation to other evidence (data, journals, literature, etc.) of educational discrimination and it also involved disclosures of family background, and discussion of the experience of general discrimination by EMS in Hong Kong, I had to pay utmost attention to the ethical feelings and culture of EMS in this respect.

Ethics “*concerns the morality of human conduct*”, it refers to “*the moral deliberation, choice and accountability on the part of researchers throughout the research process*”. There are complexities in “*researching private lives and placing accounts in the public arena*” with reference to Edwards and Mauthner (2002). Informed consent is essential if the research participants may be exposed to stress or embarrassment (Frankfort-Nachmias and Nachmias, 1992).

Conduct of the Interviews

I left full discretion to all the participants to choose the venue for our interviews to ensure their comfort and create a relaxing atmosphere. As a result of their choice, all interviews with the school principals, teachers and 5 students were conducted inside the premises of the schools where a room was provided. As for the other 3 students, the interviews were conducted in a quiet corner of a coffee shop. Similarly, the choice of language rests with the participants and Chinese (Cantonese language) was used throughout the interviews with school principals and teachers while English was used with all EMS. All the interviews lasted from about 45 minutes to slightly over 1 hour.

These stakeholders freely expressed their views during the interviews, touching upon, deviating from, and expanding on the relevant areas of my research. This explains why there may not be corresponding and standard replies obtained from each interviewee to each research area. The participants were informed that the interview would be conducted in audio-recording and they would be transcribed after the interview. I also reminded the participants before the

interview that I would not address them by their names. Instead, I would always address them by their pseudonyms to ensure anonymity and to encourage full and frank disclosure of their views and opinions.

Analysis and Interpretation of Interview Data

The audio recordings of the interviews were stored in my personal computer and the identity of each participant was marked with a simple English alphabet as a pseudonym to maintain their anonymity. I have attached one copy of the transcription to let the readers know what a full transcription of each interview is like. In this respect, I exhibited the interview of Principal Mr. Kong as Appendix 6.

I at least listened once or twice to recordings, and I had to listen repeatedly to some unclear recordings due to low voice levels during the interviews. I relied on my assistants to transcribe and type the contents of each audio recording. When written transcriptions for each interview were completed, I checked the accuracy of the work done and the contents of the conversation between the interviewee and myself. I carefully checked the translation from Cantonese to English for each interview conducted with school principals and teachers. Similarly, I carefully checked the English transcript's accuracy with reference to the English recordings. After an accurate transcription was produced, the next step was to analyse the data collected.

Coding

I arranged data under six themes, three for EMS and another three for the principals and teachers and I organised the findings section according to these themes. As far as EMS' transcription is concerned, I designed the following themes to compare and analyse the answers given to the students:

- a) Chinese language learning;
- b) experiences of general discrimination;
- c) understanding and awareness of legal rights.

Taking into consideration the principals' and teachers' broad experience and perspectives, I designed a different set of themes for them:

- d) government support and resources;
- e) perceptions of the problems for EMS in learning Chinese;
- f) the public universities' admission requirements.

By grouping all similar contents from the text of the data under each specific theme, I did my content analysis by analysing, examining, verifying and interpreting the contents of the written language (Flick, 2009; Mayring, 2014; Krippendorff, 2004) (see Appendix 7).

An analysis of the interview data was conducted to reflect the collective views of principals, teachers and EMS towards the Chinese language issue which has been under debate for the last two decades since the handover of Hong Kong to China in 1997. These analyses and interpretations appear below.

Table 4.1: Background of 6 school principals and their schools

Status	Pseudonym	Intake of EMS at school	Ethnicities of EMS
1 st Principal	Mr. Pau	An Aided School with 75% of students as EMS	Mainly Pakistani, Nepalese and others
2 nd Principal	Mr. Kong	A Direct Subsidy Scheme School with 70% out of 600 students being EMS	Mainly Pakistani, Indian with Nepalese and Filipino
3 rd Principal	Mr. Ching	An Aided School with 4 EMS only	Pakistani
4 th Principal	Mr. Abdullah	An Aided School with around 350 EMS	Pakistani and Nepalese
5 th Principal	Mr. Cheuk	An Aided School with 100 EMS out of over 300 students	Mainly Filipino with Indian, Pakistani, Nepalese, Thai, etc.
6 th Principal	Ms. Ma	A Government School with 80% EMS	Half of EMS from Pakistani and Nepalese

Table 4.2: Background of 2 teachers and their school

Status	Pseudonym	Intake of EMS at school	Ethnicities of EMS
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1 st Teacher	Ms. Ling	Aided-school with 92 EMS out of 200 students	Mainly Pakistani, Nepalese and Indian
2 nd Teacher	Ms. Suen	Aided-school with about 70% EMS out of 260 students	Mainly Pakistani, Filipino, and Vietnamese

Table 4.3: Background of 8 EMS

Status	Pseudonym	Ethnicity	Background
1 st Student	Ms. Susan	Nepalese	Came to Hong Kong around 9 years old, now 28 years old
2 nd Student	Ms. Barbara	Pakistani	Came to Hong Kong around 18 years old, now over 22 years old
3 rd Student	Ms. Bonnie	Pakistani	Born in Hong Kong, educated in Hong Kong throughout, now 19 years old
4 th Student	Ms. Juliet	Nepalese	Born in Nepal, came to Hong Kong around 5 years old, now 23 years old
5 th Student	Ms. Kenny	Nepalese	Born in Nepal, came to Hong Kong in 2009 for primary 6 study, returned to Nepal once and came back to Hong Kong again for secondary 4 in 2013
6 th Student	Ms. Susanna	Nepalese	Born in Hong Kong, educated in Nepal. Returned to Hong Kong around 8 years old, now over 18 years old

7 th Student	Ms. Angela	Pakistani	Born in Hong Kong, educated in Hong Kong throughout, now over 18 years old
8 th Student	Ms. Pamela	Nepalese	Came to Hong Kong before 17 years old, now 19 years old

Stakeholders representing the public universities

I was keen to speak to representatives of the public universities to find out their positions on the controversial issues of discrimination concerning their entrance policies, in terms of their unparalleled and undisclosed point assessment and conversion between the Alternative Qualifications in Chinese Language Requirement and the Hong Kong Diploma of Secondary Education Chinese subject (HKDSE Chinese subject). I was unsuccessful. Despite the dispatch of registered letters to the registrars of the nine public universities, I did not hear replies from any university nor an invitation for a meeting or a discussion.

Out of these universities, I received a reply from Hong Kong Metropolitan University (formerly known as the Open University) that a suitable applicant can use the following qualifications to fulfil the requirement for Chinese Language:

- a) HKDSE Applied Learning (Chinese) (ApL(C)): Attained;
- b) General Certificate of Education (GCE) A-Level / Advanced Level Chinese: Grade E or above;
- c) GCE O-Level, GCSE / International General Certificate of Secondary Education (IGCSE) Chinese: Grade E or above

Apart from Hong Kong Metropolitan University, the reply from the Hong Kong Baptist University (HKBU) only referred me to their website: <http://admissions.hkbu.edu.hk/en/hkdse.html>. The Hong Kong University of Science and Technology (HKUST) replied that they did not receive my registered mail, the University of Hong Kong (HKU) enquired whether assistance was still required in July 2019 when all the registered letters were sent out in May 2019.

Findings

The report of the findings below is organised according to the perceptions of EMS, principals and teachers I interviewed. The themes discussed that arose from the interviews with EMS are: Chinese language learning, experiences of general discrimination, and understanding and awareness of legal rights. The themes for the principals and teachers are: government support and resources, perceptions of the problems for EMS of learning Chinese, and the public universities' admission requirements.

EMS' Perceptions

Experience of Chinese language learning

My aim is to establish whether there is enough evidence for legal redress that EMS from Pakistan and Nepal are educationally excluded from higher education based on not being proficient enough in Chinese. I wanted to know what EMS would say about how the exclusionary educational practices limit their chances of becoming proficient in Chinese. This section is based on 8 student interviews which I analysed for what they said about their experience of learning Chinese. In the Tables below, I have shown the characteristics which influenced how well a student could learn Chinese. Please note that the level of competency in the GCSE Chinese subject is defined as follows.

Table 4.4: Student Characteristics that Relate to Learning Chinese

STUDENT	Ms Barbara	Ms Bonnie	Ms Juliet	Ms Kenny	Ms Susan	Ms Angela	Ms Pamela	Ms Susanna
Born abroad in their own countries Pakistan or Nepal	√	X	√	√	√	X	√	X
Born in HK	X	√	X	X	X	√	X	√
Parent(s) speak Cantonese	X	√	X	√	X	√	√	√
Parents read and write Cantonese	X	X	X	X	X	X	X	X

Experienced difficulty learning Chinese (reading and writing)	√	√	√	√	√	√	√	√
Experienced difficulty learning Oral Chinese	X	X	X	X	X	X	X	X
Chinese Level	All students except Ms. Susan who took up French language are arranged to study the GCSE Chinese subject which is equivalent to about primary 2-3 level							

The GCSE Chinese subject is offered by the United Kingdom-based Edexcel International Examination Board and is treated as a foreign language for students from the United Kingdom (Gao, 2019). Applying this rationale to EMS in Hong Kong, this GCSE Chinese subject is arranged for EMS in Hong Kong as a foreign language rather than as a second language for them. In any case, the standard of the GCSE Chinese subject is assessed to be about primary 2-3 levels (Kapai, 2012).

That Chinese is a difficult language for foreigners to learn was confirmed by my research participants. Apart from the 28-year-old student Ms. Susan from Nepal who did not have to study Chinese in her childhood, none of the other 7 students I interviewed was able to have any family support from their parents to their Chinese writing or study at home. It can be seen from the Table above that all 8 students did not have their parents to help them learn Chinese, and all 8 students found learning Chinese reading and writing at school difficult. Those who were born overseas arriving in Hong Kong at age 5 (Ms. Juliet), 9 (Ms. Susan), 12 (Ms. Kenny), 17 (Ms. Pamela) and 18 (Ms. Barbara) found it especially difficult to catch up because they needed to learn oral Chinese as well. It is particularly noteworthy that two EMS, namely Ms. Bonnie and Ms. Angela, despite being born in Hong Kong, could not entirely overcome the difficulty of learning Chinese.

The typical difficulty they experience is writing Chinese characters. Inevitably, the GCSE Chinese subject is not an alternative but the only alternative during their studies. The experience with Ms. Bonnie was quite unusual as she had loved watching TV programmes and animations in Chinese without difficulty, through which she might have made sound progress. However, she had to go to Pakistan for 3 months for surgery when she was in Form 4. Upon her return to Hong Kong, she found it impossible to catch up with her peers to gain the results required for university admission in the GCE. Ms. Angela admitted that her level of Chinese writing was poor, and she was not good at reading and writing either.

From the perspective of these students, support from the education system was poor: Ms. Juliet was not given goals at school for learning Chinese; Ms. Kenny did not receive extra lessons in Chinese while Ms. Susanna opined that her study in Chinese at school was only to achieve a pass at the GCSE level; and Ms. Kenny reported that the teachers and principal of her school were “unsupportive”. Only Ms. Pamela found her teachers supportive.

EMS attending my interviews generally did not think there were effective support and measures to help them learn Chinese. In addition, the fact that none of the interviewees ever attempted to sit the HKDSE Chinese subject, which, to their understanding, “is meant for the Chinese student”, indirectly indicates the difficulty of the Chinese language. This lends credence to any observation that EMS in Hong Kong have been subject to educational disadvantage since they were in primary school, where they had to compete with Chinese students in the same Chinese subject and Chinese exam papers without appropriate additional support.

Experience of general discrimination

The next theme I tackle is “general discrimination” as opposed to “educational discrimination” because whether or not someone feels included or excluded from society impacts his/her capacity to learn both the language of that society more generally. The purpose of establishing “general discrimination” against EMS in Hong Kong is to support the imminence and urgency of assisting these EMS in pursuing higher education in Hong Kong. Otherwise, EMS will continue to be deployed in low-skilled jobs in Hong Kong society, where they will be further exposed to general discrimination and have less opportunities to establish a decent career (Census and Statistics Department, 2012, p. 72).

All 8 EMS except Ms. Barbara have suffered some form of discrimination of various degrees in Hong Kong with the most serious case being the experience of Ms. Angela whose mother was treated rudely by staff of a government department when she went there to collect some social allowance and who herself was called “Ah Cha”, a derogatory phrase considered to be a very offensive and discriminatory insult against people of Pakistan or India, meaning “inferior”, by an old lady in a grocery shop.

With the exception of Ms. Barbara who was happy with her life in Hong Kong, all students who had expressed their feelings towards the issue of racial discrimination had negative experiences to some extent. Apart from the 8 EMS interviewees’ personal experience of racial discrimination in Hong Kong, many EMS have experienced or seen racial discrimination against themselves or their family members in the public area or on transport (Mercado Solutions Associates Ltd, 2016).

At school, Ms. Susan encountered discrimination and she had a hard time when she could not speak Cantonese at the beginning when she was small. Ms. Bonnie had a similar experience when she was not able to catch up with the Chinese academically. The students started to discriminate against her on her race. When she ended up in a Band 3 school, she also experienced racism because she was a Pakistani girl and a Muslim. She also believed Chinese teachers had racial discrimination against EMS.

Out of school premises, Ms. Susan had also been poorly treated when she went to markets where she was shouted at rudely during her shopping. Ms. Susan did not think the atmosphere in Hong Kong was pleasant to an ethnic minority. Ms. Bonnie was fired after she had started working in a local coffee shop without reason. Ms. Juliet did not think the Hong Kong people and students discriminated against them as much as before although her father had a bad experience with the bus driver who spoke to him rudely when her father did not speak Chinese. Ms. Kenny agreed that there was discrimination in Hong Kong, and one way of telling this was judging by the look that the Hong Kong people had on her and her mother. In general, she thought Hong Kong people were unfriendly to her and her family. Ms. Susanna found it hard to get along with people who spoke Chinese here due to the language and cultural barrier.

Ms. Angela said there was discrimination in Hong Kong, and she found it was better to speak in English rather than Chinese with the Hong Kong people so that they so that they might think of her as a tourist spending a few days in Hong Kong .

Ms. Pamela said she looked like a Filipino and the Hong Kong people did not wish to talk to her that much in the belief that she was a domestic helper. She also had a horrible experience when one of her siblings, in the presence of her father, was treated badly and rudely by the staff on the ferry from Macau to Hong Kong by telling him that he could not go to Hong Kong for unknown reasons. Nevertheless, this was the scope of work of an immigration officer and not the ferry staff's business.

Understanding and awareness of legal statutes

This is the third and last theme of the interviews of EMS and it ends dramatically with a short description. As far as legal action and legal redress are concerned, I made direct enquiries with the EMS to find out how much they knew about their rights, how much they knew about the Race Discrimination Ordinance (RDO), the Basic Law or other statutes which might grant them legal rights or affect their legal interests. It gives us a good understanding of whether EMS in Hong Kong are totally ignorant of their constitutional rights and fundamental rights under the present education system and curriculum in Hong Kong. If they knew nothing about their educational rights, this may explain why, so far, the HKSAR government and Education Bureau (EDB) have not been legally challenged in their possible breach of EMS' constitutional rights in the education field. Similarly, if the EMS interviewed did not know much about the laws which may affect them, this reflects the fact that there has been little legal education given to EMS during their study at school. It ultimately reflects the unsatisfactory condition that the EMS are generally unaware of their legal rights which are available under the laws of Hong Kong.

A vast majority of 7 of the 8 students had not heard of any legal statutes or did not have any understanding of constitutional rights which might affect students. Although Ms. Juliet, as an exceptional case, has heard of the RDO, she did not appear to understand the RDO. 28-year-old mature student Ms. Susan only knew if there was any discrimination in the working field, she could go to the Equal Opportunities Commission (EOC). Ms. Barbara did not know any educational inequality laws and has not heard of the RDO. Ms. Bonnie, Ms. Kenny, Ms. Angela

and Ms. Pamela did not know anything about laws affecting EMS, RDO, Basic Law and/or the Hong Kong Bill of Rights Ordinance (BORO) and so on.

Realistically, ignorance of the relevant legal statutes often happens to any aggrieved party under any anti-discrimination statutes in Hong Kong (Equal Opportunities Commission, 2016, p. 3). For example, the victims may not realise that the discrimination against them may be legally actionable under the Sex Discrimination Ordinance (SDO) (Cap. 480), the Disability Discrimination Ordinance (Cap. 487), and the Family Status Discrimination Ordinance (Cap. 527). In spite of this, it is the duty of the lawyers to study the merits of each individual case to determine whether or not the case may find its way to court.

Having dealt with the themes of EMS, I will deal with the three themes of the school principals and teachers, namely, government support and resources for EMS, perceptions of the problems for EMS of learning Chinese and public universities' admission requirements.

Principals' and Teachers' Perspectives

Government support and resources for EMS

The HKSAR government has implemented support measures to aid EMS in their educational pursuits. Schools enrolling EMS receive adequate funding and subsidies: the higher the number of EMS a school admits, the greater the funds or subsidies it can obtain from the HKSAR government. However, it seems that financial resources are not the issue here. The crux of the matter is that there has been a lack of long-term planning, such as a comprehensive plan or policy, in the direction of an education curriculum designed typically to help EMS with their Chinese language learning and studying. In fact, these were particularly pointed out by principals Mr. Kong and Mr. Ching.

As far as funding and subsidies from the HKSAR government are concerned, all 6 principals had positive views. Principal Pau confirmed that if a school could admit more than 10 EMS, a government subsidy of HK\$800,000 would be provided and for more than 90 EMS, a fund of as much as HK\$1.5 million could be provided. Likewise, Principal Kong said the government subsidy was sometimes more than enough. Mr. Ching said the HKSAR government had given a lot of money to the school. Principal Abdullah and Principal Ching agreed that the HKSAR government had provided grants and funds to assist EMS. Lastly, Principal Ma was a principal

from a government school, and she opined that the government had given a lot of funding to EMS and the financial support was sufficient.

A couple of principals interviewed had particularly strong views of what should be done to assist EMS in their Chinese learning. Principal Kong stressed that what Hong Kong lacked was a direction and policy, and we needed a clear set of goals and policies for Chinese education. Further, a learning framework should contain details of each learning stage within the primary curriculum and what the HKSAR government has never had is a second language policy. Moreover, teacher training has been inadequate; on the other hand, the problem identified by Principal Ching was a lack of an effective policy. Further, the HKSAR government needed to involve ethnic minorities in decision-making and throwing money at the problem did not solve it.

Related to the HKSAR government's efforts to support were the opinions about the subject known as ApL(C), which is a career-related subject introduced in 2014/15 to provide another alternative Chinese language study to EMS and address the problem of the Chinese language study of EMS.

To Principal Kong, ApL(C) was not a good alternative for EMS. In fact, it insulted them because its scope of learning was very narrow, confined to language training in the service industry with opportunities to work at the junior level. These views were echoed by Principal Ma, a government school principal who was also reserved in attitude towards the value of ApL(C) and she was of the opinion that it was too career-oriented. Principal Abdullah also agreed that ApL(C) was only related to low-level jobs such as hospitality, service, restaurant business, hotel and so on, but only in entry-level positions. Therefore, ApL(C) is a type of humiliation to students as it implies ethnic minorities can only do basic low-skilled jobs.

Principal Kong further said that the GCSE Chinese subject was an admission ticket to public universities. Still, it represented a misguided attitude toward education because educators had the responsibility to help EMS adapt to local Hong Kong life rather than excluding them and keeping them low in society's hierarchy. Besides, Principal Kong further wondered why ApL(C) could not be extended to accounting, legal or business work apart from its present syllabus in the area of the service industry, catering business, tourism and so on. His discussion

highlighted the likelihood that the difficulties with the Chinese were symptomatic of wider problems of inclusion and integration of the ethnic minority population in Hong Kong.

Perceptions of the problems for EMS of learning Chinese

As principals and teachers are on the frontline taking care of EMS, their opinions and comments on the Chinese language studies of EMS have great value in my thesis research. Throughout the various interviews, I explored how difficult the HKDSE Chinese subject is for EMS, how difficult it is for EMS to get admitted to schools of a higher ranking, and also what the other difficulties or problems in the Chinese learning of EMS are. I deal with these issues as sub-themes.

The difficulty of the HKDSE Chinese subject for EMS

Evidently, for these respondents, the examination of the HKDSE Chinese subject is difficult even for Chinese students, and the examination of the GCSE Chinese subject is easy for EMS. The principals and teachers I interviewed emphasised how true these statements were. With negative comments, Principal Pau and Principal Ma told me why the HKDSE Chinese subject was a formidable task for EMS because the exam paper comprised classical Chinese literature left over in Chinese history from over a thousand years ago. These principals' comments were echoed by teacher Ms. Ling, who agreed that the difficult part of the exam paper of the HKDSE Chinese subject was Chinese literature.

Their past experience has shown that EMS did not and would not attempt the HKDSE Chinese subject. Principal Kong has only seen one EMS in the past 10 years, teacher Ms. Ling has seen another one in her 10 years of teaching, teacher Ms. Suen saw three EMS in her 10 years of teaching who attempted the HKDSE Chinese subject and finally, Principal Pau, five years in the past within the same school, there was only one EMS who took the HKDSE Chinese subject. Among these students, as far as these principals and teachers could remember, two EMS achieved a result of Level 2, and another one had a marginal pass with Level 3, which fulfilled the minimum entrance requirement of the public universities.

Attention was drawn to the unfairness of the situation. Principal Pau opined that the difficulty and substantial unfairness to EMS was in the exam paper of the HKDSE Chinese subject which contained a test of Chinese literature. Principal Pau further did not understand why EMS had

to learn Chinese literature, which was written a thousand years ago. In order to avoid the difficulty of the Chinese exam, some local students attended schools with an International Baccalaureate (IB) curriculum instead of the local curriculum. Principal Ma reminded me that before 1997, Chinese was not a compulsory subject; no one had to study Chinese to gain admission to public universities. Principal Ma admitted that it was unfair for an EMS with the highest score in GCSE Chinese subject to compete with a Chinese student who achieves the highest level in HKDSE Chinese due to point conversion.

The barriers to EMS attending a high-status school.

Chapter 1 introduced three bandings of Hong Kong schools: Band 1 for the high academic achievers, Band 2 for the average, and Band 3 for the underachievers. Primary school graduates rely on the results of 4 core subjects, namely Chinese, English, Mathematics, General Studies and 2 minor subjects as one way to get admission to Band 1 secondary schools in Hong Kong. The principals discussed the difficulty EMS have in gaining admission to Band 1 schools.

Principal Kong said EMS had a lower chance of admission to Band 1 secondary school due to their lower scores in the Chinese subject, a core subject in primary school.

EMS need to rely on the results of the other three core subjects (English, Mathematics, and General Studies), and they face unfair competition in the whole banding process. Principal Kong further pointed out the inequality in the Chinese language with EMS started at a much earlier stage, that was, from primary studies where EMS had a lower chance of admission to Band 1 secondary schools. Due to the low Chinese language ability, teacher Ms. Ling also said that EMS had more difficulty getting into high-ranking secondary schools. Principal Ching had a similar observation that EMS did not do well in the exam of a Chinese subject, which was a subject for internal assessment in the final stages of primary school education, and the result of this Chinese subject affected the chances of EMS' admission to secondary schools. Teacher Ms. Suen agreed that the unsatisfactory internal results of EMS in primary schools caused them to get into Band 3 schools.

Principal Abdullah commented that not all Band 1 schools would reject EMS, but their possibility of admission was lower because the exams in primary schools comprised Chinese, English, Mathematics and General Studies, which were calculated as Internal Assessments (IA)

for admission to the secondary schools. Besides, both the Chinese students and EMS had to take the same Chinese exam paper. Principal Ching said if EMS did not achieve a good result in Chinese in IA in primary school, this score would count against them in their admission to secondary schools. On one hand, in teacher Ms. Ling's opinion, the Chinese language ability of EMS had an adverse influence on their seeking admission to a secondary school with higher teaching standards and ranking since Chinese was an important subject both in primary and secondary school. On the other hand, in teacher Ms. Suen's opinion, if the IA results of EMS in primary school were not satisfactory, they would be allocated to Band 2 or Band 3 schools in Hong Kong.

However, Principal Kong went further and was eager to reveal how language policies placed EMS in an inferior, excluded position in society. He proposed that the GCSE Chinese subject was an easy exam to pass for EMS and the education policy was wrong to ask for a lower standard in Chinese for EMS purely because of their ethnicity. Previously, Chinese was not a compulsory subject under the Form 5 Hong Kong School Certificate of Education. The fact that Chinese had become a compulsory subject created an impasse with the introduction of GCSE. In Principal Kong's opinion, the problem was that Hong Kong had one standard curriculum for Chinese education designed for mother-tongue speakers only. It was very difficult for EMS who are unfamiliar with Chinese culture to learn. He pointed out that the education policy discouraged EMS from taking the HKDSE Chinese subject and they had no choice but to choose the GCSE Chinese subject.

Apart from EMS, their parents had some difficulty with the Chinese language. Principal Kong further identified the problem of learning Chinese for EMS, which started from the very first day they attended school, as it was extremely rare for students to succeed in Chinese language learning without family support. Parents need to devote a lot of time to assisting their children in writing Chinese characters with the correct vertical and horizontal strokes. Successful stories with EMS in Chinese language learning have been very rare. This was confirmed by others: few parents of EMS could communicate with the school in English or Chinese. Many of them could not even read or write Chinese, even if they have settled down in Hong Kong as the fourth generation. EMS usually came from low-income families and some EMS in Principal Cheuk's school could not even afford the school fee.

Of the two teachers interviewed, teacher Ms. Ling said EMS did not speak Chinese at home

and they faced difficulties in Chinese. Most of the parents of EMS had problems using Chinese, which was why the school has hired a non-Chinese teaching assistant to assist in translation with the parents.

On the other hand, teacher Ms. Suen has noticed that there has been a change in parental attitude towards their children. In the past five years, parents of EMS began to show expectations towards their children, and they realised learning Chinese was essential for their children.

Public universities' admission requirements

As described in Chapter 3, the requirement for university entrance was Level 3 for Chinese and English, Level 2 for Mathematics and Liberal Studies, and this together makes out a formula of “3, 3, 2, 2”. Note that the Liberal Studies has been abandoned as described in Chapter 3. The fact that a GCSE Chinese subject can be used to replace a HKDSE Chinese subject is also already explained in Chapter 3. What I wish to explore from the interviews with the principals and teachers is whether there is any discrimination in treating the GCSE Chinese subject and the HKDSE Chinese subject in any manner. Such discrimination involves giving a lower point assessment or conversion to the GCSE Chinese subject which may affect the chances of admission to public universities to an EMS when he competes with a Chinese student who will be given a higher point assessment or conversion with the HKDSE Chinese subject.

I enquired with the principals and teachers to find out how public universities would compare and assess the HKDSE Chinese subject and the GCSE Chinese subject and how points were given to these subjects. In response to my enquiries, these stakeholders gave the following opinions and replies.

“It’s really a black box. They have absolute authority, and you can’t complain”, Principal Cheuk said in my interview when he commented on the entrance requirements of public universities. He further explained that there was a complicated formula of weighting or multiplier to calculate the points for each subject. The assessment process was not transparent, and the university admissions system was a black box.

Surprisingly, throughout my interviews, the point assessment or conversion of the GCSE Chinese subject was subject to different interpretations by different principals. On one hand, Principal Ching had no information on how the GCSE Chinese subject was calculated. On the

other hand, Principal Ma, being a government school principal, expressed her views:

*“It is clear for the HKDSE Chinese subject, the levels from 1 to 5** will get 1-7 points, but it is not specified for the GCSE Chinese subject. They only have a general description. They should specify it but I don’t think the information could be easily found. I don’t think the information is clear.”*

Principal Abdullah believed that 7 points were not awarded on the GCSE Chinese subject. He added that the universities would consider 4 core subjects and the best results of two elective subjects. These electives could be Physics, Chemistry, Biology, Geography, Accounting, etc. Therefore, a high-achieving student could get 42 points as full mark, that is, 6 subjects x 7 points (with the highest level 5** each) = 42 points. He expected that the universities would not award 7 points on the GCSE Chinese subject of EMS. Principal Kong claimed that different universities had different requirements for various subjects and no hard and fast rule existed. However, Principal Kong had experience and dealt with a case in which the HKU confirmed by email that the highest grade of GCSE Chinese subject was equivalent to the highest level of the HKDSE Chinese subject. Principal Ching did not know how the assessment or point conversion systems worked for the GCSE Chinese subject.

Lastly, there was a striking consistency in the replies given by the two teachers. Both teachers, Ms. Ling and Ms. Suen, pointed out that there was a difference of 7 points for the HKDSE Chinese subject and 3 points for the GCSE Chinese subject. Teacher Ms. Suen further said it was unfair to EMS because whether it was for the GCE or GCSE Chinese subject, 3 points were the maximum points which could be awarded, whereas one could get 7 points in the HKDSE Chinese subject.

Principal Abdullah told me that around 60,000 to 70,000 students applied for university admission each year, but only 12,500 students could gain entry to universities. Under any circumstances, the universities never specified why a student could not be admitted to a university programme of his choice. In other words, universities never explained why a student got rejected by the university.

Principal Abdullah analysed that the system of calculation and point conversion has been very complicated. Students should apply for a university programme which they achieved good

results in the strong and popular subjects required by the universities. On average, it required 22 points to get into a university under the JUPAS. The admissions process lacked transparency; universities stated in their prospectuses that they would consider the GCSE Chinese subject. This made it challenging to compare different students, as university admissions operated like a black box. The school lacked the resources to investigate further, and universities were unwilling to disclose their admission criteria.

Principal Ma said most students took three electives in addition to the four compulsory core subjects. Students could take a maximum number of four electives depending on their ability. Universities would need to look at the results of more electives for a competitive study programme. For the less competitive ones, one or two electives would be enough. The scoring for the HKDSE Chinese subject was clear, but for the GCSE Chinese subject, it was not specifically mentioned and the information could not be easily found. In the GCSE Chinese subject, grades A,B,C were used and in the HKDSE Chinese subject, Level 1, 2, 3 were used. HKDSE subjects could get up to 7 points while the GCSE Chinese subject could obtain 3 points only.

While EMS had to go through academic competition with the Chinese students under the local curriculum, the non-JUPAS students had the privilege not to. Non-JUPAS students were Hong Kong students or foreign students, regardless of their nationalities, who were studying under the IB, GCE, European curriculum, which were only provided in privately-funded schools, etc.

According to Principal Kong, there was a 30% quota reserved by the public universities for non-JUPAS students and these students did not have to understand Chinese at all. This quota did not assist any of the EMS in Hong Kong as it was given to non-JUPAS students only and was not available to any EMS destined to study under the local curriculum.

Discussion

The interviews with principals, teachers and students gave me an opportunity to probe into, understand and gain knowledge about the situation and circumstances of the academic study of EMS in Hong Kong. It also allowed me to ‘put flesh on the bones’ of the data derived from different literature, journals, surveys or findings. Interviews confirmed that EMS have sustained educational disadvantages as early as primary school graduation and before their admission to secondary schools. Parents of EMS cannot assist their children in their academic

work because they do not know how to write Chinese characters, in addition, some cannot speak Chinese. Moreover, EMS are studying under a curriculum designed for Chinese students, their language experience, culture and home environment have never been taken into consideration under this education curriculum in Hong Kong. An unfavourable IA system exists in primary schools that considers Chinese as a core subject, requiring a compulsory examination for EMS, without providing adaptive measures for secondary school placement. Under the system of Secondary School Places Allocation (SSPA), EMS are assessed by the secondary schools with the result from the same set of examination papers in Chinese subject. This inevitably drags down their overall performance in all subjects when assessed alongside Chinese students (Oxfam Hong Kong *et al.*, 2020, p. 41).

Perhaps it should be accepted that it is unfair and unrealistic to expect EMS to compete with Chinese students in a language which is not their first language from primary school onwards. Objectively speaking, the HKSAR government has largely overlooked the systemic unfairness faced by EMS in government or aided primary schools when they graduate from primary school to secondary school as a result of low academic results in their primary Chinese core subject. The heavy price which EMS must pay is that they are mostly allocated to study in Band 3 or partially Band 2 secondary schools as an undesirable alternative. Consequently, many EMS are admitted to Band 2 or Band 3 schools, marking the onset of educational discrimination against them even before they reach secondary school. Through no fault of their own, they will likely face diminished opportunities for admission to a Band 1 school.

Leaving aside the IA system, the alternative course for EMS is to study the ApL(C) apart from the GCSE Chinese subject. This appears to be a positive step to assist EMS to learn and study Chinese and might look like another admission ticket to public universities. However, both the GCSE Chinese subject and the ApL(C) are similar in nature, they are either not given any converted points by any public universities or are regarded as obtaining a Level 3 only as HKDSE Chinese subject by the Hong Kong Polytechnic University only under Appendix 8 of this thesis.

In fact, ApL(C) is only an additional elective that EMS can take as one of the subjects in the HKDSE (Education Bureau, 2017). The limitation and discrimination of ApL(C) is that it prepares them for limited work in the service industry, such as hotels, catering, tourism, etc. EMS are passively placed under a bipolar Chinese learning situation heading towards an

equally undesirable destination: either a path of basic low-skilled (and low-income) jobs-oriented ApL(C) or an as-if-foreign-language approached GCSE. Moreover, even with the GCSE Chinese subject, it cannot come close to 7 conversion points of the HKDSE Chinese subject recognised by the public universities under the JUPAS.

Although the HKSAR government offers resources to schools which has an intake of EMS, it does not have the effect of upgrading the Chinese standard of EMS to a level in which they can compete with the Chinese students on the HKDSE Chinese subject. This is sad and unsatisfactory in all the circumstances. However, it opens up a leeway for legal action and legal redress to be sought against the EDB and /or the public universities under the JUPAS. This will be fully explored and discussed in Chapter 6, Legal Analysis, where all the data collected in all Chapters, as well as the views and opinions of the principals, teachers and/or the students, will be summed up.

The actual experience of EMS in Hong Kong, coupled with the analyses of their school principals and teachers, suggests educational disadvantage and discrimination against EMS from an objective perspective. However, according to the opinions of the school principals in general, funding provided by the HKSAR government is sufficient. On the other hand, relying on the policy addresses of the Chief Executive in Chapter 2, the HKSAR government seems to have demonstrated determination to assist EMS in Hong Kong.

Policy addresses by different Chief Executives of the HKSAR Government and policy documents have clearly suggested that the HKSAR government pays utmost attention to the educational development of EMS. However, stating something in a policy document tends to create the impression that it will happen according to what Spreen stated (2001):

“My own experience in educational reform in the United States has made me susceptible to the argument that when policies are put on paper with a coherent logic we are deluded into thinking fundamental change is taking place.”

This explains the situation in Hong Kong, where there appears to have been sufficient funding and a number of supportive measures available to assist EMS in their Chinese language learning. Despite the fact that EMS could hardly progress beyond the level of GCSE, it is an

indication that we have been misled into thinking fundamental change has been taking place in the best interest of EMS.

The question is how we should reconcile or rationalise all these inconsistencies? In all circumstances, this begs the question of what ‘equal access to education’ means in theory and practice.

In an attempt to resolve the crux of this problem, I fall back on the relatively comprehensive analysis of what an ideal equal access to education is in the publication of ‘Human rights obligations: making education available, accessible, acceptable and adaptable’ produced by Katarina Tomasevski, the former United Nations Rapporteur for Education (2003).

In this literature, Tomasevski, with the aid of two box charts as follows, identified a Four A Framework, namely: Availability, Accessibility, Acceptability and Adaptability, to determine whether or not and how the right to education is fully made available, accessible, acceptable and adaptable to all students. Applying this Four A Framework to the education of EMS in Hong Kong provides valuable insights into the study of the justiciability of EMS’ discriminatory issue. In this regard, I put down the box charts in Tomasevski’s publication as follows for my discussion:

Box 1: Concepts of the Four A Framework

Right to Education	Availability	● Fiscal allocations ● Schools matching school-aged children (number, diversity) ● Teachers (education and training, recruitment, labour rights, trade union freedoms)
	Accessibility	● Elimination of legal and administrative barriers ● Elimination of financial obstacles ● Identification and elimination of discriminatory denials of access ● Elimination of obstacles to compulsory schooling (fees, distance, schedule)
	Acceptability	● Parental choice of education for their children (with human rights correctives) ● Enforcement of minimal standards (quality, safety, environmental health) ● Language of instruction ● Freedom from censorship ● Recognition of children as subjects of rights
Rights through Education	Adaptability	● Minority children ● Indigenous children ● Working children ● Children with disabilities ● Child migrants, travellers ● Concordance of age-determined rights ● Elimination of child marriage ● Elimination of child labour ● Prevention of child soldiering

Box 2: Scheme of the Four A Framework

Availability	Schools	● Establishment/closure of schools ● Freedom to establish schools ● Funding for public schools ● Public funding for private schools
	Teachers	● Criteria for recruitment ● Fitness for teaching ● Labour rights ● Trade union freedoms ● Professional responsibilities ● Academic freedom
Accessibility	Compulsory	● All-encompassing ● Free-of-charge ● Assured attendance ● Parental freedom of choice
	Post-compulsory	● Discriminatory denials of access ● Preferential access ● Criteria for admission ● Recognition of foreign diplomas
Acceptability	Regulation and Supervision	● Minimum standards ● Respect of diversity ● Language of instruction ● Orientation and contents ● School discipline ● Rights of learners
Adaptability	Special Needs Out-of-school Education	● Children with disabilities ● Working children ● Refugee children ● Children deprived of their liberty

The above concept and scheme of the Four A Framework, under the hands of Tomasevski, outlines governmental obligations towards students with different backgrounds. These

responsibilities are reflected in various international human rights treaties, clearly presented and explained in Chapter 5. In my opinion, they are equivalent to a set of criteria or requirements which any signatory party to the treaties, including the HKSAR government, must comply with in order to implement the international covenants effectively in their regions. In view of the significance of the Four A Framework of Tomasevski, I adopt and apply its principles to the situation of Hong Kong with analysis as follow.

Availability

According to Tomasevski, students must have access to schools and teachers with public funding, as this is their right to education. Although funds are nominally provided, the effective use of such funds remains questionable. The training of teachers, as seen in my interviews with the stakeholders, is inadequate. The school matching mechanism has been controversial since day one of kindergarten education.

Accessibility

The hurdle, which is set at a higher level to EMS in their admission to Band 1 secondary schools due to the assessment of a Chinese core subject and incompetence in Chinese language before their promotion from the primary school, raises a concern about equal education.

Acceptability

Education of good quality with professional teachers and the appropriate language of instruction is a standard recognised by Tomasevski. In relation to the Chinese language teaching and learning for EMS in Hong Kong, there seems to be much room for improvement in this framework. The ultimate question is whether there are experienced and qualified teachers in Hong Kong who can teach EMS and help them achieve a standard far higher than the level of GCSE Chinese subject.

Adaptability

Adapting to the needs of every student, taking into account their respective weaknesses, vulnerabilities, and disabilities, is the spirit of this concept. It appears that the unified curriculum of the HKDSE does not effectively cater to the needs of EMS. It introduces complex Chinese knowledge and Classical Chinese literature that even local Chinese students find challenging, let alone EMS. The alternative schemes offered in the name of providing flexibility

do not adequately address the needs of EMS and may impede their ability to achieve social mobility. This falls short of providing an adaptable education system.

In summary, after analysing the data collected from EMS, school principals and teachers against the literature background, it substantiates a strong argument that the particular obligations under the concepts and schemes of availability, accessibility, acceptability and adaptability have not been fulfilled after the 1997 handover.

The above concepts and scheme of the Four A Framework, extracted from the publication of Tomasevski, are an enhancement of human rights through education. In my opinion, it summarises governmental human rights obligations in education to all school-aged children and students, regardless of their ethnicity and gender, as a matter of justice and fairness.

In this respect, I conclude the concept of minority rights and the theory of justice in this Chapter before we deal with the legal issues and judicial review in Chapters 5 and 6, respectively.

Minority Rights

As stated in Chapter 1, the EDB classified EMS under non-Chinese speaking students (NCS students), and this seems to reflect EMS's problem as a linguistic rather than an ethnic issue. In other countries of the world, discrimination finds its way to reach the minority rights of the ethnic, linguistic or religious communities. In the Americas, race and ethnicity continue to play a role in poverty, leading to economic discrimination amongst Afro-descendants, indigenous and other marginalised communities.

The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) prohibits all kinds of discrimination, including the right to education against the minorities.

The United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minority in Article 4(2) states:

“To take measures to create favourable conditions to enable persons belonging to minorities to express their characteristics and to develop their culture, language,

religion, traditions and customs, except where specific practice are in violation of national law and contrary to international standards.”

On the other hand, the Report of the Special Rapporteur on the right to education, Kishore Singh ‘Justiciability of the right to education’ states:

“The enjoyment of the right to education is often least accessible to those who need it most – disadvantaged and marginalised groups and, above all, children from poor families” (Singh, 2013).

This clearly tallies with the phenomenon of the EMS in Hong Kong under the research of this thesis. A matter is justiciable if it can be properly brought before a Court and is capable of being disposed of judicially (Garner and Black, 2009).

Quality education, not simply education, has increasingly become a concern due to deterioration in quality from education providers, and its justiciability is considered to be crucial for upholding quality and standards of education.

In the same Report of Special Rapporteur, Kishore Singh (2013), he observed that there were difficulties for the disadvantaged groups to pursue legal remedies partly due to the lack of knowledge and financial resources. They were reluctant or timid to bring legal actions due to poor language skills or fear of reprisals. Likewise, procedural complexities might create a barrier and litigation costs might deter claimants. Kishore Singh concluded that the right to education was a legally enforceable right and should be provided with the broadest and strongest legal protection. In terms of legal aid, the United States Declaration, adopted by the General Assembly on 24th September, 2012, emphasised that States should promote access to justice for all, including legal aid as the protection of the right to education of the poor should be central to poverty reduction strategies. On the other hand, Kishore Singh emphasised that educating the public about the means and mechanisms to pursue a violation of the right to education was the primary responsibility of the governments.

In other words, when resources are provided to the majority in the development of their language or education, the same resources should be provided to the minority in the same place. Failing that, the discrimination against minorities, who are among the poorest of the poor, forms

one of the most significant barriers to the full human development and economic prosperity of countries throughout the Americas.

Besides, minorities have the right to participate in public life and decision-making. This is particularly the case when decision-making affects the development of their culture, language and economic benefit. Any such decisions must be made with prior consultation with the minority community, incorporating as wide a range of opinions as possible, apart from the community's "leaders", who may not be representative of the community as a whole.

Minority education in Ethiopia

Politically and culturally, "dominant-minority groups" refers to those who have power and authority in hands in the country of Ethiopia. With reference to that, we look at the conclusion which was put forward by sociologist Joseph B. Gittler to define "minority groups" as minority groups whose members experience a wide range of discriminatory treatment and they are frequently relegated to positions relatively low in the structure of a society. This is the position of the Pakistani and Nepalese families and their EMS in Hong Kong.

Historically, the minority groups in Ethiopia experienced a "melting pot" principle in the educational system, a phenomenon similar to that which the minority groups in America have experienced previously. Under this principle, the minority students had to leave behind their culture, heritage and roots in order to learn the language and accept the culture of the dominant majority groups (Tuso, 1982).

Two modes, namely "pluralism" and "legal protection of the minority", were considered to be modes acting in the best interest of the minority groups, and they have developed and evolved in the United States in the last three decades. In fact, the significant step to advance minority education in the United States was taken by the court, which declared a "separate" but "equal" education unconstitutional in *Brown v Board of Education of Topeka, Kansas* (1954). Chief Justice Earl Warren held as follows at pages 493-494:

"We come then to the question presented: Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other 'tangible' factors may be equal, deprive the children of the minority group of equal educational opportunities?"

...

To separate [black children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely to ever be undone.

...

We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment."

The gap between whites and blacks in educational attainment is narrowed to the extent of proving "*segregation in education contributed to the psychic injury of black children*". Subsequently, the "melting pot" principle came to an end and was replaced by a pluralistic approach; thereafter, the history, culture and experience of minority groups have been included in the curriculum, and bilingual education has been introduced under federal law (Tuso, 1982, p. 278).

The conclusion drawn as a result of the Ethiopian situation and the court case was that a desirable and meaningful resolution for minority education can only be achieved when the political, social and intellectual forces put their minds together to effect changes. Nevertheless, the speed and scope of changes depend on a country's economic capacity. We need to bear this in mind when we assess EMS' issue in Hong Kong, where funding and economic capacity of the HKSAR government do not seem to be a problem.

Minority rights in Kenya

An indigenous ethnic group "the Ogiek Community" was issued with an eviction notice by the Kenya Forestry Service to leave the Mau Forest on the basis that it is a government land. Taking the case to the African Court on Human and Peoples' Rights, the Applicant argued on behalf of the Ogiek Community that it threatened the survival of the community (*African Commission on Human and Peoples' Rights v. Republic of Kenya*, 2017).

The African Court on Human and Peoples' Rights ruled that a number of Articles of the Protocol to the African Charter on Human and People's Rights had been violated. The court

further found that the Ogiek Community had been discriminated against. The Kenyan Government had failed to recognise the Ogiek Community as a distinct tribe as opposed to any other similar groups in Kenya. Due to the obvious vulnerability of the Ogiek Community, they could become easy targets of different forms of discrimination and persecution. As a result, there was interference with their cultural life under Article 17 which ensured every individual should have the right to education, the cultural life, morals and traditional values of his community should be respected and recognised.

On such a basis, the Ogiek's property rights were denied due to the lack of recognition of the Ogiek Community's status. The Kenyan Government had no justification for the eviction of the Ogiek Community from their land.

Furthermore, enjoyment of the rights and freedoms without distinction of any kind such as race, ethnic group, colour, sex, language, etc, under Article 2 was also violated as the way which the Ogiek Community was evicted amounts to "distinction" based on ethnicity.

Foreign minority education in relation to Hong Kong Education

Hamdesa Tusso (1982) states that a resolution to resolve the minority education crisis can only be meaningful if and when the political, social and intellectual forces jointly proceed to bring changes to the issues which they fully understand. In terms of the speed and scope in which these changes can be made, leeway is given to any country with specific reference to its economic capacity and development. For instance, Hamdesa Tusso analyses that Ethiopia cannot respond as swiftly or effectively in funding, staffing, and enhancing facilities for minority education as the United States has over the past thirty years.

A case study by Mochwanaesi, Steyn and Walt (2005) for the education for minority groups in South Africa states that teaching, reading and writing should be conducted in the mother tongue, especially in elementary classes. The educators should be from the same cultural background as the learners, or at least they should fully understand the culture of the learners. Furthermore, the learning content should enable the Griqua learner to choose a career.

However, applying the ideal pedagogy of this case study to Hong Kong, there are obvious and unrealistic difficulties. From time immemorial, the colonial status of Hong Kong until 1997, English has been the supreme and dominant language, with Chinese as the secondary language.

After 1997, Chinese language has risen to become the dominant language with English as the secondary language. It seems clear that the mother-tongue languages of Urdu and Nepalese of the EMS have been given little attention by the government before or after the handover, as reflected in the small number of schools which provide learning of these cultural languages in Hong Kong in Chapter 3. As a result, the academic success and social mobility of these EMS largely hinge on the proficiency of Chinese language.

A Theory of Justice

I do not intend to explore the philosophy concerning minority rights in a broad sense. Nevertheless, in the situation of Hong Kong where EMS account for a low percentage of the whole population with a government where sufficient funding does not seem to be a problem, I wish to engage the theories of the philosopher John Rawls to support my legal arguments in Chapters 5 and 6.

I introduce the concept of “Justice as Fairness” by Rawls (1999) with particular reference to his Liberty Principle and Difference Principle. First and foremost, in the opinion of Rawls, inequalities inevitably exist in any society, and there is no universal rule of justice for all societies. Moreover, inequalities may result from inherited characteristics, social class or endowments by birth attributing to different individuals compared to the least-advantaged members.

This mirrors the situation in Hong Kong, where the EMS meet the ethnic minorities of Whites, Japanese, and Koreans. These minorities have experienced no particular cultural or linguistic problem here due to their study in international schools, which enables them to avoid the Chinese language hurdle with a non-local curriculum in Hong Kong.

Two principles of justice were derived by Rawls, namely, the Liberty Principle and the Difference Principle. In the first principle, Rawls establishes equal basic rights and liberties for all people and in the second principle, social and economic inequalities are only acceptable when two conditions are met: first, there is a fair equality of opportunity in all positions and offices open to all; second, these should be made available to the greatest benefit of the least advantaged members of society.

In Rawls' theories, the Liberty Principle has priority over the Difference Principle and the first half of the Difference Principle has priority over the latter half.

Controversial as his philosophies are, the "Justice as Fairness" concept of Rawls (1999, p.13), advocates the elimination of discrimination and if this cannot be done, "inequalities of wealth and authority are just only if they result in compensating benefits for everyone, and in particular for the least-advantaged members of society".

The difference principle of Justice of Rawls (1999, p.86) extends to his observations that inequalities of birth and natural endowment are underserved. As a result, greater resources should be spent on the education of the less rather than the more intelligent, at least for the earlier years of their schooling.

Although Rawls' philosophy sparks controversy, I am inclined to attach importance to his theories as a guide for achieving balance between the privileged and the most vulnerable members of society. Hopefully, this will bring a silver lining to EMS in Hong Kong to help them perform well in education, employment, and integration into our community.

Chapter 5: The Inter-correlation between International Covenants and the domestic laws of Hong Kong on Discrimination in Education

Background

In Chapters 1 to 4, a foundation has been laid to explain the insurmountable challenges Ethnic Minority Students (EMS) face in their access to education, education that enables them to move onto higher education and, consequently, achieve their social mobility. As ethnic minorities strive to improve their socio-economic status, this thesis has attempted to show the linguistic and cultural disadvantages EMS face in Hong Kong in exercising their right to education.

To summarise, the Education Bureau (EDB) has made an effort to ensure that all students in Hong Kong, regardless of race, are provided with 12 years of free education from the academic year of 2008/2009, which commenced in September 2008. This includes six years of primary education, typically for children aged 5 to 11, and six years of secondary education, typically for students aged 12 to 18. By the time students have completed these 12 years of free education, those who wish to attend university in Hong Kong may proceed with applying for admission to public universities under the unified system of the Joint University Programmes Admissions System (JUPAS).

By 2017, all government-funded degrees and sub-degrees provided by the University Grants Committee member institutions and most other full-time degrees provided by Hong Kong institutions are under JUPAS. It has been referenced in Chapter 3 that, although international examination standards, e.g. the General Certificate of Secondary Education Chinese subject (GCSE Chinese subject), are considered to be acceptable Chinese language qualification for admission by the public universities in JUPAS, low acceptance rate of EMS seems to indicate that public universities do not favour the alternative Chinese qualifications.

As concluded in Chapter 4, the statistical disadvantage faced by EMS demonstrates that taking the Hong Kong Diploma of Secondary Education (HKDSE) is an uphill battle since EMS' Chinese abilities are far behind in standard as early as in the kindergarten and primary school

stage. This also means their access to higher education will also be hindered by the Chinese language learning requirement imposed from primary school when EMS are aged 5-6.

As for pre-primary education, it has been addressed in previous Chapters that it is not legally compulsory in Hong Kong. Children may simply attend a childcare centre before primary school. Most kindergartens in Hong Kong are privately owned. It would be remiss not to mention that only in the academic year of 2007/08 was there a “Pre-primary Education Voucher Scheme”, which provides subsidies to parents with the right of abode in Hong Kong to allow children aged 2 years and 8 months or above to attend local non-profit-making kindergartens.

The thesis will explore and illustrate that the difficulties faced by EMS may be so grave that legal redress may be allowed through judicial review (JR) against the EDB. Such legal redress arises from possible racial discrimination against EMS. The right to education is not to be discriminated against as it is protected both in international covenants and in domestic Hong Kong laws.

This Chapter will thus introduce the intercorrelation between international covenants and Hong Kong’s domestic laws in this area. Chapter 6 will discuss the possibilities and challenges that EMS may face should they wish to protect their right to education in Hong Kong. Chapter 7 evaluates the prospect of success of the Judicial Review (JR) and the social justice it pursues.

Chapter 3 also addressed the fact that, following the end of 6 years of free primary schooling, 4 subjects, including the Chinese language subject, must be taken as an examination by every government or government-aided primary school. No distinction is made for EMS. Secondary schools then assess the examination results of these 4 subjects as their main criteria for admission to further education.

Ironically, even though the EMS may find schools with English as Medium of Instruction (EMI) to be more supportive of their learning experience, as such schools provide a superior education to schools using Chinese as Medium of Instruction (CMI), it has been shown in

previous Chapters that because of learning disadvantages at the primary school stage, EMS may not perform as strongly as Chinese students in the final primary school examinations, which would mean their entrance to Band 1 EMI secondary schools is more difficult.

Chapters 1 to 4, thus, provide the background to allow us to consider in Chapter 5 what level of protection is provided by international covenants and domestic Hong Kong law for EMS' right to education, and Chapter 6 will elaborate on possible legal redress. Since Chapter 5 and Chapter 7 are the legal chapters of this thesis, I have arranged the legal methods and methodology to be presented in this chapter as follows. Through this presentation, I will also conduct a guided reading for readers on how to approach the legal part of this thesis.

Legal Methods and Methodology

In Chapter 4, I outlined how the non-doctrinal legal research was conducted and explained the approach of qualitative research and the arrangements of the semi-structured interviews with the stakeholders. Upon its completion, I performed the coding exercise, analysed and interpreted the data collected. In this Chapter, I will further elaborate on the legal methods and methodology of the doctrinal and non-doctrinal legal research as follows.

Doctrinal legal research versus Non-doctrinal legal research

Methodology is essentially an 'approach' in research work and the methods adopted are tools to conduct the research. Since the research title of my thesis is "*Educational Disadvantage and Discrimination for Pakistani and Nepalese School Students in Hong Kong: The Possibilities of Judicial Review and Legal Redress*", inevitably, as the title suggests, intensive legal research is required to be conducted in order to fully explore every possible avenue of legal actions which may be pursued to eliminate and remove educational disadvantage and discrimination against the EMS.

However, I bear in mind the interactive correlation between the law on one hand and the social norms, values, attitudes and behaviour on the other. The former moulds and controls the latter, while the latter influences the former (Vibhute and Aynale, 2009, p. 3).

Doctrinal legal research, in its broad sense, requires a researcher to go into the underlying principles or reasons of the law and it involves analysis of the facts of a problem and the process of identifying and retrieving information necessary to support legal decision-making (Jain, 1972, p. 490). In conducting this area of doctrinal legal research, statutes and Court judgments are the primary sources of research materials, whereas law journals and textbooks are the secondary sources.

On the other hand, in non-doctrinal legal research, social scientists have various research methods such as observational techniques, interviews, questionnaires and case studies. In view of this, a doctrinal legal researcher has to apply the methodology known to social sciences if the research problem in the thesis involves a part of social sciences.

These two branches of methodology are also referred to as ‘Doctrinal research’ and ‘Non-doctrinal research’ in the field of research. Singhal and Malik (2012, p.252) describe doctrinal research as:

“Doctrinal research is the most common methodology employed by those undertaking research in law. Doctrinal research asks what the law is on a particular issue. It consists of either a simple research directed at finding a specific statement of the law or a more complex and in-depth analysis of legal reasoning.”

It is said that doctrinal legal research is a two-part process involving locating legal doctrines, sources of the law, statutes and legislation in the first place. Through the power of reasoning, researchers analyse and interpret them, whereas non-doctrinal legal research emphasises research into the relationship of law with people and social values and facts. Doctrinal legal researcher goes deeply into analysis of “black-letter” of law by closely referencing the primary source materials of constitution and legislation.

By contrast, non-doctrinal legal research is also known as socio-legal research, which relies on findings and analysis of social facts other than law. Therefore, McCrudden (2006) interpreted it in a way that socio-legal research refers to anything which goes beyond and

outside the internal perspective of doctrinal legal research.

In view of these, doctrinal legal research and non-doctrinal legal research are complementary to each other in order to understand the mutual influence between law and social facts and reality at the same time. Without understanding law and a strong base in doctrinal legal research, Baxi (1975) considered it futile to embark upon the non-doctrinal legal research.

Lastly, a definition of how the socio-legal approach interacts with the law is given in depth by Ranbir Singh as follows.

“Socio-Legal Research or Study is an event where the science of law meets that the science of society. This research requires a multi-disciplinary approach to analyse and interpret the law, the legal phenomenon, the relationship between those two and also their relationship with the society in its widest sense. Socio-Legal Research has its theoretical, practical and methodological bases in the social sciences. Law is an important aspect when it comes to any social investigation. The originates and functions in a society based upon the particular needs, customs, traditions of the society and it also possesses the ability to greatly influence the social structure and functions of any society. Therefore, just as researchers are clueless and hapless if they have no knowledge of even the basics of the law, legal system and the various important if not all the law institutions, legal researchers too would be clueless and hapless and would do no justice whatsoever to legal inquiry if they do not possess the basic knowledge and are not aware of the mechanics of social research methods. In societies where the development is planned, law plays the role of a catalyst which helps and speeds the process of social reform. Thus in a dynamic or developing society a legal researcher must adopt a multi-disciplinary approach as the legal problems in the society will be largely in connection with the social, economic, political and psychological issues” (Singh, Bajpai and Singh, 2018).

Applying the above theories and doctrines to my legal thesis, in line with the practice and concepts of doctrinal legal research, the legal data, information and knowledge in this thesis was built up through a number of channels, these include:

- a) An examination of the primary source materials such as all the relevant international covenants, articles of the European Convention, the European Court of Human Rights (ECtHR), the court judgments of common law jurisdictions and Hong Kong, all domestic laws of Hong Kong such as the Basic Law, Hong Kong Bill of Rights Ordinance (BORO), Race Discrimination Ordinance (RDO), etc.
- b) Visits to the Hong Kong High Court Library to have access to law journals, textbooks, Halsbury's Laws of England and Hong Kong, hard copies of Court judgments in overseas common law jurisdictions, in the Hong Kong judiciary;
- c) Access to the Hong Kong Special Administrative Region government's (HKSAR government) judiciary website, international Westlaw online legal research, LexisNexis Hong Kong, etc.

Conducting research over the above non-exhaustive area, I focused on the key issues of discrimination, education, human rights, constitutional laws, JR, etc. Through the ocean of legal data, I had to search for directly and indirectly relevant data to support the standing of this thesis.

The challenge with this thesis is that it extends beyond traditional academic research. It is intricately linked to the evolution of human rights in education and its impact on the EMS in Hong Kong, a region that was formerly under British rule. As such, the social reality and the laws in this respect are intertwined and indivisible.

Therefore, this thesis requires three legal chapters to enable a thorough introduction of laws and Court judgments, their application to the case of EMS, and their influence on the consideration of JR in Hong Kong.

Adopting the quote of Ranbir Singh which explains that non-doctrinal legal research is a meeting of science of law and the science of society, a socio-legal researcher and a legal researcher are both clueless and hapless if they do not have an understanding of the law and the social reality.

Thus, in order to reach the social structures and functions, norms and behaviours, socio-economic background of the Ethnic Minority Parents (EMP) and EMS, a non-exhaustive list of non-doctrinal legal research areas which I had access to include the followings:

- a) Access to data and websites of non-governmental organisations which assist the ethnic minorities in Hong Kong, particularly in their education and linguistic problems;
- b) Access to major government departments' official websites, which provide assistance to ethnic minorities, information on the status quo and ethnic minorities' backgrounds, etc.
- c) Access to the academic websites of different universities to study different open surveys, findings, reports done by professors, scholars or research teams on topics and issues of ethnic minorities;
- d) Access to all circulars and memorandums issued by the EDB and all official announcements by government officials touching upon the issues or problems of ethnic minorities.
- e) Direct interviews with stakeholders of schools and education, etc.

By comprehensively analysing the social, economic and cultural background of the EMS in the first four Chapters and examining the legal contexts with the reality of the EMS in Chapters 5 to 7 with a final discussion in Chapter 8, this thesis will render its arguments accessible to readers without legal expertise and knowledge.

Domestic laws on preventing discrimination in education

Before we study the importance, necessity, purpose, and merits of bringing any legal action against the EDB in Hong Kong, we delve into the international safeguards that ensure education is accessible and available to all, regardless of race and ethnicity that may lead to discrimination.

In the meantime, the study of the domestic laws of Hong Kong is essential to understanding the status and significance of these international safeguards.

Under the legal system of Hong Kong, BORO entered into force on the 8th June, 1991 and it incorporated the provisions of the International Covenant on Civil and Political Rights (ICCPR) into the law of Hong Kong. On the other hand, the National People's Congress of the People's Republic of China adopted the Basic Law on the 4th April, 1990. Both the BORO and the Basic Law have been regarded as the constitutional laws of Hong Kong.

Article 39 of the Basic Law gives legal effect to international covenants and is the point of interface for the Basic Law, ICCPR and the BORO:

“The provisions of the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and international labour conventions as applied to Hong Kong shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region”.

In gist, the Basic Law and the BORO do not contradict the international covenants in implementing and enforcing fundamental human rights. In other words, they are complementary to each other.

For example, Article 25 of the Basic Law reads that “[a]ll Hong Kong residents shall be equal before the law”.

Article 1 of the BORO echoes the basic human rights of the international covenants and states:

“The rights recognized in this Bill of Rights shall be enjoyed without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

On the other hand, legal precedents of other common law jurisdictions have high persuasive authority in Hong Kong Courts and the same is extended to decisions of the European Court of Human Rights (ECtHR). The Court of Final Appeal in Hong Kong which is the highest appellate Court in Hong Kong, states:

“...the decisions of the Strasbourg Court (also known as the European Human Rights Court) on provisions of the European Convention which are in the same, or substantially the same terms, as the relevant provisions of the Bill of Rights, though not binding on the Courts of Hong Kong, are of high persuasive authority and have been so regarded by this Court.” (Koon Wing Yee v Insider Dealing Tribunal, 2008, para. 27)

Meanwhile, the comments or report of the United Nations Human Rights Committee (UNHRC) has been referred to as a more direct guide to the interpretation of the Bill of Rights as well as a “*valuable influential resource*” by the Hong Kong Court of Appeal and Court of Final Appeal (*Fok Lai Ying v Governor in Council*, 1997, p. 819; *HKSAR v Yeung May Wan*, 2005).

Therefore, for the purpose of this thesis research, I opine that there is no difference or incompatibility between the equal or equitable right of access to education in common law jurisdictions and the principles in this respect upheld by the ECtHR.

Following this, I will introduce the relevant international covenants, Court judgments of common law jurisdictions and the European court, and Articles of European Conventions to highlight their compatibility and inter-correlation.

The Role of the United Nations Human Rights Committee

Before we embark on further studies of international treaties or overseas legal contexts, the structure of the UNHRC needs to be explained as it has a significant role to play in monitoring the constitutional rights of all peoples in the countries or places where they are signatories to the treaties.

In brief, the UNHRC monitors the implementation of international treaties such as the ICCPR and the ICESCR by the state members. It seeks to ensure, through constructive dialogues with the state parties, that adequate education, health care, housing, food, and clothing are provided to all people.

I list the following international treaties below for our further understanding of the science of law before we return to the position of the UNHRC at the end of this Chapter. These treaties confirm that the obligations of the HKSAR government towards the education of EMS in other jurisdictions are identical or almost identical, depending on the government's resources.

1. The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)

This convention, adopted by the United Nations General Assembly in 1965, calls on signatory countries to take all necessary measures to eliminate racial discrimination in all areas of public life, including education.

Article 5 of the ICERD calls on states to guarantee everyone's right to education without discrimination and to ensure that all educational institutions provide equal opportunities for all.

2. International Covenant on Economic, Social and Cultural Rights (ICESCR)

This covenant was adopted by the United Nations General Assembly in 1966 and recognised the right to education as a fundamental human right. Article 13 of the ICESCR establishes the right to education without discrimination of any kind and emphasises the importance of equal access to education for all, without distinction of any kind.

3. International Covenant of Civil and Political Rights (ICCPR)

Article 26 of the ICCPR provides that all persons are equal before the law, and the laws prohibit any discrimination on any grounds such as race, colour, language, social origin, or other status.

4. The Convention on the Rights of the Child (CRC)

The CRC is the key international treaty that outlines the fundamental rights and protections of children. It prohibits discrimination of any kind, including that based on race, and calls on governments to take active measures to prevent and eliminate discrimination in all areas of life, including education. Governments that have ratified the treaty must ensure children have equal access to quality education regardless of race.

The CRC also recognises that the promotion of intercultural understanding and respect for diversity in education is critical, so the treaty encourages developing educational programs that promote tolerance and respect for all cultures and ethnicities.

Further, it establishes that children have the right to access information, including information that promotes respect for diversity, eradicates prejudice, counters stereotyping and addresses hate speech arising from ethnicity.

Such protection is encapsulated in Article 2 of the CRC which serves as a more comprehensive and essential instrument to combat racial discrimination against the EMS. It requires governments to take active measures to ensure that every child can enjoy the right to education. All those under the age of 18 are protected by the CRC (unless the adult age is attained earlier under the domestic law of that country).

Hong Kong's necessity to consider affirmative action

The United Nations Committee on Economic, Social and Cultural Rights (UNCESCR) has been outspoken in its Concluding Observations on implementing the ICESR in Hong Kong in 2014 about how non-Chinese speaking (NCS) students “*continued to be de facto discriminated in the public education system*”. In Chapter 1, we have made a distinction that financial background plays a role in separating NCS students from EMS, in the sense that simply being an NCS student does not mean one cannot get a quality education. It may be achieved through costly private and international school education with private tuition as long as the NCS students have family resources. Such options are financially simply out of reach for EMS, as illustrated by the Median Income chart for ethnic minorities in Chapter 2.

An equitable, rather than equal (in the sense that EMS are subjected to the same requirements as native Chinese-speaking students), educational provision would be necessary for Hong Kong to maintain its reputation for having a highly educated population.

So far, the Chinese as a second language curriculum, particularly designed to adapt to the needs of the EMS, has not been devised. This is despite the criticism and complaints raised over the years by different Non-governmental Organisations and in various literature, as stated in Chapter 2.

This observation can be reinforced by the interviews conducted with the students in Chapter 4, where the difficulties they expressed in learning Chinese cast further doubt on whether the Hong Kong language education policy and systems for students are truly equitable since the EMS often achieve only primary 2-3 level in Chinese proficiency by secondary school

graduation. Though the UNCESCR is outspoken in its criticism and directly challenges Hong Kong's language education policy as discriminatory, its role is passive in influencing actual policy work and legislation on educational provisions in Hong Kong.

An affirmative duty imposed

Furthermore, as a party to the ICCPR, the HKSAR government has a positive obligation to see that her role and duty under the ICCPR are fulfilled.

Article 2 of the ICCPR provides:

1. *“Each State Party to the present Covenant undertakes to take steps individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.*
2. *The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”*

In the UNCESCR's Comment No. 13, adopted in December 1999 under the title 'Non-discrimination and equal treatment', Art 37 further provides,

“State Parties must closely monitor education - including all relevant policies, institutions, programmes, spending patterns and other practices - so as to identify and take measures to redress any de facto discrimination. Educational data should be disaggregated by the prohibited grounds of discrimination.”

Lastly, Article 5(e)(v) of the ICESCR states that

“States parties have an obligation to prohibit racial discrimination on the ground of race, colour, or national or ethnic origin, in the enjoyment of the right to education and training, which is one of the economic, social and cultural rights.

Article 1(1) of the ICERD enshrines the doctrines of direct and indirect discrimination in defining racial discrimination, while Articles 1(4) and 2(2) of the ICERD states that ‘States Parties should take special concrete measures to protect racial groups in exercising their fundamental human rights.’”

Summing up the above, the HKSAR government must not evade its obligations and positive duty to address and examine the pressing issue of the Chinese language problem of the EMS in Hong Kong from a broad perspective. The issue then arises when specific concrete measures do not appear to protect EMS in exercising their fundamental right to education. In that case, could legal redress or intervention be a solution?

What is discrimination?

We need to understand what constitutes “discrimination” under the law before we can further pursue whether the discrimination is legally actionable in Court.

The UNHRC adopted its General Comment 18 in 1989 by setting out what “discrimination” means or refers to:

“...any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.

...the principle of equality sometimes requires States parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant. For example, in a State where the general conditions of a certain part of the population prevent or impair their enjoyment of human rights, the State should take specific action to correct those conditions.”

This comment from the UNHRC describes what discrimination is in clear and simple words and it reminds all States parties that it is an affirmative duty on their part to take pro-active action or step to put an end to such discrimination if it arises.

Article 2 of the ICCPR echoes the comment with the following provision:

“Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

Lastly, Article 1 and Article 14 under the European Convention signed by the European governments as a Protocol read:

Article 1

“The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

Article 14

“The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

In summary, the above comments from committees of United Nations, international treaties as well as Articles from the European Convention, the contexts and definition of “discrimination” shares a common point, that is, for the purpose of the EMS in this thesis, all individuals are entitled to enjoy their constitutional rights regardless of their race, language and status.

Direct and Indirect Discrimination

There are two key concepts with discrimination, namely, ‘direct discrimination’ and ‘indirect discrimination’ under the Race Discrimination Ordinance (RDO) in Hong Kong which are compatible with the common law jurisdiction and the European Convention.

The legal provision of direct and indirect discrimination can be found under sections 4(1)(a)(b) and 4(2) of the RDO, which give a clear definition as follows:

- “4 (1) *In any circumstances relevant for the purposes of any provision of this Ordinance, a person (the discriminator) discriminates against another person if –*
- (a) On the ground of the race of that other person, the discriminator treats that other person less favourably than the discriminator treats or would treat other persons; or*
 - (b) The discriminator applies to that other person a requirement or condition which the discriminator applies or would apply equally to persons not of the same racial group as that other person but –*
 - (i) which is such that the proportion of persons of the same racial group as that other person who can comply with it is considerably smaller than the proportion of persons not of that racial group who can comply with it;*
 - (ii) which the discriminator cannot show to be justifiable irrespective of the race of the person to whom it is applied; and*
 - (iii) which is to the detriment of the other person because that person cannot comply with it.*
- (2) For the purposes of subsection (1)(b)(ii), a requirement or condition is justifiable if it serves a legitimate objective and bears a rational and proportionate connection to the objective.”*

As indicated under section 4 of the RDO, direct and indirect discrimination are premised on different discriminatory acts. The former involves a less favourable treatment to a person on the ground of his race and the latter involves a requirement or condition applied to a person who finds it considerably difficult to comply with due to his race. Considering this, these two concepts are frequently regarded as mutually exclusive unless a claimant can demonstrate the material facts exist under both direct and indirect discrimination within anti-discrimination laws (*C v The Chinese University of Hong Kong*, 2022).

This thesis prioritises “indirect discrimination” which reflects the nature of our challenges. These challenges pertain to government or public universities’ policies or systems, which often function as a requirement or condition under section 4(1)(b) of the RDO, as analysed in Chapter 6.

An international legal history and perspective on discrimination cases

Albania in the 30s

The Permanent International Court of Justice, more commonly known as the World Court, and later replaced by the International Court of Justice in 1946, has said in as early as 1935 in an advisory opinion on the ‘Minority Schools in Albania’ case that:

“Equality in law precludes discrimination of any kind; whereas equality in fact may involve the necessity of different treatment in order to attain a result which establishes an equilibrium between different situations” (Advisory Opinion regarding Minority Schools in Albania, 1935, para. 64).

The circumstances which led to the World Court making the advisory opinion above are not dissimilar to what occurred in Hong Kong after the 1997 handover, which has been addressed in Chapter 1. In the Minority Schools of Albania case, Albania’s national government had been established in 1920, which included its own ministry of education to lay the foundation for a national education system. Various American schools and Italian and French schools continued operation in these “foreign schools”.

By 1933, a Royal Constitution was amended where education became an exclusive right of the state, leading to closures or nationalisation of the “foreign schools”. The only “foreign schools” left were those for the Greek minority, but were also closed by the 1933 Constitution, and it was Greece’s referral of this matter to the World Court that ultimately gave way for Albania to reopen these schools. In the World Court’s advisory opinion, it was resolved that the then League of Nations would provide that,

“Albanian nationals who belong to racial, religious or linguistic minorities will enjoy the same treatment and security in law and in fact as other Albanian nationals. In particular they shall have an equal right to maintain, manage and control at their own

expense or to establish in the future, charitable, religious and social institutions, schools and other educational establishments, with the right to use their own language and to exercise their religion freely therein” (Advisory Opinion regarding Minority Schools in Albania, 1935, p. 5).

In essence, the law prohibits discrimination against students regardless of their race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. However, differential treatment applied to some students in order to achieve equality with others does not necessarily amount to discrimination. That is what is required—an equitable language education policy.

US in the 70s and 80s

By 1974, in the US Supreme Court class action case of *Lau v Nichols*, the Supreme Court of the United States made a ruling that it was a violation of Title VI of the Civil Rights Act of 1964 for failing to provide supplementary English language courses to 1800 students of Chinese origin as this practice in principle breached the relevant Act which prohibits discrimination on the grounds of race, colour or national origin in any academic programmes funded by federal financial assistance.

The learned judge in this court case, Justice William O. Douglas was of the opinion that “there will be no equality of treatment merely by providing students with the same facilities, textbooks, teachers and curriculum to students who do not understand the English language as in doing so, these students are effectively foreclosed from any meaningful education.”

That being said, the decision of *Lau v Nichols* may not be far-reaching enough if it is applied to overcome the discrimination faced by EMS in pursuing quality education in Hong Kong. The decision of *Lau v Nichols* is profoundly sympathetic and astute in its observations of the difficulties faced by NCS students. It recognises that equal treatment does not constitute equal educational opportunity. However, the case gives no legal implication for what curriculum and methodology can be adopted to restore the rights of the affected EMS students pursuing the class action.

By the 80s, the 1981 case of *Castañeda v Pickard* remedied what *Lau v Nichols* did not address clearly by giving the American public specific guidelines to determine if a school district met the ideals expressed in *Lau v Nichols*. When a school district in Raymondville, Texas, was charged of being in violation of the rights of English language learners under the US's Equal Education Opportunities Act 1974, a 3-step test was set out to determine if "appropriate action" was made for programs serving language-minority students – this is known as the "Castañeda test". Summary of paragraphs 59-60 of the judgment espousing the 3-limb test is as follows:

"First, the court must examine carefully the evidence the record contains concerning the soundness of the educational theory or principles upon which the challenged program is based...The court's responsibility, insofar as educational theory is concerned, is only to ascertain that a school system is pursuing a program informed by an educational theory recognized as sound by some experts in the field or, at least, deemed a legitimate experimental strategy.

...The court's second inquiry would be whether the programs and practices actually used by a school system are reasonably calculated to implement effectively the educational theory adopted by the school. We do not believe that it may fairly be said that a school system is taking appropriate action to remedy language barriers if, despite the adoption of a promising theory, the system fails to follow through with practices, resources and personnel necessary to transform the theory into reality.

Finally, a determination that a school system has adopted a sound program for alleviating the language barriers impeding the educational progress of some of its students and made bona fide efforts to make the program work does not necessarily end the court's inquiry into the appropriateness of the system's actions. If a school's program, although premised on a legitimate educational theory and implemented through the use of adequate techniques, fails, after being employed for a period of time sufficient to give the plan a legitimate trial, to produce results indicating that the language barriers confronting students are actually being overcome, that program may, at that point, no longer constitute appropriate action as far as that school is concerned."

This test was then used in consideration by the then Office of Civil Rights with whether compliance was made with *Lau v Nichols*.

Europe in the 90s and 00s

Language barriers and education continuously require attention from nations when different nationalities come together and the European Union's establishment as both a federation and confederation also required judicial intervention in national educational policies to achieve the *in varietate concordia*, "united in diversity" motto ideal of the European Union. The cases considered in this thesis are concerned with the Roma children.

In *Sampanis v Greece* (2008), the ECtHR found that the Greek education policies were inconsistent with Article 2 of Protocol No.1, Articles 13 and 14 of the European Convention on Human Rights (ECHR) by using language as a barrier to segregate Greek students from Roma origin from enrolling in mainstream schools. A complaint was made that schooling for children in the 2004-2005 school year and placement of children in special classes in an annex to the main primary school building were measures made based on the children's Roma origin. The judgment given was that there was "*a strong presumption of discrimination and it was therefore for the Government to show that this difference in treatment was the result of objective factors, unrelated to the ethnic origin of the persons concerned*".

In 2000, the ECtHR faced its first case challenging systemic racial segregation in *DH v Czech Republic*. It was determined that the Czech Republic had breached Articles 1 and 14 of Protocol 1 of the ECHR by wrongly placing a large number of Roma children in *special schools* for the mentally disabled. When this case was brought, Roma children in the Czech Republic were 27 times more likely to be placed in *special schools* for the mentally disabled compared to non-Roma children. The children were Czech nationals of Roma descent and were all born between 1985 and 1991, and when application was made to the ECtHR in 2000, they were 9-15 years old but had already been placed in *special schools* for the mentally disabled between 1996 and 1999. Statistics presented before the ECtHR had shown that even if Roma children managed to avoid being placed in *special schools*, where half of the students in these schools were Roma, they were then enrolled into substandard and predominantly Roma urban ghetto schools (*DH v Czech Republic*, 2007).

The comparison to the situation of EMS in Hong Kong is clear: ultimately, as children are streamed into substandard education, how can they access higher education or stable employment? The case of *DH* is ongoing, given that it is still awaiting enforcement of judgment, but by 2007, the ECtHR's Grand Chamber had found that there was an indirect form of discrimination since Roma children *de facto* received inferior education because of their ethnic origin. In terms of complaints made for breaching international covenants, the CRC provisions of Article 28 on "Education" and Article 30 on "Protecting Children of Minorities or of Indigenous People" were both complained of, as are other provisions in the ICCPR (Article 26), ICERD (Article 1), and in the UNESCO Convention Against Discrimination in Education (to which, for the scope of this thesis, it should be noted that Hong Kong is not a signatory).

By 2013, the ECtHR reiterated in the case of *Horvath and Kiss v Hungary*, another Roma children case, that the line of jurisprudence marked by *DH v Czech Republic* that there is admissibility of statistical evidence to establish *prima facie* discrimination based on ethnic origin (*Horvath and Kiss v Hungary*, 2013, para 107.). There is a reversal of the burden of proof in that the state has to prove its educational policy is objectively justified and not made under any factors pursuant to the ethnicity of the children (*Horvath and Kiss v Hungary*, 2013, para 108). The ECtHR also affirmed that for state education, it is unnecessary to make findings to prove a discriminatory intent for indirect discrimination (*Horvath and Kiss v Hungary*, 2013, para 106). *Horvath and Kiss* was concerned with 2 Romani male applicants being placed in "remedial schools" which included Hungarian children with mild mental disabilities, where a basic curriculum was taught, one that rendered graduates grave difficulty in seeking quality education or employment that would be available to the general population.

These cases that have come before the ECtHR have been part of concerted and strategic litigation efforts by Roma rights non-government organisations and international justice non-government organisations. It is obvious that statistical evidence is important to allow for an understanding as to whether an individual or group has been discriminated against. However, in *DH*, the ECtHR has also noted that it "*considers that, when it comes to assessing the impact of a measure or practice on an individual or group, statistics which appear on critical examination to be reliable and significant will be sufficient to constitute the prima facie evidence the applicant [i.e. the Roma children] is required to produce. This does not, however, mean that indirect discrimination cannot be proved without statistical evidence*" (*DH v Czech Republic*, 2007, para 188).

The UK asylum case of *R (European Roma Rights Centre) v Immigration Officer at Prague Airport* where the then UK's highest court, the House of Lords (now Supreme Court) gave judgment in December 2004 illustrates a realistic scenario of what indirect discrimination can really constitute. In that case, it was unanimously held there had been discrimination against Roma by the British immigration officials on the basis of treating them less favourably than non-Roma. It was found that the immigration system was inherently and systematically discriminatory against the Roma, as they were deliberately and intensively questioned by immigration officials even though officials knew Czech asylum seekers entering the UK were Roma. The case's appeal itself has failed given that there is no international law requiring Roma to be allowed into a country before they apply for asylum, but judgment has been given which illustrates that discrimination has to normally be proved by inference, indirectly, rather than through having direct evidence:

“[B]ecause people rarely advertise their prejudices and may not even be aware of them, discrimination has normally to be proved by inference rather than direct evidence. Once treatment less favourable than that of a comparable person...is shown, the Court will look to the alleged discriminator for an explanation. The explanation must, of course, be unrelated to the race or sex of the complainant. If there is no, or no satisfactory explanation, it is legitimate to infer that the less favourable treatment was on racial grounds” (R (European Roma Rights Centre) v Immigration Officer at Prague Airport, 2004, para 73).

The possible legal approach in Hong Kong

The above foreign Court judgments gave us an idea of what discrimination is like in other countries. This raises the question of whether discrimination against EMS is legally actionable in Hong Kong Courts.

In order to give any in-depth consideration to this aspect of human rights in Hong Kong, our attention should be directed to comments issued by various committees of the United Nations from time to time to remind Hong Kong of their grave concern towards the constitutional rights of the EMS in Hong Kong.

Reference is also made to the followings:

The United Nations Committee on the Elimination of Racial Discrimination (UNCERD) recommends that a policy on Chinese teaching for NCS students from immigrant backgrounds be developed in consultation with the teachers and the communities concerned. It is said that efforts to improve the quality of Chinese language education for these immigrant students be intensified (United Nations Committee on the Elimination of Racial Discrimination, 2009, para 31).

The above recommendation was issued in 2009, which was 12 years after the 1997 handover. Up to this date, ethnic minorities and teachers have not been involved as stakeholders in dimensions on any policy related to Chinese teaching.

The UNCERD recommended that Hong Kong, China, urgently take all necessary measures to eliminate *de facto* discrimination against NCS, including the reallocation of resources, and to promote access to education in mainstream schools. The Committee urged Hong Kong, China, to step up its efforts to implement legislation and policies on bilingual education at all levels of education and to provide high-quality education in Chinese as a second language (United Nations Committee on the Elimination of Racial Discrimination, 2018).

It is noteworthy that the UNCERD in its report in 2018 has voiced her observations and concerns on the Chinese language education of the EMS in Hong Kong, noting that as of 2014, there was still a lack of appropriate measures to alleviate the unsatisfactory issue of Chinese language study for EMS (United Nations Committee on the Elimination of Racial Discrimination, 2018).

In the same report, the UNCERD further observed that despite the introduction of Chinese Language Curriculum Second Language Learning Framework (Learning Framework), there is insufficient Chinese language instruction to assist NCS students (United Nations Committee on the Elimination of Racial Discrimination, 2018, para 23). This implies there was still insufficiency in 2018 after the Learning Framework was introduced in 2014.

With a view to all the above comments from the United Nations Committees, a final review of this Chapter enables us to understand that legal proceedings are available to any person who claims that their fundamental rights have been contravened under international treaties like

ICCPR, ICESCR, CRC, as well as under the domestic laws of Hong Kong such as the RDO, Basic Law, BORO, and others.

However, not all discriminatory acts are subject to legal action in Hong Kong Court. The test adopted by Hong Kong is similar to that in the common law jurisdictions and the ECtHR. This test can be explained in simple terms as follows:

Discrimination is justified provided it pursues a legitimate aim, is rationally connected with the aim, and the discriminatory measure adopted is no more than necessary for that purpose.

Finally, a balance needs to be struck as to whether the benefit to society results in an unacceptably harsh burden on an individual.

This is known as the 4-step Hysan test approved and applied by the Court of Final Appeal (*Hysan Development Co. Ltd. v Town Planning Board*, 2016) in Hong Kong to adjudicate cases on limitation or restriction of constitutional rights. In the upcoming Chapter, we will examine the mechanism, process, and application of the 4-step Hysan test, which serves as a justification tool for assessing the legality of discrimination.

Chapter 6: Legal Redress for EMS in Hong Kong by way of Judicial Review: Possibilities, Difficulties, The Way Ahead

In Chapter 5, the international covenants, the Articles of the European Convention and overseas Court judgments have been cross-referenced with the domestic laws of Hong Kong, giving a clear picture of the compatibility of the constitutional rights and laws among these common law jurisdictions.

Furthermore, in the first four Chapters, we have addressed the hurdles that ethnic minority students (EMS) face in accessing quality education despite governmental promises and supportive endeavours. In the face of the educational disadvantage against EMS, which has persisted for nearly three decades in Hong Kong, EMS may have to resort to legal redress by way of judicial review (JR), a remedy typically understood as a last resort.

In this Chapter, we will analyse the discrimination cases that have been put before the Hong Kong courts to illustrate the gravity of discrimination against EMS and how it may be possible for them to pursue their right to quality education by such legal means.

The previous Chapters have dealt with the educational policies affecting EMS extensively. In law, these are understood as administrative actions arising from the exercise of powers of government officials or other public officers. Their powers derive from legislation and administrative decisions.

When all methods of making complaints to the government have been exhausted, JR is the next step as it enables a judge to determine whether the decisions made by the government or public bodies are in line with the law. It is a means of last resort for the court to step in and supervise whether government officials are exercising their powers and duties properly. In Hong Kong, the Courts continue to follow certain principles of the common law and uphold the tradition that any person exercising public power may be subject to JR. This is an important part of ensuring good governance and administration and is an effective means of ensuring that any exercise of power is proper. If not, it can be remedied through legal process to safeguard individual interests, rights, and freedoms.

A matter is justiciable if it can be properly brought before a court and is capable of being resolved judicially. As a result, to resolve the issue of the EMS in Court, JR is the appropriate avenue.

Strategic Litigation

For strategic and practical purposes, we need to study the importance, necessity, purpose and merits of bringing a legal action against the Education Bureau (EDB) and the public universities in Hong Kong.

From a practical point of view, litigation is introduced for various purposes, including but not limited to strategies. Strategic Litigation is an under-defined term and it can be interchangeably used with terms such as “public interest litigation”, “cause lawyering”, “impact litigation” or “test-case litigation” (Ramsden and Gledhill, 2019).

In summary, it seeks a long-term impact with the outcome. As a method of advocacy, it has multi-faceted objectives which create effect beyond the Court system. Lastly, it broadly extends litigation to include international mechanisms of redress.

Using litigation to advance a cause by seeking to demonstrate the subject in litigation is a constitutionally-mandated issue and a common phenomenon in the judicial history of the United States (Divan, 2016).

A summary of concepts from various common law jurisdictions tells us more about the purpose of initiating strategic litigation:

It is a course which, through a case in Court, achieves a positive impact on parties rather than the individual complainant (Open Society Justice Initiative, 2016, p. 10).

On the other hand, it takes one step forward and further to seek social and legal change which impacts the larger population and the government. In the end, the power of the Court is engaged in changing laws and policies to defend constitutional or human rights (The Malaysian Centre for Constitutionalism and Human Rights, 2014, p. 25). Similarly, it introduces a way to bring about a change in law to benefit as many people as possible (Walsh, 2017).

From another perspective, the focus is on the change of law or policy reform rather than the individual interest of the complainant (The European Roma Rights Center, 2004, p. 35; Flemington Kensington Community Legal Centre, no date). Lastly, it calls for a systemic change for all victims rather than for a single victim of the same crimes (Trial International, no date).

Summing up the above different and multiple concepts, the merits of bringing a legal action to rectify the discrimination of the EMS in Hong Kong serve an ultimate purpose. Through litigation, it is not only expected but is foreseeable that precedents established through litigation in Court will have far-reaching effects on the rights and position of the minority groups suffering the same or similar violations in the city or countries where they live (Minority Rights Group, 2017). There will be many more EMS to come in future under the educational system in Hong Kong and their academic achievements hinge on a comprehensively equal access to education with the Chinese students in Hong Kong.

Garner and Black (2009) defines “strategic litigation” as a legal practice to advance social justice for the public good, a lawsuit brought to establish an important legal principle or right, the practice of a lawyer who advocates for social justice by combining litigation with public education in order to lobby and advance a cause past its current legal limitations and boundaries.

In view of the multi-purposes and merits that strategic litigation can bring about in the issue of *Educational Disadvantage and Discrimination for Pakistani and Nepalese School Students in Hong Kong*, I will elaborate in detail in this Chapter on the principles, procedures and hurdles of JR and access to legal assistance from the Legal Aid Department (LAD) and Equal Opportunities Commission (EOC). These are all the need-to-know knowledge and rights for any EMS who wish to avail of the JR process to pursue their constitutional rights of equal access to education.

In this thesis, I will present three judicially reviewable issues identified through my doctrinal and socio-legal research. Alongside these issues, I will introduce with analysis some definitive judgments with judicial decisions from Hong Kong to establish a foundational context. The relevance and significance of these judgments will emerge when they are applied to a JR

scenario, where the arguments and counter-arguments between the applicant and respondent are examined in Chapter 7.

The three judicially reviewable issues

1. The Primary School Internal Assessment Challenge (The first challenge)

As explained in Chapter 3, primary students who wish to gain admission to government or subsidised secondary schools in Hong Kong are required to take six exam papers including the Chinese subject which is a core subject earning high weighting and marks. Internal assessment of these subjects done by the schools will be forwarded to the EDB for processing. Its results determine the students' admission opportunities to Band 1 schools (for high-achieving students), Band 2 schools (for average students), and Band 3 schools (for below-average students).

The crux of this challenge is, as detailed in Chapter 2, from the first day of education in kindergarten until the completion of a primary education study, there was a lack of a "Chinese as a second language curriculum" as officially devised by the EDB with the support of experienced and trained teachers to assist the EMS. Kindergartens, primary and secondary schools have been given a free hand to design their materials or modify teaching materials provided by the EDB to suit the needs of the EMS studying in their schools respectively. The Learning Framework, along with other support measures under the Supplementary Guide to the Chinese language curriculum (Supplementary Guide), appear to have been insufficient to help EMS achieve Chinese proficiency significantly beyond the General Certificate of Secondary Education (GCSE) Chinese level. Therefore, when the EMS have to compete with the Chinese students on the exam paper of the core Chinese subject, they will find this requirement or condition under the Internal Assessment considerably difficult to comply with. This is indirect discrimination under the Race Discrimination Ordinance (Cap. 602) (RDO) and a breach of constitutional laws against the human rights of the EMS.

2. The Hong Kong Diploma of Secondary Education Chinese subject (HKDSE Chinese subject) Challenge (The second challenge)

The HKDSE Chinese subject is a requirement or condition for all student applicants

to demonstrate Chinese language proficiency for admission to public universities. Considering its difficulty where few EMS can pass, upon consensus reached with the EDB, the public universities agreed to accept GCSE Chinese subject in 2008/2009 as an alternative Chinese language qualification for public universities' admission. However, the GCSE Chinese subject is only equivalent to a primary 2-3 level, which is significantly lower in standard. Furthermore, unlike the HKDSE Chinese subject, where 7 to 8.5 points are given to high achievers, the GCSE Chinese subject does not receive clear conversion points as part of the assessment criteria. Consequently, this challenge also alleged indirect discrimination as the HKDSE Chinese subject is a requirement which applies to all students including EMS who will find it considerably difficult to comply with.

3. The Points Conversion Challenge (The third challenge)

Public universities award 7 to 8.5 conversion points for top performers in the HKDSE Chinese subject, but do not grant conversion points for the GCSE Chinese subject, which is treated merely as an alternative qualification in Chinese language to meet public universities' admission requirement.

This challenge arises from indirect discrimination related to the policies or systems of public universities that mandate HKDSE Chinese subject as a requirement or condition for all students, including those in the EMS. Nevertheless, both the EDB and the public universities are aware that the EMS will struggle to meet this requirement or condition. This discriminates the EMS and the HKDSE Chinese subject is the hurdle for them to score reasonably high conversion points.

Hereinafter, throughout this thesis, I will refer to the above three challenges as “the Three Challenges” when addressing them collectively and the “first”, “second” and “third” challenge” when considering them individually.

Ultimately, each of the Three Challenges will undergo a four-stage test (hereinafter called the “4 step Hysan test”), as established in *Hysan Development Co. Ltd. v Town Planning Board* (2016), the Court of Final Appeal case referenced at the conclusion of Chapter 5. A further explanation is given below as to how this test, compatible with court judgments in other

common law jurisdictions and European Courts of Human Rights (ECtHR), applies in Hong Kong Court judgment.

Concisely, any infringement, restriction or limitation that may be interpreted as a form of discrimination against one's rights is subject to JR. Nevertheless, a 4-step Hysan test is employed to determine whether the discrimination is justified. In other words, discrimination is considered to be justified and ceases to be discrimination if it passes every step of the 4-step Hysan test.

The 4-step Hysan Test

Under this Court of Final Appeal case, the 4-step Hysan test laid down since 2016 is:

- (a) The restriction or limitation must pursue a legitimate aim;
- (b) The restriction or limitation must also be rationally connected to that legitimate aim;
- (c) The restriction or limitation must also be no more than was necessary to accomplish that legitimate aim; and
- (d) Where an encroaching measure has passed the three-step test, the last question to be asked is: whether a reasonable balance had been struck between the societal benefits of the encroachment and the inroads made into the constitutionally protected rights of the societal interest resulted in an unacceptably harsh burden on the individual.

It is worth noting that the aforementioned text (d) is articulated in relatively complex language. In layman's terms, this implies that when a restriction or limitation successfully satisfies the three-step test, the ultimate question which the court will ask is: Do the societal benefits derived from the restriction or limitation impose an unacceptably harsh burden on the affected individuals – in this instance, the EMS.

In any case, the 4-step Hysan test in Hong Kong under the court judgment *Hysan Development Co. Ltd. v Town Planning Board* (2016) is also a universally acceptable criteria in the ECtHR and in common law jurisdictions where international covenants apply.

As far as this court judgment is concerned, on the basis of infringement against private property rights under the Basic Law, the appellant in this case appealed against the Town Planning Board for setting planning and height restrictions in the development of properties owned by the appellant. Upon the appeal to the highest appellate Court of Hong Kong, it was determined that the town planning restrictions pursued a legitimate aim in the city, its considerations for air ventilation and pedestrian flow were also rationally connected to the legitimate objectives. The first two steps were satisfied.

The application of the third step is slightly complex to understand. It involves standards approved by the court to determine whether the discrimination is justified. To outline succinctly, a restriction or limitation is unreasonable if a less intrusive and equally effective measure is available. Besides, if the issue pertains to the Hong Kong Special Administrative Region government's (HKSAR government) socio-economic policies, the court typically does not intervene unless the restriction or limitation is so unreasonable or infringes upon the core values of human rights.

Lastly, the fourth step is likely to be satisfied if the first three steps are met, unless it imposes an unacceptably harsh burden on the individual. Nevertheless, among the Three Challenges, specific attention should be given to the third and fourth steps of the 4-step Hysan test, as these are the stages where strong counterarguments against the respondent in a JR can be developed.

In other words, some constitutional rights are absolute and will not survive any one of the steps in the 4-step Hysan Test. For instance, prohibition against torture or getting married at a suitable age are good examples. On the other hand, where the rights are not absolute, the law determines its restrictions and the permissible extent of those restrictions.

Principles and the spirit of the fourth step of the 4-step Hysan Test

It is worth noting how different judges addressed the significance of the fourth step, since we will particularly argue that the indirect discrimination imposes an unacceptably harsh burden on EMS.

As explained by McLachlin J in *RJR-MacDonald Inc v A-G of Canada* (1995), it is only necessary to consider this fourth step if the first three requirements of legitimate aim, rational

connection and minimal impairment are satisfied.

In England, in the opinion of Lord Bingham in *Huang v Secretary of State for the Home Department* (2007, para. 19), the interests of society must be balanced with those of individuals and groups. This must always involve striking a fair balance between the rights of the individual and the interests of the community.

Lord Reed JSC describes the fourth step in the *Bank Mellat v Her Majesty's Treasury* (No 2) (2014, para. 74) as “*the question at step four is whether the impact of the rights infringement is disproportionate to the likely benefit of the impugned measure*”.

On the basis of the judges’ comments and observations, when considering the Three Challenges, there is no need to reach the fourth step if any one of the first three steps is not satisfied. Secondly, when the fourth step is reached, the court has to conduct a balancing exercise to compare the societal benefits of a policy that infringes a constitutional right and the burden imposed on the individual. The court will only intervene if the severity of the burden is unacceptably harsh.

Ultimately, the fourth step requires the court to search for a fair balance between the demands of the general interest of the community and the requirements of protecting the individual’s fundamental rights, and this is inherent in the whole of the Convention of the ECtHR (*Soering v United Kingdom*, 1989).

However, it is only necessary to balance the interests of the community as opposed to the interests of the EMS when the discrimination passes the first three steps of the 4-step Hysan test. There is no need to reach the fourth step if the discrimination alleged does not pass any one of the first three steps under the test.

I will also address the application of the 4-step Hysan test to the Three Challenges in Chapter 7, where I will anticipate arguments and pre-empt the defences of the respondent in a JR proceeding. Through this process, the merits of the Three Challenges will be explored and the substance of the arguments and counter-arguments between the applicant and respondent will be analysed.

Before this exercise is conducted, I will present below selected appellate and final appeal court

judgments concerning challenges to human rights which are either binding or persuasive to judges in subsequent hearings in Hong Kong. It is essential to understand these major JR cases in order to appreciate their relevance and significance, and to follow the in-depth analysis of the Three Challenges with reference to some of these court judgments in the following chapter.

An overview of the appellate or final appeal court judgments

- I. The court judgment of *Fok Chun Wa & Anor v The Hospital Authority & Anor* (2012) 15 HKCFAR 409

A pregnant woman from China, representing women from the Mainland who are married to Hong Kong residents, appealed to the Court of Final Appeal (CFA), claiming she was being discriminated against as she could not access all the benefits with significantly lower medical fees available to pregnant women who are Hong Kong permanent residents. To be eligible for these benefits, this mainland woman had to fulfill a period of continuous residence in Hong Kong for 7 years before she could become a permanent resident of Hong Kong after her marriage.

In short, the Chinese women were the applicants in the JR, contending that the differential treatment they received compared to Hong Kong women constituted discrimination under constitutional laws.

In applying the 4-step Hysan test, it is noteworthy that the CFA had adopted a test of “comparator” or “like cases be treated alike” and a test of “margin of discretion” (or “margin of appreciation”) in the course of adjudication. For the “comparator” test, a resident pregnant woman in Hong Kong was compared with a pregnant woman from China, and the CFA had to find out whether and why she was being discriminated against. Applying the “margin of appreciation” test, the rights of women from China and the needs of society need to be balanced, and a margin is retained for the executive branch and legislature to consider the government policies. Under normal circumstances, a court will not interfere unless the issue was manifestly unreasonable or the reason for unequal treatment affected fundamental values, such as those involving personal or human characteristics like race, colour, gender, sexual orientation, religion, politics or social origin (*R v Director of Public Prosecutions, ex p Kebilene*, 2000; *HKSAR v Lam Kwong Wai*, 2016, para. 45).

The court ultimately dismissed the applicants' (Chinese women) claim, expressly acknowledging the government Treasury's constrained resources which is a socio-economic issue. As a result, the benefit of health or obstetric services with considerable government subsidies should be intended or reserved exclusively for permanent residents of Hong Kong.

With anticipation, this socio-economic issue is an area where the respondent can strongly argue in the next Chapter. Specifically, if the appeal is allowed in any of our Three Challenges, it will necessitate changes to educational policies and the examination system, which would impose a heavy financial burden on the resources of our Treasury.

II. *QT v Director of Immigration* (2018) 21 HKCFAR 324

This is a case of discrimination against sexual orientation. A UK national who entered into a same-sex civil partnership in England was denied a dependent visa by the Director of Immigration in Hong Kong because Hong Kong's marital policies only recognise monogamous marriage between a man and a woman.

The UK national's partner received an employment visa in Hong Kong through the HKSAR government's Talent Scheme. However, the Director of Immigration refused to grant a dependent visa to the UK national due to the couple's same-sex marriage, which is not recognised by Hong Kong law.

The UK national alleged a violation of human rights, aligning herself under the same comparable group as any overseas male-female couple arriving in Hong Kong on an employment visa, with a dependent visa granted to the spouse.

Ultimately, the JR succeeded, and the two arguments presented by the Director of Immigration failed because the Court disagreed with the Director's stance. It ruled that denying the dependent visa neither promotes the attraction of talent to join Hong Kong's workforce nor maintains strict immigration control.

Before we leave the *QT v Director of Immigration* case, the core reasoning of the

Court's judgment deserves our attention. First, this case aligns with the *Fok Chun Wa* case. Specifically, when an issue involves core values of human rights, the HKSAR government's margin of discretion (also referred to as the margin of appreciation) becomes much narrower and the Court will subject the impugned measure to particularly rigorous scrutiny. Under these circumstances, the HKSAR government must provide "very weighty reasons" or "particularly convincing and weighty reasons" to justify the alleged discrimination. This explains why, in the *Fok Chun Wa* case, the HKSAR government was given a broad leeway to deal with Chinese women where human rights were not involved, while in this *QT v Director of Immigration* case, a much narrower leeway was afforded to the HKSAR government in its dealings with UK nationals, which involve core values of human rights.

III. *Equal Opportunities Commission v Director of Education* [2001] 2 HKLRD 690

This is an important Court case which bears some striking resemblance with our issues under the Three Challenges. Therefore, it is essential to introduce and explore this case at length. The EOC in Hong Kong took the Director of Education (DE) to Court in a challenge against the DE for managing a system for the transfer of students from primary to secondary school under the system of Secondary School Places Allocation (SSPA).

Under the SSPA system, a student received a score from each primary school on subjects taught. The score was based on internal assessments and centrally administered academic aptitude tests (AAT). Based on these scores, students were allocated to schools of different bands, with top students having a much better chance of being allocated to schools of higher banding.

The average scores for girls were higher in internal assessments and the average scores for boys were higher in AAT. The EDB introduced a scaling system to evaluate girls and boys separately. This led to the boys' scores being raised and the girls' scores being lowered. Additionally, the cutoff scores for the bands were different for boys and girls, with girls needing a higher score to enter the top band. The issue is whether there was sexual discrimination under section 5(1)(b) of the Sex Discrimination Ordinance (Chapter 480) (SDO) which is a similar equivalent of section 4(1)(b) of the RDO referred to in Chapter 5 and it reads:

“5(1) A person discriminates against a woman in any circumstances relevant for the purposes of any provision of this Ordinance if:

- (b) he applies to her a requirement or condition which he applies or would apply to a man but:*
 - (i) which is such that the proportion of women who can comply with it is considerably smaller than the proportion of men who can comply with it;*
 - (ii) which he cannot show to be justifiable irrespective of the sex of the person to whom it is applied; and*
 - (iii) which is to her detriment because she cannot comply with it.”*

In the end, the Court declared against the DE that the discriminatory aspects of the SSPA system had to be eliminated. The Court ruled that there was direct discrimination against individual pupils and the defence of ensuring “group fairness” and “equality of opportunity” between the two sexes failed. This is a case in which the DE, being well-intentioned, wished to balance the fixed ratio of boys’ and girls’ admission to co-educational secondary schools.

Under the DE’s arrangement, the top third of the students under the SSPA are placed into Band 1 schools, the second third into Band 2 and so on and it is the policy of the DE that gender ratios in co-educational secondary schools should remain balanced. However, in the eyes of the Court, when all primary school students were sitting exactly the same tests, if the ‘skewing’ of the results of those tests on the basis of gender results in unequal treatment, it constitutes direct discrimination and the purpose of the legislation was to secure equality of treatment for an individual rather than equality treatment for a class.

Finally, it is noteworthy that the Court made a declaration that the SSPC system was unlawful direct discrimination on sex because the DE focused excessively on “group fairness” without paying attention to the individual rights of the boys and girls. As a result, the girls were disadvantaged on the basis of their sex only. In the end, the DE was given a period of time to take steps as necessary to honour the findings of the Court and to modify and implement a system which entirely removes the discrimination.

With reference to Section 21K of the High Court Ordinance (Cap. 4), a declaratory relief can be made by the Court provided it is “just and convenient” to do so. It is also likely to be considered by the Court in adjudicating cases of discrimination which are based on a “system” or “government policy”.

On this basis, a declaration from the Court in the Three Challenges against the examination policy of the HKSAR government, the points conversion policy and the admission requirements of the public universities is a remedy we ask for as a possible legal redress under the contemplated JR in this thesis.

Delay

Delay is a great hurdle for JR. I will resolve this crucial issue here, leaving the substantive arguments and counter-arguments of the JR in the next Chapter.

To overcome this hurdle, the following CFA case is a helpful judgment to the EMS, i.e. the applicant.

IV. *Leung TC William Roy v Secretary for Justice* [2005] 3 HKLRD 657

It is a great hurdle to bring a JR if there has been a delay since the discrimination occurred.

Section 54 of the High Court Ordinance and Order 53 rule 4(1) of the Rules of the High Court reads:

“An application for leave to apply for JR shall be made promptly and in any event within three months from the date when grounds for the application first arose unless the Court considers that there is good reason for extending the period within which the application shall be made.”

This Court judgment helps overcome the time hurdle as the applicant was allowed to challenge directly the legal provisions of the law, which restricts his freedom of sexual activities with gay men after he had suffered discrimination for years. The generous time extension was granted by the Court based on the protection of fundamental rights under the Basic Law which are on-going and the infringement against fundamental

human rights of a class of persons, in the interests of public policy are important issues.

In this case, the central issue was the legality of sexual relations between gay men, which were deemed unlawful until the age of 21. The law in question criminalised sexual activity between one or both members of a gay couple if either of them was under the age of 21. Interestingly, no such legal restrictions applied to lesbian or heterosexual couples as long as both individuals were over the age of 16. The Court ultimately deemed the sections of the statute pertaining to the age restrictions on gay male intimacy to be inconsistent with the Basic Law and the BORO, which align with international covenants and public law. Consequently, the laws in question were declared void.

This case reiterates the significance of human rights and successfully navigates the essential time constraints of a JR. Hence, it is likely that this three-month hurdle can be overcome because the discrimination suffered by any EMS is ongoing from kindergarten to tertiary education level.

V. *Raval v Department of Health and Social Security (1985) (Raval)*

The applicant relied on the Race Relations Act 1976, an equivalent of section 4(1)(b) of the RDO, and complained that, as an Asian, she was unable to obtain the necessary grade in the GCE O level, which was required for a clerical job in the Civil Service.

The applicant's complaint was dismissed by the industrial tribunal. Subsequently, she appealed against the industrial tribunal's decision to the appeal tribunal. The significance of this case lies in the appeal tribunal's dismissal of her appeal with *obiter dicta* in the EMS' favour: the appeal tribunal determined that the required qualifications were *prima facie* discriminatory and the industrial tribunal wrongly stated that Asians were not inherently less capable of meeting the required examination standard than the indigenous population.

The appeal tribunal upheld the industrial tribunal's decision, deeming it justifiable primarily because the applicant's inability to meet the requirement did not disadvantage her. She could potentially achieve the necessary qualification by passing a G.C.E. "O" Level exam, which was within her capabilities, either in the future or even in the past. The reason she did not take the exam was due to her belief that it would be degrading

to her after having years of teaching English.

Importantly, the appeal tribunal confirmed two material principles:

- a) a person's ability is bound to be affected if the exam is conducted in a language that is their second language. This is evident common sense and no statistics on comparative performance are required to prove this in Court;
- b) once a *prima facie* case of discrimination is established by the affected individual, the burden of proof shifts to the respondent to disprove it by objective justification.

Importantly, the case of *Raval* is an essential precedent in the United Kingdom; its principles and the test of "burden of proof" in particular, are widely upheld in discrimination cases. Besides, relying on this case, the Court in our intended JR is likely to agree that, the EMS' ability is bound to be affected if the exam is conducted in a second language which is very difficult one to them – the Chinese language.

VI. *Siu Kai Yuen v Maria College* (2005) is a Court case involving a claim of unlawful discrimination made against the employer under the Disability Discrimination Ordinance (Cap. 487) (DDO). The Court agreed that it can rely on its own knowledge and experience, stating that requiring extensive statistical evidence before a case can be established is not advisable.

This case echoes the *Raval* case and underscores the Court's reliance on common sense and experience in its decision-making process. They demonstrate that it is not always necessary to produce figures and statistics in Court. This attitude in the judiciary may work to our advantage in our JR since a lot of data concerning EMS are likely to be held in government archives, libraries, or internal records.

This ends the introduction of some of the enlightening or instructive Court judgments I selected from Hong Kong for our study in this thesis. Given this foundational knowledge, the next Chapter is expected to be relatively straightforward to comprehend.

Before the end of this Chapter, the practical steps and strategic preparations necessary to initiate a JR will be explored, followed by an analysis of its mechanisms and the grounds for applying for a JR.

Equal Opportunities Commission (EOC)

Before an application for JR is submitted to the Court, legal assistance from the EOC and LAD must be explored. This serves both strategic and practical purposes for the reasons explained below.

As explained in Chapter 2, the EOC was established in May 1996 as a statutory body of the HKSAR government to implement the anti-discrimination laws of Hong Kong and work towards the elimination of all discrimination prohibited by these laws. Therefore, it is advisable to approach the EOC as the first step prior to a JR application to the Court (Equal Opportunities Commission, no date).

As a standard practice of the EOC, a meeting will be promptly arranged between the complainant and the other party to peacefully resolve the issue, potentially through apologies or compensation if a *prima facie* case is established after investigation. However, given the longstanding criticisms of the public bodies' educational discrimination against EMS over the past two decades, it is unlikely that the DE, the EDB, or the public universities will make any concessions in this process.

Despite this, the strategic focus should be on the legal assistance that the EOC may provide to the complainant if the case is too complex for the complainant to handle alone. The Legal and Complaint Committee of the EOC will consider whether civil litigation can be initiated against the discriminator. If the EOC determines that it is warranted, they may assist the complainant in hiring an external lawyer.

Importantly, for the first time in its history, according to the Court judgement of *Equal Opportunities Commission v Director of Education* referred to in this Chapter, upon receipt of complaints of gender discrimination under the SSPA system in 1998, the EOC failed to resolve the issue through meetings with the EDB. Finally, it invoked its powers under the SDO to institute a formal investigation which resulted in a JR against the DE.

Under the RDO, the EOC holds the same power as it does under the SDO. Ideally, the EOC should be approached to handle the JR of the Three Challenges on behalf of the EMS in the same way as under the *Equal Opportunities Commission v Director of Education*. Once the

case is in the good hands of the EOC, the legal costs and the complexity of all legal procedures will be taken care of by the EOC. Objectively speaking, the EOC is only in a position to turn down the approach of the EMS if, in their professional opinion, there are no merits in any of the Three Challenges.

Legal Aid Department (LAD)

If the EOC declines to take up the case of the EMS, the LAD should be approached to provide free legal assistance to the EMS in launching a JR under the Three Challenges in Court. The first legally-aided discrimination case under the RDO involves a fifteen-year-old Indian boy, Arjun Singh, who complained against the police for failing to provide adequate police services to protect and assist him as would be provided to other members of the public. The case failed as the Court held that Arjun Singh failed to prove that he was treated less favourably in the provision of “services” by the police under the RDO.

The significance of this case is Arjun Singh was represented by the LAD and the implication of this is, similar to that of the EOC, the costs of his litigation fee and complexity of legal procedures were taken care of by the Legal Aid Department (*Singh Arjun (by his next friend Singh Anita Guruprit) v Secretary for Justice & Hung Kai Kam*, 2016).

It is noteworthy that an applicant for legal aid assistance is required to pass a ‘means test’ to find out the financial resources of the EMS as the principle of the Legal Aid is to assist those parties with very limited financial resources and income. In this respect, there should not be a problem for the EMS’ families with disadvantaged socio-economic backgrounds. Apart from this, the applicant is required to meet the “merits test” of the intended JR issues. This practically means whether the claim has reasonable grounds under the Three Challenges (Legal Aid Department, no date).

Concept, Process and Procedures of Judicial Review (JR)

JR is a discretionary remedy. It is also a remedy of last resort. In looking at the exercise of discretion, the Courts are entitled to consider matters such as the nature and importance of the decision under review, the effect of any order on the conduct of good administration, and whether the granting of a remedy is necessary or desirable in the interests of justice. It is not the role of the Court to consider whether a decision under challenge was right or wrong. A

Court is not entitled to substitute its discretion for that of the decision-maker (*R v English Schools Foundation*, 2004).

The Court plays a crucial role in supervising the conduct of decision makers to ensure they adhere to the requirements of the law. Decision makers, who are entrusted with official powers, are obligated to exercise caution to avoid exceeding or misusing their authority. They are expected to act in good faith and ensure that their decisions, which can have significant consequences, are rational and not arbitrary or unreasonable. Their decisions should reflect a thorough consideration of all relevant factors.

Who Can Be Sued?

A person who applies for JR is called an ‘applicant’ and the person against whom the JR is sought is known as the ‘respondent’. The next question is who can be sued and who the respondent is if an EMS lodges a JR on the basis of any one of the three challenges.

A few case authorities or legal literature below confirmed the status of who the respondent(s) can be in the field of education if a JR is launched. “*A body is performing a public function when it provides public goods or other collective services, such as ... education*” (De Smith, 1995). The EDB and the public universities are public bodies performing public functions: IA in the primary school is introduced and managed by the EDB; and the admission and assessment of students are performed by the public universities. Section 3 of the Education Ordinance (Cap. 279) defines all schools as being “educational establishments” and provides that the DE shall be the responsible body for all schools which are entirely maintained and controlled by the HKSAR government.

Schools and universities have been taken to Court as respondents under JR from time to time regarding various legal issues. For example, the Court ruled that, in determining a disciplinary matter against a student, the Lingnan University is clearly a public authority amenable to JR when it is set up by way of the Lingnan University Ordinance (Cap. 1165) and its objects are “to provide for education, studies, training and research” under Section 3 of the said Ordinance. These are clearly public functions (*Leung Chak Sang v Lingnan University*, 2001).

Similarly, the English Schools Foundation (ESF) was found to be a product of statute, namely,

the English Schools Foundation Ordinance (Cap. 1117). The Court again held that in determining whether a student should be admitted to an ESF school and whether a student should be expelled from an ESF school, both the ESF itself and the individual school were performing a public function, not a private one (*R v English Schools Foundation*, 2004).

As a respondent, the DE of the EDB was also taken to Court by the applicant EOC for a JR that the SSPA system was discriminatory. This case authority has important implications for our intended JR under the 3 challenges which will be explained later (*Equal Opportunities Commission v Director of Education*, 2001).

All public universities were established under the statutory ordinance in Hong Kong, for example, the University of Hong Kong (HKU) was formed under the University of Hong Kong Ordinance (Cap. 1053), the Chinese University of Hong Kong (CUHK) was formed under the Chinese University of Hong Kong Ordinance (Cap. 1109) and the City University of Hong Kong (CityU) was formed under the City University of Hong Kong Ordinance (Cap. 1132). All the public universities were given a high degree of autonomy and a free hand to manage the universities. In this regard, the DE, on behalf of the EDB, and all the public universities established by statutory ordinance are subject to JR as public bodies performing public functions in the field of education.

In conclusion, the EDB, the DE and the public universities, performing public functions, are all subject to JR. They can be sued by the EMS or parents acting on behalf of the EMS if they are minors below the age of 18 under the laws of Hong Kong. Furthermore, a non-government organisation such as the EOC can take up the case on behalf of the individual who sues, the LAD can provide legal aid to the applicant and sue under the government's legal aid resources.

Appeal

According to judicial practice in Hong Kong, if there are other avenues of redress (such as an appeal) lie against the decision complained of, those should normally be pursued before applying for JR (*Stock Exchange of Hong Kong Ltd v Onshine Securities Ltd*, 1994). The Court explains the reason for this rule that JR is a collateral challenge and its remedy is not to be made available where an alternative remedy exists (*R v Chief Constable of the Merseyside Police, ex parte Calveley*, 1986). In fact, the Courts will rarely allow the collateral

process of JR if it is used to attack an appealable decision (*Chow Shun Chiu v HKSAR*, 2002). Therefore, for any EMS who wishes to consider JR against the EDB and /or the public universities, it is advisable for them to exhaust any process of appeal before making the JR application to Court.

It is evident that there is a lack of transparency in the appeal process in Hong Kong. None of the official websites of the public universities, which had been thoroughly searched and introduced at the end of Chapter 3, clearly indicate whether an EMS can appeal against a decision of the public universities for rejecting an EMS in his application for admission.

Grounds of Judicial Review

Following a progressive understanding of the concept of JR, we proceed to introduce the acceptable grounds which the Courts in Hong Kong will consider in a JR application.

The discrimination generated under the Three Challenges against the EMS forms the basis of a legal action known as JR. JR is a judicial process against the decision or decision-making process of a public body if the decision or decision-making process of the public body is “illegal”, “improper” or “irrational” (Order 53, Rule 1A of the Rules of the High Court, Cap. 4A). These three elements are distinct concepts and an application for JR relies on ‘grounds’.

There are a number of grounds in a JR application (Chan, 1999). Application for leave from the Court is required before the hearing of a JR can be heard in Court and the threshold of the Court is an “arguability test” in considering whether or not to grant leave. A reasonably arguable case “*is one which enjoys realistic prospects of success*” (*Chan Po Fun Peter v Cheung CW Winnie & Another*, 2007). Therefore, it is essential to establish that any grounds of JR to be at least reasonably arguable in the court when the application for leave is being made. Nonetheless, we should focus on indirect discrimination and breaches of constitutional law, which are the primary arguments of our JR.

However, for the purpose of this thesis, I will list out below and analyse some of the directly related grounds to the EMS’ discrimination which are considered to be reasonably arguable from my perspective. After all, the grounds for JR may be intertwined with one another

depending on the nature of the JR. Ultimately, our primary grounds are premised on violations of the RDO and constitutional law provisions

Grounds of JR include:

1. Illegality,
2. Legitimate expectation,
3. Unreasonableness
4. Inconsistency with constitutional laws.

1. Illegality

An administrator is under a duty to understand the law correctly and regulate its power in line with the law. Illegality sets in when this does not happen. Under the limb of illegality, there are a number of sub-grounds in which the power is exercised. I will focus on two grounds of illegality which are possibly linked to the proposal that the HKSAR government has failed to provide quality education to the EMS.

(a) Irrelevant considerations

The decision-maker takes into account an irrelevant consideration or fails to take into account a relevant consideration.

The difficulties and hurdles of the EMS in learning Chinese are adequately explored in Chapter 2. The 12 years of compulsory education provided to all students in Hong Kong under the educational policy does not meet the requirement or standard of quality education as far as the Chinese language study of the EMS is concerned. Arguably, the HKSAR government, in moulding the mother-tongue educational policy of Hong Kong, failed to take into consideration of the particular circumstances of the EMS and failed to consult the ethnic minority stakeholders.

(b) Failure to exercise discretion

This ground arises when decision making requires exercising discretion, but it is fettered if the decision maker applies policies so rigidly without regard to the merits of a case.

Under this ground, the various allegations of breach of indirect discrimination under the RDO are good examples, as they involve a failure of the EDB to take into account of the interest, cultural and linguistic backgrounds of the EMS in implementing the post-handover language policies of the HKSAR government.

2. Legitimate Expectation

The Court of Final Appeal observed and stated:

“A legitimate expectation arises as a result of a promise, representation, practice or policy made, adopted or announced by or on behalf of government or a public authority” (Attorney-General of Hong Kong v Ng Yuen Shiu, 1983; Secretary of State for the Home Department, Ex parte Ruddock & Others, 1987)

Furthermore, Lord Denning interpreted the concept of legitimate expectation as:

“[A]n administrative body may, in a proper case, be bound to give a person who is affected by their decision an opportunity of making representations. It all depends on whether he has some right or interest or, I would add, some legitimate expectation, of which it would not be fair to deprive him without hearing what he has to say” (Ridge v Baldwin, 1963).

Based on these principles, the repeated commitments made by the Chief Executive in various policy addresses suggest that the guarantee of constitutional rights in education for all students may serve as a basis for argument under this ground.

3. Unreasonableness

The decision of a public body is unreasonable and is liable to be quashed when the Court concludes that no public body properly directed itself on the relevant law and acting reasonably could have reached that decision. This is where the famous *Wednesbury* principle comes into the picture (*Associated Provincial Pictures Houses*

Limited v Wednesbury Corporation, 1948). The court may be more critical in its examination of the decision-making process where fundamental human rights are involved, particularly where those rights are protected by a constitutional instrument such as the Basic Law. Similarly, Sir Thomas Bingham in a court case said that the more substantial the interference with human rights, the more the court would require by way of justification before it was satisfied that the decision was reasonable (*R v Ministry of Defence, ex parte Smith and Other*, 1996).

The HKSAR government's decision-making process resulted in the establishment of various policies and systems that impact the fundamental human rights of students, which falls under this ground of JR.

4. Inconsistency with the Race Discrimination Ordinance (RDO) / Basic Law / Hong Kong Bill of Rights Ordinance (BORO)

The public body's decision is held to be in breach of constitutional laws, including, but not limited to, the RDO, the Basic Law, the BORO, international covenants, the European Convention, and so on.

Upon analysis of the grounds of JR, the grounds are much broader than we thought. They are not confined to the decision-making of the HKSAR government or public bodies in the sense that this is a constitutional challenge involving a restriction of constitutionally guaranteed rights and freedoms, but it also includes the right to education and receiving quality education regardless of ethnicity.

Legal Redresses

Since it has been established that EMS face educational discrimination, the next question is about the legal redresses for the aggrieved party. The legal redress which is available to an aggrieved EMS is to obtain one or more than one of the following orders from the court in the case of a successful JR in local court pursuant to Order 53, Rule 1 of the Rules of the High Court (Cap. 4A):

(1) “An application for judicial review must be made if the applicant is seeking—

- (a) *an order for mandamus, prohibition or certiorari; or*
- (b) *an injunction under section 21J of the Ordinance restraining a person from acting in any office in which he is not entitled to act.*
- (2) *An application for judicial review may be made if the applicant is seeking—*
 - (a) *a declaration; or*
 - (b) *an injunction (not being an injunction mentioned in paragraph (1)(b)).*
- (3) *An application for judicial review may include an application for an award of damages, restitution or the recovery of a sum due but may not seek such a remedy alone.”*

Stated in simple language and applying the above orders to our scenario, the above orders can be imposed by the court upon a successful JR application to require the EDB or the public universities to do something, stop doing something, quash a decision, declare something to be discriminatory and have it removed or eliminated, etc. Nevertheless, as analysed in this Chapter, the most likely relief is a declaration (as the court has ordered in the *EOC* case) and redress available to the court if an EMS succeeds in a discrimination lawsuit against the HKSAR government and / or the public universities.

Defence

Before taking the public bodies to the court on a legal action of JR, it is essential to work out whether the public bodies have any defence against the JR. A JR in court may end up in a number of ways: the court refuses to grant leave (i.e. permission) for the application for JR; leave is granted, but the application for JR fails because the applicant fails to prove the discrimination in court or alternatively; the applicant is able to prove discrimination in court but the respondent succeeds in his defence that the discrimination or restriction in rights is justifiable, if it serves a legitimate objective, bears a rational and proportional connection to the objective and does not result in unacceptably harsh burden on the affected individual.

In summary, the Three Challenges appear reasonably arguable and satisfy the threshold for JR application. In the next chapter, I will examine what defensive arguments the HKSAR government, the EDB and the public universities might raise to counter the legal claims in this JR.

Conclusion

It might seem implausible that an international city like Hong Kong, with full implementation of all constitutional laws from local and overseas sources, has a serious human rights problem affecting the EMS. Apart from the issue of ApL(C), which was only introduced in 2014/15, the problems and discrimination generated by the Internal Assessment Challenge and the HKDSE Chinese subject Challenge have existed in Hong Kong for years. Despite the criticisms and voices of concern raised in society, no legal actions have taken place in the past against the DE, the EDB or the public universities. Some of the negative reports about the Chinese language problems of the EMS have also come from the EOC. Nevertheless, discriminatory practices against EMS persist to this day. EMS have no choice but to continue with the IA in the final stage of primary school and work on a Chinese exam paper, which is the same exam paper that the Chinese students will take, without sufficient support that would allow them to compete in a level playing field.

Knowing their Chinese proficiency limits exam scores and Band 1 school admissions, the EMS and their parents often feel powerless. It appears to be the case that Band 3 schools are primarily the ones admitting EMS immediately upon their graduation from primary schools. Discrimination continues right up to the stage that EMS leave the secondary schools for their university admission. The HKDSE Chinese subject is a compulsory Chinese subject required for all the public universities as university entrance. It was not until 2008 that the introduction of the GCSE Chinese subject was recognised by the public universities. However, discrimination persists because the Joint University Programmes Admissions System (JUPAS) only accepts the GCSE Chinese subject as an alternative Chinese language qualification.

In Chapter 4, interviews with stakeholders revealed the following results: two teachers expressed that, based on their understanding and without information from official sources to confirm, the GCSE Chinese subject is allocated 3 conversion points in the university admission process under JUPAS.

However, while the HKDSE Chinese subject has transparent conversion points publicly available on the public universities' websites, equivalent benchmarks for the GCSE Chinese subject remain undefined.

On the other hand, four principals explained that the assessment criteria or the points conversion system lacked transparency for the GCSE Chinese subject. It was like a black box and there was difficulty to find out whether conversion points were given to the GCSE Chinese subject. The observations from these stakeholders clearly support the allegation that public universities do not officially allocate any conversion points to the GCSE Chinese subject.

In any case, this Chapter has identified three judicially reviewable challenges against the concerned public bodies. In terms of legal strategy, the first approach with the EOC and the LAD is explained, followed by JR against the public bodies on the basis of the Three Challenges under the breach of section 4(1)(b) of the RDO and all other available constitutional laws. Once any one of the Three Challenges constitutes a breach under section 4(1)(b) of the RDO, it invokes various violations under constitutional and human rights laws, which ensure equality of education to all people regardless of race. After all, the RDO, the Basic Law, the BORO, the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR) are mutually complementary and not mutually exclusive to each other.

As for the legal redress or relief available to the EMS under any of the Three Challenges, a careful examination of Court judgments, such as *Equal Opportunities Commission v Director of Education*, reveals that the Court plays a crucial role. Putting aside draconian orders like mandamus, certiorari, or injunction, the Court has the power to demand action, immediate or progressive changes in the case of a successful JR action.

In any event, should the Court determine that any one of the Three Challenges constitutes discrimination against EMS, the EDB and/or the public universities must reform both the system and the relevant policies pursuant to the Court order to eliminate such discrimination.

This will benefit all the EMS in Hong Kong in the long run, creating a level playing field for them to compete with Chinese students on an equal basis for admission to the Band 1 and Band 2 primary schools and to the public universities in Hong Kong.

Undoubtedly, the discrimination faced by EMS in their pursuit of equitable education in Hong Kong constitutes a long-standing issue of significant public interest and policy concern.

Though much statistical evidence has been relied on to show that EMS, much like the Roman children of Europe in the *DH v Czech Republic* (2007) case discussed in Chapter 5, they are prejudiced in receiving quality education due to multiple discriminatory factors, it may fall outside the scope of this educational research to go further into cultural segregation that ultimately leads to EMS being marginalised in having a supportive environment to get a firm grasp of Chinese language at early and formative stages of their education.

Although this research struggles to obtain university admission statistics on whether institutions treat the GCSE Chinese subject differently from the HKDSE Chinese subject, various uncertainties surrounding EMS' access to higher education persist.

Lastly, this Chapter analyses the Hong Kong Judiciary's attitude towards the rights we pursue, as well as the mechanisms and principles of JR. It aims to provide a well-equipped framework to readers for evaluating the competing arguments of the applicant and respondent raised in a JR in the next Chapter.

Chapter 7: The Judicial Review (JR) Landscape - Anticipating Arguments and Pre-empting the Defence of the Respondent

This chapter addresses two primary concerns:

- a) to evaluate the prospect of success of a JR;
- b) to evaluate the value of pursuing a JR aimed at advancing social justice, systemic change, and policy reforms to benefit as many as EMS as possible – particularly given the complex language-related challenges in Hong Kong after the 1997 handover.

To enhance the success of a JR, legal counsel representing the applicant and respondent respectively gain strategic advantages by accurately conducting a pre-emptive exercise.

From the applicant's perspective, this exercise involves a proactive approach to anticipating, addressing and countering the potential arguments and challenges posed by the respondent's legal counsel, who represents the Education Bureau (EDB) or public universities in the JR.

Chapter 6 provides a basic guide to understanding the contexts and principal issues of the Three Challenges with reference to court judgments. A concise overview of each of these judgments is also summarised within.

In a JR, these court judgments are either binding or persuasive in subsequent hearings within the common law jurisdiction. Legal counsel representing the applicant or respondent will make use of them to strengthen their case through effective advocacy in court. For the purpose of this exercise, the seminal court judgments studied in Chapter 6 will be restated and analysed below.

The Applicant's Position

We contend that the policy, system, condition or requirement underlying the following Three Challenges, as identified in Chapter 6, are unconstitutional and unlawful:

- a) the Internal Assessment Challenge (the first challenge);
- b) the Hong Kong Diploma of Secondary School (HKDSE) Chinese subject Challenge (the second challenge);
- c) the Points Conversion Challenge (the third challenge).

We allege on behalf of the applicant, that the acts of the EDB and public universities violate local and international constitutional laws and / or Hong Kong's Race Discrimination Ordinance (RDO). In contrast, the respondent contends that no such violations exist.

The outcome of the JR depends on which way the scales of justice tilt, ultimately determined by compelling arguments grounded in the correct interpretation and application of statutes and case law, as well as the principles of common law jurisdictions.

1. An analysis of “the Internal Assessment Challenge” (the first challenge), “the HKDSE Chinese Subject Challenge” (the second challenge) and the “Points Conversion Challenge” (the third challenge) based on the *Fok Chun Wa* judgment

In the *Fok Chun Wa* case, the Court of Final Appeal (CFA) ruled against the applicant, who represented pregnant women from China, stating that they were not eligible for substantially subsidised obstetric services available in Hong Kong. These benefits are reserved exclusively for Hong Kong permanent residents, driven by concerns over the treasury's limited resources. This approach brings the case within the realm of socio-economic policy considerations.

The respondent is likely to make use of the two-stage approach adopted by the judges in the *Fok Chun Wa* case, when considering whether the constitutional right of equality has been infringed. The first stage is to identify the “comparators”. After the comparators are identified, as a second stage, the court will consider whether a differential treatment is justified under the 4-step Hysan test, established in the *Hysan* case in 2016.

Furthermore, in considering the second stage, a ‘margin of discretion’ is given to the executive and legislature. This term is a leeway given to the Hong Kong Special Administrative Region government (HKSAR government) in devising and implementing socio-economic policies where the Judiciary does not usually get involved in unless the issue involves human rights of an individual.

It is anticipated that the two-stage approach will be argued and counter-argued throughout the Three Challenges under our JR.

(a) Identification of the “comparator”

The respondent will likely equate the status of the ethnic minority students (EMS) to that of the Chinese women in the *Fok Chun Wa* case, positioning the EMS in a similar position as if they were non-residents of Hong Kong, unlike the Chinese students who are permanent residents.

This approach seeks to persuade the court to weigh socio-economic policy implications, alerting judges to the concern that any radical reforms or changes in educational system or policies under the Three Challenges could strain the Treasury’s limited resources. As a consequence, the non-resident EMS in Hong Kong should be treated in the same way as the *Fok Chun Wa* case and the public spending on education should be reserved for permanent residents only.

In anticipation of such strategic arguments, the applicant needs to clarify that although the EMS and the Chinese students are two comparable groups in terms of their status as students, they are very different in nature when compared to the Chinese women and the Hong Kong women.

In essence, the EMS are mainly permanent residents of Hong Kong, while the Chinese women are not in the *Fok Chun Wa* case. Although Chinese women can become permanent residents after marrying a Hong Kong man and fulfilling a period of seven years of physical residence in Hong Kong, at the relevant time of the JR, they were still non-residents of the region.

Besides, arguments must be made that Chinese women had a choice to give birth in China instead of coming to Hong Kong, and one of their purposes for traveling to Hong Kong was to seek access to obstetric and childbirth services with substantial government subsidies available exclusively to permanent residents.

On the other hand, the EMS in our thesis, as explained in Chapter 2 under the context of Poverty, are mostly children from second-generation immigrants whose parents or grandparents had come here to settle down by joining the civil service or the British army.

Therefore, these EMS were either permanent residents born in Hong Kong or came to Hong Kong to join their families, pending a period of 7 years of continuous physical residence to become a permanent resident here; in other words, they did not have the same freedom of choice as the Chinese women.

More importantly, the fact that all these EMS under this thesis are studying in government schools or subsidised schools in Hong Kong with significant government subsidies and allowances is a clear indication of a policy of proactive inclusion of EMS in the local community with strong financial support from the government. Chinese students, as well as EMS, can become valuable human capital of our society if they are given equal access to education.

Once the Court accepts that the EMS are comparable to Chinese students, they differ from the comparable group of Chinese women and Hong Kong women in *Fok Chun Wa*'s case regarding their status. Fundamentally, the EMS are making a claim under human rights, seeking equal access to Chinese language education during their childhood and youth. Unlike the medical needs of the Chinese women, the EMS' issue under review is education, which the future of society relies upon.

The aforementioned approach from the applicant undermines the strength of any potential arguments from the respondent that any of the Three Challenges is purely or primarily a socio-economic issue as in the *Fok Chun Wa* case. It also pre-empts any difference in treatment between Chinese students and the EMS which leads to unfairness or inequality against EMS.

(b) The principles of the “margin of discretion”

The respondent will urge the court to defer the decisions of the executive or legislature in developing and implementing the socio-economic policies. They will further argue that education policies are no exception, as they also require a significant public spending.

This argument holds true because it is not the role of the court to evaluate the merits or demerits of government decisions regarding socio-economic policies, unless the

means used by the government are clearly unreasonable or has gone too far and is more than necessary.

To counter this argument, the applicant should clearly invite the court to intervene under the Three Challenges because it is unlawful and unconstitutional to infringe an individual's right if it strikes at the core value of human rights such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, sexual orientations, birth or other status gender.

This is why the Judges in the *Fok Chun Wa* case ruled that the entitlement to social welfare or subsidised health services was not a concept of human rights, as it was a right that was inextricably bound with socio-economic considerations. On the other hand, we argue that the rights to education, which include equal or equitable access to quality education for EMS, represent a human right concept that must be constitutionally and immediately protected in the best interest of individuals and social development.

The same rationale behind the above principles will be applied to the second and third challenges; specifically, EMS and Chinese students are comparable groups under the Three Challenges.

As such, consideration of socio-economic policies should yield to ensuring equal access to education for EMS, even if it necessitates radical reforms in policies and systems.

2. An analysis of “the Internal Assessment Challenge” (the first challenge), “the HKDSE Chinese Subject Challenge” (the second challenge) and the “Points Conversion Challenge” (the third challenge) based on the *EOC* judgment

The first challenge

The *Fok Chun Wa* case was decided in favour of the HKSAR government, while in this *EOC* case, the decision went against the interests of the Director of Education.

Inevitably, the applicant will rely on this case to strengthen their arguments while anticipating the respondent's probable defences.

The *EOC* case involves direct discrimination under the Sexual Discrimination Ordinance (SDO), where the Director of Education was found responsible for using a biased scoring system that lowered the scores of schoolgirls while artificially increasing those of schoolboys during their transition from primary to secondary education. Consequently, a higher number of boys than girls secured places in Band 1 secondary schools, which aligned with the Director's aim to uphold a gender-balanced admission ratio in a secondary school.

We argue that the situation in the EMS is reminiscent of what occurred in the *EOC* case, although the latter involved direct discrimination based on sex. In contrast, the EMS' claim is based on indirect discrimination; in simple terms, the requirements or conditions imposed on them are significantly more difficult to meet due to their racial background.

The respondent is likely to respond by saying that in the *EOC* case, an unfair and discriminatory scoring system was imposed upon the schoolgirls. Therefore, it was a discriminatory system which violated the SDO and constitutional laws.

However, there is no such unfair and discriminatory scoring system against the EMS under our JR. Both Chinese students and EMS must compete on the same Chinese exam paper in the final stage of primary school. Hence, if the EMS cannot perform as well as Chinese students academically, it is a matter of hard work and diligence rather than discrimination.

This appears to be an ingenious argument; nevertheless, despite equal treatment in the Chinese core subject exam, inequality occurs when EMS find the exam considerably more difficult than the Chinese students due to their racial group.

Moreover, without exception under the Three Challenges, the applicant needs to draw the court's attention to the HKSAR government's failure to fulfill its obligations under Article 136 of the Basic Law and other constitutional laws, with reference to the comments and warnings from the United Nations Human Rights Committee, and local and overseas court judgments that adjudicated on the equal right of students to access education.

On the other hand, the applicant is entitled to arrange for expert witnesses or stakeholders to provide evidence in Court. In fact, the *EOC* case has set a clear example of calling several expert witnesses to Court by both the EOC and the Education Bureau (EDB).

Professors, educational specialists, and psychologists were assembled to present evidence or submit expert reports to the Court. They analysed the structure and content of the internal exams for boys and girls, along with the differences in their intellectual, biological, and psychological development.

In common law jurisdictions, calling expert witness is a common practice in Court to assist the Court to form a sound judgment on a subject matter which is not generally within the knowledge or human experience of the Judges.

Inevitably, with reference to the example of the *EOC* case, both the applicant and the respondent in this JR are obliged to arrange expert evidence to present their case and evidence thoroughly to deal with the complexity of the alleged educational disadvantages and discrimination for the EMS which has lasted for almost three decades. In this respect, since experts play a crucial role in this JR, I will specify before the end of this chapter, the extent to which their evidence can assist the court.

Through the applicant's presentation of the above evidence, any arguments to characterise the Internal Assessment (the first challenge), the HKDSE Chinese subject (the second challenge) and / or the points conversion system (the third challenge) as fair and equal would be effectively undermined.

As a result, we counter-argue that the standard required in the Chinese core subject exam for primary school, intended for Internal Assessment, represents a requirement or condition that the EMS find significantly more challenging to meet due to their racial group.

The second challenge: a complex issue

The second challenge is characterised by increased complexity, stemming from the introduction of a General Certificate of Secondary Education (GCSE) Chinese subject, which public universities recognised in 2008/2009 as an alternative Chinese language qualification to meet the admission requirements.

The respondent will likely argue that there is no discrimination because no matter how difficult the HKDSE Chinese subject is, the EMS is not obliged to sit the exam. Alternatively, they can opt for the GCSE Chinese subject, a subject which they have no difficulty to pass at all.

In other words, any discrimination that may have existed before 2008 was eliminated by the introduction of the GCSE Chinese subject. This plausible argument can be countered by the applicant: that the HKDSE Chinese subject, as mandated by the EDB, is an examination intended for all students in Hong Kong. Therefore, it is not a Chinese subject provided for Chinese students only!

The HKDSE Chinese subject is not replaced by the GCSE Chinese subject for the EMS, and it is foreseeable that a very small number of EMS students may sit the HKDSE Chinese subject in the future.

In light of the foregoing, the HKDSE Chinese subject remains a discrimination, which EMS find significantly more difficult to meet due to their racial group. Additionally, the GCSE Chinese subject has a much lower standard than the HKDSE Chinese subject and is far below the required standard of the community.

Most critically, when EMS are unable to take or pass the HKDSE Chinese subject exam, the points conversion system for public university admissions applies discriminatory assessment criteria to the GCSE Chinese qualification.

The third challenge: a straightforward issue

The respondent is likely to contend in the third challenge that there is no discrimination against EMS who apply for admission to any one of the public universities with a GCSE Chinese subject that is much lower in standard than the HKDSE Chinese subject.

This is because the GCSE Chinese subject is accepted by public universities as an “alternative Chinese language qualification” for the EMS, compared to the HKDSE Chinese subject for Chinese students. Therefore, the respondent may view this arrangement as a favourable treatment rather than discrimination.

The applicant should counter this argument by requesting the Court to review and rule on the points conversion system, which *prima facie*, discriminates against EMS by not granting clear points for the GCSE Chinese subject. In contrast, high achievers among Chinese students can earn conversion points ranging from 7 to 8.5 with their HKDSE Chinese subject.

Naturally, the points converted through this system are incorporated into public universities' admission criteria to determine student suitability.

The applicant should also refer to the case of *Raval v Department of Health and Social Security* (1985) discussed in the previous Chapter, where the Tribunal concluded that it is common sense, requiring no support from statistics, that a person's ability is bound to be affected if the exam is administered in a language that is the candidate's second language. Furthermore, this Tribunal case also confirms the rules commonly applied in discrimination cases in England and other common law jurisdictions to this day:

"If the applicant (claimant) provides prima facie evidence of discrimination, the burden of proof shifts to the respondent to disprove it with objective justification."

Once this is done, the burden of proof shifts to the EDB and public universities to demonstrate objective justification with evidence to support their system and policies. Under these circumstances, it is expected that decades of data, long shrouded under the black box and the non-transparency of the education system may finally see the light of day in court. Therefore, in addition to advancing a substantive claim under JR, this litigation also aligns with the objectives underlying the strategic litigation discussed in Chapter 6.

Race

Race is likely an issue the respondent will contend with, arguing that racial discrimination is not present in all the Three Challenges.

(a) Direct Discrimination

The respondent may argue that there is no discrimination under section 4(1)(a) of the Race Discrimination Ordinance (RDO), since the EMS are not discriminated against due to their race (direct discrimination). In other words, they have not been treated less favourably on the ground of race.

Realistically, this argument carries some weight and substance. This is the reason I have previously said direct and indirect discrimination are not mutually exclusive but for the purpose of this thesis research, I will focus on the indirect discrimination for practical and strategic reasons.

In fact, there is some difficulty to link the element of race with the Three Challenges under direct discrimination because it is arguable that the Three Challenges dealt with unsatisfactory academic result (the first challenge), the difficulty of HKDSE Chinese subject (the second challenge) and the unfair points conversion system (the third challenge) regardless of the race of the individual.

There is difficulty to establish racial discrimination because EMS has more difficulty to get admission to Band 1 secondary schools. This happens because their academic performance in the Internal Assessment is not as good as that of the Chinese students. The same rationale applies to the HKDSE Chinese subject which is also an issue of ability rather than race. Lastly, the points conversion system does not discriminate the EMS on the ground of their race, but it only discriminates the subject on the ground of its low standard. Summing these up, there is more difficulty to advance one's case in court under direct discrimination to argue that EMS are treated less favourably due to their race.

Therefore, practically and strategically, we focus on indirect discrimination where we find our solid basis of arguments as follows.

(b) Indirect Discrimination

Along the same vein, the respondent may argue that the requirement or condition, whether the core Chinese subject exam, the HKDSE Chinese subject exam or the points conversion assessment criteria, applies equally to all students regardless of race. This includes ethnically Chinese students who meet Chapter 1's definition of non-Chinese speaking students (NCS students).

To refresh our memories, the term "NCS student" is used by the EDB and is equivalent to "EMS" for the purposes of this thesis. Under the current education system, an NCS

student is entitled to take the GCSE Chinese examination under the Joint University Programmes Admissions System (JUPAS) if the NCS students are:

- i) students who have learned the Chinese language for less than 6 years while receiving primary and secondary education; or
- ii) students who have learned the Chinese language for 6 years or more in schools, but have been taught an adapted and simpler Chinese Language curriculum not normally applicable to the majority of students in our local schools.

In view of this, the respondent may argue that all students, regardless of race, must take the core Chinese subject exam in primary school (the first challenge) and be assessed under the points conversion system of the public universities if they wish to go to public universities (the second challenge). Again, as long as the students satisfy Chapter 1's definition of non-Chinese speaking students (NCS students), they are entitled to take the GCSE Chinese subject regardless of their race.

Therefore, in the opinion of the respondent, when EMS and Chinese students (falling under the definition of NCS students) receive equal treatment, there is no indirect discrimination based on race, as "racial group" is an essential element and consideration of the offence under section 4(1)(b) of RDO (indirect discrimination) which reads:

"The discriminator applies to that other person a requirement or condition which the discriminator applies or would apply equally to persons not of the same racial group as that other person but –which is such that the proportion of persons of the same racial group as that other person who can comply with it is considerably smaller than the proportion of persons not of that racial group who can comply with it"

This sounds another innovative argument from the respondent. However, after careful study, its weaknesses can be subtly identified by referencing Chapter 3 under the context of non-JUPAS Student Applicants who possess the following characteristics.

Students of Chinese ethnicity within the group of NCS students have family resources that allow them to attend international or some private schools in Hong Kong under

non-local curriculum, such as the British Curriculum, American Curriculum, or they are those who return to Hong Kong after spending a long time abroad. This qualifies them under the definition of the NCS students.

To these students, they need not worry about the difficulty of the Chinese language as they can avail of the short cut of the GCSE Chinese subject if they wish to go to public universities in Hong Kong. However, these students are the non-Joint University Programmes Admissions System (non-JUPAS students) explained in Chapter 3. Alternatively, pursuing university studies abroad is often a long-term plan and a clearly feasible option for them with their non-local curricula background.

As a consequence, the Three Challenges we raised are based on the notion of indirect discrimination against the EMS who are JUPAS students, belonging to a particular racial group. In simple terms, this means that the EDB or public universities apply a requirement or condition that the EMS find significantly more difficult to comply with due to their racial group.

In theory, an NCS student may include a student of Chinese ethnicity. In practice, an NCS student who wishes to go to public universities in Hong Kong under the research of this thesis is often or always an EMS.

Therefore, provided the affected student is from an ethnic minority group, that individual alone may apply for JR before the court.

Expert Evidence

In Chapter 6, it is explained that the court does not strictly require statistical evidence and can consider its own knowledge and experience when adjudicating educational or human rights issues (*Raval v Department of Health and Social Security*, 1985; *Siu Kai Yuen v Maria College*, 2005). Furthermore, the CFA views it as part of its constitutional duty to protect human rights, given its institutional expertise and experience (the *Fok Chun Wa* case).

Nevertheless, it is essential that the applicant provides the following expert evidence to clarify the evolution of educational disadvantage and discrimination for the EMS since the 1997 handover. This counters any arguments from experts called by the respondent to uphold and

highlight the merits and sufficiency of all support measures provided by the HKSAR government. After all, the respondent needs to convince the court why EMS' Chinese proficiency stagnates at a primary 3 level, despite all implemented support measures.

On the other hand, the applicant should call educational experts, linguistic experts and relevant stakeholders, akin to the approach in the EOC case, to support the Three Challenges and to prove its case with the following data and evidence:

- i) Chinese language is difficult to learn in reading and writing;
- ii) EMS lack support from parents and family members;
- iii) A proportion of EMS is not born in Hong Kong and have come to Hong Kong in different ages;
- iv) Many EMS have experienced discrimination from kindergarten through primary and secondary school education, under the process of CMI (Chinese language as the medium of instruction);
- v) The support measures provided from kindergarten through the completion of secondary school study are piecemeal and insufficient;
- vi) There is a shortage of experienced teachers to teach EMS Chinese language;
- vii) There are no standardised and uniformed teaching materials or textbooks devised and approved by the EDB for use by all schools, teachers and EMS;
- viii) The points conversion system of public universities is discriminatory against the GCSE Chinese subject.

The experts on behalf of the applicant are expected to assist the court in understanding the difficulty in learning how to read and write Chinese, and the learning difficulties are aggravated when the EMS are not born in Hong Kong and have arrived here at different ages.

The Chinese language and the English language are not comparable, as English utilises an alphabet system based on phonics and phonetics, while students learning Chinese must master the recognition and writing of up to 4,500 characters by the secondary level.

Further, CMI schools in Hong Kong compound the challenges faced by EMS, who must take Chinese language classes while most subjects (except for English) are taught in Chinese. Lastly, based on the expert evidence, the applicant should invite the court to ponder a question: had

the HKSAR government's language support measures achieved any measurable success, would EMS' Chinese proficiency not have progressed beyond the primary 2-3 level by now?

Therefore, through the JR, it is imperative that the court review expert findings and stakeholder evidence that document the systemic difficulties encountered by EMS to ensure a comprehensive evaluation of EMS' educational disadvantages and discrimination in Hong Kong.

The 4-step Hysan Test

The local and overseas court judgments help us understand under what circumstances discrimination becomes unlawful and unconstitutional. Ultimately, the alleged discrimination under the Three Challenges must be evaluated under the 4-step Hysan test to determine whether the human rights infringements are justified.

I will apply this test to all the Three Challenges to conclude this chapter, arguing on behalf of the applicant and countering the respondent's arguments as follows.

Under the *Hysan* case as explained in Chapter 6, the four steps of the test (4-step Hysan test) are summarised as follows to refresh our memories:

- a) the restriction or limitation must pursue a legitimate aim;
- b) it must also be rationally connected to that legitimate aim;
- c) it must also be no more than necessary to accomplish that legitimate aim; and
- d) if the above three steps are satisfied, a balance needs to be struck whether the restriction or limitation creates unacceptably harsh burden on the individual.

By applying the 4-step Hysan test, the CFA in the *Hysan* case concluded that town planning restrictions met the first step. The legitimate objectives clearly encompass promoting the health, safety, convenience, and overall welfare of the community. Consequently, the factors of height limits, air circulation, and passenger flow fulfilled the second criterion.

The third step was likewise fulfilled, as the CFA explicitly supported granting a broad margin of discretion to the Town Planning Board. This margin mirrors the extensive discretion afforded to the HKSAR government in the *Fok Chun Wa* case. Consequently, the HKSAR government

possesses considerable leeway in imposing restrictions or limitations on socio-economic policies, unless these measures are clearly unreasonable, unnecessary or infringe upon an individual's fundamental rights or core values.

The fourth step was ultimately satisfied as the planning restrictions were set by a professional board in collaboration with experts and the public, following legal requirements. In other words, it rules out the possibility of unacceptably harsh burden on an individual.

The *Hysan* case serves as an important reference and source of inspiration in tackling the Three Challenges within our JR. To conclude this Chapter, I will apply the 4-step Hysan test to the Challenges.

The Internal Assessment Challenge, the HKDSE Chinese Subject Challenge and the Points Conversion System Challenge under the 4-step Hysan test

The Internal Assessment Challenge (the first challenge)

The respondent can reasonably contend that assessing the Chinese language proficiency of all primary students is essential within the Internal Assessment (IA) framework. This evaluation aims to facilitate their transition into secondary schools that align with their abilities, accommodating different students in different banding of schools that fit their standards (the first step).

Therefore, the examination paper for the Chinese core subject, including its questions for assessment purposes, must be rationally connected to the legitimate aim (the second step). In this context, the system must be no more than is necessary to achieve its legitimate aim, as examinations remain the most appropriate method to determine a student's standard (the third step).

When this encroaching measure of the IA passes the first three steps, it is unlikely to fail at the fourth step unless it imposes an unacceptably harsh burden on the affected individuals (the fourth step).

Regarding the first challenge, from an objective perspective of the applicant, it is difficult to object to the respondent's arguments regarding the first and second steps of the 4-step Hysan

test. This is because there must be a system in any government to evaluate the academic progress and standards of students, and examinations provide a proper means to achieve that purpose.

In spite of this, the applicant has the basis to counter the respondent's arguments at the third and fourth steps of the 4-step Hysan test. The IA was structured and executed without taking into account the linguistic and cultural standards of the EMS, which markedly fall short of what is anticipated for EMS. The learning difficulties of Chinese language between kindergarten until the end of primary education further aggravates the educational disadvantage.

Therefore, under the third step, the applicant needs to argue that these restrictions or limitations under the IA are intrusive, more than necessary to achieve the legitimate aim of the first and second steps of the 4-step Hysan test.

Lastly, the applicant must demonstrate how to strike a balance between community interest and the individual rights. Under the fourth step, the ultimate question which the court will ask is: do the societal benefits derived from the restrictions or limitations impose an unacceptably harsh burden on EMS? What societal benefits will Hong Kong have if the restrictions or limitations under the IA is held to be justified under the Three Challenges?

On the other hand, the unacceptably harsh burdens impacting the prospects of the EMS under the IA are:

- a) disproportionately relegating the EMS to band 2 or band 3 secondary schools under the first challenge;
- b) depriving them of the opportunity to study with the high academic achievers in band 1 secondary schools due to their weakness in Chinese language;
- c) reducing their opportunity to study in English as medium of instruction (EMI) secondary schools where most of the high academic achievers are studying in;
- d) continuously affecting their progress of learning when they have to study in Chinese as medium of instruction (CMI) secondary school; and
- e) as a result, a substandard Chinese and English language proficiency (in particular Chinese language) adversely affects the EMS' admission to public universities and future employment prospects.

The HKDSE Chinese Subject Challenge (the second challenge)

Likewise, since the IA and the HKDSE Chinese subject are similar in nature as an examination or a system of examination, the respondent is likely to adopt the same approach and argue that the HKDSE Chinese subject is essential to maintain the Chinese language proficiency of secondary students until they enter the universities and EMS are not obliged to sit the exam of HKDSE Chinese subject when GCSE Chinese subject is an alternative option for them. Consequently, when the HKDSE Chinese subject passes all steps of the 4-step Hysan test as the IA, it is not a discrimination against any students.

The applicant should repeat the aforementioned analysis under the context “The second challenge: a complex issue” in this Chapter and reiterates the HKDSE Chinese subject exam is provided for all students in Hong Kong. However, while it passes all steps of the 4-step Hysan test for Chinese students, it does not pass the third and fourth step of the test in the same way under the Internal Assessment Challenge for EMS. That is, the high standard required under the HKDSE Chinese subject is unnecessary, unreasonable and intrusive towards the EMS (the third step) and it creates unacceptably harsh burden on the EMS (the fourth step) which includes:

- a) unable to attain a higher Chinese proficiency standard since the HKDSE Chinese subject is too difficult for EMS and this subject is based on a local curriculum specifically designed for Chinese teachers instructing Chinese students;
- b) being confined to study of the GCSE Chinese subject which does not progress beyond the standard of primary 3 level; and
- c) a substandard proficiency in Chinese language adversely affects the EMS’ admission to public universities and future employment prospects.

The applicant should emphasise that the GCSE Chinese subject is a Hobson’s choice for EMS. It is a disguised discrimination instead of a favourable treatment. The EMS either go for the HKDSE Chinese subject with a high risk of failure or they should take a safe course to accept

the GCSE Chinese subject that meets the minimum requirement of public universities' admission.

The Points Conversion Challenge (the third challenge)

The third challenge deals with admission and assessment criteria of the public universities. Objectively speaking, this policy or system of points conversion satisfies all steps of the 4-step Hysan test towards the Chinese students who wish to apply for admission to the public universities.

However, the policy or system fails at the third and fourth step of the 4-step Hysan test towards EMS as the points conversion towards the GCSE Chinese subject is unclear and prima facie discriminatory. Understandably, conversion points for the HKDSE Chinese subject and the GCSE Chinese subject will be considered by the public universities as assessment criteria for admission.

Consequently, the Chinese proficiency of EMS will remain at unacceptably low levels if the GCSE Chinese subject is the only available option. This is likely to result in social harm rather than societal benefits in the long run, particularly when EMS begin working in Hong Kong with low Chinese proficiency. Therefore, the applicant should petition the court during the JR proceedings to declare the discriminatory practices stemming from the "Three Challenges" as unlawful and unconstitutional. This should include a declaratory order to the EDB and public universities to reform their discriminatory practices through immediate and progressive measures to advance social justice for EMS in Hong Kong.

This concludes all the analyses of the Three Challenges, the application of the court judgments and the 4-step Hysan test under the JR.

Chapter 8: Discussion

Introduction

In this Chapter of the thesis, I first summarise the answers to the research questions that have unfolded in the thesis. Secondly, I draw some conclusions that have so far not been foregrounded. These constitute a contribution to knowledge about how to use litigation to advance social justice for ethnic minority students (EMS) in Hong Kong. Finally, I will discuss the limitations of the research, particularly the limited potential of legal action in solving socio-political problems.

Summary Answers to Research Questions

Four research questions were framed to explore whether EMS in Hong Kong face educational disadvantage or discrimination in Chinese language learning, which, in turn, limits or impedes their opportunities to access university education. The questions were designed to explore and trace the origin of educational disadvantage or discrimination against the EMS in Chinese language education from kindergarten to secondary education and, in this respect, to find out whether the Hong Kong Special Administrative Region government (HKSAR government) has fulfilled its legal obligations under the international treaties and domestic laws.

If the answers to these questions reveal discriminatory treatments to EMS, then the question is raised of whether and how public bodies might be taken to court for perpetrating educational disadvantage or discrimination under the academic structure and system of Hong Kong.

Research Question 1

Following the handover of Hong Kong to China on the 1st July 1997, did the Hong Kong Special Administrative Region government (HKSAR government) change the English and Chinese language policy to an extent which affects the right of access to education of Ethnic Minority Students (EMS) in Hong Kong?

This research question traces the historical roots of the linguistic and cultural problem of the EMS in Hong Kong following the handover of Hong Kong to China in 1997.

As described in Chapter 2, without consultation with any of the ethnic communities and ethnic stakeholders, the HKSAR government unilaterally introduced the mother-tongue education

policy in Hong Kong and turned three-quarters of secondary schools into Chinese as Medium of Instruction (CMI) schools. As a result, this triggered a public outcry and disapproval in the society. In the end, the government fine-tuned the language policy, giving a degree of autonomy to the schools to make appropriate arrangements in the language instructions depending on the experience of teachers, ability and needs of students, and school resources. Prior to 1997, EMS had the freedom to decide how much time they wished to spend on learning Chinese. However, it later became mandatory, and the failure to attain Chinese proficiency would severely impede their academic advancement in Hong Kong.

Upon the onset of the above changes, it lays down the foundation of discriminatory treatments against EMS soon after the handover in 1997.

Research Question 2

What is the understanding and awareness of the Ethnic Minority Students (EMS) about the international treaties and domestic laws which safeguard their right of access to education?

Almost all of the EMS who attended the interviews in Chapter 4 had entirely no knowledge about the Race Discrimination Ordinance (RDO), which was drafted and enacted entirely for the benefit and protection of ethnic minorities. Apart from that, they did not have any basic understanding of any constitutional laws which might affect their educational rights.

This may explain the reason why, so far, until today, there has not been a single case in Court which pursues the infringement against the constitutional rights of the EMS under equal access to education.

Research Question 3

Has the Hong Kong Special Administrative Region government (HKSAR government) in Hong Kong fulfilled her obligations under the international treaties / or domestic laws in ensuring Ethnic Minority Students (EMS) have equal right of access to education with Chinese students after 1997?

In Chapter 4, it is clearly explained that the HKSAR government has provided significant funding or subsidies to schools admitting EMS to assist them in studying the Chinese language.

However, the limited Chinese language standard of EMS graduates from secondary schools, confined to the primary 2-3 level under the General Certificate of Secondary Education Chinese subject (GCSE Chinese subject), indicates a failure to constitutionally safeguard their right of equal access to education. It is essential that the right to education includes access to “quality” education and not just education in name only.

This low Chinese standard brings the EMS nowhere near the level of the Hong Kong Diploma of Secondary Education Chinese subject (HKDSE Chinese subject), which is secondary 6 in level and taken by Chinese students. The measures intended to support EMS fail to address the educational barriers that begin in kindergarten and persist through higher education in Hong Kong.

Research Question 4

Have the Ethnic Minority Students (EMS) incurred any discrimination at any stage of their academic studies which is legally actionable in a Hong Kong Court? Do the following existing examination assessment, Chinese subject requirement and / or the points conversion system of the public universities constitute a “discrimination” which is legally actionable in a Hong Kong Court?

- a) Internal Assessment of core subjects including Chinese language for all primary school graduates including Ethnic Minority Students (EMS);*
- b) Public universities’ compulsory entrance requirement of the Hong Kong Diploma in Secondary Education Chinese subject (HKDSE Chinese subject) for local students and acceptance of alternative Chinese language qualification such as General Certificate of Secondary Education Chinese subject (GCSE Chinese subject) for Ethnic Minority Students (EMS);*
- c) Different points conversion system on the Hong Kong Diploma in Secondary Education Chinese subject (HKDSE Chinese subject) and GCSE Chinese subject (GCSE Chinese subject) as assessment for public universities’ entrance.*

Research Question 4 is an overarching research question which brings the Three Challenges referred to in Chapter 6 squarely under a legal and microscopic examination.

For the first challenge under (a), the core Chinese subject that the EMS and Chinese students are required to take before the end of primary education is given high scaled marks as indicated in Table 3.1 in Chapter 3. This affects the opportunities of EMS' admission to the prestigious Band 1 or Band 2 secondary schools where they can study with the high and average academic achievers.

This academic arrangement is discriminatory in nature as EMS will achieve lower average scores than the Chinese students in view of the difficulties in learning Chinese as explained in Chapter 2.

For the second challenge under (b), the provision of the low-standard GCSE Chinese subject to EMS to meet the public universities' admission requirement is institutionalised prejudice rather than a benefit to the EMS, which is also a discriminatory practice.

For the third challenge under (c), the points conversion system of the public universities which discriminates the low-standard GCSE Chinese subject in points conversion provides further evidence of discrimination against EMS.

Following a presentation of the corresponding summary for the aforementioned research questions, the thesis' contribution to knowledge is explained as follows.

In respect of the first challenge (a) above, it is important to emphasise that the Education Bureau (EDB) is responsible for overseeing the Internal Assessments (IA) of primary schools. However, the EDB has failed to put an end to the requirement for EMS to take the same Chinese exam paper with their Chinese peers, impacting their chances of admission to Band 1 and Band 2 secondary schools. Therefore, it is imperative to uphold constitutional laws in Hong Kong to safeguard the rights and interests of EMS. To achieve this, pursuing legal actions and seeking appropriate remedies is a vital option. This case warrants JR and necessitates a resolution through legal means.

In respect of the second and third challenges (b) and (c) above, a very close observation discovered that the long-standing misconception that the HKSAR government was introducing a much easier exam for the benefit of EMS but which is, in fact, discriminatory in nature and

in substance. From an objective view, these two issues are also clearly judicially reviewable cases in court with the following new and broad legal approach.

The EDB has had a long time before and after the handover to formulate and improve education policy for all students and relevant stakeholders in Hong Kong under Article 136 of the Basic Law. Apparently, until now, there are clear signs that the EDB has not fulfilled its duty of providing equitable education to the EMS. The EMS have become a forgotten and increasingly marginalised group since 1997. Specific attention must be paid to the phrase “to formulate and improve education policy” under Article 136, the determining factor is whether EMS have shown progressive and consistent progress in Chinese proficiency after 1997!

The HKSAR government made its position unequivocally clear through the policy address in 2014 that they had realised the importance of Chinese language learning as well as the difficulties and hardships of the EMS when they were learning Chinese. However, while providing funding and subsidies to schools with support measures to assist EMS in learning Chinese, the HKSAR government consistently ignored the problems that have actively created barriers for EMS over the years, deficiencies which remain unaddressed to this day.

Teachers, who have been teaching Chinese to Chinese students, are not specifically trained to teach Chinese to EMS as a second language from kindergarten to secondary schools, despite Chinese being a very difficult language for foreigners. EMS often struggle to integrate into the local kindergarten education and they are not fairly treated in the IA in primary 5 and 6. Likewise, the EMS are not fairly admitted to Band 1 and Band 2 secondary schools and they face uncertainty under the points conversion system adopted by public universities in assessing admission applications. Overall, the CMI schools prejudice the EMS to an extent of requiring them to listen to Cantonese in classrooms most of the time when they may not be fully ready. EMS seem to have experienced discrimination at each of these stages. However, to narrow our focus, we will concentrate specifically on (a) IA in primary schools, (b) the introduction of the GCSE Chinese subject and (c) the admission to the public universities.

Objectively analysed, the effectiveness of the exams and support measures has been evaluated based on their current impact on EMS who have only passed the GCSE Chinese subject, a standard equivalent to a primary 2-3 level when they graduated from secondary 6.

Under Hong Kong's current scenario, the appropriate test I wish to invoke to determine the conclusive effectiveness of the education system and the policies of the Education Bureau is the *Castaneda* test from the landmark United States court case *Castaneda v Pickard* (1981) analysed in Chapter 5, which established a legal framework to assess whether the government is meeting its obligations to English language learners:

- a) First, the Court must examine the program of the school system which is recognised as sound by experts or at least, deemed a legitimate experimental strategy;
- b) After using the programme for a sufficient amount of time, if it still fails to transform the theory into reality with practices, resources, and personnel support, the school is not considered to be taking appropriate action to address language barriers;
- c) If the programme fails to produce the expected results after a sufficient period to give the plan a legitimate trial, that programme may no longer be considered appropriate action.

Applying the above *Castaneda* test to Hong Kong, almost three decades since the 1997 handover, the HKSAR government must have had ample time to evaluate, develop, and implement all previous and existing support measures to assist EMS in their Chinese language studies in consultation with experts or educational consultants.

The following quote comes from contents of the policy paper prepared by the EDB for discussion of EMS' education in the Legislative Council in 2024, which truly reflects the expectation and concern of the EDB in my opinion:

“For NCS students, Chinese proficiency is very important for their study, integration into the school environment and the community, as well as future employment”
(Legislative Council Panel on Education, 2024)

If the Chinese language is so important for academic study, social integration, and employment, as correctly identified by the EDB, the ultimate question this thesis asks is: has the Chinese proficiency of EMS been improved to a standard higher or much higher than a level over the GCSE Chinese subject which enables them to achieve these purposes? To that end, will an EMS who has completed secondary 6 or graduated from university, but possesses a Chinese proficiency level between primary 2-3, meet the expectations of the EDB?

Applying the *Castaneda* test to the HKSAR government's overall performance clearly suggests a significant room for improvement in addressing language barriers effectively. So far, no support measures have shown measurable success in achieving the EDB's anticipated outcomes.

While we do not dispute the HKSAR government's sincere efforts and good-faith intention to enhance the EMS' Chinese language proficiency, the motives and intentions behind discriminatory policies or systems are often irrelevant, as we recall the statement made by Lord Bridge in his court judgement below:

“The council in this case had the best of motives for discriminating as they did....But the purity of the discriminator's subjective motive, intention or reason for discriminating cannot save the criterion applied from the objective taint of discrimination on the ground of sex” (James v Eastleigh Borough Council, 1990, pp. 765-766)

In the meantime, we fairly acknowledge the HKSAR government's ongoing efforts and commitment to enhancing Chinese language proficiency among EMS through the introduction of various support measures over the past years. As explained in Chapter 2, these supports include, but are not limited to:

- a) the Chinese Language Curriculum Second Language Learning Framework (the Learning Framework) introduced in 2014;
- b) the Supplementary Guide to the Chinese Language Curriculum for Non-Chinese Speaking (NCS) Students (Supplementary Guide) introduced in 2008;
- c) different curriculum modes under the Supplementary Guide such as Summer Bridging Programme, Induction Programme, Initiation Programme;
- d) sufficient public funding has been regularly earmarked and provided to schools with intakes of EMS since the Chief Executive's 2014 policy address to support various support measures;
- e) introduction of alternative subjects to EMS: GCSE Chinese subject (academic) in 2008 and Applied Learning (Chinese) (ApL(C)) (vocation-related) in 2014.

Moreover, it is indeed demanding for the HKSAR government to fulfill its constitutional obligations under the complex post-handover circumstances, where “Biliteracy and Trilingualism” was implemented with a primary focus on Chinese students. Precisely for this reason, the support measures may have provided assistance without addressing the deeply entrenched linguistic and cultural challenges faced by EMS.

The primary 2-3 level in Chinese proficiency seems to reflect a systemic outcome of the HKSAR government’s policies and support measures rather than a clear indication of limitations on EMS’ ability and potential.

In other words, EMS likely possess far greater potential than currently observed, provided that they receive adequate and appropriate support through a reform of our education system and policies from kindergarten to secondary education. After all, based on interviews with the stakeholders in Chapter 4, we find it not unheard of for a small number of EMS to have marginally passed or failed the extremely difficult DSE Chinese subject exam in previous years.

Without a radical reform in the Chinese language education for EMS, it is foreseeable that the Chinese proficiency of EMS will remain at a primary 2-3 level until 2046, which marks the conclusion of the first 50-year period of Hong Kong’s “one country two systems” policy.

Limitations to this research

There are various limitations to this research, and many of them involve non-transparency and non-disclosure of EMS’ information during their different learning stages in Hong Kong.

The missing pieces of the jigsaw puzzle can only be assembled and gathered by going through a process of elimination and inference drawing. The process of elimination involves removing several possible options that are unlikely or less likely to be true until only one option is left behind in the end. In contrast, the inference-drawing exercise is a process of using observation, confirmed and proven facts to reach a logical conclusion.

While arguments continue to claim unfairness regarding EMS and Chinese students taking the same core Chinese subject exam for the IA, the absence of government data makes it impossible

to determine how many EMS enter Band 3 schools after primary education due to their lower scores in core Chinese subjects compared to Chinese students.

Similarly, no data is available to indicate how many EMS have attempted the HKDSE Chinese subject annually, nor their outcomes, whether they passed, failed, marginally passed or failed badly. Despite this, the interviews of a number of the stakeholders in Chapter 4 unanimously support the view that it is unrealistic to expect the EMS to take the HKDSE Chinese subject, an exam paper which is also dreaded by Chinese students as “the exam paper of death” in view of its difficulty.

Lastly, the lack of transparency in the assessment criteria of public universities during admissions makes it impossible to determine to what extent their evaluations are influenced by the GCSE Chinese subject compared to the HKDSE Chinese subject, which has clear conversion points.

There is no policy for the public universities to disclose why a student applicant is rejected for any university programme he applies. The whole admission process is a “black box” as indicated by a principal during the interview in Chapter 4. Appeals are discouraged, and there is no mechanism for appeals on the official websites of public universities, which only provide clear information on qualification requirements and application procedures.

However, the disparity in points conversion between the two Chinese subjects under the universities’ admission system presents *prima facie* evidence from which inferences of discrimination can be drawn.

It remains unclear why the EDB has so far failed to provide sufficient data tracking the academic studies of EMS in Hong Kong since the 1997 handover. This data is particularly important for monitoring the academic performance of EMS, especially given the aggressive changes in Hong Kong’s language policy which have raised the status of Chinese to equal, or sometimes even surpass, that of English after 1997.

It is hoped that through the collection and meticulous analyses of all available data under this thesis, the path to JR is now clear with some contribution to knowledge in the field of education as follows.

Contribution to Knowledge

There has been a dearth of in-depth literature analysing the education policy and examination system in Hong Kong from a legal perspective to seriously contemplate a test-case in Hong Kong court on behalf of EMS who have been subjected to discrimination for nearly three decades.

To laymen, it is hardly comprehensible that a “discrimination” against an individual can be justified in law and socio-economic or socio-political issues of a government has to be taken into consideration in determining whether a treatment is discriminatory under appropriate circumstances.

Nevertheless, when discrimination involves race, colour, language, social origin, or other status, the court generally adopts a generous approach to safeguard the interests of core values and fundamental concepts of human rights. Moreover, in the context of education, the HKSAR government has taken a proactive approach towards public spending to support EMS in Chinese language studies.

In order to support a legal claim, evidence is required to prove the facts which substantiate the discrimination to the extent that it is in breach of the law and it does not pass the 4-step Hysan test.

In respect of the first challenge, Table 3.1 in Chapter 3 “Internal Assessment for submission of scores by primary schools” forms clear evidence in law that the Chinese subject is a core subject with high scaled marks and this discriminates the EMS who have to face all the difficulties mentioned. This forms the factual evidence to support the JR under the primary school’s IA Challenge.

Concerning the second challenge under the Three Challenges, this thesis departs from the prevailing focus of public domain literature, which mainly critiques the GCSE Chinese subject.

When the EDB introduced the GCSE Chinese subject in 2008, the public universities began to accept this subject from NCS students as an alternative Chinese language qualification for university admission. This appeared to be a well-intentioned policy of the HKSAR government to assist the EMS to bypass the HKDSE Chinese subject, which is too difficult for them.

Hence, the GCSE Chinese subject created the illusion that the EDB had found a solution in 2008 to address the long-standing Chinese language challenges faced by the EMS. The GCSE Chinese subject, now entrenched in Hong Kong's academic system, institutionalises discrimination against EMS and systematically undermines their equal access to education.

To this day, the Chinese proficiency of our EMS remains limited to primary 2-3 level in reading and writing until they graduate from secondary school or public universities. These low standards and minimal targets set by the EDB for EMS, create exceedingly low expectations for both EMS and the education system.

From a legal perspective, it is the arrangement and intention of the EDB that EMS "MAY" take the GCSE Chinese subject if they find the HKDSE Chinese subject difficult. On the other hand, the HKDSE Chinese subject has been introduced to all students, including the EMS in Hong Kong, who wish to gain admission to public universities under the Joint University Programmes Admissions System (JUPAS).

A dilemma created by the EDB is that EMS have little choice but to choose the GCSE Chinese subject exam, rather than risk failing the far more difficult HKDSE Chinese subject exam. Ultimately, opting for the GCSE Chinese subject exam means compromising on Chinese language proficiency, which leaves EMS without the level of fluency required for higher education or employment in Hong Kong.

The third challenge under the Three Challenges deals with the points conversion system to assess candidates who apply for admission to public universities. This issue is intrinsically linked to the second challenge as the points conversion mechanism of the public universities disadvantages the EMS by assigning clear conversion points on the HKDSE Chinese subject and no or unclear conversion points on the GCSE Chinese subject, which is only accepted as alternative Chinese qualification. The evidentiary foundation for this observation can be traced through the public universities' website announcements of their admission policies and points conversion system (see Chapter 3).

A necessary precondition to bring a radical reform in Hong Kong's education system concerning EMS is the precise identification of legal issues that meet the threshold for JR, so that any significant discrimination against the EMS can be eliminated as soon as possible.

The IA of the core Chinese subject and the GCSE Chinese subject do not assist EMS in improving their Chinese language standard; on the contrary, they create barriers to their pursuit of higher and better education. The HKSAR government must urgently translate its policies into actionable plans to ensure the equal right of access to quality education in the Chinese language is given to all EMS.

Conclusion – The Way Forward

Referring to the opening of Chapter 1, we welcome the insights provided by Ricky Chu, the Chairperson of the Equal Opportunities Commission (EOC), expressing concern for the inequality in education and systemic barriers faced by ethnic minority youth. Legally speaking, this can be construed as an acknowledgment or admission, signalling a commitment from the EOC to address the discriminatory issues faced by the ethnic minority community.

However, mysteriously, since the last occasion when the EOC took a pro-active approach and took the Director of Education (DE) to Court in the Court case *Equal Opportunities Commission v Director of Education* (2001) on the basis of gender discrimination against the local students, the EOC has not responded or reacted in the same way again to defend the constitutional rights of the EMS until today. It appears the opinion of Stephen Fisher, the Director General of the charity Oxfam in Hong Kong, in Chapter 3, that the barriers to change in education policy are bureaucracy and the lack of strong voices for ethnic minority communities are true.

My research does not suggest that learning Chinese language is unnecessary or unimportant. On the contrary, it is necessary and important for various purposes, such as social integration, upward mobility and employment in society. For these particular reasons, it is imperative that the Chinese language standard of EMS needs to be improved significantly and promptly through an effective Chinese curriculum. On the other hand, EMS should not be compelled to learn Chinese to the extent that the Chinese examination results would affect and discriminate their pursuit of higher education.

It is incomprehensible why a Chinese language qualification is mandatory for all university programs, including those taught entirely in English. For instance, studying law in public universities does not necessitate Chinese language proficiency. In reality, when law graduates practice as solicitors or barristers in Hong Kong courts, they are not required to have any written or oral Chinese language skills for trial hearings conducted in English.

On the other hand, it is paradoxical that English, rather than Chinese, predominates as the academic lingua franca in various public universities. The University of Hong Kong (HKU), with regard to their 4-year Undergraduate Curriculum, announces the medium of language in their official website under their Language Provision and Support page as “English is the University’s medium of instruction and in order to support intercultural communications and understanding, the University’s Senate has endorsed English as the campus lingua franca”. Similarly, the Chinese University of Hong Kong’s (CUHK) programme overview also puts down the instruction medium as English.

In view of all these circumstances, it is imperative for the HKSAR government to fulfil her obligations to formulate policies on the development and improvement of education, including policies regarding the educational system and its administration, the language of instruction, the allocation of funds, the examination system, the system of academic awards and the recognition of educational qualifications under Article 136 of the Basic Law. However, as far as the Chinese language education for EMS is concerned, there has been a failure to perform these obligations on the part of the government under this thesis research.

Realistically, the development of an alternative Chinese curriculum and examination, with a standard between the HKDSE and the GCSE appears to be a feasible and the most sensible approach which the EDB has so far failed to consider. This would allow EMS to attain a certain level of Chinese proficiency, which leads to a recognised qualification and is a standard considerably higher than the GCSE primary 2-3 standard (Kapai, 2012, p.11, 13).

Hong Kong Unison echoes this by persistently recommending a comprehensive and adequate “Chinese as a Second Language” policy with a concrete policy goal, an implementation plan, output indicators, and a transparent monitoring and evaluation mechanism (Hong Kong Unison, 2019b).

After synthesising all available data and research in Chapters 2, 3 and 4, the most effective and imminent support measure for the EMS appears to be a Chinese curriculum, that is, the “Chinese as a Second Language Curriculum (Chinese Curriculum)” particularly devised and formulated to adapt to the immediate needs of the EMS.

The EDB should take full control over the Chinese curriculum, which should be developed solely by the HKSAR government. It should encompass, among other things, the following topics:

- a) the training of local teachers to teach EMS Chinese is primarily important as this is the general weakness for the local teachers who have been trained to teach Chinese to Chinese students instead of EMS;
- b) the design of all teaching materials and textbooks must be standardised by the EMB for all teachers, schools and EMS. This practice is only identical with the Chinese language curriculum for Chinese students who clearly understand what they have to learn, what standard they have to meet and what exam they have to sit before their next academic promotion. The problem with the EMS’ issue is that each and every school is now entitled to adapt, modify and adjust the teaching materials provided to them by the EDB for the purpose of teaching Chinese to EMS. This causes inconsistency in studies and learning and it is difficult to assess the progress of EMS in different schools.

Moreover, the GCSE Chinese Subject is a United Kingdom-based qualification with examinations offered by various exam boards in the United Kingdom. The Chinese curriculum for EMS in Hong Kong should have its own standard and exam, enabling the EDB to monitor students’ progress effectively.

Setting the standard for this Chinese curriculum between primary 6 and secondary 3 provides a realistic starting point for EMS, ensuring that schools and EMS have a clear objective to achieve and follow. Although classical Chinese literature may hold cultural value, it should be removed from the Chinese curriculum because it represents the most challenging aspect of the Chinese language, and its direct relevance to social integration and employment is limited.

It is the duty of the EDB, similar to the GCSE Chinese subject, to reach a consensus with public universities to accept the Chinese subject specifically designed for EMS under the Chinese curriculum as an alternative Chinese language qualification for university admission.

Without experiencing excessive pressure, especially during the initial transitional period, EMS should be able to pass this Chinese subject with a Chinese proficiency equivalent to primary 2 or 3 level. On the other hand, it is proposed that the standards of the Chinese subject be extended to primary 6 to junior secondary level. Under this Chinese curriculum, teaching materials and textbooks should be provided to the schools to assist the brilliant EMS to reach the senior secondary level. This would encourage EMS to strive for the highest reasonably achievable standard.

Before this Chinese curriculum is completely developed, several measures for the improvement of education for EMS must be taken. The HKSAR government needs to put an end to the IA of the core Chinese subject at the primary school level, which affects EMS' prospect of admission to Band 1 and Band 2 secondary school. Equally, public universities should put an end to the points conversion system which discriminates against GCSE Chinese subject. The GCSE Chinese subject should be awarded equivalent points to the HKDSE Chinese subject for matching grades and levels.

In the meantime, the HKDSE Chinese subject examination should become an examination requirement for Chinese students primarily, although EMS may choose to take the HKDSE Chinese subject exam if they believe their Chinese proficiency meets the required high standard.

In objective analysis, discrimination against the EMS may be significantly mitigated or resolved through the implementation of the proposed Chinese curriculum; however, seeing the slow progress in improving the Chinese education of the EMS over the past two decades, it seems an illusion to expect the HKSAR government to take the initiative to consider and implement this Chinese curriculum.

Until a test-case by way of judicial review is conducted in Hong Kong Court to launch the Three Challenges, this Chinese curriculum with all the suggested supporting measures will

remain castles in the air. In any case, 27 years after the handover in 1997, “justice delayed is justice denied” to EMS in Hong Kong for the educational disadvantage and discrimination inflicted upon them under the education system and policy of the HKSAR government.

The End

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Appendices

Appendix 1: Letter of Ethical Approval from the University of Nottingham



Our Ref: 2016/25/CQ

Dear Shahmim Khan Khattak
CC Monica McLean and David Murphy

**School Of
Education**
The
Deering
Building
Jubilee
Campus
Wollaton
Road
Nottingham
NG8 1BB
Tel: +44 (0)115 951 4543
Fax: +44 (0)115 846 6600
www.nottingham.ac.uk/education

Thank you resubmitting your research ethics application form and supporting documentation for your project:

Educational Disadvantage and Legal Redress for Pakistani and Nepalese School Children in Hong Kong: perception of possibilities

Our Ethics Committee has looked at your re-submission and has the following comments.

- The responses to all the queries raised by the reviewers have been addressed in considerable detail. Thank you for such a clear response.

Based on the above assessment, it is deemed your research is:

- Approved

I have noted that the consent form does not give the contact details of the researcher, the supervisor and the ethics coordinator (in case of complaint). Please add these details and confirm to us in writing that it has been done.

We wish you well with your research.

Dr Kay Fuller
Chair of School of Education Ethics Committee

Appendix 2: Information Sheet

Information Sheet

This research focuses on the education of the EMS in Chinese language which is a compulsory subject to them as well as to the local Chinese students, although the former takes the Chinese language exam under the General Certificate of Secondary Education (GCSE) and the latter takes the Chinese language exam under the Hong Kong Diploma of Secondary Education (HKDSE) under the local curriculum unless there are special circumstances.

The study explores the opportunities of the EMS and the local Chinese students in their admission to the universities under the Joint University Programmes Admissions System (JUPAS) and the criteria or assessment they may be subject to in respect of their Chinese language qualification which is an entry requirement for most or all of the Bachelor-degree subjects offered by these universities.

The government of Hong Kong has given recent pledges to improve significantly the support and assistance to EMS to help them with their Chinese language learning and studies. I will explore whether these measures have been effective enough to resolve the deep-rooted problem or difficulties in the process of Chinese language learning in Hong Kong and what are the difficulties for the EMS to take the Chinese language exam under the HKDSE.

It is hoped that through the views and opinions collected from a broad spectrum of students, parents, teachers, representative or staff member of the universities will reveal a true view of all circumstances of the academic studies of Chinese language of EMS and their opportunities of admission to universities in Hong Kong.

If you wish to verify my background and the background of my doctoral thesis, you are most welcome to contact my supervisor at the University of Nottingham, UK: Professor Monica McLean. Email: monica.mclean@nottingham.ac.hk or School of Education Research Ethics Coordinator: educationresearchethics@nottingham.ac.uk

Appendix 3: Consent Form

Consent form

Project title: 'Educational Disadvantage and Legal Provisions among Pakistani and Nepalese school children in Hong Kong: A study whether the requirement for Chinese language qualification as entry admission for EMS is legal and whether there is any legal redress for EMS to pursue university education'.

Researcher's name: Shahmim Khan Khattak

Supervisors' name: Professor Monica McLean,
Dr. David Murphy

I have read the above brief information giving details of the research topic and interview and I have had the opportunity to ask questions, to clarify matters and / or to obtain further information before the interview takes place.

I understand the purpose of the research project and my involvement in it.

I understand that I may withdraw from the research project at any stage or time and that this will not affect my status now or in the future.

I understand that while information gained from me during the study or interview may be published, I will not be identified and my personal results will remain confidential.

I understand that I will be audio-recorded during the interview and a written transcript will be prepared by the research after the interview.

I understand that electronic data will be stored in a separate, encrypted password file that only the researcher has access to.

I understand that I may contact the researcher or supervisor if I require further information about the research, and that I may contact the Research Ethics Coordinator of the School of Education, University of Nottingham, if I wish to make a complaint relating to my involvement in the research.

I am also satisfied that confirmation is made with me whether I wish to use a pseudonym in the interview or to attend the interview on condition of anonymity.

I agree voluntarily to participate in the interview as requested.

Contact details

Researcher: Shahmim Khan Khattak ttxskk@nottingham.ac.uk

Supervisor: Professor Monica McLean

monica.mclean@nottingham.ac.uk

Supervisor: Dr. David Murphy

David.murphy@nottingham.ac.uk

School of Education Research Ethics Coordinator:
educationresearchethics@nottingham.ac.uk

Appendix 4: Interview Questions for Students

A list of Questions for students or ex-students over 18 years of age.

Note: University or universities quoted here refer to the publicly-funded universities in Hong Kong

1. Please describe yourself and your family background, nationality, number of siblings in the family, occupations of your parents, etc.
2. Give a history of your academic studies in Hong Kong. For example, when did you come to Hong Kong? Were you born in Hong Kong? Describe the background of your primary school and secondary school in Hong Kong.
3. Under the present 3-3-4 academic system (three years junior secondary, three years senior secondary, a four-year bachelor degree course), which stage of academic study are you now up to or at which stage did you end your academic studies?

University Study

For those who failed to get into the local universities in Hong Kong

4. Originally, did you have any plans to get admission to one of the local universities? Please tell me the result of the plans if you had any.

For those who managed to get in the local universities in Hong Kong

5. Please tell me how you managed to get admission into one of the local universities in Hong Kong. What was the whole process like?

Chinese language

Did you learn Chinese?

For those who were given a choice about learning Chinese

6. Were you given a choice to study or not to study Chinese language in Hong Kong? If you did not learn Chinese language, did it affect your opportunity of getting into one of the local universities in Hong Kong.

For those who were not given a choice about learning Chinese

7. If you had to learn Chinese language in Hong Kong as a compulsory subject, do you know why you must learn Chinese language? Was Chinese language a qualification or admission requirement for the local universities admission in Hong Kong? If yes, do you know why?

For everyone who learned Chinese

8. For those who learn Chinese language in Hong Kong, what was the curriculum or teachings like at school? How did you study with the local Chinese students whose mother tongues are Chinese language (i.e. speaking in Cantonese or Putonghua and writing in traditional or simplified Chinese characters)?
9. Did you and the local Chinese students have the same textbook materials, same curriculum, etc.?
10. Did you enjoy learning the Chinese language? Was learning Chinese language difficult for you?

Academic support from family

11. During your studies, did you obtain any family support from parents or from family members, home teachers, or from any external institutions which help you with your studies?
12. If yes, please describe to what extent and how frequent and substantial in terms of quantity and quality these supports are.
13. Did you find that you had sufficient family support in your academic studies so far?

Academic support from school

14. Did the school provide any special, particular or extra academic support to ethnic minority students at school?
15. In particular, did the school provide any particular assistance to the ethnic minority students in the course of their Chinese language learning?
16. Did you find the support from your school sufficient enough to help you with your academic studies and Chinese language studies?

Chinese language curriculum

17. The Hong Kong Special Administrative Region government pledged to introduce improvements to this curriculum in the 2014 government's policy agenda? Did you notice any difference?

Poverty and Discrimination

18. Do you consider your family resources, standard of living, income of parents high, medium or low as compared to what you know about Hong Kong students in your school or in other Band one schools in Hong Kong?
19. How did your family background, language and culture influence your academic studies in Hong Kong?
20. Do you have friendly neighbours in where you live? Do you have close relationship with your neighbours? Are they Chinese? What is their general attitude towards you and your family?
21. How did you find other Chinese students in terms of their attitude towards you?
22. Who were your friends at school and what was their race?
23. In general, how do you find the attitude of Hong Kong Chinese people towards you and your family? Please give me some specific examples.
24. Again, if yes, did you find the racial discrimination affect your academic studies in any manner? Did it affect your Chinese language learning in any way?

Legal provisions

25. How much do you know about the Race Discrimination Ordinance (RDO) which was enacted in 2009?
26. Did any institutions such as non-government organizations or government departments, public-funded institutions or persons like school teachers, staff, social workers, etc inform you of the contents of the RDO which may affect you or may involve your rights in your academic studies in Hong Kong?
27. Similarly, how much do you know about Judicial Review, civil litigation on the basis of the Hong Kong Basic Law, international covenants and constitutional laws in Hong Kong? Do you know its implication and application? Repeat Question 32.

28. Did it ever occur to you, if your application for admission to the local universities is rejected only because your Chinese language qualification did not meet the admission requirement, you might have a right to seek Judicial Review against the universities' decision?

Appendix 5: Interview Questions for Principals

A list of Questions for school principals

Note: Two secondary school principals with a high intake of ethnic minority students in their schools in Hong Kong will be interviewed.

Ethnic Minority Students (EMS)

1. Please describe the history and background of your school, a private or a government-aided or government school
2. Let us know the proportion between local Chinese students and ethnic minority students (EMS).
3. Describe the nationalities of the EMS and how they gain admission to your school. What are the criteria for admitting local Chinese students and ethnic minority students in your school as compared to other schools.
4. In admitting EMS, please explain how the educational system works for private schools, government-aided schools and government schools in Hong Kong.
5. In admitting the EMS, does your school take into consideration their Chinese language qualification if they are graduates from primary schools in Hong Kong?
6. In admitting the EMS, what are the considerations of your school if these ethnic minority students are recent migrants into Hong Kong?
7. Are EMS required to learn Chinese language in Hong Kong? If yes, is this a compulsory subject?
8. Are there any differences in the Chinese language subjects taught to and learnt by the local Chinese students and EMS.
9. Is a Chinese language qualification an admission requirement for the EMS and local Chinese students to higher education to the public-funded universities (universities) in Hong Kong?
10. If yes, in your view are there reasons which justifies this admission requirement to an EMS applying to study a subject in the universities which is taught and learnt in English language only and there is no need to understand Chinese language in the subject?

Resources and support for and curriculum of Chinese language for the EMS

11. What is the general performance of EMS in their Chinese language studies? Are there any other alternatives to them if they fail in the Chinese language subject and yet wish to apply for study of an English subject in the universities? Are they still qualified to apply or are they not qualified at all to make an application should they fail to achieve a required Chinese language qualification?
12. What is the Chinese language curriculum like in your school for EMS and for the local Chinese students?
13. In terms of resources and support, how does your school assist the EMS in their Chinese language learning?
14. Please explain what is the Chinese Language Curriculum Second Language Learning Framework and the Applied Learning Chinese Language Course like in Hong Kong? Did you notice any difference in support given and resources provided by the government towards the EMS as pledged in the 2014 government's policy agenda?
15. Do you think the support and resources given to EMS so far and recently are adequate enough to help them with their Chinese language studies?
16. Do you think the EMS and the local Chinese students are equal in their academic competition from Kindergarten to the university education in Hong Kong?

Resources and support from ethnic minority parents

17. What percentage or proportion of the parents of EMS speak and write in the Chinese language?
18. Does the school maintain a normal and regular contact with parents of the EMS in order to facilitate the academic studies or Chinese language studies of EMS at school? In particular, do these parents make any contribution towards the EMS in their Chinese language learning at school?
19. Are there any difference in attitude and support between parents of local Chinese students and EMS in terms of academic studies and Chinese language studies of their children?

Appendix 6: Interview of Principal Mr. Kong

Interviewer: Shahmim Khan Khattak

Interviewee: Kong

Date of interview: 8th October, 2018

Total Length: 2 hours, 2 minutes

Interview transcript for Doctoral

Thesis

Shahmim Khan Khattak	Kong
Today is 8 th October, 2018. Before me is a principal of a secondary school in Kowloon. I will refer to him as Mr Kong, to which he agrees. Good morning, principal. Thank you for agreeing to this interview.	Yes, good morning.
You signed a participant consent form, meaning that you agree to this interview, and you understand the contents of the form, which includes your rights etc.	Yes.

Good, let's proceed. Principal, please give me a brief overview of your school. Are you managing a government school, aided school or private school, and whether your students are Chinese speaking or non-Chinese speaking students? In this interview, I will refer to non-Chinese speaking students as 'ethnic minority students'. Please take your time.	The school was established in 1975. Early on, there are two other schools operated by the same sponsoring body in the area, we are a girls' school, whilst the others are a boys' schools. At the senior secondary level, we provide only arts subjects and not science subjects. Thus, despite being named a girls' school, we also admit boys who want to study arts subject. The gender distinction was, therefore, removed. Eventually, we got rid of the distinction and used the area where our school is located as the school name. At first, we mainly admitted Chinese students. Around 2011, the school started to admit ethnic minority students. We started with 20 of ethnic minority students and put them in the same class. I joined the school in 2011 too, and I am quite experienced in dealing with ethnic minorities, as I was in our Broadway campus when they first admitted ethnic minority students for 11 years. We
	progressed from having 20 ethnic minority students to 70% out of the 600 students now. They are of different nationalities, proportion-wise in this order: Pakistanis, then Indians, then Chinese, then Nepalis, then Filipinos. They represent 90% of the racial make-up of our school.
So there are 70% out of 600 students that are ethnic minorities?	Yes.
That's quite a lot.	Yes.

So is this a government school, aided school, or private school?	We were first founded as a private school in the 1970s. In 1989, we applied to be in the Direct Subsidy Scheme ('DSS') and we were accepted in 1991. The government classifies us as an aided school, as most of our income comes from the government. The mode of subsidy depends on our headcount, as opposed to other schools that depends on the number of classes. So we are a DSS co-educational school.
Yes. How much do you get per head?	The government sets a standard. Older schools get more than newer schools, and senior students get more than junior students. On average, we get around \$60,000-70,000 per student.
Per year?	Yes, per year. So in total, with 600 students the school gets around 30 million.
Schools are classified as Band 1-3. What is your school's banding?	This depends on the student's primary school abilities. We receive all bands of students from Band 1 to 3, but mostly Band 3. We do have 10 to 20 Band 1 students.
Does the whole school have a banding, as opposed to individual student bandings?	No, Hong Kong doesn't do that. It's more of an unofficial designation by parents. They even refer to some schools as a Band 5 school, a reference to the old banding system
So there is no official banding system in Hong Kong? It is a construct by parents who	Yes. In the past, before the handover, the government used to have the EMI scheme. That is, if a school has enough Band 1 students, then in its

will classify a school according to the number of band 1 students it has?	junior classes it can use English as its medium of instruction. They are unofficially referred to as English Secondary School, and will call schools that use English as its medium of instruction as Band 1 school. The scheme is cancelled now, so no real banding exists.
How do you admit ethnic minority students? Is there a different set of policies and standards?	Not really. In the past, they have an unofficial rule only to admit Chinese students, and not ethnic minorities. If a school indicates it is willing to admit ethnic minorities, the news will spread and ethnic minority parents will know to apply. Is there an official way to announce that your school takes in ethnic minorities? No. When I first arrived here, I informed the Education Bureau that we are willing. But this is all done informally, not like there's a document record or anything. It really depends on your school's practice. On the other hand, it becomes peculiar when ethnic minorities apply to a school that isn't willing to admit them. So some schools 'unwillingly' admit ethnic minorities. Those students may opt to continue their studies there and face the challenges, but they are definitely in the minority. Especially depending on their Chinese abilities, mainstreams schools may advise them to leave for an ethnic minority school.

Regarding the mainstream school's practice, is it really difficult for ethnic minorities to get into a Band 1 school?	Not really, as the school allocation system in Hong Kong depends on the student's banding and preference. Higher banding means a higher chance to be allocated into his preferred school. As I said, Band 1 students who select a mainstream, popular Band 1 school will make the school an EMI school. Whether ethnic minorities have a lesser chance than other students really depend on their primary school results, which, in theory, all students have an equal chance of achieving a good result. But, if we look at Chinese, English and Mathematics, which are the main subjects that will determine a student's banding, ethnic minorities do not pay a lot of attention to their Chinese results. Therefore, on average, ethnic minorities tend to have a lower banding due to their Chinese results dragging them down. I can say that definitely not 33% of the ethnic minority students are in the Hong Kong Band 1. What I mean is, in 100 ethnic minority students, there won't be 33 students belonging in Band 1, as they are not in a fair competition using Chinese, English and Mathematics results to determine their banding. Their Chinese ability is below average so they can only depend on the other 2 subjects to bring them up to average.
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What is the standard required for ethnic minority students for their Chinese, English and Mathematics results?	It's difficult to say what the 'Band 1 level' is, as it depends on the student's own ranking in his primary school. There used to be something called a Territory-wide System Assessment (TSA). TSA compares a primary school's performance with other Hong Kong primary schools, and it calculates the percentage of students in that school that are eligible to be Band 1. TSA results matter a lot to the primary school. Yet the TSA is cancelled, for the purpose of reducing student pressure. And it now uses historical TSA results as reference. In a sense, the student is constrained by his school's ranking when he is classified into a banding. So apart from the student's individual Chinese, English and Mathematics results, his banding will also depend on his relative position within his own primary school. You can say the system is incredibly complicated. This is why ethnic minority students in the whole banding process faces unfair competition.
As we all know, many ethnic minorities are not born in Hong Kong. Many would arrive in Hong Kong when they are 7, 8, 9, or even 10 years old, and then they are sent to local schools to study. Do you think the banding system is unfair for the newly immigrated ethnic minorities?	Naturally yes. Hong Kong has a unified standard for both Chinese and English. Thus, when the ethnic minority students switch to the Hong Kong system, it is difficult for them. Mathematic is difficult too, as the Hong Kong system involves rote exercise not similarly found in schools around the world. So apart from Chinese, mathematic is also a challenge.

Yes. Even if they are born in Hong Kong, their parents have a foreign mother tongue. They do not use Chinese at home. In this situation, do ethnic minority students suffer a disadvantage, as compared to local students learning Chinese?	Correct. As their mother tongue is not Chinese, and Hong Kong has only one standard curriculum for Chinese education designed for mother tongue speakers (I say this because the curriculum has many cultural elements), for ethnic minority students unfamiliar with Chinese culture, it is very difficult for them to learn. This goes beyond superficial language acquisition. Students need to be immersed in Chinese culture in order to learn it effectively. For university admissions, only 60% of local students achieve a level 3 in the HKDSE, the minimum qualification required for entry into local universities. You can imagine the percentage is even lower for ethnic minority students, and the hardships they face.
In admitting ethnic minority students, regardless of their place of birth, how do you assess their Chinese skills?	We have developed different teaching materials for students who have a mother tongue other than Chinese. For some instances, we have teaching aids that treat Chinese as a second language, and we use English materials to aid our Chinese teaching. There are 12 grades in our teaching materials, and we assign the students to one of the grades on admission. They serve as different starting points for learning Chinese. But then, these are second language materials, and the ultimate goal is the GCSE or IGCSE. We have done this for around 10 years. In total, we have 3 sets of teaching aids. The first level is the second language teaching materials

	as described above. For the second level, we have immersion materials for advanced learners – in these materials we use less and less of English to teach Chinese. As for the third level, it is the ‘normal’ curriculum and students are expected to learn Chinese without the aid of other languages.
You mentioned the ultimate aim is the GCSEs. In your experience, do ethnic minority students attempt the DSE?	Yes, but very few.
How few?	Less than 1%. Mostly individual cases. For example, I know a Nepali student who has high potential and attempted to use DSE results to get into university. But then he only got level 2. This situation is common amongst Hong Kong students. For university admissions in Hong Kong, students cannot use the results of another public examination if they choose the DSE results. I am sure the Nepali student would have got good results if he did the GCSE.
So what happened to him?	He repeated a year and retook the DSE instead.
Not the GCSE?	DSE.
In your experience, have you seen ethnic minority students achieving good or even excellent DSE results for Chinese?	Yes, but very few. It’s not a no, but our education policy discourages ethnic minority students from taking the DSE. I say this because at first you had to choose either the difficult DSE or easy GCSE. Of course, nobody would choose the difficult one. Why bother with the DSE if they can get into university with the GCSE? For those who succeed with the DSE they are mostly students in traditional

	schools, but definitely in the minority.
In your experience, how many ethnic minority students achieved good or even excellent DSE results for Chinese?	For excellent results, not that I remember. I consider level 3 to be very good for them. Not in my 10 years of experience do I recall one student getting a pass in level 3.
Level 3 is barely a pass!	No, level 2 is a pass. But for JUPAS admissions, you need level 3 for both Chinese and English.
So to conclude, ethnic minority students who get level 2 or 3 in HKDSE Chinese are definitely in the minority.	Yes.

What about GCE and IGCSE? Why do some students choose these instead of the traditional GCSE?	A ‘C’ grade is the minimum university entry requirement for GCSE, also known as the O-levels. This is the same for both GCE and IGCSE. I can provide you with the data later, as many students in our school take the achieve the C grade in Form 4. So why do we bother with Advanced (AS)-levels and A-levels? The answer is simple. The minimum entry qualification is not enough for our students to handle daily conversations in Chinese. We believe language acquisition is more than getting into university. We want their Chinese skills to improve in order to better assimilate into society. That is why we encourage students to take the AS or A- levels, depending on their ability, during Form 5. This can be an advantage in their university applications. We always tell our students O-levels are not enough. I find this quite ironic as GCSE and IGCSE are low-risk exams easy to pass, but they should not be misled into thinking a GCSE Chinese qualification is enough for them to handle daily life in Hong Kong. Educational policy is wrong to ask for a lower standard in Chinese for ethnic minority students purely because of their race.
GCSE is equal to GCE O-level. IGCSE is the same as GCE O-level. And in Form 5, you will encourage able students to take AS or A-levels. Is that correct?	Yes. Our teachers will recommend students to take the AS or A-levels. Whether the students actually take it is up to them.
So O-level qualifications are lower than AS or A-levels?	Yes.

And the DSE level is by far higher than all the tests above?	Yes.
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On the JUPAS application, how do students with O, AS or A-level Chinese qualification fare with HKDSE Chinese students? For example, for subjects with no Chinese language requirement (e.g. law), why do universities still insist on Chinese proficiency? And do they receive differential treatment?	You asked 2 questions. First, if the subject has no Chinese requirement, how do GCSE students compare with locals? I guess this is a major educational policy change post-handover, that is JUPAS applicants must ‘pass’ the HKDSE. Passing means obtaining a level 3 in Chinese and English, and a level 2 in mathematics and liberal studies, and a level 2 in any elective. JUPAS applicants must go through this process. And because of this, Chinese becomes a compulsory subject. So, for students who choose subjects that are not related to Chinese, e.g. law and English literature, your DSE results must still ‘pass’, and that means passing Chinese. So, this requirement is not unique to ethnic minority students. Even locals suffer from it, so I won’t say there is inequality. Second, do ethnic minorities receive differential treatment from locals if their Chinese qualification is not the DSE? As I said, GCSE is a low-risk exam regardless of ethnicity, as the standard required is quite low. In a sense, ethnic minority students have an easier life with this lower standard. This links to Hong Kong’s wider education policy. That is to say, when the government decided that Chinese should be a compulsory subject, they did not consider the Chinese abilities of ethnic minorities. So, there is this vacuum where ethnic minorities cannot receive Chinese education suitable to their ability. As a compromise, GCSE is a temporary measure (for over 10 years) for ethnic minorities to satisfy the compulsory Chinese standard. But the government steps short of stating firmly how scores are calculated. All is quite vague.
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	Ethnic minority students benefit from a low standard, which seems to be unfair for local Chinese students, as they must take the more
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	difficult DSE exam to get JUPAS admission. You will see that the different universities have different requirements for the different subjects, and there is no clear rule. The Chinese requirement fluctuates quite a lot. Interestingly, I have an email dated a few years ago from HKU to one of our former students, stating that that as long as he has an A* in Chinese, HKU will treat that as a DSE grade 7 (the highest grade) equivalent. The student is not applying for any language subjects. And the email is quite clear on a purported HKU policy – A* in GCSE is converted to Grade 7 in DSE. We have yet to observe a similar conversion in other universities.
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So, I can say, obviously, universities have their internal non-public scoring system. Why is it not public?	Sometimes, local students suffer from the unfairness of GCSE. If the scoring system goes public, local students will question why they still have to take DSE! It also gives rise to the question why ethnic minorities deserve preferential treatment. This points to the lack of a special curriculum and assessment system to accommodate new ethnic minority immigrants. We need that to form a comprehensive Chinese as a second language policy. I refer you to an Oxfam report 2 years ago that looked at Chinese language acquisition and ethnic minorities. The report said ethnic minority students suffer mostly from Hong Kong's lack of a comprehensive Chinese as a second language policy. It studied comparable systems around the world and came to some conclusions. It is a very well-written report, but it does not offer solutions as to how the government can develop such a policy. Personally, I think the key solution lies in the university admissions system. Can we use a second qualification like IELTS for university admissions? In that case, universities should not care what a student's mother tongue is. This is the system used in the US. I think this is a precise system that would work well. JUPAS should learn from that. Still, Hong Kong universities have a few tricks up their sleeves. They reserve 30% of school places for non-JUPAS students. They tend to use these places quite flexibly, to admit students who can't even speak Chinese.
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So for non-JUPAS students, they mostly apply to overseas Hong Kongers who return to study, or students from international schools?	Yes.
So even if they are Hong Kongers, they are not required to have any Chinese qualification?	No.
Yet, for ethnic minority students, they must study Chinese under the local curriculum?	Yes
This is quite interesting as ethnic minority students must study Chinese and take a Chinese exam whereas a Chinese returning to Hong Kong from overseas or studying in international schools in Hong Kong need not know Chinese. Apart from the HKU which once said the GCSE Chinese is 7 points (in email), whether the HKU will continue to admit this in future is unknown. Besides, the other 7 to 8 Public universities never said that the highest grade of a GCSE Chinese has 7 points as HKDSE Chinese. Will this trouble or confuse the ethnic minority students?	Correct. For ethnic minority parents, they have 2 main considerations. The first consideration: If their child goes through JUPAS, their only path is to study in a local secondary school and follow local '3322' DSE standards – under this they cannot take advantage of GCSE Chinese exams. Yet, they can take advantage GCSE Chinese exams for their JUPAS applications if their school offers such exam– the universities are quite vague about this route. So it seems the latter method is more advantageous to ethnic minorities. The second consideration: ethnic minority children can enter into international schools that organize GCE or IB curriculum. Then these children can get into university via non-JUPAS ways. But these international schools do charge a lot, around 18,000 per month. How many parents can really afford
	this? So, if you are poor, take the normal DSE '3322'.

Any such problem existed before the handover, were ethnic minorities required to take compulsory Chinese lessons?	I would say after the handover, if we refer to the non-Chinese speaking students, the new secondary school curriculum's major changes are: i) the normative study period of a university degree is extended from 3 years to 4 years; ii) university admissions criteria are adjusted; and iii) the 2-tier Certificate of Education (CE) and A-level system is merged into a single DSE examination. In the past, Chinese was not a compulsory subject under the Form 5 CE. Students are required to take 2 languages, and students are free to choose, or rather the school chooses for them. Most commonly, Chinese and English. For students who are new immigrants or ethnic minorities, they had an option to use another language to substitute Chinese. The common option here was French, or even German or Spanish in the minority. Thus, Chinese was not compulsory for ethnic minorities and it never created a problem. After the handover, when Chinese became compulsory, all sorts of problem arise. And that is why we have the GCSE mess now.
For Pakistanis and Indians, which language would they choose as their second language?	Urdu and Hindi were acceptable languages before the handover. But it is difficult to find a school that actually offered the languages. Some government schools did, for example, Kadoorie Secondary School had Urdu at F5 level. There was, however, no 2nd language requirement at F6-7 levels – one language sufficed. F7 students could replace the 2nd language with any AS-level subject, and they often did so.

Then Chinese becomes compulsory for ethnic minority students after the handover?	No. The HKDSE ‘3322’ standard is a hard standard, save for the limited GCSE exception which it operates quite vaguely.
Can they still choose some foreign language in lieu?	
A few years ago, the government’s policy address placed importance on the education of ethnic minority students. They mentioned a Chinese Language Curriculum, second language Framework, Applied Learning Chinese course, amongst other policies. What are these policies really, what has the government done to promote them, and what support is offered to ethnic minority students?	As I said, there is a big gap between GCSE standard and daily use of Chinese. Our teachers estimate that the GCSE qualification is equivalent to the Chinese level of a Primary 3 student. Obviously HKDSE Chinese corresponds to the level of a Form 6 student. This is a big gap in ability! We must do something to fill in the gap. For us, we ask the students to do the A or AS levels. For other schools, I know they don’t ask the students to take any additional Chinese class after passing the GCSE because they gained their university admission ticket. I think this is the wrong attitude to education. We as educators have the responsibility to help them adapt to local Hong Kong life. So how do we bridge the gap? The government helps by offering courses and tests. Applied Learning Chinese course asks course providers to design higher-level courses with a service industry theme, mostly restaurant and hotels. The course then matches the student to the university-required level. You can say this is the middle ground between GCSE and DSE. Still, I have to say this is a piecemeal solution. We need an overarching second language policy to deal with all types of ethnic minorities. We as a society should set a goal as to the Chinese proficiency we expect of ethnic minorities. A test like TOEFL or IELTS would help. We do

	this when we apply to foreign universities. I think they deserve clearer guidelines as to what is the acceptable standard for university.
Isn't GCSE the standard that you are looking for?	It's too low – merely primary 3 level! The students can't live in Hong Kong like that. How will they manage to get a job? It's like they can't even take an order as a waiter in a local café. I think is an

	insult to their intelligence! Applied Chinese is another type of humiliation, as it implies ethnic minorities can only do basic low skilled jobs. Why can't Applied Chinese be tailored to accounting, legal, or at least business skills?
This is getting more interesting. You believe GCSEs are too simple, and there should be a higher and a clear standard that ethnic minorities should be reaching, so that they can have a better life in Hong Kong. Then I'd like to ask, is it progress that ethnic minorities are forced to learn Chinese in order to assimilate after the handover, whereas before the handover Chinese has always been the dominant language, but nobody was forced to learn it?	Progress...maybe.
What hasn't there been more protests by the ethnic minorities alleging unfairness pre- handover as opposed to post-handover?	I can't deny that the role of English in Hong Kong has changed after the British rule. It does seem English has a sacrosanct position in Hong Kong. But this is quite deceiving, as it seems to imply you must learn English in order to survive in Hong Kong. That's true for the professionals, but definitely not for the average people! The average citizen must still use Chinese in all kinds of social situations you can think of. In the past, English could get you anywhere you wanted. If we really want to help the ethnic minority, the census indicates many of them live below the poverty line, how do we help them to have an easier life? A good Chinese policy. Which is why I say to have their Chinese standard up to primary 3 level is not enough.

If ethnic minorities get into universities, it is good for their development. Do you mean that even if ethnic minorities get into universities, if their Chinese skills are not up to standard, they suffer a disadvantage in the future job market?	Yes, that's a must. From my 20 years of experience in dealing with ethnic minorities, many of them have graduated from university. After graduation, their job choices are really limited by their Chinese skills, as from local cafe and market examples I mentioned earlier. It is just the reality that if they do not have good Chinese skills, they will live a difficult life. 5 to 6 ethnic minority graduates of this school came back to be our teachers. In their words, they feel that they are unfairly treated because of their substandard Chinese skills.
Understood. Applied Learning Chinese is a subject, right? What is its relation to GCSE? I recall Applied Learning can meet some university admission requirement.	DSE is what students normally take. GCSE etc are alternative and easier methods to meet the Chinese requirement. The gap between the two courses are filled with Applied Learning Chinese. If you want to look at the materials, you can go to the course providers like Polytechnic University and Baptist University. Schools have 2 modes of providing this course. Mode 1 is to hire university course providers and send the students to their external classrooms on Saturdays. Mode 2 is to hold them inside the school and hire the course providers to teach inside the schools. Normally schools will organise a group of high ability students to take the course, as a pass in the course equates to JUPAS admission. As I said, schools usually select high ability students, mostly those who have passed the GCSE O-level exams. So, they can improve their Chinese.

So Applied Chinese can substitute HKDSE Chinese? Do they need exams?	Yes. The exams are built into the course itself. There is no public exam.
So this seems to solve the problem you earlier identified, that there should be a clear policy to improve ethnic minorities' Chinese levels?	I don't think so, as Applied Learning Chinese standard is inconsistent. Course providers bid for the contract to provide courses, and the exams are at the discretion of the providers. Providers have different quality control methods, and it depends on the individual teacher. This stems from the fact that there is no clear standard for skills or expected outcome published by the government for the providers.
Do you encourage students to take the GCSE or the Applied Learning Chinese?	Hahaha...note that passing the GCSE is enough for the purpose of university admission. But as an educator, our policy is to encourage them to take the more difficult exams subject. A-level Chinese standard is very close to DSE F5 or F6 standards. But then this is an individual requirement we ask our students to meet. Without public policy support, students don't have to motivation to do so. The support is rather thin.
For Applied Learning Chinese, do universities have a published scoring system?	No. Passing the Applied Learning Chinese simply means you meet the admission requirements, but you don't know how much score it gets you.

So in your opinion, is the government providing enough in subsidy and support for ethnic minority students?	In terms of subsidy, yes! Even more than enough sometimes. As Carrie Lam would say, money is not the problem. Nothing in Hong Kong cannot be solved by money. What we lack is a direction and policy. Legislators talk about this topic frequently. Oh here is my colleague.
Can I continue this interview for 10 more minutes? Then I will turn to your colleague.	We have to be mindful of the time, as my colleague has to teach at 11:30.
I see. You provided me with plentiful interesting information in the interview just now. If I find that I need to ask more question, can I arrange another time to talk to you?	Of course. Let me talk to my colleague and tell her to come back in 10 minutes.
Back to the subsidies. You say money is not really the problem, but the lack of direction and policy is.	Yes. I recall when CY Leung was still the Chief Executive, around 6-7 years ago, he promised ethnic minority groups to support their education. In his policy address, he allocated 200 million dollars, in my memory, to support such cause. This money supported many initiatives. For examples, for universities set up courses for teachers to learn

	how to manage ethnic minority classes, and they could apply for scholarships to study. They also opened up support for ethnic minority teaching in the Postgraduate Diploma in Education courses. For secondary schools, schools like us, we get an extra one and a half million dollars to provide extra services or equipment to improve our education quality. For primary schools and kindergarten, they provided teaching training or even asked the EDB to send support staff down to develop their curriculum. NGOs also benefitted from this policy – they got money to organize programs that helped ethnic minorities integrate in Hong Kong. Whilst I was working with the District Council, I really felt there are a lot of money available. For example, carnivals and performances in Sham Shui Po districts, and performances that invited the ethnic minorities etc, there were a lot of activities. But I would call all of these are piecemeal measures. It is not comprehensive. To be comprehensive, we need a clear set of goals and policies for Chinese education. Why don't we have one? I don't really know. At the end, the best thing the government did was to establish a Chinese learning framework.
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What is the official name of the framework - is it Chinese Curriculum Second Language Learning Curriculum?	No, I can email you the document later. If you look at the framework, you will see it is under the greater primary Chinese learning curriculum. The framework contains the details of each individual learning stage within the primary curriculum. For example, say in the primary curriculum P1 students should have certain listening abilities, then the framework divides up listening abilities into smaller, fragmented goals. And this forms the basis of second language acquisition. Government officials are tactful in claiming that they have done their work. But note this is not really a policy. Just because they fragment the greater framework into smaller pieces doesn't mean there is a comprehensive second language acquisition framework. It still very much depends on the primary learning curriculum. The government has never claimed it has a second language acquisition policy. All it does is to fragment the primary curriculum into different learning stages. That document is very large. But if you read it in detail, it merely details the primary curriculum. It does not really help schools in developing their own ethnic minority curriculum.
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On the kindergarten level, are there any obstacles to ethnic minorities who attend CMIs kindergartens as opposed to Chinese students?	I know a few kindergarten principals. They tell me the problem of learning Chinese starts from the very first day ethnic minorities attend school. This is not because of race or culture. The problem appears when they bring home their knowledge and go back to school next day. As you note, their families do not know Chinese. And familial support is very important for learning Chinese. Students who successfully overcome cultural and language differences are in the minority. Students who successfully learn Chinese entirely on their own without the help from their parents are very rare. Students who receive traditional Chinese education and succeed throughout various levels of educations are extremely rare. That is why I think your own experience, Mr Khattak, is a good example! Not a lot of my ethnic minority friends with their Chinese abilities can succeed in Hong Kong. I personally know Ms. Monica (the ex-TVB reporter) and her family as her family studied in my schools. Her siblings are examples of failures. Their big sister is very successful, but her experience did not apply to her little siblings. She received education in traditional kindergartens and schools, then ended up
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	in Baptist University studying journalism. Her mother did not help her at all. She even studied Chinese Literature in her Form 7! I asked her why she was so successful, and she said she did not know, except that she likes challenges. She like challenging people. And she likes football! It's like she is rallying against the stereotype against woman, especially Pakistanis, playing football. She has that personality. So I guess that feeds into her ambition to remove stereotypes.
But her siblings aren't very good?	No. Her siblings studied in traditional kindergartens and primary schools and fell behind in secondary schools. That is why I say familial support is very important. Ask any Hong Kong family, they will know how important it is. For example, in preparing for dictation tests, parents need to devote a lot of time to help their children study and memorise. It is like writing Chinese, the children can never get the strokes correct on their own. They need a lot of support backing them up. That is why ethnic minorities cannot easily integrate into Hong Kong's mode of education or get used to it. That is why success stories are very few.

How do ethnic minorities fare up in CMI schools? They not only need to learn to listen, but also need to learn to write. How do they fare up in primary and secondary schools?	The problems start on the first day they enter a kindergarten. It's not that families don't want to help, but they can't. How can they deal with the strokes in writing Chinese characters? This problem exacerbates when they advance to higher education. And this is exactly the problem that happened to Ms. Monica's siblings. They have a comparative advantage in English but not Chinese. This problem exacerbates over time, and even the talented Ms. Monica couldn't help her siblings. Because it asks for commitment from the children, the teacher, and their classmates for the ethnic minority students to succeed and graduate. It is just very difficult. At the end of the day, ethnic minorities need a language policy that supports non-native Chinese speakers. The government, once the policy is set, can develop training programs based on it. USA, Canada and Australia have a clear standard for non-native English speakers. Hong Kong lacks an equivalent. Mainland China in fact has one for Mandarin! But not Hong Kong. I think that's a good topic for research.
So for Ms. Monica's siblings, what Chinese exams did they take?	They passed their GCSE. But they failed the '3322' university admission requirement. I understand that the litter sister is continuing her education, but the little brother is entering the workforce.

I want to clarify, EMI and CMI policy was once scrapped. No matter the school classification, the school can choose its medium of instruction as it wishes. Can you explain this phenomenon, and what happens when ethnic minorities get admitted in CMI schools?	A normal school is mostly Chinese dominated. It will not have many ethnic minority students. Let's think of what they can do. We have a term called immersion, that we hope the students immerse in the language in order to learn. For ethnic minorities the language is Chinese. But immersion is not achieved by simply setting them free in a Chinese environment. Teacher training is important. How our teachers motivate students to achieve is very important. In theory, that is the case. But in reality, teachers do not get adequate training, and their classmates aren't very accepting of the EMS. They have not developed a separate immersion program, and local students might not be too accepting of people of a different colour and level. It therefore becomes submersion, as opposed to immersion. Submersion is drowning and they don't really learn much. Failing to learn, the Chinese ability gap will start to appear after primary school and they will fail to catch up, just as Ms. Monica's siblings. They will go on to find different schools that mainly teaches in English. We provide GCSE courses and they have a higher chance get them into university. There are 3 routes ethnic minorities can get into GCSE courses. The first type is where the ethnic minorities get into a CMI kindergarten. They will then see if the child is capable enough to catch up with his peers.
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But they mostly fail?	Yes. This reflects the gradual increase in difficulty in education as well as the limited support they get from their families. Parents may ask if tutoring can help with that. But not really.
Outside help doesn't work.	Yes. So that's the first method. The second method is those who graduate from EMI primary schools. But they charge a lot.
What about subsidized schools?	That will be traditional CMI schools. There are no government-run EMI schools. Well, there are some exceptions, like the primary school in Li Cheng Uk, they call themselves an international primary school, but really over 90% of students are ethnic minority students. Their Chinese requirement is very low. For EMI schools, they have a high English requirement, and correspondingly a lower Chinese requirement. At the end of the day, their Chinese level is probably around GCSE. The third method will be an international school, not intended for JUPAS admission and mainly for non-JUPAS admission.
This is only available to well-off families?	Yes, both the 2 nd and 3 rd methods. The traditional method really depends on the student. The government should focus its work on CMI schools, how they can get over the cultural gap and help the families with extra Chinese support starting at the kindergarten level.

You are clear about the 1st and 3rd methods. What about the 2nd method? Ethnic minorities who want to avoid CMI schools choose EMI schools, but there aren't a lot of choices as government schools are rarely, if ever, EMI. What about other subsidized schools?	There are two types of subsidized schools. For aided schools, there are some EMI schools but not a lot. Examples of EMI primary schools are Li Cheng Uk, or the Yaumatei Kaifong Association School, or the Sir Ellis Kadoorie Primary School on Hong Kong Island.
If I recall, the government mother language policy after 1997 meant most EMI schools are turned into CMI schools?	Mostly yes. Those kept are in the minority, and they won't call themselves an EMI school due to policy reasons. So they concentrate all EMI students in those schools.
So can I say ethnic minorities who want to study in an EMI school has decreased?	Yes.
So voluntarily or involuntarily, they have to study in an CMI school. And the CMI curriculum is very challenging for them.	Yes.
From my research, CMI schools can teach in English if they want to, depending on their students. So are schools CMI in name only when they have the autonomy to select?	You can say at the secondary level things are more flexible, as opposed to the past, there is a set quota on language. But it doesn't mean the flexibility has solved the ethnic minorities, language problems. They still face an uphill battle as they progress through education, as this is a cumulative problem. The sense of failure, or inability to form relationship with their peers are not solved by studying in English at secondary schools. They have bad social skills as they achieve very little in primary school. You can't solve the problems in a day. We have to look into ways how we can motivate the students and make them proactive.

These are fundamental problems apart from language.	Yes.
So, of the ethnic students you admit, what do you think of their parents? Do they participate in their children's education?	I don't see a big difference between locals and ethnic minorities. We can feel that they love their children. On the contrary, south Asian families care more about their families than Hong Kongers. They have a strong familial value. Especially for Indians, Pakistanis and Nepalis, they have strong familial values. Generations often live together. Say for Parents' Day, a few generations of the same family like to come together with the child! So that's definitely not the issue. Often the problems come when we ask the children to communicate with their parents, because both parents are working, or we must find the father to talk.
What about language?	Yes, that is an issue. Although we employ staff of different races, there is still a barrier even if I use English to talk to them. As English is both our second language. It's not as good as using our first language. We try to help by employing those staff, but problems remain.
Lastly, if students are rejected by JUPAS, do universities tell the students clearly why are rejected?	No. JUPAS only tells if you're successful or not successful.

Are there any mechanisms for students to seek feedback and understand why they are rejected?	They can appeal their DSE results, say, if you believe you deserve a level 3 and not a level 4, then there's an appeal to the Hong Kong Examinations and Assessment Authority. But before the results are announced, students might have interviews depending on the subject. On announcing the results, there isn't much to appeal about. Like you can enquire, but it is not really an appeal.
So even if the students wanted to know, they can't.	Yes. Different subjects have different admission standards.
Say if the students satisfy the minimum requirement, but still fails, they will never know why they failed.	Yes, they won't know.
Thank you for your time, Principal. I have collected 3 documents from you for record keeping...	Here's the 4 th document. It has the GCSE results of our schools for the past few years anonymized. You will see why I say GCSE is a low-risk exam.
Do you have the results of DSE students?	We do, but I need to take a look. I am in my 8 th year here, and it is at my first year when we start to admit ethnic minorities. So we only have ethnic minorities taking the DSE starting from the 2 years. I say I have 20 years of experience because I spent 8 years of it in another school. So our 5 to 6 ethnic minorities serving here are all graduates of my former schools.

For record keeping, the 4 documents are 1. Alternative Qualifications in Chinese Language Requirement Relating to The Admission of NCS Applicants to The 9 JUPAS Participating Institutions 2. an email from a student to a university enquiring the equivalence of GCSE Chinese results and DSE results. 3. An Oxfam report on secondary language education policies in abroad and Hong Kong, dated April 2014 4. Your school's ethnic minority GCSE results in 2017. Lastly, if you could, it would help me a lot if you can provide me with your schools DSE results and the contents of the framework, and also the Chinese second language Mandarin standards so we can look into the situation in Mainland China.	I might not be able to help with your last request. But they definitely have this policy. Say people of different nationalities who want to study in Chinese universities. There is a published standard for their requisite ability. I will try. As to the Chinese as a second language framework, and DSE results of our ethnic minority students, I can help you with that.
Thank you. Is there anything you wish to add? About our whole topic, ethnic minorities, their academic status, their competition with local Chinese students, the fairness, like that?	Not much. Your questions are very comprehensive.
If you do have anything to add, please find me and I will come to you immediately.	Okay.

No problem. Let me turn off the recording device.	
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Appendix 7: Example of a Themed Data of an Ethnic Minority Student Bonnie

Ms. Bonnie

THEME	TEXT FROM TRANSCRIPT
Chinese language learning	I was born in Hong Kong, I like to watch Chinese cartoons. None of them (parents) can write (Chinese), both can speak only. The teacher usually teach local students, so he didn't had the way how to teach non-Chinese student...and he didn't know how to really properly teach us and make us understand....I gave GCE but I didn't get a good result.... And did you also attempt the GCSE Chinese language exam? Yes. So what was the result in your GCSE? A.

Discrimination	It was kind of difficult to communicate with them at first, because I knew Chinese, but because of my culture, because of my religion, it made a lot of problems for me like for example, they didn't like me, because they called me a Pakistani, you're not a Chinese person. The first year (in kindergarten) was not so happy because there was none of them was talking to me. Second and third year was like getting good, because they understand me...so that's why they slowly get normal with me. I started to get some problems in my form 4. So I first go back to Pakistan for some medical problems, I had to go back for some surgeries. So I came back...I started to have a lot of
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	Chinese problems because others were learning more than me....the main teacher will say that you have already left out, you won't catch up again. They started have a racist for me, racism. What I am learning is their language, they don't feel proud of us, except they just feel that we are taking something from them, we are taking their places, where we go, if we know Chinese, we will take that place and that. They started to have racism with us, so that's why I said I won't study anymore. Because I am a Pakistani girl, I am a Muslim, so they started racist. I feel like that Chinese people do racist us, then afterwards that hope was finished. But later on I just worked there (a small restaurant) for four days, and then she just said to me directly 'I fire you'. I do work as a tuition teacher for my own culture people, for my own religion people....we don't racist them, but other Chinese teachers do racist them.
Understanding and awareness of constitutional laws	Nothing. I don't know anything about this.

Appendix 8: Entrance Requirements for Public Universities in Relation to Alternative Chinese Language Qualification

Table 1

Entrance requirement for The University of Hong Kong in relation to alternative Chinese language qualification

The University of Hong Kong	Minimum requirement
Applied Learning Chinese	Attained
GCSE	Grade E / Grade 3
IGCSE	Grade E / Grade 3
GCE O Level	Grade E
GCE A Level	Grade E
GCE AS Level	Grade E

Table 2

Entrance requirement for The Chinese University of Hong Kong in relation to alternative Chinese language qualification

Chinese University of Hong Kong	Minimum requirement
Applied Learning Chinese	Attained
GCSE	Grade C / Grade 4
IGCSE	Grade C / Grade 4
GCE O Level	Grade E
GCE A Level	Grade E
GCE AS Level	Grade E

Table 3

Entrance requirement for The Hong Kong University of Science and Technology in relation to the alternative Chinese language requirement

Hong Kong University of Science and Technology	Minimum requirement
Applied Learning Chinese	Attained or above
GCSE	Grade E
IGCSE	Grade E

GCE O Level	Grade E
GCE A Level	Grade E
GCE AS Level	Grade E
DSE Foreign Language	Grade E or above

Note: The HKUST is an exception among the JUPAS and it accepts foreign language under the DSE to be an alternative Chinese language qualification

Table 4

Entrance requirement for The City University of Hong Kong in relation to the alternative Chinese language qualification

City University of Hong Kong	Minimum requirement
Applied Learning Chinese	Attained or above
GCSE	Grade C / Grade 4
IGCSE	Grade C / Grade 4
GCE O Level	Grade E
GCE A Level	Grade E or above
GCE AS Level	Grade E or above

Table 5

Entrance requirement for The Hong Kong Polytechnic University in relation to the alternative Chinese language qualification

Hong Kong Polytechnic University	Minimum requirement
Applied Learning Chinese	Attained
GCSE	Grade C / Grade 4
IGCSE	Grade C / Grade 4
GCE O Level	Grade C
GCE A Level	Grade E
GCE AS Level	Grade E

Note: PolyU states explicitly that any achievement of the required grade listed out in the above table will be regarded as obtaining a Level 3 in HKDSE Chinese and similarly, achieving Grade E in any one of the six foreign language subjects will be accepted as elective subject reaching the Level 3 requirement.

Table 6

Entrance requirement for the Hong Kong Baptist University in relation to the alternative Chinese language qualification

Hong Kong Baptist University	Minimum requirement
Applied Learning Chinese	Attained
GCSE	Grade C / Grade 4 or above
IGCSE	Grade C / Grade 4 or above
GCE O Level	Grade C / Grade 4 or above
GCE A Level	Grade E or above
GCE AS Level	Grade E or above

Note: DSE Category C subjects (Other Languages) normally cannot be used for meeting the entrance requirement on Chinese Language. While waivers may be granted at the discretion of individual programmes, such consideration is only made under special circumstances, on a case-by-case basis. Students are therefore strongly advised to obtain the requisite Chinese language qualifications.

Table 7

Entrance requirement for Lingnan University in relation to the alternative Chinese language qualification

Lingnan University	Minimum requirement
Applied Learning Chinese	Attained
GCSE	Grade C / Grade 4 or above
IGCSE	Grade C / Grade 4 or above
GCE O Level	Grade C / Grade 4 or above
GCE A Level	Grade E or above
GCE AS Level	Grade E or above

Table 8

Entrance requirement for The Education University of Hong Kong in relation to the alternative Chinese language qualification

Education University	Minimum requirement
Applied Learning Chinese	Attained
GCSE	Grade C / Grade 4 or above
IGCSE	Grade C / Grade 4 or above
GCE O Level	Grade C / Grade 4 or above
GCE A Level	Grade E or above
GCE AS Level	Grade E or above

Table 9

Entrance requirement for the Open University of Hong Kong in relation to the alternative Chinese language qualification

Open University	Minimum requirement
Applied Learning Chinese	Attained
GCSE	Grade E / Grade 3 or above
IGCSE	Grade E / Grade 3 or above
GCE O Level	Grade E or above
GCE A Level	Grade E or above
GCE AS Level	Grade E or above

Appendix 9: HKDSE Points Conversion

Points conversion of all Levels under the HKDSE subject including the HKDSE Chinese subject

The University of Hong Kong (**HKU**), The Chinese University of Hong Kong (**CUHK**), The Hong Kong Polytechnic University (**PolyU**)

Level 1-4	Level 5	Level 5*	Level 5**
1-4 points	5.5 points	7 points	8.5 points

Note: From the 2018, the conversion system of **HKU** has changed and Level 5** is now awarded 8.5 points.

From the 2019, CU has done the same. On the other hand, the point conversion system of the following universities remain unchanged.

Hong Kong University of Science and Technology (**HKUST**), City University of Hong Kong (**CityU**), Hong Kong Baptist University (**HKBU**), Lingnan University (**LingU**), The Education University of Hong Kong (**EdU**), Hong Kong Metropolitan University (**HKMU**)

Level 1-5	Level 5*	Level 5**
1-5	6	7