

**Speech by The Honourable Chief Justice Geoffrey Ma
at the UNSW Law, University of New South Wales
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**Criticising Judges and the Courts:
Overstepping the Crease¹**

1. I thank UNSW Law for the great honour of being asked to speak this evening. You may find it curious as to why I have incorporated into the title of this talk a reference to cricket. Part of the reason is that I love both cricket and the law, and have probably been involved in both for about the same time. Other than this, there is perhaps little similarity between the two. Cricket is a game where the rules are clear; there is no balancing exercise to be performed. If you bowl beyond the crease or you are outside the crease, there are consequences. In the law, one also deals with limits. Often,

¹ I wish to acknowledge the assistance I have received from the Judicial Assistants of the Hong Kong Court of Final Appeal: Mr Harry Chan LLB (Hong Kong), BCL (Oxon); Mr Ted Noel Chan LLB (Northampton), LLM (University College, London) and Mr Adrian Lo LLB (Hong Kong), LLM (London School of Economics), Barrister.

like cricket, if one goes beyond these limits, there will be unfortunate consequences: under the law, there can be criminal liability, a liability to pay damages, make restitution and so on. Sometimes, however, the boundary is not between right and wrong so much as a conflict between competing rights which come up against one another. One sees this particularly in the area of fundamental rights where different rights or interests, each legitimate, can confront one another. In such a situation, identifying the boundary can be difficult and a balancing exercise may have to be performed. This can be made even more difficult when other factors come into play.

2. Criticism of judges and the courts has been the subject matter of discussion of late in Hong Kong and, I perceive, elsewhere. I have just delivered an Oration in

Brisbane regarding this topic.² The point I was trying to make was that when discussing criticisms made against the court, one is trying to mediate between two fundamental features of a society: the freedom of speech and the necessity of upholding the authority of the court. This is not a battle between individuals. Rather, it is a matter of balancing two facets of the public interest. When one adds to this the fact there are different types of criticism ranging from sheer abuse through to uninformed criticisms and informed criticisms, the equation can look like one of those impossible physics ones. After all, the freedom of speech is one thing but not everything that is said is either fair or right. And when the administration of justice is affected, what really are the stakes and what should be done?

² “Criticism of the courts and judges: informed criticism and otherwise”, Supreme Court of Queensland Oration, 21 May 2018.

3. I would like first to approach the matter by looking at two fundamentals: the rule of law and the administration of justice. It is these fundamentals that provide the proper context to the present discussion.

4. The real test of an independent judiciary is how the courts deal with the day-to-day business of adjudicating disputes, how they discharge in practice their constitutional responsibilities and just how transparent their work is. In this context, the type of case that often provides the litmus test are public law cases.

5. Public law cases provide perhaps the best examples because very often they involve controversial issues where the court is faced with a number of diametrically opposite views, each of which may appear to be entirely reasonable. In most other areas of the law, the answer to a legal problem is often

fairly clearcut, even though getting there may at times be complex. In the area of public law, however, and in particular cases which involve issues of constitutional importance, there can be generated much controversy. Here, the views of the public (and I include here the government as well) will be as diverse as the society itself in which the legal dispute originates. When one is dealing with, for example, issues involving the freedom of expression, or perhaps immigration issues or indigenous rights, public controversy is almost certain to arise.

6. The way in which courts deal with such issues – and I am not here referring to the actual result of any litigation – is critical. It is critical because the way in which a court approaches such cases – its methodology and most important of all, its reasoning – will demonstrate whether those

principles which provide the foundation of the common law, have been applied.

7. Just what are these principles that I have been talking about? One of course starts with a concept of the rule of law. For me, this concept has two intertwined parts: first, the existence of laws which respect the dignity of persons and the ability of every member of a community to lead a civilised life; secondly, the existence of an institution – the judiciary – which promotes and enforces such laws. These two parts are inseparable. In this talk, I assume the first part and discuss only the second.

8. An independent judiciary is key. The meaning of an independent judiciary is reflected in the Judicial Oath taken by judges. The precise words may differ from jurisdiction to jurisdiction but the effect is the same. In Hong Kong, the

Judicial Oath requires each judge to adhere to the law in discharge of their duties. Judges are required “to act in full accordance with the law, honestly and with integrity, safeguard the law and administer justice without fear or favour, self-interest or deceit”.

9. Adherence to the law means much more than just an adherence to the words of the law. As important, if not more so, one must look to the spirit of the law. A ready example of this is in the way fundamental rights and freedoms are interpreted by the courts. These are in similar form and one will instantly recognise their content: the right to life, to equality, freedom of speech or expression, freedom of political or religious belief, and so on. But it is the way in which they are construed that is all important. When it comes to fundamental rights and freedoms, they should be construed

purposively and generously, avoiding a literal, technical, narrow or rigid approach.

10. The spirit of the law is by its very nature an imprecise concept, even at times elusive. Owing to this imprecision, it becomes a somewhat flexible concept and this can occasionally give rise to difficulties. The difficulties arise when the purported exercise of rights and freedoms are taken to their limits and meet head on the legitimate and reasonable interests or points of views which go the opposite direction. This type of situation provides a ready example of what I was discussing earlier when I referred to the difficulties faced by the courts when confronted with diametrically opposite, yet on their face, reasonable views. This is where a fine balance needs to be struck, and controversies in the outcome of a case may be unavoidable.

11. Cases dealing with the freedom of speech provide common scenarios in which difficulties of reaching the correct balance are faced by the courts. For instance, in 1999, in *HKSAR v Ng Kung Siu*,³ the Hong Kong courts and ultimately the Court of Final Appeal were faced with determining the extent of the freedom of expression in the context of flag burning. There existed legislation which criminalized the desecration of both the Hong Kong flag and the national flag (the National Flag and National Emblem Ordinance and the Regional Flag and Regional Emblem Ordinance).⁴ The question for the courts was: did such legislation which criminalized flag burning as a means of political protest (or for any other purpose) breach the constitutional guarantee of the freedom of expression? The Court of Final Appeal upheld

³ (1999) 2 HKCFAR 442.

⁴ It is not a criminal offence to burn the national flag in Australia, although there have been attempts to criminalise this over the years. The most recent attempts were the Protection of the Australian National Flag (Desecration of the Flag) Bill 2006 and the Flags (Protection of Australian Flags) Amendment Bill 2008. Apparently, it may be possible to lay a charge of disorderly conduct by creating a disturbance. In New Zealand, the burning of the national flag is likely to be a criminal offence under s. 11 of the Flags, Emblems and Names Protection Act 1981.

the constitutionality of the legislation (the Court of Appeal having held otherwise). The Court was there faced with two diametrically opposed arguments, with each argument in its own way, cogent and powerful. The Court of Final Appeal ultimately came to the view that the legislation constituted only a limited restriction on the freedom of expression, whereas the criminal offence protected the unique symbolism of the national and regional flags which it was felt was important to be preserved particularly at the early stages of the resumption of the exercise of the sovereignty over Hong Kong.

12. Immigration cases are also controversial in that a sizeable proportion of the community will have very strong views one way and an equally sizeable proportion of the population will have just as strong a view the opposite way. Sometimes, minority groups seek the protection of their rights. What do the courts do in such situations where, whichever

way they decide a sizeable number of people will disagree with, if not protest, against the result that is reached?

13. The answer should of course ultimately be quite a simple one in terms of the court's approach. Whether or not a case is a high-profile one, or involves controversial topics, or is just a run-of-the-mill one handled on a daily basis by the courts, the approach is exactly the same, and it is a principled one. The court will simply apply the law to the facts and the judge or judges will do so adhering to their judicial oath. No regard will be paid to whether the result will or will not be a popular one (not that this can be gauged in the first place), certainly not to whether it will accord with what the majority of the community wishes. Indeed, to have regard to such matters is really quite out of the question. In public law cases, the protection of core-values or core-rights and the need to adopt a principled approach is fundamental.

14. On occasion, the courts will be the last refuge open to a minority in society pitted against the excesses of the majority. This is inevitable given the proper operation and application of the law. And for me, this is what is meant by a principled approach to the discharge of a judge's constitutional role: the adherence to the letter and the spirit of the law, and its proper application, protecting those who need protection.

15. Occasionally, criticisms are made against judges along the lines that they are not elected. As a conceptual argument, it has merits on both sides but very often it is deployed as a means of criticising results in court proceedings that are not to the liking of persons or groups. This can occur particularly in controversial cases. In *W v Registrar of*

Marriages,⁵ the Hong Kong Court of Final Appeal determined the constitutionality of a provision in the Marriage Ordinance⁶ which had the effect of excluding transsexual persons from the definition of “woman” for the purposes of being able to marry. The Court of Final Appeal decided, applying a remedial interpretation, that the term “woman” had to be read and given effect so as to include a transsexual. This was consistent with the essence of the constitutional right to marry.⁷ There were strong reactions to this result, with polar opposite sides each claiming a victory or disaster for the rule of law in Hong Kong. On a matter as delicate and controversial as transsexuals, one will inevitably provoke controversy whichever way a decision is made. In our judgment, we said this⁸: “Reliance on the absence of a

⁵ (2013) 16 HKCFAR 112. The decision was a majority decision of 4 (Ma CJ, Ribeiro and Bokhary PJJ, Lord Hoffmann NPJ) to 1 (Chan PJ).

⁶ Cap. 181.

⁷ Article 37 of the Basic Law and Article 19(2) of the Bill of Rights Ordinance.

⁸ At para. 116.

majority consensus as a reason for rejecting a minority's claim is inimical in principle to fundamental rights." We quoted from a paper⁹ given by a former Chief Justice of Ireland, Murray CJ who said: "How can resort to the will of the majority dictate the decisions of a court whose role is to interpret universal and indivisible human rights, especially minority rights?"

16. In this type of case, it is perhaps inevitable that the courts will face criticism. Sometimes such criticism can be very harsh, even to the point of being abusive. The criticism of courts and judges raises some fundamental dilemmas that are not easy to resolve. The difficulty arises from the point made earlier that reasonable points of view do often proceed from diametrically opposite positions and finding some middle ground, if there is any, is often extremely hard. On the

⁹ "Consensus: concordance, or hegemony of the majority?" in *Dialogue Between Judges 2008*, Strasbourg, European Court of Human Rights.

one hand, there is an imperative to uphold and maintain the dignity of the law and the necessary respect for it. Against this facet, and just as important, is the freedom of speech. In respect of this fundamental right, I wish to be clear: I do not suggest the judiciary, courts and the work of the courts should in any way be immune from free speech: there is no reason why they should be in any way and indeed free speech often benefits the administration of justice.

17. A tension inevitably exists between these two facets. The freedom of speech, though a fundamental right, is not unlimited. In Australia, the freedom of speech (or discussion) is regarded as essential to sustain the system of government that is constitutionally mandated and is accordingly to be regarded as effectively entrenched as a constitutional right.¹⁰

¹⁰ *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, at 48-9 (Brennan J). See also: *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106, at 139 (Mason J). In some States, the right is expressly set out: see s. 16 of the Human Rights Act 2004 (ACT); s. 15 of the Charter of Human Rights and Responsibilities Act 2006 (Victoria).

It is, however, not absolute.¹¹ In Hong Kong, it is stated to be a right enjoyed by residents of Hong Kong: see Article 27 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China.¹² Under Article 39 of the Basic Law, the provisions of the International Covenant on Civil and Political Rights are to be implemented and the Covenant has legislative force in Hong Kong through the Hong Kong Bill of Rights Ordinance.¹³ Article 16 of the Bill of Rights guarantees the freedom of expression but states, as does the Covenant,¹⁴ that the exercise of this freedom carries with it special duties and responsibilities:-

“It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary –

¹¹ *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, at 561 (The Court). Incidentally, the Dean of the UNSW Law appeared as counsel in this famous case.

¹² The Basic Law is a constitutional document promulgated by the National People's Congress under the Constitution of the People's Republic of China.

¹³ Cap. 383.

¹⁴ Under Article 19.

- (a) for respect of the rights or reputations of others;
or
- (b) for the protection of national security or of public order (ordre public), or of public health or morals.”

Laws against hate speech and the law of defamation provide clear instances of legitimate restrictions to this freedom.

18. I shall go into the limits of free speech regarding judges and the courts when dealing with the form of contempt of court known as scandalising the court. Of more interest, however, is looking more closely at the concerns or problems that may arise when the exercise of free speech results in a distortion over what the rule of law means in a society. It is this aspect that can give rise to real concern because if the rule of law itself, involving the concept of the administration of justice, is misunderstood, then the confidence of the community in the institution of the law would inevitably be

undermined. However praiseworthy a court system is and however well it works, the absence of confidence in the system seriously undermines the rule of law and this in turn will undermine society itself.

19. I must now turn to the offence of contempt by scandalising the court. I do not intend what follows to be a definitive or complete analysis of this form of contempt, but it is useful to examine the interplay between the freedom of speech and the administration of justice in relation to this offence.

20. The offence is controversial because it seemingly goes against the freedom of speech. As I have said earlier, this right is a constitutionally protected one but even where it is not constitutionally protected, it is fiercely guarded and rightly so. The controversy is further fuelled by the fact that

in some jurisdictions, this offence has been abolished. It was abolished in the United Kingdom in 2013.¹⁵

21. Many textbooks and commentators take as the starting point the definition of the offence contained in *R v Gray*,¹⁶ a decision of the English Court of Appeal. The offence was defined in the following way,¹⁷ “Any act done or writing published calculated to bring a Court or a judge of the Court into contempt, or to lower his authority.” Notwithstanding the vagueness of this definition, prosecutions for this offence have largely involved scurrilous and abusive attacks on judges, but not always. *Gray* itself was an example of abusive remarks. In the course of reporting at a trial for obscene libel in Birmingham, a journalist (Mr Gray) wrote and published in the *Birmingham Daily Argus* an article in

¹⁵ By s. 33 of the Crime and Courts Act 2013.

¹⁶ [1900] 2 QB 36; 82 Law Times Reports 534.

¹⁷ In the judgment of Lord Russell of Killowen CJ at 40.

which the trial judge¹⁸ was described as “the impudent little man in horsehair, a microcosm of conceit and empty headedness” and that the fact that he had been left a lot of money by a wealthy relative “spoiled a successful bus conductor”. Despite apologizing for what Mr Gray recalcitrantly accepted were words that were “intemperate, improper, ungentlemanly, and void of the respect due to his Lordship’s person and office”, he was fined £100, with another £25 for costs and was imprisoned in Holloway Prison until the sums were paid.

22. Another case involved Lord Mansfield. John Wilkes, the 18th Century politician¹⁹ founded the newspaper *The North Briton*. In the infamous Issue 45,²⁰ an article criticised the royal speech of King George III endorsing the

¹⁸ Mr Justice Darling.

¹⁹ Wilkes was regarded as a radical, having supported the Americans in the American War of Independence.

²⁰ Published on 23 April 1763.

Treaty of Paris 1763.²¹ Wilkes and other publishers were convicted of seditious libel before Lord Mansfield. At this point, a publisher named John Almon (a friend of Wilkes) published two pamphlets criticising Lord Mansfield for acting “officiously and arbitrarily”. Almon was prosecuted for contempt. In the judgment of Mr Justice Wilmot,²² it was stated that the offence of contempt is “not for the sake of the Judges, as private individuals, but because they are the channels by which the King’s justice is conveyed to the people”. This link to the administration of justice is an important one.

23. The emphasis on the administration of justice aspect is most clearly demonstrated by the approach of the Australian

²¹ This treaty ended the Seven Years War between Great Britain and France and Spain.

²² *The King v Almon* (1765) Wilm 243. This judgment was never delivered as a judgment because the prosecution against Almon was not proceeded with, on account of a technicality (the indictment stated “*The King v Wilkes*” when the defendant should have been Almon).

courts regarding this offence.²³ *R v Dunbabin, Ex parte Williams* contains perhaps the earliest analysis of this offence.²⁴ There, disparaging remarks were made (these were held by the High Court of Australia to be “a clear contempt”) against the High Court itself in *The Sun* by its editor. Reference was made to conclusions reached by the High Court “with that keen microscopic vision for splits in hairs which is the admiration of all laymen” and that the Court should be given some “real work to do” so that it “would not have time to argue for days on the exact length of the split in the hair, and the precise difference between Tweedledum and Tweedledee.” Rich J, who gave the first judgment of the court, said this²⁵:-

“Any matter is a contempt which has a tendency to deflect the Court from a strict and unhesitating

²³ The offence still exists in Australia.

²⁴ (1935) 53 CLR 434.

²⁵ At 442.

application of the letter of the law or, in questions of fact, from determining them exclusively by reference to the evidence. But such interferences may also arise from publications which tend to detract from the authority and influence of judicial determinations, publications calculated to impair the confidence of the people in the Court's judgments because the matter published aims at lowering the authority of the Court as a whole or that of its Judges and excites misgivings as to the integrity, propriety and impartiality brought to the exercise of the judicial office."

Dixon J added ²⁶ : "It is necessary for the purpose of maintaining public confidence in the administration of law that there should be some certain and immediate method of repressing imputations upon Courts of justice which, if continued, are likely to impair their authority." Note the reference in these judgments to the importance of public confidence in the legal system.

²⁶ At 447.

24. In England, well before the passing of the Human Rights Act 1998 and the abolition of the offence in 2013, misgivings were already expressed by eminent judges and lawyers about the offence. In *McLeod v St. Aubyn*,²⁷ Lord Morris in delivering the Opinion of the Privy Council said that “Committal for contempt of Court is a weapon to be used sparingly, and always with reference to the interests of the administration of justice”. On the same theme of the administration of justice but also emphasising the freedom of speech aspect, is the case, again before the Privy Council, of *Ambard v Attorney General for Trinidad and Tobago*.²⁸ There, the editor of *The Port of Spain Gazette* was convicted of contempt of court, fined £25, ordered to pay costs on a solicitor and own client basis and imprisoned for a month in case he could not pay the fine. The offending article which Ambard had edited was critical of the alleged disparity in

²⁷ [1899] AC 549, at 561.

²⁸ [1936] AC 332.

sentencing by magistrates in Trinidad and Tobago for certain criminal offences with similar facts. The criticism was, however, neither abusive nor intemperate. I set out a part of what was written:-

“It is the inequality of the sentences as fitting the circumstances of the offences that seems to often demand some comment. And if we here venture to draw attention to this, it is not by any means with the idea of confirming popular opinion as to the inherent severity or leniency of individual judges or magistrates, but simply with a view to inviting consideration of a matter that must, and in fact does, cause adverse comment amongst the masses as to the evenness of the administration of justice in Trinidad.”

Your instincts about this being as far removed from being a contempt as can be were shared by Lord Atkin. In a much-quoted passage, fuelled no doubt by the facts of the case before the Privy Council, he said this:-

“But whether the authority and position of an individual judge, or the due administration of justice, is concerned, no wrong is committed by any member of the public who exercises the ordinary right of criticising, in good faith, in private or public, the public act done in the seat of justice. The path of criticism is a public way: the wrong headed are permitted to err therein: provided that members of the public abstain from imputing improper motives to those taking part in the administration of justice, and are genuinely exercising a right of criticism, and not acting in malice or attempting to impair the administration of justice, they are immune. Justice is not a cloistered virtue: she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men.”

25. The main reason for the abolition of the offence in England was the freedom of speech angle. In the debate in the House of Lords over the proposed legislative amendment,²⁹ Lord Pannick QC said:-

“There is simply no justification today for maintaining a criminal offence of being rude about the judiciary – scandalising the judges or, as the Scots call it, murmuring judges. We do not protect

²⁹ House of Lords debates, 2 July 2012.

other public officials in this way. Judges, like all other public servants, must be open to criticism because, in this context as in others, freedom of expression helps to expose error and injustice. It promotes debate on issues of public importance. A criminal offence of scandalising the judiciary may inhibit others from speaking out on perceived judicial errors.”

26. The offence, however, remains here in Australia and in Hong Kong. In Australia, the justification for the offence I would suggest is the need to emphasise the need to uphold the authority of the courts, an administration of justice issue. The “good sense of the community will be a sufficient safeguard against the scandalous disparagement of a judge”³⁰ is often going to be true, but sometimes it will not. This was the very point made by Rich J and Dixon J in *Dunbabin* from which I have quoted earlier. True it is that the human rights aspect is

³⁰ Gibbs CJ (together with Mason, Wilson and Brennan JJ) in *Gallagher v Attorney General* (1983) 152 CLR 238, at 243.

regarded as important in Australia as it should be,³¹ but I accept there comes a point when the administration of justice is so affected that something needs to be done. It is a matter of balancing the two important aspects of free speech and the impairment of the authority of the courts. This point was also made in *Gallagher*³² where it was said (after referring to *Dunbabin*), “The law endeavours to reconcile two principles, each of which is of cardinal importance, but which, in some circumstances, appear to come in conflict”. Then comes the critical passage, “The authority of the law rests on public confidence, and it is important to the stability of society that the confidence of the public should not be shaken by baseless attacks on the integrity or impartiality of courts or judges”.

³¹ Notably, as Mason J (who has sat as a Non-Permanent Judge of the Hong Kong Court of Final Appeal) said in *Nationwide News* at 32, “at common law no contempt is made out if all that the defendant does is to exercise his or her ordinary right to criticise, in good faith, the conduct of the court or the judge”.

³² At 243.

27. I am aware of course of the case of Sevdet Besim who had pleaded guilty in 2016 to having done preparatory acts in planning for a terrorist attack on Anzac Day in Melbourne. The controversy relevant for present purposes related to remarks made by three Government ministers as reported in *The Australian* to the effect that the courts of Victoria were light on sentencing for terrorism offences. The controversy was that these ministers were made to answer to the Court of Appeal of Victoria on a possible charge of contempt. As I understand it, this involved both a contempt on the basis that an attempt was made to influence the court as well as a contempt by scandalising the court. I do not want to wade into this controversy; much has already been spoken and written on it.³³ I will, however, say this. I have no doubt that one of the main considerations that will have weighed heavily on the court's mind was the balancing exercise I have referred

³³ I have found interesting and instructive the recent article written by Dyson Heydon "Does Political Criticism of Judges Damage Judicial Independence" published by the Policy Exchange, February 2018. I am grateful to Professor Sean Brennan and Professor Gabrielle Appleby for referring this article to me.

to earlier. It is one of the most difficult balancing exercises a court will have to undertake, involving the need to take into account a fundamental right as against another equally important feature (and also one in which the very institution affected by it acts as the judge).

28. In Hong Kong, the offence of contempt by scandalising the court remains in existence. There have been as one would expect for an offence of this nature, very few cases and these have been confined to instances of abusive remarks. The leading authority *Wong Yeung Ng v Secretary for Justice*³⁴ involved the finding of contempt by the court against the chief editor of a popular newspaper in which there were what were described as “abusive, offensive and scurrilous” remarks which also contained “racist slurs”.³⁵ The

³⁴ [1999] 2 HKLRD 293.

³⁵ At 301F. The milder abuses included referring to judges and Obscene Articles Tribunal members as “dogs and bitches”, “scumbags”, “Mangy yellow skinned dogs”, “stupid men and women who suffer from congenital mental retardation”.

Court of Appeal had to consider how such criticisms were to be seen against the freedom of speech contained in the Basic Law.³⁶ It was accepted by leading counsel for the editor³⁷ that the term “public order” in Article 16 of the Hong Kong Bill of Rights included the due administration of justice.³⁸ The judgment of Mr Justice Mortimer VP contains the clearest statement of the position in Hong Kong:-³⁹

“I readily accept Mr Kentridge’s point that the administration of justice in Hong Kong is held in high repute both at home and abroad. There is every reason to think that it enjoys general confidence and respect. Therefore, it has little to fear from *bona fide*, temperate, and rational criticism. Indeed, the appellate process itself involves this and yet tends to increase confidence in the system. Further, like many other public institutions, it stands to benefit from, rather than be damaged by, such criticism – especially if constructive. Nor do I think that isolated excesses of disappointed litigants or their lawyers which are

³⁶ I have referred to this constitutional document earlier: see para. 6 above.

³⁷ Mr Sydney Kentridge QC.

³⁸ At 307I.

³⁹ At 312I-313A.

neither in the face of the court nor related to proceedings either pending or in progress, ought necessarily to be condemned as scandalising contempts.”

Leave to appeal to the Court of Final Appeal was refused.

The Appeal Committee emphasised in refusing leave that the freedom of speech is not unrestricted and every community was entitled to protect itself from conduct aimed at undermining the due administration of justice; this was an important aspect of the preservation of the rule of law.⁴⁰

29. The reference to the rule of law is a reminder of the proper context in which to analyse criticisms made of the court. We have just seen the controversial nature of the offence of contempt by scandalising the court. It is controversial because of its potential in undermining the fundamental right of the freedom of speech and this creates

⁴⁰ [1999] 3 HKC 143, at 147B-C. As an aside, it is noteworthy that the practice of the Hong Kong Court of Final Appeal is to provide reasons when leave to appeal is refused.

the dilemmas I have earlier mentioned. The controversy in the nature of the offence is demonstrated by an understandably marked reluctance to institute contempt proceedings for this offence save perhaps in the most egregious situations. A number of jurisdictions have looked closely at this offence, setting up Law Commissions.⁴¹ As I have mentioned, the offence has been abolished in the United Kingdom.

30. The fundamental problem in this area is recognising those situations when the limits of the freedom of speech are exceeded and the administration of justice is compromised to the extent that something needs to be done. When these boundaries are reached, what is the most appropriate step to take? Contempt proceedings can be an option but there is an understandable reluctance to do so as I have just mentioned.

⁴¹ For example, in Canada and New Zealand.

Apart from those matters gone into earlier, judges also regard themselves as sufficiently broad-shouldered and thick-skinned to withstand criticism. As Justice Felix Frankfurter of the United States Supreme Court said in *Pennekamp v Florida*,⁴² “weak characters ought not to be judges”.

31. Admittedly criticisms of the court and of the legal system can often be extremely constructive. These are welcome when they are made on an informed basis. One does not have any difficulties in accepting these and though such criticisms may be harsh at times, they are to be encouraged rather than discouraged. It is when the criticisms are not informed, meaning they ignore the fundamentals of the legal system, that they become a cause for concern. This, I would emphasise, is not a freedom of speech issue. Of course one is

⁴² (1946) 328 US 331. The case involved criticisms made in a newspaper directed at the handling of criminal cases as being too favourable to criminals. Justice Frankfurter was not one to hold back punches. He described the offence of contempt by scandalising the court as “English foolishness” (see *Bridges v California* (1941) 314 US 252, at 287).

entitled to make uninformed comments but the freedom to do so does not make it right to do so. Such uninformed comments may also be harmful when members of the community become confused by what they hear or read by way of criticism, and as a consequence lose confidence in the system. This is a far greater danger than the odd, isolated abuse directed at judges.

32. A growing trend, however, in recent times has been the phenomenon of entirely associating the integrity of a legal system with the outcome, one way or the other, of cases determined by the courts. Some of the criticisms against the courts in recent times as well as over the years have originated from this false premiss. As I have mentioned, the courts deal from time to time with very high profile and controversial cases, and these cases can be divisive. I will give some examples drawn from cases in Hong Kong, although I am sure

you will find parallels. Such cases can arise in criminal proceedings. Earlier this year, the Hong Kong Court of Final Appeal heard the case of *Secretary for Justice v Wong Chi Fung*⁴³ in which the Court took the unusual step of dealing with sentencing issues.⁴⁴ In this particular appeal, three student leaders were convicted of unlawful assembly outside the Legislative Council in 2014. This case was particularly controversial as it arose out of a highly political gathering that got out of control; violence was involved. The student leaders (the appellants) were given community service orders by the trial magistrate, only to have these sentences, on a review by the prosecution, converted into immediate custodial ones. The decision of the Court of Final Appeal was to reinstate the original sentences of community service on the basis that while the Court of Appeal was right to issue new sentencing guidelines for the offence of unlawful assembly, the new

⁴³ [2018] 2 HKC 50.

⁴⁴ Sentencing principles are usually left to the Court of Appeal.

guidelines should not be applied retrospectively. The result was that the three defendants were immediately released. There were criticisms of the decision of the Court of Final Appeal from all sides of the political spectrum. Many of these criticisms came from people who had not read the judgment of the Court at all (or had no intention of reading it or trying to understand the legal reasoning) but who had voiced their views on the integrity of the legal system based on the outcome alone. For those who opposed the students, the legal system had let society down by freeing the students. For the supporters of the students, the system had let society down because the Court of Final Appeal had sanctioned the new guidelines on tougher sentencing for the offence of unlawful assembly. The students asserted that what they did involved an act of civil disobedience.

33. On the civil side, usually in applications for judicial review, the courts have also had to deal with controversial matters. In *Vallejos v Commissioner of Registration*,⁴⁵ the court grappled with the issue of whether foreign domestic workers could, by reason of the fact that they had ordinarily resided in Hong Kong for a continuous period of seven years, become permanent residents,⁴⁶ notwithstanding that under the Immigration Ordinance,⁴⁷ such domestic workers were classified as not being ordinarily resident for the purposes of Article 24(2)(4) of the Basic Law. The court held against the domestic workers. The reaction was loud. It is interesting to contrast the reported reactions to the result. After the decision of the Court of First Instance which was in favour of Ms Vallejos, her lawyer proclaimed, “It is a good win for the rule of law.” After the result in the CFA, he is reported to

⁴⁵ (2018) 16 HKCFAR 45.

⁴⁶ Under Article 24(2)(4) of the Basic Law, persons who have ordinarily resided in Hong Kong for a continuous period of not less than 7 years and who have taken Hong Kong as their permanent residence can become permanent residents.

⁴⁷ Cap. 115.

have said, “The ruling is not a good reflection of the values we should be teaching youngsters and people in our society.”

34. In *GA v Director of Immigration*,⁴⁸ the Court of Final Appeal this time had to determine whether the refusal by the Director of Immigration to allow mandated refugees and screened-in torture claimants⁴⁹ the right to work was constitutional. The constitutional challenge was unsuccessful and the Director of Immigration’s position was upheld. The lawyer acting for the unsuccessful appellant is reported to have referred to the decision as “an embarrassment for Hong Kong’s legal system.”

⁴⁸ (2014) 17 HKCFAR 60.

⁴⁹ Mandated refugees are persons who have successfully established their claims as refugees to the United Nations High Commission for Refugees under the 1951 United Nations Convention Relating to the Status of Refugees and the 1967 Protocol to the Convention. Screened-in torture claimants are those who are regarded as being at risk of being in danger of being subjected to torture in their home country, for the purposes of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (or CAT – the Convention Against Torture). In *GA*, such persons were in Hong Kong awaiting resettlement overseas.

35. I have referred to the reactions in these high profile, controversial cases not to target much less criticise the people who made these comments (they were after all exercising their freedom of speech as they were entitled to), but in order to make the point that the mere outcomes of cases are sometimes seen by people, even by some lawyers, as *the* barometer by which the integrity of the legal system or the rule of law is to be measured. This is wrong and undesirable. I completely understand that one may be dissatisfied with a result (or satisfied with it) but to link the mere outcome of a case to the integrity of a legal system is illogical, unprincipled and unfair. This is the distortion in relation to the rule of law I referred to earlier.⁵⁰

36. The reason why such thinking is wrong is because it leads to a distortion and complete misunderstanding of what

⁵⁰ In para. 18 above.

truly represents the rule of law and the administration of justice. I have earlier referred to these as the two fundamentals,⁵¹ and I went on also to describe the essence of a legal system. What I have just articulated may seem obvious to lawyers and judges but it may not be to other members of the community. There are of course those who do understand the system but choose, for whatever reason (often political) when criticising the courts, to lose sight of these fundamentals of the common law system. For the vast majority of other people within the community, it is important that they do understand. The transparency of the way justice is administered is a major factor enabling the public to see how courts and judges operate. Decisions of the courts affect people's lives and affect the community. It goes without saying that the administration of justice must accordingly be openly conducted so that all persons can clearly see the

⁵¹ In para. 3 above.

process under which their rights or liabilities are determined. Were it not so, there is a danger that when important decisions are made, people will inevitably speculate as to the reasons how and why such decisions have been arrived at; specifically whether any outside factors have influenced the court. The independence of the judiciary becomes then questioned and this would really be very damaging for any legal system. This is the damage to the administration of justice that Rich and Dixon JJ referred to in *Dunbabin* and which the High Court of Australia referred to in *Gallagher*⁵². One cannot throw off a yoke like that. Transparency ensures that this requirement and responsibility to act only in accordance with the law and legal principle, can be plainly and obviously seen by all.

37. In respect of transparency, there are two facets to consider:-

⁵² See paras. 23 and 26 above.

(1) Openness of court proceedings. There should be no mystery as to what goes on in the courts. Apart from sensitive cases,⁵³ the public must be able to see the judicial process in operation. In the Brexit litigation in the UK, after the decision of the Divisional Court in the *Miller* case,⁵⁴ there were quite outrageous headlines in the newspapers.⁵⁵ Such reactions were to be contrasted with the substantially less emotional reactions after the matter had been determined by the United Kingdom Supreme Court. One of the reasons for this muted reaction, even though the Supreme Court upheld⁵⁶ the decision of the Divisional Court, was that most

⁵³ For example, cases involving children or where sensitive and confidential matters are considered (such as in applications for a Mareva injunction or an Anton Piller order).

⁵⁴ *R (Miller and Another) v Secretary of State for Exiting the European Union* [2017] 2 WLR 583.

⁵⁵ Such headlines included, notably, “Enemies of the People” (Daily Mail 3 November 2016). This was described by Lord Judge, the former Lord Chief Justice of England and Wales, as being “very unpleasant”. There were other headlines: “The judges versus the people” (Daily Telegraph 3 November 2016); “WHO DO YOU THINK EU ARE?” (The Sun 3 November 2016).

⁵⁶ By a majority of 8 to 3.

people began to realize that the courts were not in any sense dealing with or deciding political issues; they were merely applying the law. People were able to see this partly because there was much better and more informed coverage of the proceedings (for example the proceedings in the Supreme Court were televised) than had been the position during the Divisional Court hearing. The openness of the proceedings helped the public to understand that the courts were merely applying the law and nothing else.

- (2) The openness of proceedings in court thus enables what takes place in court to be revealed to all members of the public. This, however, is not enough because there must also be transparency in the precise way a court has decided on the outcome

of a case. This is where the reasoned judgment comes into play. I believe that one of the characteristics of a common law system, indeed one of its great strengths, is the existence of the reasoned judgment. Lawyers and judges alike, not to mention law students, often complain about the length of judgments of the court – some run into hundreds of pages and even more paragraphs, but whatever their length, they serve a vital function. Judgments of the court reveal in great detail every step of the reasoning that leads to the conclusion in any case. Everyone, and not only the parties to a case, can see precisely how a result has been reached by the court. This enables the losing party to know why he or she has lost, and therefore is able to consider whether or not to appeal. For the public, because as we know all judgments (except in

sensitive cases) are made publicly available, it can clearly be seen that courts and judges decide cases strictly in accordance with the law. One may wish to criticize the legal reasoning of the courts but by making public the reasons in a judgment, there can really be no criticism along the lines that the court has decided on the outcome of a case in reliance on non-legal matters.

38. It is somewhat ironic that many misunderstandings of the law emanating from uninformed criticisms can be quite easily rebutted merely by understanding the legal system that we have, together with the transparency of it all. Perhaps more can be done to explain just what the legal system is really about. Law schools have a responsibility here, not only lawyers. This has over the years taxed me in my present position in Hong Kong where there are almost daily

references made to the rule of law and the work of the courts. You will no doubt have ideas of your own. The challenge then is try to inform the community of these essentials of the rule of law and the common law. The responsibility falls on all of us. Only when the community understands all this can there truly be confidence in the system. And confidence in a legal system is key to its continuation.

39. For common law jurisdictions, the common law is not about wigs and gowns or the colourful history that dates back to English mediaeval times. It is about fundamental principles of the rule of law. It is these fundamental features that ensure for the community a system of fairness and justice in the resolution of disputes, and a system that allows people to predict with some degree of certainty as they conduct their daily affairs.

40. As we look to the future, the message must be a clear and simple one: a system that is able to discharge the responsibilities and functions expected of a legal system, namely to ensure that there is justice, and where the rule of law thrives, is a system that is worth preserving and fighting for.

41. I once again thank UNSW Law for the great honour of addressing you.

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