

**Speech by The Honourable Chief Justice Geoffrey Ma  
at the Melbourne Law School, University of Melbourne  
23 May 2018  
Melbourne, Australia**

**The common law in operation in the  
Hong Kong Special Administrative Region:  
the Hong Kong story<sup>1</sup>**

1. It is a great pleasure to be back in Melbourne and I thank the Dean of MLS, Professor Pip Nicholson, for the great privilege and honour of being invited to say something this evening.

2. For those of you who have seen the Court of Final Appeal Building in Hong Kong, the first noticeable feature are the ionic columns. You will see bullet holes on these columns and on the walls of the building. This is a stark reminder of the scars of the Second World War when Hong Kong was

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<sup>1</sup> 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), LL.M (University College, London) and Mr Adrian Lo LLB (Hong Kong), LL.M (London School of Economics), Barrister.

occupied from Christmas Day 1941 for a period of nearly four years. Britain was fortunate not to have been invaded but there was considerable bombing. As London was bombed, the Prime Minister Winston Churchill was said to have asked, “Are the courts functioning?” When he was told they were, his response was “Thank God. If the courts are working, nothing can go wrong.” Later, after the War was over, in a speech in the House of Commons<sup>2</sup> Mr Churchill referred to the judiciary as “one of the greatest living assets of ..... [the] people”.<sup>3</sup> This firm and unshakeable belief in those qualities of the common law that go to the existence of the rule of law are as timeless as they are relevant. In the case of those jurisdictions which have a common law heritage, one can conveniently begin with (and one usually takes this as a starting point) Magna Carta. Some say the beginnings of an

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<sup>2</sup> On 23 March 1954.

<sup>3</sup> Hansard, HC, vol. 525 ed. 1061.

idea of rights date back to Edward the Confessor. Clauses 39 and 40 of the Great Charter state:-

“No free man is to be arrested or imprisoned or disseised or outlawed or exiled or in any other way ruined nor will we go against him or send against him except by the lawful judgment of his peers or by the Law of the Land.

We will not sell or deny or delay right or justice to anyone.”

3. The meaning of these clauses can be simply put: they stand for due process according to law and the independence of the judiciary, key concepts in the rule of law. But what have these pages out of English history, even dating back to mediaeval times, to do with Hong Kong, particularly now that it is a region within the People’s Republic of China? The short answer is that Hong Kong is a common law jurisdiction and this is not just a description of the legal

system as it appears on its face; it has real meaning in terms of the rule of law.

4. Historically, the origins of the common law in Hong Kong are easy to trace: to 1841 with the arrival of the British to occupy and administer a place described by the Foreign Secretary, Viscount Palmerston, as “a barren island with barely a house on it”. At that time, Hong Kong was populated by about 4,000 people spread over a few villages. The fishing population was about half the land population.<sup>4</sup>

5. The primary reason for the British presence in Hong Kong, indeed the Far East, at that time was of course trade. Trade is a complex activity which depends on a number of factors combining together: natural resources, geographical advantages, human activity and proper governance.

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<sup>4</sup> The population of Hong Kong is now close to 7.5 million, more than that of the State of Victoria.

Underlying all these factors which loosely make up the term ‘trade’ is the existence of a system of regulations and enforcement that is a part of what we call a legal system. And the legal system that was introduced into Hong Kong in 1841 was the common law.<sup>5</sup> True that the trappings and eccentricities of the common law were introduced into Hong Kong as well – the somewhat quaint rituals of court address engaged by counsel, the court dress of wigs and gowns, the traditional Opening of the Legal Year ceremony which takes place months after the real opening of the legal year – all these were introduced and indeed continue to exist in Hong Kong.

6. The People’s Republic of China (the PRC) is, according to its Constitution, run on socialist principles.<sup>6</sup> The

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<sup>5</sup> Section 3 of Ordinance No. 15 of 1844 stated that the law of England applied in Hong Kong except where local circumstances dictated otherwise.

<sup>6</sup> Article 1 of the Constitution.

supreme sovereign body is the National People's Congress (the NPC), which represents the people,<sup>7</sup> and all institutions are answerable to the NPC. The legal system of the PRC is based on civil law.

7. Hong Kong is now a part of the PRC. On 1 July 1997, the PRC resumed the exercise of sovereignty over Hong Kong. The constitutional position of Hong Kong which is contained in a constitutional instrument known as the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China,<sup>8</sup> is unique. The Basic Law is significant in at least the following two respects: first, it states the principles reflecting the implementation of the PRC's basic policies towards Hong Kong<sup>9</sup> – the main one being the policy of “One Country Two Systems”; and secondly, for the

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<sup>7</sup> Article 2 of the Constitution.

<sup>8</sup> Adopted at the Third Session of the Seventh National People's Congress on 4 April 1990, promulgated by the President of the PRC the same day. The Basic Law became effective from 1 July 1997.

<sup>9</sup> This is stated in the Preamble to the Basic Law.

first time in Hong Kong's history, fundamental rights are expressly set out.

8. The theme of the Basic Law was one of continuity, meaning that one of its primary objectives was the continuation of those institutions and features that had served Hong Kong well in the past and that would carry on contributing to Hong Kong's success in the future. For instance, there was to be the continuation of an independent taxation system (Article 108) and the continued use of the Hong Kong dollar which was freely convertible (Articles 111 and 112). Principally for present purposes, among the institutions to be continued were the common law and the independence of the judiciary.

9. In these respects:-

- (1) No fewer than three articles in the Basic Law refer to the independence of the judiciary: Articles 2, 19 and 85. The earlier two articles refer to “independent judicial power”; Article 85 states that the Hong Kong courts “shall exercise judicial power independently, free from any interference.”
- (2) Article 8 of the Basic Law refers to the continuation of the common law and rules of equity, and also a recognition of the language of the common law (here Article 9 states that both Chinese and English may be used as official languages by the executive, the legislature and the judiciary).
- (3) Article 81 of the Basic Law states that the judicial system previously practised in Hong Kong (that is, prior to 1 July 1997) will be maintained, except for



the change consequent upon the setting up of the Court of Final Appeal, now the highest court in Hong Kong. Previously, the highest appellate tribunal for Hong Kong was the Judicial Committee of the Privy Council. Apart from the Court of Final Appeal, the court system remains the same post 1 July 1997 as before: the Magistrates' Courts, the District Court and the High Court (this comprising the Court of First Instance and the Court of Appeal). As before, there are two appellate levels: to the Court of Appeal and then to the Court of Final Appeal or, in the case of appeals from the Magistrates' Court, to the Court of First Instance and then possibly to the Court of Final Appeal. The jury system is also expressly preserved under Article 86 of the Basic Law.

(4) Apart from two exceptions, there are no nationality requirements for judges in Hong Kong. Article 92 of the Basic Law states that judges are to be chosen on the basis of their judicial and professional qualities alone, and may be recruited from other common law jurisdictions. The Court of Final Appeal goes one step further enabling judges from other common law jurisdictions actually to sit on the court on a temporary basis (Article 82). I shall elaborate later on judges from other common law jurisdictions. The two exceptions to nationality are the Chief Justice and the Chief Judge of the High Court, who, by Article 90, are required to be Chinese citizens who are permanent residents of the HKSAR.

(5) Lawyers who are able to practise in Hong Kong may include not only local lawyers but also lawyers from outside Hong Kong: Article 94.

10. An interesting, but important, feature in the Basic Law is the interface between the Mainland and Hong Kong. Article 13 of the Basic Law states that the Central People's Government shall be responsible for the foreign affairs relating to Hong Kong. Article 19 adds to this by stating that the Hong Kong courts shall have no jurisdiction over acts of state such as defence and foreign affairs. Article 158 is an important provision in the Basic Law. It provides for an authoritative interpretation of the Basic Law by the Standing Committee of the National People's Congress, a political body. This provision has stirred some controversy in Hong Kong. So far there have been five interpretations. The Court of Final Appeal looked into this provision in 1999 in *Lau Kong Yung v*

*Director of Immigration* following the first of the Interpretations.<sup>10</sup> A useful insight into Article 158 was given by Sir Anthony Mason in his article “The Rule of Law in the Shadow of the Giant: The Hong Kong Experience.”<sup>11</sup>

11. As I have mentioned earlier, the Basic Law also for the first time sets out guaranteed rights and freedoms:-

- (1) These rights are set out in Chapter III of the Basic Law under the heading “Fundamental Rights and Duties of the Residents”.
  
- (2) The right to equality before the law is stipulated in Article 25.

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<sup>10</sup> [1999] 2 HKCFAR 300.

<sup>11</sup> [2011] Sydney Law Review 27.

- (3) Article 26 refers to the right to vote and the right to stand for election.
  
- (4) Article 27 refers to the freedom of speech, of the press and of publication, freedom of association, of assembly, of procession and of demonstration; and the right and freedom to form trade unions, and to strike.
  
- (5) Article 28 refers to the freedom of the person and to the principle that no one should be subjected to arbitrary or unlawful arrest, detention or imprisonment.
  
- (6) Article 31 refers to the freedom of movement, and freedom of emigration to other countries and regions.

- (7) Article 32 refers to the freedom of conscience. It stipulates that residents shall have the freedom of religious belief, and the freedom to preach and to conduct and to participate in religious activities.
- (8) Article 34 states that Hong Kong residents shall have the freedom to engage in academic research, literary and artistic creation, and other cultural activities.
- (9) Article 35 refers to the right to confidential legal advice, access to the courts and the right to institute legal proceedings in the courts against the acts of the executive authorities and their personnel.

(10) Article 39 provides that the International Covenant on Civil and Political Rights<sup>12</sup> should be implemented in Hong Kong. The ICCPR is in force in Hong Kong under the Bill of Rights Ordinance Cap. 383. That Ordinance sets out in 23 articles the Hong Kong Bill of Rights.

12. Any legislation inconsistent with the Basic Law or with any of the rights and freedoms set out in the Bill of Rights can be declared invalid by the courts. This is the effect of Section 6 of the Bill of Rights Ordinance and of Article 11 of the Basic Law, and obviously gives considerable power to the courts in Hong Kong: its effect is to enable the courts to make authoritative rulings on the meaning of the constitution that would bind the legislature in terms of what it can or cannot do. The Hong Kong courts have in the past declared

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<sup>12</sup> This is a multilateral treaty adopted by the UN General Assembly in 1966. Australia ratified the treaty in 1980. It finds legislative force in Victoria under the Charter of Human Rights and Responsibilities Act 2006 (which makes special reference to the Aboriginal people of Victoria).

legislative provisions unconstitutional and therefore void.<sup>13</sup>

This is not a power that exists, for example, in the United Kingdom or in New Zealand.<sup>14</sup> The importance of such a power is that constitutionally guaranteed rights are regarded as being entrenched. This point was made by Brennan J in *Nationwide News Pty Ltd v Wills*<sup>15</sup> where, in the context of the freedom of expression, he said regarding the fragility of a common law right<sup>16</sup>:-

“But the fragility of the common law ‘right’ to the free expression of opinion is in part due to the absence of a constitutional entrenchment of the form of government which the public discussion of political and economic matters is required to sustain.”

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<sup>13</sup> See, for example, *Secretary for Justice v Yau Yuk Lung* (2007) 10 HKCFAR 335 in which the CFA held that a statutory provision criminalising buggery between men in public should be struck down as being discriminatory on the ground of sexual orientation; *Chan Kin Sum v Secretary for Justice* [2009] 2 HKLRD 166 in which statutory provisions stipulating that persons serving a sentence of imprisonment were disqualified from being registered as electors were struck down as being contrary to the right to vote under Article 26 of the Basic Law.

<sup>14</sup> It does not appear to be a power that exists in Victoria either: see ss. 28-31 of the Charter of Human Rights and Responsibilities Act 2006.

<sup>15</sup> (1991-1992) 177 CLR 1.

<sup>16</sup> At 48.



13. So far, I have dealt with the position on paper under the Basic Law and the Hong Kong Bill of Rights Ordinance, but one must always answer the critical question of the reality behind the theory. Just how real and effective are the rights and freedoms, and the principles and institutions to which I have just referred?

14. As far as the legal profession is concerned, the reality certainly seems to fit the position on paper:-

- (1) There appears an ever increasing number of lawyers in Hong Kong, both local as well as from overseas. Close to 40 years ago, many of the large London city law firms began to set up in Hong Kong. In the past 25 years, we have seen many overseas law firms (including US and Australian ones) establish themselves here. The three law schools in Hong

Kong (the University of Hong Kong, the Chinese University of Hong Kong and the City University of Hong Kong) are producing increasing numbers of law graduates.

- (2) We have a strong Bar in Hong Kong and one that values its independence. A strong and independent Bar is one of the hallmarks of a common law system: a Bar that is not afraid to speak out on legal issues which affect the community and to act in the public interest.

Both branches of the profession continue to grow. This is some indication of confidence in the system.

15. As far as the Hong Kong judiciary is concerned, I have earlier referred to Article 82 of the Basic Law enabling

judges from other common law jurisdictions to sit on the Court of Final Appeal. As I also mentioned earlier, one of the major themes of the Basic Law is the theme of continuity. Before 1997, the highest appellate tribunal for Hong Kong is the Judicial Committee of the Privy Council. It was regarded as equally important the post 1 July 1997, the Court of Final Appeal should also benefit from having the very best judges from common law jurisdictions to sit in appeals in Hong Kong. The presence of a common law jurisdiction judge has been one of the key factors in the success of the Court since its establishment. I am also told constantly by business and commercial persons that the presence of these judges is a significant contributing factor to the confidence with which Hong Kong's legal system in particular and the rule of law in Hong Kong in general, are held both within and outside Hong Kong.

16. The importance of the presence of the common law jurisdiction judges as contributing meaningfully to the status of Hong Kong as an established common law jurisdiction is threefold:-

- (1) First, the actual persons who are judges from common law jurisdiction sitting on the CFA<sup>17</sup> comprise the most eminent judges in the common law world. From Australia alone, the Court at present has four members, being two former Chief Justices and a former justice of the High Court of Australia and the former Chief Justice of New South Wales.<sup>18</sup> In the past, we have also had two other former Chief Justices and two former justices of High Court of Australia.<sup>19</sup> This will doubtless

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<sup>17</sup> They are referred to as non-permanent judges of the Court of Final Appeal (NPJs).

<sup>18</sup> Murray Gleeson, Robert French, James Spigelman and William Gummow.

<sup>19</sup> Sir Anthony Mason, Sir Gerard Brennan, Sir Daryl Dawson and Michael McHugh.

continue. From the United Kingdom, the current non-permanent judges of the CFA include the two former Presidents of the Supreme Court as well as a current member of that court.<sup>20</sup>

(2) Secondly, and this is perhaps the most important aspect, the presence of these overseas judges, who are without doubt leading jurists of the present (or indeed, any) generation, adds significantly to the legal expertise of the Court and they make a significant contribution to the cases before the CFA and to Hong Kong jurisprudence generally.

(3) Thirdly, the NPJs sit on Hong Kong's highest court without any restrictions as to the type of cases heard by them. This is an important point of principle

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<sup>20</sup> Lord Phillips of Worth Matravers, Lord Neuberger of Abbotsbury and Lord Reed. The other non-permanent judges from the United Kingdom include Lord Hoffmann, Lord Millett, Lord Walker of Gestingthorpe, Lord Collins of Mapesbury and Lord Clarke of Stone-cum-Ebony.

because NPJs are not in any sense foreign judges: when they sit in Hong Kong, they are Hong Kong judges and they have an equal say in the collegiate panel of five judges in the CFA. In every one of the most important cases the CFA has heard over the past 21 years, a common law NPJ has sat and written judgments in such cases. The series of cases decided soon after 1 July 1997 relating to the right of abode of persons from the Mainland born of Hong Kong residents<sup>21</sup> and to the legal effect of the first Interpretation given by the Standing Committee of the National People's Congress,<sup>22</sup> involved the participation of Sir Anthony Mason NPJ as a member of the CFA. Sir Anthony was again a member of the Court in the important case of

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<sup>21</sup> Article 24(3) of the Basic Law. These cases comprise *Ng Ka Ling v Director of Immigration* (1999) 2 HKCFAR 4, *Chan Kam Nga v Director of Immigration* (1999) 2 HKCFAR 82.

<sup>22</sup> *Lau Kong Yung v Director of Immigration* (1999) 2 HKCFAR 300, in which Sir Anthony Mason NPJ wrote a separate judgment.

*Democratic Republic of the Congo v FG Hemisphere Associates LLC (No. 1)*.<sup>23</sup> More recently, in the controversial case of *Secretary for Justice v Wong Chi Fung and Others*,<sup>24</sup> Lord Hoffmann NPJ was also a member of the CFA. These are examples among many other cases and the participation of common law NPJs in important, controversial and high profile cases will continue. Next month, the CFA will hear the case of *QT v Director of Immigration*, involving the immigration policy affecting same sex married couples. Lord Walker of Gestingthorpe will be the non-permanent judge sitting on the Court.

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<sup>23</sup> (2011) 14 HKCFAR 95 (the “*Congo Case*”). This case was about state immunity. An interpretation was given by the Standing Committee of the National People’s Congress to the effect that issues of state immunity came within the rubric of foreign affairs under Articles 13 and 19 of the Basic Law.

<sup>24</sup> [2018] 2 HKC 50. This case was a politically controversial one because it involved the sentencing of student activists for unlawful assembly. They said what they did involved an act of civil disobedience.

17. In a speech given at the University of Hong Kong,<sup>25</sup> Lord Neuberger of Abbotsbury likened common law NPJs to canaries who used to be taken down in coal mines to detect the presence of noxious gases. He said this, “On a previous occasion, I have suggested that the foreign NPJs are the canaries in the mine: so long as they are happy to serve on the Hong Kong Court of Final Appeal, then I think you can safely assume that all is well with judicial independence and impartiality in Hong Kong.” He added pointedly, “If I had any serious concerns about judicial independence or judicial impartiality in Hong Kong, I would not be sitting in the HKCFA, and the same is I am sure true of the other common law jurisdiction Non-Permanent Judges .....” David Neuberger next sits on the Court later this year in September.

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<sup>25</sup> On 13 September 2017 (“Judges, Access to Justice, the Rule of Law and the Court of Final Appeal under ‘One Country Two Systems’.”)



In 2013, in a talk given to the Hong Kong Judicial Institute,<sup>26</sup>

Sir Anthony Mason said about the Court of Final Appeal:-

“The CFA goes about its work in much the same way as the High Court of Australia did when I was Chief Justice. Indeed I am not aware of any substantial difference. I have sat on appellate courts in Australia and others in Fiji and the Solomon Islands with judges from different jurisdictions, including Lord Cooke of Thorndon who was an original NPJ of the CFA. And I have participated in arbitrations with retired judges and lawyers from various jurisdictions, including the United States. My experience has been that the common law tradition generates a marked similarity of approach across the jurisdictions; a principled approach to the judicial task which is based on impartiality, due process, and judicial method.”

18. The tradition of appointing the best jurists from common law jurisdictions continues to this day. As I deliver this talk, the proposed appointment of two further common law judges is in the process of going through the endorsement

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<sup>26</sup> On 25 October 2013 (“Sitting as a Non-Permanent Judge in the Court of Final Appeal for the past 16 years”).

process in the Legislative Council, our legislature.<sup>27</sup> The proposed common law NPs are Baroness Hale of Richmond and Chief Justice McLachlin, the latter (if appointed) being the first appointment to the Court from Canada.

19. Institutions and the identity of judges aside, the real test, however, of an effective and respectable judiciary must really be how the courts actually 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 is the case that arouses public controversy. Public law cases are of such a type.

20. Public law cases provide perhaps the best examples because very often, they involve controversial issues where

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<sup>27</sup> The endorsement of the Legislative Council is required for the appointment of judges of the Court of Final Appeal, including the Chief Justice: Article 90 of the Basic Law; s. 7A of the Hong Kong Court of Final Appeal Ordinance Cap. 484.

the court is faced with a number of diametrically opposite views, each of which is passionately held and all 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, very often the interest of the public in general is engaged. 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 before the court originates. When one is dealing with, for example, issues involving the freedom of expression, or perhaps immigration issues or (as in the case of Hong Kong and Australia) indigenous rights, public controversy is almost certain to arise.

21. 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.

22. 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. I assume the first part and discuss only the second.

23. An independent judiciary is key. In a common law jurisdiction one should be able to take this for granted (I say “should” bearing in mind, however, the warning given by Sir Ninian Stephen at the Inaugural AIJA Oration in 1989<sup>28</sup>, simply headed “Judicial Independence”, where he said, “Judicial independence is not lightly to be assumed as an unthreatened norm, existing as a matter of course in every highly developed society”). 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”. You may think it unnecessary to dwell on this for it

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<sup>28</sup> 21 July 1989 in Brisbane.

is so obvious but it is not evident to some people and therefore necessary to be constantly reminded of it. As for equality before the law, when judges decide cases, of course the parties before them matter (after all they are the reason for the litigation in the first place) but their identities, their status (even if or especially if they are the government) do not.

24. Adherence to the law means much more than just looking at 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 of expression, of political or religious belief, and so on. I have earlier set out some of these rights. But it is the way in which they are construed that is of great importance. When it comes to fundamental rights and freedoms, they

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

25. 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 in certain cases 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.

26. Cases dealing with the freedom of speech provide common scenarios in which difficulties of reaching the correct balance are faced by the courts. In 1999, in *HKSAR v Ng Kung Siu*,<sup>29</sup> 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).<sup>30</sup> 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 the constitutionality of the

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<sup>29</sup> (1999) 2 HKCFAR 442.

<sup>30</sup> 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.



legislation (the Court of Appeal having held otherwise). The Court was there faced with two diametrically opposed arguments but each argument was 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.

27. Other areas in which the courts will sometimes face difficulties in balancing competing interests include challenges made to government decisions where socio-economic factors come into play. In another case decided by the Hong Kong Court of Final Appeal (*Fok Chun*

*Wa v Hospital Authority*),<sup>31</sup> consideration was given to the conflict between the constitutional right to equality (in that case in the context of social welfare) when seen against the socio-economic policies of the government. While some leeway will always be accorded to the government where socio-economic policies are involved, there are clear limits. There is no question of any sort of *carte blanche* being given to the government. Where core-values or core-rights are affected, the courts will always be vigilant in their protection.

28. These types of decisions made by the court can, by their very nature, be extremely controversial. Immigration cases also fall within this category. They are 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

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<sup>31</sup> [2012] 15 HKCFAR 409.

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?

29. 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, as I have earlier mentioned, and the need to adopt a principled approach, represents what I hope is a commonly held view of the public interest as far as the courts are concerned.

30. 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. I am reminded here of two quotes, one which appears in a satirical form, the other from part of another AIJA Oration this time delivered by Justice Rosalie Abella in 1998:-

(1) The satirical quote is from James Bovard, the libertarian political commentator, “Democracy must be something more than two wolves and a sheep voting on what to have for dinner”.<sup>32</sup>

(2) In the 9<sup>th</sup> AIJA Oration “Human Rights and the Judicial Role”<sup>33</sup>, Justice Abella said this:-

“Somehow we have let those who have enough, say ‘enough is enough’, leaving thousands wondering where the equality they were promised is, and why so many people who already have it, think nobody else needs it.”

31. In *W v Registrar of Marriages*,<sup>34</sup> the Hong Kong Court of Final Appeal determined the constitutionality of a

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<sup>32</sup> James Bovard, *Lost Rights: The Destruction of American Liberty* (1994) at Pg. 333.

<sup>33</sup> 23 October 1998 in Melbourne. Justice Abella is a justice in the Supreme Court of Canada.

<sup>34</sup> (2013) 16 HKCFAR 112. The decision was a majority decision of 4 (Ma CJ, Ribeiro PJ, Bokhary and Lord Hoffmann NPJJ) to 1 (Chan PJ).

provision in the Marriage Ordinance<sup>35</sup> 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.<sup>36</sup> 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 this<sup>37</sup>: “Reliance on the absence of a majority consensus as a reason for rejecting a minority’s claim is inimical in principle to fundamental rights.” We quoted

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<sup>35</sup> Cap. 181.

<sup>36</sup> Article 37 of the Basic Law and Article 19(2) of the Bill of Rights Ordinance.

<sup>37</sup> At para. 16.

from a paper<sup>38</sup> 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?” Lord Mansfield CJ put it well in *R v Wilkes*<sup>39</sup>:-

“I will not do that which my conscience tells me is wrong, upon this occasion; to gain the huzzas of thousands, or the daily praise of all the papers which come from the press: I will not avoid doing what I think is right; though it should draw on me the whole artillery of libels; all that falsehood and malice can invent ...”

32. It is perhaps inevitable that the courts will in controversial cases face criticism, sometimes quite fierce from sections of the public. Moreover, it certainly seems nowadays that criticisms are more vocal and less restrained in the

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<sup>38</sup> “Consensus: concordance, or hegemony of the majority?” in *Dialogue Between Judges 2008*, Strasbourg, European Court of Human Rights.

<sup>39</sup> (1770) 4 Burr 2527, at 2562; 98 ER 327, at 347.

language used. Criticism of the decisions of the courts is a fact of life and one must live with it. I have just delivered an Oration in Brisbane on this topic.<sup>40</sup> Hong Kong is no different from any other jurisdiction in this respect and with the power to strike down legislative acts as being unconstitutional,<sup>41</sup> it is perhaps little wonder that there may be some additional sensitivity in this power given to the Hong Kong courts. Judges are after all, as some argue, not elected. And the Hong Kong courts have, on a number of occasions, struck down legislation as being unconstitutional, pursuant to the power mentioned earlier. Criticisms and discussion of the activities of the courts are indeed healthy to this extent: if such criticism is justified, then improvements can be made or lessons learnt; if not, at least people are taking on an interest in matters of considerable importance. No doubt some people will only

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<sup>40</sup> “Criticism of the courts and judges: informed criticism and otherwise”, Supreme Court of Queensland Oration, 21 May 2018.

<sup>41</sup> See para. 12 above.



look at the actual result of cases determined by the courts in order to evaluate the integrity or effectiveness of a legal system. This is a wrong approach. One ought to be more concerned with fundamentals and matters of principle. For many people, while a decision of the court may be an unpopular one, this is not as important as an assurance that every time a judicial decision is made, the court has acted in accordance with principle, according to the law and proper procedure and above all, has acted independently.

33. Without this assurance, one can have very little confidence in the integrity of a legal system. In Hong Kong where we aspire to maintain the common law tradition, and I daresay this will be the same challenge faced in other common law jurisdictions, how is this integrity of the law demonstrated in a tangible way? Certainly not through mere words spoken by the Chief Justice assuring everyone that all

is well. When evaluating the integrity of a legal system, it is vital that this is done critically and empirically based on objective facts. One of the most important questions here is to ask about the transparency of a legal system and this is vital. There are two facets to consider.

34. First, the openness of court proceedings. There should be no mystery as to what goes on in the courts. Apart from sensitive cases,<sup>42</sup> the public must be able to see the judicial process in operation. I was reminded recently of what happened regarding the Brexit litigation in the United Kingdom. You will recall that after the decision of the English Divisional Court in the *Miller* case,<sup>43</sup> there were startling headlines directed against the judges of the

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<sup>42</sup> 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).

<sup>43</sup> *R (Miller and Another) v Secretary for State for Exiting the European Union* [2017] 2 WLR 583.

Divisional Court.<sup>44</sup> This was a case not only of immense constitutional importance in the United Kingdom, it also had political consequences over which many people held extremely divergent views. Whichever way the case was decided, the outcome in the courts was always going to be controversial between the so-called Brexiteers and those who wished the United Kingdom to remain in the EU. The point of referring to this litigation is to contrast the backlash following the Divisional Court decision with the substantially less emotional reaction 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 upheld<sup>45</sup> the decision of the Divisional Court, was that most people began to realize that the courts were not in any sense dealing with or deciding political issues; they were merely

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<sup>44</sup> Such headlines included, notably, “Enemies of the People” (Daily Mail 4 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).

<sup>45</sup> By a majority of 8 to 3.

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.

35. The second facet is the feature that is generally acknowledged to be one of the fundamental characteristics of the common law: the reasoned judgment. It is only by looking at the reasoning of the court in any judgment that one can see the processes that have led to the judicial decision that is made. One can see, in considerable detail sometimes, the application of the law, of legal principle and the spirit of the law, and an adherence to those fundamental principles of the common law to which reference has already been made. The

integrity of the law is there for all to see. When one talks these days about transparency, this is the transparency of the law: not just the public and open nature of court proceedings and judgments, but the public display of the very thought processes that make up a court decision. While everyone is free to criticise the decisions of the courts, surely no criticism can be levelled at our courts for a failure to reveal the full extent of the reasons that made up court decisions. It is for this reason I believe the doctrine of precedent forms such an important feature of the common law: the more compelling and cogent the reasons are to justify a result, the more attractive it becomes to follow such reasoning in a later case when a similar situation presents itself. The importance of the reasoned judgment can also be seen by imagining a system in which proper legal reasoning does not exist. Where proper reasoning is lacking, speculation then is fuelled as to what

may have motivated a legal result; even judicial independence may be questioned.

36. The common law and the system under which we operate are pivotal to the success of any society. They allow persons within a community to predict with a high degree of certainty how they should conduct themselves and their affairs, and to know that if they were to be exposed to the machinery of justice, they would be dealt with on a principled, not an arbitrary, basis. In providing this outline of the operation of the common law in Hong Kong, I hope you will find a few similarities with your own jurisdiction. It is true that the common law is about change and adaptability, but it is also about fundamental principles which we all embrace. And if I have not succeeded in making out a reasonable case, then at least believe Winston Churchill.

37. I once again thank the Melbourne Law School for the great honour of addressing you.

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