

**Speech by The Honourable Chief Justice Geoffrey Ma
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1. The relevance of public law can be easily stated – it protects and ensures the welfare of individuals in a society and also society as a whole; in other words the public interest – but it is less easy to pin down its precise perimeters. The focus is often on fundamental rights, but this cannot be seen in isolation because when one is engaged in public law, there is inevitably a link to public institutions. The executive branch of government, the legislature and the judiciary must come into the picture. Seen as a whole, this inter-relationship between the public (that is, the people, both individually and collectively) and what I have for convenience termed public institutions must involve a legal approach close to a dialogic

one. In practical terms, to a lawyer or to a judge dealing with cases on public law, the approach does mean that often a balance has to be struck between different interests and this approach underlies much of the jurisprudence one sees among many courts, Hong Kong included, when confronted with issues involving the public interest. Concepts like proportionality reflect this balancing approach.

2. In modern times, the approach adopted by courts in public law is not simply the result of historical developments in legal reasoning to be found in case law alone (a kind of building block approach). Rather, one has in most cases to analyse public law issues in the light of a constitution. There is accordingly a common theme in most comparative approaches among legal scholars and that is the approach known as constitutionalism. The numerous themes and papers

in this conference alone all encompass some aspect which can come under this umbrella.

3. A constitution (and I include here also those sets of principles which, although not contained in a formal document, are nevertheless regarded as equivalent to a constitution¹) is not just another written law which one simply applies to a set of facts in the same way as one might apply mere words in a statute. Constitutions represent ideas and ideals which provide the foundation of how a community is intended to function and to flourish. That is why, in order to make this point, some constitutions or constitutional documents use the word “basic” or “fundamental”.² The

¹ Such as the principles which together make up the Basic Laws of Israel.

² For example, the Basic Law for the Federal Republic of Germany (*Das Grundgesetz*); the Fundamental Law of Hungary (*Magyarország Alaptörvénye*).

constitutional document for Hong Kong is called the Basic Law.³

4. The premise of most constitutions is that it reflects the public interest and societal expectations. Government, the legislature and the judiciary all derive their powers from constitutions. It can be said that these institutions derive their legitimacy from the constitution, which in turn derives its own existence from the people. In philosophical terms, a constitution reflects the social or political compact entered into by the people.⁴

5. Since, as I have contended, the premise of constitutions and constitutional documents is the public

³ The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China promulgated on 4 April 1990, taking effect on 1 July 1997 on the resumption of the exercise of sovereignty by the PRC over Hong Kong. It is referred to as a constitutional document to avoid confusion with the Constitution of the PRC from which the Basic Law derives.

⁴ This is by no means an original thought. In 1791, in *The Rights of Man*, Thomas Paine had written about precisely this concept. He said that a constitution "is a thing antecedent to a government, and a government is only a creature of a constitution."

interest and community expectations, two important questions must be addressed: first, what are the contents of the constitution or constitutional document under examination; and secondly, how is the constitution or constitutional document interpreted and enforced by the courts? These are important questions to deal with because they reflect what perhaps is a useful definition of the rule of law itself, namely, that the concept embraces two vital facets:-

- (1) the existence of laws that respect the dignity, rights and liberties of the individual and of the community as a whole; and
- (2) the existence of an effective institution, namely the judiciary, to enforce such rights and liberties equally and independently.

6. The above approach in the exercise of the analysis of a constitution or constitutional document and to evaluate its efficacy can be applied generally to most legal systems but I would like to apply it in the context of Hong Kong's Basic Law. This will also serve as a brief introduction to Hong Kong's own constitutional order.

7. 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 Kong⁵ – the main one being the policy of “One Country Two Systems”; and secondly, for the first time in Hong Kong's history, fundamental rights are expressly set out in a constitutional, as opposed to a statutory, document. These rights are set out in Chapter III of the Basic Law under the heading “Fundamental Rights and Duties of the Residents”:-

⁵ This is stated in the Preamble to the Basic Law.

- (1) The right to equality before the law is stipulated in Article 25.
- (2) Article 26 refers to the right to vote and the right to stand for election.
- (3) 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.
- (4) 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.

- (5) Article 31 refers to the freedom of movement, and freedom of emigration to other countries and regions.

- (6) 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.

- (7) Article 34 states that Hong Kong residents shall have the freedom to engage in academic research, literary and artistic creation, and other cultural activities.

- (8) 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.

- (9) Article 39 is of particular note. It provides that the International Covenant on Civil and Political Rights⁶ should be implemented in Hong Kong. The ICCPR is in force in Hong Kong under the Hong Kong Bill of Rights Ordinance.⁷ That Ordinance sets out in 23 articles the Hong Kong Bill of Rights.

8. By reason of Article 11 of the Basic Law (and s. 6 of the Hong Kong Bill of Rights Ordinance), 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 gives considerable power to the courts in Hong Kong: its effect is to enable the courts to make

⁶ This is a multilateral treaty adopted by the UN General Assembly in 1966.

⁷ Chapter 383 of the Laws of Hong Kong.

authoritative rulings on the meaning of the Basic Law and the Bill of Rights that would bind the legislature in terms of what it can or cannot do. The Hong Kong courts have in the past declared legislative provisions unconstitutional and therefore void.⁸ This is not a power that always exists elsewhere (for example, in the United Kingdom or in New Zealand). The importance of such a power is that constitutionally guaranteed rights are regarded as being entrenched.

9. As regards the second aspect (the interpretation of a constitutional document and its enforcement), the focus here is on the judicial system. This is a critical inquiry because it will help answer the question: what is the structure in place to ensure that the rights and freedoms guaranteed in a

⁸ 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.

constitution or constitutional document are real and effective?⁹

10. 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. Relevant for present purposes, among the institutions to be continued were the common law and the independence of the judiciary.

11. In these respects:-

(1) No fewer than three articles in the Basic Law refer to the independence of the judiciary: Articles 2, 19

⁹ I concentrate on the judiciary in this brief discussion. The Basic Law also provides a good example of pluralism within a constitutional framework in that Article 158 states that a power is vested in the Standing Committee of the National People's Congress to provide interpretations of provisions in the Basic Law. Such interpretations are authoritative.

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).

12. An interesting feature of the judicial system is the presence of judges from other common law jurisdictions. Article 82 of the Basic Law enables judges from other common law jurisdictions to sit on the Court of Final Appeal. As I 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 was 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.

13. 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 CFA¹⁰ 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, a former justice of the High Court of Australia and the former Chief Justice of New South Wales.¹¹ In the past, we have also had two other former Chief Justices and two former justices of High Court of Australia.¹² This will doubtless continue. From the United Kingdom, the current Non-Permanent Judges of the CFA include the two

¹⁰ They are referred to as Non-Permanent Judges of the Court of Final Appeal (NPs).

¹¹ Murray Gleeson, Robert French, James Spigelman and William Gummow.

¹² Sir Anthony Mason, Sir Gerard Brennan, Sir Daryl Dawson and Michael McHugh.

former Presidents (and in due course also the current President) of the Supreme Court as well as the next Deputy President of that court.¹³ The immediate former Chief Justice of the Supreme Court of Canada, Chief Justice McLachlin, will also become an NPJ of the Court when her appointment takes effect in July.

- (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 heard by the CFA and to Hong Kong jurisprudence generally.

¹³ Lord Phillips of Worth Matravers, Lord Neuberger of Abbotsbury, Baroness Hale of Richmond 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.

(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 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. They take the same judicial oath as every other Hong Kong judge. 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.

14. 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.

15. 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 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 clear-cut, 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, 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.

16. 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 and spirit behind a constitution or constitutional document, have been applied. As Professor Dieter Grimm has put it, “The value of a constitution furthermore depends on the challenges with which it is confronted and on the answers which are gleaned from the constitution as a reaction to these challenges.”¹⁴ And this will be telling as regards the strength – or fragility – of the rule of law in any jurisdiction.

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(Total : 2,219 words)

¹⁴ In an interesting article “*The role of fundamental rights after sixty-five years of constitutional jurisprudence in Germany*” International Journal of Constitutional Law, Vol. 13 No. 1, January 2015 at P. 15.