CJ's speech at 5th Tun Hussein Onn Lecture in Kuala Lumpur (English only)

Following is the speech by the Chief Justice of the Court of Final Appeal, Mr Geoffrey Ma Tao-li, delivered at the 5th Tun Hussein Onn Lecture entitled "Constants and Variables: The Perpetual Challenge of the Courts" in Kuala Lumpur, Malaysia today (April 19):

It is a singular and great honour to be asked to deliver this, the 5th Tun Hussein Onn Lecture. I am grateful to the Lincoln's Inn Alumni Association of Malaysia for this invitation and it is a particular privilege to be able to participate in the 10th Anniversary celebrations of the Association. Though not myself a member of Lincoln's Inn - I am a member of Gray's Inn - my feelings towards my Mother Inn are exactly the same as those of you present this evening.

One of my prized possessions in the sitting room of my house is a book "A Portrait of Lincoln's Inn" (Note 1), which was presented to me by my good friend, Robert Walker. Lord Walker of Gestingthorpe delivered the 4th Tun Hussein Onn Lecture three years ago; he is one of our judges in the Hong Kong Court of Final Appeal. He is also of course the former Treasurer of Lincoln's Inn. I begin this Lecture with a quote from a Chapter he wrote in that book headed "A Community of Lawyers: Six Centuries of an Honourable Society". Apart from setting a scene of the Inn with which all of you can recall with nostalgia (fine wines, urbane talk, old silver and soft candlelight), Lord Walker makes this telling observation:

"How has the Inn managed to survive through six centuries? The grandiloquent answer would be that each generation of lawyers has faithfully passed on to the next generation of lawyers the lamps of justice, learning, integrity and good fellowship. A humbler and truer answer would be that the Inn... has shown itself capable of adapting to changing circumstances."

In this short extract are references to what ultimately constitute the themes to my Lecture: concepts of justice and integrity seen against the constant challenge of the courts of trying to arrive at just outcomes, often in the context of changing circumstances, by the application of transparent legal principles. I emphasise the word 'principles' for it is no part of a court's function to reach conclusions and to decide cases on some sort of random – or worse, arbitrary - basis. A principled approach is always and indeed the only method (Note 2).

Now so far, you would rightly think that I have been saying the obvious. However, when one looks at the reality of actually having to arrive at decisions which decide the fate of litigants before the courts or have important public ramifications, finding the correct principled approach and the appropriate principles, may not always be straightforward. As lawyers (and judges are lawyers), we are only too aware of legal principles that seem to conflict with one another, or principles that have exceptions to the rule. The courts sometimes struggle to find the right principle to apply. We are aware of many occasions when different levels of court, even in the same case, will appear to have applied sound principles and yet differed dramatically in their conclusions.

The type of situation where we in Hong Kong have occasionally encountered some difficulties in the search for the right answer has been in human rights cases, in which there exist diametrically opposite interests each of which, however, appears entirely reasonable and arguable. Take, for example, the right of social welfare and the right to equality, which are contained in many constitutions. Such rights will clash head on with a government's right to allocate and distribute finite financial resources when certain people fall outside the line that has been drawn by the relevant government policy. Yet all these rights or interests are perfectly legitimate ones. Another example is seen in immigration matters where the implementation of government policy - and one can quite easily see that immigration matters, like socio-economic ones, are primarily matters for the government to devise suitable policies - may at times clash with human rights which may go an entirely different direction. I shall expand on these examples presently. Needless to say, I concentrate in this Lecture only on the position we have experienced in Hong Kong.

The function of the courts is to adjudicate on real-life disputes between real persons. In doing so, the courts bear in mind at all times the need to arrive at a just result because, quite simply, what the courts decide and how they decide it (Note 3) determine not only the rights and liabilities of the parties, but often also lay down important legal principles which, particularly in a public law or human rights case, may have considerable impact on the general public. This is the legacy of the common law thrust upon the shoulders of judges and courts.

This responsibility on the courts translates into an obligation to get every decision right, at least to try their best to do so. A system of appeals is part of this attempt to attain this kind of perfection. In a well-known passage and a touching tribute to the work of academic jurists, Lord Goff of Chieveley referred in the postscript to his speech in Spiliada Maritime Corporation v Cansulex Limited (Note 4) to "the endless road to unattainable perfection".

Notwithstanding this inability to attain perfection, we lawyers would nevertheless like to see order and logic in the way the law operates. Lawyers in particular would like to think that the outcome of any case can be represented in a simple mathematical formula

along the lines of a x b = c, where 'a' is the relevant legal principle to be applied, 'b' represents the facts of any given case and 'c' is the product, in other words, the outcome of the case. In mathematical or scientific terms: 'a' is a constant, 'b' is a variable. There is much attraction in this simple formula and it is one that legal theory and the way law is taught to us in law schools, encourages.

The declaratory theory of law, as classically propounded (Note 5), involves the notion that there is a perfect and ideal system of law and there always has been. And, so the theory continues, when judges and courts state the law and lay down legal principles in their judgments, they are merely revealing from time to time the content of this perfect and ideal system of law. A neat theory such as this serves a useful purpose: it provides a conceptual justification for what happens in real life when courts apply legal principles to facts which have occurred sometime before, in some cases many years before, the courts adjudicate on a dispute. It answers the question: how is it possible that the applicable law in relation to facts which have occurred in the past, is sometimes only articulated by the courts many years later when the dispute is before them and sometimes, only after several rounds of appeals? The declaratory theory of law explains this phenomenon by the fiction that even though the courts may appear to be articulating new points of law (in some cases by overruling previous cases), they are, at least conceptually, only declaring what the law has always been.

The declaratory theory of law is now largely qualified and has been restated to become more practical and less metaphysical (Note 6), but it served to support the mathematical formula I have earlier set out. After all, as Lord Goff of Chieveley said in the same case (Note 7), "When a judge decides a case which comes before him, he does so on the basis of what he understands the law to be" - in other words, a statement of my simple equation.

The way law is taught is based on the application of legal principles to facts. The format of examination questions (at least in my time) centered very much not on essay questions (except where jurisprudence was involved) but on factual type problems where legal principles were to be applied to facts. Perhaps this would explain just why it was thought that a mathematical or scientific background was seen by many as a desirable attribute for the practice of law. It is no coincidence perhaps that some of our most eminent judges have had such a background (Note 8).

It is a part of human nature to want to be able to apply a simple and workable formula to arrive at an answer, particularly to a difficult problem and especially when there are important consequences. The history of science is full of brilliant flashes of inspiration, invention and discovery by great men and women who have, by compressing their theories into mathematical or scientific equations, often simple ones, advanced mankind and made real progress. Their equations, which do follow a perfect and precise structure

of constants and variables, will give you the right answer every time. So why does the law, which strives for perfection, indeed demands it, and which does seek to adopt an equation along the lines I have set out, often find it difficult to come up with the right answer?

The reason for this difficulty, I think, lies in the fact that the 'variables' part of the equation (our 'b') is so massive and wide-ranging. In truth, this is inevitable given that it comprises the breadth and variety of all human behaviour and circumstances. The range of human behaviour, human interests, societal differences, cultural and religious differences, economic discrepancies is so wide that this can often lead to quite legitimate differences in ascertaining just what should be the constant ('a') to be applied. Human differences, and just to take three facets of this (political, economic and social differences), are extremely complicated and are not easily capable always of being resolved by precise formulae, in the way a purely scientific formula can be used. In other words, our a x b = c formula is not always capable of easy application to humans. Even a formula such as $E = mc^2$ seems easier to apply.

In many cases, perhaps, I accept that our a x b = c formula can quite easily be applied. Lawyers advising their clients do this every day in whatever context legal advice is sought. Take a typical commercial transaction in which advice is sought over whether an IPO is feasible. The transaction itself may very well be (and often is) immensely complicated, but the legal requirements will be there for all to see and applied to the facts. The same with the courts. Whether or not a breach of contract has occurred and if so, whether the innocent party was legally permitted to terminate the contract by accepting the breach, is often a straightforward application of the applicable law. It may be that the applicable law (our constant) may have changed over time (Note 9), but once the applicable law is determined, it then becomes a relatively straightforward application of the law to the facts in any given case.

In some cases, however, the task of the courts is by no means easy at all and the complication here lies in the difficulty, not of articulating the constant (the principle of law), but trying to discover what is the appropriate constant to be applied in the first place. I have earlier mentioned those cases – often public law, human rights cases - where there exist rival arguments and interests, each of which may have a reasonable and objective foundation to support them, yet which are completely diametrically opposite in their effects.

I shall illustrate the problem, and the solutions which the Hong Kong courts have come up with, by reference to some cases decided by the Hong Kong Court of Final Appeal (Note 10). These were public law cases which involve the consideration of human rights.

Before coming to the cases, I ought briefly to identify the source of human rights in

Hong Kong. Two documents in particular set out the fundamental rights and freedoms of people in Hong Kong: the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (Note 11) and the Bill of Rights contained in the Hong Kong Bill of Rights Ordinance (Note 12). The Bill of Rights, in 23 Articles, sets out rights commonly found in many constitutions around the world:

(1) Articles 1 and 22: the right to equality (Note 13).

(2) Articles 2 and 5: the inherent right to life and the right to liberty and security of person (Note 14).

(3) Article 3: no one to be subject to torture or to cruel, inhuman or degrading treatment or punishment (CIDTP).

(4) Article 4: no one to be held in slavery (Note 15).

(5) Article 15: freedom of religion (Note 16).

(6) Article 16: freedom of opinion and expression (Note 17).

(7) Article 17: freedom of assembly (Note 18).

(8) Article 18: freedom of association (Note 19).

The rights contained in the Bill of Rights reflect the rights stated in the International Covenant on Civil and Political Rights (the ICCPR). This Covenant applies in Hong Kong by reason of Article 39 of the Basic Law.

The Basic Law contains a statement of fundamental rights and freedoms, for example:

(1) Article 25: the right to equality.

(2) Article 27: 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 and join trade unions, and to strike.

(3) Article 28: freedom of the person and no Hong Kong resident to be subjected to arbitrary or unlawful arrest, detention or imprisonment.

(4) Article 32: freedom of conscience, freedom of religious belief and freedom to preach, and to conduct and participate in religious activities in public.

(5) Article 35: the right to confidential legal advice, access to the courts, choice of lawyers and to judicial remedies.

(6) Article 36: the right to social welfare in accordance with law.

Returning then to the substance of this Lecture, I start by setting out the general approach of the Hong Kong courts in relation to the interpretation of basic rights and freedoms. This can be demonstrated by reference to a case decided by the Court of Final Appeal in 2005 involving the freedom of speech and of assembly (Note 20). The defendant in that case (it was a criminal matter) was convicted under a public order statute which required the Commissioner of Police to be notified of any intended demonstration involving more than 30 persons in a public place. The purpose of the legislation was to allow the Commissioner to object to a demonstration if it was necessary in the interests of public safety, public order or for the protection of the rights of other persons (Note 21). The defendant did not give the requisite notification and challenged the constitutionality of the statute. The Court of Final Appeal upheld the conviction by a majority decision of four to one on the basis that the statutory provision, after modification by the severance of some objectionable words, was constitutionally justified. That, however, is not the point I wish to make. I highlight two points in the judgment to indicate the approach of the courts in Hong Kong to fundamental rights:

(1) The general approach is to give fundamental rights a generous interpretation so as to give individuals the full measure of such rights. Correspondingly, any restrictions on constitutional rights must be narrowly construed. As Chief Justice Li said (Note 22):

"Needless to say, in a society governed by the rule of law, the courts must be vigilant in the protection of fundamental rights and must rigorously examine any restriction that may be placed on them."

(2) As to the content of the freedom of peaceful assembly, the Chief Justice said this at the outset:

"1. The freedom of peaceful assembly is a fundamental right. It is closely associated with the fundamental right of the freedom of speech. The freedom of speech and the freedom of peaceful assembly are precious and lie at the foundation of a democratic society.

2. These freedoms are of cardinal importance for the stability and progress of society for a number of inter-related reasons. The resolution of conflicts, tensions and problems through open dialogue and debate is of the essence of a democratic society. These freedoms enable such dialogue and debate to take place and ensure their vigour. A democratic society is one where the market place of ideas must thrive. These freedoms enable citizens to voice criticisms, air grievances and seek redress. This is relevant not

only to institutions exercising powers of government but also to organisations outside the public sector which in modern times have tremendous influence over the lives of citizens. Minority views may be disagreeable, unpopular, distasteful or even offensive to others. But tolerance is a hallmark of a pluralistic society. Through the exercise of these freedoms minority views can be properly ventilated."

The Leung case was relatively straightforward in that the constitutional provision involved had in-built qualifications. Less straightforward are those cases where there are no self-contained limitations and instead, conflicting provisions within the same constitutional instrument. In one case (Note 23), the courts had to deal with the conflict between the right to equality and the government's right to govern and to allocate financial resources.

The facts were these. Since the resumption of the exercise of sovereignty by the People's Republic of China over Hong Kong on July 1, 1997, we have had increasingly more and more Mainland visitors and immigrants to Hong Kong. Some of course come to Hong Kong on a temporary basis and are no more than just tourists. Others come to Hong Kong to join their families here or to settle (many, for example, have married Hong Kong permanent residents). They are permitted to do so. The applicable immigration policy has been that in such cases, before being given permission permanently to settle in Hong Kong (Note 24), the would-be immigrants would be given permission to go to Hong Kong for a three month period (Note 25) so that they can more easily adapt to life in Hong Kong before settling permanently. The practice has been that almost as soon as the relevant person returns to the Mainland under a TWP, he or she (usually it has been a woman) is then given permission immediately to return to Hong Kong on another TWP. The case with which we are concerned involves a Mainland woman married to a Hong Kong permanent resident. She became pregnant and wished to take advantage of the public hospital services in Hong Kong when she gave birth. The Government has a policy regarding public hospitals: the charges for non-Hong Kong residents are higher than those for Hong Kong residents. Here, we have a person who is almost a Hong Kong resident, and has many of the attributes of a Hong Kong resident: she is married to a Hong Kong permanent resident, spends most of her time in Hong Kong and hardly any time in the Mainland, and has applied for an OWP. From her point of view, she saw no reason why she should be treated differently to Hong Kong residents: she claimed that her being subject to higher charges when compared to Hong Kong residents breached the guarantee to equal treatment under the Hong Kong Bill of Rights (Note 26). From the Government's point of view, it was submitted that due allowance should be made for Government policy: put simply, the Government had a duty to govern and to devise policies for the community, and this should be a relevant factor to counter against the right to equality. Article 48(4) of the Basic Law states that the Chief Executive has the responsibility of deciding on government policies (together with the Executive Council - Article 54). Article 62 of the Basic Law places an obligation on the Government to formulate and implement policies, and to formulate budgets and financial accounts. By adopting a policy regarding hospital charges, the Government claimed it was doing precisely that.

The Government submitted it should be permitted (indeed had the obligation) freely to devise policies, particularly socio-economic ones and particularly bearing in mind in this context that in the public sphere, financial resources were limited. Difficult decisions had to be made by the Government as to how Hong Kong's finite resources should best be divided up and utilised. The Court acknowledged this and held that the right to equality was no doubt a fundamental human right, but was not an absolute one (compared to, say, the prohibition against torture or slavery) and one can think of situations in which inequality may be justified. The law has devised a set of rules to determine when it would be permissible to have unequal treatment. Essentially, where it can be demonstrated that differential treatment pursues a legitimate aim (meaning that there is a genuine need for a difference), that the differential treatment is rationally connected to that aim and that the differences in treatment are no more than necessary to achieve the legitimate aim, then there is justification and what appears to be differential treatment may be permitted (Note 27). You will note the need for a rational connection to the professed legitimate aim. The Court of Final Appeal ultimately agreed with the Government. The legitimate aim was said to be the long term sustainability of Hong Kong's social services and the fact that Hong Kong's financial resources were finite. Defining eligibility was therefore appropriate and due recognition had to be accorded to the Government's socio-economic policies in this regard. Drawing the line at residence status in that case was rational and justifiable.

The relevant 'constant' applied by the court in this case can be said to be the Government's constitutional duty to govern and therefore the leeway accorded to it in socio-economic matters. Basically, it was this factor - our 'constant' applied to the 'variable' being the particular circumstances of the case - that won the day for the Government. The court, however, pointed out that this was not always going to be the result. It said this:

"77. It is, however, important to put what has just been discussed into proper perspective. The proposition that the courts will allow more leeway when socio-economic policies are involved, does not lead to the consequence that they will not be vigilant when it is appropriate to do so or that the authorities have some sort of carte blanche. After all, the courts have the ultimate responsibility of determining whether acts are constitutional or lawful. It would be appropriate for the courts to intervene (indeed they would be duty-bound to do so) where, even in the area of socio-economic or other government policies, there has been any disregard for core-values. This requires a little elaboration. Where, for example, the reason for unequal treatment strikes at the heart of core-values relating to personal or human characteristics (such as race, colour, gender, sexual orientation, religion, politics, or social origin), the courts would extremely rarely (if at all) find this acceptable. These characteristics involve the respect and dignity that society accords to a human being. They are fundamental societal values. On the other hand, where other characteristics or status which do not relate to such notions or values are involved, and here I would include residence status, the courts will hesitate much more before

interfering; in other words, more leeway is given to the executive, legislature or other authorities. I have found useful in this context the analysis contained in the speech of Lord Hoffmann in Carson, 182E-183B [15]-[16]. As Lord Hoffmann observed, there can of course be borderline cases but generally there ought to be little difficulty in differentiating between a core-value and a mere question of general, social or economic policy: at 183C [17]. In the present case, using residence status as the dividing line in relation to health benefits clearly falls within the latter. This status has less to do with personal characteristics (in the sense used above) than with social and economic considerations.

78. Where core-values relating to personal characteristics are involved, the court will naturally subject the relevant legislation or decision to a particularly severe scrutiny. Lord Pannick QC (for the respondents) used the term "inherently invidious" to describe any decision which offended these core-values. While I would, for myself, not have used this expression, it nevertheless conveys the necessary sentiment.

79. It is convenient here also to remind ourselves that where the subject matter of the challenge has to do with fundamental concepts, in contradistinction to rights associated with purely social and economic policies, the courts will be particularly vigilant to protect the rights associated with such concepts, and consequently much less leeway or margin of appreciation will be accorded to the authority concerned. These fundamental concepts are those which go to the heart of any society. They include, for example, the right to life, the right not to be tortured, the right not to be held in slavery, the freedom of expression and opinion, freedom of religion (among others). Fundamental concepts also include the right to a fair trial and the presumption of innocence. Here, the courts have been vigilant to ensure that the proportionality or justification test is satisfied. Thus, in relation to the presumption of innocence, the courts have read down provisions in criminal statutes (which placed a legal or persuasive burden of proof on an accused person) to an evidential burden: see HKSAR v Lam Kwong Wai ([63] above), HKSAR v Hung Chan Wa (2006) 9 HKCFAR 614."

The passage just referred to, lends some support to my basic theme about the potential, but very real, difficulties in practice in the application of the simple equation earlier mentioned. And the next case I wish to discuss, reinforces this.

In this case (Note 28), which followed the decision of the Court of Final Appeal in Fok Chun Wa, the applicant (Note 29), a person from the Mainland had obtained an OWP to become a Hong Kong resident. She had been married to a Hong Kong permanent resident and regularly visited him under a TWP for the first two years of their marriage. Tragically, however, on the day after she arrived in Hong Kong under the OWP to settle here, her husband passed away. She then found herself homeless because the Hong Kong Housing Authority almost immediately repossessed the public housing unit occupied by her late husband. Without family or friends in Hong Kong, she was admitted

to a shelter for street sleepers. She applied for Comprehensive Social Security Allowance (CSSA) but this was rejected by the Social Welfare Department. The Government's policy was to give CSSA only to Hong Kong residents who had resided in Hong Kong for a minimum of seven years, although the Director of Social Welfare had a discretion to waive this requirement in exceptional cases (Note 30). The Director did not exercise this discretion in the case of the applicant. In conflict here were two interests. The woman relied on Article 36 of the Basic Law which states in terms that:

"Hong Kong residents shall have the right to social welfare in accordance with law. The welfare benefits and retirement security of the labour force shall be protected by law."

Against that, the Government relied on its constitutional duty to govern and formulate policies, which I have mentioned earlier in the previous case.

Superficially, there were similarities between this case and the previous one (Fok Chun Wa) in that in both cases, there was involved the question of eligibility for social benefits: in Fok in the context of subsidised health care, in Kong in the context of CSSA. But there were important differences between the two cases:

(1) Unlike in the case of Fok Chun Wa, Madam Kong was a Hong Kong resident. As such, she fell within the terms of Article 36 of the Basic Law. Although under Article 145 of the Basic Law, it is of course the Government's prerogative (and duty) to devise and implement policies, nevertheless the right to social welfare had to be accorded due weight.

(2) The weight to be accorded to the Article 36 right in Madam Kong's case was that as the Government was changing its policy on CSSA from the earlier one year residence qualification to a seven year one, it was incumbent on the Government to provide justification for the change in policy. This is a legal requirement, being the justification test, namely, there had to be a legitimate aim and a rational connection between the new policy (the seven year requirement) and that legitimate aim. The Government acknowledged that this was the applicable legal test. It is important to stress here that from start to finish, the court was only concerned with matters of law and legal requirements. The court was at no stage second-guessing or reviewing (other than in a legal sense) Government policy: that is not the constitutional mandate of the Judiciary.

(3) On the facts of the case before the Court of Final Appeal - and it is always important to stress the point that courts only act on the evidence that is before them - the Government could not demonstrate that there was a rational connection between the seven year policy and the professed legitimate aim of the long term financial sustainability of Hong Kong's social welfare services. I give but two examples of this on the evidence before the court and one bears in mind here that the Government's policy affected almost exclusively Mainland immigrants: first, there was simply no consistency between on the one hand, pursuing a policy of encouraging the migration of Mainland persons into Hong Kong (in order to effect family reunion and to rejuvenate Hong Kong's

ageing population) and on the other, not giving such migrants any financial aid when it was most needed; secondly, although in general, financial sustainability is of course a very important (and in some cases, a decisive) factor, in the present case, the Government's own documents stated that the seven year residence policy was not "driven by the need to reduce CSSA expenditure on new arrivals" (Note 31).

Kong Yunming was by no means an easy decision to arrive at. The tension between the conflicting interests was an acute one and the Court of Final Appeal, in deciding the way it did, reversed the decisions of the Court of First Instance and the Court of Appeal. The reasoning contained in the judgments of the lower courts, although the Court of Final Appeal came to a different view, was not without basis. A different 'constant' was utilised by the Court of Final Appeal to that adopted by the lower courts.

At first sight, it may appear that the search for different constants in different situations is unsatisfactory when, as we all have been told at one stage or another, consistency in the law is desirable. After all, it could be said that, certainly at first blush, there were similarities in the facts in Fok Chun Wa and Kong Yunming: both involved the application of Government policy in a socio-economic context. I accept that consistency is a virtue, but equally, flexibility in order to achieve a just result, provided this is done in a principled way, is equally desirable.

Now, I further complicate the debate by referring to those situations where the Hong Kong courts have not been inclined to be quite so flexible. Earlier, in relation to the Fok Chun Wa case, reference was made to core-values and fundamental concepts, and the vigilance with which the courts will protect those core-values and concepts. Here, the choice of the applicable constant is very much more limited. I use as my example here the right not to be subject to CIDTP (Note 32). This right has been regarded as a fundamental concept and is to be accorded priority.

Two cases of the Court of Final Appeal illustrate this. In the first (Note 33), the applicant in the relevant judicial review proceedings challenged a deportation order made against him by the Hong Kong authorities on the basis that if he were to be returned to his country of origin (Nigeria), he would be subject to the risk of CIDTP. The applicant in the case had been convicted of a drug trafficking offence and sentenced to a term of 24 years' imprisonment. On his release, the Secretary for Security issued a deportation order which the applicant challenged. His contention that if returned to Nigeria he would be subject to CIDTP was based on the fact that he was liable to be charged in that country under a statute (Note 34) which stated that any person whose journey originated from Nigeria carrying drugs into another country, notwithstanding that such a person has already been convicted of a drugs offence in that other country, or any Nigerian citizen found guilty of a drug offence in a foreign country (thereby, it was said, bringing the name of Nigeria into disrepute), would be guilty of offences under the Act. The applicant contended that the risk of double jeopardy (convicted for the same or similar offence) (Note 35) amounted to CIDTP. Against this contention was the position of the Secretary

for Security, being that the authorities ought to be given wide powers to deal with immigration matters and this was an immigration matter which the authorities should be permitted to handle as they saw fit.

The case is a complicated one but, for present purposes, I merely highlight one aspect: the CIDTP aspect. The court held that if it could be shown that there was a real risk of CIDTP (as it happened, this could not be shown on the facts of the case), then the deportation order would have been set aside. The right not to be subjected to CIDTP was seen to be an absolute and non-derogable right. This was, as Ribeiro PJ put it, "a universal minimum standard" (Note 36). I said at the beginning of the judgment:

"The approach of the [Secretary for Security] that a person (not having the right to be in Hong Kong) was liable to be deported to a place even where it could manifestly be demonstrated that he would be subject to cruel, inhuman or degrading treatment or punishment in that place, was a deeply unattractive submission".

The second case is a more recent one (Note 37). Many people from overseas come to Hong Kong, some for economic gain. Others, however, are political refugees who seek asylum or are torture claimants. They have fled their own countries for political, racial, religious, social or other reasons. In the 1970s, the Vietnamese boat people came to Hong Kong following the fall of Saigon in the Vietnam War. In more recent years, people have come from parts of Africa, the Indian sub-continent and other places. Hong Kong has always been tolerant of these people and, unlike some other places, has never simply turned them away. This is, I think, something of which Hong Kong can be proud. For people who seek asylum, while Hong Kong does not grant asylum itself (Note 38), it will generally allow such persons to remain in Hong Kong pending processing of their asylum claims (Note 39). For people who are torture claimants, that is, those who make a claim under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (usually known as the Convention against Torture (Note 40)) that, if returned to their country of origin, they would be tortured, Hong Kong (Note 41) processes their claims. If a claim is established, the relevant person will not be returned to his or her country of origin (in Convention terms, this is known as non-refoulement). Where a person has been recognised as a refugee (a mandated refugee) or, is established as a screened-in torture claimant, he or she becomes a temporary resident of Hong Kong. The word "temporary" is slightly misleading because it gives an impression of a short stay resident. Some mandated refugees or screened-in torture claimants have been in Hong Kong for a long period, over 10 years in some cases. Although they are given subsistence allowances, they are not permitted to seek employment. These people would like to be allowed to work, not just to have the opportunity to do better than survive at subsistence level, but also for their mental well-being. You can well imagine their plight and empathise with their predicament. On the other hand, Hong Kong, by reason of its attraction to economic and other migrants, needs to control immigration and the activities that non-permanent residents may be permitted to carry out here. In particular, Hong Kong's own workforce needs to be protected and this is a perfectly legitimate factor in

any immigration policy for a government to have in place. All of you when travelling will always be questioned as to whether you are entering a country for leisure or working purposes, and when permission to enter is given, you will almost always get a chop on your travel document prohibiting employment, unless you are a resident of the country you are entering. The conflicting interests are easy to see in this situation: the right to work of a mandated refugee or screened-in torture claimant who has been here for a long time as against the need to protect Hong Kong's workforce among its permanent residents. In constitutional terms, two rights come to a head here: the right not to be subjected to "cruel, inhuman or degrading treatment" (Note 42) which a denial to work can amount to, as against the right of the Government to "apply immigration controls on entry into, stay in and departure from" Hong Kong (the right to control immigration) (Note 43).

In its judgment, while the Court of Final Appeal fully recognised the Government's obligation to devise immigration policies which included the protection of Hong Kong's workforce, nevertheless where a denial to grant permission to work (Note 44) amounted to or ran a substantial and imminent risk of constituting inhuman or degrading treatment, the court held that the Director of Immigration would have to grant the necessary permission to work. In other words, the Court acknowledged the importance of the absolute right contained in Article 3 of the Bill of Rights. Owing to the insufficiency of the facts before it in that case, the Court did not make a decision as to whether the applicants in that case should have been given permission to work. I should perhaps just point out that a high threshold test has to be satisfied before inhuman and degrading treatment can be shown: a minimum level of severity must be shown; "treatment is inhuman or degrading if, to a seriously detrimental effect, it denies the most basic needs of any human being" (Note 45).

These cases, among many, demonstrate the kind of difficulties faced by the courts when having to decide between conflicting legitimate interests. As I have said earlier, this dilemma occurs most frequently in public law cases where the width of human emotions and the collision between all those interests that make up a society, are amply demonstrated. It is, however, important to bear in mind that, while the court may at times struggle to find the right constant to apply in the equation, the approach is always a principled one. It is never a random exercise and certainly not an arbitrary one dependent on the "length of the Chancellor's foot". Judges and the courts are duty-bound to apply the law. This is what we call the administration of justice, being a part of the rule of law. Under Hong Kong's Basic Law, the Judiciary is given the constitutional role of exercising "judicial power" and to do so independently (Note 46). The exercise of judicial power involves adherence to the law, legal principle and the spirit of the law. I had to take an oath when I became a judge "conscientiously, dutifully, in full accordance with the law, honestly and with integrity, safeguard the law and administer justice without fear or favour, self-interest or deceit". The oath taken in Malaysia (Note 47) requires all judges faithfully to discharge their "judicial duties". In Chief Justice Arifin's speech at the Opening of the Legal Year this year (Note 48), he said that the "primary duty of the judiciary is to dispense justice as entrusted upon us by the Federal Constitution". It could

not be made any clearer than this. The Chief Justice is, as all of you are aware, a Bencher of Lincoln's Inn.

For those who still believe that judges and courts decide cases on a random basis rather than adopt a principled approach based on the law, I would merely point to the existence of clear and fully reasoned judgments of the courts. They amply demonstrate the courts' adherence to the law, reason and nothing else. Why is this adherence to the law and principle so important? The answer is obvious and to illustrate this, I would like to make reference to a scene from a play I studied for my "O" Levels over 40 years ago, A Man for All Seasons (Note 49). As you will know, this was a play written about Sir Thomas More, who was Chancellor in England during the reign of Henry VIII. Sir Thomas More was a member of Lincoln's Inn (Note 50) and was called by Erasmus, the Dutch humanist and theologian, "omnium horarum homo" - a man for all seasons.

In this scene, More is conversing with his future son-in-law, William Roper, who is trying to persuade Sir Thomas to arrest Richard Rich, whose perjury against Sir Thomas would eventually lead to his being sentenced to death. Sir Thomas insists he cannot do this since Rich has broken no law. He says that even the devil should be free until he broke the law. Roper is exasperated with the idea even the devil should be given the benefit of the law. Sir Thomas says to him (and this, I believe, represents how all lawyers regard the law):

"What would you do? Cut a great road through the law to get after the Devil? ... And when the last law was down, and the Devil turned round on you - where would you hide, Roper, the laws all being flat? This country is planted thick with laws from coast to coast, Man's laws, not God's, and if you cut them down - and you're just the man to do it - do you really think you could stand upright in the winds that would blow then? Yes, I give the Devil benefit of law, for my own safety's sake!"

It is the law that protects and governs us, and it is the law, and only the law, that courts apply. The search for the right constant may at times be difficult or even elusive, but this "endless road to unattainable perfection" must be the only correct way. As Justice Benjamin Cardozo once said, "Law is Justice". Yet, my mathematical equation, simple to state and yet impossible to perfect in every case, poses a perpetual challenge to the courts, particularly in rapidly changing times. And it is always dynamic. Even established scientific formulae like $E = mc^2$ can hardly be said to be static when 'c' is the speed of light (Note 51), and squared at that.

I would like to end by going back to what Lord Walker of Gestingthorpe said in the quote from "A Portrait of Lincoln's Inn". He wrote about justice, learning and integrity, and I have briefly touched upon these matters. But he also talked about the lamp of good fellowship being passed from generation to generation of lawyers. This is a reference not

merely to convivial companionship, but is a reflection of a collective understanding of the need to respect people's rights and tolerance; in other words, the ideals of justice. Lincoln's Inn embodies all these ideals. I can perhaps do no better in trying to convey this "good fellowship" than to refer to what Sir Robert Megarry VC (Note 52) said at the end of his judgment in Tito v Waddell (No. 2) (Note 53). You will recall that the action tried by the Vice Chancellor was about the mining of phosphates in Ocean Island (Banaba) in the Gilbert and Ellice Islands. The Banabans claimed against the British Phosphate Commissioners and the Government of the United Kingdom. There was alleged overmining. The Banabans largely lost the litigation. However, Sir Robert Megarry paid this tribute to counsel for the Banabans, Mr John Macdonald QC:(Note 54)

"Third, I wish once more to express my very real sense of indebtedness to counsel and solicitors for all that they have done to assist me in a case which, though of great interest, has been undeniably burdensome. Although my gratitude is quite general and undifferentiated, I shall add a word about Mr. Macdonald. For a long time his professional practice and, I suspect, much of his private life must have been engulfed by the affairs of Ocean Island. It may be unusual, but I hope that it will not be thought improper, if I say that however disappointed the Banabans may be at the result of this litigation, they have every reason to be deeply grateful to Mr. Macdonald for all the skill and effort that he has manifestly put into his tenacious presentation of their case, both as leading for them in No. 1 and as supporting Mr Mowbray in No. 2. They must have shared with me the pleasure that I felt when during the course of this litigation I was privileged to call him within the Bar on his appointment to the rank of Queen's Counsel."

For me, this passage is a touching one and was largely instrumental in making me want to be a barrister over 37 years ago. The sentiments contained in this passage, as well as the existence of associations such as the Lincoln's Inn Alumni Association, amply demonstrate this fellowship. Long may it continue.

Notes:

1. Edited by Ms Angela Holdsworth (Lady Neuberger) (2007).

2. All of you will recall from your law study days that cases were never to be decided according to the length of the "Chancellor's foot". This is a reference to the criticism made of the courts of equity in the 17th century when it was perceived that the Lord Chancellor was arbitrary in the way cases were decided. John Selden, the 17th century jurist and philosopher, referred to the Chancellor's foot being "long, short or indifferent" depending on who occupied the office (Selden's Table Talk writings, 1689).

3. This is a reference to the reasons that make up a judicial decision.

4. [1987] AC 460, at 488.

5. It is not only a theory favoured by common law jurists. Civil law jurists also adopt the theory, particularly in places such as Germany.

6. See in particular the analysis of Lord Goff of Chieveley in Kleinwort Benson Limited v Lincoln City Council [1999] 2 AC 349, at 377-379.

7. At 378.

8. Lord Neuberger of Abbotsbury, the current President of the Supreme Court in the United Kingdom, took a degree in chemistry at Oxford. Lord Denning studied mathematics at Oxford. Lord Diplock also took a degree in chemistry at Oxford.

9. In our breach of contract example, all students will know how the law changed, particularly in relation to the treatment of exemption clauses, from the 'four corners' rule (Alderslade v Hendon Laundry Limited [1945] KB 189) to the concept of fundamental breach (Sze Hai Tong Limited v Rambler Cycle Company Limited [1959] AC 576), the clarification offered by the House of Lords in Suisse Atlantique Soci ́ ́ d'Armement Maritime S.A. Appellants v N.V. Rotterdamsche Kolen Centrale [1967] 1AC 361 and Photo Production Limited v Securicor Transport Limited [1980] AC 827.

10. The Court of Final Appeal, set up after the resumption of the exercise of sovereignty over Hong Kong on July 1, 1997, is the highest court in Hong Kong, replacing the Judicial Committee of the Privy Council, the highest judicial tribunal for Hong Kong before that date. The Court has five judges, one of whom can be an overseas judge from a common law jurisdiction. So far, our panel of common law jurisdiction judges has consisted of judges from Australia, New Zealand and the United Kingdom. Lord Walker of Gestingthorpe is on this panel.

11. This is Hong Kong's constitution.

12. Chapter 383 of the Laws of Hong Kong.

13. In Malaysia, this is found in Article 8 of the Federal Constitution.

14. Article 5 of the Federal Constitution.

15. Article 6 of the Federal Constitution.

16. Article 11 of the Federal Constitution.

17. Article 10(1)(a) of the Federal Constitution.

18. Article 10(1)(b) of the Federal Constitution.

19. Article 10(1)(c) of the Federal Constitution.

20. Leung Kwok Hung v HKSAR (2005) 8 HKCFAR 229.

21. Article 17 of the Bill of Rights states that any restrictions on the right of peaceful assembly can only be imposed if in conformity with the law and if necessary in a democratic society in the interests of national security of public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.

22. In para 16 of the judgment.

23. Fok Chun Wa v Hospital Authority (2012) 15 HKCFAR 409.

24. To facilitate this, they are given a One Way Permit (OWP).

25. Under a Two Way Permit (TWP).

26. Article 22 of the Bill of Rights states:
"Equality before and equal protection of law
All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

27. Lawyers refer to this as the justification test.

28. Kong Yunming v The Director of Social Welfare [2014] 1 HKC 518.

29. In the application for judicial review.

30. The Government's previous policy had required residence only of one year.

31. Kong Yunming, supra, at paras 97 and 140.

32. Article 3 of the Hong Kong Bill of Rights.

33. Ubamaka v Secretary for Security (2012) 15 HKCFAR 743.

34. The National Drug Law Enforcement Agency Act 1990 in Nigeria.

35. This is similar to the protection against repeated trials contained in Article 7(2) of the Federal Constitution.

36. At para 114 of his Judgment with which the other members of the Court agreed.

37. GA v Director of Immigration, FACV 7-10 of 2013, 18 February 2014.

38. Hong Kong is not a party to the 1951 United Nations Convention Relating to the Status of Refugees and the 1967 Protocol to this Convention (commonly known as the Refugee Convention).

39. This is discharged by the United Nations High Commissioner for Refugees.

40. Or simply CAT.

41. The Torture Claim Assessment Section of the Immigration Department handles such claims.

42. Article 3 of the Hong Kong Bill of Rights contained in the Hong Kong Bill of Rights Ordinance Cap 383.

43. Article 154(2) of the Basic Law.

44. The Director of Immigration undoubtedly possesses a discretion whether or not to grant such permission.

45. GA v Director of Immigration, supra, at para 49, citing Lord Bingham of Cornhill's speech in R (Limbuela) v Secretary of State for the Home Department [2006] 1AC 396 at para 7.

46. Articles 2, 19 and 85 of the Basic Law.

47. Article 124 of and the Sixth Schedule to the Federal Constitution.

48. On January 11, 2014.

49. By Robert Bolt.

50. Admitted in 1496.

51. The speed of light is approximately 300,000 kilometres per second or 670 million miles per hour.

52. A Bencher and former Treasurer of Lincoln's Inn.

53. [1977] Ch. 106. The judgment occupies 242 pages of the Chancery's Report for that year.

54. Also of Lincoln's Inn and a Bencher.

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