

**Young Solicitors' Group
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Distinguished Speakers' Luncheon
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Twenty Years of the Court of Final Appeal

1. These days, every year seems to mark a significant anniversary for someone. The teaching of law in the University of Hong Kong approaches 50 years next year, 30 years in the case of the City University of Hong Kong. This year, on July 1, it was 20 years to the day that the Hong Kong Special Administrative Region was established and for the purposes of this talk, the significance lies in the fact that it was also 20 years since the establishment of the Hong Kong Court of Final Appeal. As for all significant historical milestones, it is a time for reflection and perhaps even some retrospection. I would like today to make some observations on the importance of the CFA and what it represents.

2. The first judges of the CFA were Chief Justice Andrew Li and 3 Permanent Judges : Justices Litton, Ching and Bokhary. The new constitutional order brought about by the Basic Law in 1997 had the inevitable consequence that the Hong Kong courts had ultimately to decide for themselves important and controversial issues in particular in public law cases which until then had been few and far between. Of course, a number of important cases were decided when the Hong Kong Bill of Rights Ordinance¹ was enacted in 1991, but in terms of numbers and lasting importance, they were of far less significance than the post 1997 series of cases. A greater awareness of rights, in particular what are termed human rights and fundamental freedoms, was perhaps only to be expected when there was in existence a constitutional instrument being the Basic Law.

¹ Cap 383.

3. I shall presently be touching upon specific provisions of the Basic Law but wish for the time being just to deal with the establishment of the CFA and to emphasize why it was crucial for Hong Kong.

4. The Preamble to the Basic Law states in terms that the constitutional model for Hong Kong was that of “one country two systems”. The uniqueness of this cannot be emphasized enough. The Preamble further states that the provisions of the Basic Law were to ensure the implementation of the basic policies of the PRC regarding Hong Kong.

5. For the Judiciary, the most tangible and important part of the “one country two systems” constitutional model was the emphasis on the independence of the Judiciary.

Unusual for a constitutional instrument, the Basic Law mentions the facet of an independent judiciary in three places : Article 2 of the Basic Law states that Hong Kong is to enjoy “independent judicial power”, Article 19 uses this term again and Article 85 states that the Hong Kong courts “shall exercise judicial power independently, free from any interference”. It has often been said that an independent judiciary is a cornerstone of Hong Kong society. It is exactly that, forming one of the two main components of the rule of law itself. Without the independence of the judiciary the law, as one of the three pillars of government, cannot function effectively.

6. These days barely a week passes without a reference to the rule of law in Hong Kong. This is a positive trend in that it demonstrates an increasing awareness of the importance of the law and our legal system. It is clear that the existence

of the Basic Law and the Hong Kong Bill of Rights brought into sharper focus the existence of rights and fundamental freedoms. In addition, Hong Kong society and indeed the world as a whole had become more complex; and the population has increased substantially compared with a time not so long ago² and this has resulted in a greater number of legal disputes and more differences in points of view within society. The Basic Law and the Hong Kong Bill of Rights set out in explicit terms the contents of rights and freedoms. Perhaps these rights and freedoms were always a part of the common law anyway but they were never codified³ and certainly not in Hong Kong. Thus, when the Basic Law was promulgated containing a whole chapter setting out rights, this was an extremely significant milestone in Hong Kong legal history. Chapter III of the Basic Law is headed

² According to the Census and Statistics Department, the population of Hong Kong in 1970 was about 4 million. It is now just under 7.4 million.

³ Apart from rather grand charters such as Magna Carta, the 1688 Bill of Rights etc.

“FUNDAMENTAL RIGHTS AND DUTIES OF THE RESIDENTS”. There are 19 articles in this chapter setting out the content of rights and freedoms, among them :-

- (1) Equality before the law : Article 25.
- (2) The right to vote and the right to stand for election
(the right to participate in public life) : Article 26.
- (3) Freedom of speech, of the press, of assembly, of
procession and of demonstration : Article 27.
- (4) Freedom of movement : Article 31.
- (5) Freedom of conscience, religious belief : Article 32.

- (6) The right to confidential legal advice, access to the courts, choice of lawyers and judicial remedies : Article 35. Article 35 also contains this important right : “Hong Kong residents shall have the right to institute legal proceedings in the courts against the acts of the executive authorities and their personnel.” This is a statement in the clearest possible terms of the right to seek public law remedies and that the Government is not immune from suit.
- (7) Freedom of marriage : Article 37.
- (8) Article 39 states that the provisions of the International Covenant on Civil and Political Rights as applied to Hong Kong will be in force and shall be implemented in Hong Kong municipal law.

7. These rights are also enjoyed by non-Hong Kong residents. Accordingly, most commonly in immigration cases involving non-Hong Kong residents, the provisions of the Basic Law apply to them.

8. The Bill of Rights under the Hong Kong Bill of Rights Ordinance is the municipal law which implements Article 39 of the Basic Law. The Bill of Rights includes the following rights and freedoms :-

- (1) The right to equal treatment with a specific reference to men and women having equal rights :
Article 1. See also Article 22.

- (2) No one is to be subjected to torture or to cruel, inhuman or degrading treatment or punishment :

Article 3. This is regarded as an absolute right not capable of derogation and therefore not subject to any proportionality analysis.⁴ Even s 11 of the Hong Kong Bill of Rights Ordinance which on its face seems to except the application of the Bill of Rights to immigration legislation, must be read subject to the Article 3 right being absolute and nonderogable.⁵ This, as I said in *Ubamaka*, was consistent with an approach that recognized the importance placed in Hong Kong on nonderogable and absolute rights.⁶

⁴ See *Hysan Development Company Limited v Town Planning Board* (2016) 19 HKCFAR 372, at para 43 (Ribeiro PJ); *Ubamaka v Secretary for Security* (2012) 15 HKCFAR 754, at para 115 (Ribeiro PJ).

⁵ Section 11 states : “**Immigration legislation.** As regards persons not having the right to enter and remain in Hong Kong, this Ordinance does not affect any immigration legislation governing entry into, stay in and departure from Hong Kong, or the application of any such legislation.”

⁶ *Ubamaka* at para 2.

- (3) No one is to be subject to arbitrary arrest or detention and those who are deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person : Articles 5 and 6. This has significance in the immigration context.
- (4) The right to a fair hearing : Article 10.
- (5) No one is to be tried or punished again for an offence for which he or she has already been convicted or acquitted viz *autrefois acquit* or *autrefois convict* : Article 11(6). However, this right, although one that is found in an international convention, does not apply outside the territorial limits of Hong Kong. Thus, where a person resisted deportation from Hong Kong to Nigeria on the basis

that he would be prosecuted there for the same offence of which he was convicted in Hong Kong leading up to the deportation order (drug trafficking), it was held by the CFA that no reliance could be placed on Article 11(6) : see *Ubamaka*.⁷

- (6) Freedom of opinion and expression, of peaceful assembly, of association : Articles 16, 17 and 18.

9. The enforcement of rights contained in the Basic Law and the Bill of Rights can at times be a complicated and difficult exercise, particularly where different rights may pull in different directions. In this situation, the exercise of rights against other rights, though diametrically opposed to one another, may be all reasonable. Some examples will help make out this point :-

⁷ At para 164.

(1) The freedom of expression is guaranteed under the Basic Law and the Bill of Rights. However, it is subject to limitations. One ready example of this is that there must be respect for the rights and reputations of others or for the protection of national security, ordre public or of public health or morals : see Article 16(3) of the Bill of Rights. Other limits on this right include flag desecration : see *HKSAR v Ng Kung Siu*⁸; limits on professionals (such as doctors) to advertise : *Kwok Hay Kwong v Medical Council of Hong Kong*⁹.

(2) The freedom of procession and peaceful assembly (these rights are closely connected with the freedom

⁸ (1992) 2 HKCFAR 442.

⁹ [2008] 3 HKLRD 524.

of expression) contained in Article 27 of the Basic Law and Article 17 of the Bill of Rights are subject to restrictions which are necessary in the interests of national security or public safety, ordre public, the protection of public health or morals or the protection of the rights and freedoms of others. These limitations are expressly set out in Article 17.

- (3) I have already referred to the effect of s 11 of the Hong Kong Bill of Rights Ordinance.¹⁰ The diametrically opposite directions that exist can readily be seen : on the one hand are the rights under the Bill of Rights, on the other, the need to keep a tight immigration control. Drawing the line can sometimes cause difficulties. In *GA v Director*

¹⁰ See para 8(2) above.

of Immigration,¹¹ the applicants (in an application for judicial review) were persons who were mandated refugees or screened in torture claimants. While awaiting repatriation to another country, they wished to work, but were prohibited from doing so by the Immigration Department. The judicial review challenge was made relying on Article 14 of the Bill of Rights as giving the right to work. The CFA, referring to *Ubamaka*, held that s 11 was effective to prevent reliance on Article 14. However, it was also emphasized by the court that where the facts could demonstrate that a substantial or imminent risk existed of inhuman or degrading treatment by reason of the denial of permission to work under Article 3 of the Bill of Rights, then the

¹¹ (2014) 17 HKCFAR 60.

Director of Immigration would be compelled to exercise a discretion to give such permission.¹²

10. So far I have concentrated on public law but this has been deliberate in order to highlight extent of the challenges that faced the establishment of a new court for Hong Kong after 1 July 1997 (and a final appellate court at that). Public law cases tend to be those with which the public are more familiar, as very often they involve extremely controversial issues to be decided. It is in this type of case (which often involves the Government and public authorities and which also may have political, economic or social origins) where polarized views are most likely to exist.

11. Little wonder then that it was of critical importance for the CFA to establish itself quickly after 1 July 1997. Not

¹² See *GA* at paras 43-45.

only did the court have to earn a status that was equivalent to the final appellate body it replaced – the Judicial Committee of the Privy Council – the CFA had to deal with cases that would test its ability to deal effectively with the new constitutional order. In his speech at the Farewell Sitting for him, the former Chief Justice Andrew Li said that “one of the most exciting challenges has been the establishment of the Court of Final Appeal and the development of constitutional jurisprudence in the new order.”¹³ He ended the speech by reiterating that serving as the first Chief Justice in the HKSAR was the greatest honour of his life.

12. Within the first two years of sitting as Hong Kong’s final appellate court, the Court dealt with important public law cases that were to determine the approach of Hong Kong courts in dealing with Basic Law issues. This approach lasts

¹³ Chief Justice Li’s speech is reported in [2010] 13 HKCFAR 128.

to the present time. *Thang Thieu Quyen v Director of Immigration*,¹⁴ heard in July 1998, was the first major public law case determined by the Court. That, like so many of the important public law cases, dealt with immigration law. The issue at stake was the lawfulness of the administrative powers of detention of the Director of Immigration.

13. In January 1999, the Court heard a series of cases that mostly define to this day the constitutional approach of our courts. These were the so-called “Right of Abode cases” involving again immigration decisions.¹⁵ These cases involved the consideration of Article 24 of the Basic Law. In October that year, the CFA heard *Lau Kong Yung v Director of*

¹⁴ (1997-98) 1 HKCFAR 167.

¹⁵ *Ng Ka Ling v Director of Immigration* (1999) 2 HKCFAR 4; *Chan Kam Nga v Director of Immigration* (1999) 2 HKCFAR 82.

Immigration.¹⁶ These cases established important principles, among them :-

- (1) Chapter III of the Basic Law (some provisions of which I have already referred to earlier) contain constitutional guarantees for the freedoms “that lie at the heart of Hong Kong’s separate system.”¹⁷
- (2) In construing these guarantees, the Court adopts a purposive and generous approach.¹⁸
- (3) Where an interpretation is made by the Standing Committee of the National People’s Congress under Article 158 of the Basic Law, this is authoritative

¹⁶ (1999) 2 HKCFAR 300.

¹⁷ *Ng Ka Ling* at 28J-29A (CJ Li).

¹⁸ *Ng Ka Ling* at 28E, 34F, 35A.

and binding.¹⁹ As was observed by Sir Anthony Mason NPJ : “The general power of interpretation of the Basic Law vested in the Standing Committee by Article 158(1) is plainly a power to give an authoritative interpretation of the Basic Law binding on all institutions in the Region.”²⁰

14. I have made particular reference to Sir Anthony Mason as it provides a convenient introduction to the role of NonPermanent Judges in the CFA. The Basic Law makes specific reference to judges from “other common law jurisdictions” to sit on the CFA :- see Article 82. Only 1 NPJ from a common law jurisdiction can sit at any one time in a substantive appeal.²¹

¹⁹ *Lau Kong Yung* at 324D.

²⁰ *Lau Kong Yung* at 345H-I.

²¹ See s 16(1) of the Hong Kong Court of Final Appeal Ordinance Cap 484.

15. It can be surmised that the reason why provision is made for an overseas judge to sit on a Hong Kong court is that this is an example of one of the principal themes of the Basic Law : the theme of continuity. The Basic Law reflects the continuation of those institutions that have over the years contributed significantly to Hong Kong's success. The law (or rather, as I shall briefly discuss presently, the common law) was and is such an institution. Before 1 July 1997, as I have mentioned earlier, the highest appellate tribunal for Hong Kong was the Judicial Committee of the Privy Council where the very best judges from common law jurisdiction sat. It was regarded as equally important that post 1 July 1997, the CFA should also benefit from top jurists in the common law world.

16. The experience over the past 20 years has clearly shown that the overseas NPJ has made an extremely valuable contribution to the work of the Court. Sir Anthony Mason has written and contributed to many important judgments of the CFA and not just in the constitutional context.²² Other judgments of the Court written by the overseas NPJ are consistently referred to and regarded as important judgments in jurisdictions other than Hong Kong and in leading textbooks : see, for example, *Bank of East Asia Limited v Tsien Wui Marble Factory Limited*²³ (tort), *Cheng v Tse Wai Chun*²⁴ (defamation), *Moulin Global Eyecare Trading Limited v Commissioner of Inland Revenue*²⁵ (company) and *Tsit Wing*

²² For example, his seminal judgments in the area of misconduct in public office (*Shum Kwok Sher v HKSAR* (2002) 5 HKCFAR 381 and *Sin Kam Wah v HKSAR* (2005) 8 HKCFAR 192) continue to be leading judgments in this area and have been widely cited in the United Kingdom and Australia.

²³ (1999) 2 HKCFAR 349.

²⁴ (2000) 3 HKCFAR 339.

²⁵ (2014) 17 HKCFAR 218.

*(Hong Kong) Company Limited v TWG Tea Company Pte Limited*²⁶ (passing off) among many other authorities.

17. The overseas NPJ continues to add an important dimension to the work of the Court. In 1997, there were 6 overseas NPJs. Now the panel has grown to over a dozen comprising the former and current Presidents of the Supreme Court of the United Kingdom, former Chief Justices of the High Court of Australia and New South Wales.

18. I have made reference to the overseas NPJs of our CFA not only to acknowledge their contribution to the work of the Court, but also to highlight another of the institutions that have contributed to Hong Kong's success – the common law. There is no doubt that Hong Kong is a common law jurisdiction and indeed this is readily and widely accepted in

²⁶ (2016) 19 HKCFAR 20.

the common law world. The Basic Law prescribes for Hong Kong the common law system :-

- (1) Article 8 refers specifically to the application of the “common law” and “rules of equity”.
- (2) English is an official language in Hong Kong to be used by the executive authorities, legislature and the judiciary : Article 9. English is the language of the common law.
- (3) I have already referred to Article 82 providing that judges from “other” common law jurisdictions may be invited to sit on the CFA.
- (4) Article 84 states that Hong Kong courts may refer to precedents of other common law jurisdictions.

(5) Judges may be recruited from other common law jurisdictions : Article 92.

19. Of course the constitutional structure of the court system as stated in a constitutional document such as the Basic Law is but one aspect of the statement that Hong Kong is a common law jurisdiction. The other, more important, aspect to consider is how the courts and our judges operate in practice. When one talks about the characteristics of a common law jurisdiction, it is important to identify the salient features of such a system. It is not only about a system of precedent.²⁷ In my view, these characteristics of the common law stand out :-

²⁷ Also known as *stare decisis*.

- (1) First, the existence of an independent judiciary with judges who swear to “administer justice without fear or favour, selfinterest or deceit.”²⁸

- (2) Secondly, a transparent system of law in which the community, indeed the world, can see that the judiciary is an independent one that acts according to the law and nothing else. Here, I draw attention to two important facets : the openness of court proceedings to the public and the availability of reasoned judgments to demonstrate that all cases are decided in accordance with the law and only in accordance with the law.

- (3) The judicial approach of deciding cases not only according to the letter of the law but more

²⁸ This is a part of the Judicial Oath to be taken by all judges.

important, its spirit. This is best shown by the treatment of constitutionally guaranteed rights and fundamental freedoms : such are to be construed liberally and generously. This is clear from reading the cases.

20. These characteristics of the common law are shown in the work of the CFA. The Court is at the apex of Hong Kong's legal system and therefore represents in tangible form the integrity of the system. On 25 September 2015 I made a speech at the ceremonial opening of the Court of Final Appeal Building in which I said that the rule of law provides the social stability that is the foundation of a content and prosperous society, and that the CFA is the symbol of the rule of law in Hong Kong. This institution remains as strong as it has ever been in our community. Challenges there will always be but as with many things, it will be the fundamentals

that last and the one fundamental that Hong Kong has is the rule of law.
