Speech by The Honourable Chief Justice Geoffrey Ma
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Limits and Limitations : How effective are the Courts in the Protection of Human Rights?[1]

1. It is an immense honour, not to mention a great pleasure, to be invited to speak again in the Aula. I last spoke here on May 23, 2013 when I gave the Schellenberg Wittmer Lecture. I thank the University of Zurich and my friend Prof Andreas Kellerhals for the honour this evening.

2. This talk can be said to be a continuation of the Schellenberg Wittmer Lecture. The topic of the 2013 Lecture was "Courage and the Law : Upholding the Dignity of the Individual". The emphasis then was on how, historically, courts and judges needed to demonstrate courage in order to uphold the dignity of the individual by properly and fully enforcing what we loosely call human rights. I talked about why courage is essential and why this was the very quality that defined the dignity of a judge's office and, ultimately, of the community itself. In some ways, the earlier Lecture tried to provide a slightly romanticized portrayal of the work of the courts in the area of human rights. This evening, I want to examine the enforcement of human rights by the courts in a more practical manner, posing the question whether, with all the limits and limitations imposed on the courts, they are in practice successful in protecting and enforcing human rights. This is a question of real significance and the importance of this can be seen simply by a brief reference to the Federal

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[1] I am grateful for the assistance I have received from the Judicial Assistants of the Hong Kong Court of Final Appeal : Mr Griffith Cheng, LLB (University of Hong Kong), LLM (LSE); Mr Adrian Lee, BA (Oxon), LLM (University College, London); Mr Wing So, LLB (City University, Hong Kong), BCL (Oxon), MPhil (Oxon), DPhil (Oxon); Ms Samantha Lau, BSc (University of Hong Kong), LLB (University of Hong Kong), LLM (Harvard); Ms Hayley Wong, LLB (Birmingham), LLM (University College, London).

Constitution of the Swiss Confederation where it is said that "Human dignity must be respected and protected".[2] This can be said to be the ultimate test by which the rule of law is measured in any given jurisdiction. This is because the vigilance and energy with which all rights in a community (including commercial rights and other rights) are in reality enforced by the courts can best be seen by the readiness and ability of the courts to recognize and give effect to human rights. In other words, if proper recognition and respect is given to the enforcement of human rights by the courts, it will follow that all other rights will be given the same respect.

3. Determining the extent to which human rights should be enforced can at times be a complicated and difficult exercise. Unlike other areas where the application of law to the facts is a relatively straightforward exercise (the only complication often being the fact finding aspect), as regards human rights, there are often many different factors that have to be taken into account. Each of these factors may by itself be legitimate and reasonable, but they may pull in totally different directions. I can illustrate this by two simple examples :-

(1) In a normal commercial case involving breach of a contract, for example a claim for delay in delivery in the sale of commodities, the court's task is first to find out the relevant terms of the contract regarding delivery and then ask whether on the facts those terms have been breached. If there has been a delay breaching the contract, compensation is payable; otherwise the claim will be dismissed. A straightforward exercise.

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[2] Article 7 of Chapter 1 ("Fundamental Rights") of Title 2 ("Fundamental Rights, Citizenship and Social Goals") of the Federal Constitution.

(2) Take then a case involving human rights. Under the constitutional document that is relevant to Hong Kong – the Basic Law –[3] there is a provision that Hong Kong residents shall have the right to social welfare. The Government passes a law restricting the right to welfare payments only to those persons who have resided in Hong Kong for a certain period of time. Those who do not qualify (and who are in need of social welfare) claim that their constitutional rights have been infringed. The Government asserts that unless some form of qualification exists, this will have serious consequences as far as Hong Kong's economy and financial reserves are concerned. One can readily see the cogency of each side's arguments, but they pull in diametrically opposite directions. The difficult task for the court is to arrive at a fair outcome in these circumstances. And when one adds to the determination of the problem the factor of legislative intervention, meaning that the measure under attack represents the will of the elected representatives of the people, the matter can become even more difficult and complicated.

4. In dealing with human rights cases, courts are often not given much guidance either by constitutional instruments or by the relevant legislation. What principles there are as contained in these instruments can even at times be quite contradictory. The Hong Kong experience[4] has been that in common with most common law jurisdictions, our courts are left very much, deliberately in my view, to develop the law on their own. In dealing with human rights, the

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[3] The full title is 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 upon the resumption of the exercise of sovereignty by the PRC over Hong Kong.

[4] Obviously, I will concentrate in this talk on the position in Hong Kong but will make references to other jurisdictions as well, including (I say with much trepidation) Switzerland.

courts have therefore had to develop principles which seek to accommodate the various divergent points of view that do arise in the area of human rights. The variety of human rights is wide (from non-derogable rights such as the right not to be subject to torture or to cruel, inhuman or degrading treatment or punishment (CIDTP)) to other rights which can be compromised (such as the freedom of speech). Accordingly, the treatment of human rights will, in any given case, yield different approaches and on a superficial level, there can be criticism along the lines that the courts do not always act in a consistent way. In my view, however, this is indeed superficial because at all times, courts should act according to legal principle and it is vital that they do so because otherwise the application of law becomes arbitrary. Arbitrariness is the opposite of principle and it is anathema to the rule of law. This is the key to the enforcement of human rights, adherence to principle rather than to factors such as politics.

5. Before going deeper into these themes, I should perhaps first introduce the Hong Kong legal system to put in proper context how human rights fit into the picture. I have already mentioned the Basic Law. Prior to 1 July 1997, Hong Kong was a British colony. By the Treaty of Nanking, Hong Kong Island was formally ceded in perpetuity to the British Crown in August 1842. It was famously described by the Foreign Secretary, Viscount Palmerston, as a "barren rock with scarcely a house on it". The population of Hong Kong at that time was 7,450[5] and there was no meaningful legal system in place. One of the earliest ordinances[6] passed in Hong Kong was Ordinance No. 15 of 1844 which[7] stated that the law of England applied in Hong Kong except where local

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[5] Census and Statistics Department, Hong Kong Government. The population of Hong Kong today is about 7.5 million residents.

[6] As statutes are referred to in Hong Kong.

[7] By section 3.

circumstances dictated otherwise. This followed a proclamation that had been issued on 2 February 1841 by Sir Charles Eliot[8] in which it was said that, "all British subjects and foreigners residing in, or resorting to, the island of Hongkong, shall enjoy full security and protection, according to the principles and practice of British law."

6. The absence of established institutions to pass legislation afresh and the need to develop business and finance as quickly as possible (because that was, after all, the reason for the British to be in the Far East in the first place) meant that an existing (and preferably tried and tested) legal system had to be introduced to Hong Kong. There was nothing particularly innovative about this approach; this had been essentially the experience in the American colonies. "In 1844, just months after the Treaty of Nanking was ratified, a virtual 'colonization kit' of ordinances was unpacked in Hong Kong. These ordinances present a full institutional picture of what laws a port needs to operate smoothly. One cluster of ordinances provided rules for commercial activity, from merchant shipping and harbour regulation to weights and measures, the registration of wills and deeds, rules on slavery and a definition of usury."[9] This was virtually an instant transplanting of a ready made set of laws, not unlike many civil law jurisdictions which have incorporated the Napoleonic Code or German Civil Code. The common law system was thus transplanted into Hong Kong and this remains the legal system today.

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8 Who was then the Plenipotentiary and the Chief Superintendent of British trade in China.

9 See David C Donald (and others) "*A Financial Centre for Two Empires : Hong Kong's Corporate Securities and Tax Laws in its Transition from Britain to China*" (Cambridge University Press, 2014) at Pg. 25. Such ordinances included the Merchant Shipping Ordinance No. 4 of 1844, the Harbour Regulation Ordinance No. 18 of 1844, the Weights and Measures Ordinance No. 22 of 1844, the Registration of Deeds, Wills & C. Ordinance No. 3 of 1844, the Slavery Ordinance No. 1 of 1844 and the Usury Laws Ordinance No. 7 of 1844.

7. We are concerned with human rights. The common law obviously had its own set of principles relating to fundamental rights and Hong Kong as a common law jurisdiction adopted these, but it was not until the passing of the Hong Kong Bill of Rights Ordinance[10] in 1991 that fundamental rights and liberties were set out in the form of a Bill of Rights. The Bill of Rights in Hong Kong implements the rights contained in the International Covenant on Civil and Political Rights (the ICCPR).

8. The Basic Law contains the following provisions relevant to the present discussion :-

(1) By Articles 2, 19 and 85, the concept of judicial independence is firmly established in Hong Kong. This, of course, is a key component in the rule of law. Judges in Hong Kong are appointed by an independent commission[11] chaired by the Chief Justice and comprising judges, the Secretary for Justice, representatives of the Bar and Law Society, and lay persons.

(2) Article 4 gives an early indication of the importance of rights by stating the obligation of the HKSAR to safeguard the rights and freedoms of both residents and other persons in accordance with law. In Part III of the Basic Law are then set out what are termed the Fundamental Rights and Duties of both Hong Kong residents and non-residents. These rights mirror the same rights as set out in Title 2 of the Swiss Constitution, such as the right to equality (Article 25), the right to vote and stand for election (Article 26), the

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[10] Cap. 383 (Chapter 383 of the Laws of Hong Kong).

[11] Known as the Judicial Officers Recommendation Commission. Judges are appointed only on the basis of their judicial and professional qualities, which means that factors such as political affiliation are not relevant : Article 92 of the Basic Law.

freedom of speech, of the press, of assembly, of procession and demonstration (Article 27), the freedom of privacy and communication (Article 30), the freedom of conscience (Article 32), access to justice and confidential legal advice (Article 35), the right to social welfare (Article 36), freedom of marriage (Article 37) and the important Article 39 which gives constitutional backing to the ICCPR which is required to be implemented in Hong Kong. As we have seen earlier, the Hong Kong Bill of Rights Ordinance implements the provisions of the ICCPR into Hong Kong domestic law.[12]

(3) The effect of Articles 8 and 81 of the Basic Law is that Hong Kong's legal system will remain a common law legal system. A consequence of this is that judges in Hong Kong may be recruited from other common law jurisdictions : Article 92 of the Basic Law. In Hong Kong's highest court, the Court of Final Appeal, its

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[12] Hong Kong adopts what is known as the common law dualist principle whereby international treaties or conventions may in effect only be enforced by individuals if they have been incorporated into domestic or municipal law. International treaties and conventions are therefore not self-executing and unless made part of domestic law by legislation, will not confer or impose any rights or obligations on individual citizens : see *Ubamaka v Secretary for Security* (2012) 15 HKCFAR 743, at para. 43; *GA v Director of Immigration* (2014) 17 HKCFAR 60, at para. 58. In a way, it can be said this is a limitation to the enjoyment of rights in that international treaties or conventions do not automatically entail enforceable rights for individuals unless their provisions have been made enforceable by domestic law. Of course, as a matter of statutory construction, where a domestic statute is ambiguous, meaning it is reasonably capable of bearing alternative meanings which may conform to or conflict with international obligations, the court will presume that the legislature intended to comply with international treaties or obligations. Where, however, the statute is clear, the court's duties is to give effect to the words notwithstanding that this may even amount to a breach of treaty obligations. For the above, see *Ubamaka* at para. 43, referring to the English authorities of *J H Rayner Ltd v Department of Trade and Industry* [1990] 2 AC 418, *R v Secretary for Home Department ex parte Brind* [1991] 1 AC 696. By way of contrast, and obviously with much diffidence as I am certainly not sufficiently familiar with this area, it would appear that the dualist principle does not apply in Switzerland. Article 190 of the Swiss Constitution (contained in Title 4, Chapter 4 dealing with the Federal Supreme Court and other Judicial Authorities) states that the Federal Supreme Court and other judicial authorities apply federal acts and international law. This is consistent with Article 5 (headed Rule of Law) which states in para. 4 that the Confederation and the Cantons shall respect international law. However, there is I understand a principle known as the *Schubert* exception under which federal statutes which deliberately conflict with treaty obligations, will be given precedence. This appears to have some similarity to the common law as I have explained above. Whether or not the *Schubert* principle is inflexible is beyond my expertise to comment, although cases like *Eidgenössische Steuerverwaltung v X* BGE 117 Ib 367 and the *PKK* case BGE 125 II 417 (1999) may suggest otherwise.

members may include judges from other common law jurisdictions : Article 82.[13] Another consequence is that Article 84 states that the Hong Kong courts may use precedents[14] from other common law jurisdictions. It is at this point I can perhaps digress a little to discuss one particular characteristic of a common law system. This is the reasoned judgment. The common law, as applied to all areas of the law and certainly in the context of public law, in arriving at decisions involving human rights, requires not only firm and clear decisions but equally important, the existence of compelling reasons for such decisions. Ultimately, the main yardstick for determining the correctness and utility of any decision is the coherence and cogency of the reasoning in support. Another way of putting this is that the common law requires judgments be made on a principled and reasoned basis. It is the reasoning, at times lengthy, behind the determination of a legal dispute that enables the law to be properly understood as applied to particular facts. It is the application of principles to specific factual situations that enables the law to be understood by those affected by it and also to be developed. There is also the recognition that different factual circumstances may give rise to different legal outcomes. It is no wonder that the words of Justice Oliver Wendell Holmes ("The life of the law has not been logic; it has been experience … it cannot be dealt with as if it contained only the axioms and corollaries of a

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[13] At present, the Court of Final Appeal has a panel of 14 judges from common law jurisdictions who regularly sit on the court. They comprise judges from the United Kingdom, Australia, Canada and New Zealand. Included in this panel are the current President and former Presidents of the Supreme Court of the United Kingdom, former Chief Justices of the High Court of Australia and New South Wales and the former Chief Justice of Canada. These appointments reinforce the common law tradition in Hong Kong.

[14] The doctrine of precedent (*stare decisis*) is a well-known characteristic of the common law.

book of mathematics")[15] are often used to describe the common law. Only when novel and hitherto unforeseen factual situations emerge can the law truly be understood and developed. The importance of reasoning can be seen in the doctrine of precedent, often used as the prime characteristic whenever one is asked to define the common law. This doctrine (*stare decisis*) has as its foundation the properly reasoned judgment, for it is the reasoning of judgments that is utilized in future cases. In the area of public or constitutional law, the features of consistency, certainty and predictability (the polar opposites of arbitrariness) are promoted by reason of the doctrine of precedent. No doubt bad precedents can be created and it is a fair criticism that the doctrine can perpetuate a bad state of affairs, but on the whole the benefits have outweighed the disadvantages. The advantages can quite easily be seen when one looks at the wisdom displayed by great constitutional judges in their judgments, whose wisdom continues to influence constitutional law to this day.

(4) I should just mention finally in the course of going through relevant provisions of the Basic Law, Article 158. This provides that the power of interpretation of the Basic Law vests not only in the Hong Kong courts but also in the Standing Committee of the National People's Congress.[16] Any interpretation given by the Standing Committee of the NPC is authoritative and binding on the

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15 *The Common Law* (1881) Pg. 1.

16 The National People's Congress is the sovereign body in the PRC. Article 2 of the Constitution of the People's Republic of China states that all power in the PRC belongs to the people and it is through the NPC (as well as local people's congresses) that the people exercise state power.

Hong Kong courts.[17] Since 1 July 1997, there have been five interpretations of the Basic Law by the Standing Committee.

9. I have mentioned earlier that Hong Kong courts, like its counterparts in many other common law jurisdictions, have had to develop through its case law a number of principles in the area of human rights in order to accommodate the numerous interests that are bound to exist. Often, it is a question of balance and this is where the common law has both advantages and disadvantages. The chief advantage is that of flexibility so that the courts are able in any given case to meet the justice of the situation. The disadvantage is the criticism that inconsistent results are generated which to the general public, and even to lawyers, may sometimes be hard to grasp.

10. I will later in this talk deal with the principles that have come from decisions of the courts. They have had to be developed owing to the lack of specific guidance that is provided by either constitutional documents or legislation. In Hong Kong, the guidance has been quite limited :-

(1) As we have seen, the Basic Law contains a number of provisions setting out human rights and liberties. None of them, however, appears to be qualified. For example, the freedom of speech and the freedom of assembly (Article 27) are stated in unqualified terms but we know that qualifications must exist. Article 36 states that there is a right to social welfare but no qualifications are again given to this right and yet, as a matter of commonsense, the right cannot be an unlimited one, particularly as the Government has an obligation to formulate policies on the development and improvement of the system in the light of economic conditions as

[17] See *Vallejos v Commissioner of Registration* (2013) 16 HKCFAR 45, at para. 107.

well as social needs (see Article 145). The point is that while there often must be limits to human rights, where the line is to be drawn is often the difficult exercise and little guidance is given to the courts here.

(2) Where guidance is given, it is often couched in such general terms that the task of the courts is often not necessarily made easier at all. The best examples in this context are contained in the Bill of Rights (which, as stated above, mirror the provisions of the ICCPR) :-

(a) Article 16 (Article 19 of the ICCPR) deals with the freedom of opinion or expression but there can be restrictions if they are provided by law and are necessary for the respect of the rights and reputations of others or for "the protection of national security or of public order (ordre public) or of public health or morals". Closely related provisions include also Articles 17 and 18 dealing with, respectively, the right of peaceful assembly and the freedom of association (Articles 21 and 22 of the ICCPR). The stated restrictions on these rights are the same as for the freedom of expression and opinion.

(b) I accept that the references to the rights and reputations of others (directed chiefly at the law of defamation), national security and public health will in practice pose relatively few problems. However, the reference to "ordre public" is problematic. Laws are intended to be sufficiently clear so as to allow ordinary persons to regulate their affairs and know

where they stand as far as their rights are concerned. While the term "ordre public" is often used in constitutional instruments, its meaning is obscure to an ordinary person. It is difficult enough for a judge or lawyer to understand what it means. "Ordre public" has been described by the Hong Kong Court of Final Appeal as an imprecise and elusive concept.[18] It means much more than just public order in the law-and-order sense, but beyond this its outer limits cannot clearly be defined.[19] The Siracusa Principles[20] defines the term as "the sum of rules which ensure the functioning of society or the set of fundamental principles on which society is founded. Respect for human rights is part of public order (ordre public)." Professor Alexandre-Charles Kiss has described the concept as one that is not absolute or precise and cannot be reduced to a rigid formula but must remain a function of time, place and circumstances.[21] He concludes by saying, "[ordre public] may be understood as a basis for restricting some specified rights and freedoms in the interest of the adequate functioning of the public institutions necessary to the collectivity when other conditions … are met … It must be remembered, however, that in both civil law and common law systems, the use of this concept implies that courts are available and function correctly to monitor and resolve its tensions with a clear knowledge of

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[18] See *Leung Kwok Hung v HKSAR* (2005) 8 HKCFAR 229, at para. 70.

[19] See *HKSAR v Ng Kung Siu* (1999) 2 HKCFAR 442, at 457FI, 459I-460A.

[20] The Siracusa Principles on the Limitation and Derogation of Provisions in the ICCPR.

[21] Chapter 12 (Permissible Limitations on Rights) contained in *The International Bill of Rights : The Covenant on Civil and Political Rights* (edited Louis Henkin, Columbia University Press 1981) at Pg. 302.

the basic needs of the social organization and a sense of its civilized values." Discussed in this way, the application of the term "ordre public" can become extremely problematic as it may give rise to decisions based on subjective criteria.

(c) In *Leung Kwok Hung*, a case determined by the Court of Final Appeal in 2005, the Court had to consider the constitutionality of a statute that dealt with public order. Under the Public Order Ordinance,[22] a discretion was given to the Commissioner of Police to restrict the right of peaceful assembly. Under the Ordinance, written notice had to be given to the police if it was intended to hold a procession and this notice was required to be given at least one week in advance. Upon notification of the intention to hold a procession, the Ordinance[23] gave the Commissioner of Police a discretion to object "if he reasonably considers that the objection is necessary in the interests of national security or public safety, public order (ordre public) or the protection of the rights and freedoms of others". The reference to the term "ordre public" was intended to bear the same meaning as the term was used in the ICCPR : s 2(2) of the Ordinance stated expressly that the term "ordre public" should be interpreted in the same way as under the ICCPR. The Court of Final Appeal considered that it was essential to draw a distinction between the use of this concept at the constitutional level on the one hand and its use at the

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22 Cap. 245.

23 Section 14(1).

statutory level on the other.[24] The constitutional right in issue in the case was the freedom of peaceful assembly protected under both Article 27 of the Basic Law and Article 17 of the Bill of Rights (Article 21 of the ICCPR). This was stated to be a fundamental right closely associated with the fundamental right of the freedom of speech; these rights were "precious and lie at the foundation of a democratic society".[25] Owing to the importance of this right, as the Bill of Rights (ICCPR) makes clear, any restrictions must be "prescribed by law"[26] – this is the principle of legal certainty. In order to satisfy this principle, the courts have held that this means that the law concerned must be adequately accessible to the citizen and must also be formulated with sufficient precision to enable citizens to regulate their conduct.[27] Reference can be made to the decision of the European Court of Human Rights in *Sunday Times v United Kingdom*[28] where the requirement of sufficient precision meant that citizens should "be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail". In *Leung Kwok Hung*, provision that allowed the Commissioner of Police to object on the basis of "ordre public" did not satisfy the "prescribed by law" requirement. Particularly where fundamental rights

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[24] At para. 67.

[25] At para. 1.

[26] Article 39 of the Basic Law.

[27] At para. 27.

[28] (1979-1980) 2 EHRR 245, at para. 49.

were concerned, it was important that any discretion that could interfere with such rights had to be sufficiently clear if the principle of legal certainty was to be satisfied. The Court was of the view that the deployment of the concept "ordre public" at the statutory level failed to satisfy the principle of legal certainty. To allow the Commissioner of Police to exercise a discretion to object on this basis plainly did not provide an adequate indication of the scope of the discretion; it was inappropriate to use a concept taken from the ICCPR as the defined basis for the exercise of discretion.[29] Accordingly, the Court of Final Appeal held the statutory discretion contained in the relevant provisions of the Public Order Ordinance to be unconstitutional.[30] The remedy that was granted by the Court was to sever the term "ordre public" from the statutory provision. This remedy, that of severance, whereby the objectionable parts of a statute are deleted while leaving the rest of the provision intact is a common law invention so as to do minimal damage to a statute while at the same time ensuring the constitutional integrity of the provision.[31]

(d) In other provisions of the Bill of Rights (or the ICCPR), the stated limitations, while they may pass the constitutional requirement of legal certainty, nonetheless will leave much

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[29] At para. 77.

[30] By reference to both the Basic Law and the Bill of Rights Ordinance, the courts in Hong Kong are given the power to make declarations of unconstitutionality.

[31] This 'tool' has been utilized in Hong Kong (see also *Ng Ka Ling v Director of Immigration* (1999) 2 HKCFAR 1, at 39D-F as well as considered in the United Kingdom (*Independent Jamaica Council for Human Rights (1998) Ltd v Marshall-Burnett* [2005] 2 AC 356, at para. 22 and Canada (*Schachter v Canada* [1992] 2 SCR 679, at 696).

to the courts and individual judges to do in order to determine their precise application and ambit in any given situation. Take, for example, the right to equality before the courts and the right to fair and public hearing contained in Article 10 of the Bill of Rights (Article 14.1 of the ICCPR). The right is similar to the requirement in Article 30 of the Swiss Constitution that unless the law otherwise provides, court hearings and the delivery of judgments shall be in public. Article 14.1, dealing with the right to have a public hearing, is subject to the exception of the press or the public being excluded "for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice." Apart from the concept of ordre public (discussed earlier), criteria such as morals or the private lives of the parties can potentially give rise to vastly differing interpretations and application. In practice, the Hong Kong courts have been restrictive and excluded the public from hearings involving children or where pre-emptive commercial remedies have been sought where there may be considerable commercial damage done to a party if proceedings were conducted in public.[32] The concept of open justice is an important one.

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[32] Such as in the case of what are known as *Mareva* injunctions whereby a freezing order is obtained on a defendant's assets so as to avoid the possibility of a person dissipating assets in order to frustrate any judgment obtained against that person.

(3) By way of contrast however, in the area of immigration control, clear boundaries exist. I have made much reference to the applicability of the ICCPR in Hong Kong through the Hong Kong Bill of Rights Ordinance. That Ordinance, which contains the Bill of Rights, has an important qualification to the application of the rights set out in the Bill of Rights by stating that the rights have no application in the case of immigration control. Section 11 of the Ordinance contains the restriction : "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." The Court of Final Appeal has just finished hearing arguments on the ambit of s 11 of the Hong Kong Bill of Rights Ordinance.[33] Judgment is awaited.

11. I now turn to the principles that have been developed by the courts in order to come up with a coherent approach to dealing with human rights, concentrating on self-imposed (as opposed to statutory or constitutionally imposed) limits.

12. There have of course been many statements of principle by the courts, in the course of many judgments (which, as I have earlier indicated, contain full reasons as part of that facet of the rule of law being transparency). Such principles include :-

(1) A purposive approach is to be adopted in construing constitutional provisions. It is commonplace for constitutional instruments to use

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[33] *Comilang and Others v Director of Immigration* FACV 9 of 2018. The hearing concluded on 1 March 2019.

general language. It is, however, left to the courts to apply these general provisions to specific factual situations. Understanding the purpose of provisions becomes critical. In order to ascertain the purpose of a provision, resort may be had to extrinsic materials.

(2) It follows from this that courts should not simply adopt a literal, technical, narrow or rigid approach in construing constitutional provisions. Looking at purpose and context becomes important when attempting to discover the meaning of words. I have earlier made reference to the term "ordre public". Discovering the meaning of such a term requires the court to look closely at context and purpose.

(3) As far as human rights are concerned, courts should give a generous and liberal interpretation to such rights simply because these are regarded as fundamental rights and freedoms. Correspondently, any restriction on rights must be narrowly construed. This is not to say that courts should ignore what should be the true meaning of words after looking at their context and purpose, only that when doubts or ambiguities exist, the courts ought to err on the generous side as far as rights are concerned and adopt a stricter, narrower view when rights are sought to be restricted. While at first blush this may appear, at least in theory, to be problematic, it is workable.

(4) Some examples can be given :-

(a) It is common in modern times for there to be strict measures, whether statutory or administrative, regarding national

security and often such measures involve the liberty of the individual. There have been numerous cases in many jurisdictions that have grappled with the many difficult legal issues arising in this context. While obviously much weight has to be given to the views of the executive and legislature, the courts nevertheless have the duty to closely examine the relevant measures from a human rights point of view. In one of the most important cases in this area decided by the British House of Lords, *A v Secretary of State for the Home Department*,[34] Lord Nicholls of Birkenhead said this :[35] "The subject matter of the legislation is the needs of national security. This subject matter dictates that, in the ordinary course, substantial latitude should be accorded to the legislature. But the human right in question, the right to individual liberty, is one of the most fundamental of human rights. Indefinite detention without trial wholly negates that right for an indefinite period". More to the point when dealing with the meaning of a statutory provision affecting the liberty of persons, Lord Bingham of Cornhill (one of the leading human rights jurists ever in the United Kingdom) said,[36] "It is not, however, acceptable that interpretation and application of a statutory provision bearing on the liberty of the subject should be governed by implication, concession and undertaking".

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[34] [2005] 2 AC 68. This is commonly referred to as the *Belmarsh* case. The House of Lords usually sits 5 members; there were 9 members sitting on this case such was its importance.

[35] At para. 81.

[36] At para. 33.

(b) In Hong Kong, it is provided by s 5(1) of the Hong Kong Bill of Rights Ordinance that in time of public emergency which threatens the life of the nation, measures may be taken to derogate from the Bill of Rights. However, such measures must not derogate from a number of stated rights, such as the right not to be subject to CIDTP.[37] It was by reference to these provisions that the Hong Kong Court of Final Appeal in *Ubamaka v Secretary for Security* held that notwithstanding the wide words excepting the application of the Bill of Rights, as far as immigration was concerned,[38] this did not affect non-derogable rights such as the right not to be subject to CIDTP. The Court made express reference to the requirement to interpret constitutional provisions purposively. As Ribeiro PJ put it,[39] "Accordingly, any apparent conflict between section 5 and section 11 [of the Hong Kong Bill of Rights Ordinance] or any ambiguity as to the statutory purposes of those provisions should be resolved by giving precedence to section 5, according decisive weight to the non-derogable and absolute character of the rights protected by BOR Art 3 [the right not to be subject to CIDTP]". This is similar to the position in Switzerland when in 1996, both chambers of the Federal Parliament[40] declared invalid a People's initiative[41] which violated the peremptory prohibition of refoulement (the deporting of

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37 Section 5(2)(c) of the Hong Kong Bill of Rights Ordinance.

38 I have earlier referred to s 11 of the Ordinance : para. 10(3) above.

39 At para. 115.

40 Pursuant to Article 139(3) of the Constitution.

41 The Volksinitiative under Article 139(1) of the Constitution.

persons to a country where they would face the possibility of torture, inhuman or degrading treatment).[42]

13. Two of the most important factors which give rise to limitations on the enforcement of human rights are first, the concept of margin of appreciation accorded to the executive or legislature and secondly, on a broader scale and linked to the first, the relevance of the democratic process (in other words, the will of the people).

14. The concept of margin of appreciation or, as it is sometimes referred to, deference, is essentially a recognition on the part of the courts that in the area of the enforcement of human rights, it is proper to accord some weight (sometimes it can even be decisive) to the views or policy reasoning of the executive or legislature as regards the relevant measure that is being examined by the court. Originally, the concept derived from European jurisprudence when the European Court of Human Rights had to deal with the area of discretion left to Member States. A good statement of the concept can be found in the speech (judgment) of Lord Hope of Craighead in *R v Director of Public Prosecutions ex parte Kebilene*[43] when he said,[44] "In this area [where human rights are affected] difficult choices may have to be made by the executive or the legislature between the rights of the individual and the needs of society. In some circumstances it will be appropriate for the courts to recognize that there is an area of judgment within which the judiciary will defer, on democratic grounds, to the considered opinion of the elected body or person

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42 See the article "The prohibition of torture as an international norm of *jus cogens* and its implications for national and customary law" by Erica De Wet (2004) European Journal of International Law 97, at 101.

43 [2000] 2 AC 326.

44 At 380H-381D.

whose act or decision is said to be incompatible with the Convention [the European Convention on Human Rights]."

15. The concept of margin of appreciation has been applied in Hong Kong to accord due weight to the views and policies of the legislature, and, where professional ethics are concerned, to the views of the relevant governing body. Conceptually, the margin of appreciation principle reflects the different constitutional roles of the judiciary on the one hand and the executive and the legislature on the other.[45] As Lord Hobhouse of Woodborough put it,[46] "the judiciary is the part of government which has the responsibility for applying the law". Where, however, matters of state or community policy are concerned, these are matters predominantly for the executive or the legislature.[47] The independence of the judiciary, mentioned earlier, is a vital feature of its separate role in this structure.

16. *Fok Chun Wa* involved the right of equality in the context of hospital charges for obstetric services in public hospitals. The Government had determined that the fees payable by non-Hong Kong residents would be substantially higher than those charged to Hong Kong residents. The fees payable by Hong Kong residents were subsidized from the public purse. Though the right of equality was involved, the Court attached great weight to the views of the Government in this area of socio-economic policy. In this context, the Government had to distribute and devise economic policies in

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[45] See *Fok Chun Wa v Hospital Authority* (2012) 15 HKCFAR 409, at para. 64; see also *Kwok Cheuk Kin v Secretary for Constitutional and Mainland Affairs* (2017) 20 HKCFAR 353, at para. 40.

[46] In *Wilson v First County Trust Ltd (No. 2)* [2004] 1 AC 816, at para. 131.

[47] *Fok Chun Wa* at para. 64.

relation to limited resources. Applying a proportionality test,[48] the Court concluded that the Government was justified in charging two levels of fees based on whether the affected person was or was not a Hong Kong resident, notwithstanding that this resulted in unequal treatment. Although the outcome in the case was perhaps not surprising, the Court emphasized that even in the area of socio-economic policy, no *carte blanche* is given to the Government. The courts have the ultimate responsibility of determining whether as a matter of law acts of the Government are constitutional or lawful. Particularly where core-values (such as unequal treatment on the basis of race, colour, gender, sexual orientation, religion, politics or social origin) are involved, the Court would rarely find any encroachment to be acceptable because these are fundamental societal values and the Court will subject the relevant measure to severe scrutiny.[49]

17. The facet of the will of the people raises the perennially hotly debated issue of whether courts should leave it to the democratic or political process to resolve controversial issues rather than resolving these issues themselves. There are principally two schools of thought. On the one hand, when very sensitive issues arise relating to, say, abortion, same sex arrangements, even the rights of prisoners, there are inevitably intertwined with the legal issues which arise (they obviously arise as human rights are involved) important matters of policy on which the people and those elected

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[48] The well-known proportionality test involves the following exercise. Where a fundamental right has been adversely affected, the public authority (usually the Government) will be required to demonstrate that the impugned measure that has adversely affected an identified human right or has encroached upon it pursues a legitimate aim, that it is rationally connected to that aim and that the effect of the impugned measure is no more than necessary to deal with the asserted legitimate aim. To these three steps in the proportionality exercise is now added a fourth, namely, that after the three steps have been satisfied, it is also necessary to show that a reasonable balance has been struck between the societal benefits of the encroachment on the relevant human right and the extent to which that right has been encroached or adversely effected. This was the effect of the decision of the Court of Final Appeal in *Hysan Development Co Ltd v Town Planning Board* (2016) 19 HKCFAR 372. This fourth step requires the Court to take an overall, balanced view : see *Kwok Cheuk Kin* at para. 47.

[49] See *Fok Chun Wa* at paras. 77 and 78.

representatives of the people will have views and often strong views. There have been many pieces of legislation which deal with matters that impinge on human rights : the law on same sex marriages and homosexuality readily spring to mind. Why, it is asked rhetorically, should the courts even touch upon these types of issue and not simply leave it to the will of the people to decide? And as far as human rights are concerned, if, as in the case of the ICCPR and other Conventions, States are able to enter reservations or where international treaties or conventions are concerned, even where a country has entered into them, they may not necessarily be implemented into domestic law (I have earlier dealt with the common law dualist principle), does this all not suggest that human rights are not to be divorced from the political or democratic process? The argument on the other hand is equally persuasive. It accepts the fact that judges are not elected by the people (save in some jurisdictions) but notwithstanding this it remains the duty of the Judiciary to enforce and apply the law. This is so particularly in the area of human rights because rights belong to everyone and not just to the majority within a community. The right of equality extends to everyone equally without distinctions of any kind such as race, colour, sex, language, religion, political or other opinion, national or social origin or other status.[50]

18. Both points of view are valid and this is precisely the difficulty. Merely to leave the matter to democratic or political processes takes time and may never even come to pass. Certain topics may be so controversial that it may not be politically desirable to raise them. Each community may be different in this respect. And yet courts may feel an understandable reluctance to tackle such issues when they may well be matters that are appropriate for the

[50] Article 1 of the Hong Kong Bill of Rights (Article 2 of the ICCPR).

legislature to tackle. In *W v Registrar of Marriages*,[51] the Hong Kong Court of Final Appeal had to deal with the case of a transsexual person who through a sex change operation had become a woman. She wanted to marry her male partner. The Registrar of Marriages refused on the basis of the existing marriage legislation which determined sexual identity from the biological and chromosomal position at birth. Thus, notwithstanding that the applicant (W) had undergone a sex change operation and who therefore lived as and appeared in all respects to be a woman, she could not marry a man. The Court of Final Appeal held that the essence of the constitutional right to marry[52] was infringed by not allowing a transsexual to marry a member of the opposite sex. The judgment undertook an extensive analysis of the applicable legal principles. Important for our purposes was the rejection of the argument that there should be a consensus of the Hong Kong community on the issue of whether transsexuals should be permitted to marry members of the opposite sex. Even if a major consensus could be ascertained it was said that "Reliance on the absence of a majority consensus as a reason for rejecting a minority's claim is inimical in principle to fundamental rights."[53] Put another way, the court's duty is to protect minorities from the excesses of the majority. This principle applies obviously to the concept of margin of appreciation as well. There are two further points in relation to *W* that are of interest :-

(1) First, there was a dissenting judgment in the case. Chan PJ was of the view that there should be a proper review of the issue of transsexuals "with a view to propose changes in the law".[54] He felt that there was insufficient evidence to show that the circumstances

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51 (2013) 16 HKCFAR 112.

52 Contained in Article 37 of the Basic Law.

53 At para. 116.

54 At para. 197.

in Hong Kong were such as to justify the Court interpreting Article 37 of the Basic Law to include transsexual men and women for the purpose of marriage. This dissent underlies precisely the two divergent approaches mentioned earlier.

(2) Secondly, although the majority judgment was that a court declaration should be granted to the effect that a transsexual could marry a member of the opposite sex, the Court postponed making the declaration effective immediately but instead gave the Government 12 months to deal with the matter by legislation. After 12 months, no legislation was able to be passed. The declaration made by the Court accordingly became effective.

19. I now make some concluding remarks. The title of this talk asks the question : how effective are the courts in the protection of human rights? This is a question that can perhaps best be answered by others rather than by me. I have tried to place before you the very real limits and limitations that exist and how the courts have dealt with them. My own view is that notwithstanding these limits and limitations, judges must adhere to their judicial oath in discharging their constitutional duty to apply the law and in spite of the fact that the determination of legal problems may also be the province of others such as the executive or legislature, the courts must not (and do not in my experience) shirk from their responsibilities. It may be easier in some cases to leave it to others to shoulder the responsibility rather than confront difficult issues that may attract criticism, but it would not be the right approach. As my previous talk here suggested, courage is sometimes needed but first and foremost must be the recognition of a judge's own responsibilities, and it is a constitutional one, to the community.

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