

**Speech by The Honourable Chief Justice Geoffrey Ma
at the
Networking Dinner hosted by Tokyo ETO
Seoul, Korea
23 September 2019**

**The Rule of Law, the Common Law and Business:
a Hong Kong Perspective**

1. With the recent troubling events in Hong Kong, the focus has been on the rule of law. This concept is as important here in Korea as it is in Hong Kong. Hong Kong is a part of the People's Republic of China (PRC). On 1 July 1997, the PRC resumed the exercise of sovereignty over Hong Kong. The constitutional position of Hong Kong is contained in a constitutional document called the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China.¹ It is significant in at least the following two respects: first, it states the principles reflecting the implementation of the PRC's basic policies towards Hong

¹ Promulgated and adopted by the National People's Congress under the Constitution of the PRC.

Kong² – the main one being the policy of “One Country Two Systems”; and secondly, for the first time in Hong Kong’s history, fundamental rights are expressly set out. These fundamental rights include the freedom of speech, the freedom of conscience, access to justice etc.

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

² This is stated in the Preamble to the Basic Law.

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

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

(1) First, the actual persons who are judges from common law jurisdictions sitting on the CFA³ comprise the most eminent judges in the common law world. From Australia alone, the Court at present has four members, being two former Chief Justices and a former justice of the High Court of Australia and the former Chief Justice of New South Wales.⁴ In the past, we have also had two other former Chief Justices and two former justices of High Court of Australia.⁵ This will doubtless

³ They are referred to as non-permanent judges of the Court of Final Appeal (NPJs).

⁴ Murray Gleeson, Robert French, James Spigelman and William Gummow.

⁵ Sir Anthony Mason, Sir Gerard Brennan, Sir Daryl Dawson and Michael McHugh.

continue. From the United Kingdom, the current non-permanent judges of the CFA include the current President of the Supreme Court, two former Presidents of the Supreme Court as well as a current member of that court.⁶ Both Lady Hale and Lord Reed have been sitting in the recent *Brexit* case. The former Chief Justice of the Supreme Court of Canada also sits in the Court of Final Appeal.⁷

(2) Secondly, and this is perhaps the most important aspect, the presence of these overseas judges, who are without doubt leading jurists of the present (or indeed, any) generation, adds significantly to the legal expertise of the Court and they make a

⁶ Baroness Hale of Richmond, Lord Phillips of Worth Matravers, Lord Neuberger of Abbotsbury and Lord Reed. The other non-permanent judges from the United Kingdom include Lord Hoffmann, Lord Millett, Lord Walker of Gestingthorpe, Lord Collins of Mapesbury and Lord Clarke of Stone-cum-Ebony.

⁷ Chief Justice McLachlin.

significant contribution to the cases before the CFA and to Hong Kong jurisprudence generally.

- (3) Thirdly, the NPJs sit on Hong Kong's highest court without any restrictions as to the type of cases heard by them. This is an important point of principle because NPJs are not in any sense foreign judges: when they sit in Hong Kong, they are Hong Kong judges and they have an equal say in the collegiate panel of five judges in the CFA. In every one of the most important cases the CFA has heard over the past 22 years, a common law NPJ has sat and written judgments in such cases. These include all of the constitutional law cases heard by the CFA, most of which have been high profile ones.

5. I now turn to the theme of the rule of law and its connection with business. The link between economic considerations on a global scale (meaning business, trade and investment) – global economy – and the rule of law is not initially an easy concept to grasp. When I was a barrister, practising mainly in commercial law, I saw the link as many still regard it today, in somewhat narrow terms; that the relevance of the rule of law to economics was merely the existence of an economic or business friendly legal environment in any given jurisdiction. Accordingly, a jurisdiction that had the rule of law was one in which laws were certain and where the law merely complemented economic activities. However, is this really the full extent of what the business community or the international investor expects from the rule of law? Well, one supposes just as there will be different types of businesspersons or investors (some are short term speculators, others medium term, still some

others into long term investments), different points of view will be held. But this is an unsatisfactory answer and really provides very little insight into the topic we address this evening.

6. It is at this point we should first set out a definition of the rule of law. For me, the rule of law presupposes first, the existence of laws that respect the dignity, rights (including economic rights) and liberties of the individual and corporations, and secondly, the existence of an institution (we of course mean here an independent judiciary) to enforce these rights and liberties, and there is effective access to those institutions. The references to dignity and liberties in the context of rights are important; they underline the point that laws must themselves be just and respect what we term “human rights”. The reference to access (some refer to this as access to justice) is also important. Perfect laws and a perfect

judiciary (assuming perfection can ever be achieved) are one thing but they are not enough: one must gain access to them in order to be in a position to enjoy rights and liberties.

7. I believe that any global economy, and any place within it where businesspersons, traders and investors are to be found, must have a sound legal foundation. Such legal foundation clearly means the existence of the rule of law in the relevant place. And the rule of law in this context means primarily the existence of those facets I have earlier identified – the existence of laws that respect the dignity, rights and liberties of the individual (and this includes in particular human rights and fundamental freedoms) and an independent judiciary which will effectively enforce them.

8. The respect for human rights and fundamental freedoms, and their enforcement, are important to global economic development for the following reasons:-

- (1) Economic development in today's world requires international participation and that means, as an important part of this, international investment. International investment requires a sound legal foundation in the relevant place where the investment is to be made.

- (2) The legal system of that place then assumes immense importance. In jurisdictions like Korea and Hong Kong where the principle of equality before the law is a key concept, due recognition of this in reality will inevitably promote economic development and investment. The reason for this is

easy to grasp. A foreign investor, just like the citizens of a place, will be subject to the laws of that place. It is therefore only natural for that investor to compare himself or herself with other people who are subject to the law. If others who, like the investor, also have rights and liberties find themselves being treated arbitrarily, or their rights and liberties are not in reality enforced, then the same fate might one day be suffered by the investor. Where there is arbitrariness or a lack of respect for rights, this breeds inequality. A person treated advantageously one day can quite easily be treated in the opposite way the next. This is the exact reverse of what the rule of law seeks to achieve.

- (3) The enforcement of rights lies with the courts. The litigants before the courts include a multitude of

people, corporations and entities, each with different backgrounds and issues, each with a different problem to be solved. And yet each person is – or at least should be – treated in exactly the same way by the courts. In the same way as the law applies equally to all, it is the same courts which deal with the disputes before them, whatever the nature of the dispute and whatever the identity of the parties. There may be minor differences in the procedures of different tribunals or in the monetary jurisdiction of different levels of courts, but fundamentally the courts will apply the same rules to everyone before them, both the law and the spirit of the law. No litigant or class of litigant has any preferential treatment. In the resolution of any dispute, courts may have to balance a variety of diametrically

opposed interests that come before them, but all parties are treated equally.

- (4) The enforcement of rights and respect for them also lie with those who wield the most power and influence. In all jurisdictions, this means in particular the government. To everyone subject to the law, and this includes of course investors, it is important that the government respects rights and fundamental freedoms, the law and its spirit. It is also of importance that the government is itself subject to the law, and is treated equally with other litigants in the courts.

9. I have already made reference more than once to the importance of an independent judiciary. This is crucial to the rule of law. Apart from enforcing the rights of persons and

resolving the very many disputes that come before them, courts in discharging the constitutional duty on them also ensure that those in power do not abuse their position and at all times act in accordance with the law. In addition, in the discharge of their constitutional duty, judges must act with transparency. Court procedures and court proceedings must be open to the public (save in exceptional circumstances). Judgments must be properly reasoned in order to demonstrate clearly that the court has applied the law and its spirit – and only these matters – and has not been influenced by anything else. Judgments must also be easily accessible.

10. To conclude, it must be uncontroversial that a jurisdiction committed to the ideals and practicalities of the rule of law is a jurisdiction which is critical to a global economy. After all, global economies through the ages have depended on the efficacy of mercantile or business law and

such law depends entirely on the existence of the rule of law
in practice.

* * * * *