

Following is the speech by the Chief Justice of the Court of Final Appeal, Mr Geoffrey Ma Tao-li, delivered at "University Assembly - A Respect for Rights and a Respect for the Rights of Others" at Lingnan University today (March 17):

It is a great honour and privilege to be invited to address the University Assembly today, and I thank the University profoundly. Conscious of my own limitations and area of expertise, I therefore propose to talk within the confines of the operation of the law in Hong Kong and my experiences here, recognising of course the breadth of interests and disciplines in the audience before me.

The experience of the law in operation in Hong Kong has undoubtedly been the respect for legal rights (and here rights include in particular human rights) and, perhaps more important, the respect for the rights of others. The focus of my talk is to explore a little how the law copes with conflicting rights, when interests of different sections of society collide with one another.

A population of seven and a half million people trying to live together as a community is bound to have some common goals and attributes: we talk often about "the Hong Kong spirit", hard work, economic well-being and success, all matters that bind a decent and honest society. But I would suggest that it is the way the community deals with the obvious and natural differences among the population that provides a useful (and objective) litmus test for the success of that community. Because ultimately, it is the respect for rights and the rights of others that will ensure the well-being of that community. It is the respect for others that provides the necessary cohesion to withstand the inevitable pressures and challenges that will always be there. A significant - some say integral - facet of this cohesive force is the law and how it operates in practice.

In a complex place like Hong Kong, which has both local and international dimensions permeating just about every facet of life here, conflicts of interests are common, perhaps even inevitable. To illustrate the theme of tonight's talk, I would like to give some real examples of factual situations encountered by the courts, which have given rise to a collision of interests:

(1) 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 1), it will generally allow such persons to remain in Hong Kong pending processing of their asylum claims (Note 2). 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 3)) that, if returned to their country of origin, they would be tortured, Hong Kong (Note 4) 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 5) 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 6).

(2) The second factual example involves again questions associated with immigration. A serial overstayer is detained by administrative detention after serving a term of imprisonment here. This particular overstayer is a person who has entered Hong Kong four times using slightly different variations of his name in passports on each occasion. On the fourth occasion, he has overstayed for nearly five years before being arrested. After serving a seven-month sentence, he is placed by the Director of Immigration under administrative detention. The term "administrative detention" refers generally to detention by authorities for reasons other than those associated with crime (in criminal matters, the detention would be by the police, the ICAC, etc, or detention

authorised by the courts such as, for example, when persons charged with criminal offences are remanded in custody). In the particular case we are discussing, the administrative detention is authorised by the Immigration Ordinance (Note 7), whereby detention of a person up to 49 days is permitted where inquiries are being made with a view to considering whether or not a removal order (Note 8) should be made by the immigration authorities. In this particular case, the overstayer was detained for, he says, longer than was necessary for inquiries to be made, particularly since he made a claim as a torture claimant under the CAT. He seeks damages against the Director of Immigration for false imprisonment. Here, the conflict of interest is as between the obvious need to control immigration (particularly in this context to ensure that serial overstayers are detained pending removal) and the value we place on the liberty of the individual. I have earlier referred to Article 154(2) of the Basic Law giving the right to control immigration to the Government. The right to liberty is contained in the Basic Law and the Hong Kong Bill of Rights (Note 9).

(3) In the third case, the facts were these. As you know, since the resumption of the exercise of sovereignty by the PRC 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 in Hong Kong. Many, for example, have married Hong Kong permanent residents and wish to settle here. They are permitted to do so. The applicable immigration policy has been in such cases that before being given permission permanently to settle in Hong Kong (Note 10), the would-be immigrants are given permission to come to Hong Kong for three month periods (Note 11) so that they can more easily adapt to life here before settling here 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 sees no reason why she should be treated differently to Hong Kong residents: she claims that her being subject to higher charges when compared to Hong Kong residents breaches the guarantee to equal treatment under the Hong Kong Bill of Rights (Note 12). From the Government's point of view, due allowance should be made for Government policy: put simply, the Government has a duty to govern and to devise policies for the community, and this should be a relevant factor to put 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 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 was doing precisely that.

(4) The fourth example also touches on the rights of Mainland immigrants, this time in relation to a person who had obtained an OWP to become a Hong Kong resident. A Mainland immigrant to Hong Kong obtains permission to reside in Hong Kong under an OWP. She is married to a Hong Kong permanent resident and regularly visited him under a TWP for the first two years of their marriage. On the day after she arrived in Hong Kong under an OWP to settle here, her husband passed away. She then finds herself homeless because the 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 applies for Comprehensive Social Security Allowance (CSSA) but is rejected by the Social Welfare Department. The Government's policy is to give CSSA only to Hong Kong residents who have resided in Hong Kong for a minimum of seven years, although the Director of Social Welfare has a discretion to waive this requirement in exceptional cases. (Note 13) The Director does not exercise this discretion in the case of the woman in our story. In conflict here are two interests. The woman relies 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 relies on its duty to govern and formulate policies, which I have already mentioned in the previous example.

(5) Our last example concerns the previous elections for the Chief Executive. Following the election of the Chief Executive, one of the rival candidates sought to challenge the election on the basis that the elected candidate had made misrepresentations in the course of campaigning. This latter aspect is not relevant for our purposes (it was found by the court that this allegation was not legally sustainable). Of greater relevance for present purposes was the point whether the legal challenge that was made by the unsuccessful candidate had been made within the permitted time. Under the relevant Ordinance (Note 14), where a rival candidate wished to challenge the election of his opponent, he had to do so by launching an election petition within seven working days after the declaration of the result of the election. It was said that this time limit was too short because, after all, some of the possible reasons to challenge the election of a Chief Executive (Note 15) may not be known until after the expiry of the seven day period. Reliance was placed on the constitutional right of access to the courts. (Note 16) It was said that the seven day limit was simply too short. As against this argument, it was contended that the need for a speedy resolution to an election result, particularly in relation to the office of the Chief Executive, was obvious. Even though the acts of a Chief Executive are deemed valid

until the court makes a declaration that he or she is not validly elected, (Note 17) from a practical point of view, any questions over the validity of an election must obviously be resolved at the earliest opportunity.

How have the courts resolved these types of dispute? The paradox about conflicts of interest in the factual situations encountered by the courts is that very often the different points of view each have some reasonable foundation to support them. In other words, what makes the resolution of these types of cases particularly difficult is the fact that the court is asked to prefer one point of view over another, when each on its face may appear reasonable. This is unlike the type of case where the court has relatively easy choices: as between honest and dishonest conduct, or as between outcomes that accord with good commercial sense and those that do not. In the type of case I have been discussing, the spectrum of possible outcomes may be a wide one and each outcome will at first blush at least appear to be a reasonable one, albeit each with diametrically opposite consequences. Anyone who takes an interest in the work of the courts can quite legitimately ask: What has been the approach of the courts and is the court's approach a principled one?

Before one goes into the approach of the courts, it is important to say something about the role of the courts in Hong Kong. The constitutional framework for Hong Kong is of course contained in the Basic Law. It is a document that is Hong Kong's own constitution and, as its Preamble states, has been enacted under the Constitution of the PRC by the sovereign body, the National People's Congress, "prescribing the systems to be practised [in Hong Kong] in order to ensure the implementation of the basic policies of the People's Republic of China regarding Hong Kong".

So, with regard to the law, what are the "systems to be practised" in Hong Kong reflecting these basic policies?

(1) The prescribed constitutional model for Hong Kong involves the separation of powers. Article 2 of the Basic Law states that Hong Kong will enjoy "executive, legislative and independent judicial power, including that of final adjudication, in accordance with the relevant provisions of [the Basic Law]". The concept of independent judicial power is reiterated in two further articles: Articles 19 (Note 18) and 85 (Note 19). Thus contained in the three provisions of the Basic Law, the independence of the judiciary in Hong Kong could not be put more clearly or emphatically.

(2) Equally clear is the system of law in Hong Kong. In Chapter II dealing with the relationship between the Central Authorities and Hong Kong, Article 18 states that the applicable laws in Hong Kong will be the Basic Law, the laws previously in force in Hong Kong, that is, prior to July 1, 1997, (being the common law, the rules of equity, statute law and customary law (Note 20)) and the laws to be passed by the

legislature. Like judicial independence, the content of Hong Kong's laws is repeated in the Basic Law: Article 84 states that the courts of Hong Kong will adjudicate cases in accordance with the laws of the Region "as prescribed in Article 18".

I have delved a little into the system of law in Hong Kong in order really to emphasise a number of connected points which may seem obvious to all of us, but it is important to repeat these points because they are core concepts to what we understand by the term the rule of law:

(1) The first is that the institution responsible for enforcing the law (and I mean this not in the sense of law enforcement agencies) is the Judiciary and this is an institution which operates independently. In the discharge of its responsibilities, the Judiciary has extensive powers. For instance, it has the power (indeed it is a duty) to declare legislation void if it is unconstitutional (Note 21).

(2) The main function of the Judiciary is of course to adjudicate on disputes (whether of a civil or criminal nature, involving public or private rights), determining the rights and liabilities of persons or parties who go before the courts. But the courts adjudicate and determine disputes only according to the law. At once it can be seen therefore that the courts are duty bound to act in accordance with principle, and this means always acting in accordance with the law. The courts and judges do not arrive at judgments in accordance with their private or subjective views: at all times they owe their allegiance to the law. We can see this in the Basic Law, it is also a key component of the common law, and it is of course in the Judicial Oath taken by all judges (Note 22).

(3) The law is, as one would expect, contained in written form (the Basic Law, statute law, the judgments of the courts). There is, however, also the spirit of the law: this is the recognition that in applying our laws, judges must appreciate the reason and purpose behind those laws. And it is fundamental that everyone - the Government, judges, the community - is equal before the law. This is particularly important to be borne in mind in the context of public law cases where, invariably, the Government is on one side. Public law cases most commonly take the form of applications for judicial review. This key concept of equality is not just a product of the common law or the Bill of Rights (I have earlier referred to Article 22 of the Bill of Rights) but it is stated in Article 25 of the Basic Law (Note 23) and repeated in Article 1 of the Bill of the Rights (Note 24).

Adherence to the law, to legal principle and to the spirit of the law, and the concept of equality before the law, are key to the existence of the rule of law. This is not original thinking by any means. In *The Politics*, Aristotle (Note 25) refers to absolutism being objectionable on the basis that the individual becomes "arbitrary and corruptible", contrasting these qualities with the law, as he pithily puts it, "which is not". Accordingly, in order for the law, and the courts which apply it, to gain the respect and confidence of

the community they serve, it must be enforced in a principled way. I fully accept that often, the public's view of the law is measured by its satisfaction with the outcome of a case. Recent polls which were conducted following a decision of the Court of Final Appeal demonstrate this. (Note 26) To many people, certainly to me, polls taken after a decision of the court reflecting satisfaction (or dissatisfaction) with an outcome perhaps matter little in the overall scheme of things. What really matters is confidence in the system of law, in the way courts arrive at their decisions (here, the important aspect is that the courts act in accordance with the law) and in the belief that the courts are independent. The particular outcome in a court case may or may not be to people's liking, but there must be consistency in and adherence to those aspects I have just set out. This is, after all from the courts' point of view, the true meaning of the public interest. When courts and judges talk about the public interest, they do not mean what the majority or a section of the public may want as the result in any case (not that this can ever be measured anyway). What is meant by the public interest in this context is the adherence to the law and to principle.

We return then to the theme of today's lecture, the theme being the resolution of disputes where there are genuine conflicts of interest, each interest being in its own way reasonable and arguable, and having some proper basis. Still on a Greek theme (perhaps more accurately, Phrygian), often it is simply not possible merely to cut the Gordian knot exactly halfway and call that justice. But at what point is the knot to be cut (for it has to be cut)? The trouble with trying to decide cases when there exist reasonable, but diametrically opposed, points of view is that a court's judgment may not fully satisfy either side at all. As Aristotle put it in *The Nicomachean Ethics* (Note 27), justice is the mean between the unfairness to A and the unfairness to B (where A and B are the parties to a litigation).

I have already postulated the position that the courts do not operate and decide cases on a random or arbitrary basis. (Note 28) So what are the applicable principles when conflicts of interest have to be adjudicated? I confine myself to the consideration of constitutional rights (human rights). Where rights collide with one another, the courts have to resolve the conflict. In doing so, certain rights may have to be qualified or given limited application or preferred over others.

Sometimes, the answer to this lies in the relevant provisions of the Basic Law or of that other document providing for constitutional rights, the Hong Kong Bill of Rights. (Note 29) The provisions themselves may state the limits of rights. For instance:

(1) Article 30 of the Basic Law states that the freedom and privacy of communication of Hong Kong residents shall be protected by law but allows the relevant authorities to inspect private communications in order to meet the needs of public security or of investigation into criminal offences.

(2) We have already referred to Article 36 of the Basic Law giving Hong Kong residents the right to social welfare in accordance with the law. Article 145, however, allows the Government to formulate policies on the development and improvement of the social welfare system in the light of economic conditions and social needs.

(3) Article 10 of the Bill of Rights refers to open justice and states that hearings should be in public. However, the press and the public may be excluded from all or any part of a trial for reasons of morals, public order or national security, or when the interest of the private lives of the parties so requires, or to the extent necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

(4) Article 15 of the Bill of Rights refers to the freedom of thought, conscience and religion. Article 15(3), however, states that freedom to manifest one's religion or beliefs may be subject only to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

(5) Article 16 of the Bill of Rights contains the important right to hold opinions without interference and the right to freedom of expression. However, Article 16(3) states that the exercise of the freedom of expression carries with it special duties and responsibilities, and may therefore be subject to restrictions which are necessary for the respect of the rights and reputations of others; or for the protection of national security or of public order, of public health or morals.

(6) Article 17 of the Bill of Rights refers to the right of peaceful assembly. Restrictions on this right are however permissible if they are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others.

Often, however, the answer is not found in the relevant written rights themselves, but has to be found in the application of the common law. I highlight a few of the relevant principles, mainly to illustrate what I have earlier called the spirit of the law.

Many constitutions and bills of rights around the world are in similar form (ours being no exception), commonly containing references to the right to life, to equality, to freedom of expression, of assembly, etc. When considering these freedoms, which are basic human rights, it is important for courts to construe them purposively and generously, avoiding a literal, technical, narrow or rigid approach. Take, for example, the important right contained in Article 27 of the Basic Law and Article 17 of the Bill of Rights: the right of peaceful assembly. It is important to understand the purpose of the right, and to give it its full effect and to allow persons properly to enjoy it. In a decision of the Court of Final Appeal of 2005, (Note 30) the court at the beginning of its judgment gave the rationale of the freedom of peaceful assembly, closely associated as it is with the freedom

of speech. It is worthwhile quoting this passage in full because it gives a good indication of the approach of the courts in construing and applying fundamental rights:

"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."

In the application and enforcement of human rights, it is important to recognise that some rights are of an absolute nature, giving no leeway for any limitation or derogation at all. Article 8 of the ICCPR states that no one is to be held in slavery. The ICCPR, as we have seen, finds force in Hong Kong through Article 39 of the Basic Law and the Hong Kong Bill of Rights. Article 4 of the Bill of the Rights contains the prohibition against slavery. I cannot think of any possible justifiable derogation from this prohibition. Even in times of public emergency which threatens the life of the nation, there can be no derogation from the prohibition against slavery (Note 31). Another right from which there can be no derogation even in times of emergency is the right that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment (Note 32). Again, this right is of an absolute nature. Accordingly, where this right collides head on with other rights or interests, it will take precedence.

I return to the first factual example I gave earlier involving the right to work of mandated refugees and screened-in torture claimants. This was considered by the Court of Final Appeal in *GA and others v Director of Immigration* (Note 33). You will recall the basic facts: where mandated refugees and screened-in torture claimants have been in Hong Kong for substantial periods of time, must they be permitted to work? 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 34) 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."

The second case example is an even more recent decision of the Court of Final Appeal: *Ghulam Rbani v Secretary for Justice* (Note 35). This was the case of the serial overstayer who was put into administrative detention and who claimed damages for false imprisonment. Again, in arriving at its decision, the Court of Final Appeal recognised the necessity for the powers of the immigration authorities to control immigration (in this case the need to detain a person pending inquiries as to whether that person should be removed from Hong Kong), but nevertheless emphasised the obligation on the authorities not to detain a person longer than necessary. You will recall that Article 28 of the Basic Law and Article 5 of the Bill of Rights emphasise the freedom of the person, and this is a very important right not to be lightly disturbed and certainly not without compelling reason. Where a period of detention is permitted for a certain purpose, a person must not be detained any longer than is necessary for that purpose. On the facts of the case, the plaintiff (the serial overstayer) was awarded \$10,000 as damages for false imprisonment. This case emphasises the value we as a society place on freedom, and the right not to be deprived of it without compelling reason, must be given full recognition.

The third case (decided two years ago) involved a non-Hong Kong resident woman, married to a Hong Kong permanent resident, seeking to challenge the Government's policy of charging non-Hong Kong residents more for hospital services than Hong Kong residents (Note 36). The challenge brought by the applicant was based on the right to equality. The counter argument was that the Government should be permitted (indeed had the obligation) freely to devise policies, particularly socio-economic policies and particularly bearing in mind in this context that in the public sphere, financial resources are limited and decisions must be made by the Government as to how Hong Kong's finite resources should be utilised. The right to equality is no doubt a fundamental human right, but it is not an absolute right (compared, say, to the prohibition against torture or slavery) and one can think of situations in which inequality is 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 37). You will note the need for a rational connection to the professed legitimate aim. In the particular case example we are discussing, 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 socio-economic policies in this regard. Drawing the line at residence status was rational and justifiable.

I now move on to the fourth case earlier mentioned. This was the decision of the Court of the Final Appeal in December 2013 regarding CSSA, which stirred some controversy when it was handed down: Kong Yunming v the Director of Social Welfare. 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 (Note 38). 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".

In our final example, this dealing with the Chief Executive elections in 2012 (Note 39), one of the issues was the constitutionality of the seven day limit for launching an election petition to challenge the election of a rival candidate. The Court of Final Appeal had to

make a decision between the competing interests of proper access to the courts and the interests of finality. The Court came down unanimously in favour of upholding the seven day limit. In the context of contested elections, particularly for the Chief Executive, the time limit was not unduly short. It reflected the political and policy considerations of the legislature and due account had to be taken of that. The limit was also comparable to the time limit in overseas jurisdictions. On the point that some of the reasons to challenge an election may not be known until after the seven days had expired, the Court said this (Note 40):

"49. Admittedly, it is possible for these situations to arise but in my view it does not follow from this that the seven day limit becomes then objectionable from a constitutional point of view. First, where a line is drawn, it is inevitable that there may be hard cases that would arise when persons fall within the wrong side of the line. Secondly, it must be borne in mind in the present context that if a situation were to arise where one or more of the grounds in s 32(1)(a) or (b) only came to light after the seven day period, the election petition procedure does not provide the only means of redress. The existence of judicial review proceedings (although not open to s 33 persons on the s 32(1)(a) or (b) grounds); the possibility of criminal proceedings under, say, ECICO (Note 41); proceedings under art 73(9) of the Basic Law; or simple political realities, are all relevant to be considered in this context."

To conclude, as we have seen, the contents of basic rights which the Basic Law as Hong Kong's constitution guarantees, if such rights are to be given content and meaning, often give rise to conflicts between well meaning persons or interests. The existence of such conflicts is perhaps inevitable but just as inevitable is the need to resolve such conflicts. Sometimes, priority needs to be accorded to certain rights over others; sometimes, a delicate balance must be reached. The underlying message is that all rights are important and it is important that all of us in the community respect these rights and respect the rights of others. This University has long had this tradition. The ethos of the University is to enable "its students to think, judge, care and ultimately act responsibly in the changing circumstances of Hong Kong, the region and the world." I could not agree more.

Notes:

1. 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).
2. This is discharged by the United Nations High Commissioner for Refugees.
3. Or simply CAT.

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

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

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

7. Under Section 32(2A) of the Immigration Ordinance Cap 115.

8. That is, an order removing a person from Hong Kong.

9. Article 28 of the Basic Law states:

"The freedom of the person of Hong Kong residents shall be inviolable. No Hong Kong resident shall be subjected to arbitrary or unlawful arrest, detention or imprisonment. Arbitrary or unlawful search of the body of any resident or deprivation or restriction of the freedom of the person shall be prohibited. Torture of any resident or arbitrary or unlawful deprivation of the life of any resident shall be prohibited."

Articles 5(1) and (5) of the Bill of Rights state:

"Liberty and security of person

(1) Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

...

(5) Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation."

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

11. Under a Two Way Permit (TWP).

12. 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."

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

14. Section 34 of the Chief Executive Election Ordinance (CEEEO) Cap 569.

15. For example, ineligibility, disqualification or corrupt conduct: see Section 32 of the CEEEO.

16. Article 35 of the Basic Law.

17. Section 38 of the CEEEO.

18. Article 19 of the Basic Law provides that the HKSAR "shall be vested with independent judicial power".

19. Article 85 of the Basic Law states:

"The courts of the Hong Kong Special Administrative Region shall exercise judicial power independently, free from any interference. Members of the judiciary shall be immune from legal action in the performance of their judicial functions."

20. Customary law refers to customary Chinese law when it applies, for example, to aspects of inheritance or land ownership.

21. This is the effect of Article 11 of the Basic Law and Section 6 of the Hong Kong Bill of Rights Ordinance.

22. In common with all judges, I took the Judicial Oath when I became a judge in 2001 and which I took again upon becoming Chief Justice in 2010, containing these words: that I would "serve the Hong Kong Special Administrative Region conscientiously, dutifully, in full accordance with the law, honestly and with integrity, safeguard the law and administrative justice without fear or favour, self-interest or deceit".

23. Article 25 of the Basic Law states: "All Hong Kong residents shall be equal before the law".

24. Article 1 of the Bill of Rights states:

"Entitlement to rights without distinction

(1) The rights recognised in this Bill of Rights shall be enjoyed without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

(2) Men and women shall have an equal right to the enjoyment of all civil and political rights set forth in this Bill of Rights."

25. 384BC - 323BC.

26. This is the case of Kong Yunming v The Director of Social Welfare, FACV 2 of 2013, December 17, 2013. It is one of the case examples I have earlier referred to. The newspapers reported a poll taken the day after the judgment in the case was handed down, showing that the vast majority of the people interviewed disapproved of the court's decision.

27. Named after his son, Nicomachus. This is often referred to simply as The Ethics.

28. In the old days when I was a law student, this was colourfully put as deciding cases "according to the size of the Chancellor's foot".

29. The provisions of the Hong Kong Bill of Rights reproduce more or less the provisions of the International Covenant on Civil and Political Rights (the ICCPR), to which the PRC is a party and which is specifically mentioned in Article 39 of the Basic Law.

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

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

32. Article 3 of the Bill of Rights.

33. FACV 7-10 of 2013, February 18, 2014.

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

35. FACV 15 of 2013, March 13, 2014.

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

37. Lawyers refer to this as the justification test.

38. Set out in para 4(4) above.

39. Re Ho Chun Yan Albert [2014] 1HKC 319.

40. At para 49.

41. The Elections (Corrupt and Illegal Conduct) Ordinance Cap 554.

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