

THE HONG KONG SOCIETY

TALK BY THE HON. MR JUSTICE HADDON-CAVE 夏鼎基

“The Importance of the Judiciary and the Bar and the ‘One Country Two Systems’ principle in Hong Kong” (一国两制)

East India Club – Monday 20th June 2016 at 6.30 pm

1. A system of rules is only as good as the people who operate it. Pupils at their local convent school had lined up in the cafeteria for lunch. At the head of the table was a large bowl of juicy red apples. A nun left a note beside the bowl, *“Take only one. God is watching.”* Moving along the lunch line, at the other end of the counter was a large bowl of delicious chocolate chip cookies where a pupil prefect had left a handwritten message. It read, *“Take all you want. God is watching the apples.”*
2. Good evening. I have been asked to speak to you this evening about *“The Importance of the Judiciary and the Bar and the ‘One Country Two Systems’ principle in Hong Kong”*. The United Kingdom comprises ‘One Country, Three Systems’ – England & Wales, Scotland and Northern Ireland. Some would say ‘Four Systems’ because of incursions by European Law. It may be ‘One country, One system’ shortly, if some of the Brexit polls are accurate. Another title for this talk could simply be: ‘The Rule of Common Law and why you need a strong and independent Bar and the Bench to do it’.
3. As a teenager, I was lucky enough to accompany the famous Hong Kong barrister, Sir Oswald Cheung QC, to the High Court which was then at Jackson Road, opposite the cricket pitch and the old Hong Kong Club building. Uncle Ozzie inspired me to read Law and apply for the Bar. At the Inns of Court Bar School, I made a great friend who was also from Hong Kong. We were called on the same day at Gray’s Inn in 1978. Our paths then diverged: he returned to take up pupillage in Hong Kong and I stayed and joined chambers of Michael Thomas QC at No. 2 Essex Court in London. 37 years later, this friend presided over the rededication of the fine neo-classical building in Jackson Road as the new Court of Final Appeal (“CFA”). His name was, of course, Geoffrey Ma, the outstanding Chief Justice of Hong Kong.
4. In his memorable speech on the occasion of at the opening of the new CFA on 25th September 2015, Chief Justice Ma said this:

“The Basic Law implements the basic policies of the Central Government regarding Hong Kong. One of the principal themes of the Basic Law is the maintenance and continuation of those institutions that have contributed to Hong Kong's success over the years. Obviously of importance among such institutions is the rule of law. Those components of the rule of law which are of particular relevance to Hong Kong - indeed to all common law jurisdictions of which Hong Kong is one - comprise first, the due recognition of rights and fundamental freedoms, not just for oneself but also for others (respect for one's rights, respect for the rights of others and equality of all persons before the law); secondly, the existence of an independent Judiciary to enforce these rights and fundamental freedoms.

5. He added:

“The rule of law provides the social stability that is the foundation of a content and prosperous society. This building is the symbol of the rule of law in Hong Kong and this institution remains as strong as it has ever been in our community. For our part, the courts and judges will always discharge their daily responsibilities with this firmly in mind.”¹

6. His words echoed those of Lord Bingham, who had this to say about why we prefer the Rule of Law to the alternative:²

“[B]elief in the rule of law does not import unqualified admiration of the law, or the legal profession, or the courts, or the judges. We can hang on to most of our prejudices. It does, however, call on us to accept that we would very much rather live in a country which complies, or at least seeks to comply, with the principle I have stated than in one which does not. The hallmarks of a regime which flouts the rule of law are, alas, all too familiar: the midnight knock on the door, the sudden disappearance, the show trial, the subjection of prisoners to genetic experiment, the confession extracted by torture, the gulag and the concentration camp, the gas chamber, the practice of genocide or ethnic cleansing, the waging of aggressive war. The list is endless. Better to put up with some choleric judges and greedy lawyers.”

7. England started on its Rule of Law journey in 1215 with Magna Carta. It has taken centuries to evolve – and we are still working on it. However, it took only a few years to draw up the Basic Law for the Hong Kong in anticipation of the People’s Republic of China’s (PRC) resumption of sovereignty on 1st July 1997. A remarkable achievement, not least because of the unique and innovative constitution solution: Hong Kong was to be a special administrative region (SAR) within the PRC, *i.e.* remain a common law jurisdiction existing within a country that, according to its constitution³, is run on socialist principles.

8. The Basic Law is a modern Magna Carta and a brilliant document. It does two main things. First, it articulates the policy of “One Country Two Systems”. Second, it guarantees fundamental rights and freedoms. It is obviously axiomatic that document and the principles enunciated in it are respected and adhered to by all the signatories to the Joint Declaration, including in particular the PRC. It is a special privilege to be sitting on the panel with, Mr Michael Thomas CMG QC, the former Attorney-General of Hong Kong, and to whom the people of HK owe a great debt for his role in drafting aspects of the Joint Declaration.

¹ See also the Hon. Geoffrey Ma CJ’s speech, “*Strength and Fragility in tandem: The Rule of Law in Hong Kong*”, The Bar Council International Rule of Law Lecture 2015,

² Lord Bingham of Cornhill, “*The Rule of Law*”, Hart Publishing 2012.

³ The Constitution of the People’s Republic of China, adopted at the Fifth Session of the Fifth National People’s Congress of 4 December 1982, promulgated for implementation by the Proclamation of the NPC on the same day.

“One Country Two Systems” (一国两制)

9. The policy of “One Country Two Systems” was intended to do what it says on the tin: fundamentally differentiate the Hong Kong SAR from the PRC and preserve for at least 50 years the key principles and institutions which have served Hong Kong so well in the past, in particular, the Rule of Law, the Common Law, and the independence of the Judiciary.
10. Article 8 of the Basic Law states in terms that the laws in force in Hong Kong prior to 1st July 1997, that is, “*the common law, rules of equity, ordinances, subordinate legislation and customary law*” are to be maintained. Article 18 reiterates this.⁴
11. Article 81 of the Basic Law states that the judicial system previously practised in Hong Kong will be maintained, except for the change consequent upon the setting up of the CFA, now the highest court in Hong Kong. Previously, the highest appellate tribunal for Hong Kong was the Judicial Committee of the Privy Council. Article 82 provides that the Court of Final Appeal in Hong Kong may, invite judges from other common law jurisdictions to sit on the Court of Final Appeal on a temporary basis as non-permanent judges (NPJs) (Article 82). This means that members of our Supreme Court, and the senior courts of Canada, Australia and New Zealand, have had privilege of being invited to sit on the HK CFA.⁵
12. Judges are to be appointed only on the basis of their judicial and professional qualities and judges may be recruited from other common law jurisdictions (Article 92). There are no nationality restrictions for judges in Hong Kong, apart from the Chief Justice and the Chief Judge of the High Court, who must be Chinese citizens who are permanent residents of Hong Kong with no right of abode elsewhere (Article 90).⁶
13. Save for the CFA, the court system remains exactly the same post 1st July 1997 as before: the Magistrates’ courts, the District Court and the High Court (comprising the Court of First Instance and the Court of Appeal). As before, there are two appellate levels: to the Court of Appeal and then to the Court of Final Appeal or, in the case of appeals for the Magistrates’ Court, to the Court of First Instance and then possibly to the Court of Final Appeal. Article 86 expressly preserves the jury system.

Independence of judiciary cannot be taken for granted

14. No fewer than three articles in the Basic Law refer to the independence of the judiciary (Articles 2, 19 and 85). An independent judiciary is key. This can never be taken for granted. As Sir Ninian Stephen said⁷, “*Judicial independence is not lightly to be assumed*

⁴ Article 9 states that both Chinese and English may be used as official languages by the Executive, the Legislature and the Judiciary.

⁵ Lawyers who are able to practise in Hong Kong may include not only local lawyers but also lawyers from outside Hong Kong (Article 94)

⁶ Article 84 provides that Hong Kong courts can refer to precedents of other Common Law jurisdictions.

⁷ Sir Ninian Stephens, “*Judicial Independence*”, the Inaugural AIJA Oration, Brisbane, 21st July 1989.

as an unthreatened norm, existing as a matter of course in every highly developed society". The gravamen of judicial independence is embedded in Judicial Oath whereby judges are required "to act in full accordance with the law, honestly and with integrity, safeguard the law and administer justice without fear or favour, self-interest or deceit".

Guarantee of fundamental rights

15. The Basic Law also sets out in constitutional terms (for the first time in Hong Kong's history) guaranteed rights and freedoms. These rights are set out in Chapter III of the Basic Law under the heading "*Fundamental Rights and Duties of the Residents*":

- (1) The right to equality before the law (Article 25).
- (2) The right to right to vote and the right to stand for election (Article 26).
- (3) Freedom of speech, of the press and of publication, freedom of association, of assembly, of procession and of demonstration; and the right and freedom to form trade unions, and to strike (Article 27).
- (4) Freedom of the person and to the principle that no one should be subjected to arbitrary or unlawful arrest, detention or imprisonment.
- (5) Freedom of movement, and freedom of emigration to other countries and regions (Article 31).
- (6) Freedom of conscience, of religious belief, to preach and to conduct and to participate in religious activities (Article 31).
- (7) Freedom to engage in academic research, literary and artistic creation, and other cultural activities (Article 34).
- (8) The right to confidential legal advice, access to the courts and the right to institute legal proceedings in the courts against the acts of the executive authorities and their personnel (Article 35).

HK Bill of Rights

16. Article 39 provided that the International Covenant on Civil and Political Rights ("ICCPR) should be implemented in Hong Kong.⁸ The ICCPR was given effect by Bill of Rights Ordinance Cap 383 which brought into force the Hong Kong Bill of Rights.

17. Thus, Hong Kong is avowedly a Common Law jurisdiction, with all the *indicia*, obligations, characteristics and judicial approach that this entails.

HK Court's power in relation to inconsistent legislation

18. Importantly, any legislation inconsistent with the Basic Law or with any of the rights and freedoms set out in the Bill of Rights, can be declared invalid by the courts (pursuant to Section 6 of the Bill of Rights Ordinance and Article 11 of the Basic Law). This gives the courts and judges in Hong Kong considerable power: they can make authoritative rulings on the meaning of the constitution that would bind the legislature in terms of what it could or could not do. Article 11 which states in part that "*no law enacted by the legislature of the Hong Kong Special Administrative Region shall contravene this law*".

⁸ The ICCPR is a document of immense resonance: as Madam Justice Abella of the Canadian Supreme Court said, it was "*born of dreadful experiences*".

Further, section 6 of the Hong Kong Bill of Rights Ordinance provides that where there is a violation of any of the provisions in the Bill of Rights, a court can grant any relief which it considers appropriate and just. These provisions in the Basic Law and in the Ordinance empower the courts to declare statutes void if held to be unconstitutional. This is not a power that exists in many jurisdictions such as the United Kingdom and New Zealand.⁹

The HK Judiciary and Bar

19. The Rule of Law is delivered by People not just Paper. The role of the Bench and the Bar is critical in delivering the Rule of Law. A proper Common Law legal system needs a strong and independent Judiciary and a strong and independent Bar. Hong Kong is a major international city with a highly sophisticated population and economy - it requires a first class legal system in order to progress and prosper.
20. The integrity of a system of justice depends to a very large extent upon the integrity of the judges. The importance of maintaining a highly skilled, highly motivated and totally independent and incorruptible judiciary cannot be understated. This means ensuring that the terms and conditions of judges are appropriate and continue to prove attractive.
21. Hong Kong is blessed with a strong judiciary. The defining feature of the Hong Kong High Court in the past has been its ability to continue to attract talent from the Bar. It is vital that it continues to attract the brightest and the best. The Hong Kong Judicial Institute, under the leadership of the Hon. Frank Stock NPJ, has given increasing focus to judicial training and forged links with the International Committee of the Judicial College of England & Wales which I chair.
22. The importance of maintaining a highly skilled, highly motivated and totally independent Bar also cannot be understated. This is for two reasons. First, a functioning legal system needs independent advocates who can present cases properly and fearlessly in court. Second, the long-term health of the Bench depends on the quality of the Bar.
23. Hong Kong is blessed with a strong Bar and one that values its independence. A strong and independent Bar is one of the hallmarks of a Common Law system. Barristers should not be afraid to speak out on legal issues which affect the community. Barristers should feel free to act fearlessly in the public interest, both for and against the Government. The Hong Kong Bar has been very active in promoting advocacy training amongst its members and has played a leading role in the International Advocacy Council (IATC), which draws together the Advocacy Training Councils of numerous Common Law jurisdictions, including the ATC of the Bar of England & Wales which I used to chair.
24. It is encouraging that the three law schools in Hong Kong (the University of Hong Kong, the Chinese University of Hong Kong and the City University of Hong Kong) are producing increasing numbers of law graduates. It is important that the Bar continues to attract the brightest and the best from the law schools, that the Bar Council continues to

⁹ *C.f.* the position in New Zealand under ss. 4 to 6 of the New Zealand Bill of Rights Act 1990; *Hansen v R* [2007] NZSC 7.

ensure professionalism and the highest ethical standards at the Bar and that strong links are maintained with the Inns of Court.

Fourth Plenary in Beijing

25. It is also pleasing to see that a resolution was passed at the Fourth Plenary in Beijing in 2015 regarding the Rule of Law. Following a series of bi-lateral exchanges between Beijing and London, involving the President of our Supreme Court, Lord Neuberger and the President of the Supreme People's Court of the PRC, Chief Justice Zhou visited the Royal Courts in London at the beginning of June for the signing with Lord Thomas LCJ of formal programme of co-operation and exchange over the next three years.¹⁰

Postscript

26. Finally, I leave you with another example of the Rule of Law. The late great Lord Chancellor, Lord Hailsham, was striding through the Palace of Westminster in his robes and big-wig, and spotting his old friend the Court of Appeal Judge, Sir Neill Lawson, he boomed out "*Neill*"; and 12 American tourists knelt.

27. I wish the Hong Kong Society every success with its new series of lectures.

¹⁰*Letter of Exchange for Judicial Exchange and Cooperation between The Supreme People's Court of the People's Republic of China and The Supreme Court and the Judiciaries of England and Wales and Northern Ireland*" (signed on 10th June 2016).