

Hong Kong Trustees' Association
Webinar, 31 March 2023

The Common law in Hong Kong:
What does it mean for business and what of its future?

1. A \$6000 prize awaits the winner of this year's Basic Law Quiz Competition organised by the Government. In the Secondary School Category, one of the sample questions asks (in a multiple choice format): "*Which of the following is protected by the HKSAR in accordance with the Basic Law?*" Four choices are given: (A) The property of legal persons; (B) Investments from outside the HKSAR; (C) The ownership of enterprises; or (D) All of the above. If a secondary school student can answer, so too can (or should) every member of the HKTA because you are involved with each of the matters I have just mentioned. The answer is of course D ("*All of the above*") and the reason for this is (again this is what I expect all those involved in trust work will know) Article 105 of the Basic Law, which provides, "*The [HKSAR] shall, in accordance with law, protect the right of individuals and legal persons to the acquisition, use, disposal and inheritance of property and their right to compensation for lawful deprivation of their property..... The ownership of enterprises and the investments from outside the [HKSAR] shall be protected by law*". The important phrases for the purposes of today are "*in accordance with law*" and "*protected by law*". A quick look at the upcoming webinars on the HKTA's website reveals topics in respect of which the law is essential (such as third party interests in family proceedings, Hong Kong's regime of taxation for foreign sourced income).

2. With this introduction, the importance of the law to business can readily be seen. The next question then arises: what is Hong Kong's legal system and does

it fulfil what is expected of it, from the point of view not only of those who do business here or have other commercial or investment interests, but also those who are part of the community here? This must be an essential question for the HKTA.

3. You will only be too aware of the commentaries, made at home and overseas, regarding Hong Kong's legal system; a number of them negative, sometimes very negative even to the extent that the courts have become or are fast becoming the tool of the Government: in recent times, these have mostly been made in the context of the National Security Law ("**the NSL**"). Criticisms are constantly made against the courts and even judges personally¹ by those who are dissatisfied with the outcome of cases, this dissatisfaction dependent into which part of the political spectrum they fit. And yet, one must sometimes question those who voice the loudest criticisms whether they really understand the fundamentals of HK's legal system, and this includes those who are in positions of influence in the community and abroad, including politicians and the press. The aim of today's talk is to identify these fundamentals. If, at its conclusion, you think you have learned nothing new, then I would actually be quite relieved, because this would indicate a knowledge of the law and legal system that perhaps escapes many people I have come across. So what are the fundamentals of Hong Kong's legal system?

4. Any discussion of HK's legal system must begin by understanding how it fits into the relevant context, by which I mean Hong Kong's constitutional position within the People's Republic of China:-

(1) This is of course crucial: Hong Kong is a part of the PRC. The sovereign body is in Beijing. On 1 July 1997, the PRC resumed the exercise of

¹ Even sometimes by "doxxing".

sovereignty over Hong Kong. The relevant constitutional document for the HKSAR is the Basic Law.² It is noteworthy in at least the following two respects: first, it states the principles reflecting the implementation of the PRC's basic policies towards Hong Kong – the main one being the principle of “*One Country, Two Systems*”; and secondly, for the first time in Hong Kong's history, there is a written constitution setting out guaranteed rights. The constitutional model of “*One Country, Two Systems*” is a unique one and it has real practical meaning. It is intended to ensure that those principles and institutions which have served Hong Kong well, will continue. Among these principles and institutions are the rule of law and the independence of the judiciary.

(2) It cannot be emphasised enough that the Basic Law was enacted under the Constitution of the PRC³ and as such, represents the highest form of law in the PRC; it was also enacted to “*ensure the implementation of the basic policies [of the PRC] regarding Hong Kong*”.⁴ It sets out HK's institutional structure and is in my view critical in understanding our legal system. We are constantly reminded of its importance and its continued relevance cannot be doubted.⁵

(3) What does the Basic Law say? It sets out the political structure of Hong Kong, comprising the Executive, the Legislature and the Judiciary. Chapter III of the Basic Law identifies in the clearest possible terms the fundamental rights that are to be enjoyed by people in Hong Kong: these

² Its full title is: The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China.

³ Adopted by the Seventh National People's Congress on 4.4.90 and promulgated by the President on the same day.

⁴ Preamble to the Basic Law.

⁵ For example, it is specifically referred to in the NSL. Article 1 states that the NSL is enacted in accordance with the Basic Law.

include equality before the law (Art.25), the freedom of speech, of the press, of association, of assembly and demonstration (Art.27), freedom of movement within Hong Kong and of travel (Art.31), freedom of conscience and religion (Art.32), the right to confidential legal advice, access to the courts and the right to institute legal proceedings against the Government (Art.35) and the implementation of international conventions (to which the PRC is a party) such as the International Covenant on Civil and Political Rights (the ICCPR) (Art.39).⁶ Incidentally, human rights and fundamental freedoms are specifically to be protected under the NSL.⁷ I have earlier made reference to the important Art.105 of the Basic Law. Not to be forgotten either is Art.110 (*“The Government of the [HKSAR] shall provide an appropriate economic and legal environment for the maintenance of the status of Hong Kong as an international financial centre”* – I emphasise the reference to *“legal environment”*).

(4) The enumeration of fundamental rights in a constitutional document is but one aspect. Just as important is to examine the structure that is in place to ensure that these promised rights are actually real and can be enforced. Here, the Basic Law sets out, again in my view in the clearest possible terms, the legal system that is mandated for Hong Kong:-

(a) As the title of this talk states, we have a common law system of law: Art.8 (which actually contains the term *“the common law”*⁸), Art.18 (applicability of the laws previously in force before 1.7.97), Art.81 (*“The judicial system previously practiced in Hong Kong shall be*

⁶ The ICCPR is legislated in HK in the Hong Kong Bill of Rights of Ordinance, Cap.383. The particular importance of the ICCPR being thus incorporated is that it introduces an international element and accepted international norms into our domestic law.

⁷ Art.4.

⁸ A term that was highlighted by the President during his visit to HK on 1.7.22.

maintained...”) and Art.84 (“*The courts may refer to precedents of other common law jurisdictions*”⁹).

(b) The independence of the judiciary, an indispensable feature of a common law system, is stated and reiterated in 3 Articles: Art.2 (“*independent judicial power*”), Art.19 (“*independent judicial power*”) and Art.85 (“*The courts of the [HKSAR] shall exercise judicial power independently, free from any interference.*”).

5. The term “*the independence of the judiciary*”, another term that is often referred to these days, needs to be understood. It does not mean, as some commentators have assumed, that the judiciary is somehow unaccountable to anyone except itself. It is actually quite the opposite of that misconception: the judiciary is fully accountable to the community in the discharge of its constitutional responsibilities. This accountability is most tangible and evident in the feature that is one of the main characteristics of the common law - transparency. I shall presently say a little more about transparency, but for now I wish to discuss the constitutional responsibilities of the judiciary. This is of course not the occasion to enter into an academic dialogue on constitutional law. For present purposes, it suffices to say that the constitutional duties incumbent on judges are largely contained in the Judicial Oath. The Judicial Oath in Hong Kong follows more or less the equivalent oath we recognise in many other common law jurisdictions: this is the requirement on judges to discharge their duties “*in full accordance with the law*” and to “*safeguard the law and administer justice without fear or favour, self-interest or deceit*”. The judicial oath taken by

⁹ Precedents are those previous decisions of the courts which lay down legal principles that are expected to be followed in the future. It is one of the main characteristics of the common law and one that is directly connected the aspect of transparency (further discussed later in this talk).

judges all over the World is to similar effect.¹⁰ The provisions of the Basic Law earlier referred to, reinforce this view and of course, Art.25 (the guarantee of the right to equality before the law) is key to understanding properly the function of the courts. Put simply, the courts do not take sides. Whoever succeeds in a case, civil or criminal, depends on the law and evidence; the courts do not have any preconceived biases nor do they favour one side over another.¹¹ To put it simply: an independent judiciary is an impartial one, there to administer the law “*without fear or favour*”. Thus stated, the proposition can almost be accepted as a truism, but how many people really appreciate this or understand the full extent of what the concept entails?

6. A critical manifestation of the independence of the judiciary is that judges are required to be completely apolitical in the discharge of their duties. This is not mere desirability: it is a constitutional imperative. The duty of every judge is only – and simply – to administer the law. This means dealing with cases strictly in accordance with the law, with no extraneous factors such as politics influencing the result. There can be no question of such a bias. Arbitrariness and bias are the opposites of acting in accordance with the law. Were this not so, this would certainly impinge on the said guarantee of equality before the law. Moreover, Art.92 of the Basic Law states that judges in Hong Kong are chosen on the basis of their “*judicial and professional qualities*”, nothing else. So, when I read commentaries and statements from people effectively demanding, at least expecting, a given result in court cases, whether civil or criminal, irrespective of legal principle and the quality of the evidence, this risks distorting the notions of fairness, equality before the law and ultimately, the rule of law itself because it introduces the notion of bias which is anathema to the concept of justice. I

¹⁰ For example, in the United Kingdom, the oath states “I will do right to all manner of people after the laws and usages of this Realm, without fear or favour, affection or ill-will”.

¹¹ This is represented by the blind-folded statue of Themis which sits atop the Court of Final Building.

mention “*legal principle and the quality of the evidence*” just now: it will come as no surprise to you that when courts determine legal disputes before them (whether civil or criminal), the outcome is wholly dependent on what is the meaning of the law and on whether the evidence fits into the requirements of that law. The meaning of the law and evidence are key.

7. At this point, it is useful to examine what we mean by the rule of law, a term I am sure you will have heard many times. It does not mean, as many assume, just law and order. Essentially, the rule of law has two important connected components. First, the recognition that the law governs not only the often complex inter-relationships and inter-actions between members of a community (both personal and commercial), but also protects those individual rights and freedoms that define the dignity that should be accorded to persons, and this include commercial persons or entities. This can be expressed as an acknowledgment of the rights of the individual, coupled with the respect for the rights of others in the community. Secondly, the rule of law requires an independent judiciary to enforce the law. Neither of these components is a political concept, but both have as their foundation equality before the law. Equality is the starting point of justice and indeed, one can argue, it is ultimately the point of justice itself. The reason why these two components of the rule of law are inextricably bound arises from the sometimes extremely difficult balances that have to be reached when dealing with the law. I have already mentioned the balancing of individual rights against the rights of others in the community. These sometimes veer in diametrically opposite directions. Take the obvious, but very real, potential conflict between the freedom of speech and the interests of the community. There are obvious limits to the freedom of speech such as the tendency to incite violence or hatred, disruption to society and other aspects of public order or security. The balances that need to be struck are sometimes complex and difficult, partly because the factors that have to be evaluated often

pull in different directions and yet may be, at least on their face, reasonable stances to adopt. Different people will have diverse views on where the balance lies, but it will be the courts which have the ultimate responsibility of determining the appropriate balance in accordance with the law and the evidence.¹² At this point, one instantly sees the absolute necessity of an independent judiciary, free of bias, as we have discussed earlier.

8. But how do we know that, in reality, the courts do fulfil the terms of their constitutional mandate and that judges do faithfully adhere to the Judicial Oath? How can we be certain that the courts do act in accordance with law and legal principle, and that judges are not biased or do not act arbitrarily? Certainly not merely on my say so nor indeed anyone else's. I suggest that if there is to be justified confidence in a legal system (and this applies to any legal system, not just Hong Kong's), the analysis needs to be undertaken objectively. Any justification must be empirically demonstrated as well. This is an important and worthwhile exercise because it is directly linked to the aspect of confidence in the legal system, which is of course vital. Without such confidence, the law cannot fulfil its primary function within the community and may even fall into disrepute.

9. The practical manifestation of the rule of law is known as the administration of justice. As such, it needs to be tangible and visible. I mentioned earlier the feature of transparency, this being one of the primary characteristics of the common law. It is also one of the most important objective and empirical features (perhaps the strongest one) that one looks for in evaluating the existence of the rule of law. The reason is that if the workings of the law in operation are transparent, its strengths, weaknesses, its content and even its spirit are all laid

¹² It is to be reiterated that the courts only deal with the law. They do not determine the political or moral merits of a legal dispute,

bare for all not only to see but also to criticise and evaluate.¹³ Only then can one effectively begin to assess the existence of the rule of law in a community. More importantly, this also ensures the accountability of those involved in the administration of justice.

10. So how transparent are the workings of the judicial system in Hong Kong? In Hong Kong, transparency is evident from two facets: first, all proceedings are open to the public;¹⁴ secondly, the reasoning of the courts in arriving at any decision is also made public, so that the public can see precisely how a court has dealt with a case and whether it has done so strictly in accordance with the law. They represent what is meant by open justice. I deal briefly with these facets in turn:-

- (1) Openness of court proceedings. The fact that any member of the public is able to observe court proceedings provides an effective supervision of the whole of the judicial process. Closely connected to this is the ability, save in exceptional and recognised circumstances, of the press to report. This is embodied in Article 14.1 of the ICCPR (Article 10 of the Hong Kong Bill of Rights)¹⁵ and is a common characteristic of common law jurisdictions. In his speech at the Ceremonial Opening of the Legal Year on 16 January this year, the Chief Justice mentioned the setting up of a committee to look into the broadcasting of some court proceedings. This will of course provide greater access to the public to observe judicial processes.

¹³ It is noteworthy that many of the criticisms that are made against the legal system in Hong Kong are made possible precisely because there is such transparency.

¹⁴ Except where the public interest dictates otherwise, such as where children are involved.

¹⁵ Public hearings and the requirement that judgments be made public.

(2) Reasoned judgments. This is for me a crucial indication of the existence of the rule of law and is one the main characteristics of the common law. Reasoned decisions demonstrate not only to the parties to the particular suit but also to the world at large, the precise thought process of the court in arriving at any decision. It exposes for detailed analysis and scrutiny the reasons for a decision and, where these reasons are not convincing, the judgment will enable the losing party to consider an appeal. In jury trials, there is of course no requirement on a jury to provide reasons but a jury's verdict is always preceded by a detailed summing-up, from which one can often work out the reasons to justify or explain a jury's verdict. A reasoned judgment will demonstrate that a court has discharged its responsibility of determining the outcome of cases strictly according to law, legal principles, the spirit of the law and has acted independently. Put another way, where the decision of a court is not accompanied by any reasons at all or there are inadequate reasons, this may give rise to some unfortunate speculation as to whether a court has really acted strictly according to the law, instead taking into account extraneous and illegitimate factors. Of course, it does not follow that where judgments do not contain reasons or have inadequate reasons that the court is not independent, but certainly the existence of the reasoned judgments will go a long way to dispel any such speculation. And if the relevant proceedings are behind closed doors, adverse speculation becomes even more intense. This is not so in Hong Kong. I know of no other public institution that goes to such lengths to explain to the world its thought processes in arriving at decisions. This transparency helps to demonstrate whether the reality matches the theory.

11. I have in this talk tried to highlight those features of Hong Kong's legal system that need to be reiterated, certainly understood, if one, like all of you, works or operates in a context in which the law is highly relevant.

They are fundamental to the concept of the rule of law itself. Judges and lawyers can of course be expected to know them, but others too, in particular those who are affected by the law (or even who take an interest in the administration of justice in Hong Kong) should be aware of its features and understand the fundamentals. It is the existence of these fundamentals in our system that have enabled Hong Kong to be recognised as one of the leading common law jurisdictions, a recognition that I hope will continue to attract the very best lawyers to join the ranks of the judiciary and one that has attracted our overseas Non-Permanent Judges to be a part of the Court of Final Appeal.¹⁶ But there is little doubt that we face challenges and increasingly, questions are raised regarding our legal system. In order to deal with these questions and to put many of the comments that are now made into perspective, it is essential to have a firm grasp of the fundamentals as I have called them.

12. And, finally, what of the future of the common law in Hong Kong? Does it have a place in contemporary Hong Kong and will it still be relevant after 2047? Will the many recent assurances by officials both in the Mainland and in Hong Kong continue to hold good in the years to come? The continued credibility, integrity and utility of Hong Kong's legal system is entirely dependent on it providing the sound legal infrastructure essential for the running of the community, to enable the rights of all who live, work and invest here to be respected and for the maintenance of Hong Kong as an international financial centre and a place where people can trust that their property will be safe. In short, our law and legal system must continue to deliver what the law in any jurisdiction is obliged to deliver. Given an understanding of the fundamentals of our system of law, you have to decide

¹⁶ The latest being Justice Patrick Keane, formerly of the High Court of Australia (that jurisdiction's highest court).

whether the common law in Hong Kong has delivered what it is supposed to deliver. In my nearly 45 years' experience in the law here, both practicing and as a judge, I believe that the common law has provided a firm foundation, not to mention stability, to enable Hong Kong to be successful and will continue to do so in the many years to come, and well beyond 2047 too. But my opinion matters little. It is what the community believes that is crucial. Confidence in the law and in the rule of law is more critical now than ever before. The community whom the law serves is watching and the world is watching too.

Geoffrey Ma

March 31, 2023