

Singapore Academy of Law
Annual Lecture on 18 August 2009:
The Development of the Common Law in Hong Kong
under “One Country, Two Systems” by
The Honourable Chief Justice Andrew K N Li

Introduction

1. I am greatly honoured to be invited to deliver this prestigious Annual Lecture. And I am delighted to have this opportunity of visiting Singapore to learn about developments in its legal system. I am most grateful to the Chief Justice and the Academy for their warm hospitality during my visit.

2. The Academy is a unique institution in bringing together various parts of the profession under one membership body. A principal mission is to nurture a strong collegiate spirit among its members in order to maintain pride in the profession and its honourable standards and practices. Over the last 20 years, its achievements have been impressive. I am sure that under the leadership of the Chief Justice, the Academy will continue to go from strength to strength.

Singapore and Hong Kong

3. In the late 1960's, during my undergraduate days in Cambridge, I met many fellow students from Singapore and Malaysia and had the opportunity of hearing Minister Mentor speak. Since that time, I have followed developments in Singapore with great interest.

4. In January 1970, nearly 40 years ago, on receiving his honorary degree from the University of Hong Kong, Minister Mentor gave his speech under the title “Hong Kong and Singapore – a Tale of Two Cities”. He discussed their respective histories and developments and concluded with this perceptive prediction.

“... into the long-term future, the peoples of Hong Kong and Singapore may have significant, even exciting roles to

play. As pioneers in modernization of their regions, Hong Kong and Singapore can act as catalysts to accelerate the transforming of traditional agricultural societies around them...

By design, Hong Kong and Singapore were chosen as trading beach-heads to a vaster hinterland ... By the accident of subsequent developments, they may become dissemination points, not simply of the sophisticated manufacture of the developed world, but more vital, of social values and disciplines, of skills and expertise.”

5. Over the last 50 years, Hong Kong and Singapore have developed in the context of different geographical and historical circumstances. Today, there are both similarities and differences between the two societies. One thing which both jurisdictions share is the common law heritage. Both have developed legal systems which have been given very high rankings in international surveys. I am sure that both jurisdictions have much to learn from each other. Certainly, Hong Kong has much to learn from the Judiciary-led reforms in Singapore, as discussed in the World Bank’s publication, which have transformed your judicial system over the last 20 years.

Theme

6. In this lecture, I shall discuss the continuing development of the common law in Hong Kong since 1997. I shall focus on the jurisprudence of the Court of Final Appeal (“the Court”) which was established to replace the Privy Council as Hong Kong’s final appellate court. A comprehensive survey of its jurisprudence cannot be attempted. I shall select from its decisions as appropriate to give a flavour of the development of the common law after 1997.

The constitutional framework

7. On the resumption of the exercise of sovereignty by the People’s Republic of China on 1 July 1997, Hong Kong was

established as a Special Administrative Region of China under the principle of “one country, two systems” in accordance with Article 31 of the Chinese Constitution. It is governed by the Basic Law, our mini-constitution, which was adopted by the National People’s Congress on 4 April 1990. The resumption of the exercise of sovereignty resulted from the Sino-British Joint Declaration which had been signed by the two Governments in December 1984.

8. The Basic Law is a national law of China enacted under and taking effect under the Chinese legal system. It provides that the laws previously in force in Hong Kong shall be maintained except for any that contravene the Basic Law and subject to amendment by the Hong Kong legislature¹. Thus, it mandates the continuation of a legal system based on the common law. The great strength of the common law is of course its ability to adapt to changing times and circumstances and the conditions of the society it serves.

The Court of Final Appeal

9. The Court of Final Appeal, which was established in 1997 as Hong Kong’s final appellate court, is a collegiate court of five judges with the Chief Justice presiding. Under the Court’s statute², one of the five judges is a non-permanent Judge. A non-permanent overseas judge is usually invited to sit³. At

¹ Article 8. See also Article 18.

² The Hong Kong Court of Final Appeal Ordinance, Cap. 484.

³ The statute provides for two panels of non-permanent judges, a panel of non-permanent Hong Kong judges, and a panel of non-permanent overseas judges, that is judges from other common law jurisdictions. Non-permanent Hong Kong judges may include serving or retired senior Hong Kong judges. Non-permanent overseas judges are serving or retired judges from other common law jurisdictions who are ordinarily resident outside Hong Kong and who have not served as judges in Hong Kong. As a matter of practice, a non-permanent overseas judge is usually invited to sit as the fifth member. The statute provides that there cannot be more than one non-permanent overseas judge sitting. Where one of the four full time members (that is, the Chief Justice and the three permanent judges) is not

present, the panel of non-permanent overseas judges comprises serving and retired Law Lords from the United Kingdom, retired judges from the High Court of Australia and the Supreme Court of New Zealand.

10. An appeal lies as of right from a final judgment of the Court of Appeal in a civil case, where the matter in dispute amounts to or is the value of \$1 million or more. Apart from this exceptional category, leave must be obtained for any appeal. The Court's power to deal with applications for leave are exercised by an Appeal Committee, consisting three Hong Kong judges, whose decision is final.

11. In 2008, 140 applications for leave were disposed of. 61% of them were dealt with on the papers without a hearing on the basis that no reasonable ground of appeal had been shown. For the remainder, apart from 3% which were withdrawn, a short hearing would be held. Leave was granted in 17% of the total, amounting to 47% of the applications orally heard. In that year, the Court disposed of 38 appeals of which 7 were criminal appeals. The caseload of the Court far exceeds the previous caseload of the Privy Council on appeal from Hong Kong. The highest number of cases from Hong Kong dealt with by the Privy Council in any year prior to 1997 was in 1996 when it disposed of 16 appeals and 28 petitions for leave to appeal.

Stare decisis

12. The doctrine of stare decisis⁴ is an essential part of a common law system.

13. In Singapore, with the abolition of all appeals to the Privy Council in 1994 and with the establishment of the Court of Appeal as Singapore's final appellate court, the Chief Justice issued a Practice Statement concerning the use of precedent in

available to sit, he must be replaced by a non-permanent Hong Kong judge.

⁴ Keep to what has been decided previously.

that Court⁵. The statement recognized the vital role the doctrine of stare decisis plays in giving certainty to the law and predictability in its application. It also recognized, however, that the development of the law in Singapore should reflect its political, social and economic circumstances and the fundamental values of its society. It adopted the position that whilst the Court of Appeal would continue to treat prior decisions of its own and of the Privy Council as normally binding, it will depart from such prior decisions, whenever it appears right to do so. Bearing in mind the consequences of departure, this power would be exercised sparingly.

14. Hong Kong had to address a similar question in the new constitutional order after 1997. The decision was made not to issue any practice statement but that the matter should be addressed when the point arises in a case.

15. In *Solicitor (24/07) v Law Society of Hong Kong*⁶, the Court addressed the question. The Court first clarified the status of Privy Council decisions before 1997. As a matter of principle, the doctrine of precedent only operates as between courts within an hierarchy in the same judicial system. Before 1997, when the Privy Council dealt with an appeal from Hong Kong, it was functioning solely as the final appellate court in and as part of the Hong Kong judicial system. Its decisions on appeal from Hong Kong were therefore binding on all courts in Hong Kong. But Privy Council decisions on appeal from other jurisdictions were not binding on Hong Kong courts since it was not functioning as a Hong Kong court as part of its judicial system. However, Privy Council decisions on non-Hong Kong appeals and also decisions of the House of Lords, bearing in mind that it shares essentially a common membership with the Privy Council, had such a great persuasive effect that they were virtually invariably followed, except where local circumstances were material. Unless circumstances in Hong Kong made a difference, the Privy

⁵ [1994] 2 SLR 689.

⁶ (2008) 11 HKCFAR 117 at 129-145.

Council on a Hong Kong appeal was unlikely to diverge from a decision its members had reached in a different capacity, especially where the earlier decision was not an old one.

16. The Basic Law enshrines the theme of continuity of the legal system after 1997. The Court held that, having regard to this, the body of jurisprudence represented by Privy Council decisions on Hong Kong appeals continues to be binding after 1997. But the Court asserted its power to depart from previous decisions of the Privy Council and the Court's own previous decisions. This is consistent with the approach adopted by final appellate courts in numerous common law jurisdictions as well as by the Privy Council. The Court recognized the fundamental importance of the doctrine of precedent in giving the necessary degree of certainty to the law and in providing reasonable predictability and consistency to its application. At the same time, the Court appreciated that a rigid and inflexible adherence to previous binding precedents may unduly inhibit the proper development of the law and may cause injustice in individual cases. Recognizing the importance of these considerations, the Court stated that it will only exercise the power to depart from previous precedents most sparingly.

Comparative jurisprudence

17. In the same case, the Court affirmed⁷ that in the new constitutional order, it is of the greatest importance that the courts in Hong Kong should continue to derive assistance from comparative jurisprudence. Hong Kong is a relatively small jurisdiction and in seeking the appropriate solution to problems, it is of great benefit to understand how similar problems have been dealt with elsewhere. Indeed, the Basic Law underlines the importance of comparative jurisprudence by expressly providing in Article 84 that the courts in Hong Kong may refer to precedents of other common law jurisdictions. The courts in Hong Kong refer to decisions of final appellate courts in other jurisdictions as well as to decisions of supra-national courts, such

⁷ at 133.

as the European Court of Human Rights⁸.

18. Singapore cases are often cited in our courts and the Court has derived assistance from them. Recent examples are in the areas of legal professional privilege⁹ and shipping¹⁰.

19. Bearing in mind that historically, Hong Kong's legal system originated from the British legal system, decisions of the Privy Council and the House of Lords would be treated with great respect. The persuasive effect of any comparative jurisprudence would depend on all the circumstances, including in particular, the nature of the issue and the similarity of any relevant statutory or constitutional provision. At the end of the day, the courts in Hong Kong must decide for themselves what is appropriate for our own jurisdiction. As will be referred to later, there have been occasions when the Court of Final Appeal has not adopted the same approach as the English courts.

Interpretation of the Basic Law

20. As many had anticipated, a great challenge for the Court has been in the area of the interpretation of the Basic Law.

21. As has been noted, the Basic Law provides for the continuation of a common law system in Hong Kong. So in accordance with the Basic Law, the courts are bound to apply the common law approach to constitutional interpretation. The Court has discussed the approach to the interpretation of the Basic Law

⁸ See Sir Anthony Mason, "The Place of Comparative Law in Developing the Jurisprudence on the Rule of Law and Human Rights in Hong Kong" (2007) 37 HKLJ 299.

⁹ In *Akai Holdings Ltd v Ernest & Young* [2009] 2 HKC 245, the Court referred to *Skandinaviska Epskilda Banken AB (Publ) v Asia Pacific Breweries (Singapore) Pte Ltd* [2007] SGCA 9.

¹⁰ In *Carewins Development (China) Ltd v Bright Fortune Shipping Ltd* [2009] 3 HKLRD 409, the Court referred to *Voss v APL Co Pte Ltd* [2002] 2 Lloyd's Rep 707.

in the leading cases of *Ng Ka Ling v Director of Immigration*¹¹ and *Chong Fung Yuen v Director of Immigration*¹².

22. In *Ng Ka Ling*¹³ and *Chong Fung Yuen*¹⁴, the Court stated that, applying the common law approach, a purposive approach should be adopted to the interpretation of the Basic Law. This is necessary:

“... because a constitution states general principles and expresses purposes without condescending to particularity and definition of terms. Gaps and ambiguities are bound to arise and, in resolving them, the courts are bound to give effect to the principles and purposes declared in, and to be ascertained from, the constitution and relevant extrinsic materials. So, in ascertaining the true meaning of the instrument, the courts must consider the purpose of the instrument and its relevant provisions as well as the language of its text in the light of the context, context being of particular importance in the interpretation of a constitutional instrument.”

23. As the Court stated in *Chong Fung Yuen*¹⁵, in a common law system, the courts’ role in interpreting the Basic Law is to construe the language used in the text of the instrument in order to ascertain the legislative intent as expressed in the language. Their task is not to ascertain the intent of the lawmaker on its own. Their duty is to ascertain what was meant by the language used and to give effect to the legislative intent as expressed in the language.

24. The language is not considered in isolation but is considered in the light of its context and purpose. Whilst the courts must avoid a literal, technical, narrow or rigid approach,

¹¹ (1999) 2 HKCFAR 4.

¹² (2001) 4 HKCFAR 211.

¹³ at 28-29.

¹⁴ at 223-4.

¹⁵ at 223.

they cannot give the language a meaning which the language cannot bear¹⁶.

25. In *Chong Fung Yuen*, the Court was concerned with Article 24(2)(1) which provides that Chinese citizens born in Hong Kong before or after 1 July 1997 shall be permanent residents. The Court held that its meaning was clear and rejected the argument that by necessary implication, Chinese citizens who are born to illegal immigrants, overstayers or people residing temporarily in Hong Kong are excluded. In *Tam Nga Yin v Director of Immigration*¹⁷, the Court was concerned with another limb of Article 24(2). Article 24(2)(3) confers permanent resident status on “persons of Chinese nationality born outside Hong Kong of permanent residents” who come within the first two limbs of Article 24(2). The Court held that it was plain that the language, with the phrase “born ... of”, refers only to natural children and that adopted children are not included.

26. Chapter III of the Basic Law is entitled “Fundamental Rights and Duties of the Residents”. It contains constitutional guarantees of rights and freedoms and entrenches the Bill of Rights¹⁸ which implements the International Covenant on Civil and Political Rights as applied to Hong Kong. The rights and freedoms guaranteed in the Basic Law and the Bill of Rights lie at the heart of Hong Kong’s separate system. The Court¹⁹ has emphasized repeatedly that the courts should give a generous interpretation to the constitutional guarantees of these rights and freedoms.

Interpretation by the Standing Committee

27. Under Article 67(4) of the Chinese Constitution, the Standing Committee of the National People’s Congress has the

¹⁶ at 224.

¹⁷ (2001) 4 HKCFAR 251.

¹⁸ The Bill of Rights is contained in the Hong Kong Bill of Rights Ordinance, Cap 383.

¹⁹ See *Ng Ka Ling* at 29 and *Chong Fung Yuen* at 224.

power to interpret laws. The laws include the Basic Law which is a national law. The Standing Committee's power to interpret the Basic Law is also set out in Article 158 of the Basic Law itself. Under the Mainland legal system, interpretation by the Standing Committee can clarify or supplement laws²⁰.

28. By Article 158, the Standing Committee authorizes the courts in Hong Kong to interpret the provisions which are within the limits of autonomy of the Region and provides that the courts in Hong Kong may also interpret other provisions. Further, the article obliges the Court of Final Appeal to seek from the Standing Committee an interpretation of provisions concerning affairs which are within the responsibility of the Central People's Government or concerning the relationship between the Central Authorities and the Region before final judgment in cases where there is a need to interpret these provisions in adjudicating cases.

29. Although the courts in Hong Kong are bound to adopt the common law approach to interpret the Basic Law, it must be recognized that by virtue of Article 158, the Standing Committee has the plenary power to interpret any article of the Basic Law and that any interpretation by the Standing Committee is binding in and part of the legal system of the Hong Kong Special Administrative Region. The power is not limited to the excluded provisions which the Court is bound under Article 158 to refer to the Standing Committee for interpretation. The Court so held in *Lau Kong Yung v Director of Immigration*²¹.

30. In that case, the Court upheld the validity of the Standing Committee's Interpretation issued on 26 June 1999 which reached interpretations of certain articles of the Basic Law which were different from those held by the Court in the right of abode cases²². The right of abode episode has been well

²⁰ See *Chong Fung Yuen* at 221.

²¹ (1999) 2 HKCFAR 300.

²² *Ng Ka Ling and Chan Kam Nga v Director of Immigration* (1999) 2 HKCFAR 82.

documented and extensively debated by commentators²³. Many of them hold the view that, apart from an interpretation upon a judicial reference from the Court of Final Appeal, the Standing Committee's power to interpret the Basic Law is a power which should only be exercised in exceptional circumstances.

Restrictions on rights and freedoms

31. In cases involving the Basic Law, the courts are usually concerned with whether the restrictions on rights and freedoms provided for by laws enacted by the Legislature are valid. The burden is on the state to justify the restriction²⁴. Any restriction must satisfy two requirements. First, it must be "prescribed by law". Secondly, it must satisfy the proportionality test.

Prescribed by law

32. Any restriction of rights must satisfy the requirement of "prescribed by law"²⁵. This requirement mandates the principle of legal certainty. A statutory discretion conferred on a public official to restrict a fundamental right must give an adequate indication of the scope of the discretion with a degree of precision appropriate to the subject matter. In *Leung Kwok Hung v HKSAR*²⁶, the Court was concerned with the discretion vested in the Commissioner of Police to regulate public processions. The Court observed that as the situations that may arise for consideration are of an infinite variety and would involve many different circumstances and considerations, it is important for the Commissioner to have a considerable degree of flexibility. It was held that even taking these considerations into account, the discretion to restrict for the purpose of "public order (ordre public)" does not give an adequate indication of the scope of the discretion as the concept of "ordre public" is an imprecise and

²³ For example, Johannes Chan, H L Fu & Yash Ghai (eds) *Hong Kong's Constitutional Debate : Conflict over Interpretation* (Hong Kong University Press, Hong Kong 2000).

²⁴ *HKSAR v Lam Kwong Wai* (2006) 9 HKCFAR 574 at 600-601.

²⁵ Article 39 of the Basic Law.

²⁶ (2005) 8 HKCFAR 229.

elusive one. The Court held that the purpose of public order as opposed to “ordre public” would be sufficiently certain and severed the words “ordre public” from the relevant statutory provision.

The proportionality test

33. Many of the rights and freedoms are guaranteed by the Bill of Rights or both the Bill and the Basic Law. Any restriction must satisfy the relevant provision in the Bill²⁷. In relation to many rights and freedoms, the Bill prescribes that restrictions are only justified if they are necessary for specified purposes. These constitute the legitimate purposes for permissible restriction. The test is one of necessity. It has to be shown that a restriction is necessary for a legitimate purpose.

34. The Court has held that the constitutional requirement of necessity involves the application of a proportionality test. The use of a proportionality test in examining whether a restriction of a right is justified in a democratic society is consistent with the approach to constitutional review in many jurisdictions. By applying the proportionality test, a proper balance is struck between the interests of the society on the one hand and the rights of the individual on the other.

35. The Court has formulated the proportionality test in these terms. First, the restriction must be rationally connected with the legitimate purpose or purposes for the restriction. Secondly, the means used to impair the right must be no more than is necessary to accomplish the legitimate purpose in question²⁸.

²⁷ Article 39 and *Gurung Kesh Bahadur v Director of Immigration* (2002) 5 HKCFAR 480. In that case, the Court also held that where the right and freedom is guaranteed only by the Basic Law, the question whether it could be restricted and if so, the test for judging permissible restrictions, depends on its nature and subject matter.

²⁸ *Leung Kwok Hung* at 253.

36. As has been noted, the Bill of Rights sets out the legitimate purposes for permissible restriction of a number of rights. For example, in relation to the freedom of speech or expression which is guaranteed by both the Basic Law and the Bill of Rights²⁹, Article 16(3) of the Bill provides that the exercise of this right:

“carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary –

- (a) for respect of the rights or reputations of others; or
- (b) for the protection of national security or of public order (ordre public), or of public health or morals.”

Where the legitimate purposes are not constitutionally specified, the courts have to ascertain what they are and decide whether they are of sufficient importance to justify limiting the right in question.

37. There have been many instances of the application of the proportionality test. In *HKSAR v Ng Kung Siu*³⁰, the Court upheld the validity of statutes which criminalize the desecration of the national and regional flags. The Court recognized that the relevant statutory provisions restrict the freedom of speech but considered that the restriction is a limited one in that it only bans one mode of expressing whatever message the person concerned may wish to express, that is, the mode of desecrating the flag. It held that such a limited restriction was proportionate to the legitimate aims sought to be achieved, namely the protection of the national flag as a unique symbol of the Nation and the regional flag as a unique symbol of the Hong Kong Special Administrative Region in accordance with what were unquestionably legitimate societal and community interests.

38. In *HKSAR v Lam Kwong Wai*³¹, the Court held that a statutory presumption reversing the persuasive or legal onus of

²⁹ Article 27 of the Basic Law and Article 16(2) of the Bill of Rights.

³⁰ (1999) 2 HKCFAR 442.

³¹ (2006) 9 HKCFAR 574.

proof as to the purpose of possession in relation to the offence of the possession of an imitation firearm was a derogation from the presumption of innocence which did not satisfy the proportionality test. The Court read down the presumption to impose only an evidential burden on the defendant which would be consistent with the presumption of innocence. In *HKSAR v Hung Chan Wa*³², the Court adopted a similar approach to statutory presumptions reversing the persuasive or legal burden of proof as to possession and knowledge in relation to offences involving dangerous drugs.

39. In reaching its decisions on the validity of restrictions of rights applying the proportionality test, the courts would accord appropriate weight to the judgment of the Legislature in imposing the restriction in question³³. The weight to be accorded to the legislative judgment would vary from case to case, depending on the subject matter. In *Lau Cheong v HKSAR*³⁴, the Court accorded considerable weight to the legislative judgment in upholding the constitutional validity of the mandatory life sentence for murder.

Remedies

40. In constitutional adjudication, the Court has adopted a flexible approach in granting remedies to ensure constitutional compliance, including reading in and reading down. For example, in the drugs and firearms cases concerning reverse onus provisions, the Court read down the provisions in question so that the defendant bears an evidential and not a persuasive burden of proof.

41. That a considerable degree of flexibility may be used in devising a remedy in a constitutional case is illustrated by the Court's decision in *Koon Wing Yee v Insider Dealing Tribunal*³⁵.

³² (2006) 9 HKCFAR 614.

³³ *Lam Kwong Wai* at 601, *Ng Kung Siu* at 460.

³⁴ (2002) 5 HKCFAR 415.

³⁵ (2008) 11 HKCFAR 170.

A constitutional challenge was made to the findings of the Tribunal on the ground that the proceedings before it were criminal and they involved breaches of various rights applicable to criminal proceedings, including the right to protection against self-incrimination. The Court struck down the provision conferring on the Tribunal the power to impose penalties. Although this power itself did not infringe any constitutional right, it was the reason for characterizing the proceedings as criminal. With the reason eliminated, the proceedings were held not to be criminal in nature and the Tribunal's findings and orders, other than the imposition of penalties, were held to be valid, including the disqualification from serving as a director and the disgorgement of gain.

42. The Court has suspended the declaration of unconstitutionality for a period in order to enable the Government to enact new legislation³⁶. During the period of suspension, the Government can function under legislation which had been declared unconstitutional, without acting contrary to any operative declaration and hence without any risk of committing any contempt of court. But despite such suspension, the Government is not shielded from legal liability for functioning pursuant to the unconstitutional legislation. The Court has kept open the question whether it has power to go further and make an order of temporary validity which would have the effect of shielding the Government from such liability.

43. The Court has also kept open the question whether a court has the power to engage in prospective overruling, that is to impose a temporal limitation on its judgment so that its retrospective effect would be limited to the extent specified³⁷. However, the Court has made clear that in dealing with an application for extension of time to appeal against conviction at

³⁶ *Koo Sze Yiu v Chief Executive of the HKSAR* (2006) 9 HKCFAR 441. This was applied by Cheung J in *Chan Kin Sum Simon v Secretary for Justice and Electoral Affairs Commission* HCAL 79/2008 (11 March 2009).

³⁷ *HKSAR v Hung Chan Wa* at 630.

any level of court, the ground, that a previous view of the law has now been held to be incorrect, by itself would not justify an extension of time³⁸.

Constitutional influence

44. Apart from providing protection, the constitutional guarantees of rights and freedoms have also influenced the development of the common law. For example, in *Cheng v Tse*³⁹ in laying down the modern approach to the defence of fair comment, the Court stated that having regard to the constitutional guarantee of freedom of speech, the Court should adopt a generous approach so that the right of fair comment on matters of public interest is maintained in its full vigour.

45. In *Yeung May Wan v HKSAR*⁴⁰, the Court was concerned with the criminal offence of obstruction in a public place without lawful authority or excuse. It is clear that a person who creates an obstruction cannot be said to be acting without lawful excuse if his conduct involves a reasonable use of the highway or public place. Where the obstruction in question results from a peaceful demonstration, the Court held that it is essential that the protection given by the constitutionally guaranteed right to demonstrate is recognized and given substantial weight when assessing the reasonableness of the obstruction⁴¹.

Statutory interpretation

46. With the increasing complexity in modern life, many areas have to be subjected to state regulation in the public interest. This has led to a very substantial growth in the volume of the statute book. The interpretation of statutes is of course an essential part of the judicial function and an increasing part of the work of the courts concerns the proper interpretation of statutes.

³⁸ *HKSAR v Hung Chan Wa* at 632.

³⁹ (2000) 3 HKCFAR 339.

⁴⁰ (2005) 8 HKCFAR 137.

⁴¹ at 157.

47. A statute must be considered as a whole in its context. A purposive approach is adopted. In construing a statute, the courts should adopt an interpretation which is consistent with and gives effect to the legislative purpose.

48. In *Town Planning Board v Society for the Protection of the Harbour Ltd*⁴², the Court was concerned with the interpretation of the Protection of the Harbour Ordinance⁴³. That is a unique piece of legislation. It was enacted to protect and preserve the harbour in Hong Kong by establishing a presumption against reclamation. The legislative intent was to give legal recognition to the unique character of the harbour as a special public asset and a natural heritage of the Hong Kong people and to the great public need to protect and preserve it. Having regard to such intent, the Court held that on a true construction, the presumption could only be rebutted by establishing an overriding public need for reclamation. This includes economic, environmental and social needs of the community. A need would only be overriding if it was a compelling and present need.

49. In *Ho Choi Wan v Hong Kong Housing Authority*⁴⁴, the Court was concerned with the provisions in the Housing Ordinance⁴⁵ relating to the variation of rent for public housing tenants. The purpose of these provisions was to protect tenants by limiting both the frequency with which and the amount by which the Authority could vary the rent. Although the word “variation” included both upwards and downwards revisions, the Court held that in the context of the statutory purpose, it was limited to increase of rent and did not extend to reduction of rent. The provision restricted the frequency and amount of any increase in rent which the Authority might impose. But it did not prevent it from reducing rent as often and by as little as it might

⁴² (2004) 7 HKCFAR 1.

⁴³ Cap 531.

⁴⁴ (2005) 8 HKCFAR 628.

⁴⁵ Cap. 283.

consider appropriate. This afforded better and fuller protection of tenants.

50. Apart from constitutional and statutory interpretation, the Court has developed the common law in various areas.

Administrative law

51. In the area of administrative law, the Court has developed the doctrine of legitimate expectation⁴⁶. Under the doctrine, a failure to honour a legitimate expectation of a substantive outcome or benefit might, in the absence of any overriding reason of law or policy excluding its operation, result in such unfairness to individuals as to amount to an abuse of power justifying intervention by the court.

52. The doctrine comprises four aspects⁴⁷. First, the law requires that a legitimate expectation, arising from a promise or representation that it would be honoured, should be properly taken into account in the decision-making process, so long as to do so falls within the power, statutory or otherwise, of the decision-maker. Secondly, unless there are reasons recognized by law for not giving effect to the legitimate expectation, then effect should be given to it. Fairness requires that if effect is not given to it, the decision-maker should express his reasons so that they may be tested in a court if it is challenged. Thirdly, even if the decision involves the making of a political choice by reference to policy considerations, the decision-maker must make the choice in the light of the legitimate expectation of the parties. Fourthly, failure to do so would usually result in the decision being vitiated by reasons of failure to take into account a relevant consideration. It would only be in an exceptional case that the court would be satisfied that the failure to do so has not affected the decision.

Professional disciplinary proceedings

53. The case of *Solicitor (24/07) v Law Society* concerning

⁴⁶ *Ng Siu Tung v Director of Immigration* (2002) 5 HKCFAR 1.

⁴⁷ at 41-2.

solicitor disciplinary proceedings, which has been referred to in relation to *stare decisis*, provides examples of the Court adopting approaches on two questions which are different from those which have been adopted by the Privy Council and the English Court of Appeal respectively. In that case, the Court held that the appropriate standard of proof in disciplinary proceedings in Hong Kong was the civil standard of a preponderance of probability under the *Re H*⁴⁸ approach. The more serious the act or omission alleged, the more inherently improbable it must be regarded. And the more inherently improbable it was to be regarded, the more compelling would be the evidence needed to prove it on a preponderance of probability. In adopting this approach, the Court did not follow the decision of the Privy Council in *Campbell v Hamlet*⁴⁹ on appeal from Trinidad and Tobago. In that case, it was held that the criminal standard of proof is the correct standard to be applied in all disciplinary proceedings concerning the legal profession.

Stare decisis and the Court of Appeal

54. In the same case, the Court departed from the approach laid down in the decision of the English Court of Appeal in *Young v Bristol Aeroplane Ltd*⁵⁰ concerning the circumstances in which it, as an intermediate Court of Appeal, may depart from its previous decisions. That approach had previously been adopted by the Court of Appeal in Hong Kong.

55. The Court considered that the first two exceptions established in *Young* were on analysis not real exceptions and should not be regarded as such in Hong Kong; namely, that the Court of Appeal was bound to decide which of two conflicting decisions of its own it would follow and that it was not bound to follow a previous decision of its own, which, though not expressly overruled, could not stand with a subsequent decision of the Privy Council on appeal from Hong Kong or of the Court

⁴⁸ *Re H & Others (Minors) (Sexual Abuse : Standard of Proof)* [1996] AC 563.

⁴⁹ [2005] 3 All ER1116.

⁵⁰ [1944] KB 718.

of Final Appeal.

56. As to the third exception in *Young*, namely, the Court of Appeal is not bound by a decision of its own if it is satisfied that the decision was given *per incuriam*, the Court held that this exception should not be retained in Hong Kong for its Court of Appeal and should be replaced by an exception based on the “plainly wrong” test. The Court considered that this new test struck a proper balance between the conflicting demands of the need for certainty in the law and the appropriate degree of flexibility. The Court of Appeal would undoubtedly approach the matter with great caution and should take all circumstances into account before deciding to depart from its previous decision, including the nature of the issue involved, the length of time for which the previous decision has stood, the extent of its application, whether the issue is likely to be before the Court of Final Appeal or the Legislature, whether the matter is best left to them and whether and the extent to which failure to depart from it would occasion injustice in the case in question and similar cases.

Private law

57. An interesting case in private law is *Chen Li Hung v Ting Lei Miao*⁵¹ which raised the interesting conflict of laws question whether the courts in Hong Kong should recognize a bankruptcy order granted by a court in Taiwan. The Court considered that non-recognition of a government, which covered the case of a territory under the de jure sovereignty of the sovereign but not under its de facto control, could not be pressed to its ultimate logical limit. There was a common law principle that where private rights or acts of everyday occurrence or perfunctory acts of administration were concerned, the courts might, in the interests of justice and common sense, where no consideration of public policy to the contrary prevailed, give recognition to the actual facts or realities found to exist in the territory in question⁵². The Court held that the Taiwanese

⁵¹ (2000) 3 HKCFAR 9.

⁵² at 17-19.

bankruptcy order should be recognized and should be given effect by the Hong Kong courts.

Tort law

58. In the area of tort law, the Court developed the law of public nuisance by laying down three ingredients for liability. First, there must be a state of affairs which constituted a public nuisance. Secondly, the nuisance hazard, which could arise from an act or omission on the part of the defendant must be causative of particular injury to a member of the public. Thirdly, a defendant could only be liable if he knew or ought reasonably to have known that his act or omission would result in a nuisance hazard presenting a real risk of harm to the public. And the injury must be of a foreseeable type. In developing the law in this way, the Court did not follow English cases which over a period of time have laid down various technical distinctions in this area⁵³.

Property law

59. In property law, the Court has adapted the law of easements in the context of multi-storey buildings⁵⁴. Under the Hong Kong system of dealing with multi-storey buildings in multi-occupation, owners of flats held the property as legal tenants in common, with each owner owning undivided shares in the property and a Deed of Mutual Covenant regulated by contract the rights as between the owners regarding the exclusive use and occupation of units allotted to their respective parcels of undivided shares, their use of common parts of the building, as well as their mutual obligations on such matters as management charges. Under this system, an easement could not be created as between co-owners since an owner could not have an easement over his own land. Further, units in a multi-storey building were not separate tenements legally in different occupation.

60. The Court held however that quasi-easements could

⁵³ *Leung Tsang Hung v Incorporated Owners of Kwok Wing House* (2007) 10 HKCFAR 480.

⁵⁴ *Kung Ming Tak Tong Co Ltd v Park Solid Enterprises Ltd* [2008] 5 HKLRD 441.

subsist between them. These are rights similar to easements which could arise as contractual easements by express agreement or contractual implication. Further, under the rule in *Wheeldon v Burrows*⁵⁵, they could be recognized and implied into a grant which did not expressly deal with them.

Tax law

61. The Court has dealt with a number of tax cases relating to the interpretation of Hong Kong tax legislation. In considering whether tax avoidance schemes are effective, the Court has refined the approach of the House of Lords in *W.T. Ramsay Ltd v Inland Revenue Commissioners*⁵⁶ and subsequent decisions. In *Collector of Stamp Revenue v Arrowtown Assets Ltd*⁵⁷, the Court held that there is no specialized principle of statutory construction applicable to tax legislation. Purposive interpretation should be applied to the facts viewed realistically. The ultimate question was whether the relevant statutory provisions, construed purposively, were intended to apply to the transaction in question.

Procedural law

62. In procedural law, the Court has developed the inherent jurisdiction of the courts to deal with vexatious litigants who abuse the process of the courts. In addition to making an order requiring the vexatious litigant to obtain leave to issue any fresh application in existing proceedings, the Court held that the courts may make an extended order prohibiting the vexatious litigant from instituting any new proceedings without the leave of the court⁵⁸.

Criminal law

63. In criminal cases, the Court has emphasized that its role is not to function as a second Court of Appeal⁵⁹. Its role is to deal

⁵⁵ (1879) LR 12 Ch D 31.

⁵⁶ [1982] AC 300.

⁵⁷ (2003) 6 HKCFAR 517.

⁵⁸ *Ng Yat Chi v Max Share Ltd* (2005) 8 HKCFAR 1.

⁵⁹ See for example *Zeng Liang Xin v HKSAR* (1997-98) 1 HKCFAR 12, and *Chim*

with points of law of great and general importance and cases where it is shown that substantial and grave injustice has been done. The latter imposes a high hurdle. To succeed, “it must be shown that there has been to the appellant’s disadvantage a departure from accepted norms which departure is so serious as to constitute a substantial and grave injustice”⁶⁰.

64. Points of law which the Court has dealt with include whether certain criminal offences are sufficiently certain to comply with the principle of legal certainty. In *Mo Yuk Ping v HKSAR*⁶¹, the Court stated:

“A criminal offence must be so clearly defined in law that it is accessible and formulated with sufficient precision to enable the citizen to foresee, if need be with appropriate advice, whether his course of conduct is lawful or unlawful. It is, however, accepted that absolute certainty is unattainable and would entail excessive rigidity. Hence it is recognized that a prescription by law inevitably may involve some degree of vagueness in the prescription which may require clarification by the courts.”

65. In that case, the Court held that the common law offence of conspiracy to defraud complies with the principle of legal certainty. In *Shum Kwok Sher v HKSAR*⁶², the Court held that the common law offence of misconduct in public office is sufficiently certain.

66. In *Chong Ching Yuen v HKSAR*⁶³, the Court addressed the question of whether a conviction should be quashed on the

Pui Chung v HKSAR (1999) 2 HKCFAR 166.

⁶⁰ *Chong Ching Yuen v HKSAR* (2004) 7 HKCFAR 126 at 135 and *So Yiu Fung v HKSAR* (1999) 2 HKCFAR 539 at 543.

⁶¹ See *Mo Yuk Ping v HKSAR* (2007) 10 HKCFAR 386 at 409-410 referring Articles 28 and 39 of the Basic Law and Articles 5(1) and 11(1) of the Bill of Rights.

⁶² (2002) 5 HKCFAR 381. See the re-formulation of the elements of the offence in *Sin Kam Wah v HKSAR* (2005) 8 HKCFAR 192.

⁶³ (2004) 7 HKCFAR 126.

ground of the incompetence of defence counsel. The Court held that the critical question was whether the appellant had a fair trial. It was unlikely that anything short of a very high degree of defence incompetence would ever reduce or contribute to reducing a trial to something less than a fair trial. The phrase “flagrant incompetence” has been used as a convenient form of shorthand to describe such incompetence.

Conclusion

67. Just over 12 years have passed since the resumption of the exercise of sovereignty. During this period, the courts in Hong Kong have faced many interesting challenges. I believe that we have met them successfully.

68. I trust that this lecture has given you some idea of how the common law has continued to thrive in Hong Kong. With its continuing adaptability and vitality, I am sure that the common law will continue to be developed so as to meet the changing needs and circumstances of an evolving and dynamic society in Hong Kong as part of China under the principle of “one country, two systems”.