

**Maintaining prosperity and stability under the
common law**

(by Secretary for Justice, Ms Teresa Cheng, SC)

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In 2019, Hong Kong experienced one of the most challenging and unsettling times in her history - the street violence, widespread vigilantism, and blatant disregard of the law and our constitutional order. The National Security Law (“NSL”) was enacted and became applicable in Hong Kong on 30 June 2020. Thereafter, law and order was restored, and Hong Kong re-emerged as an inclusive, rational and stable society.

For the past two years, despite these challenges, and others such as the onset of the pandemic and the geopolitical situation, Hong Kong’s businesses continued to thrive. For example, being ranked as the world’s first initial

public offering (IPO) venue in the world in seven of the last 12 years, a total of \$397.5 billion was raised in 2020 through IPO in Hong Kong, while \$314.2 billion was recorded in 2019. According to the Chief Executive Officer of Hong Kong Exchanges and Clearing Limited, Mr Nicolas Aguzin, as at the end of May 2021, the amount of IPO funds raised is about \$184 billion, an increase of 621% when compared with \$25.5 billion for the same period last year. In the securities market, the average daily turnover for the first six months of 2021 was \$188.2 billion, representing an increase of 60% when compared with \$117.5 billion for the same period in 2020.

Hong Kong's success as a long-standing international financial centre is predicated upon its mature and robust legal system and legal infrastructure, which in turn is supported by a mature and independent judiciary.

The independence of the judiciary is constitutionally

guaranteed. Judges are appointed based only on their judicial and professional qualities. They adjudicate cases based only on law and evidence, without fear or favour, independently and free from any interference. Hong Kong judgments are cited in overseas jurisprudence from time to time, which speaks volumes on the confidence of the global legal community in the integrity and quality of Hong Kong’s judicial system.

As pointed out by the Chief Justice of the Court of Final Appeal (CFA) at the Ceremonial Opening of the Legal Year 2021, “[a]n independent judiciary is essential to the rule of law in Hong Kong and the due administration of justice. It is equally crucial to public and business confidence - whether local or overseas - in our judicial system, as well as to the international reputation of Hong Kong as a society that is governed by the rule of law under the ‘one country, two systems’ arrangement.” This is echoed by Lord Sumption, a former Justice of the United Kingdom Supreme Court and a Non-Permanent Judge

(NPJ) of CFA, that “[t]he permanent judiciary of Hong Kong is completely committed to judicial independence and the rule of law. Successive chief justices have made this clear in public statements. These statements are not just lip service. They represent the convictions of experienced, courageous and independent-minded judges.”

Article 8 of the Basic Law provides that the common law shall be maintained after the establishment of the Hong Kong Special Administrative Region. This legal system has served Hong Kong and also our country well. It has provided a solid foundation for implementing one of the fundamental purposes of the Basic Law, which is to maintain the prosperity and stability of Hong Kong. One of the major advantages of the common law is that it is largely doctrinal but capable of adapting to societal values and changing circumstances, thus providing certainty and predictability and yet also flexible to deal with business changing needs. As Sir Anthony Mason, a former NPJ of CFA, highlighted one of the major features of the common law:

*“The differences that distinguish the jurisprudence of the various common law jurisdictions are largely doctrinal. The variations in doctrine may be attributed, however, to different judicial responses to variations in the material circumstances and conditions of society in the various jurisdictions or to different judicial perceptions about particular societal values... ”*¹

Similar observations were made by the late Lord Millett, a former NPJ of CFA, in *China Field Ltd v Appeal Tribunal (Buildings) (No. 2)*:

“...our judges must develop the common law of Hong Kong to suit the circumstances of Hong Kong. It is well recognised that the common law is no longer monolithic but may evolve differently in the various common law jurisdictions ... [The Court of Final Appeal] will continue to respect and have regard to decisions of the English courts, but it will decline to adopt them not only

¹ Sir Anthony Mason, “The Common Law,” in *Hong Kong’s Court of Final Appeal: The Development of the Law in China’s Hong Kong*, eds. Young and Ghai (Cambridge University Press, 2014), p. 338.

when it considers their reasoning to be unsound or contrary to principle or unsuitable for the circumstances of Hong Kong, but also when it considers that the law of Hong Kong should be developed on different lines.”²

These basic jurisprudential notions of the common law allow the business community to appreciate its flexibility to adapt timeously to evolving circumstances through judge made law, finding logical solutions to novel cases taking into account the specific facts in each case. A legal system that tailors to what is required given the social, cultural and economic fabric of society is indeed one which should be treasured.

Hong Kong is the only jurisdiction in the world that has a truly bilingual common law system, English and Chinese, and is the only common law jurisdiction in China. In developing the common law of Hong Kong, the uniqueness of our societal values and business friendly environment will no doubt be fully taken into account,

² See [2009] 5 HKLRD 662, at [78] and [81].

reflecting Hong Kong as the most Chinese city outside the Mainland and the most international city in China. With the common law system, we are uniquely placed to intermediate business to and from China, promoting in-bound and out-bound capital flow and investments.

The Greater Bay Area (“GBA”) Outline Development Plan explicitly supports Hong Kong to establish itself as the centre for international legal and dispute resolution services in the Asia-Pacific region. The objective has been reaffirmed under the 14th Five-Year Plan. These national policies provide unprecedented opportunities for the Hong Kong legal sector and are being implemented gradually. To name but a few, Hong Kong lawyers can now take the GBA Legal Professional Examination with a view to practising PRC law in the GBA; Hong Kong enterprises registered in Qianhai (which area may be expanded) can chose Hong Kong law as the governing law in their contracts even without any foreign related element.

The unique arrangements reached with the Supreme People's Court will promote the use of Hong Kong law and Hong Kong as a forum for dispute resolution whether in its courts or as a seat of arbitration. This will in turn provide better protection and certainty to entities that use Hong Kong as a deal making or dispute resolution hub.

As a result, despite the challenges, the threats and the unfair criticisms made by some, the facts and figures quoted above demonstrate that with stability and order restored and a society underpinned by the robust legal system and the common law, business and investment environment remains untarnished and Hong Kong continues to thrive.

Yet, some unfounded criticisms that have been recently made must be addressed.

The NSL does not in anyway interfere with judicial independence. National security is entirely a matter within the purview of the Central Authorities, but Hong Kong has been entrusted to investigate, prosecute and adjudicate cases concerning offence endangering national security, with only very limited specified exceptions. Whilst there is a list of designated judges appointed by the Chief Executive to handle cases concerning offence endangering national security, the assignment of judges to handle particular cases remains the sole responsibility of the judiciary. Judgments set out the reasons by which the decisions were arrived at, demonstrating to all objective and fair-minded observers that first, due administration of criminal justice system remains in compliance with human rights protection and principles of the rule of law as required by Articles 4 and 5 of the NSL, and secondly, the system of designated judges under NSL does not in any way affect the independence of our judiciary. As the court noted in *Tong Ying Kit (No. 1)* [2020] 4 HKLRD 382,

no reasonable, fair-minded and well-informed observer would think that a designated judge is or may be no longer independent of the Government.

The jurisdiction of the courts in civil and commercial matters remains unaltered after the enactment of the NSL, and is not in anyway “limited” contrary to some misleading suggestions.

By virtue of Article 19 of the Basic Law, Hong Kong courts have jurisdiction over a case even if it involves national security issues with the qualification that the courts have no jurisdiction over “acts of state”. Hence, questions of fact concerning acts of state that arise in the adjudication of cases shall be dealt with by a certificate from the Chief Executive who must first obtain a certifying document from the Central People’s Government, with the adjudication of the case itself remaining entirely in the remit of the judiciary. This

certification requirement has always existed since the Basic Law came into operation, and can be traced back to the English “act of state” doctrine.

The suggestion that Hong Kong courts have no jurisdiction to preside over civil matters involving national security issues after the enactment of the NSL is plainly unsustainable and can only stem from a total misunderstanding of our legal system. Reliance on the CFA case of Lai Chee Ying (2021) 24 HKCFAR 33 in support of such misguided suggestion is also misplaced. The CFA simply affirmed the lack of jurisdiction of the Hong Kong courts to review the legislative acts of the National People’s Congress and its Standing Committee as was held by the CFA in 1999 in the decision of Ng Ka Ling (No. 2) (1999) 2 HKCFAR 41.

It has been suggested that the approach taken by the court in the case of *The Securities and Futures Commission*

(“SFC”) v *Ernst & Young* [2015] 5, HKLRD 293, in which the court rejected a plea refusing to disclose documents on the ground that the PRC law on State secrets prohibited such disclosure, would no longer be applied after the enactment of the NSL. This is a complete misreading of the case. The court in that case simply held that the evidential burden of establishing the relevant ground was not discharged, with the court concluding that “*the objection based on State secrets...is a complete red herring*”. The established principles governing the court’s jurisdiction (and the lack of it) will continue to apply under the constitutional framework of the Basic Law.

Concern on the extraterritorial reach of the NSL is unwarranted. The extraterritorial jurisdiction imposed by the NSL is in line with the well-recognized international law principle of protective jurisdiction that is necessary for any sovereign state to safeguard national security. This is no different in national security laws in many

jurisdictions.

Similarly, a fear of an "inadvertent breach" of the NSL is unwarranted. The elements of each of the four offences in the NSL encompass the *actus reus* and *mens rea* and are clearly set out. The burden is on the prosecution to prove the relevant intent beyond reasonable doubt, and hence the suggestion that an entity could inadvertently commit an offence under the NSL is ill-conceived. The NSL does not target legitimate business activities. In fact it provides for a stable environment that is conducive to vibrant business and investment activities.

The freedom of movement is protected in Hong Kong. Article 31 of the Basic Law provides that Hong Kong residents shall have freedom to travel and to enter or leave the Region, and Article 8(2) of the Hong Kong Bill of Rights provides for the liberty of movement, stating that “everyone shall be free to leave Hong Kong”.

The amendments to the Immigration Ordinance which has come into force on 1 August 2021 was made to implement the internationally accepted standards arising from amendments to Annex 9 of the Convention on International Civil Aviation, putting in place the Advanced Passenger Information (“API”) system. According to the International Civil Aviation Organization (“ICAO”) Council, *“Implementing API will assist compliance with UN Security Council Resolutions 2178(2014) and 2309(2016) [relating to the prevention of movement of terrorists by effective border controls]. API implementation address several issues, including reduction of bottlenecks in border processing, enhancing aviation security, enabling States to use border security resources more effectively and efficiently, etc.”* The Legislative Council Brief on the amendment in question sets out its legislative intent which is in line with the statement from ICAO Council. Some sinister and

erroneous remarks, including those from the Bar Association (wrongly alleging the amendment as abrogating the fundamental right of Hong Kong residents) must be rejected.

Freedoms of expression and of press are guaranteed under the Basic Law. The exercise of the right to such freedoms is not absolute and carries with it special duties and responsibilities. The concept of “responsible journalism” is well-established in international jurisprudence on human rights, and the courts have consistently reiterated that journalists cannot be exempted from their duty to comply with ordinary criminal law. It should be remembered that journalists are entitled to the protection of the right to the freedom to expression only if they act in good faith in order to provide accurate and reliable information in accordance with the tenets of responsible journalism³. Likewise, publishers and

³ See e.g. *Man v Romania* (2020) 70 EHRR SE7, at [124].

editors of newspapers are obliged to observe the special duties and responsibilities in journalistic activities. The boundary between protected journalistic activities and acts endangering national security is thus reasonably clear. There is no basis whatsoever to broadly suggest that any journalistic activities could be arbitrarily regarded as endangering national security. The free flow of information in accordance with the law is respected.

Having clarified these misconceptions on the NSL, one must focus on our unique strengths – the “one country, two systems” policy enshrined in the Basic Law. The Central Authorities have repeatedly affirmed that they will honour the policy and have been so doing for the past 24 years. Provided we honour our part by staying true to the fundamental purpose of the Basic Law – upholding national sovereignty, unity, territorial integrity, and do not embark upon acts that threaten or undermine the constitutional order of Hong Kong - there is no reason why the common law will not continue to apply in the future. The common law is, after all, an indispensable

foundation for Hong Kong to be an international financial centre and thereby contributing to the implementation of the other fundamental purpose of the Basic Law - maintaining the prosperity and stability of Hong Kong.

Ends