CHAPTER 1

HONG KONG LAW IN GLOBAL PERSPECTIVE

1. Introduction

> If society puts any value on the concept of the rule of law as a cornerstone or pillar in our community, it is important to understand Hong Kong's legal system and how justice — for conceptually, this is after all the purpose of law — is administered. Hong Kong's legal system is based on the common law and on that system's characteristics of fairness, transparency and access to justice. The key players include of course those who are most intimately connected to the law's operation, the courts and the legal profession, but of considerable importance is also the understanding and acceptance by everyone, especially those with influence or power (chief among whom is of course the Government and all those within it), of the purpose of the law. The law is there to facilitate the well-being of our society, and not to be seen as somehow obstructing it.[1]
>
> Chief Justice Geoffrey Ma

1.001

The essence of law and justice in Hong Kong can be summed up in one short paragraph, but a whole book is needed to exemplify what that paragraph means. This introductory chapter provides a foundation for the study of the Hong Kong legal system in a global context. It is organised as follows. The second section familiarises the reader with the distinctive features of Hong Kong law. The third explores the common law tradition from which this legal system unquestionably derives. It also compares and contrasts the common law with civilian law (also known as "civil law"), the other world leading legal tradition. The fourth section describes the various ways to classify law. The fifth section sums up the chapter's main points.

1.002

2. The Uniqueness of Hong Kong Law

Founded as a British Crown Colony in 1843 and converted to a Chinese Special Administrative Region in 1997, modern day Hong Kong combines a densely populated international financial centre with large swaths of sparsely inhabited rural countryside in its hinterlands, peninsulas and 262 outlying islands, spanning a total land area of 1,104.43 km^2 and a further sea area of 1,650.60 km^2. Bordering the northern end of the South China Sea and situated on the south-eastern tip of the Pearl River Delta, Hong Kong had a population of about 7.3 million as of 2015, comparable to that of Switzerland. Whilst the vast majority is of ethnic Chinese descent, hundreds of thousands of residents belong to the gamut of ethnicities hailing from every inhabited continent.

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Established in 1843 as a stand-alone jurisdiction separate from England and Wales, the Hong Kong legal system predates those currently in force in mainland China,[2]

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1 GT Ma, "Chief Justice's Speech at Ceremonial Opening of the Legal Year 2016" (11 January 2016).

2 The legal system of the People's Republic of China was originally established in 1949 but underwent destruction during the Cultural Revolution (1966–1976). It was not re-established until the late 1970s. See, generally, PB Potter, *China's Legal System* (Polity Press, 2013).

Japan,[3] the Koreas,[4] Macau,[5] Mongolia,[6] and Taiwan,[7] as the oldest continuously functioning legal system in East Asia. Save for a brief interruption of three years and eight months, when the Japanese occupied Hong Kong (1941–1945) during the Second World War,[8] the same legal system has held sway in the territory over the course of no less than 170 years, even after the resumption of sovereignty in 1997 by the People's Republic of China, which operates a system of law based on Socialist and civilian law principles.[9]

1.005 The predominance of the common law in Hong Kong entails that its legal system shares few of the Continental European civilian law principles and practices of all nearby jurisdictions.[10] This means, unsurprisingly, that its legal system has been, both before and after the 1 July 1997 Handover, incomprehensible in many ways to jurists and officials from China, who are inured to very different juridical traditions, ways of legal interpretation and configurations of law and politics.[11]

1.006 The Basic Law of the Hong Kong Special Administrative Region[12] was promulgated by the National People's Congress on 4 April 1990, to codify the promises of the People's Republic of China to conserve the pre-existing institutions and way of life of Hong Kong. It is no ordinary legal document but an offshoot of the Sino-British Joint Declaration of 1984,[13] a United Nations-registered, binding international treaty brought forth by two veto-wielding members of the Security Council.

1.007 Also extraordinary is the Court of Final Appeal that wields the nascent Special Administrative Region's independent judicial power of final adjudication. It is a

[3] The modern Japanese legal system emerged after the Meiji Restoration, which started in 1868. See, generally, CF Goodman, *The Rule of Law in Japan: A Comparative Analysis* (Kluwer Law International, 2nd ed 2008).

[4] The "fourteen reforms" declared by the Chosun dynasty in 1895 signified the emergence of modern Korean law. See, generally, SH Kim, "The Democratization and Internationalization of the Korean Legal Field" in Y Dezalay and BG Garth (eds), *Lawyers and the Rule of Law in an Era of Globalization* (Routledge, 2011).

[5] Despite Portuguese presence since 1553, Portugal's sovereignty over Macau was asserted only in 1845. It was only after the Luso-Chinese Treaty of Friendship and Trade of 1887 that a legal system modelled after Portuguese law began to develop. Macau's Legislative Assembly was established in 1920, and its competence to legislate locally was confirmed in 1976 with the enactment of art.2 of the *Estatuto Orgânico de Macau* (Organic Statute of Macau). The *Lei de Bases da Organizacao Judiciaria* (Law of the Basic Organisation of the Judiciary) 1991 finally marked the establishment of a Macau legal system separate from the Judicial District of Lisbon. See, for example, Z Hao, *Macau History and Society* (Hong Kong University Press, 2011).

[6] Modern Mongolian law first emerged when Mongolia became independent in 1911. Mongolia, with its legal system, came under Communist control in 1921. In 1992, it transitioned into an independent representative democracy. See, for example, T Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (Cambridge University Press, 2003).

[7] The current legal system in force in Taiwan originated from that of the Republic of China, first established in 1912 after the fall of the Qing Empire. A modern justice system was first established in Taiwan by the Japanese in 1896, however. See, generally, CF Lo, *The Legal System and Culture of Taiwan* (Kluwer Law International, 2006).

[8] The British Hong Kong legal system operated on a limited basis even during Japanese occupation. See A Birch, "Confinement and Constitutional Conflict in Occupied Hong Kong 1941-45" (1973) 3 HKLJ 293.

[9] See R Wacks, "Can the Common Law Survive the Basic Law?" 18 HKLJ 435 (1988).

[10] See T Ruskola, "The East Asian Legal Tradition" in M Bussani and Uo Mattei (eds), *The Cambridge Companion to Comparative Law* (Cambridge University Press, 2012).

[11] Y Ghai, "Themes and Arguments" in SNM Young and Y Ghai (eds), *Hong Kong's Court of Final Appeal: The Development of the Law in China's Hong Kong* (Cambridge University Press, 2014) 2.

[12] Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (Adopted at the Third Session of the Seventh National People's Congress on 4 April 1990 Promulgated by Order No 26 of the President of the People's Republic of China on 4 April 1990 Effective as of 1 July 1997).

[13] Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong (19 December 1984).

cosmopolitan court not limited to local jurists but inclusive of sitting or retired justices of the Supreme Court of the United Kingdom, the Judicial Committee of the Privy Council, the High Court of Australia and the Supreme Court of New Zealand. Given its Commonwealth composition, the Court has naturally put unusual stress on the need to internationalise the Region's legal system after the resumption of Chinese sovereignty. In *Shum Kwok Sher v HKSAR* (2002) 5 HKCFAR 381, 401, Sir Anthony Mason NPJ opined:

> In interpreting the provisions of chap. III of the Basic Law and the provisions of the Bill, the Court may consider it appropriate to take account of the established principles of international jurisprudence as well as the decisions of international and national courts and tribunals on like or substantially similar provisions in the International Covenant on Civil and Political Rights, other international instruments and national constitutions.

1.008 More generally, in *Solicitor (24/07) v Law Society of Hong Kong* (2008) 11 HKCFAR 117, 133, Li CJ admonished:

> After 1 July 1997, in the new constitutional order, it is of the greatest importance that the courts in Hong Kong should continue to derive assistance from overseas jurisprudence. This includes the decisions of final appellate courts in various common law jurisdictions as well as decisions of supra-national courts, such as the European Court of Human Rights. Compared to many common law jurisdictions, Hong Kong is a relatively small jurisdiction. It is of great benefit to the Hong Kong courts to examine comparative jurisprudence in seeking the appropriate solution for the problems which come before them. This is underlined in the Basic Law itself. Article 84 expressly provides that the courts in Hong Kong may refer to precedents of other common law jurisdictions.

1.009 The 19th century acquisition by Queen Victoria of Hong Kong Island and the territories surrounding it from the Daoguang Emperor, as well as the late 20th century transfer of these acquisitions from the sovereignty of the United Kingdom to that of the People's Republic of China, were international events regulated by the international law of the day.[14] Hong Kong nevertheless defies classical concepts of international relations and international law,[15] being a non-independent territory,[16] which has "a distinct international voice".[17]

[14] Y Ghai, "Hong Kong's Autonomy: Dialects of Powers and Institutions" in Y Ghai and S Woodman (eds), *Practising Self-Government: A Comparative Study of Autonomous Regions* (Cambridge University Press, 2013) 319.

[15] MS Neves, "The External Relations of the Hong Kong Special Administrative Region" in R Ash, P Ferdinand, B Hook and R Porter (eds), *Hong Kong in Transition: The Handover Years* (St Martin's Press, 2000) 272–273.

[16] The Hong Kong Special Administrative Region is not an independent sovereign state, see art.1 of the Basic Law: "The Hong Kong Special Administrative Region is an inalienable part of the People's Republic of China", but it is a distinct customs territory in its own right, see Basic Law, art.116(1), which states "The Hong Kong Special Administrative Region shall be a separate customs territory".

[17] J Crawford, *The Creation of States in International Law* (Oxford University Press, 2nd ed 2006) 251–252.

1.010 The internationalisation of Hong Kong law owes partly to wider globalisation processes and partly to the special needs of a territory that lacks significant natural resources. Heavily dependent on international trade from the beginning, the Hong Kong economy, in order to thrive and stay competitive, was forced to maintain extensive trade, business and cultural links with the rest of the world. It was observed more than 30 years ago that "Hong Kong is international or she is nothing".[18]

1.011 Industrialisation and development as an international financial centre occurred without any meaningful support from either Britain, which cut her loose financially in 1958, or China, which groaned under civil wars, Cultural Revolution purges and poverty until the late 1970s. More recently, it was remarked that if the Special Administrative Region "does not proactively position itself to participate in potential solutions to mitigate against the brutality of globalization … [it] might be left behind".[19]

1.012 This outward orientation of Hong Kong's economy entailed the negotiation of bilateral and multilateral treaties, participation in regional and global organisations and constant legal as well as practical reforms to keep up with best practices across advanced economies.[20] Hong Kong's legal system, which upholds the rational predictability requisite to a free and efficient market, is widely acknowledged to have contributed significantly to its transformation from an insignificant cluster of remote fishing villages to a leading international financial centre in many ways on a par with New York and London.[21] As the Solicitor-General of Hong Kong admitted in 2014:

> Without a track record of safeguarding the rule of law or an independent judiciary, Hong Kong could not have achieved its current level of success. Banks, financial institutions and large multinational corporations would have never come to Hong Kong if they were not rest assured that their investments and interests were protected by a good legal system and impartial courts. The rule of law, not only provides stakeholders, but all individuals in Hong Kong, with a secure and predictable environment so that everyone knows what their rights and obligations are. It [also] ensures a level playing field for all businesses, which is why Hong Kong is one of the leading legal and global financial centres.[22]

1.013 The absorption of jurisdictions operating under a different legal tradition into a state practising common law is not unprecedented; consider Louisiana in the United States, Quebec in Canada and Scotland in the United Kingdom. Hong Kong is thus far the only common law jurisdiction to have been incorporated into a state not only without the common law but also adherent to a Socialist variant of the civilian law. The Basic Law

[18] AJ Youngson, *Hong Kong Economic Growth and Policy* (Oxford University Press, 1982) 114.

[19] LM Cummings and JTH Tang, "The External Challenge of Hong Kong's Governance: Global Responsibility for a World City" in M Sing (ed), *Politics and Government in Hong Kong: Crisis under Chinese Sovereignty* (Routledge, 2009) 189.

[20] Y Ghai, *Hong Kong's New Constitutional Order: The Resumption of Chinese Sovereignty and the Basic Law* (Hong Kong University Press, 1997) 429.

[21] M Elliott, "NyLonKong: A Tale of Three Cities" *Time Magazine* (28 January 2008).

[22] CG Claytor, "Face to Face with Frank Poon, Solicitor General, HKSAR" (2014) 9 *Hong Kong Lawyer* 20, 22.

left a mark in the history of decolonisation when it brokered the merger of a former British enclave with the world's largest remaining Leninist state.[23]

1.014 Hong Kong's legal system, moreover, little resembles those of ordinary provinces in unitary states, the constituents of federated states, or even cities in both unitary and federated states. There are many objections to considering Hong Kong a mere "city" in legal terms. There is, for instance, no such thing as a City of London legal system,[24] New York City legal system[25] or Municipality of Shanghai legal system[26] comparable to Hong Kong's. Unlike Hong Kong, none of London, New York and Shanghai is:[27]

(1) for all practical purposes exempt from the constitution and laws of its own Sovereign;

(2) competent to enact primary legislation on virtually all matters;

(3) completely exempt from paying taxes to its own Sovereign;

(4) vested with the power of final adjudication in a local court of last resort that is not hierarchically subordinate to the supreme court of the Sovereign;

(5) vested with legal power to impose customs control independently of its own Sovereign; and

(6) vested with power to conclude binding treaties with foreign states in many policy domains.

1.015 Indeed, both before and after 1 July 1997, the Sovereign (*viz* the British Crown and the People's Republic of China, respectively) avoided designating Hong Kong a "city" or "municipality".[28] It might cause confusion with entities that deserve that title unambiguously, like London and Shanghai. Hong Kong's Sovereigns rather designated its legal status with rubrics like "British Crown Colony" (1843–1983), "British Dependent Territory" (1983–1997) and "Special Administrative Region" (1997–present).

1.016 There are entities legally designated cities inside Hong Kong, the most prominent of which is still, by law, known as the "City of Victoria" pursuant to Schedule 1 of the Interpretation and General Clauses Ordinance (Cap.1). The centre of the City of Victoria is more commonly known as "Central" today and is the business and political heart of the territory.

[23] MK Chan, "Democracy Derailed: Realpolitik in the Making of the Hong Kong Basic Law, 1985-90" in MK Chan and DJ Clark (eds), *The Hong Kong Basic Law: Blueprint for "Stability and Prosperity" under Chinese Sovereignty?* (HKUP, 1991) 6.

[24] London is the capital of the United Kingdom and the country of England.

[25] New York City is the largest city of the State of New York in the United States.

[26] Shanghai is a provincial-level municipality of the People's Republic of China.

[27] See AHY Chen, "The Theory, Constitution and Practice of Autonomy: The Case of Hong Kong" in J Oliveira and P Cardinal (eds), *One Country, Two Systems, Three Legal Orders – Perspectives of Evolution: Essays on Macau's Autonomy after the Resumption of Sovereignty by China* (Springer, 2009) 759–760.

[28] Unlike New York or London, which is "a national financial centre with a large international component", Hong Kong is "an international financial centre with a limited national component", see DC Donald, *A Financial Centre for Two Empires: Hong Kong's Corporate, Securities and Tax Laws in its Transition from Britain to China* (Cambridge University Press, 2014) 219.

3. The Common Law and Civilian Law Traditions

(a) The common law tradition

1.017 Hong Kong's legal system has remained firmly embedded in the common law tradition notwithstanding her departure from the Commonwealth in 1997. Decisions of the Court of Final Appeal have been cited with approval by courts of last resort across the common law world, from England and Wales, Scotland, Australia, Canada, New Zealand to Malaysia, Singapore, the Eastern Caribbean territories, the Cayman Islands, Trinidad and Tobago, Fiji and Tonga.[29]

1.018 Nevertheless, the legal system of Hong Kong is no mere clone of the English; it admits Chinese customs *in lieu* of English ones, for example, in appropriate circumstances. A "common law of Hong Kong" has thus been in existence from the beginning. In *China Field Ltd v Appeal Tribunal (Buildings) (No 2)* (2009) 12 HKCFAR 342, 351–352, Bokhary PJ observed:

> The emergence of a common law of Hong Kong can be traced to almost the earliest stage of British rule here. By s.3 of the Supreme Court Ordinance 1844 and later s.5 of the Supreme Court Ordinance 1873, the Hong Kong courts were empowered and required to apply English common law except where the same was "inapplicable to the local circumstances of [Hong Kong] or of its inhabitants". One of the things which that exception did was to leave some room in certain spheres for ethnic Chinese domiciled in Hong Kong to resort to the laws and customs of traditional China, and some such room remains to the present day. Another consequence of the exception is that the Hong Kong courts had to develop what amounted to a common law of Hong Kong even though it was for the most part identical to English common law.

1.019 It is nowadays widely recognised that, whilst all common law systems sprang directly or indirectly from England, the common law is no longer monolithic and may differ from one jurisdiction to another.[30] The term "common law" is used every day to refer to the case law that judges make through adjudication. This informal usage contrasts with the law that springs from other sources, such as legislation enacted by representative legislatures (known as "Ordinances" in Hong Kong).

1.020 Lawyers may use "common law" to mean those case law principles that exclude equity rulings.[31] Although the rules of equity were originally inspired by notions of natural law and justice, nowadays equity is "no more and no less natural justice than the common law, and is in fact nothing other than a particular branch of law" since England reorganised its judiciary by the Judicature Act 1873, merging the Court of Chancery (that had governed equity) with the Courts of King's Bench and Common Pleas (that had governed the law) into one High Court of Justice.

[29] PY Lo, "Impact of Jurisprudence beyond Hong Kong" in SNM Young and Y Ghai (eds), *Hong Kong's Court of Final Appeal: The Development of the Law in China's Hong Kong* (Cambridge University Press, 2014) 580.

[30] See *Kensland Realty Ltd v Tai Tang & Chong* (2008) 11 HKCFAR 237, 295 (McHugh NPJ).

[31] See A Gillespie, *The English Legal System* (Oxford University Press, 5th ed 2015) 12–13.

1.021 The interchangeableness of the terms "case law" and "common law" is largely due to the high-profile activity of courts in common law systems to declare and modify the meaning of the common law. The confusion of terms is not entirely unproblematic.

1.022 Sir William Blackstone, a former Justice of the Court of King's Bench and the first Vinerian Professor of English Law at the University of Oxford, in his seminal Commentaries on the Laws of England, wrote "the law, and the opinion of the judge, are not always convertible terms, or one and the same thing; since it sometimes may happen that the judge may mistake the law". Instead, "the decisions of courts of justice" are not the common law itself but, more accurately, "the evidence of what is common law".[32]

1.023 In *R v Bembridge* (1783) 3 Doug KB 327, 332, 99 ER 679, 681, the great jurist Lord Mansfield CJ, likewise opined, "The law does not consist of particular cases but of general principles, which are illustrated and explained by these cases". In other words, case law, though it may embody the norms of the common law, is not properly considered common law in itself.

1.024 The common law is more than case law. Traditionally, the common law has been understood as the unwritten customary law which had gradually evolved over a period of 1,000 years, "first in England and later on every inhabited continent" on earth.[33] It lays claim to ancient prescription, ongoing adaptability, correct principle and reason and conformability to society and social consent; it is rational and principled and descended from time immemorial.[34] It is directed towards maintenance of the peace, the protection of the people and the pursuit of justice.[35] It is not static; it adapts itself to changes of society, yet always within limits and without obliterating the past.[36]

1.025 The common law, in short, embodies the inherent social order of a free, just and reasonable community that constantly evolves. It is ascertained, clarified and developed through the medium of cumulative case law precedents and traditions that are never uncritically received by judges. Consider the landmark decision of Lord Mansfield CJ in *Somerset v Stewart* (1772) Lofft 1, 98 ER 499, 509, which abolished slavery at common law in England and Wales four years before the independence of the United States:

> The state of slavery is of such a nature, that it is incapable of being now introduced by Courts of Justice upon mere reasoning or inferences from any principles, natural or political; it must take its life from positive law; the origin of it can in no country or age be traced back to any other source: immemorial usage preserves the memory of positive law long after all traces of the occasion, reason, authority and time of its introduction are lost; and in a case so odious as the condition of slaves must be taken strictly, the power claimed by the return was never in use here; no master was ever allowed to take a slave by force to be sold abroad because he had deserted from his service, or for any other reason whatever? We cannot say

[32] W Blackstone, *Commentaries on the Laws of England* (Clarendon Press, 1765) Vol. 1, 71.

[33] S Hall, *Law of Contract in Hong Kong: Cases and Commentary* (LexisNexis, 4th ed 2015) 50.

[34] BZ Tamanaha, *Law as a Means to an End: Threat to the Rule of Law* (Cambridge University Press, 2006) 32.

[35] MRLL Kelly, "Common Law Constitutionalism and the Oath of Governance: 'An Hieroglyphic of the Laws'" (2009) 28 *Mississippi College Law Review* 121, 166.

[36] DA Strauss, *The Living Constitution* (Oxford University Press, 2010) 3.

the cause set forth by the return is allowed or approved by the laws of this Kingdom, therefore the man must be discharged.

1.026 If case law — the handiwork of judges — no longer reflects the latest common law position manifested in social realities and popular expectations, it will lose its persuasiveness, if not its relevance.[37]

1.027 Rather than "detailed rules", the common law, which can be understood in four different but interrelated senses (see Table 1), is a distinct set of "attitudes, methods, procedures, general principles."[38] The common law now "stands for a set of concepts, interests, and values which it has protected during the course of its long history [which] include the rule of law, judicial independence, access to the courts, the separation of powers, and the liberty of the individual".[39] It sees rights, for instance, as inherent in the person, not derived from Sovereigns, and law as an inherent limitation on sovereignty itself, prior to constitutional documents like the Basic Law.[40] All common law jurisdictions could thus be said to share broad constitutional values grounded in liberal notions of legitimacy.[41]

Table 1: The Common Law in Four Senses

The Common Law
The inherent social order of a free, just and reasonable community
The Common Law System versus The Civilian Law System
A type of legal system based on the common law as opposed to other types of legal system (eg the French civilian law tradition)
Case Law versus Legislation
Legal principles emanating from judgments delivered by the superior courts of record based on the common law, as opposed to legislation enacted by the legislature
Law versus Equity
A branch of case law principles known as the 'rules of the common law' or simply 'law', as opposed to another branch of case law principles known as the rules of equity

1.028 The common law is the foundation of law in every jurisdiction that adheres to it.[42] Its paradigmatic source is not the Sovereign's command but the community's consensus of right and wrong; it elevates assent over domination, the community over the state and moral authority over material coercion.[43] The common law is thus independent of any individual's will, even the Sovereign's. It is binding on the very judges who elaborated it and "commands" such universal assent that it seldom undergoes legislative revision

[37] Hall (n 33 above) 53.
[38] P Wesley-Smith, "The Reception of English Law in Hong Kong" (1988) 18 HKLJ 183, 216.
[39] A Mason, "The Role of The Common Law in Hong Kong" in J Young and R Lee (eds), *The Common Law Lecture Series 2005* (University of Hong Kong Faculty of Law, 2006) 1.
[40] PC Magalhães, "Explaining the Constitutionalization of Social Rights: Portuguese Hypotheses and a Cross-National Test" in DJ Galligan and M Versteeg (eds), *Social and Political Foundations of Constitutions* (Cambridge University Press, 2013) 444.
[41] TRS Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford University Press, 2001) 5.
[42] S Hall, *Foundations of International Law* (LexisNexis, 2012) 173.
[43] JR Stoner, *Common-Law Liberty: Rethinking American Constitutionalism* (University Press of Kansas, 2003) 5.

or clarification save when contradictions or doubts arise in a particular branch of law.[44] It cannot be derived from any authoritative or quasi-sacred text enacted by a higher authority.

1.029 In Hong Kong's case, the common law is that part of domestic law which is not sourced in (even if mentioned by) the Basic Law and enactments of the Legislative Council.[45] The very rule that statute supersedes inconsistent case law is itself a rule of common law which, moreover, only emerged in the 17th century.[46] Statutes are to be drafted and interpreted consistently with deep-rooted common law principles.[47] In many ways, legislation has always been "a collection of islands in a sea of common law".[48]

(b) The civilian law tradition

1.030 The common law in its several versions governs full 30% of the world's population.[49] Major jurisdictions include Australia, Canada, England, India, New Zealand and the United States. In terms of global influence, it is rivalled only by the Romano-Germanic civilian law family which significantly shaped the legal systems of all contemporary jurisdictions in East Asia except Hong Kong.

1.031 These two are of course not the only influential legal traditions extant: Catholic canon law, Hindu law, Islamic law, Talmudic law, Scandinavian law and Socialist law also hold sway in many parts of the world.[50] Important variations notwithstanding, most contemporary legal systems owe their most fundamental features to either the common law or the civilian law tradition. Former colonies generally received their legal systems from their colonial rulers; no former British colony has ever adopted a civilian law system nor any continental European colony a common law one.[51]

1.032 The ancient Roman tradition of civilian law (*ius civile* in Latin) was reborn with the revival of Latin of the 11th, 12th and 13th centuries in the work of scholars of the new-born "universities of study" in places like Paris and Bologna, who set out to develop a law that would be autonomous from the canon law of the Church, yet superior in rational malleability to the patchwork of prevailing local custom. They took for the basis of their endeavour the rediscovered *Corpus Juris Civilis* (Body of Civilian Law) commissioned in the 6th century by the Eastern Roman Emperor Justinian the Great (r. 527–565).

[44] FA Hayek, *Law, Legislation and Liberty: A New Statement of the Liberal Principles of Justice and Political Economy* (Routledge, Vol. I, 1993) 85.
[45] Hall (n 42 above).
[46] See E Wicks, *The Evolution of a Constitution: Eight Key Moments in British Constitutional History* (Hart Publishing, 2006).
[47] TRS Allan, "The Rule of Law as the Rule of Reason: Consent and Constitutionalism" (1995) 115 *Law Quarterly Review* 221, 241–242.
[48] P Cane, *Controlling Administrative Power: An Historical Comparison* (Cambridge University Press, 2016) 205.
[49] P Darbyshire, *Darbyshire on the English Legal System* (Sweet & Maxwell, 11th ed 2014) 11.
[50] P Vines, *Law and Justice in Australia: Foundations of the Legal System* (Oxford University Press, 2nd ed) 18.
[51] A few former British colonies like South Africa and Sri Lanka have developed "mixed" systems that combine elements of civil with common law. See DM Klerman, PG Mahoney, H Spamann and MI Weinstein, "Legal Origin or Colonial History?" (2011) 3 *Journal of Legal Analysis* 379, 385.

1.033 In the course of expounding the civil law, European jurists conceived of law as an abstract and sophisticated body of precepts related to the study of theology and philosophy.[52] Their study and refinement of Roman law culminated in the magisterial codification of the Napoleonic Code of 1804,[53] which was carried across Continental Europe by Napoleon's invasions to Belgium, Italy, Luxembourg, the Low Countries and Rhenish provinces and Poland; an influence felt in Portugal, Spain and some cantons of Switzerland as well.[54]

1.034 In the ensuing era of imperialist expansion, France disseminated her legal influence to the Near East, Northern and Sub-Saharan Africa, Indochina, Oceania and the French Caribbean Islands. The Russian Empire adopted and modified the French Civil Code for its own use. The German Empire, building on Roman and French models of law, enacted the German Commercial Code in 1897 and radiated its legal influence to Austria, China, Czechoslovakia, Greece, Hungary, Italy, Japan, Korea, Switzerland, Yugoslavia and certain constituent states of the former Soviet Union.[55]

1.035 Systemic differences between civilian and common law persist in spite of the fact that the rising volume of statutory enactments in common law jurisdictions and judicial elaboration in civilian law jurisdictions has caused some convergences as well (see Table 2). Unlike its civilian law counterpart, a statute enacted in a common law jurisdiction is premised on the expectation that courts will work out the details in case law.

Table 2: Characteristics of Common Law and Civilian Law Systems

Common Law Systems	Civilian Law Systems
Pre-eminence of Case Law and Custom	Pre-eminence of Law Codes
Adversarial System	Inquisitorial System
Recognition Judiciary	Career Judiciary
Doctrine of *Stare Decisis*	No Doctrine of *Stare Decisis*
Executive-affiliated Prosecutions Service	Stand-alone Procuracy

1.036 Often, but not always, this is because the statute was drafted with a view to modify rather than abandon the prior state of the common law; seldom, if ever, is it designed to supplant fundamental common law norms. In civilian law jurisdictions, courts are expected to apply codified law, which is already compendious, literally and cautiously by default.[56]

[52] R Zimmermann, "Roman Law in the Modern World", in D Johnston (ed), *The Cambridge Companion to Roman Law* (Cambridge University Press, 2015) 458–459.

[53] C Anderson, *Roman Law* (Dundee University Press, 2009) 115.

[54] R La Porta, F Lopez-de-Silanes and A Shleifer, "The Economic Consequences of Legal Origins" (2008) 46 *Journal of Economic Literature* 285, 289–291.

[55] P du Plessis, *Borkowski's Textbook on Roman Law* (Oxford University Press, 5th ed 2015) 365.

[56] G Aldashev, "Legal Institutions, Political Economy, and Development" (2009) 25 *Oxford Review of Economic Policy* 257, 265.

1.037 Dispute resolution in the civilian law tends to be inquisitorial, but in the common law adversarial or accusatorial. The inquisitorial model originated in ancient Rome, was developed in the medieval ecclesiastical courts in cases involving the crime of heresy and spread across Europe under the influence of canon law and the rise of statism in the 16th century.[57] In spite of its susceptibility to "notorious abuses", the inquisitorial system did aspire to the ideal of justice being administered in accordance with professional learning and the common good.[58]

1.038 In the contemporary version of the inquisitorial system, the main responsibility for presenting the case falls on the court itself; witnesses and parties are questioned by the presiding judge, while the role of lawyers is supplementary.[59] Trial at common law entails the adversaries to the case to confront each other with witnesses, evidence and arguments, laid largely unaided before a passive judge–umpire. In *Jones v National Coal Board* [1957] 2 QB 55, 63–65, Denning LJ expounded the key characteristics and underlying rationale of adversarial proceedings:

> In the system of trial which we have evolved in this country, the judge sits to hear and determine the issues raised by the parties, not to conduct an investigation or examination on behalf of society at large, as happens, we believe, in some foreign countries … If he goes beyond this, he drops the mantle of a judge and assumes the role of an advocate; and the change does not become him well. Lord Chancellor Bacon spoke right when he said that: "Patience and gravity of hearing is an essential part of justice; and an over-speaking judge is no well-tuned cymbal."

1.039 The judge as career civil servant is a civilian law notion, whereas the common law conceives of judges as experts recognised for their achievements independent of the judiciary. The term "career judiciary" thus refers to a system in which judges join at a young age, even right out of law school, and make their entire careers therein, while a "recognition judiciary" is one where judges are appointed to the bench later in life in recognition of careers in private or government practice.[60]

1.040 Civilian law jurisdictions typically create judicial training institutes to train young lawyers who elect to make a career in the judiciary. This reinforces the separate identity of judges as making up a civil service of their own. The common law normally ignores judicial training as such; thus, appointment to superior courts does not presuppose previous experience on inferior courts.

1.041 The Macau legal system is a good illustration of important characteristics of the civilian law tradition. Like Hong Kong, Macau is a former Western European dependency with

[57] JH Merryman and R Perez-Perdomo, *The Civil Law Tradition: An Introduction to the Legal Systems of Europe and Latin America* (Stanford University Press, 3rd ed 2007) 128.

[58] A Cassese et al., *Cassese's International Criminal Law* (Oxford University Press, 3rd ed 2013) 330.

[59] M Zander, *Cases and Materials on the English Legal System* (Cambridge University Press, 10th ed 2007) 395.

[60] N Garoupa and T Ginsburg, "Hybrid Judicial Career Structures: Reputation versus Legal Tradition" (2011) 3 *Journal of Legal Analysis* 411, 411–413.

a multi-cultural identity,[61] and a Special Administrative Region of the People's Republic of China located on the northern end of the South China Sea, bordering Guangdong Province. Today, it is home to the world's largest casinos; its gambling revenue exceeds those of Las Vegas and Atlantic City combined.[62]

1.042 Macau is the only East Asian jurisdiction that was colonised by a Continental European imperial power. The fingerprints of the Romano-Germanic civilian law tradition are all over the Macau legal system, whose legal culture and legislation are "directly linked" to those of Portugal, Germany, France, the European Union,[63] and other Lusophone jurisdictions such as Brazil.[64] The *Lei Básica de Macau* (Macau Basic Law) of 1993,[65] authorised by the Sino-Portuguese Joint Declaration of 1987,[66] is in form and substance highly similar to the Hong Kong Basic Law. The *Lei Básica* has conserved the pre-existing Portuguese legal institutions to a very large extent.

1.043 "Law" for the Macau legal system is almost synonymous with "written legislation".[67] There are currently six major codes; *viz* the Civil Code, Civil Procedure Code, Criminal Code, Criminal Procedure Code, Commercial Code and Administrative Procedure Code, which contain abstract general rules and principles whence solutions to concrete cases are to be deduced. Most of these Codes strongly resemble the ones already in force in Portugal; although some, such as the Commercial Code, draw from the Italian Civil Code,[68] and the Civil Code takes as its "bone structure" the German Civil Code or *Bürgerliches Gesetzbuch* (BGB).[69] Following the Portuguese civilian law tradition, Macau recognises international and municipal law as comprising one legal system, and gives precedence to the former in case of conflict.

1.044 Case law and custom are relatively unimportant in Macau; neither has the status of a formal source of law. There is no such thing as binding precedent; Macau's judges have no legal obligation to follow rulings issued previously by any court in the judicial hierarchy.[70] That said, the decisions of Portuguese courts are often invoked in Macau's courts, the transfer of sovereignty notwithstanding. Also, the *Tribunal de Última Instância* (Court of Final Appeal) can deploy the special procedure of "fixation of jurisprudence" in certain situations to make the output of the entire courts system uniform on a given legal issue.

61 See, CA Mendes, "Macau in China's Relations with the Lusophone World" (2014) 57 *Brazilian Journal of International Politics* 225.

62 S Lo, "Hong Kong" in WA Joseph (ed), *Politics in China: An Introduction* (Oxford University Press, 2010) 364.

63 IC Ferreira, "The Macau SAR Legal System – Is the EU Law a Source of Inspiration for Macau Lawmakers?" in JAF Godinho (ed), *Studies on Macau Civil, Commercial, Constitutional, and Criminal Law* (LexisNexis, 2010) 66.

64 D de Castro Halis, "'Post-Colonial' Legal Interpretation in Macau, China: Between European and Chinese Influences" in S Miyazawa et al. (eds), *East Asia's Renewed Respect for the Rule of Law in the 21st Century: The Future of Legal and Judicial Landscapes in East Asia* (Brill, 2015) 77.

65 *Lei Básica da Região Administrativa Especial de Macau da República Popular da China* (Adopted by the Eighth National People's Congress at its First Session on 31 March 1993).

66 Joint Declaration of the Government of the People's Republic of China and the Government of the Portuguese Republic on the Question of Macao (signed on 13th April 1987).

67 de Castro Halis (n 64 above) 77.

68 JAF Godinho, *Macau Business Law and Legal System* (LexisNexis, 2007) 10.

69 PN Correia, "The Juridical System of Macau: A Comparative Law Perspective" in M Trigo (ed) *Report on Macau Law* (LexisNexis, 2014) 11.

70 See, EC Ip, "The Evolution of Constitutional Adjudication in the Chinese Special Administrative Regions: Theory and Evidence" (2013) 61 *The American Journal of Comparative Law* 799.

1.045 Overall, however, judges are trained to handle cases by applying codified legal provisions drafted in condensed language using precise terms and analytic concepts; for instance, the Civil Code contains 2,161 clauses and provisions formulated in this way.[71] Judges of Macau tend to consider their decisions as nothing more than products of an "abstract and logical technical process".[72] Occasionally, they may turn to academic jurists whose writings are collectively known as *doutrina* (doctrine) for assistance. It is persuasive authority especially when there is *doutrina dominante*, ie when most jurists agree.

1.046 Typical of civilian law jurisdictions, and unlike the common law practice of Hong Kong, where the Prosecutions Division of the Department of Justice makes part of the Executive branch, the *Ministério Público de Macau* or Office of Public Prosecutors of Macau, headed by a Procurator General, forms an autonomous part of the judicial system. Also typical of civilian law jurisdictions, Macau has a specialist *Tribunal Administrativo* (Administrative Court), separate from the ordinary *Tribunal Judicial de Base* (Court of First Instance), to adjudicate cases of government administration, taxation and customs duties.

1.047 Macau has a system of courts made up of career judges, *viz* judges who are hired at a young age and spend the rest of their legal careers in a judicial bureaucratic hierarchy.[73] There exists a Judicial Council, another civilian law institution, responsible for overseeing and disciplining judges under the auspices of the President of the *Tribunal de Última Instância*. Judges and prosecutors in Macau must undergo a two-year, legally required, training regimen offered by the Legal and Judicial Training Centre, an autonomous public institution.[74] By contrast, there is no judicial training college in Hong Kong; the Judicial Institute instead organises lectures, conferences and workshops for judges and judicial officers to enhance their effective judging skills on a relatively spontaneous basis.[75]

4. Classifying Law

1.048 Law is complex; classifying it systematically facilitates analysis and research.[76] There are many ways of classifying law that have implications for Hong Kong law (see Table 3). These methods are no less applicable in other jurisdictions, both common law and civilian law.

71 JAF Godinho and P Cardinal, "Macau's Court of Final Appeal" in SNM Young and Y Ghai (eds), *Hong Kong's Court of Final Appeal: The Development of the Law in China's Hong Kong* (Cambridge University Press, 2014) 609.

72 de Castro Halis (n 64 above) 78.

73 N Garoupa and T Ginsburg, *Judicial Reputation: A Comparative Theory* (University of Chicago Press, 2015) 43.

74 Macao Yearbook Editorial Committee, *Macao Yearbook 2014* (Government Information Bureau of the Macao Special Administrative Region, 2014) 140.

75 See, PY Lo, "Hong Kong: Common Law Courts in China" in JR Yeh and WC Chang (eds), *Asian Courts in Context* (Cambridge University Press, 2015) 201.

76 I Dobinson and D Roebuck, *Introduction to Law in the Hong Kong SAR* (Sweet & Maxwell, 2nd ed 2001) 15.

Y Su, "The Application of Chinese Law and Custom in Hong Kong" (1999) 29 HKLJ 267.

BZ Tamanaha, *On the Rule of Law: History. Politics, Theory* (Cambridge University Press, 2004).

M Tilbury et al., "Law Reform Today" in M Tilbury et al. (eds), *Reforming Law Reform: Perspectives from Hong Kong and Beyond* (Hong Kong University Press, 2014).

Z Tong, "A Comment on the Rise and Fall of the Supreme People's Court's Reply to *Qi Yuling*'s Case" (2010) 43 *Suffolk University Law Review* 669.

R Wacks, "One Country, Two *Grundnormen*? The Basic Law and the Basic Norm" in R Wacks (ed), *Hong Kong, China and 1997: Essays in Legal Theory* (Hong Kong University Press, 1983).

Z Wang and K Tu, "Chinese Constitutional Dynamics: A Decennial Review" in AHY Chen (ed), *Constitutionalism in Asia in the Early Twenty-First Century* (Cambridge University Press, 2014).

E Washburn, "The King's Bench and Growth of the Law" (1876) 1 *Southern Law Review* 533.

P Wesley-Smith, *An Introduction to the Hong Kong Legal System* (Oxford University Press, 3rd ed 1998).

P Wesley-Smith, *Constitutional and Administrative Law in Hong Kong* (Longman Asia, 2nd ed 1994).

P Wesley-Smith, *The Sources of Hong Kong Law* (Hong Kong University Press, 1994).

YL Wong, "Sources and Channels of Law Reform" in et al. (eds), *Reforming Law Reform: Perspectives from Hong Kong and Beyond* (Hong Kong University Press, 2014).

J Wu, "Several Issues Concerning the Relationship between the Central Government of the People's Republic of China and the Hong Kong Special Administrative Region" (1988) 2 *Journal of Chinese Law* 65.

Q Zhang, "A Constitution without Constitutionalism? The Paths of Constitutional Development in China" (2010) 8 *International Journal of Constitutional Law* 950.

Q Zhang, "From Popular Sovereignty to Human Rights: On the Paradigm Transformation of Chinese Constitutional Jurisprudence" (2009) 1 *Asia Law Quarterly* 1.

Y Zhang, "The Reasons for and Basic Principles in Formulating the Hong Kong Special Administrative Region Basic Law and Its Essential Contents and Mode of Expression" (1988) 2 *Journal of Chinese Law* 5.

TJ Zywicki, "The Rise and Fall of Efficiency in the Common Law: A Supply-side Analysis" in A Marciano (ed), *Law and Economics: A Reader* (Routledge, 2009).

CHAPTER 4

THE RULE OF LAW

1. Introduction

The common law is historically intertwined with the practice of individual liberty. Throughout modern Hong Kong's existence, it has provided the predictability and rationality that a free and efficient market depends on, by vindicating property rights, enforcing contracts and, above all, holding government itself to account before the law.[1] This has entrenched incentives for hard work and future-oriented investment,[2] setting the stage for the emergence of a premier international financial centre.[3] **4.001**

The common law has certainly achieved more than this. It not only transformed Hong Kong's economy but also its community; for it has given residents "not just a neat set of rules but an attitude of mind … not just 'Rule by Law' but 'the Rule of Law'".[4] Thus, the Government could confidently declare, on the eve of the fifth anniversary of the Handover in 2002, that "if Hong Kong people have a defining ideology, it is the rule of law".[5] The rule of law is no mere political slogan but a rigorously enforced constellation of legal principles that buttress the entire edifice of justice. The answer to every single question that arises in the context of or in consequence of governmental acts is to be guided by the rule of law.[6] **4.002**

This chapter is an introduction to the rule of law as practiced in Hong Kong's common law system. Section 2 examines the historical origins, content and ends of the rule of law, bracketing the dangers of conflating it with mere legality or public order, with reference to mainstream views of the legal and judicial community in the aftermath of the Umbrella Movement of 2014. Section 3 illustrates the mechanisms through which the rule of law is maintained: legislative oversight, judicial oversight and executive oversight. Section 4 explores the future of the rule of law beyond 30 June 2047. Section 5 summarises the main themes of this chapter. **4.003**

2. Nature of the Rule of Law in Hong Kong

(a) Origins

The English common law tradition and its characteristic feature, the rule of law, crystallises centuries of struggle between the Crown, Parliament and the Royal Courts **4.004**

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1 Y Ghai, "The Rule of Law and Capitalism: Reflections on the Basic Law" in R Wacks (ed), *China, Hong Kong and 1997: Essays in Legal Theory* (Hong Kong University Press, 1993) 342.

2 See RA Posner, "The Constitution as an Economic Document" (1987) 56 *George Washington Law Review* 4.

3 DW Arner and BFC Hsu, "The Rule of Law and Economic Development in the Hong Kong SAR" in MK Chan (ed), *China's Hong Kong Transformed: Retrospect and Prospects Beyond the First Decade* (City University Press, 2008).

4 D Chang, "Towards a Jurisprudence of a Third Kind – 'One Country, Two Systems'" (1988) 20 *Case Western Reserve Journal of International Law* 99, 110.

5 Government of the Hong Kong Special Administrative Region, *The Report on the First Five Years of the Hong Kong Special Administrative Region of the People's Republic of China* (Hong Kong Special Administrative Region, 2002) 33.

6 TRS Allan, *The Sovereignty of Law: Freedom, Constitution, and Common Law* (Oxford University Press, 2013) 88–89.

of Justice[7] over the trade-off between "power and freedom".[8] This trade-off harks back to Anglo-Saxons (5th–11th centuries) and their "unspoken but fundamental bargain"[9] between the king and the community, under which obedience was conditional upon the king's respect for the customary liberties of the folk.[10] It is plain common sense that no ruler, let alone an autocrat, can wield meaningful authority without the acquiescence of the community.[11] Ultimately, a sovereign's right to rule cannot be taken for granted and is one that flows from the approval of the community, whether tacit or expressed.

4.005 As early as 1215, the Magna Carta — the great charter of liberties — enshrined the principles that the law is sovereign even over the monarch, that powers should be separated, and that the judiciary should be independent, all of which according to Lady Justice Arden of the English Court of Appeal extra-judicially, "[are] still relevant concepts, needed as much today as in the past".[12] Magna Carta's provisions, as Lord Woolf, the former Lord Chief Justice of England and Wales who later became a non-permanent judge of the Hong Kong Court of Final Appeal, has remarked, still "contain many of the core features of a legal system of a society that today adheres to the rule of law", and because it is "part of the [English] common law" it has also formed "part of the law of many countries".[13] Magna Carta has inspired not only the fundamental laws of England like the Petition of Right 1628, the Habeas Corpus Act 1679, the Bill of Rights 1689 and the Act of Settlement 1701 but also globally influential documents like America's Declaration of Independence 1776 and the Universal Declaration of Human Rights 1948.[14]

4.006 Even when not codified in landmark constitutional texts, the rulings enunciated by the law courts have established many important principles of the rule of law. In 1610, the Court of King's Bench confronted the question of whether the monarch could make laws and raise money by his own proclamation, after King James I (r. 1603–1625), known for the Protestant King James Bible, had asserted so self-aggrandisingly before the English Parliament:

> Kings are justly called gods for that they exercise a manner or resemblance of Divine power upon earth … they make and unmake their subject; they have power of raising and casting down; of life and death; judges over all their subjects and in all causes, and yet accomptable to none but God only. They have power to exalt low things and abase high things, and make of their subjects like men at the chess, a pawn to take a bishop or a knight, and to cry up or down any of their subjects as they do their money.[15]

[7] C Turpin and A Tomkins, *British Government and the Constitution: Text and Materials* (Cambridge University Press, 7th ed 2011) 97.

[8] D Irvine, "The Spirit of Magna Carta Continues to Resonate in Modern Law" (2003) 119 *Law Quarterly Review* 227, 228.

[9] T Bingham, "The Rule of Law" (2007) 66 *Cambridge Law Journal* 67, 84–85.

[10] J Alder, *Constitutional and Administrative Law* (Palgrave Macmillan, 9th ed 2013) 110.

[11] S Abdukadirov, "The Problem of Political Calculation in Autocracies" (2010) 21 *Constitutional Political Economy* 360.

[12] M Arden, *Common Law and Modern Society: Keeping Pace with Change* (Oxford University Press, 2015) 278–279.

[13] H Woolf, "Constitutional Protection without a Written Constitution" (2005) 17 *Singapore Academy of Law Journal* 518, 523.

[14] Irvine (n 8 above) 238.

What was worse, the Lord Chancellor had warned Sir Edward Coke, the Lord Chief Justice, "to maintain the power and prerogative of the King; and in cases in which there is no authority and precedent, to leave it to the King to order in it, according to his wisdom, and for the good of his subjects, or otherwise the King would be … restrained in his prerogative, that it was to be feared the bonds would be broken". Defying all these threats and jealously defending the independence of the Court, the Lord Chief Justice emphatically declared in the *Case of Proclamations* (1611) 12 Co Rep 74, 77 ER 1352 that: **4.007**

> [T]he King by his proclamation or other ways cannot change any part of the common law, or statute law, or the customs of the realm, also the King cannot create any offence by his prohibition or proclamation, which was not an offence before, for that was to change the law, and to make an offence which was not …
>
> [W]e do find divers precedents of proclamations which are utterly against law and reason, and for that void; for *quæ contra rationem juris introducta sunt non debent trahi in consequentiam* (things introduced contrary to the reason of the law ought not to be drawn into precedents).
>
> [T]he law of England is divided into three parts, common law, statute law, and custom; but the King's proclamation is none of them.

The *Case of Proclamations* affirmed the common law principle that no man, not even the King, is above the law, and by implication, that no unilateral act of the Crown, either by prerogative or by subsidiary legislation, can alter the common law, in which subsists the wisdom of generations from time immemorial.[16] **4.008**

Entick v Carrington (1765) 19 St Tr 1029, 95 ER 807 is another leading case putting lawful limits on the Sovereign in favour of individual liberty. Entick was suspected by the authorities of being the author of seditious writings. On pretext of national security, the King's messengers broke into Entick's house and seized his books and papers on a warrant issued by the Secretary of State. Entick sued them for trespass *vi et armis* (with force and arms) in the Court of King's Bench. Holding in Entick's favour, Lord Camden CJCP ruled: **4.009**

> If it is law, it will be found in our books. If it is not to be found there, it is not law. The great end, for which men entered into society, was to secure their property. That right is preserved sacred and incommunicable in all instances, where it has not been taken away or abridged by some public law for the good of the whole. The cases where this right of property is set aside by positive law are various.

[15] James I, "King's Are Justly Called Gods" *Speech to Parliament* (21 March 1609), cited in S McIntire (ed), *Speeches in World History* (Facts on File, 2009) 137–138.

[16] JGA Pocock, *The Ancient Constitution and the Feudal Law: A Study of English Historical Thought in the Seventeenth Century* (Cambridge University Press, 1957) 33–35, cited in F Pirie, *The Anthropology of Law* (Oxford University Press, 2013) 122.

> Distresses, executions, forfeitures, taxes, &c. are all of this description; wherein every man by common consent gives up that right, for the sake of justice and the general good. By the laws of England, every invasion of private property, be it ever so minute, is a trespass. No man can set his foot upon my ground without my licence, but he is liable to an action, though the damage be nothing; which is proved by every declaration in trespass, where the defendant is called upon to answer for bruising the grass and even treading upon the soil. If he admits the fact, he is bound to shew by way of justification, that some positive law has empowered or excused him. The justification is submitted to the judges, who are to look into the books; and if such a justification can be maintained by the text of the statute law, or by the principles of common law. If no such excuse can be found or produced, the silence of the books is an authority against the defendant, and the plaintiff must have judgment.[17]

4.010 *Entick v Carrington* is a "classical example" of how the rule of law is upheld by the courts, which are obligated to give remedies to citizens victims of unlawful government conduct.[18] These and other like cases inspired Dicey to claim that the rule of law remains "a distinctive characteristic of the English constitution". According to Dicey, England's rule of law contains three salient features:

(1) "In England no man can be made to suffer punishment or to pay damages for any conduct not definitely forbidden by law".

(2) "[E]very man's legal rights or liabilities are almost invariably determined by the ordinary Courts of the realm".

(3) "[E]ach man's individual rights are far less the result of our constitution than the basis on which that constitution is founded".[19]

4.011 The last feature, which relates to the substantive aspect of the law in protecting individual rights, merits special attention for it sets the common law heritage of the rule of law apart from that of civilian law traditions. Dicey explained:

> The general rights guaranteed by the constitution may be, and in foreign countries constantly are, suspended ... The matter to be noted is, that where the right to individual freedom is a result deduced from the principles of the constitution, the idea readily occurs that the right is capable of being suspended or taken away.

4.012 On Dicey's view, the peculiarity of the common law is that rights inhere in the individual member of the community by birthright. They may not be suspended by the State by way of making, amending or repealing a constitutional statute, because the State never granted them in the first place. Rights that originate in a grant from a

[17] *Entick v Carrington* (1765) 19 St Tr 1029, 1066.

[18] I Loveland, *Constitutional Law, Administrative Law, and Human Rights: A Critical Introduction* (Oxford University Press, 6th ed 2012) 53.

[19] AV Dicey, *Introduction to the Study of the Law of the Constitution* (Liberty Classics, 8th ed 1982 [1915]) lv.

Sovereign are vulnerable to the same Sovereign's revocation. Conversely, if liberty is inherent not bestowed, then no Sovereign can take it away.[20]

4.013 According to Dicey, the rule of law is a well-known feature of the United States more because "the statesmen of America have shown unrivalled skill in providing means for giving legal security to the rights declared by American constitutions" and less because "[t]he Constitution of the United States and the constitutions of the separate States are embodied in written or printed documents, and contain declarations of rights".[21]

One of the clearest, most authoritative contemporary restatements of the rule of law tradition was offered by the late Lord Bingham. It consists of eight "sub-rules":[22]

(1) The law must be accessible and so far as possible intelligible, clear and predictable.

(2) Questions of legal right and liability should ordinarily be resolved by the application of the law and not the exercise of discretion.

(3) The laws of the land should apply equally to all, save to the extent that objective differences justify differentiation.

(4) The law must afford adequate protection of fundamental human rights.

(5) Means must be provided for resolving, without prohibitive cost or inordinate delay, *bona fide* civil disputes which the parties themselves are unable to resolve.

(6) Ministers and public officers at all levels must exercise the powers conferred on them reasonably, in good faith, for the purpose for which the powers were conferred and without exceeding the limits of such powers.

(7) Adjudicative procedures provided by the state should be fair.

(8) The rule of law requires compliance by the state with its obligations under the international law that governs the conduct of nations, whether deriving from treaty or international custom and State practice.

4.014 By definition, a legal system that does not protect fundamental rights and liberties cannot possibly qualify as one that upholds the rule of law, all the grandiose gestures in its paper constitution notwithstanding. "A state which savagely represses or persecutes sections of its people ... cannot ... be regarded as observing the rule of law [even if the repression or persecution] is the subject of detailed laws duly enacted and scrupulously observed", according to Lord Bingham.[23]

4.015 The common law is a pragmatic enterprise more concerned with outcomes than promises. As Dicey famously noted:

[20] MW McConnell, "Tradition and Constitutionalism Before the Constitution" (1998) 1998 *University of Illinois Law Review* 173, 185.

[21] Dicey (n 19 above) 118–119.

[22] See T Bingham (n 9 above) 67.

[23] T Bingham, *The Rule of Law* (Penguin, 2010) 67.

> The Habeas Corpus Acts declare no principle and define no rights, but they are for practical purposes worth a hundred constitutional articles guaranteeing individual liberty.[24]

(b) Development of the rule of law in Hong Kong

4.016 Hong Kong has long evolved its own tradition exhibiting most, if not all, of the procedural and substantive features of the English rule of law tradition. As we saw in Chapter 2, despite all of the shortcomings and imperialist assumptions of the early legal system, tradition stiffened Chief Justice Hulme's spine to protect his nascent Supreme Court from the Governor's usurpations; allowed Chinese men charged with the attempted poisoning of the European community in 1857 to be tried by jury and acquitted in face of demands from powerful colonists for their summary execution; and inspired Chief Justice Smale to free Kwok A Sing, a Chinese coolie charged with piracy aboard a European ship in 1871, on the grounds that he had been taken by force, contrary to persuasive precedent.[25]

4.017 Hong Kong's answer to the Case of Proclamations was the unreported decision of the Supreme Court in *Lugard v Chu Ping*,[26] handed down in 1909. It involved a complicated dispute over the rights of marine lot holders within a large-scale reclamation project, the Praya Scheme, which expanded the Central waterfront by several dozens of acres. In his judgment, Sir Francis Piggott CJ lectured the Governor, Sir Frederick Lugard (r. 1907–1912), on the legal limits of vice-regal power:

> I have no notion of a Government passing an Ordinance, and then acting autocratically, as if no Ordinance had been passed and doing what it thinks fit … Of course those Governors thought they were acting, and intended to act, in what they conceived to be the best interests of the Colony; but nothing justifies independent action on the part of a Governor when he has to deal with the rights of individuals and the rights of the Government. He has a Legislature to fall back on, and in all cases of doubt he is bound to consult it, or if prompt action is considered by his advisers to be essential, then he is bound to come to the Legislative Council afterwards to ratify what he has done. The grant of a Legislature to a Colony however small is part of the great constitutional system which pervades the Empire: the fact that there is a permanent Government majority does not alter the constitutional principle, which the very existence of the Legislature implies, that everything must be done regularly and in order; and if anything is done irregularly and out of order those officers who so act, the highest or the lowest, must take the consequences. And in the case of this agreement, and indeed of almost every act of the then Government in this matter, the Ordinance has been treated as waste paper, and the Legislature as non-existent.[27]

[24] Dicey (n 19 above) 118.

[25] C Munn, "The Rule of Law and Criminal Justice in the Nineteenth Century" in S Tsang (ed), *Judicial Independence and the Rule of Law in Hong Kong* (Hong Kong University Press, 2001) 48.

[26] Cited in P Wesley-Smith, "Sir Francis Piggott: Chief Justice in His Own Cause" (1982) 12 HKLJ 260, 273.

[27] *Ibid.*

4.018 The Governor all too predictably denounced this strongly worded ruling, even claiming it was "calculated to lower the dignity of the Government in the eyes of the Chinese who do not appreciate our ideas of the mutual relations between the judiciary and the Executive". The Chief Justice courageously replied to this and to the Governor's demand for a justification of his ruling in the spirit of Sir Edward Coke facing off against King James I, reminding him that:

> I have the honour to remind Your Excellency that I administer the King's justice in the Colony, and for such purpose I represent His Majesty. If in the course of the administration of the civil affairs of the Colony an order is made which interferes with the administration of justice which I cannot get altered by the usual method, it is my duty to make the strongest representation possible to that end; and this even though the order has received the sanction of the Secretary of State.[28]

4.019 Thereafter, the rule of law steadily went from strength to strength in Hong Kong, surviving even the Sino-British negotiations in the early 1980s and the Handover in 1997. In Chapter 2, we saw how the Basic Law reaffirmed the essentials of the fundamental principles of the common law of Hong Kong. In the extra-judicial words of Sir Anthony Mason:

> The rule of law, requiring the protection of human rights and fundamental freedoms, naturally became a fundamental assumption upon which the Basic Law was framed.[29]

4.020 The People's Republic of China has originally agreed that the rule of law was "essential to capitalism" in Hong Kong,[30] and, above all, "an invaluable asset and advantage" of the Special Administrative Region "which deserves careful preservation",[31] such that it would be unfitting to make any substantive alteration to it. Through the Basic Law, the incoming Sovereign promised to observe the good, approved and enduring laws of Hong Kong; to maintain the "way of life" and liberties of its residents; to follow the advice of their representatives and to rule over them in peace with prudence and mildness. Hence, according to art.22(3) of the Basic Law:

> All offices set up in the Hong Kong Special Administrative Region by departments of the Central Government, or by provinces, autonomous regions, or municipalities directly under the Central Government, and the personnel of these offices shall abide by the laws of the Region.

[28] *Ibid.*, 260, 288.

[29] A Mason, "The Place of Comparative Law in Developing the Jurisprudence of the Rule of Law and Human Rights in Hong Kong" (2007) 37 HKLJ 299, 301.

[30] Y Ghai, "Hong Kong's Autonomy: Dialects of Powers and Institutions" in Y Ghai and S Woodman (eds), *Practising Self-Government: A Comparative Study if Autonomous Regions* (Cambridge University Press, 2013) 343.

[31] Z Wang, "From the Judicial Committee of the British Privy Council to the Standing Committee of the Chinese National People's Congress – An Evaluation of the Legal Interpretive System after the Handover" (2007) 37 HKLJ 605, 617.

4.021 The Hong Kong Bill of Rights Ordinance (Cap.383), enacted the year after the Basic Law was promulgated, is doubtlessly another landmark of the rule of law in Hong Kong. Contained in Part II of the Ordinance, it reproduced verbatim much of the International Covenant on Civil and Political Rights, mentioned in the Sino-British Joint Declaration. Its provisions encompass:

(1) the entitlement to rights without distinction;[32]

(2) the right to life;[33]

(3) freedom from torture and inhuman treatment;[34]

(4) freedom from slavery;[35]

(5) the security of the person;[36]

(6) the rights of persons unlawfully deprived of their liberty;[37]

(7) freedom from imprisonment for breach of contract;[38]

(8) liberty of movement;[39]

(9) limitations on expulsion from the territory;[40]

(10) the right to a fair and public hearing;[41]

(11) the rights of persons charged with or convicted of criminal offences;[42]

(12) freedom from retrospective penal liability;[43]

(13) the right to recognition as a person before law;[44]

(14) the protection of privacy, family, home, correspondence, honour and reputation;[45]

(15) freedom of thought, conscience and religion;[46]

(16) freedom of expression;[47]

(17) the right of peaceful assembly;[48]

[32] Hong Kong Bill of Rights, art.1; International Covenant on Civil and Political Rights, art.2 and art.3.
[33] Hong Kong Bill of Rights, art.2; International Covenant on Civil and Political Rights, art.6.
[34] Hong Kong Bill of Rights, art.3; International Covenant on Civil and Political Rights, art.7.
[35] Hong Kong Bill of Rights, art.4; International Covenant on Civil and Political Rights, art.8.
[36] Hong Kong Bill of Rights, art.5; International Covenant on Civil and Political Rights, art.9.
[37] Hong Kong Bill of Rights, art.6; International Covenant on Civil and Political Rights, art.10.
[38] Hong Kong Bill of Rights, art.7; International Covenant on Civil and Political Rights, art.11.
[39] Hong Kong Bill of Rights, art.8; International Covenant on Civil and Political Rights, art.12.
[40] Hong Kong Bill of Rights, art.9; International Covenant on Civil and Political Rights, art.13.
[41] Hong Kong Bill of Rights, art.10; International Covenant on Civil and Political Rights, art.14.1.
[42] Hong Kong Bill of Rights, art.11; International Covenant on Civil and Political Rights, art.14.2.
[43] Hong Kong Bill of Rights, art.12; International Covenant on Civil and Political Rights, art.15.
[44] Hong Kong Bill of Rights, art.13; International Covenant on Civil and Political Rights, art.16.
[45] Hong Kong Bill of Rights, art.14; International Covenant on Civil and Political Rights, art.17.
[46] Hong Kong Bill of Rights, art.15; International Covenant on Civil and Political Rights, art.18.
[47] Hong Kong Bill of Rights, art.16; International Covenant on Civil and Political Rights, art.19.
[48] Hong Kong Bill of Rights, art.17; International Covenant on Civil and Political Rights, art.21.

(18) freedom of association;[49]

(19) the right to marriage;[50]

(20) the rights of children;[51]

(21) the right to participate in public affairs;[52]

(22) equal protection under the law;[53] and

(23) the rights of minorities.[54]

4.022 Consistent with the common law tradition, the Hong Kong Bill of Rights is not a grant from the Sovereign but a declaration of what is inherent in the person of each Hong Kong resident. These are birthrights that may not be suspended and may only be limited proportionately. For example, in *R v Kevin Egan* (1993) 3 HKPLR 277, 285, Deputy Judge Jones ruled from the High Court of Justice that:

> [T]he protection afforded by Article 10 of a fair and public hearing is declaratory of the situation under our law now and before the enactment of the Bill of Rights. The declaration itself is of value in that it acquaints all men of their rights, but it does not enhance nor enlarge those rights, nor the remedies available for their abuse.

4.023 Between 1991 and 1997, the courts of Hong Kong in cautious, incremental steps took on board the doctrine of proportionality in assessing the merits of limitations to fundamental rights; explicitly referenced foreign and international human rights case law and affirmed judicial competence to make impugned legislation null and void, rather than setting it aside for the nonce or leaving it to the Legislative Council entirely to declare the constitutionality of statutes. In *R v Sin Yau Ming* [1992] 1 HKCLR 127, 145, an early Bill of Rights case, the Court of Appeal (Silke V-P) unequivocally declared:

> The interests of the individual must be balanced against the interests of society generally but, in the light of the contents of the Covenant and its aim and objectives, with a bias towards the interests of the individual.

4.024 Since the Handover, the leading case on the meaning and dimensions of the rule of law has been the Court of Final Appeal's decision in *Leung Kwok Hung v HKSAR*.[55] A protest march along Queensway, a busy thoroughfare near Central, was led in May 2002 by prominent political activist Leung Kwok Hung. The march itself was peaceful, but Leung and his aides had refused to comply with the notification procedure in s.13A of the Public Order Ordinance (Cap.245), requiring organisers of an assembly to give

[49] Hong Kong Bill of Rights, art.18; International Covenant on Civil and Political Rights, art.22.
[50] Hong Kong Bill of Rights, art.19; International Covenant on Civil and Political Rights, art.23.
[51] Hong Kong Bill of Rights, art.20; International Covenant on Civil and Political Rights, art.24.
[52] Hong Kong Bill of Rights, art.21; International Covenant on Civil and Political Rights, art.25.
[53] Hong Kong Bill of Rights, art.22; International Covenant on Civil and Political Rights, art.26.
[54] Hong Kong Bill of Rights, art.23; International Covenant on Civil and Political Rights, art.27.
[55] [2005] 8 HKCFAR 229.

written notice to the police of any procession to be attended by more than 30 people, describing the purpose, time, route and estimated number of attendees. This act of civil disobedience also targetted s.14(1) of the Ordinance, authorising the Commissioner of Police to disallow the procession on vague public security grounds. Leung and two others were convicted under the statute of leading an unlawful procession.

4.025 The Court of Final Appeal rejected the appeal itself on a four-to-one vote on 8 July 2005, yet ruled for the appellants to the extent of striking down the vague, excessively broad concept of ordre public in s.14(1) that had long furnished grounds for Police Commissioners to quash peaceful processions. The Court confirmed, first of all, that the Bill of Rights is restitutive, rather than creative, in nature:

> Hong Kong's tradition of fundamental rights and freedoms took root long before the Bill of Rights was enacted and entrenched in 1991.[56]

4.026 Second, the Court laid out the role of the courts in upholding the rule of law, noting that the adequate protection of rights is intrinsic to the rule of law:

> Needless to say, in a society governed by the rule of law, the courts must be vigilant in the protection of fundamental rights and must rigorously examine any restriction that may be placed on them.[57]

4.027 Next, the Court cited Lord Chief Justice Coke's example to highlight the rule of law's emphasis on substantive justice, and not mere procedural rigour:

> Sir Edward Coke (in 4 Inst 41) made the point in language as memorable as it is picturesque. He recommended it as "[a] good caveat to parliaments to leave all causes to be measured by the golden and straight metwand of the law, and not to the uncertain and crooked cord of discretion". This is not to be dismissed as an early common lawyer's mistrust of equity. There is much more to it than anything of that kind. After all, Coke also pointed out (in Co Litt 24B) that "*[b]onus judex secundum aequum et bonum judicat, et aequitatem stricto juri praefert*" (a good judge decides according to justice and right, and prefers equity to strict law).[58]

4.028 Fourth, the Court underscored how intimately liberty is intertwined with the rule of law:

> Whenever there is a power by which the exercise of a fundamental right or freedom is liable to be restricted, a constitution properly protective of human rights requires that such a power be clearly and carefully limited to avoid the danger of it being exercised arbitrarily or disproportionately. The rule of law so demands. It so demands for the purpose of preserving what Marshall CJ of the United States Supreme Court famously described in *Marbury v Madison* 5 US 137 (1803) at p.163 as "a government of laws, and not of men". As explained in *Salmond on Jurisprudence* (12th ed., 1966) at p.65, "a government of laws is preferable to one of men not simply by virtue of being less uncertain but by reason of releasing the citizen from the mercy of other human beings." … If a freedom is not an absolute one, then it may be governed. Even so, it will not be a freedom governed by men or women. It will be, as Lord Wright said (at p.627) when delivering the advice of the Privy Council in *James v Commonwealth of Australia, State of New South Wales* [1936] AC 578, a "freedom governed by law".[59]

[56] *Ibid.*, 277 (Li CJ, Chan and Ribeiro PJJ and Sir Anthony Mason NPJ).
[57] *Ibid.*, 248 (Li CJ, Chan and Ribeiro PJJ and Sir Anthony Mason NPJ).
[58] *Ibid.*, 284–285 (Li CJ, Chan and Ribeiro PJJ and Sir Anthony Mason NPJ).

4.029 More about the rule of law as a legal principle can be found in extra-judicial speeches of current and former Chief Justices, the teaching of whom exhibits a remarkable mutual consistency. In 2013, former Chief Justice Andrew Li said:

> It is universally acknowledged that the rule of law is a cornerstone of our society … which is at the heart of our separate system and distinguishes our system from that of the Mainland.[60]

4.030 He then identified three overarching principles that manifestly correspond to Dicey's formulation more than a century ago:[61]

(1) "First, under the rule of law, everyone, both those who govern and those who are governed, is subject to the same laws".

(2) "Secondly, disputes between citizens and disputes between citizen and government are resolved fairly and impartially by an independent Judiciary".

(3) "Thirdly, the rule of law involves the effective protection of human rights".

4.031 In the same year, Chief Justice Geoffrey Ma summed up in two "premises" the rule of law as practiced in Hong Kong:

> [T]he rule of law comprises two connected premises: first, the existence of laws that respect the dignity and rights (whether personal, proprietary or what are known as human rights and freedoms) of the individual; and secondly, the existence of an independent judiciary to enforce these rights and liberties.[62]

(c) Purpose

4.032 On the occasion of a speech given before Lingnan University, Chief Justice Ma explained why the rule of law cannot be merely the rule of ordinary laws but must also be the rule of the spirit of the law:

> The law is, as one would expect, contained in written form (the Basic Law, statute law, the judgments of the courts). There is, however, also the spirit of the law: this is the recognition that in applying our laws, judges must appreciate the reason and

[59] *Ibid.*, 292 (Li CJ, Chan and Ribeiro PJJ and Sir Anthony Mason NPJ).
[60] AKN Li, "The Importance of the Rule of Law" (2013) 43 HKLJ 795, 795.
[61] *Ibid.*, 795, 796–797.
[62] GT Ma, "The Essence of Our Society: From a Written Constitution to Reality and into the Future 50 Years" *Chinese University of Hong Kong 50th Anniversary Distinguished Lecture* (22 March 2013).

> purpose behind those laws. And it is fundamental that everyone — the Government, judges, the community — is equal before the law. This is particularly important to be borne in mind in the context of public law cases where, invariably, the Government is on one side … Adherence to the law, to legal principle and to the spirit of the law, and the concept of equality before the law, are key to the existence of the rule of law.[63]

4.033 The spirit of the law is unwritten; "law" in this sense is "more than statutes and common law" and is by definition concerned less with the formal institutions of government than with the understandings on which they, and the community, are based.[64] In his 1750 treatise *The Spirit of the Laws* (the origin of the modern doctrine of separation of powers), the philosopher Charles de Secondat, Baron de Montesquieu admired the spirit of the laws of England, which he regarded as the "one nation in the world whose constitution has political liberty for its direct purpose".[65] Three centuries later, Lord Denning commented on the spirit of the modern British constitution in these words:

> It lies I believe, first, in the instinct for justice which leads us to believe that right, and not might, is the true basis of society; and secondly, in the instinct for liberty, which leads us to believe that free-will, and not force, is the true basis of government. These instincts for justice and liberty are abstract ideas which are common to all freedom-loving countries: but the peculiar genius of the British constitution lies in a third instinct, which is a practical instinct leading us to balance rights with duties, and powers with safeguards, so that neither rights not powers shall be exceeded or abused.[66]

4.034 The centrality of liberty to the rule of law was made clearer in a 1980 speech by the late Chief Justice Roberts:

> Hong Kong does not offer what is commonly called a democratic society … What it does provide is a genuinely free society. By this, I mean a society in which everyone is subject to the law, where nobody can be deprived of his property or personal freedom save in accordance with the law and where he can, within those limits which every community prescribes for the preservation of order and personal reputation, say what he thinks and pursue his own life without the intervention of the state. The only sure guarantee of such a free society is an impartial, independent and fearless judiciary. This priceless advantage has been enjoyed by Hong Kong since 1841. Our judges and magistrates are not always wise, or patient, or clever, or learned. But there are few who do not possess in full

[63] GT Ma, "A Respect for Rights and a Respect for the Rights of Others" *University Assembly Lecture at Lingnan University* (17 March 2014).

[64] DJ Galligan, "The People, the Constitution, and the Idea of Representation" in DJ Galligan and M Versteeg (eds), *Social and Political Foundations of Constitutions* (Cambridge University Press, 2013) 142–143.

[65] AM Cohler et al. (eds), *Montesquieu: The Spirit of the Laws* (Cambridge: CUP, 1989 [1748]) 156.

[66] A Denning, "The Spirit of the British Constitution" (1951) 29 *The Canadian Bar Review* 1180, 1182.

> measures the qualities which are essential to the preservation of personal freedom.[67]

4.035 Section 19 of the Interpretation and General Clauses Ordinance (Cap.1) obliges every interpreter of Ordinances to effectuate the "true intent, meaning and spirit" of the law.

4.036 The rule of law supports individual liberty by creating a predictable framework within which government must act. This frees individuals to choose their own life-styles and long-term goals and lead their lives within the same framework. The opportunity to rely on a predictable and stable environment for one's life and choices[68] enables one to pursue happiness in the absence of fear that it will be arbitrarily swept away by the government.[69]

4.037 The rule of law treats its subjects as persons competent to plan their own future.[70] This was quite succinctly put by Li CJ, Chan and Ribeiro PJJ, and Anthony Mason NPJ in *Leung Kwok Hung v HKSAR* (2005) 8 HKCFAR 229, 287:

> The proposition that vague laws inhibit the exercise of constitutional rights and freedoms goes to the core of what we have always acknowledged as our duty in respect of Basic Law rights and freedoms, namely to give them such application as ensures their enjoyment in full measure. Not everyone is prepared to risk being prosecuted on criminal or disciplinary charges. Nor does everyone relish having to bring a constitutional challenge in order to vindicate his or her beliefs.

(d) Mere legality and the rule of law

4.038 Hong Kong officials increasingly lard their speeches and pronouncements with the phrases *yifa zhigang* ("rule Hong Kong in accordance with law") and *yifa shizheng* ("administer [Hong Kong] in accordance with law").[71] The phrases seem to have originated in Chinese official statements and resonate with the unenforceable PRC Constitution's exhortation: "rule the State in accordance with law".[72] In China, *yifa* ("in accordance with law") connotes mere legality: rulers should rule in accordance with the laws they enact as rulers (see Chapter 12).

4.039 *Yifa* thus falls noticeably short of the rule of law standard, which "goes beyond merely requiring everything to be done according to law".[73] The Nobel Prize-winning economist Frederick Hayek explains why this must be so:

> If a law gave the government unlimited power to act as it pleased, all its actions would be legal, but it would certainly not be under the rule of law. The rule of law, therefore … requires that all laws conform to certain principles. From the fact that

[67] Cited in P Shieh, "Speech of the Chairman of the Hong Kong Bar Association at the Opening of the Legal Year" (13 January 2014).

[68] J Raz, *The Authority of Law* (Oxford University Press, 2nd ed 2009) 220.

[69] TRS Allan (n 6 above) 91.

[70] J Raz (n 68 above) 221.

[71] T Cheung and J But, "Xi Calls on Hong Kong to Unite behind CY Leung" *South China Morning Post* (18 March 2013).

[72] Constitution of the People's Republic of China 1982, art.59(1).

[73] H Woolf (n 13 above) 518, 524.

> the rule of law is a limitation upon all legislation, it follows that it cannot itself be a law in the same sense as the laws passed by the legislator.[74]

4.040 As the Judicial Committee of the Privy Council maintained in *Ong Ah Chuan v Public Prosecutor* [1981] AC 648, 670–671, "references to 'law' in such contexts as 'in accordance with law', 'equality before the law', 'protection of the law' and the like" in a common law jurisdiction must not be permitted to neglect "those fundamental rules of natural justice that had formed part and parcel of the common law of England [...] If it were otherwise ... it would be misuse of language", whence the protection of the law "would be little better than a mockery".

4.041 The inroads that the *yifa* slogan has made in Hong Kong's public discourse are alarming insofar as officials are using it in a way distinct from its common law significance. In 2015, the Chairman of the Bar Association took issue with *yifa* in the following words:

> [A]s we all know, Rule of Law means far more than just blind adherence to laws – respect for an independent judiciary, the need to ensure minimum contents of laws in terms of human rights protection, respect for the rights and liberty of the individual when law enforcers exercise their discretionary powers are examples of requirements of Rule of Law which go beyond just obeying the law. In fact it can be said that over-emphasis of the "obey the law" aspect of "Rule of Law" is the hallmark of a regime which is keen on using the law as a tool to constrain the governed, rather than as a means to constrain the way it governs.[75]

(e) Law and order and the rule of law

4.042 In *Koo Sze Yiu v Chief Executive of the HKSAR* [2006] 9 HKCFAR 441, 455, Bokhary PJ averred that "[t]he rule of law involves meeting the needs of law and order. It involves providing a legal system able to function effectively". In principle, the rule of law favours order over disorder, as disorder entails the unpredictability which disempowers individuals to freely pursue happiness in a stable legal framework. Yet the preference for order ends here, for an order single-mindedly attained for its own sake, even at the cost of rights and liberties, is the bane of the rule of law. Indeed, autocrats who disrespect the rule of law are ever asseverating that the purpose of governments is to maintain law and order.[76]

4.043 The Court of Final Appeal decision in *HKSAR v Chow Nok Hang* (2013) 16 HKCFAR 837 aptly illustrates this point. In Statue Square on 10 April 2011, while a prize presentation ceremony of the Mass Transit Railway Corporation was under way, Secretary for Transport and Housing Eva Cheng, their guest of honour, was giving a speech. Chow rushed onto the stage and scattered "hell money" (a banknote-like joss paper burnt to ghosts in certain East Asian folk religions) at which Cheng laughed.

[74] FA Hayek, *The Constitution of Liberty: The Definitive Edition* (The University of Chicago Press, 2011 [1960]) 310.

[75] P Shieh, "Speech of the Chairman of the Hong Kong Bar Association at the Opening of the Legal Year 2015" (12 January 2015).

[76] NE Nedzel, "The Rule of Law: Its History and Meaning in Common Law, Civil Law, and Latin American Judicial Systems" (2010) 10 *Richmond Journal of Global Law and Business* 57, 62.

Almost immediately, Wong leapt onto the stage, snatched away her microphone and shouted, "Shame on MTR for their fare hike".

4.044 Chow and Wong were both charged under s.17B(1) and 17B(2) of the Public Order Ordinance, which reads:

> (1) Any person who at any public gathering acts in a disorderly manner for the purpose of preventing the transaction of the business for which the public gathering was called together or incites others so to act shall be guilty of an offence and shall be liable on conviction to a fine at level 2 and to imprisonment for 12 months.
>
> (2) Any person who in any public place behaves in a noisy or disorderly manner, or uses, or distributes or displays any writing containing, threatening, abusive or insulting words, with intent to provoke a breach of the peace, or whereby a breach of the peace is likely to be caused, shall be guilty of an offence and shall be liable on conviction to a fine at level 2 and to imprisonment for 12 months.

4.045 Both were acquitted by a Magistrate under para.(1) but convicted under para.(2), and sentenced to 14 days imprisonment, with bail granted pending appeal.

4.046 On appeal to the Court of First Instance, Barnes J quashed their original convictions to find them guilty under para.(1) instead, fining Wong $3,000 and Chow $2,000. An unanimous Court of Final Appeal quashed all of their convictions, holding that:

> (1) The purpose of s.17B(1) is to protect the right of peaceful assembly from any who seek to interfere with it. The Section may not be invoked to punish "only a minor interruption" of an assembly which "cannot be said to have been intended to deny ... that right", as in the instant case.[77]
>
> (2) The purpose of s.17B(2) is to punish individuals not for disorderly conduct *per se* but conduct likely to cause other people present to breach the peace. No evidence was presented that any attendee — officiating guests, MTR staff, security guards or police officers — "might have been prone to reacting violently to the disorderly behaviour of the two appellants".[78]

4.047 Tang PJ criticised the Magistrate for taking a wrongheaded view that "because the appellants were not expressing their views peacefully, they were not entitled to the protection which the law extends to freedom of expression".[79] Due regard for protection of the law should have prompted the Magistrate to have first considered whether the defendants' conduct was so disorderly that the defendants "could not reasonably be expected to be tolerated" by others.[80]

4.048 The following paragraph speaks to this discussion of statutes like s.17B(2) and the conceptual distinctions between order and the rule of law:

[77] *HKSAR v Chow Nok Hang* (2013) 16 HKCFAR 837, [59] (Ribeiro PJ).

[78] *Ibid.*, [100] (Ribeiro PJ).

[79] *Ibid.*, [142] (Tang PJ).

[80] *Ibid.*, [142] (Tang PJ).

> [U]nlawful reaction from law enforcement officers and other trained personnel can be eliminated for practical purposes because of their training, discipline and professionalism. Moreover, the Community expects and the law requires no less. *In the common-law world, I can say with confidence that, if they use excessive violence in effecting arrest, they will be visited with the full force of the law.*[81] (Emphasis added.)

4.049 Ribeiro PJ moreover pointed out that it is the responsibility of the Government to lay the right charges:

> The 2nd appellant's actions may well have constituted a common assault since he appears intentionally or recklessly to have caused another to apprehend immediate and unlawful personal violence. And … he could have been arrested and bound over to keep the peace. The police have a duty to prevent such intrusions. The security personnel were entitled to act using reasonable force in the defence of others and in self-defence. If the law were to take a different view, the very constitutional rights now being invoked by the appellants would be at risk of being subverted in counter-demonstrations by thugs and bully boys seeking to suppress the expression of views they do not like. The appellants were not, however, charged with common assault. Nor was it sought to have them bound over.[82]

4.050 This is a shining example of how the rule of law prevails over self-justifications of arbitrary or excessive official conduct in the maintenance of public order in common law systems. The rule of law demands much more than having rioters punished within the purview of ordinary statutes like the Public Order Ordinance — it above all requires that potential law-breakers should be able to know what the law requires, to the extent that they can foresee how they will be violating it, how to avoid doing so, and that, even in violating the law, they will not be subject to unfair trials and manifestly disproportionate penalties.[83]

(f) The Umbrella Movement and the rule of law

4.051 The intrinsic tension between the contradictory legal traditions of Hong Kong and mainland China is perhaps best exemplified by their protracted conflicts over the meaning of the electoral reform provisions of the Basic Law. Over the past two decades, relations between Beijing and the pro-democratic elements in the Special Administrative Region have gradually descended into a "vicious cycle":[84] the apparent erosion of governmental commitment to autonomy ignites protestation from the community, which in turn leads to still further interference from the mainland.[85]

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81 *Ibid.*, [178] (Tang PJ).

82 *Ibid.*, [49] (Ribeiro PJ).

83 J Gardner, *Law As a Leap of Faith* (Oxford University Press, 2012) 213.

84 MC Davis, "The Basic Law, Universal Suffrage and the Rule of Law in Hong Kong" (2015) 38 *Hastings International and Comparative Law Review* 275, 295.

85 See M Sing and Y Tang, "Mobilization and Conflicts over Hong Kong's Democratic Reform" in W Lam et al. (eds), *Contemporary Hong Kong Government and Politics* (Hong Kong University Press, 2nd ed 2012).

4.052 Economic stimuli from Beijing have failed to allay public fears over the perceived deterioration of freedoms and civil liberties.[86] Indeed, the annual number of public processions and public meetings in Hong Kong has steadily risen, respectively, from 852 in 2004 to 1,179 in 2013 and from 1,122 in 2004 to 4,987 in 2013.[87]

4.053 On 10 June 2014, presumably in response to the "Occupy Central with Love and Peace" movement,[88] the State Council of the People's Republic of China released a controversial White Paper titled "The Practice of the 'One Country, Two Systems' Policy in the Hong Kong Special Administrative Region", which *inter alia* declared that China's "sovereignty, security and development interests" are to be paramount in Hong Kong, and that officials, legislators and judges of the putatively highly autonomous Special Administrative Region must be "loyal to the country [China]" and "subject to oversight by the central government".[89] The overall tone of the White Paper signaled the escalation in Beijing's determination to rein in Hong Kong.[90]

4.054 Undeterred by Beijing's adamant wording, Occupy Central held an informal plebiscite hand in hand with the Public Opinion Program at the University of Hong Kong 10 days later. Roughly 90% of the 800,000 participants voted for electoral reform proposals that included citizen nomination of candidates for Chief Executive and a stricture that the Legislative Council must reject any reform that falls short of "international standards" of free elections.[91] This turnout, comprising one-ninth of Hong Kong's entire population, has been interpreted as a solid public repudiation of the White Paper.[92]

4.055 On 31 August 2014, the Standing Committee of the National People's Congress decreed that all prospective candidates for Chief Executive in the upcoming 2017 election — if subjected to universal suffrage — must be vetted, in order to qualify for candidacy, by a 1,200-member Nomination Committee tightly controlled by the Party-state (31 August Decision).[93] The Standing Committee further stipulated that the Nomination Committee might nominate no more than three candidates having secured the consent of more than half the Committee's members, justifying such restrictions on the s grounds of China's "sovereignty, security and development interests", and insisting on the White Paper stance that any Chief Executive must "love the country [China] and love Hong Kong".[94] At the end of the day, the 31 August Decision has conclusively

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86 See CP Yew and K Kwong, "Hong Kong Identity on the Rise" (2014) 54 *Asian Survey* 1088.

87 DLH Hui, "The Stalemate in Political Reform and the Rise of Contentious Politics in Hong Kong" in JYS Cheng (ed), *The Second Chief Executive of Hong Kong SAR: Evaluating the Tsang Years 2005–2012* (City University Press, 2014) 229.

88 S Ortmann, "The Umbrella Movement and Hong Kong's Protracted Democratization Process" (2015) 46 *Asian Affairs* 32, 33.

89 Information Office of the State Council of the People's Republic of China, *The Practice of 'One Country, Two Systems' Policy in the Hong Kong Special Administrative Region* (Foreign Language Press, 2014) 46–47.

90 CAG Jones, *Lost in China? Law, Culture and Identity in Post-1997 Hong Kong* (Cambridge University Press, 2015) 6–7.

91 AYH Cheung, "Road to Nowhere: Hong Kong's Democratization and China's Obligations under Public International Law" (2015) 40 *Brooklyn Journal of International Law* 465, 495.

92 See Davis (n 84 above).

93 Decision of the Standing Committee of the National People's Congress on Issues Relating to the Selection of the Chief Executive of the Hong Kong Special Administrative Region by Universal Suffrage and on the Method for Forming the Legislative Council of the Hong Kong Special Administrative Region in the Year 2016 (Adopted at the Tenth Session of the Standing Committee of the Twelfth National People's Congress on 31 August 2014).

94 Cheung (n 91 above) 502.

SNM Young et al., "Role of the Chief Justice" in SNM Young and Y Ghai (eds), *Hong Kong's Court of Final Appeal: The Development of the Law in China's Hong Kong* (Cambridge University Press, 2014).

CHAPTER 7

CASE LAW REASONING AND STATUTORY INTERPRETATION

1. INTRODUCTION

It is a commonplace nowadays to say that common law judges "make law", and "judge-made law" has become essentially synonymous with common law in the sense of case law. For some, the most serious charge against case law is not that judges innovate too much, but that they have innovated too little.[1] It is not difficult to see what underpins this seemingly counter-intuitive criticism: common law judges are traditionally sceptical of abstract reasoning not rooted in the facts of real controversies between actual people.[2] **7.001**

Case law crystallises the rich detail of past disputes and their legal resolutions; thus, it is regarded by jurists of the common law tradition as far more reliable for purposes of solving future problems than hypothetical or theoretical precepts. In the course of real adjudicating, abstract principles of law embodied in precedent must indubitably be modified, but this is usually described as "development" of the common law rather than "amendment". In *Re Spectrum Plus Ltd* [2005] 2 AC 680, 697, Lord Nicholls of Birkenhead regarded "development" as "a helpful description, not a misleading euphemism" because: **7.002**

> Judges do not have a free hand to change the common law. Judicial development of the common law comprises the reasoned application of established common law principles, of greater or less generality, in current social conditions. Development of the common law by the judges in any one case is usually marginal.

This sort of marginal, incremental development of the details of particular legal rules must happen, but the doctrine of *stare decisis* imposes discipline and a limit to how far these changes may go, at least foreseeably, for most of the time. Even creative judges must invest considerable effort in explaining how changes to the status quo are consistent with the settled principles of the common law, including the rule of law itself and the protection of individual liberty.[3] And the development of case law is "necessarily driven" by the very disputes that reach the court, in ways beyond judges' control.[4] **7.003**

On this view, the salubrious development of common law in step with social change can never be imposed as a grand design by some mastermind. In many ways, the incrementalism, decentralisation and spontaneity of change in case law fall out of the perceived illegitimacy of unelected courts as engines of economic planning and social engineering. **7.004**

Indeed, many qualities differentiate case law from legislation: a legislature may take the initiative and enact a statute positively commanding swimming pool owners to erect a fence no less than 40 inches (not 39 or 41 inches) high to protect children from **7.005**

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1 DA Strauss, "Common Law Constitutional Interpretation" (1996) 63 *The University of Chicago Law Review* 877, 935.

2 AT von Mehren and PL Murray, *Law in the United States* (Cambridge University Press, 2nd ed 2007) 40; R Goff, "The Future of the Common Law" (1997) 46 *International and Comparative Law Quarterly* 745, 756.

3 A Beever, "The Declaratory Theory of Law" (2013) 33 *Oxford Journal of Legal Studies* 421, 440.

4 A Lee and N Lau, "Interview with the Honourable Mr Justice Joseph Paul Fok" (2014) 5 *Hong Kong Student Law Gazette* 24, 29.

drowning, but a common law court can only respond passively, awaiting an eventual case that involves a child injured in a swimming pool, and even then can only declare an imprecise standard obligating pool owners to take "reasonable" steps to prevent the harm from happening again.[5]

7.006 The recent Court of Final Appeal decision in *HKSAR v Chan Yau Hei* (2014) 17 HKCFAR 110 aptly illustrates common law judges' awareness of the limits of case law development in a criminal law context. The Court had to deal with the novel question of whether the ancient common law offence of outraging public decency, "which has a history going back at least 350 years",[6] can be committed by posting a message on an internet discussion forum to inflict terrorism against the Chinese government.

7.007 Fok PJ strongly reproved the appellant's conduct but conceded that to deem the internet as a physical "public place" for the purposes of the offence would substantially extend the offence's meaning and "amount, impermissibly, to judicially extending the boundaries of criminal liability",[7] which is "constitutionally objectionable" under the separation of powers between the Judiciary and the Legislature.[8] "Criminal liability in the context of the present case", as Ma CJ observed, "is one that should be determined by legislation"[9] enacted after public consultation and legislative scrutiny by the representatives of the electorate in the Legislative Council.

7.008 This chapter regards case law judicial reasoning and statutory interpretation in Hong Kong. It is organised as follows. Section 2 explains the various modes of legal reasoning. Section 3 expounds the doctrine of *stare decisis*, and how it determines which elements factor into the processes of legal reasoning. Section 4 explains how *stare decisis* is actually practiced in the courts and tribunals of Hong Kong. Section 5 reviews modern methods of statutory interpretation and is followed by section 6, which analyses the retroactive effects of judicial decisions. Section 7 sums up the key points of this chapter.

2. The Elements of Legal Reasoning

(a) Case law as artificial reason

7.009 Replying to the assertion of King James I that "he thought the law was founded upon reason, and that he and others had reason, as well as the Judges", Sir Edward Coke CJ declared in the *Prohibitions Del Roy* (1607) 12 Co Rep 63,77 ER 1342:

> [T]rue it was, that God had endowed His Majesty with excellent science, and great endowments of nature; but His Majesty was not learned in the laws of his realm of England, and causes which concern the life, or inheritance, or goods, or fortunes of his subjects, are not to be decided by natural reason but by the artificial reason and judgment of law, which law is an act which requires long study and experience, before that a man can attain to the cognizance of it: that the law was the golden mete-wand and measure to try the causes of the subjects; and which protected His Majesty in safety and peace: with which the King was greatly offended, and said, that then he should be under the law, which was treason to affirm, as he said; to which I said … That the King ought not to be under any man but under God and the law.

[5] SJ Shapiro, *Legality* (Harvard University Press, 2011) 198.
[6] *HKSAR v Chan Yau Hei* (2014) 17 HKCFAR 110, [1] (Ma CJ).
[7] *Ibid.*, [50] (Fok PJ).
[8] *Ibid.*, [34] (Fok PJ).
[9] *Ibid.*, [1] (Ma CJ).

7.010 Coke's speech posits the shibboleth that judicial reasoning is distinct from other forms of reasoning. Legal reasoning at common law is a two-fold process. First is the inductive stage, when the instant case is identified as helpfully similar to series of previously decided cases, the observed regularity of which has already suggested a general principle of law. Such a proceeding demands considerable experience and knowledge of the law. Second is the deductive stage, when the judge infers specific conclusions from the general principles of law applicable to the peculiarities of the instant case. The case law method, as Dicey puts it, implies that:

> The main employment of a Court is the application of well-known legal principles to the solution of given cases, and the deduction from those principles of their fair logical result.[10]

7.011 Albeit a bit of an oversimplification,[11] it might be said that induction predominates in case law reasoning, but deduction predominates in statutory interpretation. It is not disputed that non-legal thinkers also resort to inductive and deductive logic in a variety of contexts; nevertheless, the reliance by legal logic on rules, disciplined by stare decisis, renders the case law method a somewhat peculiar body of reasoning.[12] It must also be borne in mind that legal reasoning is seldom perfectly logical. Whilst "no system of law can be workable if it has not got logic at the root of it", as Lord Devlin remarked in *Hedley Byrne v Heller & Partners* [1964] AC 465, 516, "[t]he common law is tolerant of much illogicality, especially on the surface". Legal reasoning by deduction, for example, is more often tentative than dogmatic.[13]

(b) Induction

7.012 The inductive stage entails the identification of uncodified principles of law that run like a common thread through multitudes of past cases. This is analogous to how experimental scientists surmise laws of nature that regularly recur through physical phenomena.[14] In our age of rapid technological and social change, past cases that square with the needs of new controversies (ie precedents) cannot be taken for granted, but when such cases do suggest themselves, this is often the result of a special kind of induction lawyers rely on known as reasoning by analogy.

[10] AV Dicey, *Lectures on the Relation between Law and Public Opinion in England During the Nineteenth Century* (Macmillan & Co, 2nd ed 1962), 363.
[11] R Cross and JW Harris, *Precedent in English Law* (Clarendon Press, 4th ed 1991) 191.
[12] F Schauer, *Thinking Like A Lawyer: A New Introduction to Legal Reasoning* (Harvard University Press, 2009).
[13] JH Farrar, "Reasoning by Analogy in the Law" (1997) 9 *Bond Law Review* 149, 157.
[14] I McLeod, *Legal Method* (Palgrave Macmillan, 9th ed 2013) 13–14.

7.013 Strictly speaking, most of the inductive reasoning in case law must be analogic, as no two cases are identical — recurrence in human affairs is never so uniform as in elementary nature. The principle that "like cases are to be decided alike" necessarily rests on a mere analogic similarity of the holding in an earlier judgment to a solution of the instant case.[15]

7.014 A far-fetched instance of analogical reasoning at work is the oft-claimed parallel between the doctrine of promissory estoppel in contract and that of legitimate expectations in administrative law. In *R (Reprotech (Pebsham)) Ltd v East Sussex County Council* [2003] 1 WLR 348, 357–358, Lord Hoffmann felt compelled to warn against the possibility of abuses of the analogy between the two doctrines:

> In any case, I think that it is unhelpful to introduce private law concepts of estoppel into planning law. As Lord Scarman pointed out in *Newbury District Council v Secretary of State for the Environment* [1981] AC 578, 616, estoppels bind individuals on the ground that it would be unconscionable for them to deny what they have represented or agreed. But these concepts of private law should not be extended into "the public law of planning control, which binds everyone". (See also Dyson J in *R v Leicester City Council, Ex p Powergen UK Ltd* [2000] JPL 629, 637.)
>
> There is of course an analogy between a private law estoppel and the public law concept of a legitimate expectation created by a public authority, the denial of which may amount to an abuse of power: see *R v North and East Devon Health Authority, Ex p Coughlan* [2001] QB 213. But it is no more than an analogy because remedies against public authorities also have to take into account the interests of the general public which the authority exists to promote. Public law can also take into account the hierarchy of individual rights which exist under the Human Rights Act 1998, so that, for example, the individual's right to a home is accorded a high degree of protection (see *Coughlan*'s case, at pp 254–255) while ordinary property rights are in general far more limited by considerations of public interest: see *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] 2 WLR 1389.

7.015 Summarily expressed, sound reasoning by analogy at case law must rest on substantial similarities between precedent and the case at bar, even though these similarities may not be obvious at first glance.

(c) Deduction

7.016 Deduction is deriving specific conclusions from more or less well-established general principles or axioms, and at law is usually occasioned by the necessity to apply broad case law principles or statutory provisions to the niceties of the specific case at bar. Consider, for example, the landmark decision in tort law by the House of Lords in

[15] Cross and Harris (n 11 above) 26.

Donoghue v Stevenson [1932] AC 562 (the "snail in the bottle" case). The brief facts of the case are as follows. On 26 August 1928, May Donoghue, a shop assistant, went to a café in Glasgow with a friend. Donoghue drank a bottle of ginger beer her friend bought for her and fell ill. She discovered that a decomposed snail in the bottle had contaminated the beer and sued David Stevenson, the beer manufacturer, for negligence in the Scottish Court of Session.

7.017 Stevenson succeeded at trial, arguing that manufacturers owe no duty of care to consumers who, like Donoghue, lack privity of contract with them, in that the beer had been bought not by her, but by her friend. Donoghue appealed her case all the way to the House of Lords in London. Wrestling with the inductive stage of his reasoning, Lord Atkin remarked:

> It is remarkable how difficult it is to find in the English authorities statements of general application defining the relationship between parties that give rise to the duty [of care]. The Courts are concerned with the particular relations which come before them in actual litigation, and it is sufficient to say whether the duty exists in those circumstances. The result is that the Courts have been engaged upon an elaborate classification of duties as they exist in respect of property, whether real or personal, with further divisions as to ownership, occupation or control, and distinctions based on the particular relations of the one side or the other, whether manufacturer, salesman or landlord, customer, tenant, stranger and so on. In this way, it can be ascertained at any time whether the law recognises a duty, but only where the case can be referred to some particular species which has been examined and classified. And yet the duty which is common to all the cases where liability is established must logically be based upon some element common to the cases where it is found to exist. To seek a complete logical definition of the general principle is probably to go beyond the function of the judge, for the more general the definition the more likely it is to omit essentials or to introduce non-essentials.[16]

7.018 Having induced a general duty of care as informed by the "neighbour principle" — "[y]ou must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour … persons who are so closely and directly affected by [your] act that [you] ought reasonably to have them in contemplation as being so affected when [you are] directing [your] mind to the acts or omissions that are called in question"[17] — Lord Atkin used it to deduce in favour of Donoghue the more specific rule that:

> [A] manufacturer of products, which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him

[16] *Donoghue v Stevenson* [1932] AC 562, 578.
[17] *Ibid.*, 580.

> with no reasonable possibility of intermediate examination, and with the knowledge that the absence of reasonable care in the preparation or putting up of the products will result in an injury to the consumer's life or property, owes a duty to the consumer to take that reasonable care.[18]

7.019 Case law reasoning is subject to "a practical limitation … which is imposed by the sheer volume of reported cases",[19] such that the judge in a given case is not always knowledgeable enough to be contemplating a sample of prior cases that is representative of the whole population. This inadequacy may occasion a judicial sampling bias.[20] Despite this, case law reasoning is a very pragmatic one and demands legal principles be tailored to resolving disputes as they emerge and to clarifying statutory ambiguities as the practical problems of implementation arise.

7.020 In this regard, case law could better "satisfy social needs" than exhaustive codification,[21] whence, in the celebrated words of Lord Mansfield immortalised by *Omychund v Barker* (1744) 1 Atk 21, 26 ER 15, 23, unlike civil codes, which "very seldom can take in all cases" that can possibly arise, case law "works itself pure by rules drawn from the fountain of justice … [and] is for that reason superior to an act of parliament".

3. The Doctrine of Precedent

7.021 The doctrine of precedent or *stare decisis* (to state its epithet in full, *stare decisis et non quieta movere* — "stand by the decided and do not upset the settled") is central to all common law systems.[22] In *Solicitor (24/07) v Law Society of Hong Kong* (2008) 11 HKCFAR 117, 130–133, Li CJ succinctly summarised the essentials of *stare decisis* in Hong Kong after the departure of the British Crown as of 1 July 1997:

> As a matter of principle, the doctrine of precedent only operates as between courts within an hierarchy in the same judicial system. Thus, under the doctrine, the decision of a final appellate court is binding on the intermediate court of appeal and the lower courts in the same system. Before 1 July 1997, when the Privy Council entertained 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 appeals from Hong Kong were therefore binding on the Court of Appeal and the lower courts in Hong Kong before 1 July 1997 …
>
> The position of Privy Council decisions, which were not made on appeals from Hong Kong, is however entirely different. When sitting as the final appellate court of another jurisdiction or as the appellate court from a professional disciplinary tribunal, the Privy Council was not functioning as a Hong Kong court as part of our judicial system but was discharging its responsibility as a court in a different regime. There was no relationship between the Privy Council when so operating and the Hong Kong courts. In principle, its decisions on non-Hong Kong appeals were not binding on the courts in Hong Kong under the doctrine of precedent prior to 1 July 1997 …
>
> Before 1 July 1997, Privy Council decisions on non-Hong Kong appeals were only persuasive authority. But except where local circumstances were material, their persuasive authority was so great that the courts in Hong Kong virtually invariably followed them before 1 July 1997. The reason was that, unless there were real grounds for distinction, it was unrealistic to expect the Privy Council to take a different view on a Hong Kong appeal from that taken in its earlier decision on a non-Hong Kong appeal, especially where that earlier decision was not an old one. It may be that some of the Hong Kong judicial statements referred to above intended to refer to this realistic position. But to speak of Privy Council decisions on non-Hong Kong appeals as binding in Hong Kong is incorrect and confuses their great persuasive force with what should properly be regarded as binding under the doctrine of precedent.

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>
> Before 1 July 1997, decisions of the House of Lords stood in a similar position to decisions of the Privy Council on non-Hong Kong appeals. Although they were only persuasive, their authority was very great unless the decision was in a field where local circumstances made it appropriate for Hong Kong to develop along different lines. The House of Lords and the Privy Council essentially share a common membership. Unless local circumstances were material, the Privy Council on an appeal from Hong Kong was unlikely to diverge from a decision its members had reached in a different capacity in the House of Lords …

7.022 The persuasiveness of foreign decisions depends on its similarity to the instant case; the soundness of its reasoning and the reputation of the judges who wrote it. In *Kensland Realty Ltd v Tai Tang & Chong* (2008) 11 HKCFAR 237, 295, McHugh NPJ further explained:

[18] *Ibid.*, 599.
[19] *Home Office v Dorset Yacht Co Ltd* [1970] AC 1004, 1059.
[20] See F Schauer, "Do Cases Make Bad Law?" (2006) 73 *The University of Chicago Law Review* 883.
[21] RA Posner, *The Problems of Jurisprudence* (Harvard University Press, 1990) 233.
[22] P Wesley-Smith, *The Sources of Hong Kong Law* (Hong Kong University Press, 1994) 33.

> [I]t does not follow that this Court should automatically apply the United Kingdom decisions. Judges develop the common law and interpret statutes against a background of the social, moral, economic and political values and assumptions of the societies in which they work. Inevitably, these values and assumptions influence the development of the common law and the interpretation of legislative texts. But the values and assumptions of societies are not necessarily the same. This is the reason why the courts of former United Kingdom colonies have legitimately developed the common law of their countries so that it no longer retains its unity with the common law of the United Kingdom: *Invercargill City Council v Hamlin* [1996] AC 624 at pp.640–644 per Lord Lloyd of Berwick. It is also the reason that identical legislative texts may legitimately have different interpretations in different countries even in those countries that have inherited the rule of law and their legal systems from the United Kingdom: *Geelong Harbor Trust Commissioners v Gibbs Bright & Co* [1974] AC 810 at pp.818–820 per Lord Diplock.

7.023 Strong reasons are called for to overturn a precedent which does not conflict with other precedents. When two or more precedents conflict with each other, the latest one is to be preferred, if it was set after full consideration of earlier precedents.[23] An otherwise valid precedent is not binding if it conflicts with statute law, under the doctrine of legislative supremacy.

7.024 There are four main justifications for *stare decisis*:[24]

(1) Equality

(2) Certainty

(3) Economy

(4) Humility

7.025 *Stare decisis* promotes equality for it seeks to ensure adherence to the principle that like cases are to be treated alike. This coheres with the rule of law and its basic procedural standard — equal justice under law. It enhances the certainty of law because it "gives the necessary degree of certainty to the law and provides reasonable predictability and consistency to its application. Such certainty, predictability and consistency provide the foundation for the conduct of activities and the conclusion of business and commercial transactions".[25]

7.026 *Stare decisis* is economic as it relieves judges of any necessity to reason from scratch, conserving precious time and mental energy in the strenuous task of crafting legal

[23] *Minister of Pensions v Higham* [1948] 2 KB 153, 155 (Denning J).

[24] EA Farnsworth and S Sheppard, *An Introduction to the Legal System of the United States* (Oxford University Press, 4th ed 2010) 59.

[25] *Solicitor (24/07) v Law Society of Hong Kong* (2008) 11 HKCFAR 117, 134 (Li CJ).

doctrine or that "currency of the law" which will set the practical terms for dispute resolution into the future.[26] And it exacts of judges a modicum of humility and respect for the cumulative wisdom and experience of past generations of judges and advocates;[27] as Sir Matthew Hale, Lord Chief Justice of England between 1671 and 1676, remarked:

> [Judicial decisions] have a great weight and authority in expounding, declaring and publishing what the law of this Kingdom is, especially when such decisions hold a consonancy and congruity with resolutions and decisions of former times, and though such decisions are less than a law, yet they are a greater evidence thereof than the opinion of any private persons, as such, whatsoever.[28]

7.027 Not all precedents bind, nor does every part of a binding precedent matter. An appreciation of how *stare decisis* works requires familiarity with the structure of judicial decisions. This consists of:

(1) An assessment of questions of material fact: what happened?

(2) An assessment of questions of law: what is the position of the law on what happened?

(3) A decision logically inferred from the foregoing assessments, which assigns rights and liabilities to the parties to the case with finality.[29]

7.028 Continuing with the case of *Donoghue v Stevenson*, the question of material fact was whether a decomposed snail was found in May Donoghue's beer bottle (as distinct from non-material facts like what dress she was wearing). The question of law was whether manufacturers owe a duty of care to consumers regardless of privity or should be held directly liable to them for acts of negligence.[30]

7.029 Only that part of a judgment known as the *ratio decidendi* (*rationes decidendi* in the plural) binds future courts under *stare decisis*. *Ratio decidendi* means "the decisional reason"; it is "the principle or statement of law on which the previous decision is based to the extent to which it is essential to the decision, it being recognized that there may be more than one *ratio* when the court assigns more than one ground for its decision".[31] All other parts of the judgment, called *dicta* (*dictum* in the singular), meaning "things [merely] said" or *obiter dicta* ("things said by the way"), even if statements of law, so long as they make no part of the *ratio decidendi* do not bind judges in future decisions.[32]

[26] EH Tiller and FB Cross, "What is Legal Doctrine?" (2006) 100 *Northwestern University Law Review* 517.

[27] MD Walters, "Written Constitutions and Unwritten Constitutionalism" in G Huscroft (ed), *Expounding the Constitution: Essays in Constitutional Theory* (Cambridge University Press, 2008) 275.

[28] M Hale, *The History of the Common Law of England* (E and R Nutt and R Gosling, 1739) 67.

[29] R Ward and A Wragg, *Walker and Walker's English Legal System* (Oxford University Press, 9th ed 2005) 81.

[30] Schauer (n 12 above) 204.

[31] *Solicitor (24/07) v Law Society of Hong Kong* (2008) 11 HKCFAR 117, 136, n 11 (Li CJ).

[32] N Maccormick, "Why Cases have *Rationes* and What these Are" in L Goldstein (ed), *Precedent in Law* (Clarendon Press, 1987) 156.

7.030 It is usually straightforward to identify the *ratio* in a judgment if only one judge is issuing one opinion (multi-member courts may give more than one opinion, as in the Court of Final Appeal), and his or her writing is clear; nevertheless, no sure-fire rule exists for identifying *rationes decidendi* and different analytic techniques may be applied in complex situations.

7.031 In *Donoghue v Stevenson*, the neighbour principle is undoubtedly part of Lord Atkin's *ratio decidendi*, as a critical step in reaching the outcome. It is not, however, necessarily part of the *ratio decidendi* of the judgment of the whole court which decided *Donoghue v Stevenson*, even though the dissenters (Lord Buckmaster and Lord Tomlin) were in the minority, because Lord Thankerton and Lord Macmillan, the judges concurring with Lord Atkin, expressed no clear agreement with everything he said in what turned out the majority opinion.[33] In a multi-judge court, therefore, only a minimal reading of the majority opinion, which clinches the common ground between them all, will be regarded as the ratio decidendi.[34]

7.032 Overall, *stare decisis* performs two apparently conflicting functions. On the one hand, it obliges courts to deliver decisions coherent with applicable precedent; on the other hand, it empowers current judges to set precedents that bind future judges; it alternately stabilises case law and occasions its evolution.[35] It should follow that the doctrine is not to be adhered-to rigidly or exploited as an excuse to evade acknowledgement of past mistakes.[36] As Li CJ commented in *Solicitor (24/07) v Law Society of Hong Kong* (2008) 11 HKCFAR 117, 140:

> [C]ertainty in the law and predictability and consistency in its application are of great importance. They provide the foundation for the orderly conduct of commercial, business and other activities. When disputes arise, they provide the basis for the negotiation and conclusion of compromises to settle them. On the other hand, too rigid and inflexible an adherence to precedents may impede the proper development of the law and may cause injustice in particular cases. There is thus a tension between the need for certainty, predictability and consistency and the need for adaptability, flexibility and justice. A proper balance has to be struck between these conflicting demands.

7.033 In striking the delicate balance between these conflicting demands, courts have worked out ways and means of circumscribing the consequences of inopportune precedent. The keywords glossing the headnotes of cases reported by the *Hong Kong Law Reports & Digest* (HKLRD) serve to describe the various ways precedent may be treated by common law courts (see Table 12).[37]

[33] RFV Heuston, "*Donoghue v Stevenson* in Retrospect" (1957) 20 *Modern Law Review* 1, 5.
[34] *Gold v Essex County Council* [1942] 2 KB 293.
[35] PA Fernandez and GAM Ponzetto, "*Stare Decisis*: Rhetoric and Substance" (2010) 28 *The Journal of Law, Economics, and Organization* 313, 313.
[36] N Duxbury, *The Nature and Authority of Precedent* (Cambridge University Press, 2008) 183.
[37] I Dobinson and D Roebuck, *Introduction to Law in the Hong Kong SAR* (Sweet & Maxwell, 2nd ed 2001) 110–111.

Table 12: Keywords on the Treatment of Precedents

Keyword	Meaning
Followed	The court follows the precedent as binding or persuasive.
Applied	The court applies a legal principle from the precedent to the instant situation.
Considered	The court considered the precedent in its dicta but did not find it instantly applicable.
Distinguished	Without in any way questioning its legal soundness, the court found reasons distinguishing the situation of the precedent from the instant case, so that it cannot be applicable. Distinguishing a precedent avoids the erosion of legal certainty consequent upon a permissive resort to overrulings, while conserving the distinguished precedent for future use.[38] This is no straightforward task, however. Judges must support their claims of distinctions with reasoning that demonstrates their consistency and continuity with the principles of the common law, the logical coherence of which hinges on just this justificatory process. Distinguishing is an indispensable part of the case law method, for it is a basic axiom that "common law rules are refined over time, as later courts develop a more precise sense of various possibilities and how they should be treated".[39]
Overruled	The court declared the precedent was wrong. Overruling precedents unequivocally "will promote and not impair the certainty of the law", and is preferable to distinguishing them on "inadequate grounds [which] is bound to lead to uncertainty, for no one can say in advance whether in a particular case the court will or will not feel bound to follow the old unsatisfactory decision".[40]

4. The Practice of *Stare Decisis* in Hong Kong

7.034 The superior courts of record are the Court of Final Appeal, the Court of Appeal, the Court of First Instance and the Competition Tribunal. The inferior courts of record are the District Court, the Magistrate' Courts, the Lands Tribunal, the Coroner's Court, the Labour Tribunal, the Small Claims Tribunal and the Obscene Articles Tribunal. Subject to the rules of *stare decisis*, a superior court is competent to create precedents that bind any court below it, whereas, an inferior court cannot create precedents that bind itself or any court below it (see Table 13).[41]

[38] RA Posner, *Economic Analysis of Law* (Wolters Kluwer, 9th ed 2014) 762.
[39] K Greenawalt, *Statutory and Common Law Interpretation* (Oxford University Press, 2013) 275.
[40] *Jones v Secretary of State for Social Services* [1972] AC 944, 966 (Lord Reid).
[41] P Darbyshire, *Darbyshire on the English Legal System* (Sweet & Maxwell, 11th ed 2014) 41–42.