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**by**

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Hong Kong is a common law jurisdiction according to private international law or conflict of laws.[[1]](#footnote-2) Put very simply, common law is made by Judges in their decisions and for hundreds of years judgments have been written in English. Common Law evolved as they are “*discovered*” by Judges in actual decisions; it grows from precedent to precedent. I believe the English language and the evolution of the common law on a case by case basis are essential features of the common law system.

Between 1843 and 1997, Hong Kong law included the evolving common law, some English Statute Laws and Statutes enacted locally in Hong Kong. I believe the common law system enabled Hong Kong to become an important International Financial, Commercial and Arbitration Centre. Of course, laws are only tools, and they are only as good as the people who use them. Hong Kong would not have succeeded without competent and independent Judges , a competent and independent legal profession and a Government which respected the rule of law.

On 1 July 1997, the People’s Republic of China (PRC) resumed exercise of sovereignty over Hong Kong. Given the PRC’s vastly different system, the Chinese Government promised that thereafter and for at least 50 years, Hong Kong should be administered under the “*One Country Two Systems*” policy. In my opinion, nothing distinguishes the two systems more than their different systems of law.

After lengthy consultation, and to give effect to the policy of “*One Country Two Systems*”, the Basic Law of Hong Kong (BL) was promulgated by the People’s Congress of the PRC and came into effect on 1 July 1997. In the years between the Sino- British Joint Declaration of 1985 and the establishment of the HKSAR on 1 July 1997, many English legislations which were applicable to HK were enacted locally in Hong Kong. Thus, came 1 July 1997, so far as Hong Kong’s legal system is concerned, apart from vesting the power of final adjudication in Hong Kong and the creation of the HKCFA, which I shall deal with below, there were no material changes. An important function of Basic Law was to ensure continuity [[2]](#footnote-3).

Thus, Hong Kong’s legal system remains the common law system. Article 8 provides that “*The laws previously in force in Hong Kong, that is, the common law, rules of equity, ordinances, subordinate legislation, and customary law shall be maintained, except for any that contravenes this Law, and subject to any amendment by the legislature of the Hong Kong Special Administrative Region*”. Article 84 provides in the adjudication of cases, Judges “*may refer to precedents of other common law jurisdiction*”. They ensure that Hong Kong would remain a member of the international common law community, reinforced by the fact that Judges from other common law jurisdictions may sit in the Hong Kong Court of Final Appeal (HKCFA).

BL also ensures that Judges should remain independent as before 1997, so they would continue to be appointed on the recommendation of an independent body based on merit and removeable only for cause.[[3]](#footnote-4)

The legal profession would also remain the same. Article 94 provides that “*on the basis of the system previously operating in Hong Kong, the Government of the Hong Kong Special Administrative Region may make provisions for local lawyers and lawyers from outside Hong Kong to work and practise in the Region*.” And under BL35 “*Hong Kong residents shall have the right to confidential legal advice, access to the courts, choice of lawyers for timely protection of their lawful rights and interests or for representation in the courts, and to judicial remedies.”*

There is also a provision of great significance which gives practical and necessary support to the common law system. Article 9 provides “*In addition to the Chinese Language, English may be used as an official language by the executive authorities, legislature and judiciary of the Hong Kong Special Administrative Region*”. Because of Article 9, all legislations in Hong Kong are enacted in both Chinese and English, and both versions are “*equally authentic*”[[4]](#footnote-5). After 1997, English has remained the dominant language in commerce, finance and the law in Hong Kong. I do not believe the common law system in Hong Kong could work without English as an official language. We do not have Judges or lawyers (whether ethnically Chinese or not) who could practise common law except in English. Nor do I believe such Judges or lawyers exist anywhere at all. Our law students are taught in English. If English was not an official language, I do not think the common law system which had been in place in Hong Kong since 1843 could survive. In my opinion, common law cannot be divorced from the English language.

Moreover, English as an official language is indispensable to Hong Kong as an International Commercial and Financial Center as well as an International Dispute Resolution Center. Hong Kong has actively promoted alternative dispute resolution and the Hong Kong International Arbitration Center (HKIAC) was established as early as 1985. In International Arbitration, English is often the common language of the parties and common law their law of choice. London, Singapore and Hong Kong are the leading International Arbitration Centers. It is no co-incidence that they have in common the common law system and English as the language of their law. English is not regarded in Hong Kong “*as a symbol of ‘colonial culture’ but a high-end lingua franca of all industries, international finance, economics, trade, law and medical science*.”[[5]](#footnote-6)

Hong Kong is a cosmopolitan city with a large and important non Chinese population.

The Basic Law recognizes the past and continuing contribution made to Hong Kong by non Chinese nationals. The Basic Law provides that “*persons not of Chinese nationality who have entered Hong Kong with valid travel documents, have ordinarily resided in Hong Kong for a continuous period of not less than seven years and have taken Hong Kong as their place of permanent residence before and after the establishment of the Hong Kong Special Administrative Region*” and their children under the age of 21 also have the right of abode in Hong Kong[[6]](#footnote-7). Moreover, apart from a few positions, for example, that of the Chief Executive, President of the Legislative Council, the Chief Justice, non Chinese nationals can occupy important public positions. Few places in the world treat non nationals so generously. In Hong Kong, they are rightly recognized as an essential part of what makes Hong Kong an international city. Needless to say non Chinese nationals, with the appropriate qualifications, are welcome to practise Hong Kong or foreign law in Hong Kong and many of them do so.

I turn now to the power of final adjudication in Hong Kong.

After 1 July 1997, the power of final adjudication was vested in the HKCFA. Prior to 1 July 1997, it was vested in the Judicial Committee of the Privy Council where it applied Hong Kong law as a Hong Kong Court. I was a practising Barrister in Hong Kong in 1997 and I carried on as before. I relied on the same authorities and there was no change. The only change was convenience of not having to travel to London for a final appeal and a greater familiarity with the judges in the Final Court of Appeal.

As for the Court of Final Appeal, Article 82 provides “*The power of final adjudication of the Hong Kong Special Administrative Region shall be vested in the Court of Final Appeal of the Region, which may as required invite judges from other common law jurisdictions to sit on the Court of Final Appeal*.”

Judges from other common law jurisdictions have been appointed as overseas Non-Permanent Judges. Initially from England, Australia, New Zealand and more recently from Canada as well. The presence of these overseas judges and the fact that in the adjudication of cases, Judges “*may refer to precedents of other common law jurisdictions*” , ensure that Hong Kong should remain firmly anchored to the common law system. It is no surprise that Sir Anthony Mason, a former Chief Justice of the High Court of Australia, and one of the longest serving overseas Non-Permanent Judges should say “*My experience has been that the common law tradition generates a marked similarity of approach across the jurisdictions; a principled approach to the judicial task which is based on impartiality, due process, and judicial* method” and that he was not aware of any substantial difference in the Hing Kong court of Final Appeal’s approach.[[7]](#footnote-8)

I can say from my personal experience that there has not been any material departure from the English common law tradition since 1997. In many ways, Hong Kong may be compared with Singapore. Singaporean authorities are often cited in Hong Kong and personally I have detected no difference in Singapore’s common law tradition after Singapore’s independence. Both Singapore and Hong Kong are in the mainstream of the common law and part of the common law world. In the common law marketplace of ideas, their decisions and decisions in other common law jurisdictions compete. This healthy competition contributes to the vitality of the common law. The advantage of being part of the vital common law world means Hong Kong could adopt and adept the best available idea from other common law jurisdictions which are considered the most suitable to Hong Kong.

After 1997, there have been cases where the HKCFA has departed from English authorities. That is to be expected. For example, In **Big Island Construction (HK) Ltd v Wu Yi Development Company Limited and Another**[[8]](#footnote-9) the HKCFA, by a majority, refused to follow **Seldon v Davidson** and English cases which followed it, and instead followed Australian authorities to contrary effect.[[9]](#footnote-10) These cases show the vitality of the Hong Kong system and how strongly Hong Kong is anchored to the international common law system.

The Basic Law came into force on 1 July 1997, so we are halfway through the promised 50 years.[[10]](#footnote-11)

How has Hong Kong’s common law system fare so far? I believe the common law system has worked well. We remain in the mainstream. We realise the importance of not becoming a common law backwater.

I have no doubt the HKSAR Government recognises the importance of the common law to Hong Kong as an international financial, commercial and dispute resolution centre. The importance of common law was acknowledged by President Xi in his speech on the 25th Anniversary of the establishment of the HKSAR when he said:

“*---- The Central Government fully supports Hong Kong in its effort to maintain its distinctive status and edges, to improve its presence as an International financial, shipping, and trading centre, to keep its business environment free, open, and regulated, and to maintain the common law, so as to expand and facilitate its exchanges with the world*.”

The description of Hong Kong as a cosmopolis with its distinct status is encouraging and consistent with the policy of “one country, two systems”. Given such support, Hong Kong should remain an important member of the common law world.

The participation of Hong Kong lawyers at this Conference (including the Chairman of the Hong Kong Bar Association) shows clearly Hong Kong’s commitment “*to maintain the common law and to expand and facilitate Hong Kong’s exchanges with the world*”.

1. Judges from other common law jurisdiction in the Hong Kong Court of Final Appeal, 3 May 2021 [↑](#footnote-ref-2)
2. Solicitor (24/07) v Law Society of Hong Kong (2008) 11 HKCFAR 117 [↑](#footnote-ref-3)
3. Article 88 and 89 [↑](#footnote-ref-4)
4. <https://www.doj.gov.hk> accessed on 21 July 2022. Section 10B(1) of the **Interpretation and General Clauses Ordinance Cap.1** [↑](#footnote-ref-5)
5. Cao Erbao: Not GDP where Hong Kong’s strategic value to China, Hong Kong 01. <https://www.hk01.com/sns/article/793554> (private translation) [↑](#footnote-ref-6)
6. Article 24(4) & (5) [↑](#footnote-ref-7)
7. 2013 Hong Kong Judicial Institute, para.10 [↑](#footnote-ref-8)
8. 2015 18 HKCFAR 364 [↑](#footnote-ref-9)
9. **Big Island Construction (HK) Ltd v Wu Yi Development Company Limited and Another** was concerned with the English Court of Appeal’s decision in **Seldon v Davidson**, which has been followed in England since it was decided in 1968. The effect of the decision was that *“if money is proved, or admitted to have been paid by A to B, then in the absence of any circumstances suggesting a presumption of advancement, there is prima facie an obligation to repay the money; accordingly if B claims that the money was intended as a gift, the onus is on him to prove this fact.*” However, there are strong Australian authorities to the opposite effect. **Heydon v Perpetual Executors and Trustees and Agency Company (WA) Limited (1930) 45 CLR111** [↑](#footnote-ref-10)
10. BL5 [↑](#footnote-ref-11)