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Legal Systems

Common Law

Case, Precedent Based

More concerned with resolving a trial, **not resolving future conduct** by formulation of general abstractions.

Fact based, leaning towards **individual liberty**. Narrow interpretation of legislation. May do justice in one case but not in general (retrospectively).

Judges have to give **academic quality reasons** to support their judgment. This sustains the common law and is transparent – natural justice.

Consistent, certain, inflexible

The making of law in decided cases offers opportunities for growth and **legal development**, which could not be provided by Parliament. The courts can more quickly lay down new principles, or extend old principles, to meet novel circumstances. There has built up over the centuries a wealth of cases illustrative of a vast number of the principles of English law. The cases exemplify the law in the sort of detail that could not be achieved in a long code of the Continental type. However, therein lies another weakness of case law. Its very bulk and complexity make it increasingly difficult to find the law.

Procedure

To provide **certainty** in the law, judges are bound by precedent and consistent rules of evidence and procedure and principles. Their **decisions must be reasoned** so it possible to understand the law. It avoids mistakes.

Expensive

Inflexible: mistakes and injustice can perpetuate (see rule of law on page 13)

Adversarial System

Allows less room for the state to be biased against the defendant.

Non-contested facts are agreed upon and not dealt with during the trial process.

Competitive so only best points put forward – may distort truth.

2 incomplete, biased views of the case resolved by an independent person. Fair.

The independence and impartiality of the judiciary is essential and the main way in which the citizen is protected from dictatorial government. However, the substance of the rules, which are to be administered and applied may be considered to be unjust, wrong or immoral.

Separation of Powers

Emphasis on Substantive and Procedural Justice

Defects

Not systematic, arbitrary interpretation of ratio and cases by judges.

Injustices are raised only (through procedure) in valid cases by appropriate courts. It can take lots of **money and time** to solve injustices decided at high courts. **Inflexible**.

Access to law is expensive and exclusive. The law itself is **not crisply clear**. It may be undemocratic that unelected judges 'make' law. Codification of laws may be beneficial in some cases.

Civil Law

Code based

Laws to be applied only (broad interpretation of legislation), no creation of laws. Judgements are short. Deductive reasoning puts emphasis on academic writings.

Oppressive, **opaque justice** – emphasizing **social stability**.

Application of codes to a wide spectrum of facts?

Inquisitorial System

Judge directs trials in the **search for truth**. Substantive justice. ~Impartiality?

Judges can be young and inexperienced as they need only to apply the codified laws.

The system is rife with **uncertainty** as judicial discretion plays a large part in the decision. Decisions are not explained. Justice may be arbitrary.

How independent is the judiciary?

Interplay of Systems

Codification vs. Case law

Common law jurisdictions have begun to codify more laws.

In civil law jurisdictions, courts have begun to *openly* yield more to previous case results though already of a persuasive nature.

Civil law judges actually do have cogent reasoning in the court file. Perhaps in the future, the distinctions between the two will have dissipated to the point that they appear the same.

Inquisitorial vs. Adversarial

The **Small Claims Tribunal and Labour Tribunal** are using the inquisitorial system to reduce costs and to bring about quick remedies and reconciliation.

In civil law jurisdictions, higher courts have begun show signs of **turning adversarial**. In criminal cases, the juge d'instruction hears witnesses and suspects, orders searchers and delivers warrants. The goal of the judge is not the prosecution of a certain person, but the finding of truth, and as such his duty is to look both for incriminating and exculpating evidence. Both the prosecution and the defence may request actions from the judge, and may appeal the judge's decision before the court of appeal.

If the juge d'instruction decides there is a valid case against a certain suspect, he defers the suspect to a tribunal or court, where the proceedings are adversarial, opposing the prosecution and the defence.

Administrative cases are different. Proceedings are markedly more inquisitorial: most of the procedure is conducted in writing as opposed to in open court, and the parties are not even required to attend the court. This reflects the fact that administrative lawsuits are for the most part about matters of formal procedure and technicalities.

A commonly held misconception in common law countries is that inquisitorial systems do not allow for the presumption of innocence. This misconception comes in large part because in inquisitorial systems, an investigating magistrate supervises police investigations. However the **magistrate does not determine innocence** or guilt. A criminal defendant who confesses, has his confession entered into evidence and the trial continues as usual. In addition, contrary to myth, modern inquisitorial systems also separate the role of the prosecutor and judge in criminal cases and provide a criminal defendant a right to a defence and a right to counsel.

Chinese Law

Developing and absorbing from systems all over the world.

Emphasis on mediation, not enforcement.

There is little judicial independence as judges are party members and party members act on behalf of the judiciary, legislature and executive branches of government. Separation of powers is not taken as a good thing.

Justice

Some judges will seek to **do justice despite arbitrary rules**; others see the legal rules as paramount in order to justice by providing certainty in the law.

Lord Denning said, "My root belief is that the proper role of the judge is to do justice between the parties before him. If there is any rule of law which impairs the doing of justice, then it is the province of the judge to do all he legitimately can to avoid the rule, even to change it, so as to do justice in the instant case before him." (The Family Story" (1981)).

The **primacy of legal rules** was stated by **Sir Robert Megarry** VC, "The question is not whether the [claimants] ought to succeed as a matter of fairness or ethics or morality. I have no jurisdiction to make an award to the [claimants] just because I reach the conclusion ... that they have had a raw deal. This is a Court of Law and Equity (using "equity" in its technical sense), administering justice according to law and equity, and my duty is to examine the [claimants'] claim on that footing." (Tito v Waddell (No.2) [1977])

Procedural Justice

An independent criterion for what constitutes a just outcome of the procedure.

A procedure that guarantees that the fair outcome will be achieved.

We can have a system whereby the sole determinant of whether procedural justice is achieved is the outcome of the process.

Sometimes, the costs of the system bust be balanced with the benefit if products.

A fair procedure may be one that allows parties to **participate** in the process, e.g. defendant to give evidence, witnesses, etc.

Substantive Justice

The **content of the law** and the social ends to be achieved must be seen to be fair.

Achieved if parties get what they need or deserve.

(It should be the result of procedural justice).

Equity softens the common law, but is rarely found to have application in the criminal law. In Central London Property v High Trees House, Denning J looked for substantive justice, rather than just following the letter of the law.

In criminal law, judges use the word "policy", not equity, and by appealing to "policy" can do justice in the criminal law where the rules would dictate that another course should be followed. In R v Wacker [2000], Kay LJ said "Thus looked at as a matter of pure public policy, we can see no justification for concluding that the criminal law should decline to hold a person as criminally responsible for the death of another simply because the two were engaged in some joint unlawful activity…" Perry Wacker had been responsible for the deaths of 58 Chinese immigrants he carried in the back of his lorry.

Remedial Justice

The penalty should be appropriate.

Natural Justice

Founded in the notion that logical reasoning may allow the determination of just, or fair, processes in legal proceedings.

A person accused of a crime, or at risk of some form of loss, should be given adequate notice about the proceedings (including any charges).

A person making a decision should declare any personal interest they may have in the proceedings. A person who makes a decision should be unbiased and act in good faith.

Proceedings should be conducted so they are fair to all the parties – both sides must be heard. Each party to a proceeding is entitled to ask questions and contradict the evidence of the opposing party.

A decision-maker should not take into account irrelevant considerations.

A decision-maker should take into account relevant considerations.

Not only should justice be done but also seen to be done; in other words, legal proceedings should be made public.

Social Justice

Social justice, sometimes called civil justice, is a concept largely based on various social contract theories. Most variations on the concept hold that as governments are instituted among populations for the benefit of members of those populations, those governments which fail to see to the welfare of their citizens are failing to uphold their part in the social contract and are, therefore, unjust. The concept usually includes, but is not limited to, upholding human rights; many variants also contain some statements concerning more equitable distributions of wealth and resources.

The term "social justice" is generally so phrased in order to distinguish this particular concept from concepts of justice in law — some of which, according to their critics, are decidedly unjust in a social sense — and from concepts of justice as embedded in systems of morality which may differ between cultures.

Social justice refers to the overall fairness of a society in its divisions of rewards and burdens.

Stare Decisis

Decisions from the **Court of Final Appeal** are binding on all lower courts, see: R v CHAN HING CHEUNG. Unless: a point was assumed where the court heard no argument; or where there are two conflicting decisions in the court, see: R v BAKER. The CFA may overrule its own decisions if they are manifesting incorrect.

Decisions from the **Court of Appeal** are binding unless in conflict with subsequent CFA or Privy Council decisions. PC dicta may undermine CA ratio. The CA is bound by its own decisions unless: there are conflicting decisions of its own; or it cannot stand a subsequent PC or HoL decision, see: YOUNG v BRISTOL AIRPLANES. There is greater flexibility to depart where liberty is at stake, see: SJ v WONG SF and RE SPENCER (non-criminal).

Decisions from the **Court of First Instance** are not binding on itself nor decision from pre-1976 puisne (unskilled) judges. Decisions should generally be followed unless it is clear that it was they were wrong: R v LAI, BENNY. Where there are conflicting decisions of courts of equal power, the later decision is to be preferred, if it is reached after full consideration of the earlier decision: AG v GARDINER.

District and Magistrate Court decisions are not binding on anyone but will be followed in the absence of contrary authorities unless courts are satisfied that they are clearly wrong: TSANG v HANG.

Pre-1997 **Privy Council** decisions are binding on HK courts except the CFA (Art8, BL): BAHADUR v SECRETARY FOR SECURITY. That includes appeals from other jurisdictions.

Decisions from the **House of Lords** are strictly *not* binding because: it is not in the domestic curial hierarchy; and common law develops to meet changing circumstances of the society where it is applied: NG STEVEN v EASTWEEK. They are highly persuasive and even more so where the legislation on debate is common: DE LESALA. In TAI HING COTTON MILL, the PC said that it would follow the HoL if the point argued was on English law because the HoL is the "final arbiter" of English law. Law where custom has interfered is not affected.

Decisions from international courts are persuasive only.

Breaking Bonds

Common law courts should respect each other's decisions. Only local supreme courts are binding on lower courts. Other jurisdictions' courts are not.

To be binding, the rationes decidendi must be based on similar material facts.

A court can **re-interpret a ratio**.

A court can **distinguish** the case by material facts.

A court can **overrule** the case.

It can cite a change of **social circumstances** in overruling: MILIANGOS v GFT.

It can move aside **per incuriam**, i.e. state that the previous decision was based on ignorance of existing precedent.

Persuasiveness

Quality of reasoning;

Position of court;

Judge eminence;

Dependence on social/economic factors, age of precedent;

Injustice.

'Making' Law

Theories

Declaratory Theory: Judges do not create or change the law, but they 'declare' it. Because a trial always occurs after the event, the judge must state the law at the time of the event, explaining (limited) retrospective effect. It does not take into account technological advancements or social change. Judges can hide behind this to prevent the perception that they prefer one view of the law to another, and thereby retain public respect for the judicial impartiality. Ignorance of what *the law is going to be* is no defence. Article 7(1), European Convention on Human Rights: no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed.

Realist Theory: Judges make law within narrow confines. This explains overruling. It is mildly inconsistent with the separation of powers.

Laws must be retrospective since cases are tried after an incident. It is contrary to common sense that law does not change. Given social, moral and technological changes. It must change to bring about justice.

Reasoning

Inductive reasoning: drawing reasons from specific cases and formulating a general principle.

Deductive reasoning: applying a general principle to specific cases.

Rule of Law

The Human Rights Act has gone some way to ensure some basic rights cannot be removed by the state and are actionable in the courts. The conflict between the courts and Parliament create a tension in this respect. This is largely resolved by the courts enforcing the will of Parliament, but retaining the right to review activities of the

executive by way of judicial review. For example, the government (the executive) claims to act using prerogative powers, of which little is known, or indeed whether they exist, only the courts are in a position to challenge this claimed authority of the executive.

This bedrock of a democratic free society forms the basis of both Distributive Justice and Corrective Justice and as part of procedural justice, ensures the English Legal System is a fair system. Whichever, analysis is being used it means the Rule of Law, and this includes Natural Justice.

Distinguish between 'rule by law' and 'rule of law'.

Under the rule *by* law, law is an instrument of the government, and the government is above the law. In contrast, under the rule *of* law, no one is above the law, not even the government. The core of 'rule of law' is an autonomous legal order. Under rule of law, the authority of law depends on its degree of autonomy, that is, the degree to which law is distinct and separate from other structures such as politics and religion.

Rule of law is a regulator of government power.

Rule of law means equality before law.

Rule of law means procedural and formal justice.

Power Regulator

The rule of law has two functions: it limits government arbitrariness and power abuse, and it makes the government more rational and its policies more intelligent.

The opposite of 'rule of law' is 'rule of man'. There are two kinds of rule of man. The first kind is 'rule of the few', examples of which include tyranny and oligarchy. The second kind of rule of person is 'rule of the many', an example of which is the ancient Greek democracies. The common feature of rule of man is the ethos that "what pleases the ruler(s) is law". That is, under rule of man, there is no limit to what the rulers/government can do and how they do things.

In contrast, a key aspect of rule of law is 'limitation', i.e. it **limits the discretionary power** of the government, including the power to changes laws. Rule of law requires the supremacy of law as opposed to the supremacy of the government or any political party. The government has to follow legal procedures that are pre-fixed and pre-announced. Rules which make it possible to **foresee with fair certainty** how authority will use its coercive powers in given circumstances, and to plan one's individual affairs on the basis of this knowledge.

Rule of law also makes the government more intelligent and articulate in its decision-making. Only a constitution that limits the capacity of political decision makers to silence their sharpest critics can enhance the intelligence and legitimacy of decisions made. Without rule of law as a limit, popular will can easily be corrupted by short-term irrationalities. As such, liberal democrats demand rule of law because it helps us to behave according to our long-term interest and reason.

Equality before the Law

According to Dicey, "Not only is **no man above the law**, but every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals. Sentences should be similar for similar crimes (China). The panel of mainly male judges in common law jurisdictions may present some bias. Discrimination on the grounds of age, sex, and colour and so on should not be tolerated but **recognition of human differences** must be retained if justice, in its widest sense of fairness, is to be achieved. Some consider that in the interests of justice some individuals or groups should benefit from positive discrimination so as to even out the disadvantages experienced by such individuals or groups in the past. Others would see this as unfair and that promotion or preferment should be achieved only on merit. Given that people may discriminate against others in subtle as well as overt ways, the law has had to develop the notion of direct and indirect discrimination in an attempt to change attitudes and ensure fairer treatment of those who would otherwise stand little chance of success in employment, education, housing or other social activities.

Formal Procedure

Formality refers to the characteristic that the **criteria of lawmaking and lawfinding are intrinsic to the legal system** itself; that is, all rules, procedures and decisions can be deduced from the legal system itself. In contrast, a legal system that emphasizes substantive qualities of lawmaking and lawfinding uses factors outside law, such as ethical, emotional, religious or political factors, to evaluate cases. To Weber, only a formally rational legal system can achieve "legal domination" (rule of law) through consistent application of general rules, because only a formally rational legal system can maintain a "consistent system of abstract rules" that is necessary for rule of law.

A formally rational legal system results in procedural justice, which "connotes the method of achieving justice by consistently applying rules and procedures that shape the institutional order of a legal system". More specifically, procedural justice consists of several principles.

- The legal system must have a complete set of decisional and procedural rules that are fair.
- The fair rules must also be pre-fixed and pre-announced.
- These decisional and procedural rules must be transparently applied.
- These decisional and procedural rules must be consistently applied.

When these four conditions are satisfied, western judges and lawyers will say that they have achieved formal or procedural justice. Note that this notion of justice is more concerned with process and procedure than with the end result. In other words, as long as the process is fair, transparent and consistent, justice is obtained and legality is achieved.

One example will help illustrate the concept of procedural or formal justice in contrast to substantive justice. If, in truth, a person has killed another person, substantive justice requires that the killer be punished according to law. However, if the killer is illegally

tortured by the police to confess to his crime and, as a result of the confession, the police find conclusive evidence (i.e., evidence proving guilt beyond reasonable doubt), such as the weapon, the body of the victim, etc., for the court to convict the killer (which results in substantive justice), there is no procedural justice because the process of finding guilt has violated the basic rights of the killer who, before the conviction, is a citizen entitled to the full protection of the Bill of Rights.

Does it make sense to emphasize procedural justice? The general answer is yes. In a system that sacrifices procedural justice for the sake of substantive justice, the danger of arbitrary government power and the threat to individual liberty will be too great. Eventually, that system will lead to substantive injustice as well. In contrast, in a system that emphasizes procedural justice, arbitrary government power will be checked, liberty will be protected, and substantive justice will improve or be preserved in the long term (if we believe that truth is best obtained through contest and debate between equals).

Procedural justice has at least three values. First, without fair and just procedure, there is **no guarantee that the end result will be just** (that is, substantive justice cannot be guaranteed). As such, procedural justice is seen as a necessary condition for substantive justice.

Second, formal or procedural justice is a **condition for constraining government arbitrariness and protecting individual rights.** When the government is required to follow pre-fixed, transparent and fair procedures before it can deprive a person's life, liberty or property, the danger of government arbitrariness is substantially reduced and the prospect for wrongful deprivations of individual rights is also significantly diminished.

Third, as Max Weber points out, procedural justice results in **consistency, predictability and calculability** that are desirable aspects of economic and social life. This second value of procedural justice is independent of any value we place on substantive justice.

Those laws that constitute constraints on government arbitrariness and establish formal justice must be 'civil'. In the western system of liberal democracy, substantive justice has been guaranteed by a constitutional state. "A large number of constitutional devices are, in effect, intended to create the conditions of a lawmaking process in which the law will remain tied to justice. For this reason legislation is entrusted to elected bodies that must periodically answer to the electorate. And for the same reason "we do not give those who are elected to office Carte Blanche, but we consider them power holders curbed by and bound to a representative role".

Balancing Certainty and Flexibility

Certainty can also easily slide into rigidity with the effect that the law and legal system will fail to meet changing social needs. This was a major criticism of the common law

and one, which Equity attempted to remedy. Once Equity itself applied the doctrine of precedent, it too became rigid and less able to adapt to meet changing needs. A balance has to be found between, on the one hand certainty and, on the other, flexibility. Another aspect of certainty is that the takes **prospective effect** rather than a **retrospective effect**. If law applies to the future those affected will be able to arrange their affairs in such a way as to conform to the law. If the law has retrospective effect, actions they perform which were legal when performed become illegal later. This is seen as unjust, unless there are special circumstances that necessitate a law having retrospective effect, for example the War Crimes Act 1991.

There is also a presumption in legislation that law does not have **extra-territorial effect**; in a modern society, this is not considered just, as those who offend abroad and return to the UK are seen to have escaped justice. There are many examples of modern law, 'plugging the gap'.

The law must be certain and available to all, **no laws must be made in secret** (it is alleged that there are only three places where laws are made in private; Cuba, North Korea, and the European Union). Hence, all Acts of Parliament and Statutory Instruments and Local Byelaws must be published. The law is usually framed in such a way that it only proscribes (prohibits) activity, so if activities are not proscribed then they can be engaged in quite lawfully.

Separation of Powers

Power corrupts. By separating powers into the legislature, executive and judiciary, checks can be maintained that force them to comply with public interests whilst not adhering the whims or pressure exerted by forces with vastly unequal bargaining power.

Development of HK Law

UK → HK

Adoption of common law as applicable to HK and subject to modification.

Adoption of statutes.

1997 Sources of Law

The Basic Law – Hong Kong's Constitution under the constitution of the PRC. No law shall be enacted that contravenes this vague collection of statements Art 18.

Laws previously in force provided under Article 8: common law, statutes…

Common law from superior courts in other countries is not binding on the CFA as they must be subject to the basic law.

If it is discovered that a law is inconsistent with the basic law, it will be declared void and will have retrospective benefit. The problem will magnify through time.

Chinese law concerning the national flag, territorial sea and air privileges as well as defence apply through Annex III and Article 18. HK courts have jurisdiction in handling acts done by military forces stationed in HK otherwise than in execution of their duties.

Precedent

Court of Final Appeal not bound by other courts. Lower courts should be bound by other courts in different countries to avoid uncertainty.

Court of Appeal to be bound by its own decisions except where there are conflicting decisions; inconsistent with the CFA; considered a mistake by a superior court.

1 Country 2 Systems

Background

Article 8, Basic Law provides for the continued validity of the laws previously in force. Article 160 allowed the SCNPC to declare laws as contravening the basic law. This power

was used but concerned technicalities and did not affect in any major way the functionality of HK (pre 1997). Mainland laws concerning the national flag, territorial sea and air privileges as well as defence apply through Annex III and Article 18. HK courts have jurisdiction in handling acts done by military forces stationed in HK otherwise than in execution of their duties.

HK courts can interpret the Basic Law but if it is outside the autonomy, it must be referred to the SCNPC whose interpretation is binding. It must be necessary for adjudication of the case.

The culture of HK is generally subservient and is susceptible to the whims of policy makers from the CPG and HKSAR government.

Ng Ka Ling

Concerning the '**clarification'**: HK courts shall have authority to review the legislative acts of the NPC and if they are inconsistent with the basic law, must declare them invalid. This, was criticised by the CPG and the SARG applied to the CFA for a 'clarification'. The clarification did not move from the CFA's original position.

This move was slated for using political pressure on the courts to appease the CPG. Albert Chen says the clarification was a pragmatic, facing saving manoeuvre for the CFA to reiterate its powers and jurisdiction. This move was a better alternative than having the SCNPC interpret the statement, which would undermine HK autonomy and the authority of the CFA.

Concerning the **reference of the Basic Law interpretation** to the CPG: under Article 158, the SCNPC has the ultimate authority to interpret the Basic Law. The interpretation was essentially the same but the SC said that since it concerned the relationship between SAR and PRC, it should have been referred in accordance with Article 158(3) of the BL.

It is unconceivable that a political/legislative body should interpret the law where an independent court can assess that predictably, objectively, impartially and rationally. Justice under the law is central to the rule of law. This legislative interpretation can change the law in a common law system anytime even without a case. BUT note that we sit in different systems and this is the only constitutional way to do with it. HK courts still have their say in cases where their autonomy is uncontested.

But then why did the government refer this case? Isn't an amendment a better, more democratic solution? CPG considered an amendment to be embarrassing to the newly, carefully drafted mini-constitution.

Johannes Chan says it has serious implications on the judicial independence in Hong Kong. Legislative interpretation is contrary to the purpose of common law to serve all equally.

Sally Aw

The non-prosecution of a newspaper proprietor was said to be due to insufficient evidence and the protection of the public good – namely employment and the freedom of expression. It is highly speculative that the closure of an English newspaper will lead to the aforesaid consequences. This has been slated as giving power to rich and

influential people as well as underpinning links between suspects and the executive branch of government.

Equality before the law has been impaired. Did we have such cases during our colonial days with the UK? Or is China such a close neighbour that it must affect us in this way? Does it relate to the state of development of the law in China?

Big Spender

Criminal active in China and (mainly) Hong Kong was arrested in China, tried and sentenced to death. Raises extradition arrangement problems. Why did Hong Kong delegate its authority to China? Where is our judicial independence? Do we respect the laws of China?

Constitutionality of the Public Order Ordinance

Ordinance was nullified back to its original form – and then a new one was created preserving most amendments. It is an offence to gather to protest without a licence. Prior notification is required for the police – balance the right to assembly with the rule of law. It remains the discretion of the police whether or not to prosecute. There are no guidelines but they have been stopping politically aligned protests more and more. Biased information? Big events?

Freedom of Association and Religion

Associations should be governed by the rule of law. If subject to the whims of political thoughts, freedom will have an illusive meaning.

Attempts to discourage religious acts are worrying but we have to know what it takes to keep a population as large as China's under control.

Freedom of Expression

Self-censorship has resulted from warnings that the press should not disseminate political views against the PRC. RTHK constantly under fire for using public money to criticise the government.

National Flag

HKSAR v Ng and Lee:

Defendants convicted with violations of the National and Regional Flag Ordinances by the CFA. It was held that he flags were an important symbols of the nation and should be protected. Further, there were other modes of expression that they could use so it did not inhibit of free speech.

Albert Chen: it was a balance between rights to freedom of expression and the need to protect national and regional symbols in our special state of one country, two systems. The CFA also upheld the power of HK courts to review the constitutionality of legislation on human rights grounds and if necessary, to strike down such legislation.

Interpretation of s66 IGCO

Changing 'crown' to 'state' released state from the obligations imposed by ordinances unless otherwise stated. State was to include organs of the executive branch of the PRC

and the HK government. It also included the Xinhua News Agency. This contravenes Article 22 that says that all Government organs shall abide by the laws of the region.

Overall…

Low degree of interference and the law is well preserved – court systems, common law, statutes, enforcement, accountability. This position may be eroded over time of the government does not take a stronger stance in protecting the rule of law.

The Legal Profession

The legal profession serves the economy, protection of rights and the community. Solicitors deal with clients from China, etc. Barristers deal with solicitors and are naturally more independent of the political climate. They are potentially stronger in protecting the rule of law and an independent bar means a independent judiciary. The professional code is strict and has been useful in curbing corruption and upholding the image of lawyers.

PANG YIU HUNG v Commissioner of Police [LPP]

Legal professional privilege (LPP) is a privilege that rests in the client not the legal practitioner but which in common law the practitioner is bound to uphold.

Police saw that s25A OSCO was not subject to LPP, overriding the privilege.

S25A is not by express provision made subject to LPP but other sections are.

Rule 116 of the Code of Conduct of the Hong Kong Bar describes LPP:
"A barrister employed as Counsel is under a duty not to communicate to any third person information which has been entrusted to him in confidence, and not to use such information to his client's detriment or to his own or another client's advantage. This duty continues after the relation of Counsel and client has ceased. A barrister's duty not to divulge confidential information without the consent of his client, express or implied, subsists unless he is compelled to do so by order of a Court or the circumstances give rise to a public duty of disclose or the protection of the barrister's professional interests requires it."

Enable a client to make full disclosure to his legal adviser for the purposes of seeking legal advice without apprehension. That is a fundamental human right. Legal professional privilege applies only to communications made for the purpose of seeking and receiving legal advice.

The rule of LPP applies with equal force to solicitors and is long established in the common law.

Article 35 of the Basic Law guarantees that the LPP is protected by the Basic Law as a fundamental right. Article 87 provides that the rights previously enjoyed by parties to proceedings shall be maintained.

It is vital to the administration of justice generally. Any encroachment on that rule therefore effects not just the legal system but has an impact too on the broader public interest.

When the privilege does not apply

LPP may be limited by legislation, subject to constitution. This will be so when there is **express statutory language** to that effect or when, as a matter of interpretation, the implication that it is limited is clearly necessary.

LPP will not apply in respect of communications made in order to obtain advice for a criminal purpose. That exception applies whether the lawyer knows or is ignorant of the criminal purpose, see: R v COX AND RAILTON.

BULLIVANT v ATTORNEY GENERAL FOR VICTORIA: The judge would have to satisfy himself whether there was really fraud or something that would displace the privilege. It must have been a reasonable and proper thing under the circumstances to establish the proposition.

LPP does not apply to 'communications' that do not contain advice, including payments and time sheets.

Discretion to Prosecute

Ms. Elsie Leung, head of the department of justice has discretion in prosecutions. There are 2 things to follow when deciding whether or not to prosecute: evidence and public interest [Sally Aw]. Arguments for explaining the act include: transparency, discourage arbitrary decisions leading to abuse. Arguments against include: too much pressure contrary to judicial independence.

Proposals

Extending Rights of Audience to Solicitors

The Law Society has refused to adopt the Cab Rank rule. Solicitors may thus reject clients – denying them access to justice. Currently, they must refer them to barristers.

Solicitors may be guided by improper motives and not advise clients of other advocate choices for the job. Implementation into honour code required.

Cost effectiveness must be demonstrated and communicated.

Rigorous training is required for solicitors to practice advocacy. Barristers have more experience.

Recommend further study and public poll.

Direct Access to Barristers (professional bodies)

Bar association may recognise bodies at their own discretion.

Professionals are not laymen and may be in a better position than some solicitors in presenting the case to barristers.

Advertising and Promotions

Advertisements tend to inflate the qualities of the firms or individuals they promote. That may damage the image of the profession and lead to a distrust in the rule of law. For a profession that is inherently foreign and vulnerable to the one country two systems situation, it is a risky affair.

On the other hand, good advertising will increase the choices available to clients and improve business to lesser-known start up firms. Therefore stringent rules should be enforced to maintain the image of the profession whilst allowing room for the market forces to operate and expand accessibility to justice.

Legal Aid

Access to justice and equal protection under the law are hallmarks of the rule of law. They are core values enshrined under the Basic Law, especially so for the weaker and more vulnerable of our society who are poorer members of society.

A significant proportion of those needing to assert their rights should have access to the courts where rights will be enforced.

Background Info

The director of legal aid (DLA) administrates the scheme.

A Litigation Unit (LU) considers aid cases leaning towards out-of-court settlements.

The **Legal Aid Scheme** uses a means test ($155,800) and a merits test (reasonable grounds for action) to screen applicants. Appeals can go to the Registrar of the High Court. Applicants above the income mark in civil cases can pay contributions to the costs. In criminal cases, the means test can be waived in the interests of justice.

The **Legal Advice Scheme** provides free legal advice to anyone. It is (my opinion) good for referring people to the duty lawyer scheme and preventing costly, unnecessary litigation.

The **Duty Lawyer Scheme** provides legal representation to virtually all defendants who are charged in the magistracies. Means test: gross annual income: $127,330. Administrator has a discretion to grant if it is in the interests of justice to do so. Applicants are also subject to a merits test: jeopardy of losing his liberty or involvement in a substantial question of law.

Tel-Law provides free telephone legal advice pointing towards the Legal Advice Scheme. English, Cantonese and Putonghua language tapes are available. Should it be extended to internet provisions?

The **Supplementary Legal Aid Scheme** assists the sandwiched class. Financial limits are set above normal with a cap of $432,900. Assists personal injury or death as well as medical, dental or legal professional negligence claims and where damages are likely to exceed $60,000. The scheme also covers the Employees' Compensation Ordinance irrespective of the amount claimed. The scheme is successfully self-financing, funded by legal aid contributions and damages or compensation recovered. This scheme **could be improved** in light of its success to extend its arm of help. Discretion could be granted by the DLA to allow cases failing the means test, esp. the legally handicapped and persons in hardship.

The **Official Solicitor**'s main duties are to act as Amicus Curiæ in legal proceedings for persons under disability of age or mental capacity and as representative of deceased persons' estates for the purpose of legal/care or protection proceedings to represent any party. Also acts on behalf of a person committed to prison for contempt who is unable or unwilling to apply on his own behalf for release.

Issues

Revision of financial eligibility every 2 years for economical fluctuations.

Persons waived from financial eligibility should pay more contributions.

Human rights mandates the discretion to waive the means test in civil cases involving a Bill of Rights claim. Criminal cases **should abolish the means test** and rely on contributions only. The means test is not a 'sufficiency' test.

HK has no independent administrator of and no pre-determined budget for legal aid. There should be a **fixed budget** for expensive cases.

Public money now goes to pay for cases that promote the public good. How is **quality** maintained? Fees now encourage court attendance. No fees are paid of preparation work which would reduce the time/money spent in trial and foster settlement. Inadequate fees discourage experienced counsel from attending court and that puts equality of arms out of balance. Economic decline has forced lawyers to undertake cases that are not their forté and that is bad. Application procedures should be enhanced to take this into account.

Schemes to circumvent the means test should be stopped. **Spouses** should be grouped together subject to the case being dealt with. **Infants** should not be grouped together with guardians because it might discourage guardians from making claims on behalf of the infant, plus, damages paid to the infant are for the minor only. The rights of the minor are more important than the public money involved.

Could the schemes promote **mediation**? That could reduce time in litigation and stop tactics where parties prolong the trial to waste money. Mediation is good where the bargaining powers are similar and an amicable solution is desired. **Arbitration** where an arbitrator's order is binding is good for unequal bargaining positions.

Tax breaks for pro bono service? Contingency Legal Aid Fund might be set up with proportion of damages payout paid into fund but huge sums of money need to be involved for this scheme to be workable.

Conditional fees where only the winner pays may extend representation to the ineligible.

Appeals from refusals to grant legal aid can be extended to include more liberty-inhibiting cases. Legal Aid is not available to an applicant appealing against the decision of the Director who himself is represented by a Legal Aid Counsel. Applicants need informed legal input prior to mounting an appeal.

What about **legal-rights education** to be dished out from a legal aid grant? Since knowledge of legal rights is a prerequisite to access to justice, it should be so.

Independence

Government: Status quo works fine. LAD has taken government to court and given aid to sue itself. Costs to de-establish LAD is high. LAD still needs government funds and independence would impose extra tax on distributed funds.

Predetermined budgets may improve prioritising. The status quo is expensive.

Priority against other Welfare

Is legal aid more important than health, education and employment? The law affects everyone and it must be seen to be fair (natural justice). It is a right and protection of the individual provided by the state. It provides equality before the law, an equal ground in common law jurisdictions is very important if the rule of law is to be respected.

Woolf Reforms

Lord Justice Cresswell: "the wind of change is blowing strongly through the courts".

Underlying bedrock principles and results

Litigation should be viewed as a last resort.

Resolve disputes quickly by: Pre action protocols; Offers to settle; ADR supported in the rules for early use. Result: All working well:

ADR

Centre for Dispute Resolution (CEDR) reported an increase of 50 per cent in mediations since April 1999. More co-operative, less adversarial approach. Courts can impose financial penalties.

Result: Aggressive behaviour largely disappeared. A culture change has emerged. (Towards European model? Inquisitorial model to be developed?)

Court control.

Wide and discretionary judicial case-management powers, to set early trial dates and to refuse to move them. Curtailment of tactical applications and appeals.

Result: Changes generally finding favour with well-organised litigants. Judges exercising increased powers selectively.

Overall Result

New proceedings are down by 25% generally.

Are 'protocols' and 'offers to settle' working?

Actions delayed on wait-and see principle?

Waiting for Court of Appeal review of the Law Commission proposals on general damages in personal injury claims?

Carrot, rather than the stick, approach:

On timetables for serving evidence, and sanctions for minor non-compliance.

Accepting as unjust to strike out cases or other evidence, except in extreme circumstances.

Senior judge recently expressed concern about courts' inflexibility in extending deadlines

Bureaucratic delays.

Allocation and listing questionnaires.

Transfer between ordinary county courts and trial centres.

Judicial enthusiasm for case-management.

Attendance at a short case-management conference not necessary.

Inadequate facilities for telephone and video hearings.

Judge not keen to use technology.

Result: Delay in issuing orders; more hearings than proportionate.

Rush to implement changes

Dovetailing rules and procedures not complete.

Link between rules, practice directions, protocols and forms is sometimes poor, 12 supplements to the rules in first year.

Special problems with litigation not normal contract and negligence disputes e.g. landlord and tenant actions.

Result: Rules being adapted, unsatisfactorily, on ad hoc basis.

Confusion:

Central London County Court is issuing its own case-management 'bible'.

Vice chancellor, Sir Richard Scott, trying to control local variations encouraging advance approval (by him) of pilot schemes, which are then monitored.

Some courts have four grades for summary assessment of costs, when the guidelines specify three.

Result: Local practices, if not practice directions, are emerging.

Costs will not be reduced

For cases that do not settle.

Professor Zander: 'costs may increase, due to:

Protocols and tight court timetables requiring more early work, especially for defendants (the 'frontload');

Extra hearings which the lawyer is expected to attend'.

Result:

Insufficient resources for new technology.

Need for secure e-mail for serving documents.

Case-management software and document scanning facilities needed.

Emerging principles

Statements of case need to be shorter

Extensive quotes from documents will sometimes be necessary

Amendments will be allowed even close to or during the trial when a significant amendment to a schedule of loss was allowed only ten days before trial;

Expert evidence… because:

> Experts are expensive, contribute to delay;
>
> too often agree at the court door; and
>
> above all too many give evidence in a partisan way,

reforms move towards the court-appointed expert, adopted in most civil law inquisitorial jurisdictions.

Expert evidence will only be allowed when necessary to help the court;

Single joint experts will be the norm in lower-value claims;

Extensive case management powers to allow judge to control which types of expert may prepare a report or give oral evidence, when, how, and at what cost;

Early disclosure of expert reports;

Results: Instructing single joint experts has taken off. 65% now receive joint instructions.

Costs

Not much judicial interpretation.

Earlier and more frequent settlements and summary assessments means the Supreme Court Taxing Office is short of work.

Results overall: Can lawyers continue to make a living while settling cases early and appropriately, whilst managing client expectations, especially when working on limited legal aid or legal expense rates or any contingency arrangement?

Why do we still have a High Court and a county court, sitting on top of the tracking system and different levels of judges?

Woolf reforms in a nutshell

Civil Procedure Rules 1999 which followed Woolf created a common set of court procedure rules. Identical procedure and jurisdiction in both the county court and High Court. **Procedures simplified**.

Any action may be started in the county court except defamation.

Cases valued at less than £15,000 (£50,000 in personal injuries cases) must start in the county court.

All actions now start with the issue of a claim form.

Duty to disclose documents. Strict timetables to be followed for exchanging documents and replying to queries.

Early settlement encouraged. Litigation to be avoided wherever possible by encouraging ADR and use of pre-action protocols; financial incentives (by way of costs) for both parties to settle either prior to trial or early in the trial. The court can order a month's postponement to allow parties to settle, with substantial costs implications for rejecting offers to settle.

Costs have now become **front-loaded**.

The tracks intended to reduce costs and time and prevent tactical procedures.

Co-operative litigation where the judge manages the timescale of the case.

Fixed costs for the fast-track failed. Prevention of the exploitation of poorer party by use of expensive procedure.

Cases valued at less than £15000 allocated to fast-track with fixed costs and fixed timetable requiring cases to be heard within 30 weeks. This is a significant reforms which has changed a lifetime of practice for solicitors.

Cases valued at more than £15000 allocated to multi-track procedure, and are judge led in terms of case management.

Cases can be moved between tracks if the cases is complicated or too expensive to conduct in the High Court.

Alternative Dispute Resolution

Advantages	Disadvantages
Cheap, some schemes are completely free.	ADR is not always cheap, and can be as expensive as court action.
Quick, many cases can be resolved in a matter of weeks, or even days.	Not all forms of ADR are quick, in fact some forms of ADR require a client to pass through many stages before adjudication.
Informality is preferred by many clients.	There can be too much informality, not popular with sophisticated clients.
Efficient system for recovery of debts, by individuals.	An unintended and some believe an undesirable result is the constant use by business of small claims court as an efficient debt-collecting agency.
Creates an imbalance by allowing an unprepared side to be assisted a mediator.	Disadvantages the less powerful side in a dispute, by assisting negotiation thereby produces a result that reflects the imbalance of bargaining power.
Popular with claimants who do not need to use a lawyer, and in some cases are discouraged by the process from using a lawyer.	Not popular with lawyers because it is not in their financial interests. This has the effect of closing access to the legal system which should be open "to all".
Simple process, for example in the Small Claims Court.	Confusing array of ADR which does not necessarily, in the end, work out quicker or cheaper than court proceedings. Some trade arbitration schemes, such as Ombudsmen often award less than would a court.
More suitable in family matters, or where the parties have an ongoing relationship	Unsuitable for some types of claim, for example where there has been intentional wrongdoing, or involves public law, or crime.
Middle class professional complainants make a high proportion of the users ADR, particularly Ombudsmen and Trade Association schemes.	Why should a party who is "right in law" or has a "very strong" case consider an ADR compromise?
High degree of success and use is growing rapidly.	Claimants do not normally issue proceedings wanting to recover a proportion of their claim; they want it all because that is what they consider they are entitled to.

The Need for a Legal System

Plato argued that **man is naturally good** and simply needs education to guide his behaviour, while Marx saw law as a tool of **class oppression** that we could be do away with, once a truly socialist society had taken over. History has shown that his theory has many practical difficulties and few states have retained a truly communist system. **Marx** saw the law as an instrument of **control by capital** of the working classes. Sometimes law appears to work in their favour but in reality only serving capital. Property laws in the UK serve well those that are landed and have goods and chattels. This is not to suggest a conspiracy by capital, but simply how the system operates so that capitalism survives, and ergo the nation is more prosperous; it is axiomatic that law favours capital. Even legislation aimed at protecting the worker does not work against capital. Factory safety regulations found necessary following the industrial revolution may have been more about handicapping competitors than the welfare of workers. The provision of schools and health care may have had more to do with providing an educated work force and a fit population from which to recruit soldiers than the general good of the population and of the individual.

The role of law in China and Japan and modern Russia, for example, is different from role of law in western nations. In those countries there is a low respect for the law, except in business and industry. Tradition features highly. Resort to law is a last resort and conciliation is preferred for social control.