

# PATHS OF JUSTICE

Johannes M. M. Chan

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## *Preface*

What is justice? Can justice be done? Jurists and philosophers have been asking these questions for centuries. While there is a huge body of learned work on these questions, no theory can tell what justice is or whether justice has been done in any particular case. At the end of the day, justice perhaps just lies in the hearts of ordinary people. Like the concept of the reasonable man, justice may not be something that can be formulated in abstraction but by and large is something that we recognize when we see it in practice.

I have long wanted to write a book to explore these themes through real cases. As an academic lawyer, I have the privilege of being involved in the two related but in fact quite separate worlds of academia and legal practice. I was particularly inspired by Geoffrey Robertson's book *The Justice Game*, in which he shared his own experience and insights as to whether justice has been achieved through the cases he has been involved with. While there is no doubt that justice is the fundamental value sought by our legal system, it is unjustifiably romantic if not self-deceiving to believe that justice is or will always be achieved in real life. There are times when our legal system will simply fail us, and admitting its failure is the first step towards improving it.

I was also inspired by the two books by Patrick Shuk-siu Yu, *The Seventh Child in the Law* and *No. 9 Ice House Street*, in which he recounted many of his own cases and explained how our legal system works (and fails to work). I have tremendous respect for Patrick, who is a legendary figure in the legal field and a man of great principles. He had retired when I started practice, and I am glad that our paths have crossed. I was particularly honoured when Patrick came to my admission to the Inner Bar, as he had seldom made public appearances and held strong views about the institution of Senior/Queen's Counsel. The stories that Patrick recounted in his books are fascinating, but they reinforce my impression that, while Hong Kong may be a relatively affluent society, there is a shocking level of ignorance about the law among the general public. Thus, I hope I have written a book on our legal system that lay members of the community will find approachable and interesting, without losing some of the sophistication in the arguments through which we can explore together the meaning of justice.

This book is not intended to be comprehensive, nor is it meant to be a scholarly thesis. The cases serve to provide a snapshot rather than a full picture. They were selected

in the hope that they could offer some insights into some of the most frequently asked questions in law: How does a lawyer defend someone who is guilty (Chapters 9, 11, 12, and 13)? The 'guilty' defendants went free in Chapter 13, whereas the 'innocent' defendants in Chapter 11 were convicted. The defendants in both Chapters 9 and 12 were prepared to accept their responsibility, but one was acquitted and one was convicted. Had justice been done in those cases? Does the law favour the rich and the resourceful (Chapters 9 and 10)? Could access to justice ever be restricted (Chapters 18 and 19)? Is there a duty to obey the law in all circumstances (Chapter 27)?

Freedom is not free. There is always a price to be paid, and the real issue is how much we are prepared to pay for these rights and freedoms. Few would dispute that we should protect the environment, but are we prepared to pay the price of a much costlier bridge after a full environmental impact assessment, or the price of development in order to protect a pristine harbour (Chapters 4 and 5)? Or, have we adopted a double standard of fairness in the treatment of foreign domestic helpers (Chapter 7)? Again, few would argue against the requirement of fairness in administrative proceedings, but are we prepared to impose a requirement that a decision maker must always give reasons for his or her decisions, and if not, why not (Chapter 17)? The right to legal representation is important, but what if it impedes the efficiency of disciplinary or administrative proceedings (Chapters 15 and 16)? How do we reconcile fairness with administrative efficacy (Chapters 15, 16, and 17)? Few people would dispute the sanctity of human rights in the cool and calm atmosphere of a university classroom, but the choice may be very different in real life when there are competing interests, when we are caught up in moral controversy, or when we find ourselves in emotionally charged scenarios. A commitment to fundamental rights is put to a strenuous test when protection of human rights requires giving up some vested interests, such as extending the right of abode to a group perceived to be competing 'undeservedly' for social welfare and employment opportunities with local people (Chapters 6 and 7). Time and again it has been said that human rights are not absolute, but to what extent and how do we weigh the two sides of the scale when human rights are measured against other competing interests such as national security or prevention of crime (Chapter 8)? The justification of national security is easy to make, but with all its wrappings in secrecy and confidentiality, should it still be subject to judicial scrutiny? Is the excuse the beginning of a question rather than an answer (Chapters 14, 20, 24, 25, and 26)? Is the occurrence of an abuse of freedom a justification for denying it (Chapters 19, 20, and 21)?

Fundamental values may well be in conflict with one another: It is noble to protect the right to life, but is it fair to force a mother to give birth to a child with severe disabilities and to put the burden of taking care of this child for the rest of her life on the reluctant parents, who may not have the resources or the support to enable them to cope (Chapter 29)? This is not just about the price to be paid but who is paying the price. What is just in such circumstances, and justice for whom?

There are also a few chapters that deal with the legal profession and professionalism (Chapters 1, 2, 3, and 28). The legal profession is honourable only because lawyers, by and large, do live up to a high ethical standard and are committed to the values of justice and fairness. There are times when a lawyer will have to defend an unpopular cause (Chapters 3, 4, 6, and 7). It is reassuring that, when the time comes, there are always lawyers who are prepared to rise to the occasion (Chapter 3). On the other hand, a fair trial does not guarantee substantive justice (Chapter 23). A few chapters recount some personal experience with jurisdictions that do not have high regard for human rights (Chapters 22, 23, and 26).

Law involves a value choice. We may not always agree with the choice that is made, and there may be more than one plausible and rational choice (Chapters 29 and 30). Sometimes we may be thankful to be the advocate and not the judge, so that the choice is not in our hands. Sometimes the value choice may not be explicit and can only be discovered by reading between the lines of the learned judgments. This book tries to unfold some of these value choices (Chapters 4, 5, 6, 7, 20, 21, 29, and 30). These cases span a period of 30 years. Some are well-known cases; others involve ordinary people. They are not law reports but human stories. Justice is done in some of these cases, while in some others, our system has failed to deliver justice. Sometimes there may be more than one version of justice. And when justice is done, it is not always rosy; sometimes it is achieved only at a great human cost (Chapter 4). Sometimes it just fails us. Some of these cases also illustrate how our government works and what transparency and accountability mean in reality (Chapters 4, 15, 17, 22, and 23). Through the description of real action in the court, this book will give readers a better understanding of our legal system and how it works in practice. This book will achieve its purpose if it can provoke further thought about the institution of the law and lawyers and the meaning of justice and the rule of law.

The book was conceived some time ago. I then put it aside for a while, until my good friends Professor Douglas Kerr and Professor Elaine Ho encouraged me to put my thoughts on paper after the turbulent year of 2015. I would particularly like to thank Douglas and Elaine for their inspiration and friendship, and Douglas for agreeing to go through every story in this book and for suggesting the title of this book. Any mistake, of course, remains mine. I would also like to thank my colleagues and friends Vivian Wong, Dr Marco Wan, Cora Chan, Eddie Leung, Alan Tsang, Anthony Neoh SC, Dr Margaret Ng, Winston Chu, Jeff Tse, Herman Tang, Simon Fung, and Dr Sarah Lau for their continuous support, inspiring discussions, and helpful comments and assistance on different chapters of the book, as well as the helpful comments of the anonymous reviewers of this book. I was personally involved in some of the cases and would like to thank my clients and solicitors for consenting to my publishing their stories. I have relied on publicly available information as much as possible. I would also like to thank the Society for Protection of the Harbour Ltd. and Winston Chu for their permission to reproduce the photos and plans in this book. Let me also thank Susie Han Jia of Hong Kong University Press, who readily supported this project when

I first approached her, and Clara Ho of Hong Kong University Press for her patience, accommodation, and valuable assistance throughout the editing process. Finally, I have used gender neutral terms as far as possible. On those few occasions when such usage may affect the flow of reading, the use of gender specific term means no disrespect for gender equality, and the use of male gender will include female gender and vice versa, unless the context otherwise suggests.

The last two years have been both eventful and challenging to me and my family. I am grateful for the unfailing support of Priscilla, my wife, and Andreana, my daughter, who are always by my side. They have kept me going with this project, put up patiently with the writing process, and provided me with inspiration as well as invaluable comments and suggestions on various draft chapters. To them this book is dedicated.

Johannes Chan  
The University of Hong Kong  
December 2017

I

# Joining the Legal Profession

# 1

## *Town and gown*

### Early life

Like many of my contemporaries in the 1970s, I grew up in a public housing estate. Both of my parents were migrants from the Mainland who came to Hong Kong in the late 1950s. Indeed, my maternal grandfather was well educated and spoke fluent English. He was a small landowner and suffered badly during the Cultural Revolution. Not only were his land and property confiscated, but he was mock-executed three times in front of his family. My parents came to Hong Kong to seek refuge from the internal turmoil in the Mainland, and given their background, they understandably took the Communist Party with great distrust.

Life in the 1960s and 1970s in Hong Kong was rather simple. There was no computer, no internet, and no mobile phone. Listening to the radio was the common pastime; a tape recorder was very fashionable, and a television set was a luxury. Free television broadcast was only available in the early 1970s. As a young boy, I used to enjoy an evening radio programme called 'Diary of the Great Husband' (大丈夫日記), which was a very popular programme that was broadcast at around 8:30 p.m. every weekday. It was about the daily life of a couple. The husband was played by an actor called Lam Bun (林彬), who was killed during the riot in 1967 for his outspoken criticism against the rioters. That was the first time I encountered life and death.

While many parents these days want their children to study law, it was not a popular choice in the late 1970s, partly because, thanks to colonial education, very few secondary students knew what law was about, and partly because the generation of my parents generally considered law inseparable from politics, and politics was bad and dirty. Thirty years later, this division between law and politics is still deeply entrenched in the minds of many well-educated people, though now law is regarded as respectable, at least in financial term, whereas politics is still something to keep a distance from. One of the best-known remarks was made by my dear friend Ronny Tong SC, when he said, on the eve of his assumption of chairmanship of the Bar Association, that the Bar should only comment on law and not on politics. A few months later, he was one of the most vociferous critics against the interpretation made by the Standing Committee of the National People's Congress, which effectively reversed the judgment

of the Court of Final Appeal in the popularly known ‘right of abode case’ and later an elected member of the Legislative Council.<sup>1</sup> After all, politics is about the business of the public and is neither good nor bad in itself; it is the people who take part in it that determine its nature. As long as there are people, there is politics. It is not something to be afraid of; nor can we run away from it. Who can really say that there is no politics at work, at home, at the sacred church of God, or in the intellectual temple of academia? Just like many other things in life, we just have to face it and deal with it.

I first came across law where I met, in a voluntary service programme, some youngsters in a detention centre. They came from a deprived family background; the education system failed them, and in those days, doing well in public examinations was the only avenue for upward social mobility. For them, the future, if there was one at all, was bleak. Some of them told me that they hated to go to school; they didn’t want to stay at their overcrowded home either. They wandered around at public playgrounds, came across some gangsters, attracted by the freedom and excitement on the streets, and some of them started committing petty crimes. They were arrested and convicted. Some were abandoned by their families, who felt ashamed of them. They did not stay long in a detention or a training centre. When they were released, they were sent back to exactly the same environment. Nothing was changed, save that they were now labelled as convicted—an untouchable group. It was a pretty gloomy experience that had shackled my dream of becoming a social worker. It seemed to me, at least at that moment, that there was so little that a social worker could do. At the same time, I became curious about how law works. In fact, I entered law school out of curiosity rather than due to any aspiration to becoming a lawyer, a profession which, honestly, I had very little idea about at that time.

Law turned out to be a highly intellectual and rewarding discipline that provides excellent training of the mind. I enjoyed the study of law as a discipline but had no idea whether I would enjoy the legal profession. I worked in two law firms and one chambers as a summer student during my undergraduate years. The two law firms were very different; one offered a very cordial environment with some very nice people, and the other gave me the first taste of what criminal law practice was about. I was attracted to the life at the Bar, but I was not sure if I would be sufficiently competent to be a barrister. After four years of study, I felt I was still not ready to commit myself to the legal profession. Why should I bind myself to a legal career merely because I had made a choice to study law at the age of 19? I decided to see more of the world and went to do a master’s degree at the London School of Economics and Political Science (LSE).

I decided to choose some subjects that were not available in Hong Kong and that might be of some relevance to the future of Hong Kong. At that time, the Sino-British negotiation on the future of Hong Kong had just begun. The future of Hong Kong was filled with uncertainty. So, I chose to focus on human rights. I recalled when I was interviewed for scholarship I was repeatedly asked why I wanted to do impractical

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1. *Ng Ka Ling v Director of Immigration* (1999) 2 HKCFAR 4. See also Chapter 3 on the clarification.

subjects like human rights and not something more practical like intellectual property. It was to some extent true that human rights was then not a practical subject in Hong Kong (and indeed not even a subject on offer). But who could foresee that it would suddenly become an area of great practical importance when the government decided to introduce the Bill of Rights Ordinance in 1991, as one of the measures to restore the confidence of the people of Hong Kong, shattered by what many had witnessed to have taken place at Tiananmen Square on 4 June 1989? I always tell my students that they should choose electives according to their interest. There is no such thing as 'practical', as much depends on what comes your way in future. In a rapidly changing world, the half-life of knowledge is increasingly shortened. What really counts are intellectual capability, analytical power, problem-solving skills, and the ability to communicate.

### London

I had a fruitful and rewarding year in London. LSE was well known for producing non-conformists, and it had attracted many world-renowned scholars who were critical of the establishment. At LSE, I met a number of very inspiring teachers, such as my supervisor, Professor Rosalyn Higgins QC, who later became the president of the International Court of Justice, and the late Professor Peter Duffy QC, who was then the president of Amnesty International. Rosalyn has a particular influence on me. She is inspiring, extremely knowledgeable, highly focused, frank and direct, kind and patient but would not stand nonsense. She taught, wrote, and practised at the Bar, being one of the practising academic silks. Peter introduced me to the work of the European Court of Human Rights. We became good friends and later worked together on the *European Reports of Human Rights*, of which he was the editor, and various missions of Amnesty International. The LSE master curriculum required us to do four subjects, and I audited another four. I also did a non-law subject in social planning, which taught me something about planning the national health system, the building of Terminal 3 of Heathrow Airport, and human resources planning. I met Professor Howard Glennester, another inspiring and non-conforming professor. One of my classmates in social planning was Rosanna Wong, who was then doing her second master's degree. Rosanna has subsequently had a distinguished career in the public life of Hong Kong. I did attend a class in intellectual property once. The only reason was that it was taught by Professor Bill Cornish, a leading world figure on intellectual property. Professor Cornish was a tall and slim gentleman who spoke in a rather gentle but monotonous tone. He reminded me of Professor Peter Wesley-Smith, one of my teachers and later a colleague at the University of Hong Kong, who was a learned scholar and a kind mentor to junior academics like me. Professor Cornish was a great scholar, but the subject did not strike a chord in me, no doubt due to my own inadequacies!

London was a fascinating city with a lot to offer. The year broadened my horizons in many aspects of life. Living on a tight scholarship budget was another great experience. I had to plan carefully my weekly spending, limiting myself to not more than £25

a week. If I wanted to have a better meal one day, or to buy an expensive book, I would have to fast for a few days to save up the money. Fortunately, there were plenty of free museums, exhibitions, and cultural events, and of course the lovely parks, in London. Musicals were expensive, but if you were willing to spend a few hours queuing for specially discounted returned tickets, it was quite possible to be able to enjoy world-class performances at a very reasonable price. I managed to watch the great musical *Cats* and hear Elaine Page singing *Memory* for just £1!

The year in London was also a year of fruitful reflection. I kept asking myself what I wanted to do in future. I had practically decided that I would not be a solicitor. The Bar was still an attractive option. I knew I would like to look for a people-oriented job. Law, and particularly barristers, is not really a profession with a lot of human interaction. Teachers and social workers fall within this category. I also found that I enjoyed research. Hong Kong adopted the English legal system. The transplantation of an English legal system, rooted in the English language and culture, to a Chinese community is itself a fascinating subject for research, as is the likely interaction between the Hong Kong and the Mainland Chinese legal system in the years to come. We followed English law in many areas, sometimes too slavishly, without sufficient consideration of local circumstances. There are also many areas of local significance that have not been researched at all. I read as much as I could in London and followed closely the Sino-British negotiations on the future of Hong Kong. London offered one the peace of mind that allowed one to focus and concentrate, something which strangely (and sadly) was absent in Hong Kong. Finally, I thought there was a need for local teachers in legal education in Hong Kong. With the ongoing uncertainty of the future of Hong Kong, the rule of law would be of critical importance to Hong Kong in the days to come, and the best way to strengthen the rule of law would be to nurture young minds through legal education. At that time, Albert Chen, who later became a professor, was the only Chinese lecturer in the only law school in Hong Kong.<sup>2</sup> Albert was a solid but also relatively shy scholar. I believed education is to be achieved not just in the classrooms but more effectively through interaction with students and by what the teacher has done and stands for outside the classroom. For these reasons, I decided to join academia, but I think I had to acquire sufficient life experience before I had anything valuable to offer to my students. On my return to London, I joined the Bar, and indeed, since then, I have never left the Bar.

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2. The Department of Law of the University of Hong Kong was initially set up as a department in the Faculty of Social Sciences in 1969. It became a School of Law in 1978, and subsequently a Faculty of Law with two departments in 1984. The term 'law school' in this book is used to refer generically to the Faculty of Law at the University of Hong Kong at different stages of its development. It remains the only law school in Hong Kong until City University set up the second law school in 1987. Likewise, the term 'the University' refers to The University of Hong Kong, unless the context suggests otherwise.

## The legal profession

Let me digress and say something about the legal profession. The Bar is a very challenging and demanding profession. It is a profession with a long history and comes with fascinating tradition and a set of firmly entrenched values. It has its share of eccentricity as well. In Chinese, the word ‘barrister’ (大律師) is literally translated as ‘big lawyer’, which gives barristers a sense of superiority and solicitors a sense of grievance, as solicitors are sometimes asked when they will be promoted to ‘big lawyers’. This is a misunderstanding, as solicitors and barristers are just two different branches of the profession without one branch being more senior than the other, though admittedly some barristers do think that they are the more superior branch. This is unwarranted, as there are many very bright as well as not-so-bright members in both branches. Barristers work primarily on referral from solicitors and focus exclusively on litigation. The work of a barrister includes mainly advocacy (appearance at all levels of courts), drafting of pleadings (litigation-related documents), and written advice (known as opinion). Barristers are easily distinguishable from solicitors in courts. A barrister wears a horsetail wig and dresses in a different gown from that of a solicitor in open court. All barristers practise as sole practitioners. Some of them may join together to form a set of chambers, but that simply means they share some common expenses. In a set of chambers, each barrister works independently and is not subject to the order or authority of another barrister. Hence, it is quite possible for a barrister to act for one side of a case and another barrister in the same chambers to act for the other side of the case.

Solicitors are the first port of call for anyone who needs legal service. They provide all kinds of legal services and advice, ranging from commercial, listing, intellectual property, shipping, matrimonial, litigation, property, and so on. In that sense, solicitors may be regarded as general practitioners though this is not entirely accurate, as many solicitors do practise in highly specialized areas. Solicitors may also appear in court (known as the right of audience), but they are restricted to District Court or below, unless they have acquired the status of solicitor-advocates by passing a statutory assessment. The right of audience at the higher court has been a matter of controversy between the two branches of the profession for many years, and the system of solicitor-advocates is a compromise to allow eligible solicitors to acquire a higher right of audience, which until 2010 was a monopoly of the Bar. My colleague at the University, Eric Cheung, who is also the director of our Clinical Legal Education Programme, is among the first batch of solicitors to have acquired a higher right of audience in criminal practice.

Admission to the Bar is a court process that is commenced by filing a motion in court. Barristers are listed according to seniority, and the action number determines the seniority of barristers who are admitted in the same hearing. The admission is also known as ‘call to the Bar’, the bar being literally a wooden barrier in an old common law courtroom that separated the inner precincts of the court from the public gallery. Only a barrister was allowed to come up to the bar to address the court. The more

distinguished members of the Bar are appointed as Senior Counsel, or Queen's Counsel before 1997. In the old days, upon their appointment, Queen's Counsel is allowed to cross the bar to address the court, and hence their admission is also known as 'call to the Inner Bar'. Any barrister who is not a Senior Counsel is known as a 'junior', no matter how many years of experience he or she may have. So there are senior-juniors and junior-juniors but still 'juniors'. Junior barristers wear a cotton gown in court, whereas Senior Counsel wears a silk gown. Hence, Senior Counsel is also known as silk, and admission as Senior Counsel is known as 'taking silk'. It usually takes at least 15 years before one considers applying for silk, and some never do. The first Queen's Counsel was Sir Francis Bacon in the late sixteenth century, and nowadays about 10 per cent of the barristers are Senior Counsel. Appointments used to be made by the monarch upon recommendation, but they are now made more systematically by the Chief Justice in consultation with senior judges and chairpersons of the professional bodies upon application, which application is open in December each year. The Chairperson of the Bar consults all Senior Counsel on the applications. Of course, not all applications are successful. An old tradition is that any junior barrister who applies for silk has to write to all junior barristers who are senior to him or her, informing them as a matter of courtesy and affording them an opportunity to object (as he or she will overtake their seniority upon appointment as Senior Counsel). I think this is a good tradition, but sadly it is not always adhered to nowadays. Senior Counsel are the leaders of the Bar and have the responsibility of upholding the rule of law, the values of the legal profession, and the transmission of knowledge and experience to the next generation. Many Senior Counsel are also prominent community leaders who render valuable and voluntary service to the community.

The Bar still retains many interesting traditions. At the Ceremonial Opening of the Legal Year, which takes place annually in January, Senior Counsel join the judiciary in a procession and are dressed in full-bottomed wigs, buckle shoes with knee breeches, a silk gown, a dress coat, and a tricorne (for carrying); that is, dresses that were fashionable at the time of Mozart. Some people criticized this dress as anachronistic; others believe that it symbolizes the solemnity of justice. In a General Meeting of the Bar held shortly before the change of sovereignty, members voted by an overwhelming majority to retain the wig and gown. Barristers do not shake hands with one another and address one another in court as 'my learned friend'. Some barristers still carry their wig and gown in a drawstring bag of cotton damask (a cotton-silk mixture) embroidered with their initials, and put their wig in an oval or round shaped travel tin, also with personal engraving. A junior barrister carries a blue bag and a senior counsel a red bag though it is also traditional for a Senior Counsel to give a red bag to a junior and the right to use it when the junior has rendered outstanding assistance on a case.

In other respects, the Bar will probably have to catch up with times. It is a fairly small profession, slightly over 1,000 members in 2017 (compared with over 8,000 solicitors). The Bar still adopts an apprentice system. A young member serves a year of pupillage with one or more pupil masters, who have to have at least 5 years of

experience. Pupillage is unpaid (which is anachronistic and unjustifiable in modern days), and once it is completed, the young barristers are expected to set up their own chambers (or join an existing set of chambers), with considerable outgoings and expenses. This has deterred some talented young people from joining the Bar in recent years, especially when they are offered an attractive package with a systematic and overseas training opportunity by leading law firms. Reputation at the Bar is to be established by word of mouth. Publicity or marketing is strictly regulated by the Bar and the restriction is generally even more restrictive than that in the UK. Many good practices in the modern business world seem irrelevant to the Bar although it has tried hard in recent years to keep up with modern development. In contrast, law firms are much better organized and have posed great challenges to the Bar in the recruitment of talented new members.

### Joining the University

I was lucky to have a very good start at the Bar, and it was tempting to stay at the Bar, the work of which I enjoyed, but I knew I wanted to join academia. It was not an easy decision, as everyone around me, including my pupil master, asked me to rethink about it. We have to make choices all the time, and the decision to choose one thing in life is always a decision to give up something else. At that time, there was a clear division between town and gown, and in this regard, between lawyers in private practice and lawyers in academia. Practising lawyers considered academic lawyers too theoretical and focused on issues that were mostly irrelevant to the real world, while academic lawyers believed that legal practice was not sufficiently intellectual. There seems to be a lot of misunderstanding between the two branches of lawyer, and such misinformed distinction still persists, for example, between more valued academic research and less valued practice research, as research is research and there are only good research and bad research rather than academic research versus practice research. From what I have observed in London, and particularly from people like Rosalyn and Peter, both academic silks, there should be a healthier relationship between the two branches, and maybe through my continuing practice at the Bar, I will be able to help facilitate the interaction. I joined the University but maintained a part-time practice so that I would not be out of touch with the practical side of the law. The practice enriches my research and allows me to provide a practical dimension in my teaching and writings. It also provides me with a rare and exciting opportunity, particularly in my later years of practice, to test in courts what I advocate in class and in my research as to what ought to be the law or how the law should develop. Sadly, the approach of the University, even up to the present day, towards professional practice is unduly restrictive.

In the early 1980s, Albert Chen and I were the only two local academics at the law school. Apart from a huge difference in remuneration between university appointment and legal practice in town, we were offered an appointment on local terms, following the then general practice at the civil service. The main difference between local term

appointment and expatriate term appointment included housing benefits and passage. Appointees on expatriate terms would be entitled to university housing, usually an apartment of over 2,000 square feet overlooking the harbour, and an annual passage subsidy for returning to their home place. In contrast, as a local who lived with my parents in Sha Tin at that time, all I was entitled was a transport subsidy of \$300 per month, barely enough to pay for crossing the harbour tunnel, even though I was at the same grade and doing exactly the same job as an expatriate appointee. Not everyone from overseas would be entitled to appointment on expatriate terms. Any appointee who was born in Hong Kong, the Mainland, Macau and Taiwan, that is, in short, Chinese, irrespective of how long one had lived overseas, would be offered local terms only. Such discriminatory treatment was only abolished in the early 1990s, with the support of many of my expatriate colleagues.

As one of the only two legal academics who could speak and write Chinese at that time, and due to the large number of legal and constitutional issues in the mid-1980s, notably arising from the drafting of the Basic Law, I was privileged to be presented with numerous opportunities to do very interesting work and contribute to the community. Albert and I were the two most-often consulted local legal scholars on many legal and constitutional issues (probably because of our ability to communicate in the local language more than our legal knowledge!). While we were only one year apart in joining the law school, we were, or at least perceived to be, a world apart on many constitutional issues. Albert was a distinguished scholar who preferred harmony and non-confrontation. His view was often closer to that of the Mainland government, and he was labelled, somewhat unfairly, I think, as 'pro-China', whereas I was perceived as one of those who were 'contaminated' by the Western liberal tradition. The media loved to portray us as representing two different spectra of views on many constitutional debates. Shortly before 1997, I was on the Central Policy Unit advising the outgoing British Hong Kong government, whereas after 1997, Albert was appointed to the Basic Law Committee advising the incoming master on various matters under the Basic Law. I have great respect for Albert even though we disagree on many issues. We always invited our students to hear the views of each other so that they could have the benefit of arguments on both sides and make up their own minds. Both of us have taught in the Faculty of Law for more than 30 years, and I think it is always a sign of the strengths of an institution when it could simultaneously accommodate diverse if not diametrically opposing views—a phenomenon that is gradually disappearing in our society.

A constant dilemma that both Albert and I have to face is how much we should write for academic journals and how much we should write in popular media. At a time of great constitutional and historical moment when changes in constitutionalism were taking place at an unprecedented scale and pace, views expressed in the media would make immediate impact and might influence the course of constitutional development, whereas the same views expressed in academic journals would be read by no more than a handful of academics and well after the event. We tried to strike a balance,

and with limited time, this was easier said than done. Both of us have published widely in academic journals and in the media in both English and Chinese, the latter of which has played the role of both promulgating legal education and promoting the use of Chinese in law. It was a novel challenge to write about law in Chinese, as until as late as in 1989, all laws in Hong Kong were drafted in English only, and all judicial proceedings were conducted in English. It was a mockery that everyone was presumed to know the law and that ignorance of the law was no defence, when the law was written and promulgated in a language that was foreign to 90 per cent of the population and when legal literature in Chinese was practically non-existent. We had to start practically from nothing, as publications of law in Chinese at that time existed only in Taiwan, which was a civil law jurisdiction, and the Chinese expressions as used in Taiwan, or, for that purpose, in the Mainland as well, could be quite different from the daily usage of Chinese in Hong Kong. I was once tasked by the International Committee of the Red Cross to chair a working group to work on an official Chinese version of an explanation of the four Geneva Conventions on the law of wars that would be acceptable to both Taiwan and the Mainland. I had one expert from each side on the working party. It took us many months to go through each and every sentence, and it was fascinating to see how the same words or expressions could be understood completely differently in the two regions that have had roots in the same language and culture for thousands of years!

Language can be a very sensitive issue. The common law is embedded in the English language and culture. Judges and lawyers have their legal training in English, and they think and work in the English language. A bilingual legal system would require not only proficiency in language skills but also a change of attitude. I was on the Working Party on the Use of Chinese in Court, chaired by Sir T. L. Yang, in the mid-1980s. In the course of our deliberation, some magistrates expressed their anxiety to us that the respect for the law might be diminished once the judge began to communicate with the defendants in the Chinese language! The English language is to maintain decorum if not also the mystification of the law. While such concern might be misplaced, it was telling as to the difficulties of introducing a bilingual legal system. And it is not just in the legal profession. When I first introduced a Chinese version of my congratulatory speech at the formal Graduation Ceremony of the Faculty in the mid-2000s so that I could directly address many parents who may not be fluent in the English language on this very special occasion, I could see a massive change in the atmosphere. I remember that Kenneth Kwok SC, then president of the Law Alumni Association and a mentor and good friend of mine, told me after the ceremony that he had been waiting for this occasion for 30 years!

Legal writings in Chinese could be sensitive in academia as well. The absence of a Chinese legal lexicon and the paucity of legal literature in Chinese presented one of the major challenges to the introduction of a bilingual legal system. Albert and I considered that it was our duty as local legal academics proficient in the two languages not only to fill this gap but also to raise the quality of Chinese legal writings. Yet we were told, on more than one occasion, that our writings in Chinese would not be counted

for the purpose of career development. The polite explanation was that there was no qualified assessor to evaluate the quality of these writings. It did not bother me, as I published these works because they were the right thing to do and not for institutional recognition or career advancement. Yet this kind of anachronistic attitude continues to the present day, albeit in a slightly different form. Academics were required to produce annually a number of academic articles, and the worth of an academic was measured entirely by how many so-called 'three-star' or 'four-star' articles he or she could produce, as if this was the sole purpose of universities. I fully accept that an important role of academics is to generate knowledge through research, but it would be a failing of a university's mission if all it cares about is the single and myopic task of producing three-star and four-star academic articles to the exclusion of everything else. It reminds me of the book *Federalist Papers*,<sup>3</sup> which was essentially a collection of newspaper articles on various aspects of the constitution that were published at the time of drafting the US Constitution. This book has stood the test of time and has since become a classic work on the US Constitution and political philosophy. Yet it would probably have been considered to be of nil value if it were to be done under the present research assessment climate at our tertiary institutions. Likewise, if we just focus on factors like 'impact factors' or journal ranking (which may be influenced by language bias or cultural and regional arrogance) rather than the worth of the publications themselves, or membership in distinguished academies, people like Kazuo Ishiguro or Tu Youyou would never have been awarded Nobel prize. University is about education and research, and meaningful research does extend beyond the production of three-star or four-star academic articles in academic journals. Sadly, the myopic pursuit of 'stars' seems to be where our tertiary institutions in Hong Kong are heading.

### London to Strasbourg

In 1988, I decided to pursue my doctoral study under the supervision of Professor Rosalyn Higgins. Unfortunately, shortly before I arrived in London, she became seriously ill, and it delayed the start of my doctoral study for almost six months. As part of my field work, I spent a couple of months working at the European Commission of Human Rights at Strasbourg. The European Commission of Human Rights was set up under the European Convention of Human Rights, under which an individual may bring a claim against her own country for a violation of her human rights. The claim would first be considered by the European Commission, which would make a report on whether a violation was established. If the report was not accepted by the parties, they could bring the matter to the European Court of Human Rights, whose judgment was final and binding on the State concerned.<sup>4</sup>

The Commission and the Court were situated next to one another in the same building and right opposite the European Parliament. The Secretariat of the

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3. A. Hamilton, J. Madison, and J. Jay, *The Federalist Papers* (New York: New American Library, 1961).

4. The Commission was merged with the Court two decades later.

Commission was a truly international office, the lawyers and scholars coming from many different jurisdictions. English and French were the working languages, and virtually everyone was at least bilingual. The Commission was divided into three language sections. I worked in the English language section with a Dutch lady, who became a very good friend of mine and later a prosecutor and then a judge in the Netherlands. Also in our office was a French lady who spoke hardly any English. We were supervised by Michael O'Boyle, an English lawyer who subsequently published a learned volume on the European Convention of Human Rights. I was privileged to have met many nice colleagues there. Apart from preparing reports, which was essentially judgments of the Commission reached after considering the submissions of the parties, the Commission was an independent party before the European Court if the case went to the court. One of the cases that I was involved was the *Spycatcher* case. It involved a memoir written by a former MI6 member who detailed some of the activities of the secret agency. The book was first published in the United States, and when the *Sunday Times* tried to publish a series of extracts in the United Kingdom, the British government applied for an injunction and started worldwide litigation to prevent the book from being published. Litigation was started in Australia, New Zealand, and Hong Kong. I was one of the junior counsels representing the *South China Morning Post* in opposing an application for injunction restraining the *Post* from publishing extracts of the book in Hong Kong. By the late 1980s, the *Sunday Times* case had reached Strasbourg, as the *Sunday Times* argued that the injunction order was a violation of the guarantee of freedom of expression under the European Convention.

Strasbourg is a beautiful and peaceful town in the Alsace-Lorraine region of France. It is less than an hour from Fribourg, the famous old German town which is the gate to the Black Forest, and about an hour from Basel in Switzerland. The town of Strasbourg was shaped by the French, German, and Swiss culture. It was a very enjoyable stay, but the town was so serene and tranquil that it could make you forget about the real world, if not for the occasional demonstrations outside the European Parliament. The experience was wonderful, but it also made me think about what I was pursuing in my doctoral study.

I returned to London in late 1988, by which time Professor Higgins had recovered from her illness. I worked on the change of nationality upon territorial change. While the topic had some bearing on the situation in Hong Kong, it was also a major issue in Europe, especially after the Second World War when the map of Europe was essentially redrawn, and the interaction between different nationality regimes had resulted in numerous cases of multiple nationalities or statelessness, which in turn led to many international conflicts. It was an interesting topic, and I had published a few articles on that subject and a Chinese book in the first year of my study. Yet as I went deeper into the subject, the project became increasingly unreal. This topic was remote from the situation in Hong Kong, especially after June 1989, when fear for the future became a real issue. Many people lost confidence in the future of the territory. Those who could afford to leave had made arrangement to emigrate. In 1990 alone, 60,000

families left, primarily professionals and well-educated people. There was no sign that the haemorrhage of talents would slow down. As part of the confidence-saving measures, the government decided to build a new airport, to speed up the pace of introducing democratic elections to the Legislative Council, and to introduce a Bill of Rights Ordinance. It was a challenging time for Hong Kong, and I felt helpless in London not being able to contribute to the process. By mid-1990, I decided to return to Hong Kong. Had I decided to stay in London, it would probably have taken me another 10 months to complete the doctoral thesis. I asked myself why I wanted to do it. Unlike other disciplines, a doctoral degree was never required in law. Many established legal scholars did not have a doctoral degree, and I would not need the degree for my career development. The research experience is of course by itself valuable, but a doctoral degree is not the only way to acquire such experience. To me, the successful completion of it simply means that I could claim that I know a lot about a tiny subject that is by and large irrelevant to the world (and remain ignorant of many other things). Instead of spending another year working on a thesis that would have little impact other than satisfying my own pride, I thought I could make more useful contributions to Hong Kong by working on the more burning issues there. Of course, at that time, I could not have foreseen that this decision was going to haunt me 25 years later.

### Returning to Hong Kong

I returned to the Faculty of Law at the end of 1990. By then Professor Yash Ghai, a very eminent human rights scholar and our first Sir Y. K. Pao Chair in Public Law, and Professor Andrew Byrnes, now chair professor at the University of New South Wales, had just joined the Faculty. Both of them became my lifelong friends. Together we established a master's programme in human rights with a focus in Asia. Andrew and I worked on numerous training programmes and workshops on the newly enacted Bill of Rights Ordinance for the judiciary, civil servants, and the civil societies. We set up a new set of private law reports, the *Hong Kong Public Law Reports*, which documented all the judicial decisions on the Bill of Rights and provided a historical record of the early phase of the implementation of the Bill of Rights. The series has earned quite a positive reputation and was subsequently taken over by a commercial publisher. We also worked on a *Bill of Rights Bulletin* that provided our commentaries on recent judgments and legal developments. Yash, Andrew, and I also gradually assembled volumes of literature on human rights in Hong Kong. We brought in international experts on human rights and recruited the next generation of scholars. Within a few years' time, we had established a strong international reputation in public law and built up a strong public law team within the Faculty, the expertise and experience of which has continued to benefit the Hong Kong community. Not only did we enhance the much-needed knowledge and expertise on human rights among members of the civil society in Hong Kong, but we also provided training to students from many Asian countries, producing a number of fine graduates who continued to serve the cause of human rights in their

own countries upon graduation. The master's programme in human rights, introduced in 1999, has been one of the most internationalized academic programmes even up to today, covering most of the countries that are now included in the 'One Belt, One Road' strategy, save that we did it 15 years in advance!

Professor Yash Ghai is a remarkable academic who has made immense contributions to constitutional developments in Hong Kong. He is inspiring, perceptive, critical, outspoken, and highly respected. His book *Hong Kong New Constitutional Order*, the first edition published in 1997, is the classic work on this subject. I recalled Yash came to my office one day when I was the head of the department of law. 'Johannes,' Yash said, 'I would like to apply for 12 months' leave. I have just received a phone call from the president of Kenya. The country is at the brink of civil war. He is setting up a constitutional commission, which is tasked to bring different factions together by drawing up a new constitution for the country. The president wants me to chair this commission. I don't think I can say "no". 'I don't think I can say "no" either,' I replied with a smile. 'How often do our colleagues receive a phone call from the president of their country? I doubt if you can finish the work in 12 months. Why don't I give you initially 18 months and review the situation after that? And keep me posted on your work.' In the following two years, Yash managed to bring different factions to the negotiation table and avoid a civil war, and the new constitution eventually went through parliament many years later. He returned, and later upon his retirement, he was appointed by the UN Secretary-General as the Special Rapporteur of Human Rights in Cambodia.

We would not have been able to bring Yash to Hong Kong had it not been due to the generous support of Dr Helmut Sohmen, one of the most successful entrepreneurs in Hong Kong and the region, who later became a good friend. In the mid-1980s, he was a member of the Legislative Council. Apparently none of his colleagues knew what he was talking about when he referred to the Austrian Constitution, which was also known as the Basic Law. Helmut was disappointed and felt that something had to be done to promote knowledge of public law within the community. Hence the Sir Y. K. Pao Chair was established. Since then Helmut has remained a staunch supporter of the Faculty and a good friend of mine. The endowment for the Sir Y. K. Pao Chair ran out at some point in the late 1990s, and one of the first things I did when I took over the deanship in 2002 was to promise Helmut that the chair would be absorbed as a structural chair and would continue perpetually. Helmut has also done a lot to support the master's programme in human rights, and generations of students, apart from being beneficiaries of his generous scholarships, have also enjoyed sumptuous dinners and hospitality at his home. The last time I met Helmut was at the public lecture of Chris Patten, the last governor of Hong Kong, in 2016. Helmut was still in good shape, although his years of hard work seemed to have taken a toll on his health. As an Austrian who has spent most of his life in Hong Kong, Helmut has done a lot for Hong Kong, and I wish him well.

## China

I always see the law school as something more than an institution to teach law. Britain has left a legacy of the rule of law and a well-established legal system in Hong Kong. The model of 'One Country, Two Systems' presents us with an unprecedented challenge. On one side of the border, there is a well-established system that is founded on respect for individual freedoms, diversity, and checks and balances of public powers. On the other side of the border, there is a rising power that has just emerged from a state of complete lawlessness, with an ideology that rejects the doctrine of separation of powers and no tradition of exercising constraints on public powers. Will the model work? Many people have doubts, but for those who have decided to stay in Hong Kong, there is no choice but to try our best to make it work. The law school is in the forefront of training the younger minds for this challenge, and we are in a particularly privileged position to contribute to the maintenance of the rule of law in both Hong Kong and China.

As we moved towards the transition, we modified the curriculum at the law school to prepare our students for the changes. For instance, we have introduced a compulsory course on Introduction to Chinese Law, a course on Use of Chinese in Law, and introduced a complete master of laws programme in Chinese Law. We also saw that we could bridge the gap between the two systems by exposing Mainland students and lawyers to the common law system. Our master of common law programme was introduced with that in mind in 1997, when Albert Chen was the dean, and I was in charge of its implementation and further development when I took up the headship of the department of law in 1999. The students came from three main sources: government officials, judges, and fresh graduates. A year of study of common law is too short, but our aim is not to impart to the students detailed, technical knowledge of the common law but rather to expose them to the thinking behind our system, to understand the application of the common law, and to appreciate the values underpinning and shaping the system. With great support of the Department of Justice and the Judiciary, we supplement the academic programme by a period of attachment with various government departments and the Judiciary, so that the students can better understand how our system works in practice. In the early days, the number of students was kept small, about ten of them being government officials, another ten being judges, and the rest fresh graduates from leading Mainland law schools. Apart from adequate proficiency in English, we have set an age limit of 42. The rationale is that if the student is under 42 years of age (which is regarded as youthful in public office career in the Mainland), and is proficient in a foreign language, he or she is likely to be a high flyer at an energetic stage of life and is likely to move into a position of influence in the years to come. We were proved right. In 2009 we hosted a celebration dinner in Beijing to mark the fortieth anniversary of the Faculty. Many alumni, who had been promoted to considerably senior levels, came to join the dinner from all parts of the country. It was a most touching and enjoyable event. Professor Cheng Kai Ming, who was then a pro-vice-chancellor of the University of Hong Kong, later told me that he was very moved

when I addressed our alumni, as he could see that we were working on the future of the country.

On one occasion when I visited our alumni at the Shenzhen People's Court, I asked them how their study in Hong Kong had had an impact on their work. There are over 100 judges at the Shenzhen People's Court who are our alumni. A number of them have occupied positions as division heads, and they have implemented many procedural reforms, many of which are modelled after or inspired by the Hong Kong system. Of course, they admitted frankly that some systemic issues are beyond their control or ability to tackle. Yet in their day-to-day operation, they are more ready to challenge written evidence presented by the State and are more willing to listen to the arguments of both sides. They tend to write longer judgments to address the arguments put forward by both sides and to give their reasons for the arguments that they have rejected. Some graduates working in regulatory institutions decided to publish their internal decisions so as to make the decision-making process more transparent. These changes mark the beginning of rationality in the system, and rationality is the first step towards a fair system. They told me that these changes were inspired by their study in Hong Kong.

Throughout my tenure of deanship I have maintained a close collaboration with all the major law schools in the Mainland. In the early days, I hoped we were able to raise their academic standards through our collaboration and to help expose them to the international academic community. At the same time, through these collaborations we are able to learn more about the Mainland system. We had annual conferences with Peking University; we organized regular conferences to bring together scholars and academics from the Mainland, Taiwan, Macau, and Hong Kong to enhance better understanding of legal development on both sides of the Straits. At the same time, I continued to work with the Mainland judiciary with a view to providing training programmes to the judges. I believe judges are the key players in upholding the rule of law, and we hope we can contribute to the enhancement of judicial quality in the Mainland through our experience of judicial training in the Western legal system. Of course the interflow is two-way. We introduced summer study and internship programmes in the Mainland for our own students. I have also worked on an idea of teaching our compulsory course on Introduction to Chinese Law in the Mainland, so that we can enhance our students' understanding of how the Mainland legal system works in practice. I am glad that the first of such courses took place in 2016. As most practitioners who have worked in the Mainland will appreciate, any collaborative work there requires the highest level of patience. There were occasions when we thought we had reached an agreement, but that the agreement was brushed aside at the last minute, and negotiations had to start all over again for no reason but a change of personnel. Programmes could be delayed and suspended without any prior notice, simply because a new head had been appointed. I have had my own share of experience and frustration with the worst aspects of bureaucracy and politics but was at the same time most encouraged by the liberal and enthusiastic partners and friends that I have collaborated with in the Mainland.

In or around 2011, together with my good friend Professor Dame Hazel Genn, then the dean of law of University College London, we launched a rule of law programme in the Mainland, first with Renmin University and then with Peking University. Essentially, we held a mock trial in the Mainland on a case that was modelled on a real case in the Mainland and then presented a trial and full arguments of that case before a common law judge. We managed to invite some of the best judges from the United Kingdom and our Court of Final Appeal to preside over the trial, with advocates from the common law system arguing for both sides. The trial was observed by Mainland judges, academics, policymakers, and students. After the trial, we had very fruitful and interesting discussions on the differences in treating the same case—why certain things were done in a certain way under our system, and how that very same case would be tried under the Mainland system. The programme was a great success in bringing two major legal jurisdictions into fruitful dialogues.

In around 2014, I had come to almost the last stage of discussion with the National Judicial College of an ambitious programme for judicial training of judges in the Mainland. Unfortunately, all discussions were halted after my stepping down from the deanship and the outbreak of Occupy Central in the autumn of 2014.

### **The twenty-first century: A turbulent time**

I became dean of the Faculty of Law in 2002 and remained in that position for 12 years. I am glad to see how the Faculty has over that period emerged from a local teaching law school to become one of the leading international law schools in the world. Very few academics have joined the university with a view to eventually becoming a university administrator. Indeed, when one gets such an administrative position, most colleagues would commiserate rather than congratulate you. Most colleagues did it out of a sense of duty, and I was no exception. It is a very onerous (and thankless) job with an extremely broad portfolio that requires very different skills and mindset from being an academic. A dean these days has to handle human resources planning, financial planning, budgeting, institutional advancement, international development, public relations, fundraising, alumni networking, crisis management, in addition to teaching and research. Worst of all, a dean has to manage people with extremely high egos in an environment that rests on respect, consultation, and persuasion, with power and authority that can hardly be relied upon. I have learned a lot on the job, and the best part of the job has been to be able to meet and work with many wonderful people during my tenure. Yet deans, or any senior administrators, are given virtually no training when they are appointed to the job. Most universities are still working on the archaic assumption that an accomplished academic means that he or she can also take up management jobs in the university, without giving sufficient emphasis on practical management experience. The hitherto assumption that a good academic would be a good administrator is proved more often than not by refute! Research accomplishment, which is a necessary but insufficient requirement by itself, and administrative leadership or competence can be as far apart as two different planets.

I stepped down from the deanship in July 2014 and took my sabbatical leave in the following nine months. I taught a constitutional law course at the University of Pennsylvania Law School, an Ivy League university where I had a wonderful time and met wonderful colleagues and students, and then spent some most fruitful time for research at the University of Cambridge as a visiting fellow. The autumn of 2014 witnessed the outbreak of Occupy Central, or the Umbrella Movement, as it was subsequently known, in Hong Kong, where protestors occupied the financial district for 79 days in protest of the highly controlled model of the nomination of the Chief Executive and the lack of progress of democracy in Hong Kong. Despite my physical absence from Hong Kong at that time, I was unexpectedly drawn into a turbulent political storm in relation to the movement. I was then recommended for appointment to a vice-president position at the University. When I was first approached for the position, I was hesitant, as it would be a difficult decision whether to continue in administration, which I might be able to make some contribution to with my experience, or to return to research and teaching, which I longed to resume after serving many years in administration. Eventually I decided to take up the challenge of a leadership position, hoping to bring some needed changes to the institution and without knowing what was awaiting me. Apparently some quarters of the community considered it undesirable, in the aftermath of Occupy Central in Hong Kong, for a liberal academic to take up an important leadership position of a university which was perceived to be the cradle of the liberal ideas of the student protestors. For over 12 months, I was continuously bombarded with scathing and frivolous personal attacks, including accusing me of supporting the Occupy Central movement in Hong Kong, which I was not involved in at all, or for not stopping my colleague who was one of the instigators of Occupy Central to carry out his ideas. But what power did I have over my colleague on his political activities outside the campus, and why should I interfere with his beliefs and activities as long as he has satisfactorily discharged his academic duties? A handful of these critics also somehow portrayed me as a dean interested only in politicking at the expense of our academic standards, whereas international rankings, like Quacquarelli Symonds (QS) and, more recently, Times Higher Education (THES), have since 2012 consistently ranked the Faculty within the top 20 law schools in the world, based on criteria including teaching, research, and citation.

It was a turbulent time. The process was most unpleasant, and the public attacks have taken a toll on me and my family, but it is reassuring that there are many, many supporting friends around, both from Hong Kong and overseas. I could easily have withdrawn from the appointment process to spare myself from the vicious attacks, had it not been that the withdrawal would have been perceived to be a surrender of the principle of academic freedom. I have been telling my students that our commitment to fundamental values would only be tested when such commitment requires some kind of sacrifice, and it appears that I am to be tested by my own belief. I adhered to my principles and conscience, though not without a price. It took almost 18 months for the storm to die down. I am pleased to regain my peace of mind since the dust has

settled. A very senior and well respected professor at the University once asked me if I was angry at the University. Not at all; probably sadness rather than anger. I don't have any feeling of animosity towards anyone who was involved in the process; such feeling would not have changed anything. Life is too short to be spent on grief, anger, regret and lament. Perhaps I prefer to see things from the positive side. The experience makes my life more interesting. I have at least been given time to reflect on my own inadequacies and to consider how blessed I am with the friendship and support that I have received. I would in particular like to thank Professor Peter Mathieson, the then President of the University, who has to face tremendous political pressure in supporting my appointment.<sup>5</sup> There is no point in looking back at those days, as life has had to move on. It is indeed a blessing in disguise as I can resume what I have always intended to do when I joined academia—teaching and research.

I started my academic career partly with the hope to bridge the gap between town and gown. The relation between town and gown has become a lot healthier than, say, it was 30 years ago. The Court of Final Appeal under the great leadership of Chief Justice Andrew Li has been very receptive to academic work. Indeed, Hong Kong is fortunate and privileged to have our Court of Final Appeal led by enlightened and liberal judicial leaders like the successive Chief Justices Andrew Li, who taught me modesty and perseverance, and Geoffrey Ma, who is always warm and pleasant, Justice Kemy Bokhary, a personal friend with whom I have the privilege of collaborating on a number of academic works, Justice Bob Ribeiro who was once my teacher at the University, Justice Patrick Chan, our first alumnus on the Court of Final Appeal, Sir Anthony Mason, who is a strong believer in close collaboration between town and gown, and who has made immense contributions to legal scholarship, and many, many others who, for space constraints, could not be named here. It is increasingly accepted that a strong tie among academia, the judiciary, and the practitioners would benefit and strengthen our legal system. Scholarship and practice are not mutually exclusive. In fact, interaction and understanding will complement and enrich one another's work. In this regard, I am particularly honoured when Chief Justice Andrew Li conferred on me the title of Honorary Senior Counsel, also known as 'academic silk'. The title itself is the best testimony that town and gown should work together to serve our legal system and our community.

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5. See 'A Turbulent Tenure: HKU Vice-Chancellor Reflects on His Time at the Helm of Hong Kong's Oldest University', *South China Morning Post*, 8 January 2018 (<http://www.scmp.com/news/hong-kong/politics/article/2127163/turbulent-tenure-hku-vice-chancellor-reflects-his-time-helm>). For more details of the incident, see Johannes Chan and Douglas Kerr, 'Academic Freedom, Political Interference and Public Accountability', (2016) 7 *Journal of Academic Freedom* 1–21.

XII

## **Law and Moral Choices**

## *Whose life is it anyway?*

Unlike doctors, lawyers are not always thought of as persons involved with making decisions of life and death. Yet for those who practise family law, this is not an uncommon occurrence, and on those occasions, lawyers are relieved that they are only advocates and not the decision makers themselves.

John asked,<sup>1</sup> with tears in his eyes, ‘Honey, are you sure?’ ‘Yes, I’m sure,’ Mary replied. Her tears had already dried. She turned her head away from her husband and gazed at the grey-blue sky outside the window of the hospital ward. ‘This will be the best for her,’ she murmured to herself.

### **Court No. 3 of the Royal Court of Justice**

Clerk:            Court.

[All rose. The judges came out and took their seats.]

Ms Ryan QC: My Lords, I appear on behalf of the Hammersmith and Fulham Local Authority. This is an urgent appeal from a judgment made by Justice Ewbank this morning when the learned judge decided that the parents’ wishes should be respected and refused to make an order to authorize the hospital to carry out an operation on a newborn child . . .

Mr Gray QC: My Lords, I appear for the parents. This is a very poignantly sad case. It is a case where nature has made its own arrangements to terminate a life which would not be fruitful, and nature should not be interfered with. It is a most difficult and painful decision for the parents to make. Yet it is also a case where the views of responsible and caring parents, as these are, that it is better for the child to be allowed to die, should be respected . . .

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1. This story is based on a real case in *Re B* [1981] 1 WLR 1421, but the names of all persons and institutions used here are fictitious.

### Three days ago, Maternity Ward 5B, London Chelsea Hospital

Dr Osmond walked into the room. Mary looked well, though a bit pale, having just gone through a caesarean section. She had just recovered from the effects of sedation and could not wait to see her child. John followed Dr Osmond into the room. He had been having a talk with the doctor and now looked bewildered and lost.

‘Mary, you look good. You’re doing well. You should be able to get up tomorrow morning,’ Dr Osmond said.

‘How about the baby? How is she? When can I see her?’ Mary asked eagerly.

‘The operation was successful,’ Dr Osmond replied. ‘But now I’m afraid I have some bad news.’ The doctor paused for a while. John went to the bedside and took his wife’s hand. ‘The child was born suffering from Patau syndrome. This was caused by an extra pair of chromosomes 13. It causes serious physical and mental abnormalities, including heart defects, incomplete brain development, and mental retardation. There will also be other internal and external abnormalities. She is not in the most serious condition but is still in a serious stage. At this stage we can’t tell what kind of life she will be able to lead. She won’t be a vegetable, that’s for sure, but I’m very sorry to tell you she will have severe mental and physical disabilities. Seventy per cent of children with this syndrome do not live beyond a year, and survival to adulthood is very rare though the longest case so far is known to have survived to the age of 33.’

Mary burst into tears. ‘Is there anything you can do? We’ll do anything!’

Dr Osmond looked sombre. ‘I’m afraid that’s not all. She also suffers from intestinal blockage, and that requires an immediate operation. If she does not have this operation, she will die within a matter of days. Please discuss this between you. Take as much time as you need. I will need your consent to carry out the operation.’

### Two days ago

‘At least she’ll have one or more years to live. Who knows, maybe her condition will be curable by then. Maybe there will be miracles. I’ll do everything to give her a happy life,’ John said, and tried to sound hopeful.

‘And what if it’s not curable by then?’ Mary’s voice was sad but determined. She had had no sleep since the news yesterday. ‘We have to be realistic, John. Think how stressful it will be to take care of a child with severe mental and physical disabilities. You have a job, and we need you to work to support the family. I’m not sure I can cope—not for myself—but how can I bear to watch her suffer for months or even years and to witness her dying gradually with all the suffering? What kind of life will she have?’

The couple clung to one another and cried for quite a while.

‘Honey, are you sure?’ John asked. ‘Yes, I’m sure,’ Mary said. ‘This will be the best for her. Take me to see our child. I want to see more of her before she’s gone.’

‘This is Dr Osmond.’ In discharge of his duty, Dr Osmond reported the matter to the Hammersmith and Fulham Local Authority. ‘I have to report to you that the parents have refused to give their consent to the operation. The parents are sober, calm, and well educated. They know what they are doing, and they think that it’s in the best interest of the child to let her go peacefully. I told them that we could keep her from pain and suffering by sedation. However, as a doctor I can’t recommend this course. If the operation is not carried out, the child will die within days. If we do operate, there may be heart complications, and as a result she might still die within two or three months. But even if the operation is successful, she has Patau syndrome, and the present assessment is that her life expectancy is about one to a few years. With possible medical advancement, this is not a short time. My duty is to save life, not to end it.’

An urgent conference was held at the local authority that afternoon. It was decided that the authority should intervene in the matter.

### A day ago

An urgent application was made by the local authority to the court, applying to make the child a ward of the court, asking the court to give the care and control of the child to the authority and to authorize them to direct that the operation be carried out. On the strength of the evidence of Dr Osmond, the judge so directed.

The child was removed to St Thomas Hospital for the operation that afternoon. Dr Phillips, the consultant surgeon who was to perform the operation, was hesitant when she learned about the objection of the parents. She decided to speak to them, and they told her on the phone that, in view of the fact that the child had Patau syndrome, they did not wish to have the operation performed. Dr Phillips, in a later affirmation to the court, stated:

I decided therefore to respect the wishes of the parents and not to perform the operation, a decision which would, I believe (after about 20 years in the medical profession), be taken by the great majority of surgeons faced with a similar situation.

### This morning

The local authority went back to Mr Justice Ewbank, armed with a further affirmation from Dr Taylor, a surgeon of the London Chelsea Hospital, and Dr Riley, another surgeon of a neighbouring hospital. Both Dr Taylor and Dr Riley were of the view that the operation should be carried out. Mr Justice Ewbank was asked to decide whether to continue his order that the operation should be performed or whether to revoke that order in view of the conflicting medical evidence. The parents were served with the relevant documents and appeared before Mr Justice Ewbank. They maintained their view that there should be no operation. After hearing the parties, Mr Justice Ewbank decided that the parents’ wishes should be respected.

The local authority lodged an urgent appeal to the Court of Appeal in the afternoon. The Official Solicitor intervened and was represented by Mr Jackson QC. Ms Ryan QC appeared on behalf of the local authority, and Mr Gray QC acted pro bono for the parents.

### **Court No. 3 of the Royal Court of Justice**

Ms Ryan QC: My Lords, while there are conflicting medical opinions regarding the operation, there is a consensus that if it is successful, the child will live for about one to a few years, and maybe even longer, as there are reported cases of survival to adulthood. We certainly appreciate the burden on the parents and respect their wishes. However, the child is now a ward of the court, and the paramount consideration must be her best interest. Insofar as it is a matter of care, the local authority is prepared to give whatever support we can so that this unfortunate child can be provided with a happy life as far as this can be done. The local authority is also prepared, if this is considered desirable, to make good adoption arrangements so that the burden of taking care of this unfortunate child could be borne by persons other than the natural parents.

Mr Jackson QC: The duty of the Official Solicitor is to protect the best interest of the child. The question for this court is whether to allow an operation to take place which may result in her living for one to a few years, and maybe even longer, as a sufferer from Patau syndrome, or whether (and this will be the brutal result) to terminate the life of the child because she also has an intestinal complaint. My Lords, the overriding consideration is what is in the best interest of the child. No doubt your Lordships should give weight, and heavy weight indeed, to the wishes of the parents. To be sure, the shock to these caring and loving parents must be overwhelming, and no doubt they came to their decision in grief and great sorrow. They had to make this decision also under great time pressure. Under these harrowing circumstances, while their views should be accorded great weight, they should not necessarily prevail. The determination of what lies in the best interest of the child rests with the court and no longer with the parents or the doctors. It is a decision of the court that is to be made in the light of the evidence and views expressed by the parents and the doctors. But at the end of the day, it is for this court to decide whether the child should in effect be condemned to die, or whether her life is still so imponderable that it would be wrong for it to be taken from her. The life is that of a child. No prognosis as to

the child's future can be made at this point. Medical advancement is progressing at tremendous speed these days. Who knows if, in a year's time, this disease would not have become curable, or her conditions could not have become improved? Should she be deprived of this opportunity? My Lords, this child is in no different a position from many other unfortunate Patau syndrome children, except that she happens to have an intestinal problem that needs an operation. Should she be put in the same position as any other child born with this condition and be given a chance to live? The life is hers, and hers alone. On this, my Lords, I rest my case.

Mr Gray QC: It is easy to argue for a right to life in the abstract, but what kind of life are we talking about? My Lords, the decision of the parents, no doubt one taken in grief and great sorrow, is also a calm and rational choice, made after the most careful consideration of what is best for this unfortunate baby. Let me make it very clear that it is not because of the difficulties which will be occasioned to them that they make this decision. As loving and caring parents, no difficulties would so great as to compel them to shed their love and responsibility to take care of their unfortunate child. It is precisely from that love and responsibility that they have made the decision that their daughter should not be made to bear all the pain and suffering for the rest of her life. It is agreed by the doctors that, even if the operation is successful, she will only have a short life expectancy. Thirty per cent of the children cannot survive beyond a few months; seventy per cent cannot survive beyond a year; and it is rare to have survival beyond adulthood. They also agree that it is certain that she will be very severely mentally and physically challenged, and there will be internal and external abnormalities. To put it brutally, her existence will be nothing but painful—painful to her and painful to people around her. Yes, there is always a theoretical possibility that medical science may advance in the years to come, but there is a limit for optimism. Would it be in the best interest of the child to condemn her to months and years of certain and foreseeable suffering, for a mere theoretical possibility, which no one can possibly say for sure will come true, in the distant future? Yes, no one can tell what kind of life is in store for a child with Patau syndrome who survives till adulthood, but one thing is certain. She will have severe mental and physical disabilities, and no one can expect that she will have anything like a normal existence. It is true that no prognosis as to the child's future can be made at this stage, and probably not for a further few months to a year, but the doctors are not optimistic. I am afraid

there is no reason at all to expect that the child will be able to lead a quality life. Indeed, the odds are against that. My Lords, a right to life must imply a life of bearable quality. Not only would she not have a meaningful quality of life, but it will also put unbearable burden on those who have to take care of her for the rest of her life, who would have to spend days, weeks, and years to take care of her, only to meet the inevitable and heartbreaking destiny at the end of that journey. Are we as a community imposing an unjustifiable burden on the parents and pain and suffering on the child so that the rest of us can feel morally good? My learned friend Mr Jackson QC asked why this child should be treated differently from other children with Patau syndrome. Without meaning to sound harsh or brutal, this child has a fatal intestinal problem. God or nature has given the child a way out. Where nature has made its own arrangement to terminate a life which could not be a fruitful one, nature should not be interfered with.

The Court of Appeal adjourned for consideration of its judgment. What will the court decide? How would you decide? What would be a just decision? And justice for whom?

*When a woman is not a woman**The transgender case*

One afternoon in 1985, a charming student called Andrea Fong came to my office at the University and asked if I could be the supervisor of her graduation dissertation. She intended to write about the plight of transgender persons. I agreed and suggested that, as it involved different disciplines, she might wish to consult my colleagues at the Medical Faculty and the Psychology Department of the University of Hong Kong. I sent her to Dr Tsang Ka Tat of the Psychology Department.

A couple of months later, at the Senior Common Room of the University, I had lunch with Dr Tsang to discuss the dissertation. It happened that Dr Ng Mun Lun of the Department of Psychiatry of the Faculty of Medicine was around. In those days, the Senior Common Room was a place that colleagues from different faculties and disciplines would meet and discuss interesting issues and share research ideas. Over the years, I have visited many leading universities, and one common feature is that they all place considerable emphasis on a place where colleagues from different disciplines can meet and interact. Such encounters and discussions spark new ideas. Unfortunately, in recent years, the University of Hong Kong has treated the Senior Common Room as nothing but dining facilities for staff and is reluctant to put in resources to turn it into an integral part of the academic life.

At that lunch meeting, we found that there were indeed considerable demands for transgender operation services in Hong Kong. Dr Ng Mun Lun is a specialist in this area. He noted that there were patients who could not accept their own gender and would go to great length to relieve themselves of the acute mental and emotional distress. Some of these patients would administer self-help by injecting hormones; some may mutilate themselves in order to get rid of the gonadal organs they detest. My colleague Professor Sam Winter vividly described their plight many years later: they 'considered themselves females imprisoned in the male bodies, and vice versa'.<sup>1</sup> It was a well-recognized medical condition, and medical treatment in public hospitals in Hong Kong was first available in 1981. These patients did not normally respond to psychiatric or psychological treatment, and the only cure was to have a sex reassignment surgical operation. This operation was painful, complex, and irreversible, and therefore great care and assessment should be carried out before the operation.

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1. Affidavit evidence of Professor Sam Winter in *W v Registrar of Marriage* (2013) 16 HKCFAR 112, at 127.

Unfortunately, there was no standard practice of assessment, and malpractice was not unheard of. At the end of that lunch, we decided that, since there were only a small number of professionals working in this area, we might try to work out some standard assessment procedures.

After a few months' discussion, we gathered a team composed of psychiatrists, psychologists, and plastic surgeons, in addition to Dr Ng, Dr Tsang, and me. At that time sex reassignment surgery was performed at Princess Margaret Hospital only, and later at Queen Mary Hospital (apart from private and overseas clinics), and we managed to get the plastic surgeons at the two public hospitals on our team. We devised a year-long assessment process during which patients would have to undergo various psychiatric and psychological assessments and go through a year of real-life experience living in their preferred gender, to ensure that this was a proper case for the irreversible sex reassignment surgery. My role was to meet them at the beginning of this assessment process to advise them on the legal position, and then to meet them again just shortly before the operation to advise them on any change in the legal position. The law at that time did not recognize the post-operation gender, and this would have various legal ramifications.

Since then I have met a dozen transgender patients. Most of them were already cross-dressing and living the life of a different gender. An overwhelming majority of them were 'male to female' patients. Most of them were from the lower working class; a number of them were street or dance performers. A significant number of them had a history of being abused by their cohabittees. Of the dozen patients that I have met, there was only one who came from a middle-class professional background and was my only 'female-to-male' transgender patient. While all the male-to-female patients had put on make-up, and had already administered hormones themselves or received hormonal treatment, they still had a rather coarse appearance and a hoarse voice. They invariably adopted a very low profile and appeared a bit shy in dealing with people. The secretary at the law department did ask me on a few occasions who they were, as they looked 'strange' to her. One of our difficulties at that time was that there was considerable social stigma against this group of persons, and they disappeared as soon as the surgical operation was completed, making it very difficult for us to follow up on how well they had adjusted to life in the post-operation gender.

I left the assessment team after two years when I went on sabbatical. I heard later that our assessment process was adopted and refined by the government and became a standard process at government hospitals. The assessment period has been extended to two years. Since then I have moved on to other things and had forgotten about this area, until the issue surfaced again more than two decades later.

### The W case

W was a post-operation male-to-female transsexual person. She was born a male, but from an early age she perceived herself as female. She was diagnosed as suffering

from gender identity disorder and underwent psychiatric assessment and hormonal treatment between 2005 and 2008. In January 2007, she went to Thailand to have genital surgery (orchiectomy) and then changed her name to a female name by deed poll. After having successfully gone through the real-life experience assessment under professional supervision, she went through the sex reassignment surgery at a public hospital in Hong Kong involving the removal of her penis and the construction of an artificial vagina to enable her to engage in sexual intercourse with a man. With a supporting letter from the Hospital Authority, she successfully changed her gender to female in her educational records, her identity card, and later her passport.

In November 2008, she wrote to the Registrar of Marriage seeking confirmation that she was able to marry her male partner. The registrar replied:

According to our legal advice, the biological sexual constitution of an individual is fixed at birth and cannot be changed, either by the natural development of organs of the opposite sex, or by medical or surgical means. The Registrar of Marriages is not empowered to celebrate the marriage between persons of the same biological sex. For the purpose of marriage, only an individual's sex at birth counts and any operative intervention is ignored.

A challenge to this decision set in train legal proceedings in the following five years, resulting in a major change in social and legal policy.

The law was deceptively simple. Section 40 of the Marriage Ordinance said that 'every marriage under this Ordinance shall be a Christian marriage or the equivalent of a Christian marriage', meaning a 'voluntary union for life of one man and one woman to the exclusion of all others'. At the heart of the case is the meaning of 'a man' and 'a woman'.

At the outset, W's legal team was at pains to emphasize that this case was not about same-sex marriage, which was a highly controversial subject. The issue was a narrower one, whether 'a woman', for the purpose of marriage, included a post-operation male-to-female transsexual person?

The English court has given a negative answer. In the leading case of *Corbett v Corbett*,<sup>2</sup> which was decided in 1971, Mr Justice Ormrod held that natural heterosexual intercourse was an essential element of the institution of marriage on which the family was built, because it was the basis of procreation. This was in line with the notion of Christian marriage, marriage ordained for the procreation of children. The learned judge identified five possible criteria for determining one's gender: (1) chromosomal factors, (2) gonadal factors (the presence or absence of testes or ovaries), (3) genital factors (including internal sex organs), (4) psychological factors, and possibly (5) hormonal factors or secondary sexual characteristics. However, given the essentially heterosexual character of the relationship in marriage, the judge concluded that the criteria must be biological, for even the most extreme degree of transsexualism in a

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2. [1971] P 83.

male could not reproduce a person who was naturally capable of performing the essential role of a woman in marriage.

As the determining factor is biological, gender is determined at birth and cannot be changed. This case was the leading authority for determining gender in the following four decades. It led to an amendment of the Nullity of Marriage Act 1971 in the United Kingdom, which in turn led to the amendment in our Matrimonial Causes Ordinance and Marriage Ordinance that reproduced the English enactment in identical term. With this drafting history, all nine judges involved in this case agreed that, as a matter of construction, the terms 'a man' and 'a woman' could only be construed as referring to a biological man and woman, the gender of which was governed by biological factors, for the purpose of marriage.

The remaining question was whether such a narrow construction should continue to be adopted 40 years after *Corbett* was decided, and if such a narrow construction were to be adopted, whether such construction would be consistent with the right to marry under the Bill of Rights and the Basic Law. The courts were divided on these issues.

### The Court of First Instance and the Court of Appeal

At first instance, the Chief Judge of the High Court took 'Christian marriage or its equivalent' as the starting point and held that '[a]ccording to the doctrine of the Church of England, marriage is in its nature a union permanent and lifelong, for better or for worse, till death them do part, of one man and one woman, to the exclusion of all others on either side, for the procreation and nurture of children, for the hallowing and right direction of the natural instincts and affections, and for the mutual society, help and comfort which the one ought to have of the other, both in prosperity and adversity.'<sup>3</sup> Taking into account the drafting history of the Marriage Ordinance and the ordinary usage of the term 'man' and 'woman', the learned judge held that the biological definition of sex in *Corbett v Corbett* represented the current state of law. While he accepted that there were medical advances and the social changes of attitude towards the institution of marriage, the question of recognition of a change of sex raised a series of other questions which the court was not in a position to answer. The court was not to fill a gap in social policy. In this regard, the learned judge identified the difficulties that would be posed by such a fundamental change in the law. These difficulties included: the uncertainty surrounding the circumstances in which gender reassignment should be recognized for the purposes of marriage; the fact that recognizing gender reassignment for the purposes of marriage is part of a wider problem which should be considered as a whole and not dealt with piecemeal; the implications of same-sex marriage; the different tests and rationales put forward to determine when a transsexual individual should be recognized in his or her desired sex; and the question

3. HCAL 120/2009, para 116.

of disclosure. All these difficulties pointed to the conclusion that any change in the law should be made by the legislature and not the court. While the right to marriage should be in accord with general social consensus, 'the versatility of the constitutional right to marry does *not* give the courts a judicial licence to engineer a fundamental social and legal reform of the institution of marriage. In other words, what is constitutionally guaranteed is the right to participate in the institution of marriage as informed by the contemporary societal consensus, everything else being equal. Absent any compelling reasons, the constitutional guarantee does not mean that a Hong Kong resident can ask a court to construe the right to marry in such a way that does not enjoy contemporary societal consensual support, and, in substance, to effect a fundamental social and legal reform of the current institution of marriage to accord with the resident's idea of what it ought to be.'<sup>4</sup> In other words, it is not the constitutional role of the judiciary to engineer fundamental social changes with far-reaching consequences. The Court of Appeal essentially agreed with this reasoning.<sup>5</sup>

The Court of Final Appeal disagreed.

### The Court of Final Appeal

A majority of the Court of Final Appeal held that, in the past 40 years, there were far-reaching changes to the nature of marriage as a social institution. In present-day multicultural Hong Kong, procreation was no longer regarded as essential to marriage. It was never a legal requirement for marriage that a couple should be able to or wish to procreate children together. As the Chief Justice and Mr Justice Ribeiro stated in their joint judgment, 'the importance attributed by Ormrod J to procreation as the essential constituent of a Christian marriage has much diminished. Men and women who decide to share their lives together now exercise far greater choice in deciding whether to marry at all, whether to have children, how their property should be dealt with and indeed, whether they should remain together as a couple. While many in society will still no doubt regard procreation as of great importance to a marriage, many others will take a different view. Many people now marry without having children, while many others have children without getting married, neither group attracting social opprobrium.'<sup>6</sup>

At the same time, with the advance of medical knowledge, transsexualism is much better understood now and has been widely recognized as a condition requiring medical treatment, with diagnostic criteria approved by the World Health Organization. The latest medical classification of sexual identity is by reference to both psychological and biological factors. The psychological aspects include gender identity (self-perception of being male or female); social sex role (living as male or female); sexual orientation (homosexual, heterosexual, asexual, or bisexual); and sex of rearing

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4. Para 192.

5. CACV 266/2010.

6. At 154.

(whether raised as male or female). Gender identity disorder refers to the condition of patients possessing the chromosomal and other biological features of one sex but profoundly and unshakably perceive themselves to be members of the opposite sex. They may persistently experience acute emotional distress, feeling trapped in a body which does not correspond with what they firmly believe to be their 'real' sex. The aetiology of the condition is still uncertain, and the degree of psychological distress varies from mild gender dysphoria to severe transsexualism. For the latter group, sex reassignment surgery is the only cure. The operation comprises various elements. It is a painful process, and the procedures differ for male-to-female and female-to-male patients.<sup>7</sup> Sex reassignment surgery has been available in public hospitals in Hong Kong since 1981. Between 1 October 2007 and 30 September 2009, 86 patients were diagnosed with gender identity disorder, and from January 2006 to September 2009, 18 patients successfully underwent sex reassignment surgery in public hospitals. It is also the practice of the Immigration Department to issue a replacement identity card with a new gender to these patients, upon production of a letter from the Hospital Authority certifying the completion of sex reassignment surgery.

The court had considerable sympathy for the plight of transsexual persons. In 2003, a transsexual person, Louise Chan, was stalked and 'outed' by the local media. Her life was considerably disturbed, and she lost her job. On 21 September 2004, she committed suicide. Two days later, another transgender woman, Sasha Moon, also committed suicide. Apart from social stigma, the denial of their right to marry was total. It was argued that there was no legal restriction of their right to marry, as a male-to-female person could still marry a female person. The court rejected such an argument as unrealistic and running counter to the whole purpose of sex reassignment surgery as a form of treatment of transsexualism. Another objection was that, once the post-operation gender was recognized for the purpose of marriage, it would open the door to same-sex marriage. The court emphasized that this case was about recognition of post-operation gender only, and it expressed no view on same-sex marriage. It further rejected the lack of a social consensus in favour of recognition of reassigned gender as a ground for rejecting a right of the minority, for otherwise it would amount to an entrenchment of prejudice against a minority. As Mr Justice Bokhary forcefully stated, 'What is involved is a constitutionally guaranteed human right. One of the functions—perhaps by far the most important one—of constitutionally guaranteed human rights is to protect minorities. Why is there any need to guarantee a right to marry? After all, no society is likely to put impediments in the way of the majority entering into marriages as they like. The greatest and most urgent need for constitutional protection is apt to be found among those who form a minority, especially a misunderstood minority.'<sup>8</sup>

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7. Evidence of Dr Ho Pui Tat, associate consultant in psychiatry at Kwai Chung Hospital, and Dr Albert Yuen Wai Cheung, consultant surgeon and chief of surgical service of Ruttonjee Hospital: at paras 5–14.

8. At 187, para 220.

Finally, the court also recognized the international trend towards recognition of post-operation gender, including not only Western countries such as Canada, part of the United States or most European states, but also Asian countries such as Japan, India, Singapore, South Korea, Indonesia, and Mainland China. The European Court of Human Rights has found the *Corbett* definition a violation of the right to marry under the European Convention on Human Rights, and it led to the enactment of Gender Recognition Act 2004 in the United Kingdom.

While these are powerful arguments to depart from the *Corbett v Corbett* definition of sex, the appeal raised again the question of the proper role of the court. As Mr Justice Patrick Chan powerfully put in his dissenting judgment, 'giving recognition to the reassigned gender for the purpose of marriage involves a change of social policy . . . The role of the Court is to give effect to a change in an existing social policy, not to introduce any new social policy. The former is a judicial process but the latter is a matter for the democratic process. Social policy issues should not be decided by the Court.' Mr Justice Chan was not persuaded that, for the purpose of marriage, the ordinary meanings of man and woman in Hong Kong have changed to such an extent that it is now necessary to accommodate a transsexual man and woman. At least there was no evidence before the court of any change of social attitude to the traditional concept of marriage or the degree of social acceptance of transsexualism. He accepted that the problems facing transsexuals should be recognized and a comprehensive review was required, but this should be done by the legislature and not the court. While he was the only dissenting judge on the Court of Final Appeal, there were altogether five judges who have adopted this approach if one includes the lower courts.

Nonetheless, this is how our legal system works. By a majority of four to one, the Court of Final Appeal, adopting a remedial interpretation of the Marriage Ordinance, held that the meaning of 'woman' and 'female' in the Marriage Ordinance and the Matrimonial Causes Ordinance includes a post-operation male-to-female transsexual person whose gender has been certified by an appropriate medical authority to have changed as a result of sex reassignment surgery. This was the final verdict.

At the same time, the Court of Final Appeal recognized that its judgment had far-reaching implications and could give rise to difficult issues that need to be addressed. Hence, it took the exceptional step of staying the effect of its judgment for 12 months to allow the government to introduce necessary legislation. The court took an even more unusual step of identifying some of the issues that need to be addressed by the legislature. The first issue was how to decide who qualified as 'a man' or 'a woman' for the purpose of marriage and other purposes, such as adoption, succession, tax, property, immigration, gender-specific criminal law, and social welfare. The court in this case accepted that someone who has completed the sex assignment surgery should have the reassigned gender recognized but left open whether this would be the appropriate line to be drawn. Instead of leaving the matter to the court to draw the line case by case, the court suggested that an expert panel be set up for this purpose. This issue turned out to be so controversial that it sabotaged subsequent legislative initiatives.

Another issue involved the impact of a legally recognized gender change on an existing marriage, such as, for example, the impact on one's spouse and children when a person has undergone sex reassignment surgery during marriage. There is no doubt that these are important issues that need to be addressed. While it is helpful for the court to outline these issues, it also strengthens the concern of Mr Justice Chan that the court was entering the realm of law making rather than law interpretation.

### The aftermath

In any event, this case stands as a milestone in our legal development. After long and tedious litigation that lasted five years, this case was rightly hailed as the champion for the rights of the transsexual persons. Yet the battle was only half-won.

In the following 12 months, there were extensive debates on what the new legislation should look like. The government was prepared to introduce a simple scheme that was modelled on the English Gender Recognition Act. It proposed to give effect to the judgment of the Court of Final Appeal by recognizing the post-operation gender. Those who were aggrieved by the decision of the court, particularly those from the Church, continued to oppose the new legislation. Those who campaigned for the rights of transsexual persons considered the new legislation too conservative and failed to recognize that many transsexual persons who were clearly suffering from gender identity disorder might, for some good reasons, not wish to undergo the painful sex reassignment surgery. Thus, the new legislation was attacked left, right, and centre. No agreement was reached after 12 months. The judgment of the court came into effect at the expiry of 12 months. Persons like W could now marry, but sadly, a whole host of questions arising from the recognition of post-operation gender remain unanswered. With hindsight, the Court of Final Appeal was right not to leave the case to the legislature after all!

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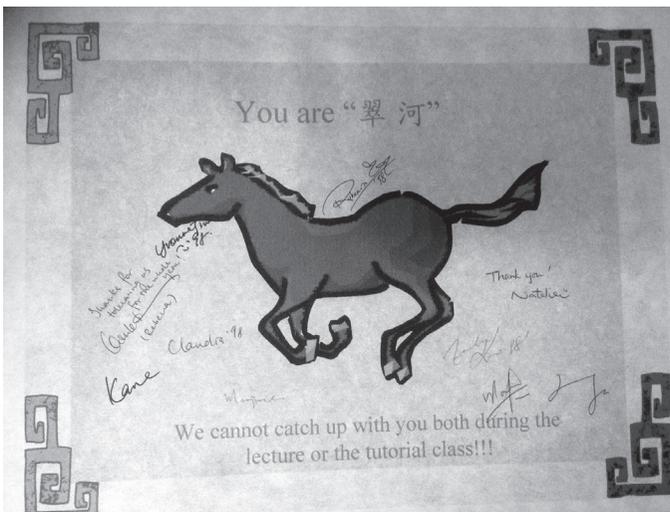
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## *About the author*

Johannes Chan SC (Hon) is professor of law and former dean (2002–2014) of the Faculty of Law at the University of Hong Kong. He specializes in the areas of constitutional law, administrative law, and human rights, and has published widely in these fields. His written and edited books include *Law of the Hong Kong Constitution*, *Hong Kong's Constitutional Debates*, *Immigration Law and Policy in Hong Kong*, *Reflections on the Academia* (翰林隨筆：在公義路上的反思), *On the Road to Justice* (走在公義路上), and *Insights on Law and Politics* (法政敏言). He was also the BOK Visiting International Professor at the University of Pennsylvania Law School, Herbert Smith Freehills Visiting Professor at the University of Cambridge, and held other visiting positions at the University of New South Wales, the University of Zurich, and University College London. He is highly regarded internationally as a leading scholar as well as a transformative dean. He has appeared as a barrister in many leading human rights cases. In 2003, he was appointed Honorary Senior Counsel in Hong Kong, the first (and so far the only) academic silk in Hong Kong. He is also a well-known media commentator on current affairs and has written a weekly column in *Ming Pao* on law and politics since 2003.



Part of a thank-you card from one of my first-year legal system tutorial groups in 1998–1999. '翠河' (River Verdun) is the name of the horse that holds the record of being three-time champion in three racing seasons in Hong Kong in 1990–1994.