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Hong Kong and the People's Republic of China: the Continuity of the Common Law Tradition

1 It is a great honour to be asked to deliver this the 19th AIJA Oration, the first time it has taken place outside Australia. It is good to be back in Auckland. This is my third trip here; the first was in 1980 when my wife and I visited New Zealand.

2 The theme of the Oration is often a subject connected with judicial administration, but sometimes not. Occasionally, the audience is asked to take a step back and take a more general view of fundamental aspects of the law. Today's talk focuses primarily on the characteristics that make up the operation of the common law as we know it, with an emphasis on Hong Kong. Hong Kong, as you all know, is a special administrative region within the People's Republic of China. It is a common law jurisdiction which exists within a

country that, according to its constitution[1], is run on socialist principles. I start, however, this journey in England.

3 In March 1911, in the British Parliament, the Home Secretary at the time, Mr Winston Churchill, was openly berating the Judiciary for a series of decisions not to the liking of the Government. In a famous exchange, the well-known Member of Parliament and King's Counsel, Mr Edward Carson asked the simple question of Mr Churchill, "*Does the Right Honourable Gentleman thinks it fair to attack men who are not allowed to reply?*" For once, and probably one of the very few times in his life, Winston Churchill was dumbfounded and unable to say anything witty. All he could muster was "*That is obviously a controversial and debating remark, nobody knows it more than the Honourable and learned Gentleman*".

4 How true those words actually were. Sir Edward Carson KC, later Lord Carson (who became a Lord of Appeal in

[1] The Constitution of the People's Republic of China, adopted at the Fifth Session of the Fifth National People's Congress of 4 December 1982, promulgated for implementation by the Proclamation of the NPC on the same day.

Ordinary[2]) whose statue stands at Stormont today, was perhaps the most famous barrister of his time. He defended the Marquess of Queensbury against the libel action instituted by Oscar Wilde. He was also the counsel who, in 1910, successfully defended George Archer-Shee, the naval cadet at the Osbourne Naval College who had been accused of stealing a 5 shilling postal note[3]. Lord Carson appreciated what was true then and is equally applicable today of our courts and judges: first, however sensitive or controversial the subject matter of any case before the courts, judges will decide the matter only in accordance with the law; secondly, deciding cases in accordance with the law means not only applying the true meaning of words, but more important, applying the spirit of the law; and thirdly, judges do not speak out in public either to defend their decisions or to bask in their popularity – court decisions are to be judged and explained only by the reasoning that underlies them; in other words the reasons contained in a judgment are critical. These three themes, which I believe were clearly behind that famous exchange between

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2 In June 1921, taking the place of Lord Moulton, Baron Carson of Duncairn was appointed directly from the Bar to the House of Lords.

3 Terence Rattigan based his play "The Winslow Boy" on this celebrated case.

Sir Edward and Mr Churchill, are second nature to judges and represent for me the essence of the common law tradition.

5 How does this tradition – the common law system of law – continue to exist in Hong Kong, a Special Administrative Region of the People's Republic of China comprising some 7.5 million people, most of whom are Chinese? Historically, the arrival of the common law is easy to trace: to 1841 with the arrival of the British colonizing what the then Foreign Secretary Viscount Palmerston referred to as "a barren island with barely a house on it". Then, Hong Kong was populated by about 4,000 people spread over a few villages. The fishing population was about half the land population. These days, Hong Kong is a multi-cultural society, having firm international connections and, it has to be said, a real international feel to it.

6 The primary reason for the British presence in Hong Kong, indeed the Far East, at that time, was of course trade. But trade is a complex activity which depends on a number of factors combining together: natural resources, geographical advantages, human activity

and proper governance. Underlying all these factors which loosely make up the term ‘trade’ is the existence of a system of regulations and enforcement that is a part of what we call a legal system. And the legal system that was introduced into Hong Kong in 1841 was the common law. True that the trappings and eccentricities of the common law were also introduced into Hong Kong – the somewhat quaint rituals of court address engaged by counsel and the court, the court dress of wigs and gowns, the traditional Opening of the Legal Year ceremony which takes place months after the real opening of the legal year – all these were introduced and indeed continue to exist in Hong Kong.

7 However, it is the essence of the common law to which this address is directed, and, in this context, the critical questions relating to Hong Kong: how is it that the common law is still being applied in Hong Kong and what of its future?

8 As mentioned earlier, the People's Republic of China is, according to its Constitution, run on socialist principles[4]. The supreme sovereign body is the National People's Congress, which represents the people[5], and all institutions (including the mainland judiciary) are responsible to the NPC.

9 So far as Hong Kong is concerned, it is part of the PRC. On 1 July 1997, the PRC resumed the exercise of sovereignty over Hong Kong – this is the official terminology (in the vernacular, terms such as the "handover of sovereignty" or simply "the handover", are used). The constitutional position of Hong Kong which is contained in an instrument called the Basic Law of the Hong Kong SAR of the PRC[6], is unique. The Basic Law, Hong Kong's own constitution, is significant in at least the following two respects: first, it states the principles reflecting the implementation of the PRC's basic policies towards Hong Kong – the main one being the policy of "One Country

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4 Article 1 of the Constitution.

5 Article 2 of the Constitution.

6 Adopted at the Third Session of the Seventh National People's Congress on 4 April 1990, promulgated by the President of the PRC the same day. The Basic Law became effective from 1 July 1997.

Two Systems"; and secondly, for the first time in Hong Kong's history, there is a written constitution setting out guaranteed rights. The constitutional model of "One Country Two Systems" is perhaps a unique one, but it has real practical meaning. It ensures that those principles and institutions which have served Hong Kong well in the past, will continue. Among these principles and institutions are the rule of law and the independence of the judiciary.

10 The Basic Law preserves the common law and reinforces the independence of the judiciary:-

(1) No fewer than three articles in the Basic Law refer to the independence of the judiciary: Articles 2, 19 and 85.

(2) Article 8 of the Basic Law refers to the continuation of the common law and the rules of equity, and also a recognition of the language of the common law (here Article 9 states that both Chinese and English may be used as official

languages by the executive, the legislature and the judiciary).

(3) Article 81 of the Basic Law states that the judiciary system previously practised in Hong Kong (that is, prior to 1 July 1997) will be maintained, except for the change consequent upon the setting up of the Court of Final Appeal, now the highest court in Hong Kong. Previously, as in the case of both New Zealand and Australia, the highest appellate tribunal for Hong Kong was the Judicial Committee of the Privy Council. Apart from the Court of Final Appeal, the court system remains the same post 1 July 1997 as before: the Magistrates' courts, the District Court and the High Court (this comprising the Court of First Instance and the Court of Appeal). As before, there are two appellate levels: to the Court of Appeal and then to the Court of Final Appeal or, in the case of appeals for the Magistrates' Court, to the Court of First Instance and then

possibly to the Court of Final Appeal. The jury system is also expressly preserved under Article 86 of the Basic Law.

(4) Apart from two exceptions, there are no nationality requirements for judges in Hong Kong. Article 92 of the Basic Law states that judges are to be chosen on the basis of their judicial and professional qualities alone, and maybe recruited from other common law jurisdictions. The Court of Final Appeal goes one step further enabling judges from other common law jurisdictions actually to sit on the court on a temporary basis (Article 82). The two exceptions to nationality are the Chief Justice and the Chief Judge of the High Court, who, by Article 90, are required to be Chinese citizens who are permanent residents of the HKSAR.

(5) Lawyers who are able to practise in Hong Kong may include not only local lawyers but also lawyers from outside Hong Kong: Article 94.

11 As I have mentioned earlier, the Basic Law also for the first time sets out in constitutional terms (for the first time in Hong Kong's history) guaranteed rights and freedoms:-

(1) These rights are set out in Chapter III of the Basic Law under the heading "Fundamental Rights and Duties of the Residents".

(2) The right to equality before the law is stipulated under the Article 25.

(3) Article 26 refers to the right to vote and the right to stand for election.

(4) Article 27 refers to the freedom of speech, of the press and of publication, freedom of association, of assembly, of procession and of demonstration; and the right and freedom to form trade unions, and to strike.

(5) Article 28 refers to the freedom of the person and to the principle that no one should be subjected to arbitrary or unlawful arrest, detention or imprisonment.

(6) Article 31 refers to the freedom of movement, and freedom of emigration to other countries and regions.

(7) Article 32 refers to the freedom of conscience. It stipulates that residents shall have the freedom of religious belief, and the freedom to preach and to conduct and to participate in religious activities.

(8) Article 34 states that Hong Kong residents shall have the freedom to engage in academic research, literary and artistic creation, and other cultural activities.

(9) Article 35 refers to the right to confidential legal advice, access to the courts and the right to institute legal

proceedings in the courts against the acts of the executive authorities and their personnel.

(10) Article 39 provides that the International Covenant on Civil and Political Rights should be implemented in Hong Kong. The ICCPR is in force in Hong Kong under the Bill of Rights Ordinance Cap 383. That Ordinance sets out in 23 articles the Hong Kong Bill of Rights. The ICCPR is an important document, and, as so poignantly put by Madam Justice Abella of the Canadian Supreme Court, it was "born of dreadful experiences".

12 Any legislation inconsistent with the Basic Law or with any of the rights and freedoms set out in the Bill of Rights can be declared invalid by the courts. This is the effect of Section 6 of the Bill of Rights Ordinance and of Article 11 of the Basic Law, and obviously gives considerable power to the courts in Hong Kong:- its effect is to enable the courts to make authoritative rulings on the meaning of the constitution that would bind the legislature in terms of

what it could or could not do. *Quaere* the position in New Zealand: Sections 4 to 6 of the New Zealand Bill of Rights Act 1990; *Hansen v R*[7].

13 So far, I have dealt with the position on paper under the Basic Law and the Hong Kong Bill of Rights Ordinance, but, as always, one must answer the critical question of the reality behind the theory. Just how real and effective are the rights and freedoms, and the principles and institutions to which I have just referred?

14 As far as the institutions are concerned, the reality certainly seems to fit the position on paper:-

(1) There appears an ever increasing number of lawyers in Hong Kong, both local as well as from overseas. 30 years ago, many of the large London City law firms began to set up in Hong Kong. In the past 10 years, we have seen

[7] [2007] NZSC 7.

many overseas law firms (including US and Australian ones) establish themselves here. The three law schools in Hong Kong (the University of Hong Kong, the Chinese University of Hong Kong and the City University of Hong Kong) are producing increasing numbers of law graduates.

(2) We have a strong Bar in Hong Kong and one that values its independence. A strong and independent Bar is one of the hallmarks of a common law system: a Bar that is not afraid to speak out on legal issues which affect the community and to act in the public interest.

(3) So far as the Judiciary is concerned, our judges are indeed chosen on merit, on the basis of their judicial and professional qualities.

(4) Since the establishment of the Court of Final Appeal on 1 July 1997, in every substantive appeal (bar two or three) a judge from a common law jurisdiction has sat as part of

the court of five. There is a panel of judges from common law jurisdictions who sit as Non Permanent Judges in the Court of Final Appeal. This panel has included retired judges from New Zealand and Australia (among them former Chief Justices) and current, as well as retired, judges of the Supreme Court of the United Kingdom. The Non Permanent Judge currently sitting in Hong Kong is Sir Anthony Mason AC, who has regularly sat since the establishment of the Court[8].

15 The real test, however, of an effective and respectable judiciary is how the courts actually deal with the day to day business of adjudicating disputes, how they discharge in practice the constitutional responsibilities and how they apply that sometimes elusive concept, the public interest. In this context, the type of case that often provides the quintessential litmus test is the case that

[8] Sir Anthony is an Honorary Life Member of the AIJA.

arouses public controversy. I am mainly talking about those cases that engage issues of public law.

16 Public law cases provide perhaps the best examples because very often, they involve controversial issues where the court can be confronted with a number of diametrically opposite views, each of which is passionately held and all of which may appear to be entirely reasonable. In most other areas of the law, the answer to a legal problem is often fairly clearcut, even though the discovery of the answer may at times be complex. In the area of public law, however, and in particular cases which involve issues of constitutional importance, very often the interest of the public in general is engaged. Here, the views of the public (and I include here the government as well) will be as diverse as the society itself in which the legal dispute before the court originates. When one is dealing with, for example, issues involving the freedom of expression, or perhaps immigration issues or (as in the case of Hong Kong and I daresay New Zealand and Australia) indigenous rights, public controversy is almost certain to arise.

17 The way in which courts deal with such issues – and I am here not just talking about the actual result of any litigation – is critical. It is critical because the way in which a court approaches such cases – its methodology and most important of all, its reasoning – will demonstrate whether those principles which provide the foundation of the common law, have been applied.

18 Just what are these principles that I have been talking about? One of course starts with a concept of the rule of law. For me, this concept has two intertwined parts: first, the existence of laws which respect the dignity of persons and the ability of every member of a community to lead a civilized life; secondly, the existence of institutions which promote and enforce such laws. These two parts are inseparable. In this talk, I assume the first part and discuss only the second.

19 An independent judiciary is key. In a common law jurisdiction one should be able to take this for granted (I say "should" bearing in mind, however, the warning given by Sir Ninian Stephen at

the Inaugural AIJA Oration in 1989[9], simply intituled "Judicial Independence", where he said, "*Judicial independence is not lightly to be assumed as an unthreatened norm, existing as a matter of course in every highly developed society*"). The meaning of an independent judiciary is reflected in the Judicial Oath taken by judges. The precise words may differ from jurisdiction to jurisdiction but the effect is always the same. In Hong Kong, the Judicial Oath requires each judge to adhere to the law in discharge of their duties. Judges are required "*to act in full accordance with the law, honestly and with integrity, safeguard the law and administer justice without fear or favour, self-interest or deceit*". It is the same elsewhere. All are equal before the law and it is the law which is supreme. Why? In the famous words of Justice Benjamin Cardozo, quite simply "*Law is Justice*" or, in the equally well-known phrase of Chief Justice Elias, "*Law then is what convinces*". There is no need to dwell on this, for it is so obvious but necessary always to mention it. As for equality before the law, as I often say to law students, when judges decide

[9] 21 July 1989 in Brisbane.

cases, of course the parties before them matter (afterall they are the reason for the litigation in the first place) but their identities, their status (even if or especially if they are the government) do not.

20 Adherence to the law means much more than just an adherence to the words of the law. As important, if not more so, one must look to the spirit of the law. A ready example of this is in the way constitutional rights and freedoms are interpreted by the courts. Most constitutions or bills of rights are in similar form and one will instantly recognize the references in them to the right to life, to equality, freedom of speech of expression, of political or religious belief, and so on. But it is the way in which such rights and freedoms are construed that provide the essential test. Even if one starts from the standard premise that constitutions are living instruments which are intended to meet changing needs and circumstances, when it comes to fundamental rights and freedoms, they are to be construed purposively and generously, avoiding a literal, technical, narrow or rigid approach.

21 The spirit of the law is by its very nature an imprecise concept, even at times elusive. Because of its imprecision, it is obviously a flexible concept and can give rise in certain cases to difficulties for the courts. The difficulties arise when the purported exercise of rights and freedoms are taken to their limits and meet head on the legitimate and reasonable interests or points of views which go to the opposite direction. This type of situation provides a ready example of what I was discussing earlier when I referred to the difficulties faced by the courts when confronted with diametrically opposite, yet on their face, reasonable views. This is where a fine balance needs to be struck, and controversies in the outcome of a case may be unavoidable.

22 Cases dealing with the freedom of speech provide common scenarios in which difficulties of reaching the correct balance are faced by the courts. In 1999, in *HKSAR v Ng Kung Siu*[10], the Hong Kong courts and ultimately the Court of Final Appeal were faced with

[10] (1999) 2 HKCFAR 442.

determining the extent of the freedom of expression in the context of flag burning. There existed legislation which criminalized the desecration of both the Hong Kong flag and the national flag (the National Flag and National Emblem Ordinance and the Regional Flag and Regional Emblem Ordinance). The question for the courts was: did such legislation which criminalized flag burning as a means of political protest (or for any other purpose) breach the constitutional guarantee of the freedom of expression? The Court of Final Appeal upheld the constitutionality of the legislation (the Court of Appeal having held otherwise). The Court was there faced with two diametrically opposed arguments but each argument in its own way, cogent and powerful. The Court of Final Appeal ultimately came to the view that the legislation constituted only a limited restriction on the freedom of expression, whereas the criminal offence protected the unique symbolism of the national and regional flags which it was felt was important to be preserved particularly at the early stages of the resumption of the exercise of the sovereignty over Hong Kong.

23 Other areas in which the courts will sometimes face difficulties in balancing competing interests include challenges made to government decisions where socio-economic factors come into play. In a recent case decided by the Hong Kong Court of Final Appeal (*Fok Chun Wa v Hospital Authority*)[11] , consideration was given to the conflict between the constitutional right to equality (in that case in the context of social welfare) when seen against the socio-economic policies of the government. While some leeway will always be accorded to the government where socio-economic policies are involved, there are clear limits. There is no question of any sort of *carte blanche* being given to the government. Where core-values or core-rights are affected, the courts will always be vigilant in their protection.

24 These types of decisions made by the court can, by their very nature, be extremely controversial. Immigration cases also fall within this category. They are controversial in that a sizeable

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[11] [2012] 2 HKC 412.

proportion of the community will have very strong views one way and an equally sizeable proportion of the population will have just as strong a view the opposite way. Sometimes, the vast majority will have strong views against only a tiny minority. What do the courts do in such situations where, whichever way they decide, a sizeable number of people will disagree with, if not protest against the result that is reached? In other words, on one view, these are lose-lose situations.

25 The answer is of course ultimately quite a simple one in terms of the court's approach. Whether or not a case is a high-profile one, or involves controversial topics, or is just a run-of-the-mill one handled on a daily basis by the courts, the approach is exactly the same, and it is a principled one. The court will simply apply the law to the facts and the judge or judges will do so adhering to their judicial oath. No regard will be paid to whether the result will or will not be a popular one (not that this can be gauged in the first place), certainly not to whether it will accord with what the majority of the community wishes. Indeed, to have regard to such matters is really

quite out of the question. In public law cases, the protection of core-values or core-rights, as I have earlier mentioned, and the need to adopt a principled approach, represents what I hope is a commonly held view of the public interest as far as the courts are concerned.

26 On occasion, the courts will be the last refuge open to a minority in society pitted against the excesses of the majority. This is inevitable given the proper operation and application of the law. And for me, this is what is meant by a principled approach to the discharge of a judge's constitutional role: the adherence to the letter and the spirit of the law, and its proper application, protecting those who need protection. I am reminded here of two quotes, one which appears in a satirical form, the other from part of a deeply impressive AIJA Oration delivered by Madam Justice Abella in 1998:-

(1) The satirical quote is from James Bovard, the libertarian political commentator, "*Democracy must be something more than two wolves and a sheep voting on what to have for dinner*".

(2) In the 9th AIJA Oration "Human Rights and the Judicial Role"[12], Madam Justice Abella said this:-

"*Somehow we have let those who have enough, say 'enough is enough', leaving thousands wondering where the equality they were promised is, and why so many people who already have it, think nobody else needs it*."

27 It is therefore inevitable that the courts will face criticism, sometimes quite fierce from sections of the public and even the government of the day. Unlike in times long passed, it is nowadays common for criticism to be publicly ventilated over the activities of any institution, and the judiciary is not immune from public, or even government, fury.

28 In the 13th AIJA Oration in 2003 "The Centenary of the High Court: Lessons from History"[13], Chief Justice Gleeson said this:-

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[12] 23 October 1998 in Melbourne.
[13] 3 October 2003 in Melbourne.

"*Judicial review of legislative and executive action is part of the High Court's reason for being. It involves the Court in the resolution of disputes that have political significance: sometimes major political significance. Decisions on matters of that kind naturally arouse partisan feeling. That feeling is sometimes directed towards the Court. Checks and balances are applauded universally in theory; but people with power do not always enjoy being checked or balanced. The enthusiasm of politicians for judicial review may depend upon whether they are in Government or Opposition. The High Court never has been, and never will be, free of the certainty that some of its decisions will arouse popular resentment, and even partisan fury. That is a clear lesson of its history.*"

29 Over the years, some of the decisions of the courts in a number of jurisdictions have come under intense scrutiny and have been the subject of open criticism by the community at large, even by political leaders. I need only point to some examples. In about 2003, a Court of Appeal ruling in New Zealand in relation to foreshore and seabed rights in the Marlborough Sounds (*Attorney General v Ngati*

Apa)[14] which led to a rift between the New Zealand Government and the Maori community, was followed by harsh criticism of the courts by the Deputy Prime Minister in a speech that was part of the celebrations to mark the 150th anniversary of the establishment of the New Zealand Parliament. The point he made was that the courts appeared to be challenging the position of Parliament. In the United Kingdom, in February 2010, much controversy was stirred when the then Home Secretary openly said that he totally rejected a Court of Appeal decision that criticised the conduct of MI 5 and MI 6[15]. Only recently, the present Home Secretary launched a very scathing attack on court decisions upholding the rights of foreign criminals[16].

30 I make no comment on these decisions; I am not qualified to do so. The only point I wish to make is that criticism of the decisions of the courts is therefore a fact of life and one must live with it. Hong Kong is no different in this respect and with the power to strike down legislative acts as being unconstitutional, it is perhaps

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14 [2003] 3 NZLR 643.
15 Ex parte Binyam Mohamed.
16 Ex parte Aziz Lamari.

little wonder that there may be some additional sensitivity in this power given to the Hong Kong courts. Judges are afterall, as some argue, not elected. And the Hong Kong courts have, on a number of occasions, struck down legislation as being unconstitutional, pursuant to the power mentioned earlier. Criticisms and discussion of the activities of the courts are indeed healthy to this extent: if such criticism is justified, then improvements can be made or lessons learnt; if not, at least people are taking on an interest in matters of considerable importance. No doubt some people will only look at the actual result of cases determined by the courts in order to evaluate the integrity or effectiveness of a legal system. Perhaps that is fine as far as it goes but in my view it does not go far enough. One ought to be more concerned with fundamentals and matters of principle. For many people, while a decision of the court may be an unpopular one, this is not as important as an assurance that every time a judicial decision is made, the court has acted in accordance with principle, according to the law and proper procedure and above all, has acted independently.

31 Without this assurance, one can have very little confidence in the integrity of a legal system. In Hong Kong where we aspire to maintain the common law tradition, and I daresay this will be the same challenge faced in other common law jurisdictions, how is this integrity of the law demonstrated in a tangible way? Certainly not through mere words spoken by the Chief Justice assuring everyone that all is well.

32 The answer lies in what is generally acknowledged to be one of the fundamental characteristics of the common law: the reasoned judgment. It is only by looking at the reasoning of the court in any judgment that one can see the processes that have led to the judicial decision that is made. One can see, in considerable detail sometimes, the application of the law, of legal principle and the spirit of the law, and an adherence to those fundamental principles of the common law to which reference has already been made. The integrity of the law is there for all to see. When one talks these days about transparency, this is the transparency of the law: not just the public and open nature of court proceedings and judgments, but the public

display of the very thought processes that make up a court decision. While everyone is free to criticize the decisions of the courts, surely no criticism can be levelled at our courts for a failure to reveal the full extent of the reasons that made up court decisions. It is for this reason I believe the doctrine of precedent forms such an important feature of the common law: the more compelling and cogent the reasons are to justify a result, the more attractive it becomes to follow such reasoning in a later case when a similar situation presents itself.

33 The importance of the reasoned judgment can also be seen by imagining a system in which proper legal reasoning does not exist. Where proper reasoning is lacking, speculation then is fuelled as to what may have motivated a legal result; even judicial independence may be questioned.

34 The infamous case (the term as used by Justice Sandra Day O'Connor) of *Dred Scott v John FA Sandford*[17], a decision of the US

[17] (1856) 19 How 393.

Supreme Court under Chief Justice Taney, is a classic example of unacceptable legal reasoning which gave rise to the danger of a perception of a lack of judicial independence. There, a coloured man (Dred Scott) and his family had been assaulted by his alleged master and owner, Sandford. He brought an action in the Federal Courts in St Louis, Missouri in trespass. The issue which eventually made its way to the Supreme Court was whether Dred Scott had the necessary *locus standi* as a US citizen to make a claim against Sandford. Only US citizens could sue.

35 In determining this issue, the Court had to construe the meaning of citizen under the US Constitution. Was Scott a citizen of the United States? Chief Justice Taney regarded it as his obligation to interpret the Constitution in accordance with what its drafters meant. In his judgment (at 405), he said, "It is not the province of the court to decide upon the justice or injustice, the policy or impolicy, of these laws." The Supreme Court held that despite the fact that in the course of moving from state to state (Missouri to Illinois to Upper Louisiana back to Missouri), Dred Scott had resided in Wisconsin where slavery

had been outlawed (by the Missouri Compromise), he remained a slave when he returned to Missouri. As such, it was felt his status did not enable him to be treated as a citizen of the United States. Chief Justice Taney, in the course of his analysis as to what the framers of the Constitution had in mind, referred to black people as "a subordinate and inferior class of beings"[18] and "an inferior order, and altogether unfit to associate with the white race".

36 These are strong words and not acceptable ones. This inadequate legal reasoning, devoid of humanity, simply and totally ignored the concept of human rights and dignity, and the spirit of the law. True it is that Chief Justice Taney was associating himself with what he thought were the views of the majority of Americans at the time (although this is debatable[19]) but even accepting this, he did not display the courage, the vocation and judicial independence that is the hallmark of a judge. By holding the way it did, the Supreme Court laid itself open to the accusation that it had not been truly independent.

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[18] At pages 404-405.

[19] See the 69 page dissenting judgment of Justice Benjamin Curtis.

The (by our standards) outrageous reasoning in *Dred Scott v Sandford* led many people to think of that case as representing an unfortunate chapter in the history of the US Supreme Court and that the Court, for once, did not display the independence for which it is now famous[20]. As Chief Justice Mc'Lachlin reminded us in the 14th Oration in 2006[21], courage and conscience are judicial qualities needed in any judiciary.

37 I return finally to where I started – the exchange between Sir Edward Carson and Mr Winston Churchill. It should never be necessary for the courts to have to explain their decisions, but our decisions must eloquently and properly speak for themselves. This is part of the common law tradition alongside those other characteristics I have talked about – an independent and fearless judiciary, the adherence to the law and her spirit. Whatever challenges are to be faced by all of us in the future, it will be these fundamental

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[20] In his Pulitzer Prize winning work "The Dred Scott Case: Its Significance in American Law and Politics", the historian the late Professor Don Fehrenbacher of Stanford University said this: "Taney's opinion, carefully read, proved to be a work of unmitigated partisanship, polemical in spirit though judicial in its language, and more like an ultimatum than a formula for sectional accommodation. Peace on Taney's terms resembled the peace implicit in a demand for unconditional surrender."

[21] "The 21st Century Courts: Old Challenges and New". 28 April 2006 in Melbourne.

characteristics that will see us through. In the same way they have guided us in the past and the present, they will continue to do so in the future.

Geoffrey Ma
7 March 2013
Auckland