FAREWELL TO PROFESSOR YASH GHAI*

Sixteen years ago, Hong Kong was at the crossroads of a constitutional journey from a dependent territory to a special administrative region. On the one hand, there was the Basic Law, which was then in the final stages of drafting, and which provided the promise for constitutionalism, human rights and the rule of law. On the other hand, there was the suppression of the students' movement in the summer of 1989 at Tiananmen Square in Beijing, which had cast grave doubt on the prospect of a successful implementation of the "one country, two systems" policy. This model of "one country, two systems", which seeks to bring under one roof two very different legal systems and legal cultures at different stages of development and maturity, was itself unprecedented. It was under such circumstances that Dr Helmut Sohmen, with all his foresight and concern for Hong Kong, decided to endow a chair in public law at the University of Hong Kong, with a view to bringing to Hong Kong much-needed constitutional expertise. The Sir Y. K. Pao Chair in Public Law was thus established. The intriguing constitutional issues that Hong Kong was likely to face had attracted a world-renowned scholar, Professor Yash Ghai, who joined the Faculty of Law of the University of Hong Kong on 8 December 1989 as the first holder of the Sir Y. K. Pao Chair in Public Law.

The arrival of Professor Yash Ghai was not surprising at all, as he was closely associated with the constitutions of several developing countries in the region, having drafted new constitutions for some of them, while mending the broken constitutions of others. Professor Ghai has left his footprints on the constitutions of many countries, including Papua New Guinea, the Seychelles, Solomon Islands, Vanuatu, Western Samoa, Fiji, Zambia, Cook Islands, Afghanistan, Iraq, Nepal, and Burma. He was even involved in peace negotiations between various governments and political dissidents and revolutionaries, including the Tamils in the jungles of Sri Lanka.

Professor Ghai initially intended to stay in Hong Kong for a few years. To his surprise, he ended up staying for 16 years and has, through his extensive scholarship and vocal critique, made enormous contributions to the development of public law both at the University and more generally in Hong Kong. His name is always linked to constitutional development and human rights protection. Indeed, shortly after the resumption of sovereignty over Hong Kong in July 1997, in the first judgment on the Basic Law in *HKSAR v David Ma*,[1] Chief Judge Patrick Chan (as he then was) referred to the work of

* Based on a speech delivered by the author at a farewell ceremony for Professor Yash Ghai, on 1 Mar 2006, at the University of Hong Kong.

1 [1997] HKLRD 761.

Professor Ghai on the international, domestic and constitutional nature of our Basic Law, as follows:

> "[T]he Basic Law . . . has at least three dimensions: international, domestic and constitutional. It must also be borne in mind that it was not drafted by common law lawyers. It was drafted in the Chinese language with an official English version but the Chinese version takes precedence in case of discrepancies. That being the background and features of the Basic Law, it is obvious that there will be difficulties in the interpretation of its various provisions. (See the discussions in Hong Kong's New Constitutional Order, Yash Ghai, Chapter 5.) In my view, the generous and purposive approach may not be applicable in interpreting every article of the Basic Law. However, in the context of the present case which involves the constitutional aspects of the Basic Law, I agree that this approach is more appropriate." [2]

Professor Ghai's monumental work on the Basic Law[3] can probably be described as a landmark in the development of our constitutional jurisprudence. In *Lau Kong Yung v Director of Immigration*,[4] the Chief Justice found support in the work of Professor Ghai when he concluded that the Standing Committee of the NPC has the power to make binding interpretations on Hong Kong:

> "Accordingly, the Standing Committee has the power to make the Interpretation under Art 158(1). The Interpretation is binding on the courts of the HKSAR.
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> This conclusion on the power of the Standing Committee to interpret under Art 158(1) derives some support from Professor Yash Ghai in his work *Hong Kong's New Constitutional Order* (2nd edn, 1999), p 198. He expressed the view that the power of the Standing Committee to interpret is a general power. It is 'plenary in that it covers all the provisions of the Basic Law; this power may be exercised in the absence of litigation'." [5]

More recently, in the controversial case of *Ho Choi Wan v Housing Authority*,[6] involving a challenge to the adjustment or non-adjustment of rental in public housing, Bokhary PJ had this to say:

2 *Ibid.*, at 773.
3 Yash Ghai, *Hong Kong's New Constitutional Order: The Resumption of Chinese Sovereignty and the Basic Law* (Hong Kong University Press, 2nd edn, 1999).
4 [1999] 3 HKLRD 778.
5 *Ibid.*, at 800, *per* Li CJ.
6 [2005] 4 HKLRD 706.

> "In his ever-helpful book, *Hong Kong's New Constitutional Order* (2nd edn, 1999), Professor Yash Ghai draws attention (at p 411, footnote 11) to the United Nations Committee on Economic, Social and Cultural Rights' 7 December 1994 report on Hong Kong. There the Committee expressed its regret that the ICESCR had not been incorporated into Hong Kong domestic law. Hong Kong may not have legislated for economic, social and cultural rights in their entirety. But as far as housing is concerned, we have the Housing Ordinance."[7]

And just a few months ago, in the landmark decision of the Court of Final Appeal on the approach towards regulation of public assemblies and demonstrations, Bokhary PJ said:

> "Each of the challenged schemes is contained in the Public Order Ordinance (Cap 245). This Ordinance is one of the two statutes containing post-handover amendments criticized by Professor Yash Ghai in the rights chapter of his valuable book *Hong Kong's New Constitutional Order* (2nd edn, 1999). At p 454 he said that '[t]here has been no serious restrictions on rights since [the handover] save for the amendments to the Public Order and Societies Ordinances'. Reference was made in the Court of Appeal to what the United Nations Human Rights Committee said. In para 19 of its 15 November 1999 Concluding Observations on Hong Kong (CCPR/C/79/Add 117) the Committee expressed its concern that the Public Order Ordinance could be applied to 'restrict unduly' enjoyment of freedom of assembly. This concern of the Committee's was noted in the United States Department of State's 2000 Country Reports on Human Rights Practices at p 804. The State Department pointed out that this Court has not yet had the opportunity to rule on the matter. This appeal is the first such opportunity."[8]

The admirers of Professor Ghai are not confined to the Court of Final Appeal. In the aftermath of the first NPC interpretation on the Basic Law, Stock J (as he then was) found Professor Ghai's analysis in "The NPC Interpretation and its Consequences" in *Hong Kong Constitutional Debates* "very helpful".[9] In *Wong Kam Kuen v TELA*, a case relating to freedom of

7 *Ibid.*, at 727–8.

8 *Leung Kwok Hung v HKSAR* [2005] 3 HKLRD 164 at 201–202, para 106.

9 *HKSAR v Ng Siu Tung* [2000] HKEC 726, referring to Y. Ghai, "The NPC Interpretation and Its Consequences", in J. Chan, H. L. Fu and Y. Ghai (eds), *Hong Kong's Constitutional Debate: Conflict over Interpretation* (Hong Kong University Press, 2000), at p 210.

expression and censorship, Hartmann J drew support from his work in *The Hong Kong Bill of Rights: A Comparative Approach*.[10]

Professor Ghai's work is not always followed. In *Ting Lei Miao v Chen Li Hung*,[11] the leading case on the enforcement in Hong Kong of a bankruptcy order made by a Taiwan Court, Mortimer VP said:

> "Taiwan is part of the sacred territory of the People's Republic of China. It is the lofty duty of the entire Chinese people, including our compatriots in Taiwan, to accomplish the great task of reunifying the motherland.
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> Whilst Professor Yash Ghai may be correct in a passage in his work *Hong Kong's New Constitutional Order* which was drawn to our attention to the effect that:
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> > 'China's views of its own and Hong Kong's relationship with Taiwan change periodically, which may make it difficult for Hong Kong to establish a clear and coherent external relations policy with Taiwan . . .'
>
> that is not a relevant consideration."[12]

Over the past 16 years, Professor Ghai has contributed immensely in laying a strong foundation for the development of our public law and human rights academic programme, which has now become an area of excellence in the Faculty of Law. I have had the great privilege of working with Professor Ghai as a colleague, a co-author and a co-editor in all these years. Together with Professor Andrew Byrnes, we started a modest course on human rights in the early 1990s. By the mid-1990s, we were able to develop a full LLM(HR) programme. Professor Ghai was pivotal in the setting up and the implementation of this programme and played a key role in securing the necessary funding to make it possible. From its inception, Professor Ghai insisted that this LLM(HR) programme should have a distinct focus on Asia so as to mark itself out from other similar programmes offered in the West. He was proved right; and within a few years, the programme had gained an international reputation and remains today as the only human rights programme that focuses on Asia. Over the years, many students from Asian countries have had the privilege and benefit of being taught and indeed inspired by Professor Ghai. After graduation many of them have returned to their countries to serve human rights causes there.

[10] [2003] 2 HKLRD H1, para 16, referring to Y. Ghai, "Freedom of Expression as a Human Rights", in J. Chan & Y. Ghai (eds), *The Hong Kong Bill of Rights: A Comparative Approach* (Butterworths, 1993), p 307.

[11] [1999] 1 HKLRD 123.

[12] *Ibid.*, at 141.

Notwithstanding his international fame and stature, Professor Ghai remains a modest person, very approachable and down-to-earth. He has played a key role in promoting research in the Faculty, is always generous with his time and in sharing his experience with colleagues. In recognition of his outstanding academic achievement, Professor Ghai was awarded the University's Distinguished Researcher Award in 2001, which is the highest honour for academic research achievement in the University.

Before concluding this tribute to Professor Ghai I must mention an incident which occurred about four years ago, on a rather quiet morning, when Professor Ghai came into my office. I was the Head of the Department at that time. He told me that the President of Kenya had just called him and wanted him to chair a constitution commission with a view to bringing together a shattered country on the brink of civil war. As a Kenyan he felt he was obliged to take it up. This mission, which took up the following two and a half years, became a high water mark in Professor Ghai's distinguished career. He became one of the most well-known persons in Kenya. With his skilful diplomacy and his belief in participatory democracy, he managed to bring together the different factions in the country to discuss a new draft constitution. The process itself became a major contribution to public education in Kenya on the importance of the rule of law, human rights and constitutionalism. But Professor Ghai's leadership also came with a price, as when he was featured in the Kenya press in all manner of cartoons and pictures, some amusing, others rather scary.

Professor Ghai formally retired from the University at the end of 2005, after 16 years of distinguished service, yet he has not shown any sign of slowing down in his activities. He is still engaged in some part-time teaching, and is in charge of a few research projects at the University. More recently, he has been appointed by the UN Secretary General Kofi Annan as his Special Representative for Human Rights in Cambodia. He is responsible for monitoring the observance of human rights there, as well as advising the Cambodian Government and the civil society on the protection of human rights. No doubt he will make an important contribution to this war-torn country.

Professor Ghai will be fondly remembered by many generations of law students, academics, practitioners and judges. He has set a high standard for all of us to follow. He has opened up new horizons in constitutionalism for others to work on. He has distinguished himself as a scholar and as a firm believer in human rights and the rule of law. We wish him all the best as he begins a new life of formal retirement from this University.

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