

THE CHALLENGE OF INDEPENDENCE

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Mr. Chairman, Ms. Robinson, The Hon Anthony Gubbay, Fellow Members of Independent Bars, Distinguished Guests, Ladies and Gentlemen:

It is my privilege to represent the Hong Kong Bar at this Inaugural World Bar Conference and it is an even greater privilege to be given the chance to address this distinguished audience. It is once said that a good speech is like a lady's dress: it should be long enough to cover the subject but short enough to make it interesting. That is easier said than done but I shall try.

Independence has been described as the first of earthly blessings. Of all legal practitioners, barristers in private practice enjoy the most independence. Compared to solicitors and others who practise law as government lawyers or in-house, barristers are indeed most blessed in this regard. **But, what does this blessing challenge us to do? In a society that practises the Rule of Law, the greatest challenge of independence for us is to use our independence in such ways as to uphold the Rule of Law, to protect the independence of the Judiciary, to serve the public pro bono, to initiate law reforms, to educate the public about the rule of law and to generally oversee the proper administration of justice.**

If you would allow me, I would like to share with you how the Hong Kong Bar has stood up to those challenges in the first five years of the history of the Hong Kong Special Administrative Region.

On 1 July 1997, the People's Republic of China ("PRC") resumed exercising sovereignty over Hong Kong, when Hong Kong became a Special Administrative Region of PRC. We have our own constitutional document called the Basic Law, which promises autonomy to Hong Kong for 50 years. The new constitutional order in post-1997 Hong Kong is encapsulated in the reference to "One

Country, Two Systems”. It is a novel idea and a constitutional concept never tested anywhere in the world. As such, there are bound to be much uncharted territories that have to be visited during the course of its implementation.

Hong Kong practises the common law, while PRC has basically a civil law system. While the Chinese legal system has come a long way since the Country came out of the Cultural Revolution in 1979 to achieving internationally accepted standards, the two systems, as they now stand, are still having different degrees of maturity and stages of development. Very interesting chemistry occurs when jurists from the two very different systems are seised of the same legal issue for resolution. They may conclude differently on what purposes the law should serve particularly when human rights issues are involved.

In the initial years, we cannot exclude opportunists who want to reap personal benefits by taking advantage of the situation that is in a state of flux. To these people, there is no absolute right or wrong and there is no clear black and white. Everything has a tone of grey. **There were government officials and legislators who, in the name of expediency or for the sake of purported effective governance, have been too ready in compromising fundamental values of the Rule of Law that we lawyers treat as inviolable and have held dearly to our hearts.** Rule of Law and Independence of the Judiciary were what we had taken for granted. But, can no longer. Fairness, due process and respect for fundamental human rights and freedom were values we assumed to have been shared by all. But, can no longer. **It has become increasingly clear that, if not being closely watched and scrutinized, these institutions on which Hong Kong has depended for her success would be undermined and threatened more than ever.**

The Judiciary and the Department of Justice have their roles to play in defending those values. But, we cannot just count on them. Barristers in Hong Kong know very well that in this perplexed and testing time, the public looks upon the Bar for leadership and guidance on important issues of law.

This is particularly so when one realizes that albeit the Rule of Law has been practised in Hong Kong for over a century, this British transplant has never taken roots there and not too many in Hong Kong truly appreciate the values and principles governing its implementation. **Many still think Rule of Law simply means that the Government makes laws and the citizens observe them. Not many can readily tell the difference between rule of law and rule by law.** There was a legendary wise Judge in feudal Chinese history in the name of Judge Pao, who had been reputed for never making any wrong decision in the most difficult cases. The Judge's problem was that he used the ends to justify the means. He could ask someone to act as the ghost of a murder victim to threaten an accused to confess his crime. There was no objective procedure to be observed in his court. The Judge's approach, however, still very much represents the approach to the law of the man in the street of Hong Kong.

The Hong Kong Bar Association has assumed increasing importance in the civil society of Hong Kong as a body that can be trusted for its ability to inform highly controversial, and at times politically-charged, debates of the proper perspective to be adopted in approaching questions of law. Our independence has enabled us to render unbiased, rational and principled professional opinions on the law in such debates on public issues concerning the rule of law and proper administration of justice in the territory. Other participants in such debates either had or were perceived to have their own axe to grind because of their connections with the government or stakeholders. The Hong Kong Bar owes its credibility to its independence. Without being independent, the Bar cannot possibly earn the public's respect and have done what it did.

The more notable of these controversial debates in which the Bar was involved include **the reference by the HKSAR Government of provisions of the Basic Law to the National People's Congress Standing Committee in June 1999 for a reinterpretation after such provisions had already been finally adjudicated upon by the Court of Final Appeal.** In this case, children born in the Mainland to parents who are Hong Kong permanent residents are seeking right of abode in the territory. The Court of Final Appeal applied common law principles to interpret what has been a clear provision in the Basic Law and declared right of abode in favour of these children. The

reinterpretation sought by the Government from the NPCSC referred to what was described as the “original legislative intent” and denied to these children the right declared in their favour by the CFA. The Bar called for an amendment to the Basic Law and objected to the reinterpretation. The Bar takes the view that the reinterpretation sought was a blow to judicial autonomy enjoyed by the HKSAR as promised by the Basic Law. About 800 lawyers, including a considerable number of barristers, staged a silent march on 30 June 1999 in support of judicial autonomy in the HKSAR. The Bar has maintained the pressure on the Government to either undertake never again to seek reinterpretation from the NPCSC after provisions of the Basic Law have been finally adjudicated upon by the CFA or to establish a convention for reference. The Government is so far prepared only to publicly state that such action would not be lightly repeated in the future.

In June 2000, a demonstration by right of abode claimants and student activists resulted in scuffles between demonstrators and police officers in the course of which pepper sprays were used. The police subsequently charged five student activists of participating in an unlawful assembly. **The Hong Kong Bar Association issued statements, which were widely reported in the media, to explain to the public how freedoms of expression, assembly and association were fundamental human rights protected by our constitutional document and how sections in the Public Order Ordinance for which the students had been charged may have infringed such constitutionally protected rights.** The prosecution of students attracted widespread condemnation in the community and focused the attention of the public on the compatibility of the Public Order Ordinance with international human rights standards protecting the freedoms of expression, assembly and association. Charges against the students were finally dropped.

In May 2001, there were indications that the Government intended to pass anti-cult laws so as to proscribe activities of followers of the spiritual movement known as “Falun Gong” in Hong Kong. “Falun Gong” was outlawed in China as an “evil cult” carrying on subversive acts, but its followers in Hong Kong have been restrained in their activities and not breached any laws in Hong Kong. **The Hong Kong Bar Association published a Press Statement on 25**

May expressing concern over the Government's thinking about legislating against "cults". The statement noted the danger of the lack of an objective definition of "cult", which permits arbitrariness and abuse in the implementation of any legislation against "cults". It further argued that no case of necessity had been made out for legislating against "cults" in Hong Kong. Any legislation proposed for regulating or prohibiting "cults" would, in the opinion of the Bar Association, have a grave impact on the freedoms of thought, conscience, belief and religion and the freedoms of expression, assembly and association, all of which are guaranteed under the Basic Law. The Government has since confirmed that it has no immediate plans to legislate against "cults" and the debate has gone into abeyance.

The present focus of concern of the Hong Kong Bar is how the government will go about enacting laws under Article 23 of the Basic Law. The Article requires the HKSAR to legislate on its own against treason, sedition, secession, subversion, theft of state secrets and activities of and liaison with foreign political organizations. If not properly handled, the laws enacted could easily infringe upon fundamental human rights and freedoms entrenched by the Basic Law. The Bar is preparing an opinion and I expect the same to be finalized for publication not long after my return. The Hong Kong Bar hopes the publication of this paper will help to initiate meaningful public debates on the subject and to restrain the government from going overboard when legislating.

Providing marked contrast to the clear and principled stands of the Bar, the Law Society of Hong Kong has found it difficult to speak with one voice in standing up for the values and principles of the Rule of Law and proper administration of justice in manners that the Bar had done. Besides conflict of business interest amongst different solicitor firms, each firm also has its own clients to please and cannot afford to ignore sensitivity of the clients' feeling about controversial issues. Barristers do not have those difficulties because we are accountable to none and are Lords of ourselves. The importance of independence is again amply demonstrated and certainly explains the difference in behaviours of the two lawyers bodies in Hong Kong.

In the past 5-6 years, the Hong Kong Bar Association has come down from the ivory tower and reached out to the man in the street. We see our role as law teachers to be the most important of all. We have realized that it is only when the ordinary people see the beauty of the rule of law and understand how the system has worked to their benefit and for their protection that they will cherish and defend it. And, it is only with public support for the rule of law that it will continue to flourish and thrive.

To fully discharge its role of law teacher, the Bar readily appears in public forum and private seminars and goes on television and radio programmes to explain in succinct and everyday language what are otherwise difficult legal concepts and principles. The Bar has been writing articles in popular Chinese newspapers to share with the masses what Rule of Law truly means and how the institution is meant to keep the powerful under check and to protect the weak from abuse. The Bar has also been visiting secondary schools and universities to share with future leaders of our society values conveyed by the Rule of Law that we have held dearly to our hearts. One of our radio programmes has been made into a compact disc and a selection of articles published in the Chinese press has been collected in a book format for distribution to secondary school, universities and public libraries.

All these have been hard work for the Bar. But, we are convinced that all these have been worthwhile when we know the public appreciates what the Bar has done. When appearing on radio and television or in public forums, I have always had people encouraging the Bar to continue to be a watchdog seeing to the proper administration of justice and the independent voice on which they can depend for guidance on the law. From time to time, I even had strangers coming up to me in the streets to shake my hand to show the same appreciation and encouragement.

Like many of the Bars represented at this Conference, the Hong Kong Bar is also faced with needs to adapt to the changing practice environment. Solicitors are demanding to be granted rights of audience in the higher courts and the best law graduates are finding it increasingly difficult to resist the temptation to become solicitors for certainty and security. The Hong Kong Bar is looking at ways to

enhance its competitiveness and to attract able young men and women to join its ranks. But, the one bottom line that we want to jealously guard is our independence. No matter how inviting some practice reforms and future developments are, they cannot be adopted if their implementation means the Bar having to compromise its independence. This is not only to benefit those who engage our services, but also for the good of Hong Kong at this historic juncture of her constitutional development.

Independence is an achievement and not a bequest. The society in which each of us operates does not owe the Bar our independence. Unless we serve the society well and strive to continue to achieve, we could well be stripped of the independence we are enjoying today.

A barrister had been addressing the Court of Appeal for two and a half days on a very dull point of law. At the end of his argument, which he feared had not been acceptable to the Court, he expressed the hope that their Lordships would not think he had been wasting the time of the Court – “Wasting the Court’s time?” said the presiding Lord Justice, “You have trespassed upon eternity!” I know not how many of you have been uttering the same remark to yourselves, but given the more than full schedule of this Conference, I think I am well advised to end by wishing all our independent Bars the best of luck and every success in our future undertakings serving the ends of Justice.

LONG LIVE THE INDEPENDENCE OF OUR BARS AND
LET JUSTICE BE DONE.

Thank you.

June 28, 2002
Edinburgh