

Statement of the Hong Kong Bar Association on the Rule of Law and Civil Disobedience

1. The Hong Kong Bar Association (“HKBA”) issues this Statement to set out its views on Civil Disobedience which are relevant to the current situation of Hong Kong, where many residents have been engaged in prolonged and widespread occupation of public places and roads, resulting in obstruction of traffic. Such conduct is potentially unlawful.

2. Many residents who are engaging in such activities seek to justify their acts by reference to the concept of civil disobedience. As Chief Justice McEachern of British Columbia said in the case of *R v Bridges* (1990) 78 DLR (4th) 529 at paragraph 10, “civil disobedience is a philosophical, not a legal principle”. Put shortly, participants deliberately break a law to bring attention to – and as a protest against - the injustice of a law or government action. Civil disobedience does not constitute any defence to a criminal charge. If a participant is prosecuted for an offence committed in the course of civil disobedience and if the ingredients of the offence can be proved, his motive for committing the offence, however noble or honourable, is not a legal justification or defence to the criminal charge. Nor is his trial an occasion for the merits of his political cause to be adjudicated by a court.

3. Even though civil disobedience is not a defence in law, courts in different jurisdictions have nonetheless commented on the concept from the perspective of Rule of Law. The concept is, however, deeply controversial and divisive, even among judges. Two examples will suffice for present purposes.

4. In *Everywoman's Health Centre Society (1988) v Bridges* (1989) 61 DLR (4th) 154, Wood J of the British Columbia Supreme Court said (to persons engaged in acts of civil disobedience):-

“Many of you, while assuring me of your respect for the law, have characterized your contemptuous conduct as an act of last resort stemming from frustration brought on by the failure of government to act upon your views and to change the law accordingly. by seeking to change the law by deliberately disobeying it you threaten the continued existence of the very instrument, indeed the only instrument through which you may eventually achieve the end you seek. Such conduct is not only illegal, it is completely self-defeating.” (emphasis added)

5. On the other hand, in the well-known case of *R v Jones (Margaret)* [2007] 1 AC 136, Lord Hoffmann (now one of the Non-Permanent Judges of Hong Kong’s Court of Final Appeal) said (at paragraph 89):-

“89. My Lords, civil disobedience on conscientious grounds has a long and honourable history in this country. People who break the law to affirm their belief in the injustice of a law or government action are sometimes vindicated by history. The suffragettes are an example which comes immediately to mind. It is the mark of a civilised community that it can accommodate protests and demonstrations of this kind. But there are conventions which are generally accepted by the law-breakers on one side and the law-enforcers on the other. The protesters behave with a sense of proportion and do not cause excessive damage or inconvenience. And they vouch the sincerity of their beliefs by accepting the penalties imposed by the law. The police and prosecutors, on the other hand, behave with restraint and the magistrates impose sentences which take the conscientious motives of the protesters into account.” (emphasis added)

6. The HKBA’s position is that even on a sympathetic view of civil disobedience (such as Lord Hoffmann’s), it is essential for participants to respect the rights and freedoms of other people who do not necessarily agree with their views and not to cause excessive damage or inconvenience. They should also be ready to accept the criminal consequences of their conduct. On the other hand, in taking law enforcement actions and in exercising prosecutorial discretion, police and prosecuting authorities need to act with sensitivity, restraint and proportionality at all times.

7. Regrettably, just as the Police acted excessively in their use of CS gas on 28 September 2014 (and which was the subject of the HKBA's statement dated 29 September 2014), there are indications that the prolonged acts of the participants have caused – or are at least beginning to cause - excessive damage and inconvenience to a not insignificant part of the community. As was readily and explicitly admitted by one of the organizations involved in the movement in the course of calling for sacrifice by road-users and other surrounding citizens, “a lot of people had suffered inconvenience because of traffic congestion; parents were upset because their children could not attend school; employees had to spend extra tens of minutes per day to attend work because of road closure; residents were bothered by the noise made downstairs”. This is so, notwithstanding the laudable fact that most of the participants were and are behaving peacefully.

8. Lastly the HKBA views with considerable alarm the suggestion from some quarters, in the course of the continued political discourse, that any discussion of constitutional or legal principles is a form of “trickery” or insistence on “trivial technicalities”. The HKBA's position on electoral reform has been set out in its two statements dated 28 April 2014 and 11 July 2014. The same will not be repeated here. Whatever views one may now have about the constitutional regime laid down by the drafters of the Basic Law 24 years ago, the inescapable fact is that any discussion of electoral progress must be conducted within the framework of what is constitutionally permitted. The Honourable Mr. Justice Bokhary, Non Permanent Judge of the Court of Final Appeal, was also reported to have said, on the occasion of a talk given on 9 April 2013, that any proposal of universal suffrage in Hong Kong must be pursued within the framework of the Basic Law. Whatever misgivings there may be concerning the decision of the Standing Committee of the National People's Congress of 31 August 2014, it is dangerous – and inimical to the Rule of Law - for discussions of constitutional principle to be openly denigrated as “trivial technicalities” or “trickery”. On this, the HKBA can do

no better than to repeat what the Honourable Mr. Andrew Li, former Chief Justice of the Court of Final Appeal, said in his article “*Under rule of law, an independent judiciary answers to no political masters*” dated 15 August 2014:-

“I hope that there will be rational discussions within the parameters of the Basic Law”.

HONG KONG BAR ASSOCIATION
8 OCTOBER 2014