

Speech of the Chairman of the Hong Kong Bar Association Opening the Roundtable Meeting of the International Legal Assistance Consortium in Hong Kong on Strengthening Rule of Law Institutions and Human Rights in Asia (15 October 2015, Hong Kong)

THE HONG KONG BAR AS A RULE OF LAW INSTITUTION

Ms Johansson, Mr Francis, Colleagues, Ladies and Gentlemen,

It is both an honour and a responsibility for me to speak at the Opening of the Roundtable Meeting on Strengthening Rule of Law Institutions and Human Rights in Asia, organized by the International Legal Assistance Consortium (ILAC) and the Asian Human Rights Commission (AHRC).

It is an honour because you have chosen Hong Kong as the venue for the Roundtable Meeting. It is a responsibility because the Hong Kong Bar Association is a member of the ILAC.

In choosing the theme of this speech, I act on the belief that you would like to know more about Hong Kong, and also what Hong Kong barristers and the Hong Kong Bar Association do in maintaining the Rule of Law in Hong Kong and in promoting the Rule of Law in neighbouring regions.

Hong Kong is a former British colony and a Special Administrative Region of China. Hong Kong's legal system is based on the common law. Judges and lawyers continue to apply the common law and interpret legislation on the common law approach in adjudications in the courts. Wigs and gowns continue to be worn by judges and lawyers in open court. The legal profession maintains a clear division between barristers and solicitors, a division we see as increasingly blurred even in England and Wales from where the tradition of division originated. Such continuity is made possible by the establishment of the Special Administrative Region and the enactment of the Hong Kong Basic Law in 1990 as the constitutional instrument of Special Administrative Region by China's National People's

Congress. The object of the enactment was for the maintenance of the stability and prosperity of Hong Kong and of its capitalist economy and way of life of the Hong Kong people upon its return to Chinese rule, or what the Chinese Central Authorities call the resumption of exercise of sovereignty over Hong Kong, on 1 July 1997.

Article 8 of the Basic Law states: “The laws previously in force in Hong Kong, that is, the common law, rules of equity ... shall be maintained”. Pursuant to the Basic Law, the Court of Final Appeal of Hong Kong, which exercises the power of final adjudication, invites judges from other common law jurisdictions to sit in the adjudication of cases .

This is the environment under which Hong Kong barristers have continued to practise since 1 July 1997. Hong Kong barristers themselves are self-regulatory through the Hong Kong Bar Association. I would like to illustrate the functions of Hong Kong barristers and the Hong Kong Bar Association in maintaining the Rule of Law by several recent examples.

You may have heard of the Umbrella Movement that erupted in Hong Kong in 2014. It was a protest movement that involved the occupation of major roads and road junctions in three areas (on either side of the harbor) in Hong Kong. The three areas were cleared out in the end at different times, but only after a total of 79 days.

The movement began with a demonstration against the restrictive framework prescribed by the Central Authorities for electing the Chief Executive of Hong Kong by universal suffrage in 2017 in September 2014. It escalated into the occupation of major roads in busy areas on either side of the harbour in the days following 28 September 2014. The occupation of major thoroughfares in the form of public gatherings, albeit largely peaceful, were nevertheless unlawful. It is not difficult to imagine that traffic was seriously disrupted, as were a lot of businesses that depended on a flow of vehicular and human traffic in those areas. Strong sentiments were expressed on either side of the divide amongst Hong Kong residents - those who supported and those who condemned the Movement. In the course of those 79 days, the

Hong Kong Bar Association issued three public statements in the midst of polarized public opinions.

The first one was issued on 29 September 2014. It was the day after the Hong Kong Police used CS gas on demonstrators in the Admiralty area not far from the High Court building on Hong Kong Island in an attempt to disperse the crowds. This was done without much warning in the late afternoon of 28 September 2014. More CS gas canisters were fired in the course of that evening. In a statement issued the following day, the Hong Kong Bar Association condemned the use of force as excessive and disproportionate, bearing in mind that the overwhelming majority of the demonstrators were apparently conducting themselves peacefully. The underlying political debate that motivated the demonstrators and the unruly or criminal conduct of a minority of them cannot justify the use of such force by the Police against unarmed civilians as a matter of law and common decency. The escalation of the use of force by the Police was uncalled for and, as shown in the events to follow, had unnecessarily aggravated public feelings of resentment and frustration. Far from having its intended effects, it had in fact caused more people to take to the streets.

I believe that the Bar Association was justified to intervene and issue the Statement of 29 September 2014 not only to express the collective sentiment of the profession but also to warn the Hong Kong Government that the action of the Police was disproportionate, and that the use of excessive force must be abated.

This did not represent any knee-jerk reaction against the acts or judgment of the governmental authorities. In more peaceful times, as in the days after the Umbrella Movement, the Bar Association had always willingly participated in public consultations of the Government, attended Legislative Council meetings and supported public events to state its understanding of legislative and other proposals from the perspective of the law and of legal practitioners, and shared its understanding with the public of the legal process. The Bar has also spoken in support of the law enforcement agencies and the Prosecutions Division of the Department of Justice in the Prosecutions Week,

a recent drive to promote better public understanding of the prosecution process. At times when our expressed views were critical, it was invariably genuinely intended to assist the executive authorities and the legislature in their policy and law-making decisions.

The second statement was issued on 8 October 2014. Its theme was on the Rule of Law and Civil Disobedience. It was issued against the background of the prolonged occupation of major public roads by Hong Kong residents who seek to justify their acts by reference to the concept of civil disobedience. The Bar Association, making reference to cases from Canada and the United Kingdom, sought to explain in this statement that 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.” The Bar Association also makes clear its position that “it is essential for participants [of civil disobedience] 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.” The Bar Association also warned that it was ‘dangerous – and inimical to the Rule of Law – for discussions of constitutional principle to be openly denigrated as “trivial technicalities” or “trickery”’ by some politicians since development of Hong Kong’s political system must be discussed within the framework and parameters of the Basic Law.

This statement was issued at a time during the occupation when there was a possibility of the government holding a session of negotiation with student leaders, who at that point of time insisted that “civic nomination” of candidates in the election of the Chief Executive should be provided for in 2017, a proposal that fell outside the framework of the Basic Law, as the Bar

had previously opined. I believe that this second statement addressed the public and explained the law in the best understanding and clearest manner the Bar Association could muster. This was not the typical occasion to do such work, but we saw it as necessary in view of the deadlock between the occupiers and the authority. More typically, members of the Bar has are invited to schools and community centres to speak on the legal system, the courts, the practice of law and the Rule of Law in Hong Kong.

The third statement was issued near the end of October 2014 (on 28 October 2014) in the light of some politicians (several of whom had legal qualifications) openly calling for defiance of injunction orders granted by the Court of First Instance restraining the further occupation of areas in Admiralty and Mongkok. Supporters of the occupiers openly vilified the judges involved while politicians, even those who are members of the legal profession, joined in the criticism or stood by. The Bar Association explained that if a person believes that an order made by the Court was wrong and ought not to have been made at all, she can challenge it in Court. But, before or until an order is set aside it should be obeyed. In the statement, we said: “Independence of the Judiciary and respect for the dignity and authority of the Court are fundamental tenets of the concept of the Rule of Law. When deliberate defiance of a court order is committed *en masse* as a combined effort, a direct affront to the Rule of Law will inevitably result. For the same reason, open calls to the public to disobey a court order applicable to them would undoubtedly constitute an erosion of the Rule of Law.” Quoting Sir Isaiah Berlin, the Bar Association expressed the view that the Rule of Law is “definitely Hong Kong’s all-too-precious egg now much at risk of being broken by recent events.”

I believe that this third statement shows that the Bar Association has sought to be above politics and stands ready to criticize both the Government and opposition politicians. More importantly, it indicates the Bar Association’s natural role to uphold and defend the independence of the judiciary and the dignity and authority of the Courts of the Hong Kong Special Administrative Region.

All of the above illustrate to some extent the Bar Association's roles in respect of maintaining *internally* Hong Kong's Rule of Law, which includes the independence of the judiciary and the exercise of independent judicial power (including that of final adjudication) by the courts of the Hong Kong Special Administrative Region.

Externally, both the Bar Association and individual barristers have done work to promote the Rule of Law in neighbouring regions, including Mainland China. In July of this year, the Hong Kong Bar spoke up following reports of a wave of arrests and detention made of a significant number of mainland Chinese lawyers in a number of provinces in China. Rather than passing sweeping judgment on the nature of the arrests before objective facts of individual cases can be ascertained, the Bar called upon mainland authorities to strictly abide by due process in the course of investigation and enforcement actions, and to respect the fundamental rights of legal professionals.

The Bar Association has been running a successful programme with Peking University to teach undergraduate and postgraduate students there the common law legal system. In visits paid by various Mainland China lawyers associations to the Bar in Hong Kong, we painstakingly explained the concept of an independent Bar as being crucial to the independence of the judiciary and to administration of justice. The Bar Association's delegations paid visits to counterparts in Mainland China and other Asian regions to exchange views and conduct joint exercises on legal practice issues. Some members of the Bar have helped developing countries formulating necessary legislation in the Rule of Law infrastructure, including Myanmar's draft legal aid legislation.

Let me end this address by referring to two recent talks by our Chief Justice Geoffrey Ma on the Rule of Law.

At the Bar Council of England and Wales' Annual International Rule of Law Lecture 2015 (May 2015), the Chief Justice said that the Rule of Law is seen by many as being Hong Kong's strength and regarded by some as an

economic advantage enjoyed over the rest of China, indeed the whole of the South East Asia region. The Chief Justice then addressed queries about the fragility of Hong Kong's Rule of Law in the light of recent events, including the Umbrella Movement.

The Chief Justice's vision of the Rule of Law, I believe, is shared by our colleagues here. In his words, the Rule of Law "encapsulates two important but related concepts:- first, there must exist laws which respect the dignity, rights and liberties of the individual in any society and secondly, there must exist an independent institution which enforces rights, liberties and freedoms both in letter and, more important, in spirit. There is nothing original in this definition which I adopt: the two facets of the rule of law constitute in essence the lasting themes of Magna Carta."

Chief Justice Ma also asks those concerned with the fragility or robustness of the Rule of Law in Hong Kong to examine not only the legal infrastructure in place (in other words, the position on paper) but also the reality, namely, do the courts in reality protect fundamental rights and are they truly independent?

The Chief Justice believes so, by reference to the following markers: "First, transparency of the legal system. ... Secondly and this for me provides a crucial indication of the existence of the rule of law, the reasoned judgments. ... Thirdly, connected to the second factor just discussed, a reasoned judgment will indicate clearly the court's approach to the law. In the area of human rights, one can then see the approach of the court as to whether human rights are generously construed and applied, or not. ... Fourthly, the appointment process of judges is also a relevant consideration in determining the independence of the Judiciary. ... Fifthly, effective access to the courts or justice. ... Sixthly and lastly, and this is perhaps the most nebulous factor in relation to the determination of the existence of the rule of law, the views of the users of the courts (mainly being perhaps the lawyers) towards the courts and their confidence in the system, provide some indication to support (or, as the case may be, not support) the existence of the rule of law". He gave weight to this last point: "A judiciary, even if in

reality truly independent but which is not perceived as being independent, loses the confidence of the community and has its work cut out to convince the population that it truly does deliver what is expected of it. It is easy to see why. If the rule of law is a cohesive force which binds a society enabling it to function as such, a lack of respect for it will obviously undermine this essential cohesion.”

Finally, on 18 June 2015, Chief Justice Ma, speaking at the meeting of the Royal Geographical Society, Hong Kong Chapter, on the Magna Carta (and indeed the Magna Carta’s 800th anniversary and its symbolism for the Rule of Law is to be celebrated in Hong Kong at the end of this month with an academic conference), made the point that: “Like the Grail, Magna Carta represents something that is, to put it as simply as I can, good in us; we ought to do our best to live up to it.”

On this note, may I again welcome you all to Hong Kong in this 800th anniversary year of the Magna Carta, and thank you for your attention.