

**SPEECH OF THE CHAIRMAN
OF THE HONG KONG BAR ASSOCIATION
AT THE OPENING OF THE LEGAL YEAR 2018
8TH JANUARY 2018**

Chief Justice, Secretary for Justice, President of the Law Society, Members of the Judiciary, Members of the Legal Profession, Distinguished Guests, Ladies and Gentlemen:

The powers of the Standing Committee of the National People’s Congress (“NPCSC”) and the tension between the two systems

1. For anyone who cares about the rule of law in Hong Kong, 2017 turned out to be yet another eventful year.
2. Most recently, on 28 December 2017, the Hong Kong Bar Association issued a strong statement in response to the Decision of the NPCSC made on 27 December 2017 (“the Decision”).¹ The Decision concerns the Co-location Arrangement under which Mainland laws shall apply, and Mainland officials may exercise their powers, within designated areas at the West Kowloon terminus for the high-speed trains to the Mainland, and also on the trains while they are in Hong Kong. The Decision confirms that the Co-location Arrangement is consistent with the Basic Law (“BL”).
3. In explaining the Decision, it appears that the NPCSC has, in substance, though not in form, exercised its power of interpretation of various provisions in the BL. The problem is that the way the NPCSC construed those provisions in the BL is unconvincing and difficult to comprehend from the

¹ Statement of the Hong Kong Bar Association on the Decision of the NPCSC of 27 December 2017 on the Co-operation Agreement between the Mainland and the HKSAR on the Establishment of the Port at the West Kowloon Station of the Guangzhou-Shenzhen-Hong Kong Express Rail Link for Implementing Co-location Arrangement, 28 December 2017

Bar's point of view.

4. It is true that the NPCSC has the power to interpret the BL under both the Constitution of PRC² and also the BL itself.³ Our Court of Final Appeal (“the CFA”) has also affirmed that the NPCSC’s power to interpret the BL is in general and unqualified terms; the NPCSC can clarify or supplement laws; and an interpretation by the NPCSC is binding on the courts of Hong Kong.⁴
5. This power of final interpretation is the link between the two systems under the principle of “one country, two systems”; but it is also the source of tension.⁵ How such a power is exercised has a direct impact on the general perception as to whether the Central Authorities are truly committed to maintain the integrity of the BL. A negative perception in this respect is bound to diminish people’s trust and confidence in the rule of law in Hong Kong. The source of tension is also the source of doubts, worries and in a way fears.
6. There is no reason for me to doubt that the Central Authorities are determined to maintain the prosperity and stability of Hong Kong as promised under the BL. However, if a significant number of people lack confidence in the Central Authorities and the rule of law in Hong Kong, it will be hard to promote stability. It is therefore crucial that, in deciding whether, when and how it is going to exercise its potent powers, a high degree of sensitivity on the part of the Central Authorities is critical. Sir Anthony Mason chose a most telling title for his article on the power of the NPCSC to interpret the BL: the

² Article 67(4)

³ Article 158

⁴ *Yau Wai Ching v Chief Executive of the Hong Kong Special Administrative Region, Secretary for Justice*, FAMV7/2017 (1 September 2017), (2017) 20 HKCFAR 390, §35

⁵ Sir Anthony Mason, *The Rule of Law in the Shadow of the Giant: The Hong Kong Experience*, 33 *Sydney Law Review* (2011), pp. 627-8

title was “*The Rule of Law in the Shadow of the Giant: The Hong Kong Experience*”. The Giant needs to appreciate that any step taken by it might be weighty, and result in an earthquake and unwanted consequences.

7. On this occasion, it is regrettable and unfortunate that an earthquake has occurred. The shockwave caused by the earthquake is distinctly felt. Having said that, I firmly believe that the rule of law in Hong Kong is strong enough to survive the aftermath of the earthquake. Such belief of mine is based on the fact that there remains a strong and independent judiciary in Hong Kong. An independent judiciary is, of course, an essential element to the rule of law and the core of the core values of Hong Kong.

Judicial independence

8. Judicial independence was called into question in 2017. The question was prompted mainly by court judgments relating to highly charged political events. A common phenomenon in those cases is that the winning party and its supporters would say that the rule of law has been upheld whereas the losing party and its supporters would say that the rule of law is dead. Each side sees the existence, or non-existence of the rule of law, depending on the outcome of the case. As Lord Bingham observed in his well-known work, *The Rule of Law*, there is widespread impression that the phrase “*rule of law*” has been uttered as magic words as meaning little more than “*Hooray for our side*”.⁶
9. Let me say this loud and clear. Up to this moment, no one has been able to adduce any real evidence that judicial independence in Hong Kong has been compromised in those cases, or indeed in any case.

⁶ Tom Bingham, *The Rule of Law*, 2010, p. 5

10. A fair-minded and informed observer will and should always presume that judges will abide by their judicial oath,⁷ which requires the judges “*to ... safeguard the law and administer justice without fear or favour, self-interest or deceit*”.⁸ It must also be presumed that our judges will observe the “*Guide to Judicial Conduct*”, which provides that “*Judges must reject any extraneous attempt, direct or indirect, to influence them, by any means*” (§15).
11. I would also like to adduce a piece of compelling evidence to support that judicial independence has not been diminished. The BL allows the CFA to invite judges from other Common Law jurisdictions to sit on the CFA.⁹ In January 2017, there were two new appointments: the Honourable Mr. Justice Robert French AC (the former Chief Justice of the High Court of Australia) and Lord Reed (a judge of the Supreme Court of the United Kingdom).¹⁰ The number of foreign Non-Permanent Judges (“NPJs”) was increased from 10 to 12. Lord Neuberger, the former President of the Supreme Court of the United Kingdom and a NPJ of the CFA, has suggested that foreign NPJs are like the canaries in the coal mines: so long as they are happy to serve, you can safely assume that all is well with judicial independence and impartiality in Hong Kong.¹¹
12. Having said that, it is vital to correct groundless criticisms against our judiciary, and to prevent them from spreading. The real danger posed by these criticisms, even though they are groundless, is that members of the public

⁷ *Helow v Home Secretary* [2008] 1 WLR 2416 at 2435D, §57, *per* Lord Mance; *HKSAR v Md Emran Hossain* (2016) 19 HKCFAR 679 at 699, §42, *per* Fok PJ

⁸ Article 104 of the Basic Law; section 16(e) and Schedule 2, Part V, of the Oath and Declarations Ordinance (Cap. 11)

⁹ Article 82

¹⁰ Press Release dated 18 January 2017, *Appointment of non-permanent judges from other common law jurisdictions of the Court of Final Appeal*

¹¹ Lord Neuberger, *Judges, Access to Justice, the Rule of Law and the Court of Final Appeal under “One Country Two Systems”*, University of Hong Kong, 13 September 2017, p. 11.

may be confused, and even induced into believing that something must be wrong with our judicial system. If these groundless criticisms proliferate, this may erode people's trust and confidence in the system gradually. As the rule of law depends on the trust and confidence of the people, it is liable to become a self-fulfilling prophecy if the groundless criticisms are allowed to accumulate.

13. This is why the Bar will continue to respond to unfounded criticisms against the judiciary without any hesitation. In February 2017, in response to personal attacks made against the judge mainly by the so-called pro-establishment supporters in a case where seven policemen were found guilty of an assault, we issued a statement pointing out that *“Whilst everyone enjoys freedom of expression and may comment on the judgment, personal attacks against the Judge with insulting and threatening words and actions are of no assistance to any rational discussions, but undermine the respect for the court which should be shown by members of the public in a society that abides by the Rule of law”*.¹² In August 2017, in response to comments made mainly by the so-called pro-democracy supporters on a decision of the Court of Appeal in relation to the sentence passed on some young people who were found guilty of unlawful assembly, the Hong Kong Bar Association and the Law Society of Hong Kong issued a joint statement where we said *“Open and rational debate on the issues raised in individual cases is to be encouraged in a civil society. However, unfounded comments that judicial decisions were made or influenced by political considerations originating outside Hong Kong are unjustified and damaging to our legal system, and to Hong Kong as a whole.”*¹³. Last Saturday, the Bar issued another statement

¹² Statement of the Hong Kong Bar Association in Response to Personal Attacks on Judge, 20 February 2017

¹³ Joint Statement of the Hong Kong Bar Association and the Law Society of Hong Kong In Response to Criticisms of Judicial Independence in Hong Kong, 18 August 2017

in response to personal attacks on a magistrate.

The role of the Bar

14. You may ask, what is the rationale behind the Bar's tradition in speaking out on issues relating to the rule of law? The answer is to be found by what our Chief Justice said at the 2016 Presidential Address of the Bentham Association,¹⁴ *"The Bar has no cause to promote other than justice and the rule of law; it is also apolitical. I believe the Bar's motive in speaking up for the rule of law arises out of a need to offer a balanced point of view and a view that is firmly rooted in the law and the spirit of the law"*.¹⁵ To take it further, to offer a balanced point of view is not an end itself; it is the basis and pre-condition of rational discussions on, very often, highly controversial issues. The Bar strives to engage in frank and constructive dialogues with all interested parties including those against whom we have criticized, for example, the Government and the Central Authorities, and those who are against the authorities.
15. A meaningful and constructive dialogue will remain most difficult, if not impossible, unless a good rapport can be established. In order that the Bar can perform its role properly and effectively, it is crucial that people are convinced that whatever the Bar says is truly a balanced point of view firmly rooted in the law and the spirit of the law with no ulterior cause to promote.
16. As one of my predecessors, Mr Paul Shieh SC, said, *"We owe no affiliation to any side. We are independent, not only from the Establishment but also from party political forces Our independence makes our views on Rule of Law all the more valuable and balanced. We are not the "Reserve Team" of*

¹⁴ *"In Praise of an Old, Honourable and Distinguished Friend: The Bar"*, 16 March 2016

¹⁵ *Ibid.*, §10

*political parties...*¹⁶ Perception is as important as reality. The Bar must not only be, but also seen to be, apolitical and independent. The Bar is not, and must not be seen or even suspected to be, the mouthpiece of any political force. We must keep politics out of not only the judicial process,¹⁷ but also the Bar.

Conclusion

17. The former Chief Justice Mr Andrew Li has said that the rule of law and judicial independence are like the music of a song and its lyrics; but this song has to be sung by all of us with heart and soul, and not just by judges and legal professionals.¹⁸ People are only willing to sing together if they respect and trust the judges and the legal professionals. Respect and trust cannot be taken for granted. They are to be earned.
18. For those reasons, on this important occasion, on behalf of every member of the Bar, I make a solemn pledge to my dear fellow citizens of Hong Kong and my dear friends, that each of us will strive to uphold the rule of law in Hong Kong to the best of our ability, with integrity, passion and humility.
19. On this note, may I wish you all a happy new year.

Paul Lam S.C.

¹⁶ Speech of Mr Paul Shieh SC, Chairman of the Hong Kong Bar Association at the Opening of the Legal Year 2015, 12 January 2015, §19

¹⁷ *Chief Executive of HKSAR v President of the Legislative Council* [2017] 1 HKLR 460 at 481, §68

¹⁸ Mingpao, 2 June 2017