

**Speech Given at the Opening of the Legal Year, 9 January 2017**  
**by the Chairman of the Hong Kong Bar Association**  
**Winnie Tam SC**

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

1. It gives me great pleasure to welcome you all to this annual ceremony.

Defiance of the Law as Self-defeating to Social Causes

2. 2016 has been an eventful year both here and abroad. Civic unrest and clashes arose amidst disappointment and discontent. These can sadly be characterised as symptomatic of deep divides or, in some instances, polarisation of society. Far away in the city of Charlotte, North Carolina in the United States, protests erupted against police violence on coloured citizens which turned violent themselves, leading to injury of scores of officers and protesters.
3. When the US Attorney General Loretta Lynch spoke in September 2016 at the International Bar Association's annual conference about the protests in Charlotte, she readily recognised the legitimacy of protests as a protected constitutional right, and a vital instrument for raising issues and creating change. She also rightly pointed out that when protests turn violent, it only undermines the very justice it seeks to achieve.
4. In Hong Kong in February 2016, a rally in Mongkok organised by "Localists" in the name of protecting hawkers' rights developed into street warfare. Masked protesters were seen hurling metal garbage cans and bricks dug up from the pavement at unarmed law enforcement officers. Arson was committed on private property in the street. The leaders of the perpetrators sought to justify their acts by championing the slogan "Struggle with no Bottom Line". They claimed that the end of achieving social justice would justify the use of any means even illegal or violent.
5. I believe the words of Attorney General Lynch aptly describe the self-defeating cause of the Localists and their supporters in the Mongkok incident. The hawkers' trade was interrupted as they dispersed and ran for cover. People who were once sympathetic to the cause of the young and powerless began to question the "No-bottom-line" approach. The end failed to justify the means. Instead, the means defeated their very purpose.

6. In the months to follow, Hong Kong people witnessed two Localists losing the LegCo seats that they had won in the September elections, when they were but one small step away from assuming office. That one step was the taking of the oath of allegiance to the Basic Law and to the Hong Kong Special Administrative Region of the People's Republic of China.
7. On 12 October 2016, instead of taking the oath as required by Article 104 and prescribed under Section 19 of Oaths and Declarations Ordinance, the two Localists each staged a set of self-styled acts of defiance, substituting their own scripts for the prescribed wording for the oath, and using words of insult and foul language to refer to China and the Chinese people. This eventually led to the duo being disqualified for their positions in accordance with Article 104 of the Basic Law and the plain wording of section 21 of the Oaths and Declarations Ordinance.
8. I shall come to the twists and turns of this incident and their effect on Hong Kong in a moment, but many including their supporters have seen their acts of defiance of the law as gratuitous and deeply offensive. They defeat the very purpose that their supporters entrusted them with - the purpose of placing them in LegCo so as to bring about positive changes to the law.

#### Tension under "One Country Two Systems" – Interpretation of BL104

9. This brings me to the legal drama that followed which put the spotlight on the role of our judges under One Country Two Systems. The President of LegCo, based upon legal advice he obtained, permitted the duo to have their invalid oaths re-administered at the next meeting. On the same day, the Secretary for Justice, alongside the Chief Executive of the Hong Kong SAR, filed for judicial review, seeking declarations that the duo was disqualified, and that the President of LegCo had no power to allow the oaths to be re-administered.
10. In the LegCo chamber, the next meeting quickly ground to a halt in the midst of commotion, sound and fury. Legislators demonstrating their support for the Localists sought, by force, to escort the duo into the chamber for their oaths to be re-administered, while the pro-establishment legislators withdrew from the chamber in order to abort the meeting.
11. In the courtroom, the full hearing continued following leave given by the court. The arguments turned upon the powers of the President of LegCo and the jurisdiction of the court over the President's decision. No one disputed the fact that the two declined or neglected to make the oath when they staged what can best be described as a farcical and offensive performance.

12. This forms the backdrop to the fifth interpretation of the Basic Law. On 7 November 2016, before the decision of the Court of First Instance was handed down by Mr Justice Thomas Au, the Standing Committee of the National People's Congress of China ("NPCSC") exercised its constitutional power under Article 158(1) and announced its interpretation of Article 104 of the Basic Law ("the Interpretation"). The original short text of Article 104 was explained in words several times its length, with the types of disqualifying conduct spelt out, the duties of the oath administrator delineated, and the consequences of disqualification specified.
13. Thereafter the Court of First Instance and the Court of Appeal successively decided that the duo have lost their qualification as LegCo members, and the President had no power to allow their oaths to be re-administered.<sup>1</sup> Mr Justice Au of the Court of First Instance also emphasised that his decision would have been the same with or without the Interpretation.

#### Judicial Independence under One Country Two Systems

14. While the Hong Kong courts do have the power to interpret the Basic Law according to common law principles, the final power of interpretation rests with the NPCSC under One Country Two Systems as a matter of constitutional order<sup>2</sup>. **However, it is a power best exercised with utmost circumspection, in order to preserve the integrity and viability of One Country Two Systems. In particular, the timing of the exercise of such power could give rise to undesirable perceptions that could outweigh any beneficial effects.**
15. From the four previous occasions of the exercise of such power, it would be fair to observe that the NPCSC has proven itself not to be trigger-happy when it comes to interpreting the Basic Law. On none of those occasions did the NPCSC exercise its rights on its own volition during the pendency of litigation on the subject provision in the Basic Law.
16. Over the incident, **the Bar issued two strongly worded statements in a span of 6 days.** Before an interpretation became a certainty, **we expressed our "deep concerns" over the possibility of the move and called upon the NPCSC to exercise the highest degree of restraint in handling the sensitive situation to**

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<sup>1</sup> *The Chief Executive of the Hong Kong Special Administrative Region & Another v The President of the Legislative Council & Others* (unrep., CACV 224-227/2016, 30 November 2016) (CA); *The Chief Executive of the Hong Kong Special Administrative Region & Another v The President of the Legislative Council & Others* (unrep., HCAL 185/2016 and HCMP 2819/2016, 15 November 2016)

<sup>2</sup> Article 158, The Basic Law.

avoid adverse implications to “One Country Two Systems”. When interpretation of the NPCSC of Article 104 became a *fait accompli* we reiterated our view that it was unnecessary, and would do more harm than good to public perception of the continued respect for the rule of law in Hong Kong. Above all, we reiterated our concern that the perception of the authority and independence of the judiciary within the international community is liable to be undermined, given the unfortunate timing of the Interpretation.

17. Some Mainland Chinese officials more sensitive to the concerns of Hong Kong people emphasised that the interpretation was not intended to dictate the result of any particular case, the timing was purely dictated by the scheduled regular meeting of the NPCSC. However, in the words of one of the Hong Kong members of the Basic Law Committee under NPCSC, the move was timed to guard against the contingency that the court should give Article 104 of the Basic Law a meaning that turns out not to align with the meaning ascribed to it by the NPCSC. From that perspective, an interpretation pre-empting the possibility of an “adverse” decision would be the lesser of the two evils compared with an interpretation issued *after* the decision is made that would have the effect of denouncing and reversing it.
18. From the point of view of the independent Bar as the guardians of the rule of law, I respectfully differ from such an assessment. **In our system, where the result of a judicious application of the law results in injustice or a consequence undesired by society, the situation is best dealt with by subsequent legislation, or by the appellate process. Where there is no ambiguity or other reasons for which the Hong Kong court finds appropriate to refer the Basic Law to NPCSC for interpretation, the court is best left to adjudicate the case independently, exercising its own power of interpretation.**
19. **In the present case, one can readily empathise with the political need perceived by the Central government to draw a clear red line to exclude from LegCo separatists who have made plain their intention to disavow the One Country Two Systems Principle. One can also appreciate the sense of urgency that arises from the difficult situation that LegCo was plunged into by the President’s decision to allow re-administration of the oaths. However, political expedience or the need for a politically fool-proof outcome must not be given precedence over the rule of law and the independence of the judiciary. Further, it must not be perceived to be given such precedence. On this issue, I venture to argue that public perception matters a great deal.**

20. It would be most unfortunate if the power of interpretation of the Basic Law were exercised during the pendency of a court action in a way that can objectively be perceived to be an attempt to stretch the meaning and effect of any constitutional provision in order to arrive at a politically expedient outcome in the action. Constitutional powers aside, this is the perception that I would suggest must be avoided at all costs.
21. Whether or not an interpretation will be perceived to have a pre-emptive effect will often depend on **the scope of the interpretation, the level of detail in its text, as well as its timing**. While it is ultimately the judge who is to apply the provisions *as interpreted* to the facts of each case before him, **the perception of interference would be inevitable if the contents are so detailed, and the timing so urgent, as to directly impact on the outcome of a pending case**.
22. In the case involving the two Localists, as it turns out, the impact of the Interpretation was more psychological than real by reason of the absence of any contention on whether they had declined or neglected to take the oaths. On the other hand, the Interpretation, with a level of detail significantly higher than the provision in the Ordinance, may have some impact upon the pending applications for judicial review filed subsequently against 4 more legislators who took their oaths on the same day as the disqualified duo. **There may be strong views either way about the merits of these 4 subsequent applications, but I have no doubt that our judges will adjudicate the pending cases impartially and strictly in accordance with the applicable law. Any attempt by any camp to exert pressure upon our judges such as by creating public opinion in favour of any conclusion should be firmly rejected.**

#### Judicial Independence Beyond Hong Kong

23. In the tumultuous times of 2016, the issue of the independence of the judiciary was very much in the limelight elsewhere too; most notably the United Kingdom. Following the referendum that resulted in the victory of the Brexit camp, court proceedings were brought to challenge the Prime Minister's right to trigger the process of leaving the European Union without seeking approval from parliament. If a bill had had to be passed by parliament *before* Article 50 of the Treaty on EU could be triggered, much delay of the process was to be expected.

24. Following an appeal that upheld the ruling of the first instance judge that parliament approval was needed, pro-Brexit British media launched a campaign of scathing attack on the 3 Court of Appeal judges, calling them “Enemies of the People”. The Daily Mail in its 11 December issue profiled all 11 Supreme Court judges, trawling through personal and public archives of each of them, and the social media pages of their personal and family connections for traces of materials to found unwarranted attacks. Each of the judges was given a Europhile rating. 4 of them got 5 stars. Another 4 were awarded 1 star.
25. Such unrestrained, open attack on senior judges by the media was an affront to the justice system of England and Wales. This shocking attitude epitomizes a polarized state of political opinion, and a fundamental ignorance in what the role of the judiciary, and what legal reasoning underpinning the rule of law is all about. One of the Supreme Court judges, Lord Kerr, summed up his role in two sentences: “We are not involved in reaching decisions based on anything other than the legal principles as they are presented to us and the legal analysis which we conduct as to these extremely difficult and complicated questions. That's not to say that we don't have personal views but we are all extremely conscious of the need to set aside our personal views and to apply the law as we conceive it to be.”

#### The Role of the Bar in Upholding the Rule of Law

26. Against this unprecedented attack on judges, it was the Chairman of the Bar of England and Wales, Chantal-Aimee Dorries QC, rather than the Lord Chancellor, who rose immediately in a spirited defence of the independence of the judiciary. The recent developments in England bring to mind the vilification of some of our own judges following their adjudication of cases involving supporters of opposing political views, which called for the Bar to issue another strongly worded statement on 25 January 2016. In our statement, we pointed out that the bedrock to the rule of law in Hong Kong is the trust and confidence of the public and international community towards our judges and the judicial system. Any inappropriate comment could fuel baseless and unnecessary suspicion on judicial independence and may undermine the confidence of the public and the international community in the rule of law in Hong Kong.
27. It is particularly during these times of challenges that the legal professions around the world must rally around one another to give support to our one common purpose despite our very different legal and political systems: that is, a common aspiration and determination for the rule of law to live and thrive. In July this year we made the Hong Kong Bar's voice heard in protesting against

measures proposed by the Malaysian government that were designed to erode the independence and autonomy of the Malaysian Bar. We continue to be in communication with the Malaysian Bar in respect of the latest developments in the government's attempt to control or undermine the Bar as an independent professional body to function as a guardian of the rule of law. In July of 2015, we issued a public statement voicing our deep concerns of the report of a large number of mainland lawyers having been arrested, detained or harassed by authorities. Since then, the issue of protection of the lawyers' right to practice in the Mainland continues to be an important item of our discussions with Mainland professional organisations and the relevant authorities with whom we have contact.

28. **In the midst of polarised political opinions held under One Country Two Systems, I see the role of the Bar as an apolitical channel of communication between the two systems.** In order to fulfil that role, we must continue to encourage and facilitate meaningful exchanges between the two jurisdictions on legal topics of common interest or concern. **In order for the Bar to maintain its influence and contribute to the development of the rule of law on both sides of the border, our voice should be one that is fair and objective, politically aware yet fearless without being judgemental, and one that firmly adheres to the core values of the rule of law.**
29. Further, the Hong Kong legal profession must contribute in exchanging knowledge with the Mainland profession and serve as a connector between lawyers of Mainland China and the international legal arena. These continuous mutual efforts of communication will not always lead to agreement on ideology or methodology, but **we must not give up any opportunity to promote a better mutual understanding of our differences to pave the way for future development of our respective systems and the enhancement of our professionalism.** To adopt the words of Sir Winston Churchill, "continuous effort – not strength or intelligence – is the key to unlocking our potential", and in our case, the potential of Hong Kong under One Country Two Systems.
30. Last but not least, it remains for me to thank you all for your patience in listening to my rather long-winded swan song. Leaders come and go, but may our good collective efforts continue to be driven by a clear purpose. On that note, may I wish you all a healthy, prosperous and fulfilling Year of 2017. May all your hopes and dreams come true.