

**SPEECH OF THE CHAIRMAN
OF THE HONG KONG BAR ASSOCIATION
AT THE OPENING OF THE LEGAL YEAR 2015
12TH JANUARY 2015**

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

1. One of the greatest British civil servants, Sir Humphrey Appleby, once said to his mentee, Bernard Woolley:-

“Speeches are not written for the audience to which they are delivered. Delivering the speech is merely the formality that has to be gone through in order to get the press release into the newspapers.¹”

2. Apart from being a very long press release, this speech is also my last speech as Chairman of the Bar, my swansong after two terms of office.
3. According to a report by the Hong Kong Examinations and Assessment Authority published last November, many secondary school students misunderstood the concept of “Rule of Law” as merely meaning executing or obeying the law. The report recommended that students should enhance their understanding of the concept. People who rarely spoke about Rule of

¹ From the episode “A Question of Loyalty” in the BBC series “Yes Minister”.

Law suddenly expressed many views. It is time for the independent Bar to offer a more balanced view.

4. In a speech I delivered on 5th September last year at the World Bar Conference in New Zealand entitled “The role of the advocate in the protection of human rights and the Rule of Law” I said the following:-

“There is no universal definition of ‘Rule of Law’. Many countries or nations claim to practise the Rule of Law but in fact what they practise is not “Rule of Law” as we understand the concept but, at most, Rule by Law or a very rudimentary form of Rule of Law namely that there shall be laws to regulate the conduct of individuals and that they should obey the laws made by the sovereign.

And that sort of view sometimes has a superficial attraction about it.

China, the sovereign state for Hong Kong, does not practise the type of Rule of Law as we understand it to mean. It has its own reason for doing so, and I am not passing any judgment on it. Maybe (or maybe not) because of this, there was an increasing tendency on the part of the executive in Hong Kong, in its public statements, to emphasise the “obey the law” aspect of “Rule of Law”. Comical it may sound, the Government in Hong Kong has become accustomed in recent years to preface almost every description of what it does by the phrase “doing so according to

law”. For example it would say that elections to the legislature had been held according to law, police had arrested suspects according to law, the Government governs Hong Kong according to law, policies are formulated and implemented according to law. Everything is done according to law.

To the untrained mind or the unsophisticated, this may sound very respectful to the concept of the Rule of Law. After all, to respect the Rule of Law one must obey the law and do things according to law. However, in my view and in the view of the Hong Kong Bar, ironically that could have the opposite effect of misleading the public as to the meaning of the Rule of Law.

First, as we all know, Rule of Law means far more than just blind adherence to laws - respect for an independent judiciary, the need to ensure minimum contents of laws in terms of human rights protection, respect for the rights and liberty of the individual when law enforcers exercise their discretionary powers are examples of requirements of Rule of Law which go beyond just obeying the law. In fact it can be said that over-emphasis of the “obey the law” aspect of “Rule of Law” is the hallmark of a regime which is keen on using the law as a tool to constrain the governed, rather than as a means to constrain the way it governs.

Second, such repeated notions of “doing things according to law” demean the law and deflect attention from the real issue. The problem arose when the public or the media comments on or

criticizes a certain Governmental policy, or executive action, “on its merits” so to speak. No one complains about legality of conduct; rather, *political* responses or justifications are being called for. Law only provides the minimum requirement to be fulfilled by *any* Government. Responses by way of “doing things according to the law” creates the misconception that many phenomena in society are the inevitable consequences of adhering to the law (when plainly they are not). Law had become the scapegoat or excuse.”

5. The phrase “Rule of Law” is often associated with well established liberal and civilized regimes. It has a positive connotation. Indiscriminate use of the phrase “Rule of Law” could confer undeserved moral respectability upon a “Rule by Law” or “Rule by Man” regime.
6. In particular, in a system without a truly independent judiciary and where laws are arbitrarily enforced, the judiciary and the executive “co-operate” to ensure that laws are interpreted in a way preferred by the executive and are used to suppress persons or entities who do not find favour with the Government. This is often dressed up as “Rule of Law”, but is in fact “Rule by Law”. “Do things according to law” means “do things according to our will”.
7. Fortunately Hong Kong is not such a regime, but eternal vigilance is the price of liberty.

8. I now address the publication of the White Paper by the State Council in June 2014. A lot of controversies focused on whether judges were correctly characterized as “administrators” of Hong Kong. The matter was blamed on translation. However, the *real* problem with the relevant part of the White Paper is that *irrespective* of translation, judges perform *judicial* tasks *independently*. The sovereign state *should not* purport to impose any ambiguous *political requirements*, such as to be “patriotic” or to “safeguard the country’s development interests”.
9. Of course our judges do not feel any pressure. But the White Paper sends a wrong message to the people of Hong Kong and the international community as to the role of the judiciary in Hong Kong. It also shows a gap in mindset. In systems subscribing to our concept of Rule of Law, the Government does not paternalistically issue edicts for judges to perform political tasks. This mentality may be commonplace on the Mainland, but is inappropriate here.
10. One invidious consequence of the White Paper is that it could be capitalized upon by foreign entities to discredit the Hong Kong legal system. Even an entirely proper decision by our independent Court of Final Appeal, the FG Hemisphere case (also known as the Congo case) about State Immunity has been *erroneously* characterized by some in order to attack our status as an international dispute resolution centre. The inappropriate part of the White Paper about judges could be seized upon to cast spurious aspersions against the Hong Kong Judiciary.

11. The fact is – according to the World Economic Forum’s Global Competitiveness Report 2014–2015, Hong Kong was ranked fifth among 144 jurisdictions worldwide and the first in Asia for judicial independence. Our Court of Final Appeal receives support from leading common law jurisdictions, not only in arbitration/business law but other areas such as public law and criminal law. A *truly* independent judiciary renders decisions – often politically unwelcome decisions - without fear or favour. I have no doubt that our judges are not going to decide cases any differently as a result of the White Paper.

12. Speaking of judicial independence, there is a tendency that whenever judges rule against the Government they are hailed as heroes, but when they rule against democracy supporters, insinuations are expressed about the “demise” of the Rule of Law. Judgments can of course be criticized on legal grounds, but to insinuate that judges have become part of the machinery of oppression, or that they are succumbing to pressure and beginning to “co-operate” with the Government, just because they rule against democracy supporters is to apply “double standards”. Such views are as misguided as certain views from the Establishment that judges were “anti-Government” just because they rule against the Administration. Judicial independence means that courts render their decisions regardless of the political affiliation of the parties. It does not mean some people are *always* right.

13. On 31st August 2014 the National People’s Congress Standing Committee (NPCSC) issued its decision on the Chief Executive election in 2017 and LegCo election in 2016. The Bar’s position on the unreasonably restrictive features of the decision has been clear, even before the NPCSC made its

decision. Let me summarize the Bar's specific views in its written submissions dated 28th April 2014 at paragraphs 55 to 69:-

- (1) The majority of the members of the nomination committee should be elected or selected in a way to ensure maximum participation by members of the electorate. If disproportionate weight is given to functional sectors, contentious issues will arise as to whether the committee is "broadly representative".
 - (2) If a person can only be nominated with the support of a majority of the nomination committee, it is impossible to see how the electorate can have a *free* or *true* choice of different candidates. The requirement is regressive when compared to the method for selecting the Chief Executive in 2012.
 - (3) The nomination committee should ensure the production of a spectrum or plurality of candidates for the voters both in terms of number and political views. The "capping" of the number of candidates at two to four² does not have much credence.
14. The NPCSC decision led to the "Umbrella Movement". The concept of civil disobedience is controversial. It involves breaking the law, but there are historical examples where civil disobedience had brought forth political or social changes. It is not possible to generalize in a sentence or two whether the concept is "right" or "wrong" in the abstract. Yet, even the initiators of the Movement accept that the concept has self-constraining features. In

² NPCSC Decision eventually stipulated "two to three"

particular, acts of civil disobedience must not be lightly resorted to, participants should use non-violent means and willingly accept punishment. Lord Hoffmann has added that participants must not cause excessive damage or inconvenience. The Bar would add that respect for the rights of others and for orders made by an independent judiciary are two further constraints.

15. Even though by and large the Movement had been carried out in a peaceful and orderly way, the actual conduct of many people overstepped legitimate limits in many respects as time went by. Regrettably, many influential figures have distorted or even denied such limits, sometimes through creative interpretation of philosophical writings. For example some argued that disobeying a civil judgment would not adversely affect the Rule of Law, or that the Rule of Law is a concept which only constrains the Government and citizens' conduct can never adversely impact on the Rule of Law. Some banners said, "we pay no heed to injunctions". General comments made by Non Permanent Judges in interviews or academic discussions were taken out of context and deified, and misinterpreted as statements of positive support/approval of what was actually said and done during the Movement. People who fairly criticized excessive aspects of the conduct of the Movement were indiscriminately demonized as "democracy traitors" or Haruki Murakami's "tall wall". Anyone who does not unreservedly support everything done during the Movement was castigated as supporting "Rule by Law". Such passionate views attracted a number of "likes" or "support" on social media.
16. As the saying goes, "Going too far is as bad as not going far enough". These views go too far. One important aspect of the Rule of Law is that

everyone is equal before the law. The Government possesses dominant public power, and power tends to corrupt. Understandably, discussion of Rule of Law tends to *emphasize* constraint on Governmental power. But it is wrong to turn this upside-down and argue that Rule of Law is *only* about constraining the Government and that citizens' conduct can *never* impact negatively on the Rule of Law. For example, open calls for defiance of court orders must adversely impact on the Rule of Law because they directly confront an independent judiciary – *the very institution* relied upon by the public to uphold the Rule of Law.

17. I am not alone. Mr Justice Bokhary said in an interview on 23rd November 2014:-

“It is difficult to see how disobedience of a court order would not impact the rule of law. I don't think it will deal rule of law a death blow, but it does impact on it Sometimes in some places the law is so oppressive that anybody in opposition to the regime would come up against the oppressive law.... But in a place like Hong Kong I don't think we have that kind of situation”

18. Mr. Andrew Li, the former Chief Justice, was more specific and direct in an interview on 17th November 2014:-

“The means used [by participants] cannot override the Rule of Law. The scale of the Movement, plus the fact that it had taken place for a

long time, and the fact that Court Orders had not been respected – these had a negative impact on and had eroded the Rule of Law.³”

These words are particularly valuable to the public because they come from a well-respected jurist and pupil master to many eminent lawyers, judges and politicians. He is in a unique position to comment on the Movement – *not in the abstract, but as it happened here, day-by-day*. His words succinctly encapsulated the point that citizens are constrained by the concept of Rule of Law, the need to respect the right of others and court orders and to avoid excessive inconvenience in the context of civil disobedience. A line can indeed be drawn between nobility of ends and excessiveness of means.

19. Many have asked, “whose side is the Bar on?” We owe no affiliation to any side. We are independent, not only from the Establishment but also from party political forces irrespective of their leadership or pedigree. Our independence makes our views on Rule of Law all the more valuable and balanced. We are not the “Reserves Team” of political parties who have – for many years – wrongly assumed that they could call upon the Bar to readily rally for their political acts from a “Rule of Law angle”. We can criticize the Establishment, as well as those with a “political halo”. Sometimes it takes more courage to criticize the latter than the former. I am quite sure that despite what I have unequivocally said about Rule of Law, Judicial Independence, the White Paper and the NPCSC Decision, there are still people who would express their discontent in a high profiled manner, simply because we have not said everything in the way they had wanted us to say, or because we had dared to criticize them. Do we blindly stand for

³ Translated from Cantonese

one side, or the other, or do we stand only for the Rule of Law? You'll be the judge.

20. Many point to the NPCSC decision as the cause of the problem. Some point to police misconduct (such as use of tear gas on 28th September, which the Bar has condemned) and argued that “they are wrong first and they are worse”. However, two wrongs do not make a right. There can be no “tit-for-tat”. That others have acted wrongly, harshly, or unsatisfactorily does not mean that you can thereby legitimize your own excesses. That said, it would be self-deceiving to gloss over the deficiencies of the NPCSC decision and the underlying discontent by repeating the official classification that the Movement was “unlawful”. The present conundrum can only be solved with enlightenment and political wisdom by *all* parties concerned.
21. The Umbrella Movement had created a lot of “gods”⁴. There are no gods in the legal world. But there is a goddess – the blindfolded goddess Themis, holding the scales of justice. One afternoon about a year ago near the High Court, a Mainland tourist asked me where the statue of Themis was. I offered to walk her to the old Supreme Court/Legco building to show her the statue. On our way, we walked past the red brick Court of Final Appeal building. I tried to introduce it to her. She showed little interest and said, “I only want to see the blindfolded goddess”. She told me she was a lawyer from the Mainland.

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Student idols

22. This could simply be a Mainland tourist taking pictures to show her friends on Weibo⁵. But in my idealistic mind, I am inclined to think that this symbolizes how our notion of Rule of Law is coveted in the eyes of our brethren across the border, especially the younger ones. We should never underestimate their yearning for the universal value of fairness and justice; we should never underestimate *our own advantage* and our ability to inform and enlighten them – students, lawyers and judges – not just about technical rules and regulations, or practice collaboration, but about our concept of Rule of Law, our most treasured asset which money cannot buy. Perhaps one day, the lady lawyer need not come here to look for Themis – not because of the “demise” of the Rule of Law in Hong Kong (as some doomsayers have kept saying), but because the spirit of Themis could be found all over the Mainland.
23. It is too early for me to say Happy Chinese New Year to you, and so instead, before I bid my final farewell, I wish you all good health and good luck. God bless you, and God bless Hong Kong.

Paul Shieh SC

Chairman

Hong Kong Bar Association

⁵ Mainland Chinese social media