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The role of the advocate in the protection of human rights and the Rule of Law

1. The title of the talk may sound slightly puzzling at first sight, because one's instinctive reaction is that of course human rights or public law litigation is conducted before the Courts by advocates, and therefore their role is obvious.

2. However, as with so many things in life, we should not lightly take things for granted. There are two points which we should bear in mind at the outset.

   (1) The first point is that we must not assume too readily that human rights and the Rule of Law are universally protected *via* the judicial or legal process. There are nations in this world where their constitution expressly provides for protection of fundamental rights such as freedom of speech and freedom of assembly, but where such constitutional provisions are rarely, if ever, invoked in their courts or enforced by their judicial organs against the executive, and where the executive regularly censors books and websites on political grounds with no scope of redress by way of a constitutional challenge in the courts.

   (2) I would put a gloss on the wording of the title. In systems where the judicial process has a role to play in the protection of human rights, everyone appearing before the Courts can be called an advocate. But I would single out the referral Bar for special treatment, for obvious reasons, since this is an international conference held with specific emphasis for independent referral Bars.

3. Since I come from Hong Kong, I would speak from the perspective of Hong Kong.

Hong Kong – part of China and yet not part of China

4. Hong Kong was a British colony before 1st July 1997 and since that date, the People's Republic of China ("PRC") had resumed its sovereignty over Hong Kong and Hong Kong became a Special Administrative Region ("SAR") of the PRC under a concept known as "one country two systems". The constitutional document for Hong Kong is called the Basic Law and is the result of years of gestation following the Sino British Joint Declaration in 1984.

5. This is not an occasion to indulge in legal or political history as to how the idea of an SAR had come about. Suffice it to note, for present purposes, the following points:-

(1) Despite the fact that the PRC, the sovereign state, practises a completely different system of law, Hong Kong remains a common law jurisdiction.

(2) Hong Kong is a place where independence of the Judiciary is held in high esteem and treasured. The Hong Kong Court of Final Appeal ("HKCFA") receives the support and recognition of leading common law jurisdictions. The proof of the pudding is in the eating. The HKCFA operates on a system whereby one senior judge from a leading common law jurisdiction is invariably invited to sit on every appeal and often render leading judgments. These are called Non-Permanent Judges ("NPJ") of the HKCFA, and our NPJs, past and present, include such legal luminaries as Lords Hoffman, Cooke, Nicholls, Woolf, Walker, Neuberger, Millett, Phillips, Collins, Clarke, Scott, Sir Anthony Mason, Sir Gerard Brennan, Sir Murray Gleeson, Mr. Justice Gummow, Sir Thomas Eichelbaum, Sir Thomas Gault and Sir Ivor Richardson.

6. In terms of human rights protection, Hong Kong has had a constitutionally entrenched Bill of Rights since 1990, earlier than the enactment of the Human Rights Act 1998 in the United Kingdom. The origin of the idea of an entrenched Bill of Rights in Hong Kong is the tragic event in Tiananmen in June 1989. The Bill is actually based on certain provisions in the International Covenant on Civil and Political Rights ("ICCPR"). The Hong Kong judiciary had not been slow in asserting the power to strike down primary legislation as being incompatible with human rights protection afforded by the Bill of Rights. Since July 1997 the Basic Law has added an additional level of constitutional protection for fundamental rights by way of its Chapter 3, which is entitled "Fundamental Rights and Duties of the Residents". Many of the rights guaranteed by Chapter 3 overlap with those in the ICCPR (e.g. freedom of speech) but some are new rights outside of the ICCPR: e.g. right to social welfare, right to confidential legal advice, freedom of marriage and to raise a family etc).

7. Hong Kong has a thriving public law scene. Judicial review and public law litigation is an active area of judicial activity. An independent Bar has played an important role in this.

8. In Hong Kong we follow the English system of a split profession. By the inherent nature of public law litigation, applicants often stand for relatively unpopular causes and take on the Government or what can be called "the establishment". Large multinational law firms often do not want to accept such cases because (i) such cases are often publicly funded but yet time consuming (since they involve novel and developing concepts and challenges) and do not fit into the business model of large multinationals; (ii) there is no hard core proof of this, but there is anecdotal evidence that judicial reviews could be regarded as "political" and some big law firms do not wish to be perceived as taking any political stance; (iii) law firms do not have the equivalent of the cab rank rule. A search of the websites of the leading multinational big firms rarely reveal human rights or public law litigation as their core area of practice.

[I should add that the above is not always the case because of the existence of what may be called "commercial JR work – where judicial reviews take place in a commercial context, typically when a commercial enterprise challenges the decisions of a regulator, or a developer challenges a planning decision. Large multinational firms (or "city firms" or "magic circle firms" routinely act for applicants in these matters) but it cannot be gainsaid that the core image of public law, or judicial review, remains that of the private citizen – or a public interest concern group – against the Government].

9. The adversarial system also means that it takes two to tango and we also need advocates willing to represent the respondent (usually the Government or a department), on fees that are not always commensurate with what may be called "commercial rate".

10. This is where a strong and independent Bar makes its contribution. The combined effect of the cab-rank rule and the independence of the Bar is that litigants are afforded a wide choice of advocates to take their challenges to the Courts. Though the Hong Kong Bar may not have specialized to such an extent as (say) the English Bar, there is a dedicated and highly skillful group of local counsel and silks who specialize in public law and who take on cases regularly on both sides. Leading human rights cases since the handover included the following:

    (1) HKSAR v Ng Kung Siu & Anor (1999) 2 HKCFAR 442 (constitutionality of a statute which banned flag burning)

    (2) Secretary for Security v. Sakthevel Prabaka (2004) 7 HKCFAR 187 (fairness of the system of screening of torture claimants)

    (3) **Koo Sze Yiu v Chief Executive of the HKSAR** (2006) 9 HKCFAR 441 (constitutionality of a statute which authorized the Chief Executive to order interception and disclosure of temecommunications)

    (4) **Leung v Secretary for Justice** [2005] 3 HKLRD 657 (constitutionality of differential age of consent between heterosexual and homosexual buggery)

    (5) **W v Registrar of Marriage** (2013) 16 HKCFAR 112 (constitutionality of a law which in effect prohibited transgender persons from marrying someone which is of the same biological sex)

(6) **Kong Yunming v Director of Social Welfare** (2013) 16 HKCFAR 950 (constitutionality of a statute which infringed upon the "right to social welfare" for newly arrived immigrants from Mainland China)

11. A glance at the legal representation on both sides reveal a core group of specialist advocates who regularly appear in the courts of Hong Kong: from the local Bar we have Philip Dykes SC, Mr. Gerard McCoy SC, Mr. Johannes Chan SC, Mr. Denis Chang SC and Dr. Pui-Yin Lo. From England we have Lord Lester QC, Lord Pannick QC, Mr. Nicholas Blake QC, Mr. Michael Fordham QC and Miss Monica Carss-Frisk QC.

12. Admission of overseas silks is a special feature of the Hong Kong system. In cases of unusual difficulty and complexity, counsel from overseas jurisdictions (mostly England) can be admitted on an *ad hoc* basis to advise on and appear in a particular case. The process is controlled by the Court and the Court is guided by public interest – the need for the development of a strong and independent local Bar and the need for clients to have their representation of choice and for there to be proper cross fertilization between the local Bar and overseas Bar.

13. Another key area where an independent Bar can contribute significantly to upholding the Rule of Law is through its public statements on matters of public or constitutional importance.

14. I am quite sure Bar Councils and Bar Associations in most nations with an independent Bar (or an independent legal profession) have a tradition of speaking out on matters of public interest, but this aspect of the role of an independent Bar has taken on a special dimension in Hong Kong.

15. The population of Hong Kong has always had an innate respect for what might be called the traditional "professions": doctors, lawyers, etc. Barristers, with their wigs and gowns (which we have retained as being a symbol of our common law heritage), have perhaps given us an added aura of respectability. In Hong Kong, very often barristers (especially Queen's Counsel or Senior Counsel) were invited to sit on Government consultative bodies because of their respectability and impartiality. For example in the "cabinet" of Christopher Patten (now Lord Patten), the last Governor of Hong Kong, there were two eminent practising QCs namely Mr. Denis Chang QC (Bar Chairman for three years) and Mr Andrew Li QC (which became the first Chief Justice of the HKCFA).

16. However, the role of the Hong Kong Bar Association as an entity only began to come to the forefront in what has become known as the "Article 23" saga in 2002.

17. Article 23 of the Basic Law provides:-

> "The Hong Kong Special Administrative Region shall enact laws on its own to prohibit any act of treason, secession, sedition, subversion against the Central People's Government, or theft of state secrets, to prohibit foreign political organizations or bodies from conducting political activities in the Region, and to prohibit political organizations or bodies of the Region from establishing ties with foreign political organizations or bodies."

18. Article 23 provides for a constitutional duty on the part of the HKSAR Government to enact laws in terms set out in the article. In 2002 the HKSAR Government embarked on a consultation exercise with a view to enacting such laws. The manner in which the consultation was being handled, and the substantive contents of the laws that were proposed to be introduced, were controversial. In particular, given the fact that Mainland Chinese concept of what amounted to "national security" or "state secrets" could be rather different from that as understood in the common law world, the risk of any such proposed legislation unduly or unnecessarily encroaching on fundamental rights is obvious.

19. Conservative/pro-establishment politicians and pro-democratic politicians all took their usual stance, for and against the proposals. The ordinary men on the street required guidance on a matter which concerned fundamental rights and liberties. The Hong Kong Bar Association took the lead and became the single most vocal apolitical body to speak out against the manner and substance of the consultation.

20. The matter then brewed politically, and ended up in a mass demonstration of half a million people on 1st July 2003. The Government was forced to withdraw the proposals. To date, Article 23 has remained an unresolved issue in Hong Kong and the HKSAR Government has not yet revived any plans to introduce related legislation.

21. Since then the Hong Kong Bar became (or, some would say, reinforced its position as) the key apolitical organization in Hong Kong to speak out on issues of Rule of Law and matters of constitutional importance. In fact matters have developed to an extent that the media would often ask the Bar to comment on a wide range of political or policy matters even though there is no legal content or "Rule of Law dimension" to the topic (and the Bar would invariably decline). [Of course the media can sometimes be forgiven for asking because they may not be able to draw the line between law and policy or politics.]

22. This has to do, in my view, with the fact that the Hong Kong Bar is independent from, and is seen to be independent from, any degree of Governmental, Mainland Chinese or business influence and was free to speak out without any inhibition. This may also have to do with the fact that the Hong Kong Government is not democratically elected and suffers from problems of legitimacy and therefore the Hong Kong public prefers

to repose faith and trust in an apolitical professional body which is impartial and authoritative which represents the Rule of Law, something which the Hong Kong public well knows to be one of the things which separate Hong Kong and Mainland China.

23. Public statements issued by the Bar on human rights and Rule of Law matters since then had included:

    (1) Comments on a Government proposal to reform electoral law so prevent legislators from resigning *en bloc* so as to trigger a *de facto* referendum. This has had the effect of focusing public debate to an extent that the Government withdrew its original proposals and replaced it by a toned down version.

    (2) Comments on certain remarks made by a senior and influential legal figure concerning the legal knowledge of Hong Kong lawyers and judges concerning the Chinese legal system and the Basic Law.

    (3) Numerous statements concerning the meaning and concept of the Rule of Law.

24. On the last point, perhaps I should elaborate why such a simple matter as the Rule of Law should require the Bar to issue numerous statements to elaborate.

25. 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.

26. 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.

27. 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.

(1) 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 goes 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.

(2) Second, such repeated notions of "doing things according to law" demeans the law and deflects attention from the real issue. The problem arose when the public or the media comments 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.

28. The Hong Kong Bar Association had been on a crusade in the past few years in its public statements to dispel any mistaken notions which may – unwittingly – have been spread by the administration: through press statements on specific incidents as well as by the Chairman's speeches in ceremonial and other occasions.

29. I should add that since the Article 23 saga, a number of former Bar Chairman in Hong Kong formed a political party called the Civic Party. Because of their former positions as Bar Chairmen, some members of the public had associated the political viewpoints and expressions with the Bar.

30. Also, it is inherent in speaking out on Rule of Law matters and matters of constitutional importance that one would express views that may be unappealing to that of the sovereign state (which operate on a different system). The official position of the HKSAR Government and the Mainland Government has been one of respect and accommodation. However that has not prevented so-called "pro establishment" politicians or ill-informed press commentators (often from outside Hong Kong) from mistakenly branding the Hong Kong Bar's position as being "political" in nature or "politically motivated". This may be because they truly think so; but it could also be because in their zeal to discredit views that they cannot defeat on the merits, they had to resort to discrediting the motivation.

31. A key example of this occurred this year. The Hong Kong Government undertook a large scale consultation on proposed universal suffrage in Hong Kong for the election of its Chief Executive. Article 45 of the Basic Law had laid down the parameters of such elections but the details are a matter of political consultation. It is something of great constitutional importance for Hong Kong and also for China. Under the Basic Law any proposed electoral package had to be blessed by the Central People's Government.

32. Ever since the commencement of the consultation (or even before), public opinions have been split on the nomination method. One political camp (the democrats) advocates one mode of nomination whereas another camp (the pro-establishment) advocates another mode. I will not bore you with the details. Suffice it to say that under the democrats' proposal every resident has the right to nominate and there is a chance that a candidate unwelcome to the PRC could be nominated. Under the pro-establishment proposals nomination should be in the hands of a nomination committee which was expressly mentioned in Article 45. It is thought by the democrats that such a nomination committee would be stacked with yesmen and that the electorate may end up with Hobson's choice.

33. There is a snag because the democrat's proposal is extremely *legally* controversial because there is a huge question mark over whether Article 45 allows any form of nomination other than one through a nomination committee. The official Government and Mainland Chinese position is that the democrats proposal is unconstitutional and not authorized by Article 45.

34. Not surprisingly the public and the politicians waited for the Bar's position. The Bar actually came out against the democrats' proposal. I was not a betting man but according to the media the Bar's position was against the odds. The Bar's submission on this point was immediately warmly embraced by the Government. The Bar was immediately criticized by some democrats as betraying the Rule of Law and damaging its hard earned credibility.

35. But what the Bar also said in its paper was that even though as a matter of constitutional interpretation, nomination must be done through a nomination committee, as a matter of law (and in compliance with the ICCPR) the nomination committee must ensure maximum participation by the electorate so that it cannot be packed by people who were expected to nominate in a particular way. The democrats pointed this out to the Government but the Government was relatively quiet on this.

36. The Bar later issued a statement calling on the Government not to take the Bar's position out of context, and even though the democrats' proposal is technically not in compliance with the Basic Law, the rationale and spirit could legally be accommodated

by a nomination committee which has maximum participation of the electorate (and not a so-called “small circle” committee).

37. This immediately prompted a response the other way. Pro establishment politicians and pro Mainland newspapers immediately criticized the Bar for changing its stance and for bowing to the political pressure of the democrats. Some commentators even described the Bar’s position as tantamount to withdrawing a concession previously made (as if one is conducting litigation), and argued that it was too late for the Bar to do so. Of course the Bar was doing nothing of that sort, if only the commentators had actually spent some time reading. But one can say that in a politically charged environment it is perhaps asking too much to expect people to understand what you actually said.

Conclusion

38. To conclude, the value of an independent referral Bar is its freedom from political and business influence so that it can speak out for, and even taken on, causes without fear or favour. It is interesting times to be part of a referral Bar in Hong Kong now, bearing in mind the legal and political landscape surrounding Hong Kong. I regard the “public education” role of the Bar as being particularly challenging and important: education in two senses – educating the public as to the utility of a split profession (which is often a myth to the lay persons) and educating the public as to the meaning and importance of the Rule of Law so that if one day attempts are made to erode it (fingers crossed - this has not happened) they can recognize it and resist it promptly and strongly.

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