

**SPEECH OF THE CHAIRMAN OF THE BAR COUNCIL**  
**OF THE HONG KONG BAR ASSOCIATION**  
**ON THE OCCASION OF THE OPENING OF THE LEGAL YEAR**  
**10TH JANUARY 2011**

Chief Justice, Secretary for Justice, President of the Law Society, Judges and Judicial Officers, Members of the Law Professions, Distinguished Guests, Ladies and Gentleman

1. Last year in my speech at this ceremony, I mentioned the difficulties faced by me in writing a speech a couple of weeks in advance and which is supposed to be read out loud word for word on the day. I also mentioned skiing and the aim not to go ‘off piste’. So for this year, I thought I would go to a ski resort to write this speech.
2. I hope I do not stumble and fall in this speech as much as I did when pretending to think about it on the slopes. If by the time I read this I am wearing a plaster cast on my arm or leg, you will know that I concentrated too much on this speech and not enough on the skiing. If no cast, then in a few minutes you may be wishing I spent more time on the speech. In fact it is my wife who broke her arm throwing herself off a black run when I asked her for the umpteenth time if she thought I should mention mediation.
3. Then again, when it comes to speech writing, I have found that – just as in real life – imagination sometimes has to stand in for experience.

4. But it takes little imagination to realise that one topic I mentioned last year is worthy of mention again. Indeed, it seems a perennial topic: Legal Aid.
5. Remember that the Legal Aid scheme is intended to provide the access to justice which would otherwise not be available to persons who cannot afford it. Equal access to justice for all underpins our commitment to the rule of law.
6. Equal access ensures that any one individual citizen can come before the courts and stand before the seat of justice as an equal to his or her opponent – whether that opponent is another such individual, a powerful corporation or the state itself.
7. As Lord Neuberger, a Non-Permanent Judge of the Hong Kong Court of Final Appeal, pointed out in a recent lecture, it is interesting to note that equality before the law, and access to courts able to dispense justice without fear or favour (as the judicial oath puts it), predate the development of democracy. Without equal access to the courts, without equality before the law, the conclusion to draw is that democracy would not long survive.
8. There is no problem with judicial independence in Hong Kong, and I am sure that this great strength of the Hong Kong system will be continued with all zeal by the new Chief Justice, whom the Bar is pleased to see at his first Ceremonial Opening this Legal Year. The smooth transition between Chief Justices is itself a testament to the continuity of the independent judiciary and rule of law in Hong Kong.

9. But, where a significant proportion of the population simply cannot afford access to justice, that is a problem that should be of great concern. This is where the Legal Aid scheme must come into play, but it does not yet do so with all the force necessary.
10. I acknowledge that there has been some recent good news. The Government has decided to raise the financial eligibility limits for Legal Aid. The limits are not as high as the Bar thinks they should be, but – as a stopgap measure – the higher limits are certainly to be welcomed.
11. Also, in his October Policy Address, the Chief Executive announced that the Government will earmark \$100 million for injection into the Supplementary Legal Aid Scheme fund when necessary to expand the scheme to cover more types of cases.
12. Well, the Bar thinks it is necessary now. Indeed, it has been necessary for some considerable time, so the Bar hopes that the good news statements will very quickly be put into action, and that the pace of improvement gathers some speed. If the Government is a believer of Thomas Jefferson’s phrase that “Delay is preferable to error”, then let me state quite clearly “Any further delay will itself be a grave error”.
13. I am certain that even this good news would not have come about but for the constant lobbying by members of the Bar’s Special Committee on Legal Aid, chaired by Ruy Barretto SC. He and his committee between them have many decades of real experience of Legal Aid matters, unmatched by anyone in Government, and their collective views and wisdom, stated with independence of mind, would well be heeded.

14. The American ethicist, Anne Lappé said, “Every time you spend money, you are casting a vote for the kind of world you want”. I hope the Hong Kong Government, which enjoys a fiscal surplus beyond the dreams of most developed countries in the current worldwide financial climate, will cast its vote to spend money because it wants a world, or at least our own country, where equal access to justice for all is a reality.
15. Lest it ever be suggested otherwise, justice is not a luxury item. It is a basic item, and one which Hong Kong can well afford. It would be nice to think that this is a topic that the Chairman of the Bar will not have to revisit again next year.
16. Another topic worthy of revisiting is mediation. Let me start by pointing out that I and the Bar are strong supporters of the introduction of mediation. But, with the benefit of the first year of the Mediation Practice Direction behind us, may I sound a note of warning. Mediation is not suitable for every case or every party, and a balanced approach to it is necessary.
17. In his recent lecture, Lord Neuberger raised the question whether a concerted drive for an ever-expanding role for mediation, and indeed treating mediation as good and litigation as bad, is consistent with a commitment to equal access to justice.
18. Alternative dispute resolution including mediation is precisely that: an alternative. It is alternative to the formal adjudication which is provided in the Courts. So, to require all persons to mediate before gaining access to the

court door will necessarily have a greater impact on some classes of litigants than others.

19. Giving a sense to litigants and their advisors that mediation is just another hurdle to jump on the way to trial is not productive and may well give rise to abuse. There have already been concerns in Hong Kong that some parties have simply “ticked the box” of mediation, without a real attempt – sometimes deliberately to avoid a real attempt – to mediate, simply to hope to avoid later criticism from the Courts.
20. Also, some litigants will have the resources to afford both mediation and litigation. Others will not. Those who do not will then be faced with a choice: accept a mediated solution, which may well not reflect their legal rights, because they cannot afford first to mediate and then litigate, or accept no solution at all.
21. Financial pressure on some litigants may well mean that a mediated solution becomes a substitute for justice because the requirement to mediate (or even the perception of such a requirement) is a fetter on access to justice. Such financially based fetters run the risk of depriving some citizens of their right of access to justice.
22. We must be careful to ensure that this does not occur. This is, of course, where in some cases Legal Aid can assist. But the guiding principle should be that mediation is a complement to justice; it cannot be a substitute for justice.

23. Looking at the stage, and the way some senior members of the Bar are dressed, it might be thought that the Bar is not a modern profession. But, the important trappings, the visible signs, of the continuity of a system which hinges on a strong independent Bar, supporting an independent judiciary in administering justice under the rule of law, should not fool even the casual observer.
24. The Bar is much attuned to the needs of modern society and the needs of its members. The Bar's support of the community is well-known, but we have also been keen to support the newer members of the profession.
25. After law degrees and work experience, many would hope that being called to the Bar marks the start of a glorious ascent into heady stardom, whereas in reality it is a trial by fire with the constant threat of being burned at the stake not just in the Court of Appeal.
26. There are some who think that Groucho Marx was serious when he asked, "What have future generations ever done for us?" We might more sensibly ask, "What have they to look forward to?"
27. I am pleased to note that with the assistance of the Department of Justice a scheme will come into place this month for the training and concentrated instruction of private sector lawyers, both barristers and solicitors, for the prosecution of cases in the Magistrates' Courts. This is one of a number of steps taken, or to be taken, by the Bar in assisting the junior members.

28. Proper training and a proper chance to gain experience, and to be paid at a sensible rate irrespective of the instructing client, are what we should be determined to provide.
29. I know younger lawyers are different. First, they all seem far more qualified than we older lawyers are. If I saw my own CV come across my desk, I would not even give myself an interview for pupillage. Also, they do not seem to need the books we older lawyers use, content as they are to rely on electronic research tools.
30. As the President of the American Bar Association said last year, because of the rapid pace of change in the modern world, there is a real gap between those now entering the legal profession and those of us who have been in it for some years. They are the 'Facebook' generation: we are the 'facelift' generation.
31. We need good young barristers now, to do the work of juniors and to be able to have senior barristers in the years to come. They will not come to the Bar if we fail to provide them with training and a real expectation of a sensible living. We want them to have moral independence, but we should know that comes so much more easily with financial independence. For its role, properly public funded work again comes to mind.
32. Indeed, at the same time as people deserve equal access to the Courts, a lawyer also deserves proper and fair remuneration for his work even when conducting it at the public expense.

33. Yet, at present, it should seem odd that a barrister can be paid more for performing a half day as a duty lawyer in the Magistrates Court than for preparing perfected grounds of appeal in a murder case. The Bar will be keeping this in sight for the coming months.
34. This is a fact not just for the Bar but also for the solicitor side of the profession. The two sides of the profession face many similar challenges, and I am pleased that we often work together. I pay tribute to the current President of the Law Society, with whom I have worked closely – though I still think it was a clear breach of natural justice that he won the President’s Cup in the Law Society’s Caring Cookery Competition, especially when the more discerning palates knew that the Chairman of the Bar’s dish was far better.
35. We are two professions, but on many topics we can and do speak with one voice. Sometimes we have made joint statements on matters of concern. For example, we hope to have drawn attention to those individuals, sometimes geographically close to us, who are sitting in the dark where the light of the rule of law does not shine.
36. We also both know that as professionals unless we stand for something, we will fall for anything. It is that kind of thinking that in my view attracts the best to come to the Bar. Of course, lawyers hope to make a good living – but most of us are not as venal as the lawyer jokes would have you believe.
37. On the other hand, it needs to be remembered that the system of justice, the work of the Courts, cannot be assessed as if it were simply a publicly funded



dispute resolution service. Justice is not like the market, and there are specific points of contrast between markets and the profession worth noting.

38. Historical continuity is at the heart of the legitimacy of the legal system. A profession values such traditions. Markets are different. A market wakes up every morning with a blank mind – rather like me. A profession has an ethical dimension and values truth, justice and fairness.
39. That historical continuity, that sense of justice and fairness, is what we gather to celebrate and perpetuate today.
40. With that firmly in mind, may I on behalf of the Bar take this opportunity to wish you all a productive and prosperous, happy and healthy year ahead.

**Russell Coleman SC**

Chairman of the Hong Kong Bar Association

10th January 2011

