

SPEECH OF THE CHAIRMAN
OF THE HONG KONG BAR ASSOCIATION
AT THE OPENING OF THE LEGAL YEAR 2014
13TH JANUARY 2014

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

1. It is good to see so many new friends and old acquaintances attending this annual ceremony of ours. For regular attendants of this ceremony, I may sound like a broken record when I start off my speech today by talking about the perennial problem of legal aid.
2. In June 2013 the Home Affairs Bureau recommended an increase of criminal legal aid fees by 9.3% on account of inflation from 2010 to 2012. In September 2013 the Legal Aid Services Council (“LASC”) advised the Chief Executive of Hong Kong (“the CE”) that “there is no immediate need to establish an Independent Legal Aid Authority”.
3. The Bar finds both these developments unacceptable.

(1) Addressing the entrenched problem of despicably low criminal legal aid fees requires far more than a biennial increment based on a questionable base rate. A contrast between (i) how much a criminal law barrister is earning on his legal aid brief and refreshers and (ii) how much the Government is prepared to pay for *other* forms of legal services, and a comparison between (i) how much a criminal barrister earned on an average brief in 1975 and (ii)

how little he earns on an average brief now is enough to put Hong Kong to embarrassment if not to shame.

(2) The LASC's recommendation to the CE is based on reasoning by which the Bar is unconvinced, and also represented a U-turn on its position in 1996 under a different chairman.

In the coming year the Bar will continue to push for a comprehensive overhaul of the criminal legal aid system and the establishment of an Independent Legal Aid Authority.

4. The Hong Kong Bar faces competition from within Hong Kong and outside Hong Kong. Competition is no bad thing, because competition brings out the best in one, and the Hong Kong Bar is ready to rise to the challenge. I repeat what I have said in the Bar Scholarship award ceremony last month, that it is reassuring to see young people with exceptional academic records forgoing the temptation of immediate financial rewards and joining the Bar where they do not enjoy any financial security. The Bar will continue to play a pivotal role in maintaining a strong and independent local Bar. This includes addressing the Court, in applications to admit overseas barristers *ad hoc*, on the public interest elements involved. A strong and independent local Bar can only flourish if a proper balance is struck between nurturing local talents and allowing the admission of overseas counsel in cases that truly require their assistance.
5. In the past year, discussion of the phrase "Rule of Law" has received significant public attention in Hong Kong. It is appropriate to remind the public as to what this concept really means.

6. It is an important aspect of the concept of the Rule of Law that there shall be laws, both criminal and civil, to regulate the behavior of residents, corporations and visitors, and that there shall be effective mechanisms to enforce those laws.
7. But it would be a grave mistake if society were to be led into thinking that this is the “be all and end all” of the Rule of Law.
8. A society which genuinely respects the Rule of Law should at the same time possess three further fundamental guarantees: (i) checks on the legality of the use of governmental discretion; (ii) guarantee as to protection of rights in the laws passed by the legislature; (iii) an independent judiciary; and an equally independent legal profession, free from control or influence of the Government or business interests (whether direct or indirect, explicit or subtle).
9. Some may argue that the last three items may not be part of the definition of the Rule of Law, at least in some countries or systems. But it is a sterile debate. What matters is that here in Hong Kong we have prospered and succeeded under a system which possesses all the above characteristics.
10. If all we have are laws and the machinery to enforce those laws against ordinary mortals, then “law” will be nothing more than a mere tool to govern the people, and the Government would be able to justify everything on the basis that it was only “doing things according to law”. It would not be “Rule of Law” but “Rule by Law”. Borrowing from ancient Chinese legend, “Rule of Law” would be like tangerines originally flourishing on the south bank of the River Huai, sweet and juicy; but which were grown into inedible bitter oranges, once they were uprooted and moved to the north bank.

11. I would also add that at the end of the day, the flourishing of the Rule of Law depends on the moral fabric of a society and the civic qualities of its citizens. Some may call it the “collective conscience”. In their absence, it would be rather pointless for a society to have the best drafted laws, best equipped police and the most high tech courts.
12. As Guǎn Zhòng, prime minister of the Kingdom of Qi, said three thousand years ago during the Spring-Autumn period:- “When their warehouses are well stocked, people will develop their manners and a sense of justice and righteousness; when people are well fed and well clad, they will learn about honour and disgrace.” The moral fabric of a society is really what ancient wisdom called a sense of “justice, righteousness and honour”. If it crumbles, it may take years to rebuild.
13. Talking about being well fed and well clad, recently I came across a point of view to this effect:- *Hong Kong is no longer in an economically dominant position, and therefore Hong Kong people have to emphasize other aspects in which they feel superior such as civic behaviour, democracy and freedom, so as to wallow in self-glory and indulge in mental self-compensation.*
14. I have two points in response.
15. First of all, the subtext of this point of view is that things are all about comparing material affluence. But even in this day and age of GDP and GNP, when legal practice sometimes appears to be the adjunct of “deals”, there are still things that money cannot buy. As the saying goes:-

“Not everything that counts can be counted, and not everything that can be counted counts”.

16. But more importantly, and specifically in the present context, the reason why we in Hong Kong constantly remind ourselves of the importance of the Rule of Law is not really to compensate for anything, or to wallow in self-glory.

17. At this juncture, let me share with you an extract from a speech given on the occasion of the Opening of the Legal Year on 7th January 1980. The speech was delivered by the then Chief Justice, the late Sir Denys Roberts who sadly left us last year:-

“A high proportion of our population has come here from elsewhere, for a variety of reasons. I doubt if many regarded the merit of our legal and judicial principles as one of them. But they should have done.

For it is these principles which determine the kind of society in which we live. If the courts are corrupt, swayed by prejudice, or subject to improper influence by outside persons or bodies, little hope exists for the protection of the rights of the individual. ...

Hong Kong does not offer what is commonly called a democratic society, if by that term denotes a political system under which the members of the executive are changed by ballot from time to time. What it does provide is a genuinely free society.

By this, I mean a society in which everyone is subject to the law, where nobody can be deprived of his property or personal freedom save in accordance with the law and where he can, within those limits which every community prescribes for the preservation of order and personal reputation,

say what he thinks and pursue his own life without the intervention of the state.

The only sure guarantee of such a free society is an impartial, independent and fearless judiciary. This priceless advantage has been enjoyed by Hong Kong since 1841. Our judges and magistrates are not always wise, or patient, or clever, or learned. But there are few who do not possess in full measure the qualities which are essential to the preservation of personal freedom.”

18. Every word of that resonates and rings true today. The same basic values of the Rule of Law had long been enjoyed in Hong Kong, whether one is talking about 1841, 1980, 1997 or 2013. I doubt that when Sir Denys spoke in 1980, thirty four years ago when the world was a different world, he was motivated by a desire to wallow in self glory or mental self compensation caused by so-called loss of economic dominance.

19. A key reason why we constantly re-iterate the virtue of the Rule of Law is, I would suggest, “vigilance”. As Sir Sydney Kentridge QC said in his book “Free Country”:-

“We should never assume that the independence of the judiciary is anywhere unassailable. It depends first on the integrity of the judges, which in this country we do not doubt, next on constraint observed by government, but equally on the support that we as citizens give to the judges in their exercise of their vital constitutional function...”

20. A truly independent judiciary, in carrying out its constitutional function, is bound to make decisions which are unpopular with the Government or particular sectors of society. As Lord Bingham, that eminent British jurist, said in his speech “Government and Judges”, “There are countries in this world where every judicial decision finds favour with the government, but they are not places where one would want to live”. We therefore owe it to the public to properly inform them of the significance of the Rule of Law so that, even though they do not like the rulings of the Courts in particular cases they will learn to respect the independence of the judiciary as an immovable bedrock of Hong Kong, and learn to treasure a truly independent Bar.

21. In recent years, media and legal personalities often commented on appointment or retirement of senior judges. Speculations are made on whether the Judiciary can continue with its tradition of protecting human rights or the Rule of Law without certain judges and whether some judges are more or less “pro-rights”. All these sound as if maintenance of the Rule of Law in Hong Kong rests on the shoulders of one or two “heroes”. This, if I can be forgiven for putting it bluntly, is a form of Rule by Man, but in the name of Rule of Law. When we talk about the Rule of Law, we refer to the institution or concept of “Rule of Law” not to any individual or individuals.

22. We also should remind ourselves again of what Sir Sydney Kentridge QC (who is a bit overworked today) said in “Free Country”,

“A culture of rights does not mean that the individual must always win against the state, or that every individual right must be extended to its furthest limit.”

23. We should also couple that with what the former Chief Justice Mr Andrew Li said in the Opening of Legal Year in January 2010:-

“So where the Executive or the Legislature is successful in a case, this is not the result of the court seeking to favour them. Equally where a judgment goes against the Executive or the Legislature, the court is not seeking to confront them. In either case, the court is simply discharging its constitutional duty of adjudicating the dispute fairly and impartially.”

24. The second sentence is of course spot on, but one must not conveniently forget the first and third ones. They must be read as a whole. There must be no double standards – “heads I win tails you lose”.

25. I will probably not be allowed to leave this hall without saying something about constitutional development. The Bar will offer its comments at the appropriate juncture in the consultative process. But there are two general points which I wish to strongly emphasise at this stage.

(1) The Basic Law sets the outer limits of permissible election packages and the basic requirements. A proposal which, upon legal analysis does not fall within the scope defined by the Basic Law would not be authorized by the constitution. It is unhelpful to indulge in soundbites or labels. The same label or popular catchphrase can cover a whole host of meanings which even the proponents fail to agree upon. It is incumbent on proponents to demonstrate how their proposals (however popular and well supported) conform to, or are mandated by, the Basic Law. Likewise any objection based on legal grounds must also be properly analyzed and explained by the

objectors (however high and powerful they are), and not by one's bare assertion or say-so.

(2) That said, within the scope authorized by the Basic Law there could be numerous legally permissible possibilities. The Government may have reservations about a "Basic Law compliant" proposal on political grounds. If so, it should "call a spade a spade" and put them forward for open discussion and debate *as political* matters. What we do not want to see is for *political* objections to be presented as *legal* objections, thereby shutting the public out from debating the political merits and demerits of legally permissible proposals. Hong Kong people's long standing respect for the Rule of Law should not be used (perhaps unwittingly) to deal with non-legal matters.

26. We live in interesting times. We face conflicting signals, whether in the field of Rule of Law or constitutional development. When I took up office a year ago I was inundated by press requests for my comments on whether the Rule of Law in Hong Kong was facing "clouds of storm of unprecedented ferocity". Yet near the end of my term another retiring Court of Final Appeal judge had openly and unequivocally assured us that there had never been any interference with judicial appointment. Looking forward, Hong Kong faces a critical period in its constitutional history. Some feel optimistic; some feel doom and gloom; some are uncertain; maybe some couldn't care less.

27. What are we to do? Let me end by sharing with you a letter written by a young man in Hong Kong, then aged 18, on 4th January 1984, thirty years ago. Many of us remember the uncertainty in Hong Kong then. It was shortly after long queues for toilet paper appeared in the supermarkets, and the pegging of the Hong Kong dollar to USD. He wrote this letter to the admissions tutor of his College in Cambridge:-

“Dear Sir,

I was offered a place to read Law in Cambridge starting from October 1984. However, as you may know, the year 1997 is approaching and the future of Hong Kong’s legal system is still uncertain. There has not yet been any formal declaration concerning the future legal system of Hong Kong. I am afraid that in case the future law in Hong Kong differs much from English law my legal knowledge may not fit in very well. After considering the matter, I would like to apply to change my course from Law to Natural Sciences. I apologise for any inconvenience caused”.

28. After one round of correspondence and deep soul searching, this young man stuck to his original choice of subject. Otherwise that young person – 30 years older now - will not be standing here to speak to you today. The moral of the story is:-

“Keep the Faith”.

29. We are a little over two weeks away from Chinese New Year. On behalf of the Hong Kong Bar, may I wish you all good health, a prosperous Year of the Horse and, as the Chinese saying goes, “as lively as dragons and horses”.

Paul Shieh SC

Chairman

Hong Kong Bar Association