

SPEECH OF THE CHAIRMAN OF THE BAR COUNCIL
OF THE HONG KONG BAR ASSOCIATION
ON THE OCCASION OF THE OPENING OF THE LEGAL YEAR
11TH JANUARY 2010

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

1. I confess that, as someone more used to speaking from brief notes, I have felt considerable difficulties in writing a speech which is supposed to be read out loud word for word. There are two main difficulties.
2. First, unless I do read the speech word for word, those reading it in Chinese translation will not have the same experience as those listening to it in English, and worse still those both reading and listening will have to try to fit the two versions together.
3. Secondly, it seems unnatural to write out in full exactly what one might say, several weeks in advance. What if, during those weeks, I have changed my mind? What if, by the time I read these words, the Secretary for Justice has said something to which I might wish to react or respond? What if the President of the Law Society has just revealed to me that his speech contains a joke, and I feel compelled to try to include one in my speech too?

4. But it is now January, and well into the ski season. I am metaphorically at the top of the run, and I will try to stay on the prepared course. However, if I do go 'off piste', I hope I may be forgiven.
5. 1949 was clearly a year of foundations or new beginnings around the world, as countries and organisations struggled to rebuild or remould after the destruction of the Second World War. Here in China, of course, we celebrated last year the 60th Anniversary of the foundation in 1949 of the People's Republic of China.
6. Related to the practice of law, 1949 saw the foundation not only of Hong Kong Bar Association (to which I shall return in a moment), but also the German Federal Lawyers Association and the Japan Federation of Bar Associations.
7. It also saw the foundation of the Legal Aid Scheme in England and Wales, set up by the Legal Aid Act 1949, and as later became the model for the Legal Aid system in Hong Kong. In England, the anniversary was not marked with celebration, but rather sadness at the drastic cuts in funding which have significantly reduced those receiving legal aid services and driven away those providing them. It is to be hoped that the cause of sadness will not affect Hong Kong, but there is significant risk that it will.
8. It is worth remembering 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. In a recent speech in England, Lord

- Neuberger, a Non-Permanent Judge of our Court of Final Appeal, described a Kafka-esque doorkeeper who is able to say that the door to law is open to all, it is simply that the cost of entry is prohibitive.
9. Hong Kong should not and need not suffer any such doorkeeper. Indeed, financially, Hong Kong is in a better position than many societies around the world; perhaps structurally so too.
 10. The man credited with the foundation of US legal aid or assistance programmes, Reginald Heber Smith pointed out that the first jobs of any State are the defence of the realm and defence of the law.
 11. Because of our constitution, the Central People's Government provides for the former. The HKSAR Government can well afford the latter. It should also be borne in mind that savings in Legal Aid costs are nugatory, as they tend to increase costs in other areas (however difficult or even impossible to quantify that may later be).
 12. As an aside, Reginald Heber Smith is credited with inaugurating the practice of calculating lawyers' fees by "billable hours". Perhaps this is the classic example of the lawyer who ensures that the litigant who can afford it should pay proper fees, whilst at the same time assistance is provided to the poorer litigant.
 13. I and others recognize and encourage the importance of truly pro bono work, but that cannot be the answer to the problem. I also believe that a lawyer deserves proper and fair remuneration for his work even when conducting it at the public expense. This is the basis upon

which the Bar hopes and expects Legal Aid fees to be set, and is the basis upon which the Bar has offered its view as to an appropriate level of remuneration for lawyers undertaking the important ‘life and limb’ cases arising out of those who claim status under the Convention Against Torture (CAT), to which Hong Kong is a party.

14. Following the impetus generated by the speech of the then President of the Law Society at this ceremony last year, a new administrative scheme to deal with CAT claimants has recently been put in place. The joint professions have worked hard to persuade the HKSAR Government that the scheme put in place should be efficient and that which best meets high legal standards, and is least susceptible to challenge by judicial review. Some advice has been taken, some not.
15. We remain concerned, for example, that the low level of payment for lawyers representing CAT claimants may limit the number of lawyers prepared to act for such claimants, which will do little to reduce the enormous number of outstanding claims. Many of those claims have no merit. Surely, it is in the best interests of Hong Kong, and indeed potential claimants, that it be made clear that Hong Kong has in place a quick, effective, efficient and lawful scheme for screening out unmeritorious applications. In that way, such claimants are less likely to come to Hong Kong to assert their claims, and the financial demands of dealing with such claimants and their claims will be reduced.
16. As the then Chairman of the Bar pointed out at the last Opening of the Legal Year, 2009 was to be a year of celebration for the 60th

- Anniversary of the foundation of Hong Kong Bar Association. Celebrate we did, and I hope it is thought that if they can do nothing else at least the current Chairman of the Bar and his friends can throw a good party.
17. Sixty years complete a full calendar cycle in the ancient Taoist or Chinese system. There have been exactly four rotations of the 'Earthly Branches' of the Chinese animal zodiac from the foundation of the Bar Association until the change of Hong Kong's sovereignty in 1997, and a further full rotation after.
 18. The continuity and development of the profession over those years, straddling as they do the change of sovereignty, should be evident to all.
 19. Of course, one cannot avoid acknowledging that law and lawyers have fared rather badly in music and literature. In grand opera, for example, lawyers are barely there. Johann Strauss's 'Die Fledermaus' is typical. A lawyer has a small part in the first act of that opera, as counsel to the baritone lead, but his assistance is so ineffective, he manages to get for his client a few extra days in jail. The lawyer in Porgy and Bess ups the price for getting Bess a divorce when she tells him she was never really married before. I probably do not even have to mention the words of Shakespeare or Dickens.
 20. Nevertheless, it can fairly be said that during each of the last sixty years Barristers in Hong Kong have been forthright in the pursuit of

the principles of right and justice which are the true heritage of the profession.

21. As it was once put by one of our Life Members, the Bar has contributed in no small measure to the supreme laws in which lies the safety of the people, and it will continue to do so when necessary, especially when the liberties of people are at stake. Respect for the law by those who govern as well as by those who are governed is the only sure shield for reasonable freedom and the maintenance of the integrity of all members of society.
22. The Bar is ready to speak out on public issues. We speak on the legal aspects of those issues, but of course the Bar does not shy away from speaking on topics simply because the legal points might arise in areas where there is a social or economic or political content.
23. One such topic, on which there is an ongoing public consultation to which the Bar will contribute, is constitutional reform. Suffice it to say at this point that the Bar believes that the development of the electoral methods for selecting the Chief Executive and for the formation of the Legislative Council should proceed within the framework prescribed in the Basic Law. The Bar also believes, and is pleased to note that the Chief Secretary has also expressed on behalf of the HKSAR Government, that the form of suffrage to be achieved within that framework must conform to the principles of universality and equality, whereas the existing functional constituency arrangements do not comply with those requirements.

24. In short, to look back over the past sixty years enables us to acknowledge the role of the Bar in upholding the rule of law in Hong Kong. Today is as good a day as any other to re-affirm that the Bar will continue to be forthright in that role.
25. It should also be understood – and it should be constantly repeated and explained to those who are yet to understand – that the members of the Bar perform their role in a system which emphasises the importance of the independence of the Judiciary. In Hong Kong, we enjoy and we prize the separation of powers. Comparisons with some other countries, or other special administrative regions, are not apt. No greater co-operation is required of any Judge in Hong Kong than that he or she should exercise his or her judicial powers independent of any interference, whether from the Executive or Legislative branches of Government or anywhere else.
26. That Hong Kong, at the beginning of this new legal year in 2010, enjoys such a strong, independent and internationally respected Judiciary is testament to the able leadership of the Chief Justice, who presides over this ceremony for the last time.
27. As the Bar and the Law Society have said before, we understand and respect the Chief Justice's reasons for his decision to take early retirement as from September this year. We recognize that the decision is typical of him, in that it has been taken with the best long-term interests of the HKSAR and its Judiciary in mind.

28. It has also been previously pointed out that there is absolutely no truth in the rumour that the Chief Justice has felt compelled to retire because, despite having worked with six previous Chairmen, he cannot stand the current Chairman of the Bar. Of course, now is not the occasion for any long speech about the Chief Justice. But, if I might speak personally for a moment, I shall be sorry to see him go.
29. In my view, one of the most enduring legacies of his tenure will be that he has instilled in practitioners at the Bar the idea that they should genuinely consider a career on the Bench. Recent, and some further rumoured, appointments confirm that the Chief Justice has encouraged, and no doubt sometimes persuaded – I deliberately avoid the phrase “arm-twisting” – the most suitable legal practitioners to become Judges.
30. Recruitments such as these maintain, and perhaps even improve, the standard of Hong Kong's Judges and are of enormous benefit to the administration of justice in Hong Kong.
31. Such recruitments are also of enormous benefit to my own practice, as each member of the Bar appointed a new judge is one less competitor for me.
32. The Chief Justice is also well-known for ushering into force the new rules of civil procedure, or Civil Justice Reform. As none of you are here today to gain CPD points, I shall resist any temptation – little though there is – to talk at any length on this topic.

33. Nevertheless, you will all know that an important element of the reforms centres on the process of mediation.
34. I have said elsewhere that I have been surprised to see how many times the word 'mediation' is mis-spelled as 'meditation'. Obviously, the two concepts are not to be confused. One is a private and confidential exercise, requiring independent, impartial, continuous, serious and sustained reflection upon an issue, often by removing oneself from reality in order to have revealed the truth or mystery of the thing; and the other is meditation.
35. We shall see whether the settlement statistics from mediation which are dreamed of come into being, but it is perhaps worth remembering the words of another lawyer, the bicentenary of whose birth was celebrated last year 2009. Abraham Lincoln wrote, "As a peacemaker the lawyer has a superior opportunity of being a good man. Discourage litigation. Persuade your neighbours to compromise whenever you can. Point out to them how the nominal winner is often the real loser – in fees, expenses and waste of time".
36. In answer to the anticipated question that surely the lawyer's income is dependent upon disputes to generate his fees, Lincoln answered, "There will still be business enough". I believe he was correct.
37. The relevant Mediation Practice Direction has only been in force for 11 days, but we at the Bar have been preparing for it for some considerable time. My predecessor as Chairman was astute to the importance to Barristers of the practice of mediation, whether they be

- acting as mediators or as advocates in mediation. Numerous accreditation and mediation advocacy courses have been attended by a large proportion of members of the Bar, through all levels of seniority.
38. Barristers can bring their integrity and natural independence to the mediation process. It is part of the essence of a Barrister's job to see all sides of an argument, and with training he or she is well able to assist the parties in seeing that as well, so that it might help to facilitate a settlement.
 39. But whether you are litigating, mediating or meditating, or none of the above, 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

11th January 2010

二零一零年一月十一日法律年度開幕禮

香港大律師公會主席致辭

終審法院首席法官，律政司司長，律師會會長，法官閣下，法律界同業，各位嘉賓，女士們，先生們:

1. 我不得不承認，我是一個較習慣於根據自己簡短筆記加上臨場發揮來作演講的人，因此，先寫一篇完整的講稿，然後跟著講稿一字一句地大聲朗讀出來，對我來說，實在難度不小。主要有兩方面的困難。
2. 首先，除非我按講稿逐字讀出，否則那些看中文翻譯和聽我英文演講的人會有不同的經歷，那些既看中文又聽英文的人就更難把兩者對照理解了。
3. 其次，要在幾個星期前已將講稿一字不漏地寫出來，並不那麼自然。萬一在那幾個星期裏，我的想法改變了，該怎麼辦呢？又或者，當我朗讀這篇講辭時，律政司司長已就某些課題發表了意見而我希望回應，又該怎麼辦？再或者律師會會長的演辭裏有一個笑話，而我覺得我應該在自己的演辭裏也加進一個呢？
4. 但現在已經是一月了，正好是滑雪的季節。我正蓄勢待發，也將盡量不超越跑道。可是，萬一我真的”跑出跑道”，我希望大家會諒解。

5. 1949 年絕對是一個奠基年和世界眾多事情的新開始，各個國家和機構努力地重建被二戰摧毀的一切。在中國，當然，去年我們慶祝了中華人民共和國 1949 年建國的六十周年。
6. 在法律執業方面，1949 年不僅是香港大律師公會奠基的一年（我遲些會再回到這個話題上），同時也是德意志聯邦律師協會（German Federal Lawyers Association）以及日本辯護士（律師）聯合會（Japan Federation of Bar Associations）的奠基年。
7. 同年，在英格蘭與威爾斯推行了按《1949 年法律援助法令》而設立的法律援助計劃。這計劃後來成爲了香港法律援助制度的典範。在英國，這個周年紀念並沒有慶典，只有惋惜，因爲法律援助資源被大幅削減，以致獲法律援助的人及服務提供者均顯著減少。希望這樣令人惋惜的事情不會在香港發生，但現時確實有這樣的風險。
8. 須記得，法律援助計劃的目的是向那些無法負擔訟費的人提供援助，以取得公義。終審法院非常任法官廖柏嘉勳爵（Lord Neuberger）最近曾在英國的一次演講裏提及到一個卡夫卡式的看門人，他說法律之門是爲大眾而開，只不過是那昂貴的入場費令人望而卻步。

9. 香港不應該且不需要容忍這樣的看門人。事實上，從經濟方面來說，香港較世界上很多地方處於一個更好的位置，或者，從建構上亦然。
10. 對設立美國的法律援助或協助計劃甚有建樹的瑞吉納.賀伯.史密斯 (Reginald Heber Smith)曾指出每一個國家首要的工作都是捍衛領土和捍衛法律。
11. 基於我們的憲法，中央人民政府提供了前者。香港特別行政區政府則負責後者。必須謹記的是，減省法律援助開支是沒有用處的，因為它會引起其他方面開支的增加(雖然很難也不大可能去將它具體量化)。
12. 順帶一提， 瑞吉納.賀伯.史密斯正式開創了以“可收費時數”來計算律師費用的先河。或者，這是一個很典型的例證，闡示律師須確保有負擔費用能力的訴訟人承擔適當的費用，而同時也為較窮困的訴訟人提供幫助。
13. 我和其他人認同且支持真正的無償工作的重要性，但這不能解決問題。我也相信一個律師必須就他所做的工作而獲取恰當和公平的報酬，即使這些報酬是來自公帑。這是大律師公會希望且期望法律援助費用設定的基礎，而基於這個前提，對於香港已加入了的《聯合國禁止酷刑公約》（Convention Against Torture (“CAT”））下提出保護申訴的人士的重要“關乎生命危險”的

案件，大律師公會表達了意見，要求為相關律師設定合理報酬水平。

14. 隨著去年律師會會長的演講所引發的動力，一個新的行政計劃已確立，以處理 CAT 申訴。兩個專業團體合力遊說香港特別行政區政府，指出已確立的計劃應具效率、達高法律水平和極少可能受司法覆核質疑。部分建議被接納，部分則否。
15. 我們非常關注，舉例說，代理 CAT 案件的律師的低水平薪酬或會限制願意代理這些案件的律師數目，而這無助於減少龐大數目的待決申訴。這些申訴，很多並不屬實。無疑，最能切合香港甚或潛在申訴人士最佳利益，莫過於清楚地表明香港設有一個快捷、有效、高效率及合法的計劃來剔除不屬實的申請。這樣，此類的申訴人士將不大會來香港提出他們的訴求，而處理這些申訴人士及他們的申訴的財政負擔則會相應減少。
16. 在上一個法律年度開幕禮上，當時的大律師公會主席指出，2009 年是香港大律師公會成立六十周年。我們當然慶祝了周年紀念，而我希望其他人會想，即使現任的大律師公會主席和他的朋友們未必事事週到，他們總有能力把一個聯歡會搞好。
17. 六十年是古代道教或中國曆法的一個完整曆法週期。從公會成立直到 1997 年香港主權變更，剛好經過了四個地支十二生肖的循環，加上另一個循環。

18. 法律專業在過去跨越主權變更這些年來的持續發展是有目共睹的。
19. 當然，誰都不能否認法律和律師在音樂及文學上沒得到什麼好評。舉例說，在歌劇裡，律師幾乎不存在。約翰·施特勞斯的《蝙蝠》（Die Fledermaus）是一個典型例子。一位律師佔了歌劇第一幕的很小一部分，作為男中音領唱的律師，他的幫助實在非常不奏效，只能幫他的客戶爭取了多幾天在監獄的時間。在《波吉和貝絲》中，當貝絲告訴律師她以前從未真正地結過婚，律師提高了替貝絲完成離婚的費用。在此恐怕我不需要複述莎士比亞或者狄更斯的話吧。
20. 然而，我可以中肯地說一句：在過去的六十年，香港大律師很明確並一直努力不懈地追求權利與公義的原則，而這正是這個專業的真正傳統。
21. 正如我們一位終身會員曾經說過，大律師專業為人民安全所依附的最高法律所做的貢獻無可估量，而且它會一直努力，尤其在人民的自由處在危險關頭而挺身而出。統治者以及被統治者對法律都予以尊重才是合理自由和社會的所有成員的安危保障的唯一可靠後盾。

22. 公會無時無刻準備好在公眾事務上發表意見。我們從法律的角度對這些事務作出評論，但當然公會不會因為所要表述的法律觀點將涉及社會、經濟或政治內容而有所迴避。
23. 政制改革正是這類話題之一。現正進行公眾諮詢，大律師公會也將參與。在此時刻，大律師公會表明，認同產生行政長官和產生立法會的選舉辦法的發展必需在《基本法》訂立的框架下進行。大律師公會也認同且欣慰地看到政務司司長同樣地代表香港特別行政區政府表示，在該框架下得出的選舉形式應符合普及和平等原則，但現有的功能組別安排並不符合這些要求。
24. 簡短地說，回顧過去六十年讓我們得以認識到大律師公會在維護香港法治上的角色。今天像其他的日子一樣，是一個很好的時機，讓大律師公會重申它的角色不變。
25. 同樣要被理解的是 - 也是要不斷地向那些未理解的人們重複和解釋的是 - 大律師公會的會員們是在一個強調司法獨立的重要性的制度下履行著他們的職責的。在香港，我們享受著且珍視這樣的分權體制。和其他國家，或者其他特別行政區相比是不恰當的。除了在他或她應當獨立地不受不管來自政府的行政部門或立法機關或者其他的任何干擾而盡力地履行他/她的司法權力之外，再沒有什麼需要任何一個香港法官作出更多的合作的了。

26. 香港在二〇一〇年新的法律年度的開始，享有著這樣茁壯的，獨立的和在國際間備受尊重的司法機構，是對最後一次主持這項儀式的終審法院首席法官的出色領導才能的最佳證明。
27. 大律師公會和律師會以前都曾指出，我們理解並尊重終審法院首席法官提出於今年九月提前退休的決定的理由。我們認同，首席法官的決定正反映他履行職責的一貫作風，一切以香港特別行政區和司法機構的長遠最佳利益為重。
28. 我也曾指出，根本沒有理由相信早前傳聞，即在和大律師公會的六位前主席合作無間後，終審法院首席法官是因無法忍受現任大律師公會主席而做出退休決定。當然，現在並不是要做關於終審法院首席法官的長篇演講。但是請容許我發表一下個人的感受，對他的提早離任，我感到很難過。
29. 我認為，他任內一個最長久的遺產是他灌輸給大律師同業的一個觀點，就是他們應當認真地考慮在事業的某一階段當法官。近日的任命和一些傳聞中的任命應可證實終審法院首席法官曾鼓勵，當然有時候曾說服 - 我特意不用“施加壓力”一詞 - 最適合的法律同業來當法官。
30. 這樣的招募可維持甚或提昇了香港法官的水平，對香港司法有莫大的益處。

31. 這樣的招募對我也有莫大益處，因為每次有大律師被任命為法官，我則少了一個競爭對手。
32. 終審法院首席法官同時也因引入新的民事程序規則，或民事司法改革的實施而著名。既然你們當中沒有人是為取得持續專業發展（CPD）的學分而來這裏，我可以抵受任何誘惑 - 儘管沒有 - 而不用在這個話題上多說了。
33. 不管怎麼樣，你們都知道改革的其中一個很重要的部分，就是發展調解。
34. 我在其他地方提到過我很驚訝地看見調解（mediation）被錯寫為冥想（meditation）。很明顯，兩個概念不可能混淆。一個是私人和保密地進行，要求一個獨立，公正和連續不中斷，嚴肅和長久的在一個問題上的反思，常常要把自己從現實當中抽離以揭示一個事物的真相或者奧秘；而另一個則是冥想了。
35. 我們稍後可從透過調解解決爭議的數據知道夢想是否成真。我想起另一位律師亞伯拉罕·林肯的話（2009 年是他的二百周年誕辰紀念），“作為一個調解者，律師更能當一個好人。勸阻訴訟。規勸你的鄰居作出妥協。告訴他們即使名義上贏了官司，但算一算所花的金錢、時間，到頭來其實是輸家”。

36. 關於律師的收入是靠著爭議來賺取報酬這可預見的問題，林肯的回答是，“生意總還是足夠的”。而我也相信這一點。
37. 雖然相關的調解實務指示僅實行了十一天，但是大律師公會對此所做的準備，則已有相當時間。前任主席很有前瞻，意識到調解執業對大律師的重要性，不論他們是作為調解員或者調解過程裏面的訟辯人，因此舉辦了多個考核和調解訟辯的課程，不少會員都參加了，當中包括不同年資的會員。
38. 大律師可以把他們的誠信以及專業使然的獨立性帶進調解裏。大律師工作的核心部分就是要瞭解一個爭議的各方面，在經過培訓後，他們可以更好地協助各方達到這個目標，有助達致和解。
39. 但不論你是做訴訟，調解或者冥想，或不屬以上所述，都讓我藉此代表大律師公會祝各位新年快樂、身體健康。

高浩文資深大律師

香港大律師公會主席

二零一零年一月十一日