

**Speech by The Honourable Chief Justice Geoffrey Ma
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Hong Kong and the Rule of Law: Is it Tangible?

1. With recent events in Hong Kong, it is inevitable that the focus will at some stage be on the activity in the courts. One sees daily commentaries and opinions from a broad spectrum of interested parties, including the media and from those involved in the law, as to what the courts should or should not be doing in the discharge of their duties. In today's talk, I wish to identify just what are the duties of the courts and the responsibilities expected of them; this goes fundamentally to the practical meaning of the rule of law and just how tangible is this concept.

2. One must preface the discussion with a recognition that lawyers, together with judges, constitute the main players in the administration of justice. Conceptually, in an adversarial system, it is the lawyers who present the necessary materials to a court to enable a legal determination to be made. In an inquisitorial system, in practice, lawyers have a similar role. But it is not your role in the administration of justice that particularly interests me for today's purposes. Rather it is the lawyer's duty in promoting the rule of law on which I wish to concentrate, for it is this duty that constitutes perhaps the most paramount of your duties. It is a duty that is owed not just to the courts but to the community in general and when times are challenging, such as in the case of Hong Kong, this is precisely when the duty becomes important to discharge. It is vital because misunderstandings and misconceptions about the rule of law, on the part sometimes even from those who should know better, can have the effect

of undermining the very foundations of a society. And once undermined, confidence in the rule of law wanes and the community will inevitably suffer.

3. Just what does the concept of the rule of law in practice mean and what are its features that lawyers and judges should be promoting?

4. One starts of course by examining the legal infrastructure in place. For most jurisdictions, the starting point is the constitutional document that governs the community. In Hong Kong's case, our constitutional document is known as the Basic Law,¹ which consists of 160 articles reflecting (as its Preamble declares) the implementation of the basic policies of the People's Republic of China regarding Hong Kong. It is only by looking closely

¹ Promulgated and adopted by the National People's Congress under the Constitution of the PRC.

at the constitutional document that one can assess whether characteristics of the rule of law have been guaranteed or preserved. It is important from a practical viewpoint to see whether such characteristics have been included, for they mark the blueprint of what a community can expect of its legal system. In short, they represent the fundamentals of any legal system. What are these characteristics of the rule of law and, using the example of Hong Kong, do they exist in constitutional documents? I refer to the two most basic characteristics of the rule of law.

5. First, the independence of the judiciary. It is important to bear this aspect firmly in mind particularly when dealing with cases with social, economic or political origins. A corollary of this is that fundamental tenet which the law demands universally: equality before the law. The independence of the judiciary is underlined in three separate

articles of Hong Kong's Basic Law: Articles 2, 19 and 85 refer to Hong Kong being vested with "independent judicial power", such power to be exercised "free from any interference". Article 25 of the Basic Law states the requirement of equality before the law.

6. A practical manifestation of the independence of the judiciary is that judges are required to be completely apolitical in the discharge of their duties. This is not just desirable, it is a constitutional imperative. The duty of every judge is only – and simply – to administer the law. This means dealing with cases strictly in accordance with law, with no extraneous factors such as politics influencing the result. There can be no question of bias. Arbitrariness and bias are the opposites of acting in accordance with the law. Were this not so, this would certainly impinge on the guarantee of equality before the law. Article 92 of the Basic Law states that judges in

Hong Kong are chosen on the basis of their “judicial and professional qualities”, nothing else. Not to be forgotten either is the Judicial Oath required to be taken by our judges: this requires judges to discharge their duties “in full accordance with the law” and to “safeguard the law and administer justice without fear or favour, self-interest or deceit”. The judicial oath taken by judges in your own jurisdictions will be to similar effect.

7. The second fundamental is the respect for and protection of fundamental rights and freedoms. We are all familiar with the content of these rights and freedoms: the freedom of speech and of the press; the freedom of association, of assembly, of procession and of demonstration; the freedom of conscience, the right of access to the courts etc. These and other rights are not only expressly spelt out in the Basic Law, they are repeated in the important Article 39 of the Basic Law.

This article provides that the International Covenant on Civil and Political Rights (the ICCPR) as applied to Hong Kong shall remain in force and be implemented through the laws of Hong Kong. The ICCPR is implemented, virtually word for word, by the Hong Kong Bill of Rights Ordinance Cap. 383 (which contains a Bill of Rights setting out the fundamental rights found in the ICCPR). The importance of Article 39 lies not only in the mere setting out of relevant rights, it introduces applicable international standards in relation to such rights. It is partly for this reason that reference is frequently made to decisions of the European Court of Human Rights on comparable provisions to those rights contained in the Bill of Rights.

8. An analysis of the concept of the rule of law begins with, as I have just done, identifying the applicable legal infrastructure in any given community. However, just as

important if not more so, is the examination of whether those promises often eloquently and forcibly set out in constitutional documents, are fulfilled in practice. This is the ultimate, empirical test of how tangible the rule of law is in any jurisdiction. Part of this exercise involves looking at how the courts have in practice performed their constitutional duties. Here, the usual context in which to test theory against practice is the treatment of what are known as human rights cases, because it is in this type of case where those facets of the independence of the judiciary and the enforcement of human rights most often take centre stage.

9. Particularly over the past 22 years following 1 July 1997,² Hong Kong has witnessed a far greater awareness by the community of fundamental rights and freedoms than before, resulting in a significant increase in the

² The date when the People's Republic of China resumed the exercise of sovereignty over Hong Kong.

number of constitutional and administrative law cases handled by the courts. Most of such cases have of course involved the Government as a party. In brief, I wish to highlight the following points that emerge from the decisions of the Hong Kong courts:-

- (1) A purposive and generous interpretation is to be given to fundamental rights and freedoms. This is because such rights and freedoms have to be given real meaning and effect, this being the clear intention of the Basic Law. After all, that chapter of the Basic Law setting out rights and freedoms is headed “FUNDAMENTAL RIGHTS AND DUTIES OF THE RESIDENTS”.³ Correspondingly,

³ Three points should be made. First, although reference is expressly made to the residents of Hong Kong, rights and freedoms are also enjoyed by non-residents as well: Article 41. Secondly, as far as any duties are concerned, the requirement is the obligation to abide by Hong Kong law. Thirdly, the use of the word “fundamental” is by no means unique to Hong Kong. Article 10 of the Constitution of the Republic of Korea refers to “fundamental and inviolable human rights of individuals”.

measures which seek to restrict or limit fundamental rights and freedoms are strictly construed.

- (2) The approach of the courts has often been to balance the various rights that collide against one another in any given case. For example, the freedom of opinion or expression is not without limits. As Article 16(3) of the Hong Kong Bill of Rights⁴ states:-

“The exercise of the rights provided for in paragraph (2) of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary –

⁴ This corresponding word for word to Article 19(3) of the ICCPR.

- (a) for respect of the rights or reputations of others; or

- (b) for the protection of national security or of public order (ordre public), or of public health or morals.”

It is important to see this balancing approach for what it is. The approach of the court is not to deny or sacrifice one right against another right; the objective of the court is to try to ensure that all rights are properly respected and acknowledged. This is a part of the overall spirit of the law in not just respect for individual rights and liberties, but also a respect for the rights and liberties of others.

(3) At all times in the determination of cases before them, the courts will only apply the law. I have earlier emphasised this point, but it is worthwhile reiterating it. Even though the determination of cases involving fundamental rights and freedoms will often originate from political, economic or social situations, the courts' role is only to determine the legal issues by applying the law and nothing else. Political, economic or social influences simply do not affect the outcome of cases; only the proper application of the law does.

10. These points I have just highlighted about the rule of law are at all times, and without exception, evident in the work of the courts in Hong Kong, but they are sometimes lost sight of when the result in cases, especially high profile ones, do not go the way that certain people or interest groups would

wish. Hong Kong is not unique in the criticism, often harsh and even sometimes quite extreme, leveled against courts and individual judges. Such criticism can come from many quarters, including the media, commentators, politicians and even some lawyers.

11. Take a recent example when bail was granted to some protestors a few weeks ago. The charges against them included incitement of others to take part in an unlawful assembly, organising an unlawful assembly and taking part in an unlawful assembly. There was much stinging criticism made against the magistrates who granted bail, the Judiciary as a whole and also against me personally. Yet, the application for bail was dealt with strictly according to law. In this context, I refer to two important aspects:- first, the relevant statutory provision⁵ states that a court “shall” grant

⁵ Sections 9D and 9G of the Criminal Procedure Ordinance Cap. 221.

bail to an accused unless there are shown to be substantial grounds to oppose bail (in other words, there is a presumption that bail will be granted, this flowing from the presumption of innocence); secondly, in order to view the applications for bail in proper context, it would be proper to ask whether or not the prosecution consented to the granting of bail.

12. These aspects, obvious to anyone who looked at the matter in proper context, were hardly (if at all) made known to the public at the time (they have been since). But whose responsibility is it to raise these points?

13. Is it the Judiciary's responsibility? Here, one must bear in mind the fact that, certainly as far as the Hong Kong courts are concerned, its work is transparent. This transparency is evident from two facets: first, all proceedings

are open to the public;⁶ secondly, the reasoning of the courts in arriving at any decision is also made public, so that the public can see precisely how a court has dealt with a case and whether it has done so strictly in accordance with the law. Beyond this transparency, it is not appropriate for the court to have to explain why and how it has arrived at a decision.

14. Is it the responsibility of the Secretary for Justice (in some jurisdictions called the Attorney General) to explain this to the public? Without doubt, the Secretary for Justice has this responsibility.

15. Is it the duty of the legal profession to speak out as well? In my view, it clearly is. I introduced this speech by identifying the duty on lawyers to promote the rule of law and stating that this is a duty owed to the community in which you

⁶ Except where the public interest dictates otherwise, such as where children are involved.

work. Speaking up for the rule of law as it is properly understood is very much a part of what a lawyer should be doing. Look within yourselves and ask whether you are prepared to stand up and be counted?

16. I thank the International Bar Association for the honour of being asked to speak at this 2019 Conference.

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