CJ's keynote address at International Malaysia Law Conference 2014 in Kuala Lumpur (English only)

Following is the keynote address by the Chief Justice of the Court of Final Appeal, Mr Geoffrey Ma Tao-li, titled "The Practice of Law: A Vocation Survives Amidst Globalisation", at the International Malaysia Law Conference 2014 in Kuala Lumpur, Malaysia, today (September 24):

Introduction

It is a great privilege to be asked to deliver this address at the International Malaysia Law Conference 2014. This is the second occasion this year I have had the good fortune of being in Kuala Lumpur; in April I had the pleasure of delivering the 5th Tun Hussein Onn Lecture to celebrate the 10th Anniversary of the Lincoln's Inn Alumni Association (Note 1). In that Lecture, I concentrated on concepts of justice and integrity seen against the constant challenge of the courts to reach just outcomes in the context of changing circumstances. In this address, I look to the legal profession.

The challenges facing the legal profession in modern practice, particularly in what is neatly encapsulated in the word "globalisation", are self-evident. This conference bulges with sessions discussing those challenges. A mere glance at the Conference programme shows that even three days barely cover the breadth of this topic. The use of the word "vocation" in the title of my address this morning is deliberate. It is not a word that is used much these days and certainly not when referring to the legal profession. It used to be. It was seen to be synonymous with a concept of honour, of doing the right thing. I do not of course use the term in the religious sense - no Damascene connotations here. We are on a surer modern footing when we talk of the legal profession being an honourable one. After all, the Inns of Court are still called Honourable Societies.

However, the word "honour" is in danger of being relegated into an anachronism these days, as meaning perhaps little more than polite and stylish behaviour. I do not think so, for honour retains very much a practical value. The concept of honour in the legal profession is one that very much survives in modern legal practice because the concept represents the safeguarding of values that enables the legal profession to serve the community, or if you like the public interest, fully and properly. Globalisation is a fact of life - a constant in the language of my lecture earlier this year - but in the middle of changes, one never loses sight of fundamental values that go to the heart of the concept of justice and fairness. This is what marks the legal profession as properly an honourable one and not, as many people or even lawyers think, a business. And it is to this aspect - the duty owed to justice and fairness - that I devote the remainder of this address. I deal with two principal facets of this: first, the extent of duties owed to the Court and its modern relevance; secondly, courage and the advocate. The first facet recognises the role of the lawyer in the administration of justice; the second facet, connected to the first,

acknowledges the special spirit displayed by those lawyers who understand the right of everyone to be legally represented, however unpopular a cause may be.

Duties Owed To The Court

Nowhere is the tension between traditional values and change more apparent than in the consideration of duties owed to the court. Lawyers, together with judges, form the key personnel in the administration of justice (Note 2). Having in place structured institutions and laws is of course vital, but the human element (including human error) ultimately defines the efficacy of a judicial system. The people who operate within a legal system are at once the strongest link in the chain as well as the weakest. Of course, judges and lawyers can do little if laws are oppressive but in most jurisdictions, we look largely to the human element to make the necessary difference. While judges have much more straightforward rules regarding conflicts of interest (Note 3), the position of lawyers is more complex.

There are essentially four groups who are interested in the activity of the courts. Overlaps of course exist, but it is useful to identify just how different these separate interests can be:

(1) First, for the courts, the administration of justice is the key interest. The administration of justice lies essentially in the effective and efficient resolution of disputes to enable justice to be done according to the law, given - and this is important to recognise - the limited resources with which the courts have to operate.

(2) Secondly, for the legal profession, the focus of this address, the interests are more complex, involving not just potential conflicts but in practice very real ones. The duties owed to the court often conflict with those owed to the client (not to mention the duties to the lawyer himself or to his firm). These interests, relatively easy to identify, are nevertheless complex owing to the many grey areas in which they operate. It would be much simpler if lawyers could simply be regarded as businessmen, or merely carrying on a trade, but this is not the case.

(3) Thirdly, the interests of the clients of lawyers are purely selfish: the resolution of their dispute in a way most favourable to them. In reality, clients can be regarded as consumers of legal services in the same way as they are consumers of products.

(4) Fourthly, the public's interest (or the public interest) lies in the effective and just enforcement of rights and liberties by an independent and efficient judiciary committed to the rule of law. How this is brought about is through the proper administration of justice.

In examining the question of duties owed to the court by the legal profession, one must pose the question whether this concept has any real significance in modern times beyond not misleading the court. Many dicta from the highest courts of those jurisdictions with which we are all familiar refer to duties owed to the court, but what is the modern relevance and, more important, in practice, what is the actual content of these

duties? I would say, in truth, now more than ever this concept retains a practical significance that continues to provide a lynchpin, particularly in a world where money seems to dominate, to the proper administration of justice. But its limitations must be recognised.

It is important to be reminded of the context of duties owed to the court by legal practitioners. Most of us work in jurisdictions where legal proceedings are adversarial in nature. That by itself gives a clue as to the role of duties owed to the court. This role is crucial because courts must have the proper materials before them before judges can even start to adjudicate justly on any matter. In jurisdictions where proceedings are adversarial, reliance is placed on lawyers to provide the necessary materials. In civil jurisdictions based on Roman-canon procedure, which places the responsibility on judges not just to adjudicate but also to gather evidence, the role of the lawyers (and the nature of their duties) are quite different. Such systems, the inquisitorial systems, however require a substantial staffing of judges. As an interesting illustration of the staffing requirements in civil jurisdictions, reference can be made to an observation by John Dawson in his History of Lay Judges. He calculated that by the 18th century, France had 5 000 royal judges, whereas in the English courts of Chancery and Common Law at that time, the judges numbered about 15.

The history of how England developed into a jurisdiction where proceedings became adversarial in approach provides a useful background to understanding the adversarial systems in common law jurisdictions (Note 4). In an interesting paper headed Bifurcation and the Bench: The influence of the jury on English conceptions of the judiciary delivered at the 2007 British Legal History Conference held in Oxford University, Professor John Langbein (Note 5) observed that in the 19th Century, it was baffling, given the volume of cases that had to be dealt with, why there was a severe understaffing of judges. Chancery judges adopted at that time almost an inquisitorial approach - Chancery procedure being based on Roman-canon principles - (Chancellors had for centuries been religious men, usually a bishop or archbishop). Professor Langbein observed:

"What kept Chancery from fulfilling its adjudicative promise is that Chancery never came to grips with the staffing implications of the Roman-canon procedures it was employing. Gathering and evaluating witness testimony and documentary evidence is time-consuming work. If you are going to have such a system, you need a large bench."

However, court proceedings were not entirely inquisitorial of course. Juries were also used in civil cases (Note 6). As cases became increasingly complex, it became apparent that juries were unable to determine cases without considerable assistance (or, more accurately, intervention) from the bench. Juries needed considerable assistance in the law before they could even begin to find the facts (at least the relevant ones). Gradually, more issues which were hitherto regarded as questions of fact were seen instead to be questions of law (for example, most notably, the issue of damages). Judges were even at one stage driven to asking jurors to reveal their thinking to the court and, where the judge thought

this to be desirable, to send the jury away for deliberation time and time again so that the desired result could be reached.

All this led to the noticeable shift from jury to judge in terms of the adjudication process. Nowadays, in many common law jurisdictions it is almost unheard of (save in defamation cases) to have a jury in civil trials. Historically, this shift led to the importance of lawyers in the overall administration of justice. Furthermore, no longer could judges, particularly when they were in short supply, adopt any sort of inquisitorial process. The parties, or rather the parties' lawyers, came to be relied on by the courts to place all relevant materials before them in order that the dispute could be properly resolved. As was often the case in the 18th and 19th centuries, it was the courts of Chancery which led the way. The work of evidence gathering, perhaps the most time consuming part of the preparations for a case (encompassing as it does not only the location and proofing of witnesses but also that bane of modern litigation, the discovery process), was left in the hands of the lawyers, rather than the courts. As Professor Langbein said of this change:

"As Chancery's subject-matter jurisdiction grew, Chancery responded by delegating ever more of its workload, especially evidence-gathering. The pattern that emerged was to allow private lawyers acting on behalf of the litigants to control the investigation, by drafting interrogatories to be put to witnesses. This departure from the Roman-canon model of court-conducted evidence-gathering effectively privatised the investigative phase of the adjudicative process."

And so we move to the present position. Understaffing, a finite supply of judges and limited public resources have become facts of life, and provide what appears to be a long term backdrop against which most of us have to accept in practical terms when dealing with the administration of justice. Judging is of course not just a "job" or a means of employment: excellence is required. Playing one's part in the administration of justice means the delivery of judgments of a high quality, judgments which provide a useful precedent in the exposition of the law and above all, judgments which justly and clearly resolve the dispute before the court.

To be added to this is the modern trend in almost every common law jurisdiction to embark on and implement substantial civil procedural justice reforms. In the United Kingdom, one notes the changes which led to a complete renovation of the civil procedure system there - the Civil Procedure Rules now have been in existence for many years. In Hong Kong, we have adopted many of the features of the Woolf Reforms in the United Kingdom in our own Civil Justice Reform, highlighting what we have termed the underlying objectives of civil procedure (Note 7).

Never before has so much been demanded of the quality of justice. The modern judiciary, more than ever, requires as much assistance as it can get in order to begin properly to fulfil its responsibilities. The role of lawyers is therefore as important, if not more so, than it has ever been.

For completeness, I should just add a word about criminal proceedings. The jury system first surfaced in the late 12th century in England. However, it was not until relatively late in the day that lawyers made a real impact on the shape of criminal proceedings. Until the middle of the 19th century, judges were reluctant to allow much participation by lawyers, for fear that trials would be prolonged. Criminal judges therefore entered into a quasi-partnership with jurors whereby judges and juries would often work together to secure what was seen to be a just result. Lawyers, in short, were seen to be an impediment to the smooth and efficient operation of the wheels of justice. This attitude changed with the passing of the Prisoners' Counsel Act in 1836, which allowed defence counsel the right to address a jury for the first time. This was the first step towards what is now automatically assumed; it was up to the parties to present before the judge and the jury all relevant materials.

But what is the proper view we ought to take of the role of the lawyer in the administration of justice by the courts? In Baron Alderson's time, as McHugh J observed in D'Orta-Ekenaike v Victoria Legal Aid (Note 8), "The institution of barristers is principally to assist the court in the dispensing of justice." Traditionally, lawyers in common law jurisdictions are seen to be officers of the court: in Hong Kong, the relevant statute governing legal practitioners (the Legal Practitioners Ordinance, Cap 159) state expressly that solicitors are officers of the court (s 3(2)). Barristers are obviously officers of the court, though for historical reasons, not called as such. But this label only tells half the story, if that. Lawyers also owe considerable duties to their clients and it is simply fanciful to suggest otherwise. And, as suggested earlier, lawyers do in reality also have regard to their firm's and their own interests. This is at times perhaps an understatement. In the US legal system, for example, the primary duty of a lawyer is to the client and lawyers have never really owed duties to "justice" inconsistent with the duties owed to the client. Charles Houston, that great professor of law at Howard University who had a massive impact on a whole generation of African-American lawyers (like Thurgood Marshall) in between the two World Wars and beyond, saw his role as training lawyers to "fight and die" for their clients. Those were the days in which the great law schools of Harvard, Yale and Columbia bragged that they were not training lawyers so much as recruits for the big Wall Street law firms.

And yet, lawyers have a pivotal role to play in the administration of justice and they are expected to fulfil this role by both the public and the courts: they do very much have duties to the court and to the administration of justice. Before going into this, I must delve in a little more detail into the pressures that face a lawyer in the modern legal world. An understanding here is essential in order, accurately and realistically, to identify the nature of the duties owed by lawyers to the court.

When I started practice as a barrister nearly 35 years ago, I was number 125 on the roll of barristers. There are now well over 1 000 barristers in Hong Kong. The number of solicitors has also multiplied by over 10 during that time. The law schools have trebled or even more, providing law students and ultimately lawyers in ever increasing numbers. There are a number of outstanding lawyers among them, but inevitably competition is

great. Practice promotion, frowned upon not that long ago, is now commonplace and even expected: it is regarded as a constitutional right. Even with the massive growth in a financial centre such as Hong Kong over the years, and this includes the proliferation of work generated by the even more massive commercial growth in Mainland China, I daresay the volume of work for lawyers has not quite matched the simple increase in the number of lawyers. But on the whole, legal work is lucrative and the financial rewards are certainly tempting for many lawyers. I have no concrete figures but, like Malaysia, the United Kingdom, Australia and New Zealand, legal services have expanded to such an extent that they represent a not insignificant part of the overall economy.

Litigation and dispute resolution have grown as part of the expansion in legal services. Lawyers who engage in this part of legal practice are of course not immune from the modern pressures of intense competition. Not to put too fine a point on it, in short, law has become big business, where substantial profits are to be made. Whereas in years long gone, lawyers would be talking in terms of guineas, they now discuss fees in terms of millions and multi-millions in whatever currency lawyers are paid in these days.

Intense competition means for many the dominant position held by the client. As I have described earlier, the client's interest is a straightforward and selfish one: his, her or its own interests. A lawyer is expected to deliver to the client what he or she wants. If a lawyer is not prepared to go all out, the client will simply look elsewhere. Lawyers have to make a living, which may not be easy because their overheads compared with their earnings are extremely high and there is no guarantee of a regular income.

This is the rub as far as duties to the court are concerned. Many authorities exist to the effect that no conflicts exist between duties owed to the court and the duties owed to the client: the former prevail every time. Statements to this effect have come from the most eminent jurists in the common law world: Chief Justice Mason in Giannarelli v Wraith (Note 9); Chief Justice Gleeson in D'Orta-Ekenaike v Victoria Legal Aid (Note 10); Lord Reid in Rondel v Worsley (Note 11). Warnings have been sounded as to the evils of economic self-interest when ethical demands dictate a different course: see here the dissenting judgment of Justice Sandra Day O'Connor in Shapero v Kentucky Bar Association (Note 12).

Yet, as we all know, there is an inherent conflict at times (or even often) between the interests of the client and the interests of the court. The court is interested in justice overall. The client is interested usually in justice for himself or herself. The lawyer can at times be caught in the middle as to what ought to be the appropriate course.

This inherent conflict has, in many jurisdictions, to be viewed against the erosion in the immunity afforded to advocates. I do not wish to embark on a detailed discussion of this topic today. It is sufficient to say that in many common law jurisdictions, the immunity for advocates from negligence suits no longer exists: in the United Kingdom (see Arthur JS Hall and Company (a firm) v Simons) (Note 13), in New Zealand (see Lai v Chamberlains) (Note 14). In the United States, it is doubtful immunity ever existed (see Ferri v Ackermann) (Note 15). In Canada, an unsuccessful attempt was made to mount an

argument based on immunity (see Demarco v Ungaro) (Note 16). Australia seems to stand out in preserving the immunity given to advocates: see D'Orta-Ekenaike. I look forward to the Plenary Session tomorrow where Justice Susan Kiefel will discuss this issue. The absence of an immunity from suit, quite clearly a policy decision of the courts, serves to heighten the pressures faced by lawyers in relation to their clients. This aspect, linked as it is to facets such as compulsory insurance, is not to be lightly ignored in the present discussion.

I have so far only referred to what can best be described as economic pressures on lawyers. One must of course not lose sight of fundamental principles of law or justice that compel a lawyer to act in certain ways which overwhelmingly prefer the interests of the client. For example, in criminal matters, the constitutional right of silence and the presumption of innocence both require that a lawyer for the defence must act in his client's best interests to avoid conviction, rather than to assist a court, jury or certainly the prosecution. Another obvious example is legal professional privilege, this fundamental principle applying in both civil and criminal proceedings. This is, commonly, a constitutionally protected right: in Hong Kong, Article 35 of the Basic Law refers to the right to confidential legal advice. The responsibility of the lawyer in adversarial proceedings is recognised in statutory provisions regarding aspects such as costs. In Hong Kong, when a court considers making a costs order against a legal representative personally, or an order for wasted costs, account must be taken of "the interest that there shall be fearless advocacy under the adversarial system of justice" (Note 17).

The identification of these "pressures", as I have rather inelegantly called them, brings home the proper context in which one must view any discussion of duties owed to the court. As with so many other aspects of the law, different and at times conflicting - but entirely legitimate - interests come into play. It is, I would suggest, unsatisfactory to approach the topic of duties owed to the court simply by reference to vague notions of truth and justice. One really has to look into a number of facets of what we understand to be encompassed in these terms: a fair trial, a just resolution of disputes, fair and proper representation and proper court procedures. Viewed in this way, a clearer picture emerges of the administration of justice, and of the role of judges and lawyers within it.

I agree to a certain extent with the view taken in the United States that the primary duty of the lawyers is to provide proper legal representation to persons who are not in a position fully or properly to represent themselves. That said, quite clearly the lawyer must also bear in mind his role in the overall administration of justice and this includes the concept of duties owed to someone or something other than his or her client. The duties owed to the court are a significant and extremely important part of a lawyer's function. Apart from well-known authorities to this effect (to which I have already made reference), statute has reinforced this.

The content of the duties owed to the court is largely similar in all common law jurisdictions. Upon analysis, they reflect (and respect) the different roles a lawyer is expected to play, in the context I have attempted to identify. So what are these duties?

Many authorities, textbooks, articles and speeches have in far greater detail enumerated the content of lawyers' duties to the court (Note 18). It is neither necessary nor desirable to add to this impressive literature. I am more keen to explore those specific areas where there can at times be a real conflict between the wishes of the client and the duties owed by lawyers to the administration of justice. In those areas where a conflict arises, the duty to the administration of justice (in other words to the court) is of course the dominant one. However, within these areas, there is ample recognition of the fact that lawyers also owe duties to their clients. It is only when certain boundaries are crossed that a lawyer must then adopt certain courses of action. A good summary of the point can be found in the speech of Lord Hoffmann in the Arthur JS Hall case (Note 19) (the court was of course looking at this aspect in considering the question of immunity from suit):

"3. Divided loyalty

Lawyers conducting litigation owe a divided loyalty. They have a duty to their clients, but they may not win by whatever means. They also owe a duty to the court and the administration of justice. They may not mislead the court or allow the judge to take what they know to be a bad point in their favour. They must cite all relevant law, whether for or against their case. They may not make imputations of dishonesty unless they have been given the information to support them. They should not waste time on irrelevancies even if the client thinks that they are important. Sometimes the performance of these duties to the court may annoy the client. So, it was said, the possibility of a claim for negligence might inhibit the lawyer from acting in accordance with his overriding duty to the court. That would be prejudicial to the administration of justice."

The conflict between duties owed to the court and the duty owed to the client has come to be known as the "divided loyalty" aspect.

I have earlier queried whether the content of the duty owed to the court amounts in practice to no more than the duty not to mislead. It is true that the majority of the duties owed to the court can, on analysis, be classified under this head. The duty not to mislead includes the following important facets:

(1) In civil proceedings, there is a heavy duty on a lawyer to ensure full and proper discovery. Severe consequences follow where this duty is breached. The theory here ought to be quite simple: there is an obligation to advise the client that disclosure of relevant documents should be made, in particular of documents which are against the client. Yet, it is the latter aspect that in practice can sometimes provide a stumbling block, as increasingly what can best be described as "ingenious" attempts are made to avoid discovery of such documents. There are of course built-in and legitimate limitations to the disclosure of relevant documents or facts. Here, I refer again to the aspect of legal professional privilege: relevant, indeed crucial, documents may not be revealed where this privilege applies. In criminal proceedings, there are no discovery obligations on a defendant at all. In contrast, but of course subject to the recognised privileges which can apply, the prosecution must disclose all relevant documentation and materials (the disclosure of unused materials is a manifestation of this obligation).

(2) In criminal proceedings, it is interesting to note the duties of counsel when the client has confessed his guilt to the offence charged. While some may argue that counsel should at least withdraw from representing the client, this is not the case. In Hong Kong, as elsewhere, the only bar on counsel is putting forward a positive case inconsistent with the confession. Within this limitation, counsel is able to (and if he continues to act for the client, expected to) challenge the prosecution witnesses by way of credibility or otherwise. The Code of Conduct of the Hong Kong Bar Association states this to be the duty of counsel (Annex 13), "His duty is to protect his client as far as possible from being convicted except by a competent tribunal and upon legal evidence sufficient to support a conviction for the offence with which he is charged". In Saif Ali v Sydney Mitchell and Co (a firm) (Note 20), Lord Diplock observed that in criminal proceedings, defence counsel may passively stand by and watch the court being misled by the prosecution by reason of its failure to ascertain facts which happen to be within defence counsel's knowledge. This was seen to be consistent with the rule that it was up to the prosecution to prove its case. Even in civil proceedings, subject of course to not misleading the court, there is no obligation on lawyers to assist the court (or the other party) on a line of inquiry that is detrimental to the client.

(3) The duty not to mislead also includes the obligation to ensure that the court is properly apprised of the relevant law; in other words, the duty to inform the court of relevant decisions or statutes on a point of law. In Hong Kong, this duty is confined to civil cases. There is no obligation as far as criminal cases are concerned (unless this coincides with the client's interests). The duty can be a difficult one to fulfil in practice where, for example, non-binding but persuasive authorities are involved, including authorities from outside the jurisdiction.

From the foregoing, it can thus be seen that even within the duty not to mislead, there is ample allowance made to recognise the duties owed by a lawyer to his or her client. The borderline between what is acceptable and what is not, seems to me on the whole to be clear in most situations.

But do the duties owed to the administration of justice go beyond not misleading the court? In my view - and arguably this is the only other important aspect of the duties owed to the court - there is the important duty to assist the court in the effective and efficient resolution of disputes before it. In a passage that has consistently been followed as well as cited, the point was made by Chief Justice Mason in Giannarelli (Note 21):

"A barrister's duty to the court epitomises the fact that the course of litigation depends on the exercise by counsel of an independent discretion or judgment in the conduct and management of a case in which he has an eye, not only to his client's success, but also to the speedy and efficient administration of justice. In selecting and limiting the number of witnesses to be called, in deciding what questions will be asked in cross-examination, what topics will be covered in address and what points of law will be raised, counsel exercises an independent judgment so that the time of the court is not taken up unnecessarily, notwithstanding that the client may wish to chase every rabbit down its

burrow. The administration of justice in our adversarial system depends in very large measure on the faithful exercise by barristers of this independent judgment in the conduct and management of the case."

In modern day civil proceedings, lawyers are expected to fulfil this important duty. Tactical games which serve no legitimate purpose are not just frowned upon, they are forbidden. Legal professions the world over should recognise this sea change - we have often heard these days the need to have a cultural change in litigation attitudes. In some jurisdictions, this is reflected in statute. In Victoria, s 16 of the Civil Procedure Act 2010 requires lawyers to recognise a paramount duty to the court to assist in the administration of justice. In Hong Kong, the rules of court specifically require that legal representatives assist the court to fulfil the underlying objectives of civil procedure (Note 22). Assisting in the efficient and effective resolution of disputes includes advising and encouraging alternative forms of dispute resolution. This obligation has now become commonplace in the professional codes of conduct.

Seen in this way, the concept of duties owed to the court can more accurately be put as duties owed to the legal system, a system which has fairness and justice as paramount objectives. It retains modern relevance in my view and there is considerable honour in a profession which recognises that. But courage is also needed. It is not needed on every occasion - after all, for most lawyers, the day to day activities consist of construing or drafting contracts, advising on joint ventures, litigating, etc. But it is important, I think, to recognise that underlying the practice of law, is courage and the courage of one's convictions. It is to this I now turn.

Courage

I have in the past talked about judicial courage (Note 23), but it is the courage of the lawyers I want briefly to highlight today. In November 2012, in London, I attended the 90th birthday celebrations of a dear friend at the Bar, Sir Sydney Kentridge QC, arranged by his colleagues at Brick Court Chambers (Note 24). I have drawn much inspiration over the years from Sydney ever since I was a pupil in those Chambers in 1978. I recommend to everyone a collection of his speeches contained in his book Free Country: Selected Lectures and Talks (Note 25).

Courage in this context stems from a respect for the rule of law and fidelity to the law. It is quite the opposite of treating the practice of law as a business. I set the scene with a well-known quote from Sir Frederic Sellers (Sellers LJ) in Ex parte Mwenya (Note 26):

"There may come times in a country's history when it may appear highly inconvenient or politically hazardous that the law should pursue its course, but in a court of law such considerations are irrelevant and cannot serve to deprive a subject of a right...".

An independent judiciary committed to the rule of law adopts as second nature what is contained in this quote but lawyers have to act for those whose fundamental rights have been or might be infringed. In Free Country, Sydney Kentridge makes a number of

references to Henry Brougham (Note 27). He quotes from a speech Lord Brougham made after a Bar Dinner some 40 years after his defence of Queen Caroline:

"In this country the administration of justice depends principally on the purity of the judges; but next on the prudence, the discretion and the courage of the advocate. No greater misfortune can befall the administration of justice than an infringement of the independence of the Bar or the failure of courage in our advocates."

The context of courage here is the courage to uphold those principles on which the rule of law is founded: the entitlement of every person to be treated equally, the enjoyment of fundamental human rights and the ability to enforce those rights in a court of law according to law and the spirit of the law. Most constitutions contain the basic structure but the reality may be a different matter entirely. Sometimes weakness is to be found in the judiciary itself but even with a strong and independent judiciary, this may not be enough. It will also take a committed and courageous legal profession to ensure the practical reality of the rule of law and the full enjoyment of the spirit of the law.

A daily reminder of this is of course the cab-rank principle. I fear that with the increasing advent of globalised legal practices - an inevitability one must accept - the traditional acceptance of briefs to represent whomsoever is next in line who asks for an advocate's services, seems at times to be fading. Too many lawyers these days choose the clients whom they want to represent. Some chose to act always for the government, others only for opponents of the government. Some act with a political agenda in mind. I also find extremely disappointing an advocate who always chooses sides as if he or she is personally identifying with the cause of the client, rather than do the very thing expected of a lawyer: to act for the client to be best of his or her ability to ensure that the client is given a fair and just hearing in a court of law in accordance with the law. At all times, lawyers (and this includes judges) are servants of the law and of the rule of law.

Whenever a lawyer takes on a case for an unpopular client or cause, the public at large may identify the lawyer with the client or cause and react in a negative way against the lawyer. Pressure may even be brought to bear. Persons accused of unspeakable crimes such as terrorism, or persons within minority or certain religious groups all have incurred the wrath of the majority in any society from time to time. Whenever a lawyer stands up to act for such persons, the courage of one's commitment to the spirit of the law is displayed. In the days of apartheid in South Africa, only a handful of lawyers were willing to stand up to act for native South Africans seeking to enforce their political rights. These South Africans were often persecuted and treated in the most barbarous way. Sydney Kentridge was one of this handful of lawyers and I have no doubt he was probably looked upon with a certain degree of disdain in many quarters of what was then South African society. I recall one summer when I was 19, going to Athens on holiday with my father. We met a South African couple and I mentioned I had met Sydney Kentridge who had just taken up a seat at Brick Court (I had spent a part of the summer there). The lady only said this, "Oh, he's one of those, isn't he?".

Sydney acted for Nelson Mandela in his treason trial in 1958, he acted for Albert

Luthuli (the former President of the African National Congress in the 1950's) and also for Archbishop Desmond Tutu, long before these men became Nobel Laureates, at a time when they were regarded as undesirable persons in South Africa. He acted for many others. What strikes me about Sydney Kentridge was his commitment to the rule of law: whether he acted for these Nobel Laureates in high profile political cases or in complex commercial litigation, he was at all times faithful to the law. It was the law that was his master.

In his talk The Ethics of Advocacy given at the Inner Temple in January 2003, he said this (Note 28):

"During the long years of apartheid in South Africa, I believe that one of the things which kept the flame of liberty flickering was that opponents of the apartheid regime charged with offences including high treason were able to find members of the Bar to defend them with such skill as they had and with vigour. This was not because they necessarily sympathised with the aims or methods of the accused, but rather because they recognised their professional duty to take on those cases."

No doubt, that handful of lawyers like Sydney Kentridge who performed their professional duty, were encouraged and comforted in the belief that for all lawyers, this was the right thing - indeed the only thing - to do. They would have had the support, moral or otherwise, of their peers and colleagues. There are few greater privileges than this kind of respect.

Conclusion

To conclude, one can see that honour remains vital in the practice of law. It is not every day of course that you will need to think along these lines but every lawyer needs to understand the fundamentals of the profession. It is a vocation, the fundamental values will - and certainly ought - never change, whether amidst globalisation and indeed amidst any other trend. It is only through this recognition that the public interest is served and the confidence of the community in the profession, sustained.

Note

1. Constants and Variables: The Perpetual Challenge of the Courts. 5th Tun Hussein Onn Lecture, 19.4.14, Kuala Lumpur.

2. There are views that perhaps arbitrators and mediators also now form a part of the administration of justice. This talk concentrates on the activity of the courts.

3. Mainly in the rules regarding bias, actual or presumed. See, for example, R v Gough [1993] AC 646; Porter v Magill [2002] 2 AC 357; in Hong Kong, Deacons v White and Case LLP (2003) 6 HKCFAR 322.

4. Malaysia, like Hong Kong, is regarded by many a common law jurisdiction. Article 60 of the Federal Constitution defines "laws" to include the common law. The Basic Law of the Hong Kong Special Administrative Region provided for the maintenance of the common law and rules of equity in Hong Kong following the resumption of the exercise of sovereignty on 1.7.1997: see Article 8 of the Basic Law.

5. The Sterling Professor of Law and Legal History at Yale Law School.

6. The jury system can be traced back to Henry II (1133-1189), providing an obviously preferable alternative to trial by ordeal, combat or (much favoured in civil law jurisdictions at the time) torture.

7. Order 1A, rule 1 of the Rules of the High Court in Hong Kong states:

"1. The underlying objectives of these rules are -
(a) to increase the cost-effectiveness of any practice and procedure to be followed in relation to proceedings before the Court;
(b) to ensure that a case is dealt with as expeditiously as is reasonably practicable;
(c) to promote a sense of reasonable proportion and procedural economy in the conduct of proceedings;
(d) to ensure fairness between the parties;
(e) to facilitate the settlement of disputes; and
(f) to ensure that the resources of the Court are distributed fairly."

8. [2005] 223 CLR 1, at 39.

9. (1988) 165 CLR 543.

10. [2005] 223 CLR 1.

11. [1969] AC 191.

12. (1987) 486 US 466.

13. [2002] 1 AC 615.

14. [2007] 2 NZLR 7.

15. (1979) 444 US 193.

16. (1979) 95 DLR (3d) 385.

17. Section 52A(5) of the High Court Ordinance, Cap 4.

18. See, for example, the classic article by Justice David Ipp Lawyers' Duties to the Court (1998) 114 LQR 63.

19. At 686E-G.

20. [1980] AC 198, at 220.

21. (1988) 165 CLR 543, at 556. See also the judgment of Justice Brennan at 578:

"The purpose of court proceedings is to do justice according to law. That is the foundation of a civilised society. According to our mode of administering justice, parties with inconsistent interests are cast in the role of adversaries and the court or judge is appointed to be an impartial arbiter between them. Counsel (whether barrister or solicitor) may appear to represent the adversaries, but counsel's duty is to assist the court in the doing of justice according to law. A client - and perhaps the public - may sometimes think that the primary duty of counsel in adversary proceedings is to secure a judgment in favour of the client. Not so."

22. Order 1A, rule 3 of the Rules of the High Court in Hong Kong.

23. Courage and the Law: Upholding the Dignity of the Individual Schellenberg Wittmer Lecture 23.5.2013, Zurich (Balateralismus im multilateralen Europa: Referate zu Faragen der Zukunft Europas 2013 published by the EuropaInstitut).

24. On his 90th birthday, Sir Sydney Kentridge was appearing in the UK Supreme Court for the Law Society in R (Prudential plc) v Special Commissioner of Income Tax [2013] 2 AC 185. He is now retired from active practice.

25. Hart Publishing 2012.

26. [1960] 1 QB 241, 308.

27. Lord Brougham who, in 1820, defended the Queen (Queen Caroline, Caroline of Brunswick) against a charge of adultery brought by her husband, King George IV. This was not a trial in a court of law, but took the form of a debate in the House of Lords over the Pains and Penalties Bill, an innocuous name for a bill sought by the King to be made law by which the Queen would be declared guilty of adultery by statute (thereby enabling the King to divorce her).

28. Free Country at page 65.

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