

Speech by Mr Justice Ribeiro PJ

to the Sir T L Yang Society of the Chinese University of Hong Kong

14 May 2015

*Changing Legal Landscapes*

1. It is an honour and a privilege to have been asked to deliver an address at this High Table Dinner of the Sir T L Yang Society. Let me begin by paying tribute to Sir T L, a distinguished Chief Justice who earned the respect and affection of the entire legal community and who gained a well-deserved reputation as an eminent scholar and a gentleman.
2. Sir T L is of course best remembered as a Judge and, about 16 years ago, I followed in his footsteps and became a judge of the Court of First Instance. Before getting there, like many of you, I began as a law student. Then I taught law for about six years, practised as a barrister for some twenty years and then became a judge, sitting successively in the Court of First Instance, the Court of Appeal and the Court of Final Appeal, where I still serve.
3. Why, you might ask, am I telling you this? No doubt this description of my journey as a lawyer merely serves to underline just how old I am! But what I thought I would do this evening is to look back at each stage of my legal career: as student, law teacher, barrister and judge – and to reflect on how the legal landscape – and my perception of what the law consists of – has changed dramatically at each stage.

*The law as seen by a student*

4. Let me start with the law as seen by a student. I think a student essentially sees the law as a series of texts. The law was to be found in

the law reports, in statutes, in textbooks and in the lectures of law teachers. My fellow students and I tried to learn the basic techniques of the common law: how to extract a principle from a line of authorities; how to reconcile apparently inconsistent cases; how to read a statute; how to apply the law to given facts.

5. This involved seeing the law as a set of rules, principles and concepts to be formulated. The concepts of offer and acceptance – Mrs Carlill and her Carbolic Smoke Ball; the concept of a duty of care owed to one's neighbour, as Lord Atkin explained; the rules as to when property does and does not pass according to the Sale of Goods Ordinance, and so forth.
6. Unsurprisingly, a student immersed in these techniques is very likely assume that, provided the right methods are applied, the system of rules will yield a definite, correct answer to any legal problem. There is, in other words, a tendency to think that the law is, or can be made, certain.
7. However, the idea of certainty in the law has lost much of its lustre over the years. It is of course desirable that the rules and principles applicable to any particular case should be as clear and certain as possible. The rule of law requires a minimum level of certainty: how else can one plan one's life in a law-abiding way? Before we can demand obedience to the law, before we can assert that no one is above the law, we must know what the law is.
8. On the other hand, certainty is not necessarily a good thing in itself. The law must be flexible. It must adapt to meet different circumstances, especially in a time of rapid social change. Indeed, some scholars have argued that certainty is merely an illusion: it is impossible to achieve because of the inherent elasticity of language; the complexity and fluidity of social interaction; and the human dimension of the law.

9. It is, of course fundamental that the rules and principles of law must be accessible to members of society. But it is equally true that the law must be understood as a functioning social institution with many dimensions which exist beyond its conceptual or normative dimension.

*The law as seen by a law lecturer*

10. Let me turn next to how I saw the law as a law teacher. When I first started out as a law lecturer, I had just completed my LL M and had not yet taken my Bar Exams or gained any practical experience in the law. I was assigned to teach courses in Criminal Law and Jurisprudence. I have to confess that I found the first year a mad scramble, trying to stay just slightly ahead of my students.
11. When, in the second year, I looked over my first year's lecture notes, I realised just how many holes there were in the course. So that year was spent largely trying to fill those holes and correcting errors that had crept in the year before. Things got a little better in the third year and I could focus largely on updating the course with recent developments in the case-law and statute. But then, it was decided to expand the range of subjects offered and so I took on two additional subjects, Labour Law as an option in the LL B and Civil Procedure in the PCLL. Labour Law was (and still is) very different in our jurisdiction from the far more developed subject it is in England and Wales. It was a subject that cried out to be researched and taught.
12. I am sure that today, with three mature law schools manned by many experienced law professors with access to a wealth of local legal literature available, my experience as a lecturer in the early days must sound quite Neanderthal!

13. How did I view the law as a lecturer? I think I still viewed it mainly as a system of rules and principles to be mastered using the method of the common law. But especially since I was teaching Jurisprudence, I was well aware of legal theories which were sceptical of the whole notion of seeing the law as a set of rules.
14. It is certainly important to discourage any tendency to think of legal problems as always having a single, “correct” answer to be “discovered” by examining applicable rules. A good law school should instil in students the realisation that often, more than one good arguable position exists, and that problems should profitably be viewed from opposing perspectives.
15. When I was a law teacher, the law was increasingly seen, not just as a system of rules, but as a functioning institution to be studied as part of society. Law schools were benefiting from cross-fertilization with the social sciences. Law professors were asking: Can we learn something from what sociologists, psychologists, economists and anthropologists have to say about the law as a social institution?
16. Law faculties were mounting empirical research projects, borrowing social science survey techniques to examine how the law was actually functioning in society. I attempted one such study involving the Labour Tribunal. It had been set up with high-sounding objectives touted by its promoters: Lawyers would be banned from appearing before the tribunal so as to ensure equality of arms between employees and employers who were assumed to have greater financial resources. It would be a tribunal with simple procedures and would provide quick and effective remedies. It struck me that this might be worth testing in practice so we sought to observe the actual practice of the tribunal. Questionnaires were

administered to litigants before and after hearings to find out how well-prepared they were for the hearing and how they managed to navigate through the tribunal's procedures. I was struck with the answers given by litigants at the end of the case. Where, looking at the case file, a lawyer would certainly have said that the claimant had "won" the case, it was startling to find that most of the litigants reported that they had "lost"!

17. I think more empirical research is needed. When working on the Civil Justice Reforms, I was struck by the absence of data on the administration of justice in our system. There were, for instance, plenty of anecdotes about horrific costs bills, but little hard data. Similarly, it was well known that many civil cases settle just before trial. Obviously, if a case is going to settle anyway, it should be encouraged to settle sooner, saving the parties' a lot of costs. But we had no data indicating what factors encourage or delay settlement. Law professors are well placed to provide impartial research on such questions and thus to contribute constructive perspectives on the law. I would like to see law faculties developing the empirical aspects of their research.

### *The law as seen by a barrister*

18. Once I began practice as a barrister, my perception of the law changed dramatically. No longer was the law to be found simply in textbooks, law reports and statutes. The legal landscape was populated by the client, the solicitor, the Court, one's opponents and their witnesses.
19. Perhaps the greatest single difference involves the question: What are the facts? When a case comes to be studied by a student or law professor, the facts have long been established. A judge or tribunal has heard the evidence, decided who to believe and made the key findings. It is on the

basis of those findings that the trial and appellate courts identify the applicable principles and determine the outcome.

20. But when in practice, a client comes for advice or assistance, the process which will determine the shape of the case is only just beginning. One must first try to ascertain the facts. A good litigation solicitor will have taken instructions from the client; obtained relevant documents; identified and obtained statements from relevant witnesses.
21. Competent solicitors and clients who respond conscientiously to requests for information and evidence, will help to build up a reliable picture of the case. But it must always be kept in mind that one is only getting one side of the story. Until one sees the other side's evidence and until the judge evaluates conflicting versions and makes the key findings, the case has not taken its final shape. If a barrister is badly instructed, or if the client has been holding back important evidence, it can come as a nasty shock to see an obviously truthful and devastating case being developed by the opposition. The Civil Justice Reforms recognize this and require the parties to lay their cards on the table so that the strength or weakness of each side's case can be assessed, facilitating earlier settlement and the saving of costs.
22. Perhaps the second most dramatic change in one's perception of the law upon becoming a barrister involves the law's human dimension. You are no longer dealing just with words on a page. You have to cope with the Judge, the witnesses and the other side. Everything is fluid. Your own witnesses may not "come up to proof" – that is, they may fail to make key points contained in their witness statements; or they may make wholly unexpected points which could sink your client's case.

23. Who you get as your Judge may make an important difference and might even affect the outcome. Different judges will perceive a case differently. The Judges themselves are also differently perceived by members of the Bar. When told that Mr or Madam Justice X is presiding, the advocate's heart may rise or sink. I believe that the vast majority of our judges are helpful and conscientious, but some judges may gain a reputation for being too greatly inclined in favour of one side or the other; or to have a tendency towards laziness or – and this is particularly true in relation to barristers just starting off at the Bar – for being very fierce.

24. I recently came across an amusing example involving two of our Non-Permanent Judges from Australia. Mr Justice Spigelman, helping to launch a recently published biography of Mr Justice Gleeson,<sup>1</sup> said this:

“This book contains numerous references to Murray Gleeson's capacity to convey his feelings of disapproval, or worse, wordlessly just by looking. As Roddy Meagher so memorably put it: ‘Murray Gleeson likes flowers. He stares at them to make them wilt’.”

25. I can testify at first hand that the terrifying reputation often attributed to Mr Justice Gleeson is wholly unjustified. He is a charming, unfailingly courteous and helpful colleague with a fine sense of humour. His scary reputation is obviously no more than a projection of the more nervous members of the Bar.

### *The law as seen by a Judge*

26. That takes me finally to a consideration of what the law looks like from a Judge's point of view. What may not be obvious is that the perspective in fact changes, depending on whether the Judge is sitting at first

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<sup>1</sup> *The Smiler* by Michael Pelly, Sydney, 27 May 2014.

instance, or as a judge of the Court of Appeal or as a judge in the Court of Final Appeal.

27. The first instance judge has a lonely job. Like the barrister, he or she does not start with ascertained facts. The first and crucial task is to find the facts. That is not easy, especially in long and complex trials. The Judge has the onerous task of ensuring that he has a good note of the evidence. Witnesses and, indeed, counsel, may have a poor idea of what is relevant. The Judge must sift through irrelevancies, repetition, and sometimes evasiveness and self-contradiction. The submissions of counsel may range from the illuminating to the downright misleading. With the help – or hindrance – of such submissions, the Judge must weigh up the evidence and decide who to believe, articulating coherent reasons for conclusions reached. This is, as I have said, a lonely and onerous responsibility. It is also crucial to the legal process since appellate courts are very largely bound by the trial judge's findings and will only very rarely go behind those findings.
28. The human dimension to this process is obviously important. A judge is after all, only human – at least most judges like to think that they are! They will react in a fallible, human way to certain witnesses and certain counsel. It is important for counsel to build a reputation for being trustworthy. If, given past experience, a judge feels that he or she cannot rely on what counsel says, life becomes much harder for the advocate since every submission is likely to be closely, and sometimes sceptically, scrutinised. In contrast, an advocate who has the judge's confidence is likely to face much fewer obstacles to developing the client's case.



29. But it is part of the professionalism demanded of a judge that he or she must put aside any such predispositions notwithstanding the natural human tendencies involved.
30. A judge sitting in the Court of Appeal is relieved of the burdens of fact-finding. He or she has the advantage of having two colleagues with whom to share the responsibilities and burdens. I say “advantage”, but again, being human, the particular chemistry of a particular panel of judges could lead one or more of them to feel that having two colleagues is actually more of a *disadvantage*. But dissent is a healthy feature of our system which values the independence of judges – including independence which involves disagreeing with one’s fellow judges.
31. David Pannick (now Lord Pannick), reminds us in his book on “*Judges*”<sup>2</sup> that great writers have occasionally painted a picture of judges as all-too-fallible human beings. Lord Pannick writes:

“When the judge is dealing with people at their most unattractive or their most unreasonable, or when they are most completely revealed as cheats, liars, or murderers, he cannot easily comply with his judicial oath to ‘do right to all manner of people after the laws and usages of this realm, without fear, favour, affection or illwill’. It can be a strain acting as ‘the living oracle’. This is particularly so when, as occasionally may happen, the judge has other matters on his mind. In Tolstoy’s *Ressurrection*, the President of the court was ‘anxious to begin the sitting and get through with it as early as possible, in time to call before six o’clock on the red-haired [woman] with whom he had begun a romance in the country last summer’. The second judge was feeling gloomy, having just been told that his wife would not be making him any dinner that evening. The third member of the court was suffering from gastric catarrh.”

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<sup>2</sup> David Pannick, *Judges* (OUP 1987) at p 5.

32. I very much hope that descriptions similar to Tolstoy's only find a reflection in our Court of Appeal or Court of Final Appeal on the rarest of occasions!
33. I turn then to the Court of Final Appeal. Two main features differentiate the way in which the law is perceived in the CFA. First, it is the Court which must take ultimate responsibility for deciding what the law is. It is where "the buck stops". This is of particular significance when dealing with important questions of constitutional law, and where issues involving fundamental rights guaranteed by the Bill of Rights and Basic Law arise. The Judges are all keenly aware of the responsibility they bear.
34. The second feature is that of finality, as the CFA's name indicates. Every case has to be looked at in depth. In the lower courts, the primary concern is to do justice as between the parties, but in the CFA, our decisions are likely to be chewed over and microscopically analysed as precedents in future cases. In the lower courts, it is a comfort to know that the system caters for an appeal in the event that something goes wrong. But mistakes by the Court of Final Appeal – and such mistakes are inevitable – cannot easily be corrected and may have far-reaching consequences. So in preparing for a hearing in the CFA, the judges will usually try to read everything that appears to be remotely relevant. Not infrequently, this might mean reading a hundred cited authorities.
35. One of the great joys of being in the Hong Kong Court of Final Appeal is that it involves engaging with the most eminent judges of the common law world. We are privileged to have them sit with us as overseas Non-Permanent Judges. This adds tremendously to the experience and expertise available to the Court. It has led to an outward-looking

perspective on the law. In our judgments, authorities from all over the common law world and from courts such as the European Court of Human Rights are regularly cited. The Court also has the advantage of being able to draw on the immense experience and local knowledge of our local panel of Non-Permanent Judges, comprising retired CFA and Court of Appeal judges.

36. In a sense, the way law is perceived by a judge of the Court of Final Appeal brings us back full circle to the law as studied by a law student. The CFA Judge is once more dealing with the law principally as a system of rules and principles. The primary concern is to develop and apply those rules and principles, seeking to achieve justice in the case at hand, while at the same time providing a precedent which will promote justice in future cases.
37. No doubt some among you will travel a similar road, evolving from student, to practitioner, to judge. I hope that you will find the study and practice of law as rewarding and interesting at each stage as I have done. I am sure in any event that our legal system and the rule of law will continue to prosper in the safe hands of lawyers who are part of the Sir T L Yang Society.