2016 Presidential Address of the Bentham Association

In Praise of an Old, Honourable and Distinguished Friend: The Bar

1. I thank University College London, the Bentham Association and of course Mr Bentham himself for the immense honour of being invited to be this year's President and to give this evening's talk.[1] It is also a privilege to have been asked as early as December 2014; I do not think that I have ever been given such a generous period of notice. One good reason for this lengthy period of notice is perhaps that (as I was reminded forcefully by Professor Dame Hazel Genn) it is a pre-dinner talk, not an after-dinner one, meaning it has to be of a somewhat serious nature, and therefore requiring proper preparation. I shall try to oblige.

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[1] I am grateful to Mr Ken Ip (Barrister) and Mr Sean Li (Barrister), both Judicial Assistants in the Court of Final Appeal, for their assistance.

2. I start with a quote from an unreported case before the Court of Appeal in Hong Kong:-[2]

> "The Director of Audit – it makes a difference to him and therefore, because it makes a difference to him, it makes a difference to the relevant departments."

This was said in relation to the incidence of costs in a judicial review where both parties were publicly funded (on the one hand the Legal Aid Department, on the other the Department of Justice). This quote is of no interest except for one person. These were the last words spoken by me as counsel, now nearly 14 ½ years ago.

3. The theme of this evening's talk is the Bar. Everything I have learned over the course of my career at the Bar – and I will add, continue to learn – stems from my experiences and observations. These continue to influence me, and I believe other judges as well, in the way I approach my

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[2] *Prem Singh v Director of Immigration* CACV 260 of 2001, 27 November 2001. The judgment of the Court of Final Appeal is reported in (2003) 6 HKCFAR 26. The case was about immigration.

judicial responsibilities. The Bar is for me an old, honourable and distinguished friend. I have fond memories of my time in practice, but this talk is not about my reminiscences as a barrister. That would be far too uninteresting. Rather, it is about the Bar's support for the fundamentals of the rule of law, its principles, the courage it continues to show and why it deserves the full support from those with a responsibility to uphold the rule of law. The rule of law here means the respect for the legal rights of members of the community, both individually and collectively. It also means a support for the independence of the judiciary. I naturally talk from the perspective of the jurisdiction I know best of all, Hong Kong. In discussing the Bar, I do not exclude solicitors; they too are guardians of the law, but on the whole, I draw from my own experiences at the Bar. You may perhaps see some parallels and similarities in your own jurisdictions. This talk is not however about endorsing the many topics addressed by the Bar (among them political ones); it concentrates on the Bar's respect for the rule of law as I have described.

4. I begin by setting out the context of Hong Kong. It is a common law jurisdiction both under national law and in practice. By national law I am referring to the Basic Law.[3] Articles 8, 18 and 84 of the Basic Law prescribe that the applicable law in Hong Kong is the "common law, rules of equity" as well as statute law and customary law. Article 9 allows the language of the common law, English, to be one of the official languages in Hong Kong (the other being Chinese). Article 84 states that in adjudicating cases, Hong Kong courts may refer to precedents of other common law jurisdictions. Article 94 confirms that lawyers from outside Hong Kong may practise in Hong Kong. One of this Association's past Presidents, Lord Pannick QC, regularly practises in our courts. For judges, Article 82 allows judges from other common law jurisdictions to sit on the Court of Final Appeal, Hong Kong's highest court. We have and have had judges from the United

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[3] The full title is the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China. The Basic Law was enacted by the National People's Congress in accordance with the Constitution of the People's Republic of China, as the Preamble of that document says, "in order to ensure the implementation of the basic policies of the People's Republic of China regarding Hong Kong".

Kingdom, Australia and New Zealand sitting on the Court of Final Appeal. These also include former Presidents of the Bentham Association: Lord Neuberger of Abbotsbury, Lord Phillips of Worth Matravers, Lord Walker of Gestingthorpe, Lord Hoffmann, Lord Scott of Foscote and Lord Woolf of Barnes.

5. The foundation of the common law can be summarized in one concept: the rule of law. The one fundamental which an independent Bar represents can be distilled into a belief in this concept and an uncompromising respect for it. It is perhaps no coincidence that so many judges have come from the Bar. This uncompromising respect includes standing up and being counted when there are challenges or perceived challenges involving the rule of law. In Hong Kong – and from my observations elsewhere as well – there have over recent years been serious questions raised in the community about the rule of law. Occasionally, even its existence can be queried. On such occasions there is a responsibility on all

lawyers to speak up and remind the community of its importance.

6. It is the characteristic of an independent Bar that barristers do speak up on the rule of law. Those present tonight may not perhaps see need to be continually reminded of its importance but sometimes society needs this reassurance. It is logical at first blush to expect the judiciary to be among the loudest to speak out, but in reality it is often undesirable to do so. This is where an independent Bar steps in. The judicial reticence to speak out is explained by the fact that when issues about the rule of law surface, they can sometimes arise when highly charged political situations flare up. For judges to speak out in such circumstances outside court proceedings runs the risk of drawing the judiciary into immediate social or political controversies. Occasionally, there may be little choice but to speak out; generally though one should not. Allow me to give two recent examples in Hong Kong:-

(1) In 2014 for a period of 79 days,[4] protesters occupied the heart of the Central District in Hong Kong causing much disruption. Much was said about the breakdown of law and order, and the respect for the rule of law of the Hong Kong people was itself questioned. I was regularly questioned about this but invariably declined to comment. It would have been inappropriate to do so and particularly so in view of the fact that the protests were political in nature. It was also of course clear that at some stage the courts would be involved in having to resolve cases, both criminal and civil. This of course did happen. Private law actions were instituted by nearby building owners, and also by bus and taxi operators whose business had been affected. When eventually injunctions were ordered, they were not complied with by many of the protestors who chose to wait until court bailiffs enforced the court orders. It

[4] From September to November 2014.

would have been singularly inappropriate for the judiciary to have made comments in these circumstances. On the criminal side, prosecutions were launched against some of the protestors and some of these cases have been tried in the Hong Kong Magistrates' Courts. Just as for the civil cases, views became polarized after the outcomes of the criminal cases. When acquittals occurred or even when there were convictions, certain people were thoroughly dissatisfied with the results; they thought either that the acquittals were wrong or that the sentences imposed by the courts were far too light. Demonstrations against these court decisions have recently taken place.[5] Views were even expressed in the media, in online chat forums and elsewhere speculating whether the judges who had acquitted or imposed what were regarded as light sentences, were politically biased and therefore conflicted. There

[5] The latest was a demonstration in the High Court on 25 February 2016.

was even internet trolling. There were also strong views expressed the other way.

(2) The next example occurred only last month. Early on the second day of the Lunar New Year,[6] ugly and violent scenes broke out in a district of Hong Kong called Mongkok. Arrests were made and there will likely be prosecutions. Already people have been urging the courts to convict and upon conviction, to impose heavy sentences. The reasons for the events of last month may not be entirely clear but again politics may have played a part.

7. These two examples are good illustrations of highly charged situations in which it would be inappropriate for judges to speak out in public as the events occurred or even soon afterwards. As I have earlier said, cases are due to be heard by the courts. For those cases which have already been heard, it would obviously be inappropriate to comment outside the

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[6] 9 February 2016.

courtroom. Certainly, the judiciary does not embark on any form of public (or private) debate with those who disagree (or agree) with the outcomes of cases. The point was well made in a well-known exchange in the House of Commons in March 1911 between Winston Churchill[7] and Sir Edward Carson.[8] Mr Churchill was openly criticizing judges in the House for certain decisions they had made, obviously not to the Government's liking. The reply from Sir Edward was poignant, "Does the Right Honourable Gentleman think it fair to attack men who are not allowed to reply?"

8. Yet one sometimes does feel a certain frustration at the inability to speak out on fundamental and obvious matters. I do not of course say anything to undermine the freedom of expression, and I am certainly not saying that the judiciary and the work done by the courts cannot be commented on. Far from it. I accept that people are entitled to air their views on the work

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7 Then Home Secretary.

8 The famous barrister (the inspiration for *The Winslow Boy*) and Unionist MP, later to become a Law Lord.

of the courts. As my predecessor[9] has often said, in a society which values freedom of speech as a fundamental right, all court decisions are open to public discussion and informed public comment. Rather, my point is that sometimes there needs to be a reminder of certain fundamental and obvious matters in order for a more complete picture to be given. To take an obvious example, the methodology of courts in arriving at decisions. Everybody knows that in the determination of cases – and this includes criminal cases – courts make determinations in accordance with the applicable law and the evidence before them. In sentencing, after guilt has been established, a court acts according to the law and takes into account all relevant circumstances before imposing an appropriate sentence. The principal objectives of sentencing are retribution, deterrence, prevention and rehabilitation. The appropriate weight to be given to these factors will depend on the circumstances of each given case. Where parties take the view that the court has erred in sentencing, they may consider appealing. This is the system

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[9] Chief Justice Andrew Li, who was the first Chief Justice of the Hong Kong Special Administrative Region from 1997 to 2010.

of law under which we, and many jurisdictions like us, operate on a daily basis.

9. The concern I have alluded to is, however, considerably mollified by the willingness of the Bar to speak out on these matters.[10] Doing so is a reiteration of the rule of law itself and a reminder to everyone that the rule of law is a core value of any society to be cherished, supported and above all, preserved. It is not only the Bar that has spoken out. A day earlier,[11] the Secretary for Justice[12] also spoke out in response to the reactions to the court rulings to which I have earlier referred, by expressing the need to respect the rule of law and the independence of the judiciary. It is one of the responsibilities of the Secretary for Justice to speak out to support the rule of law.

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[10] For example, a public statement was issued by the Hong Kong Bar Association on 25 February 2016 regarding the incidents referred to earlier. The Bar stated, "The bedrock to the rule of law in Hong Kong is the trust and confidence of the public and the international community towards our judges and the judicial system".

[11] In a public statement about the Mongkok disturbances issued on 24 February 2016.

[12] The Secretary for Justice is Mr Rimsky Yuen SC, a former Chairman of the Bar in Hong Kong.

10. What drives the Bar and others to speak out publicly on the rule of law? After all, one can quite easily understand speaking out when one wants to promote oneself or promote some cause or other. The Bar has no cause to promote other than justice and the rule of law; it is also apolitical. I believe the Bar's motive in speaking up for the rule of law arises out of a need to offer a balanced point of view and a view that is firmly rooted in the law and the spirit of the law. Adherence to the law and to its spirit is ultimately the foundation of the rule of law itself. Times may change, governments come and go, circumstances change, but one hopes that the concept of the rule of law will always remain a constant in our society. That I believe is the thinking of the Bar.

11. It is in the area of human rights where we can often see the clearest manifestation of the work of the Bar. The Bar has for years championed human rights, not in the sense (often misunderstood by its critics) of furthering political causes but in

the very real sense of advocating a respect for fundamental human rights.

12. In Hong Kong, the Basic Law sets out the content of the human rights. A whole Chapter (Chapter III) is headed "FUNDAMENTAL RIGHTS AND DUTIES OF RESIDENTS".[13] The rights set out in it include the freedom of speech, of the press, of publication, of assembly, procession and demonstration, the freedom of the person, the freedom of conscience, the right to access to the courts and so on. Article 39 of the Basic Law makes applicable the rights contained in the International Covenant on Civil and Political Rights (the ICCPR.[14]

13. At this juncture, I would perhaps digress just a little to comment on one feature of the Basic Law, although it is not entirely unrelated to the theme of my talk. The Basic Law is

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[13] This Chapter, comprising 19 Articles, on the whole enumerates fundamental rights. The only duty spelt out is Article 42 which only states an obligation to abide by laws.

[14] This is given a statutory force by the Hong Kong Bill of Rights Ordinance Cap 383.

rightly regarded as a constitutional document and it is perhaps unusual to see in a constitutional document repetitions of key concepts; a constitution is a statement of broad principles and one would have thought there was no need to repeat concepts. For those interested in the jurisprudence of statutory interpretation, many cases talk of the principle that every word should be given effect and work should not be given an interpretation that results in duplication.[15] And yet, the Basic Law refers to the independence of the judiciary in three different provisions.[16]

14. Another provision in which there is repetition is the concept of equality: both in Article 25 of the Basic Law and as part of the panoply of rights and freedoms set out in the ICCPR.[17] Like the reiteration of the concept of the independence of the judiciary, this repetition is noteworthy

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[15] For those who prefer the use of latin, as Ulpian said in his Digest, "verba cum effectu sunt accipienda" (words are to be taken as having an effect).

[16] Articles 2, 19 and 85.

[17] The equality provision is contained in Articles 2 and 3 of the ICCPR, reproduced in Article 1 of the Hong Kong Bill of Rights.

because it is fundamental to the administration of justice. Here, it is crucial to understand the meaning of a respect for human rights. Human rights are not only to be respected and enforced when one's own interests are at stake. Other people's rights are also to be respected as well. A phrase I have often used to summarise what I have just said is this: to believe in human rights is to respect not only one's own rights and also to respect the rights of others. Too often the second part of the phrase is ignored by those who insist on the recognition and enforcement of their own rights. But this is not the way the law operates or ought to operate in practice. A respect for the rights of all persons means a practical recognition of the right of everyone to be treated equally, and that for me embodies the concept of equality. I accept that often different rights will pull in different directions but the solution lies in the proper balancing of competing interests.[18] What equality does not mean, however,

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[18] As Aharon Barak, the highly respected former President of the Supreme Court of Israel (from 1995 to 2006) has written (in *Proportionality: Constitutional Rights and their Limitations* (2012) at page 346), the balancing of interests does not involve upholding the validity of one principle while denying validity to other principles; the balancing approach reflects the notion that the legal validity of all conflicting principles is kept intact.

is the denial of the rights of minority groups when seen against the wishes of the majority (assuming a majority view can be gauged anyway). I differ therefore, although it feels a little churlish to do so, from an unqualified acceptance of Mr Bentham's doctrine of utility and ethics ("it is the greatest happiness of the greatest number that is the measure of right and wrong").[19]

15. For me, the ethos of the Bar has been a recognition and promotion of the concept of equality. Logic plays an important part in the way the law ought to be approached, but it is not a foolproof method which will yield the right answer every time. In the area of human rights, logic must give way to principle, plain common sense and a sense of fairness.

16. It is at this point I refer to the famous US case of *Brown v Board of Education of Topeka*,[20] a case with which

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[19] Jeremy Bentham: *A Fragment on Government* (1891).

[20] 347 US 483 (1954).

every American schoolboy is familiar. For me, it represents one of the finest hours of the Bar – it displays the ethos of the Bar, the determination to do the best for one's client and the legal skill of counsel. All three qualities combined to enable the Supreme Court of the United States (SCOTUS) to make what one of its distinguished former Associate Justices, Justice Sandra Day O'Connor, describes as a "quantum jump".[21] The "quantum jump" is contained in the very first passage you will read in the report of the case:-

> "Segregation of white and Negro children in the public schools of a State solely on the basis of race, pursuant to state laws permitting or requiring such segregation, denies to Negro children the equal protection of the laws guaranteed by the Fourteenth Amendment - even though the physical facilities and other 'tangible' factors of white and Negro schools may be equal."

17. The Fourteenth Amendment to the US Constitution was adopted on 9 July 1868, containing in its first section what

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[21] Sandra Day O'Connor : *The Majesty of the Law* (2003) at page 13.

is popularly known as the Equal Protection Clause[22] – in other words, the guarantee of equality. It was therefore supreme irony that this Amendment, forged in the aftermath of the American Civil War in response to the end of slavery, should have given rise to a series of laws enacted in the Southern States which effectively imposed racial segregation – these were known as the Jim Crow Laws.[23] Every aspect of life was affected, from the use of public conveniences to those institutions which effect everyone's lives – marriage[24] and education among others. Education was in many ways the worst of all; after all, it is through education that one is able to live a full life and enjoy that fundamental ideal contained in the US Declaration of Independence, the "pursuit of Happiness".[25]

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[22] "… nor shall any State… deny to any person within its jurisdiction the equal protection of the laws."

[23] Jim Crow was a character created in the 1830's in a minstrel show. It portrayed African-Americans as quite ridiculous caricatures.

[24] For example a 1911 statute in Nebraska stated that "Marriages are void when one party is a white person and the other is possessed of one-eighth or more negro, Japanese or Chinese blood."

[25] This is one of the "inalienable rights" contained in the Declaration: "Life, Liberty and the pursuit of Happiness".

18. We all know now that racial segregation cannot possibly be consistent with the right to equality. In principle, it is the precise opposite of equality in that an artificial barrier – race – is imposed; as a matter of reality, such a system is bound to result in practical differences. But what may seem obvious to you may not be obvious at all to a lot of people, hence the need to speak out. This somewhat twisted idea of equality (racial segregation) found favour with the US Supreme Court in the 1896 case of *Plessy v Ferguson*.[26] The effect of the decision was to confirm the legal validity of the "separate but equal" doctrine. In a nutshell, the doctrine was that the constitutional right to equality was not inconsistent with segregation, as long as the facilities available to white people and to other races were the same. This doctrine at its very highest may barely pass a test of logic (and it is certainly a legal fiction) but it could not disguise the real reasons behind its application in practice. The Court tried to apply logic and reason. However, the judgment of

[26] 163 US 537 (1896). This was a case upholding the validity of a Louisiana law providing for segregation in railway carriages.

Justice Brown[27] contains a revealing passage:[28] "We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act [the 1860 Act providing for separate railway carriages], but solely because the colored race chooses to put that construction upon it." The decision has of course to be seen in the context of the times.

19. But times had to change, the law had to change and the Bar had to speak out. Here, two outstanding lawyers led the way representing the two institutions that firmly believed that the most appropriate way to change was through the law. These two institutions were the Howard University Law School[29] and the National Association for the Advancement of Colored People (the NAACP). The two lawyers were Charles Houston,

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[27] Justice Henry Billings Brown, a former associate justice of the Supreme Court. He wrote the majority decision, the sole dissenting judgment was from Justice John Marshall Harlan.

[28] At page 551.

[29] The Howard University Law School (located in Washington DC) is one of the oldest law school in the US. It is popularly known as Howard Law.

Dean of Howard Law and Thurgood Marshall, a graduate of Howard Law and the first African-American to be appointed as the Associate Justice of the Supreme Court.[30] Charles Houston[31] was an immensely influential figure, teaching law the practical way. His attitude to practise at the Bar is best described by Thurgood Marshall himself in 1978: "And he taught us how the law was practiced, not how it read. Because, you see, in those days Harvard, Yale, Columbia – you name them, the big law schools – were bragging that they didn't train lawyers, they trained clerks to start off in big Wall Street law firms. Charlie Houston was training lawyers to go out and go in the courts and fight and die for their people".[32] This for me represents the most significant part of the Bar's function, namely to fight to the best of one's ability for the client's rights in a court of law, using the law – and nothing else – for the

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[30] Justice Marshall (1908-1993) was appointed to SCOTUS in 1967. He graduated first in his class at Howard Law in 1933.

[31] 1895-1950.

[32] Tribute to Charles H Houston: Amherst Magazine 1978 (reproduced in *Thurgood Marshall: His Speeches, Writings, Arguments, Opinions and Reminiscence* (ed. Mark Tushnet, 2001).

benefit of the client. This, in short, represents respect for the law and ultimately, justice itself.

20. The lawyer (among others) who fought for the cause of the NAACP was Thurgood Marshall. I have already mentioned his appointment on the Supreme Court bench in 1967. As a lawyer, he argued 32 cases in the Supreme Court, succeeding in 29. *Brown v the Board of Education* was one of them. Cases like *Brown* do not, however, just happen, appearing out of thin air by some chance litigation. If the law was to change, and more than that a change in the established way of thinking, this could only be achieved step by step. We are here after all referring to the 1930s. The NAACP rejected any form of action outside the law. Within the law, Charles Houston, who led the legal team in the Association at that time, felt that a direct attack on *Plessy v Ferguson* was doomed to fail given the conservative make up of the Supreme Court. The possibility of the Supreme Court overturning *Plessy* at that time was entirely theoretical and not real. It was to take 25 years

before *Plessy* was overturned. I am unable in this talk to deal fully with the very interesting history of the cases leading eventually to *Brown v Board of Education*.[33] Essentially, the legal reasoning deployed was to use the rationale of *Plessy* against itself. The argument went something like this, if coloured people were to be separate from white people, they had to be provided with at least equal facilities. The principle was after all "separate but equal". The NAACP knew there were many instances where the facilities, particularly in education, for coloured people were vastly inferior to those for whites. Lawsuits were brought to highlight this inequality. In *McLaurin v Oklahoma State Regents*,[34] the Supreme Court found inequality in the treatment of a 68 year old African-American student at the University of Oklahoma. The treatment was extraordinary: "And so sixty-eight-year-old George McLaurin

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[33] There are a number of important studies on this case: see for example Richard Kluger: *Simple Justice* (1975); Mark V Tushnet: *The NAACP's Legal Strategy against Segregated Education 1925-1950* (1987); James T Patterson: *Brown v Board of Education* (2001). For a shorter account, see the website of the Smithsonian National Museum of American History at Americanhistory.si.edu.

[34] 339 US 637 (1950).

was made to sit at a desk by himself in an anteroom outside the regular classrooms where his course work was given. In the library, he was assigned a segregated desk in the mezzanine behind half a carload of newspapers. In the cafeteria, he was required to eat in a dingy alcove by himself and at a different hour from the whites."[35] The Court held that the State had to admit Mr McLaurin on the same terms and conditions as other students. The same day as the Supreme Court gave its decision in *McLaurin*, it also gave another unanimous judgment in *Sweatt v Painter*.[36] In that case the University of Texas set up a segregated law school for African-Americans that was not only inferior in quality to the law school for whites but also deprived the African-American students of any opportunity to interact with other law students, an integral part of any education. As the Court said, "Few students and no one who has practised law would choose to study in an academic vacuum, removed from

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[35] *Simple Justice* at page 267.

[36] 339 US 629 (1950).

the interplay of ideas and the exchange of views with which the law is concerned".

21. These legal attempts, among many others, to undermine *Plessy v Ferguson* led eventually to the institution of several actions coming under the name of the main case *Brown v Board of Education*[37] which challenged and eventually succeeded in the reversal of the Supreme Court's decision in *Plessy v Ferguson*. While Chief Justice Earl Warren's Court must take much of the credit for having the courage to come up with the result in *Brown*, nevertheless it must not be forgotten – and this is my point – that it was through the tenacity, skill, recognition of the duty owed to the client and the respect for human rights in the way I have earlier alluded to, that the Supreme Court could even be placed in the position to come up with the judgment it eventually did and, if you like to, do the right thing.

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[37] There were five in total, the others being *Briggs v Elliott*, *Davis v Prince Edward County School Board*, *Bolling v Sharpe* and *Gebhart v Belton*.

22. The aftermath of *Brown v Board of Education* is also fascinating but at this stage I must leave it. However, the courage to do the right thing and to enable others to do likewise needs a little more precision. For me what lawyers like Charles Houston and Thurgood Marshall (and all the lawyers who worked tirelessly with them, too many to name), represented, and this is the characteristic of the Bar I hope to emphasize, is an adherence to the law itself, a respect for the law and also the unshakeable belief that all persons are entitled to have legal representation (or in the language of constitutions, access to justice[38]). This includes in particular minority groups as we have seen. The former Chief Justice of Ireland, John Murray,[39] in a paper *Consensus: concordance, or hegemony of the majority?*[40] said this: "How can resort to the will of the majority dictate the decisions of a court whose role is to interpret

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[38] See, for example, Article 35 of the Basic Law.

[39] Chief Justice Murray was Chief Justice from 2004 to 2011, although he remained a member of the Supreme Court of Ireland until 2015.

[40] In *Dialogue Between Judges 2008*, Strasboug, European Court of Human Rights.

universal and indivisible human rights, especially minority rights?" This has always been the view of the Bar.

23. Nowhere is this better illustrated further than the experience during the Apartheid years in South Africa, and in no barrister are the ideals of the Bar more personified than (I hope you forgive me for singling him out) Sir Sydney Kentridge QC. I hope you will allow me to recite an extract from one of his speeches which by now is very well-known in representing the Bar and its view of justice. In his talk *The Ethics of Advocacy* given at the Inner Temple in January 2003,[41] Sir Sydney reflected on the Apartheid years:

> "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."

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[41] This speech is reproduced in his book *Free Country : Selected Lectures and Talks* (2012) at page 65.

For me, this is the highest praise that a member of the Bar could wish to have. It signifies courage, a belief in justice, the respect for the dignity of the individual according to law and one's professional duty.

24. The respect for human rights is a persistent theme among members of the Bar around the world. The International Bar Association has a strong tradition of speaking out on human rights issues. Many Bars contain in their professional codes a duty to uphold justice without fear or favour.[42]

25. You will be somewhat relieved that I am coming to the end of this address but before I sit down to allow more relaxed activities to take place, I hope to be permitted just to make a couple more observations.

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[42] See, for example, the codes of conduct in England, Wales, Australia, Ireland, India, Japan among others. This is also a common provision one sees in the Judicial Oath taken by judges around the world. It sometimes features in statutes. For example, s 4(a) of the Lawyers and Conveyancers Act 2006 of New Zealand states the "fundamental … obligation to uphold the rule of law and facilitate the administration of justice"; s 42(1)(a) of the Legal Practitioners Act 1976 of Malaysia mandating the Malaysian Bar to "uphold the cause of justice without regard to its own interest or that of its members, uninfluenced by fear or favour."

26. The dogged persistence – insistence is perhaps even more appropriate – of the Bar to "do the right thing" requires, as we have seen, considerable legal skill and of course a core understanding of the rule of law. But it also requires adequate support and encouragement. A large part of what the Bar does (this is certainly the position in Hong Kong and here in the United Kingdom) consists of, without intending to be condescending, public education by which I mean informing the general public of the importance of the rule of law. For it is only by public confidence in the law, the rule of law and the proper administration of justice that any legal system can be sustained. This is one form of support. Another form of support is also important and involves public expenditure. Legal Aid in Hong Kong has provided the means by which justice has been made more accessible not only in private law cases but also in public law cases. Since 1 July 1997,[43] with the coming into effect of the Basic Law, both the Hong Kong community and the Hong Kong Government have become much more aware of

[43] On the resumption of the exercise of sovereignty by the PRC over Hong Kong.

public law rights. Litigation in public law cases was inevitable. Many important issues affecting the heart of the community (such as immigration, marriage, the freedom of expression, social welfare etc), and the interface between Hong Kong and the Mainland, had to be dealt with by the Courts and this work continues. Emotions sometimes run high and the stakes can also be high.[44] This type of case poses massive challenges for judges. Many like me are grateful for the assistance of experienced counsel arguing cases on both sides, and such counsel include not only Hong Kong counsel but counsel admitted from the United Kingdom. Legal Aid has enabled such experienced counsel to represent parties in many public law cases (which are usually in the form of applications for judicial review). In many jurisdictions it may appear to be a logical oddity that public money should be spent to finance litigation against the State but logic here gives way to broader considerations of constitutional rights and the rule of law. In Hong Kong, but for the availability of Legal Aid, I daresay most of the important cases

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[44] Power rests in the courts to strike down legislation which is unconstitutional: see Article 8 of the Basic Law. This is not the position in the United Kingdom.

decided by the courts (up to the Court of Final Appeal level) would not have been possible. Many of these cases were important not only for the parties themselves but they enabled sound public administration practices to develop. Good governance has become the laudable aspiration it deserves to be. In Hong Kong, improvements to the Legal Aid system and the extent to which it operates are constantly debated, but the basic premise justifying its availability is sound. A sound system of Legal Aid enables the Bar to discharge those responsibilities I have earlier described. Seen in this way, for Hong Kong, Legal Aid is an integral part of both the rule of law and the administration of justice. This is the proper way of regarding Legal Aid and not as some 'necessary evil' or worse still, what some people see as an obstruction to society.

27. I started this talk – now far too long ago – by a personal recollection and I will conclude similarly. Some years ago, a well-known QC in Hong Kong passed. His name was Robert Wei QC. He was the person who introduced me to my

Hong Kong pupil master, Robert Tang who was in turn his pupil. I am close friends with his son, George Wei, now a Justice of the High Court of Singapore. I visited him recently. In his chambers, on his desk were the many awards presented to his father over the years by the Hong Kong Government, the British Government and many other institutions. The most prized, however, was a silver plate presented to Robert by the Hong Kong Bar Association in 2004 when he was conferred the Honorary Life Membership of the Hong Kong Bar. For Robert Wei, this was the prize he regarded as the biggest of all; a recognition by his colleagues and friends at the Bar of the work he had devoted his professional life to. I was present at his home that day as the plate was presented; it was a proud day for him and his family. It was also to be the last time he wore the suit he so often wore as a barrister.

28. I have extremely fond memories of the Bar and count myself fortunate to have met so many barristers whom I have learnt (and continue to learn) so much. Society owes much to

the Bar as well. Its spirit and work will help see us through the many challenges that lie ahead.