

PRESENTATION

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Earlier this year at a presentation at Peking University, I said, "I've never done this before with such mixed feelings. Soon HK will have an executive of dubious character. He denies being a CCP cadre. We can only look on to see how things unfold in the future." Four or five months later, I'm here presenting to you with the same mixed feelings. Let's see how things transpire.

Fifteen years ago, Hong Kong went from being a British Crown colony to being part of Chinese territory. Many friends ask if locals have observed changes since transfer of sovereignty. In terms of law, there have been few changes, although it remains to be seen if this will remain the case in the future. In 1997, HK formally abolished the death penalty, although it had not been used for a long time (last execution was carried out in 1965). Under the 1997 "one country two systems", we retained existing legal systems and practices. Our judiciary remains rather independent, although we cannot be sure this will continue to be true in the future. The influence of the mainland on HK is increasingly visible – this is cause for worry.

Let me provide a brief overview of the "HK system". It's not an easy task to explain criminal justice system and notions of law in an hour. Let me try. I realise many friends sitting here today are from common law systems so the basic principles and notions of justice need not be explained too thoroughly. I will reiterate a few points:

1. To begin, some figures. HK has a population of 7 million. We have about 195 fulltime judges (excluding a small number of part-time judges appointed from the legal profession). There are approximately 8000 lawyers in HK.
2. We have common law jurisdiction as opposed to China's "continental (Europe) model" (I personally prefer calling it the Soviet model).
3. Is one country, two system successful? We have hung on, to be fair. Tibet requested the same "one country, two systems" policy but this request was rejected by the CCP. Why? Because HK is a small city and can be easily sealed off, whereas Tibet is geographically huge. This is in addition to the fact that the Dalai Lama's conception of geographical Tibet is at odds with China's definition of Tibet (Dalai Lama claims Tibet to be twice the size the Central Government believe it to be). Tibet's thousands of kilometres of border cannot be properly patrolled or regulated. Considering HK's manageable physical size, on the other hand, where borders are quite easily regulated, mainlanders cannot enter without visa, etc. etc. It's therefore possible to maintain distinct administration and judicial system from mainland.

For judicial success, we need a number of conditions, some written, some unwritten. Some institutions are crucial in maintaining a credible, viable legal system – an independent judiciary, independent prosecution and independent and professional lawyers, for instance. I repeat "independent" because these structures in HK have been operating rather autonomously without much political interference. This creates a sort of power balance. The independence of judiciary in HK is legendary, particularly in the mainland. I was asked once

in China, "Is corruption in HK's judiciary serious?" It implied the student hadn't even considered the possibility of zero or extremely low corruption.

Our judiciary has been rather professional; most judges are appointed after years of experience in the legal profession. They have excellent work records and proper academic qualifications. The judicial fraternity work quite closely together. The Bar Council, composed of 1100 members, has a detailed internal code of conduct and internal disciplinary (essential regulatory) mechanisms. Compare this with China, where the Ministry of Justice governs the equivalent of the Bar Council. This places the judiciary directly under the control of the executive. There can be no shortcut in this matter either on the part of the legal fraternity; a high ethical and professional standard has to be maintained from within the Bar council, or the executive will be given another reason to "manage" the judiciary.

Prosecution (Office of the Attorney-General) forms the last arm of the trio. This department is headed by the Secretary of Justice from the Department of Justice. The decision of whether or not to proceed with prosecution given the evidence available is made quite independently.

Other than these three branches of judiciary, there are other important "supporting institutions". Prison regime or management is independently organized in HK. This is a department independent from the police. We generally understand torture as occurring mostly in prison, detention centres and other places of custody. The management of these places (standard procedures, processes and command responsibility) is therefore a matter of great concern to us. In HK, most detention centres are governed by an independent Correctional Service. Even police officers who require access to prisoners need to gain permission through application, must complete their work during stipulated time and often under the supervision of Correctional Services officers. A maximum of 48 hours detention is allowed if it is authorised by senior officers. Police need a court order (by a magistrate) to detain a person for further investigation, and an arrested person can argue before the magistrate for bail. Such measures are checks against arbitrary deprivation of liberty.

Principles of rule of law are largely unwritten but nonetheless widely recognised, accepted and respected on the basis of universal and unquestionable/unquestioned values. Fundamental principles known as "rules of natural justice" are accrued from centuries of human history and experience. For example:

1. "No one shall be a judge in his own cause" – no man should try a case in which he is interested.
2. "No man should be condemned unheard" – entitlement to fair hearing. Chance to defend himself against charges.
3. "Risk of bias must be avoided" – no one should adjudicate if there's even the most remote possibility he has a personal, direct or indirect interest in the matter. Judges must themselves consciously avoid such cases and transfer the case to another judge (abdicate responsibility and thereby culpability of personal bias). We're talking not simply about obvious bias, but even the remote risk of bias.
4. Not only does substance have to be good, image also has to be good. Judges must not only act fairly but be seen to be acting fairly. Public confidence would otherwise be jeopardised. This is essential to the legitimacy and credibility of the judiciary. There are over

80 detailed paragraphs of a Code of Conduct – so specific it warns judges what to wear and what not to wear in court! Refer <http://www.hkba.org/thebar/code-of-conduct/code-of-conduct.html>.

5. Hong Kong is very small and its community very densely connected. Our media (think 'paparazzi') is very active. It is therefore critical that the judiciary is 'clean' (behaviour, lifestyle), transparent, accountable, credible, impartial and independent. Proceedings must be open ('open court justice' – no secret trial...except in special cases, for instance when a juvenile is involved. That's for the protection of the child. It is essential also that even in a closed trial, the juvenile is represented by lawyers and guardians/parents in court, as well as by probation officers. Representatives from the press may be invited although there are naturally some restrictions (publicising the child's name is strictly prohibited, for instance). Family courts are also private.

What if there is a breach of these fundamental principles? We have an important mechanism "judicial review". Procedural unfairness or unreasonableness can be challenged through this and the Court can declare that certain decisions by the authorities are void because they are unlawful or unconstitutional. (Now there is some controversy that judicial review is being abused by some unmeritorious characters!) There is also a judge who reviews the papers for judicial review to grant "leave" for hearing. The success rate for judicial review is low (20-30%) but it is, at least, a credible avenue for challenging constitutionality or lawfulness of government policies/decisions.

On Monday the Asian Human Rights Commission has scheduled a visit to the Independent Commission against Corruption (ICAC) and the Bar Association. The ICAC has been a very powerful, intrusive law enforcement agency since the mid-70s and has therefore ensured a very low corruption rate. Now the ICAC deals with more minor matters such as deception and delays. They have some "restricted" tasks such as investigating labour department (employment disputes, non-compliance with employment rules, environmental protection and property/building/estate disputes). Major law enforcement matters are still cared for by the customs and police primarily.

Law enforcement agents are responsible for investigations and filing for prosecution. However, the decision concerning whether or not to prosecute, as well as the actual prosecution, is handled by the Department of Justice. If it has been decided a case will be prosecuted, the legal profession, through lawyers, step in – even before prosecution begins. My observation in the criminal courts of Hong Kong is that over 95 percent of the people charged are represented by lawyers because success is reliant on those with legal expertise. Access to lawyers is therefore essential to the notions of justice because not everyone has legal knowledge or expertise. This is critical to our understanding of a "fair trial" – all factors and evidence have to be considered, and punishment must be appropriate to the crime.

The Hong Kong government dedicates HKD100 million each year to providing legal aid to its people. Legal aid is granted to families and in cases where employment disputes, personal injuries (and other categories) are involved. One has to appreciate the value of legal aid in maintaining the independence of the judiciary. The judicial system is often there to challenge the overwhelming power of authorities (the government). It might sound strange that a government would pay to help people challenge it. Yet, in all its literal sense, this is the other sort of "feedback" the government would or could get. Every government needs critical assessment to improve/review/repeal policies and to ensure its own functionality

and existence. When feedback mechanisms are compromised, the legitimacy and survival of the regime are also jeopardised.

Probation service is another "supporting institution" attached to the Social Welfare Department. It is, like the Correctional Services, an independent entity from the police. It is a post-incarceration service to conduct rehabilitation and reintegration activities for convicts who have already served their sentence.

Free press and media is also a "supporting institution". Free NGOs and social groups also monitor the entire process and are useful sources of information where the government may be able to otherwise control information accessible to the public. We have quite an open society; justice is largely available to the public, who then scrutinise the judiciary and the government and pass comments/criticisms. It is my sincere belief that no organisation or institution can function without some kind of challenge to its functionality or legitimacy – it is at such moments of crisis that a government is given the opportunity to prove its validity, legitimacy and worthiness of the continued support of its people. I have hope because there are many parts of Hong Kong civil society working together to improve existing institutions. The government must not perceive these "feedback mechanisms" as threats but rather as attempts by the wider society to engage their elected power-holders.

There are two important international covenants, the 1966 International Covenants on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) already incorporated in Hong Kong's laws a long time before the handover of sovereignty. The provisions therein are recognised and implemented in Hong Kong courts. In many cases regarding civil liberties, the public frequently uses these two documents to argue their case. This raises the standard of the conduct of justice. The rights of the individual are guaranteed under specific laws. These include the

- ◆ Right against self-incrimination
- ◆ Right to consult lawyers in confidence and privileged communication
- ◆ Right to remain silent

In mainland China, these rights are absent and there is almost no chance of justice ever being served because of this. In China, people have no guaranteed entitlement to access to lawyers. Some superficial changes in legislation have not relieved or reversed the situation. Communication with lawyers is at the discretion of the police, and it's not "privileged" in the sense that lawyers can be compelled to divulge what is discussed. During prisoner-counsel conferences, police officers are often present, sitting in the same room and listening in to the conversation between the legal counsel and his client. There is no chance for protest of this practice.

In Hong Kong, to achieve this openness and fairness, the prosecution has a duty to disclose all material, used and unused, to the defence. Failure to do so is ground enough for an appeal against conviction. Failure to disclose "material evidence" can result in the overturning of a conviction (therefore it is in everyone's interest to "obey the rules of the game"). The reason for this is to even the playing field in court – after all, the police have large amounts of public resource at their disposal and can carry out thorough investigations and have access to so much material, whereas a suspect (individual) has no resource to do the same (investigations where full disclosure doesn't take place privilege the prosecution).

I often wait for police and prosecution to deliver bundles of evidence. This material is for defence's consumption; even if the prosecution doesn't use a part of the material uncovered, the defence may choose to. The entirety of evidence, including what is favourable to defence, must be made available to the defence. Police are therefore forced to think before prosecuting. If the body of evidence is in any way unsatisfactory or unconvincing, the case will be dropped by the office of the Attorney-General (prosecution). This minimises the (time and resource) inefficiency of judiciary because the number of cases prosecuted is lessened and the conviction rate increased for those "guilty beyond shadow of doubt".

What remedies or safeguards exist for a person accused of torture? In the early 1990s, there were reports of serious physical abuse by police to elicit confessions. This evidence was extremely useful for the prosecution, evidence the defence would consider objectionable or obtained through objectionable methods. The defence counsel would then challenge the use of that material evidence ("confession under duress or coercion"). The judge may then render that piece of evidence "inadmissible" and exclude that from his considerations. There were trials within trials undertaken (in French, *voir dire*) where police officers and the person who claimed to have been tortured must be questioned/testify in court. This is a procedural undertaking that makes police even more cautious about their actions and discourages the use of violence. It also discourages the prosecution's heavy reliance on confessions. If police officers were found guilty of torturing an individual in their custody, there were severe and adverse consequences for their actions.

Nowadays, suspects in Hong Kong complain more about objectionable inducement than physical violence. If true, such acts render the statement given 'involuntary' and therefore excludable. Officers are liable to a fine for misconduct; this deterrent is another form of protection afforded through procedure.

Of course these are all premised on professionalism of the legal fraternity (judges, lawyers, prosecution) and law enforcement. If there's a failure at any point in the process, it will breed other failures and greater impunity. Operation of the justice system must be/is frequently scrutinised, both from within institutions and by the public. The management of the police is also regularly reviewed and updated training is provided.

What is the role and function of the legal profession? Happily, rule of law is now recognised as a core value in the Hong Kong Special Administrative Region. What system is Hong Kong trying to preserve under the "one country, two systems" policy? Whenever we talk about "one country, two systems", we have to first define the systems. China is becoming even more "capitalistic" than Hong Kong, although this is a capitalism thinly coated with socialist terminology. Independence of judiciary and rule of law would, I suggest, be two fundamental elements of this system that Hong Kong wishes to preserve. In Chapter 1 of the Bar Council's code of conduct, it states, "We uphold principles of justice and rule of law. The role and function of a lawyer is to assist the court in administering justice." This is fundamental to all other values and principles upheld by the court. Although lawyers defend their clients, they must conceive of themselves as a crucial component in the service of justice and assistants to the judge. There are three parties in a common law "adversarial system":

- ♦ judge – impartial referee
- ♦ lawyer – one side
- ♦ prosecutor – other side

In the real world, disputes are common. Everyone believes in his version of the truth and usually presents evidence supporting that version of the truth. It is therefore difficult for the judge to hear controversial matters without professional assistance from both sides of the dispute. Lawyers and prosecutors present facts in a well-defined, succinct matter that will enable the judge to immediately grasp the nature of the dispute. The questions posed to witnesses are to most expeditiously reveal facts relevant to the case; these pieces of information are also then more easily documented in a clear and systematic fashion. Gaps in information are also more readily discovered and filled in. This system relies on the understanding and agreement that no one should deliberately mislead the court. Those who fail to meet this standard must be presented before the disciplinary tribunal of the Bar. In one famous case, a senior counsel had to appear before the disciplinary tribunal and was found guilty. He was subsequently fined. This indicates the existence of rule of law – even judges, lawyers, prosecutors and other administrators of the law cannot be beyond the law but must also live and work within the same set of rules.

The public usually have a certain idea of what is just or fair, but sometimes they do not have the knowledge of how to pursue that cause. This is why there is a means test for legal aid assistance from the government. There are pro bono or heavily subsidised legal fees for families and individuals unable to afford legal counsel. This is again a mechanism that helps to level the playing field and to reduce barriers to justice.

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