

Do Hong Kong People Trust Our Courts?

Winnie Tam SC, Chairman of the Hong Kong Bar Association

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Good morning. I have been asked to speak on the three survey questions that the organizers of this symposium believe to be concerned with the confidence of the Hong Kong public in the HKSAR courts.

I believe that I am expected to speak on these three questions because I have two more months to go in chairing the Hong Kong Bar Association, (how time whizzed past and I assure you there hasn't been a dull moment), and a barrister who has practised in Hong Kong continuously since I returned from my legal studies and training in the United Kingdom after leaving HKU.

Yet another perspective I am able to share is that from the point of a view of a part-time judge. This is no easy job for someone trying to run a practice alongside other duties, but something that I would always commend to my fellow colleagues. It enables a practitioner to view it from the point of view from the bench.

Another perspective that I can share today comes from my experience in promoting the legal profession in Hong Kong and the legal services offered to overseas lawyers and entities. One statistical rating that I often use is the World Economic Forum's Global Competitiveness Report, which has consistently rated Hong Kong SAR highly, but particularly

highly in respect of the item of “judicial independence”. In the 2015/2016 report, Hong Kong SAR is ranked No 7 as an economy in the overall rating, having been in the top 10 since 2012/2013; and ranked No 4 across 140 jurisdictions for judicial independence, scoring 6.3 where the best score is 7 in a score board between 1 to 7. According to the report itself, the question asked of the persons polled, who are business executives, is: *“In your country, how independent is the judicial system from influences of the government, individuals or companies?”*¹

One can see that this question is similar to the first question for discussion that I have been asked to comment, which is: *“To what extent do you agree with this statement: **“In adjudicating cases between private citizens, judges should not consider the backgrounds of the litigants.”**”*²

When we consider the Rule of Law Education project survey results, a very substantial majority of those of the external legal culture, 85.1% of them and to whom I include business executives, either strongly agree or agree with the statement. This might tally with the 6.3 out of 1 to 7 scoring in the latest World Economic Forum’s Global Competitiveness Report. Another insight that might come out of your survey result can be that this agreement is shared across the board among Hong Kong SAR residents. Turning to the internal legal culture, (which you say includes Government officials in the policy bureaux of the executive authorities, senior officers in law enforcement agencies, Members of the Legislative Council, and judges and lawyers, those people that the 2014

¹ World Economic Forum, The Global Competitiveness Report 2015-2016, at: <http://reports.weforum.org/global-competitiveness-report-2015-2016/> (accessed on 30 October 2016).

² Q35 in the overall ROLE Survey on Legal Culture and Rule of Law Culture.

State Council White Paper on the Practice of “One Country Two Systems” in the Hong Kong SAR categorize as those concerned with the administration or governance of the Hong Kong SAR,³) there is an equally substantial majority in agreement. This result can be taken as an indication of a general consensus in the community to subscribe to this belief that judges in the Hong Kong SAR **should not**, in the adjudication of cases between private citizens, consider the backgrounds of the litigants. The sharing of this belief by those responsible for the administration or governance of Hong Kong and by those most directly concerned with the adjudication of disputes, namely judges and lawyers, can be further taken as an impliedly imposed expectation of the judges to do so by those more intimately concerned with the administration of justice, such as the legal profession.

I also note the discrepancy between the English and Chinese versions of the first question, which affects the perceived scope of that question. Whereas the Chinese version speaks simply of the **background of the litigating parties** in the adjudication of cases and can cover cases where one of the litigating parties in the adjudication is the Hong Kong SAR Government, the English version is more restricted; it is concerned only with the courts “adjudicating cases between **private citizens**”. The English version, in my opinion, is quite important since there are from time to time civil actions by individuals or companies against the Hong Kong SAR Government. These civil actions can be over relatively ordinary matters such as breach of a contract or a traffic accident involving a vehicle driven by a government driver.

³ State Council Information Office, *The Practice of the ‘One Country, Two Systems’ Policy in the Hong Kong Special Administrative Region* (June 2014), Part V, at: http://english.gov.cn/archive/white_paper/2014/08/23/content_281474982986578.htm (accessed on 30 October 2016).

Or they can be of some public significance where the public expects vindication after serious transgression of their rights, such as the recently lodged High Court action by a man acquitted of drug trafficking suing the police for damages for malicious prosecution, false imprisonment and personal injuries, arising out of the allegation that the arresting police officers fabricated evidence of possession of dangerous drug for the purpose of trafficking against him,⁴ or by another man who said that he was wrongfully arrested by the police during the time of the Occupation Movement.⁵

Under Hong Kong's laws on civil procedure, with a few exceptions such as those regarding the nature of relief that can be ordered and those concerning the entry of default judgments, the granting of summary judgments, discovery and execution of judgments, the Government's status in civil actions is as much as an ordinary legal person; it may sue or be sued by the Secretary for Justice.⁶ The expectation of both the internal legal culture and the external legal culture ought therefore be that the courts of the Hong Kong SAR shall have no or little regard of the backgrounds of the litigants before in the adjudication of cases within the courts' jurisdiction, since its judicial duty is to adjudicate the case before it adhering to the content of the applicable law and its spirit. The judicial oath, as Chief Justice Ma said in 2011, "requires judges to look

⁴ See South China Morning Post report at: <http://www.scmp.com/news/hong-kong/law-crime/article/2041253/man-acquitted-drug-trafficking-sues-hong-kong-police-more> (accessed on 30 October 2016).

⁵ See South China Morning Post report at: <http://www.scmp.com/news/hong-kong/law-crime/article/1821268/man-sues-hong-kong-police-over-wrongful-arrest-during> (accessed on 30 October 2016).

⁶ See the Crown Proceedings Ordinance (Cap 300) sections 3, 4, 5, 10, 11, 13, 16 and the Rules of the High Court (Cap 4 sub leg) Order 77.

*no further than the law as applied to the facts. The starting point and the end position in any case, is the law.”*⁷

Having said that, I have one observation to make: in adjudicating cases through the finding of contentious facts, it is often necessary, and sometimes imperative, that the judge has a penetrating understanding of the background of the litigants. The background I refer to may involve family, upbringing, social class, culture (including corporate culture), language, and other matters. This is for the purpose of assessing the meaning, implication and veracity of the evidence received in court. A failure to understand these matters may lead to a misinterpretation of the evidence.

Regarding the second question under discussion today, which is: ***‘To what extent do you agree with this statement: “If the court makes a decision which may add a big burden to public revenue, it is proper for the government not to follow the decision.”***,⁸ those who are concerned with the administration of justice and those who are concerned with the general administration or governance of the Hong Kong SAR express **overwhelming disagreement** (about 92% in disagreement) with this statement, a proposition that imposes an expectation not on the courts but on the executive authorities, or the Government of the Hong Kong SAR. What does this tell you about the faith of the officers in the governance of Hong Kong?

One can say that they believe firmly in the rule of law and two particular corollaries or implications of the rule of law.

⁷ See the Chief Justice’s Speech in the Opening of the Legal Year 2011 (10 January 2011), at: <http://www.info.gov.hk/gia/general/201101/10/P201101100201.htm> (accessed on 30 October 2016).

⁸ Q37 in the overall ROLE Survey on Legal Culture and Rule of Law Culture.

The *first* concerns the administration of justice and is encapsulated by the Latin expression of “fiat justitia, ruat coelum” (let justice be done, though the heavens fall). Simply put, as in Jowitt’s Dictionary of English Law, “A court must do its duty without regard to the consequences.” And the consequences referred to in ancient case cited in Jowitt’s Dictionary were “political consequences”, including the certain consequence of “rebellion”.⁹

The *second* concerns the obligation on the part of the executive authorities to accept, obey and implement the judgments of the courts, which are invariably on the law, giving efficacy to the principle underlying the separation and co-ordination of Hong Kong’s system of powers between the institutions distinctly vested with that of law-making (the legislature), the law-adjudicating (the courts), and the law-execution (the executive authorities).¹⁰ Lord Bingham of Cornhill expounded in his book on the rule of law the principle of the rule of law that: “ministers and public officers at all levels must exercise the powers conferred on them in good faith, fairly, for the purpose for which the powers were conferred, without exceeding the limits of such powers and not unreasonably”, stressing that this is a fundamental point, for “it falls to the executive, the government of the day and its servants, to carry [laws duly made that bind all to whom they apply] into effect, *nothing ordinarily authorizes the executive to act otherwise than in strict accordance with those laws*”.¹¹

⁹ See *Koo Sze Yiu & Anor v Chief Executive of the HKSAR* (2006) 9 HKCFAR 441, CFA at [30] (per Bokhary PJ). The permanent judge affirmed this point emphatically in face of a “constitutional crisis” in his dissent in *Democratic Republic of the Congo & Ors v FG Hemisphere Associates LLC* (2011) 14 HKCFAR 95, CFA at [83]-[84].

¹⁰ See *Lau Kwok Fai Bernard & Ors v SJ* (unreported, 10 June 2003, HCAL 177, 180/2002), CFI at [17] (per Hartmann J).

¹¹ Thomas Bingham, *The Rule of Law* (Allen Lane, 2010) p 60.

On the other hand, the external legal culture, meaning the rest of the population, appear not to be disagreeing overwhelmingly like the internal legal culture. 16.9 per cent of those of the external legal culture polled agree with the statement that it is proper for the Government not to follow a judgment of the court if that judgment may add a big burden to the public revenue. Some commentators may see this as alarming since the percentage is not an insignificant one. But I find this to reflect the reality in Hong Kong that not all of our residents have a clear and nuanced view of the rule of law and that not all of our residents have a similar list or set of priorities. All these are signs reflective of a pluralistic society. What we do wish to engage in is a rational debate on the matter.

How real is the incidence assumed in the statement that a judgment may add a big burden to the public revenue where usually, an adjudication resolves the dispute between an individual and another individual or the government and the court's order deals with the rights and interests of those involved in the adjudication only. In this the usual situation, the question of whether the judgment may add a big burden to the public revenue involves not the court's evaluation but the executive authorities' evaluation of how they would act in the light of the law and principles discussed in the judgment and maybe certain facts found in the judgment in dealing with the cases of many other similarly placed individuals, say, persons subject to the same administrative policy or legislative scheme. An option reasonably open to the executive authorities is of course to change the policy or the legislation. That the primary function of the executive authorities is to formulate suitable policies and to put them into effect either by administrative policy or by legislation is well recognized in ordinary

administrative law principles based on the common law and in the Basic Law, Articles 48, 56 and 62.

I recognize that sometimes, the adjudication may have more general effect, such as where the instrument interpreted is the Basic Law of the Hong Kong SAR and what is at stake is the validity of a legislative or administrative measure affecting many Hong Kong residents, such as their entitlements to publicly funded benefits. Here, the Court of Final Appeal has, in a number of cases concerning the extent of review the courts should perform in relation to a restriction to fundamental rights guaranteed under the Basic Law, indicated that there are different constitutional roles played by the judiciary on the one hand, and the legislative and executive authorities on the other, so that the former recognizes an area of discretion the latter have in the making of policies in the socio-economic context, including the making of choices regarding the allocation of limited public funds. The effect of this recognition on the part of the judiciary is that unless the impugned measure impinges a core value of Hong Kong's society or involves possible discrimination on inherently suspect grounds such as sex, race, religion, political opinion or sexual orientation, the court's duty to intervene applies only where the impugned measure is "manifestly without reasonable justification".¹² Again, with the approach taken by the courts and assuming, reasonably, that counsel for the government would make submissions in the light of the courts' approach, I ask **how real** is this statement.

I now turn to the third question, which asks: ***'To what extent do you agree with this statement: "The government***

¹² See *Fok Chun Wa v Hospital Authority* (2012) 15 HKCFAR 409, CFA; *Kong Yunming v Director of Social Welfare* (2013) 16 HKCFAR 950, CFA; and *Hysan Development Co Ltd & Ors v Town Planning Board* (unreported, 26 September 2016, FACV 21, 22/2015), CFA.

should ensure people in need will have legal representation in trial.” Before I deal with the results of the survey, I wish to point out a discrepancy between the English and Chinese versions since the Chinese version speaks of the obligation of the Government to ensure that residents in need would be able to obtain legal aid. It can therefore be said that the Chinese version points to a relatively specific and firm obligation on the part of the Hong Kong SAR Government to provide legal aid on a need basis.

I see that the results between the internal legal culture and the external culture, namely 90.8% under the internal and 93.7% under the external, to be relatively straightforward. The slight difference between these two expressions of overwhelming may be that the external legal culture, the Hong Kong residents themselves, do have a strong need for publicly funded legal assistance and they do find that the legal aid schemes administered by the government department responsible, the Legal Aid Department, to be essential for the upholding of a litigant’s rights in a trial. In this respect, it may be necessary to point out that the guarantees we do have under the Basic Law and the Hong Kong Bill of Rights are not co-extensive with the obligation asserted in the statement. Article 35 of the Basic Law guarantees only the Hong Kong’s resident’s choice of having legal representation to defend their rights in a timely basis. Articles 10 and 11 of the Hong Kong Bill of Rights emphasize the right to legal representation in the determination of a criminal charge where the interests of justice so require, though the jurisprudence of Article 10 does suggest that in certain circumstances, the entitlement of a fair hearing by a competent, independent and impartial tribunal established by law in the determination of a person’s rights and obligations in a suit at law may implicate the provision of affordable or free legal representation to him or her. In this

connection, I wish to stress that the availability of affordable or free legal representation through public funding is to uphold the litigant's rights and interests in view of the often complex legal proceedings, both in substance and procedure, and to ensure that all relevant issues of fact and law can be articulated before the court by reference to the relevant evidence and authorities, rather than to serve the monetary interests of the lawyers.

This Rule of Law and Legal Culture in Hong Kong survey is one of many surveys that we come across that seek to measure Hong Kong's qualities as an economy and society. Each of them follows its own methodology. We can compare methodologies between surveys to enhance the sensitivity and reliability of the one we are concerned with. One such survey that the Hong Kong Bar Association has referred to has been the World Justice Project's Rule of Law Index, which is compiled on the basis of answers provided by 300 local experts of a set of five questionnaires developed out of a published conceptual framework with the following themes: constraints on government powers, absence of corruption, open government, fundamental rights, order and security, regulatory enforcement, civil justice and criminal justice.¹³ In 2015/2016, of the 113 jurisdictions in this Index, the Hong Kong SAR has a global ranking of 16 at a score of 0.79 below the following countries: Denmark (No 1, 0.89), Germany (No 6, 0.83), New Zealand (No 8, 0.83), Singapore (No 9, 0.82), United Kingdom (No 10, 0.81) and Japan (No 15, 0.78). And if one looks at the "radar" regarding Hong Kong SAR, it appears that our jurisdiction is very strong in the absence of corruption and criminal justice, strong in order and security, regulatory environment and civil justice, but the matters that probably

¹³ Accessible at: <http://worldjusticeproject.org/rule-of-law-index> (last accessed on 31 October 2016).

lead to the SAR not coming within the global top ten are: constraints on government power, open government and fundamental rights, with lower scores on issues like non-governmental checks, lawful transition of power, freedom of expression, and freedom of association.¹⁴ This survey may provide food for thought for all of us here and we can discuss that with Mr Simon Ng, the discussant, at the later stage of today's proceedings.

THANK YOU.

¹⁴ Accessible at: <http://data.worldjusticeproject.org/#groups/HKG> (last accessed on 31 October 2016).