

CHIEF JUSTICE LI: A TRIBUTE BY SIR ANTHONY MASON

On 21 January 2011, the Hong Kong Bar Association held a Bar Mess in honour of Chief Justice Li, in recognition of his significant contribution to the administration of justice in Hong Kong. An Honorary Life Membership of the Hong Kong Bar Association was also conferred on him.

A special guest for the Bar Mess was the Honourable Sir Anthony Mason, AC, KBE, a Non-Permanent Judge of the Hong Kong Court of Final Appeal since its foundation on 1 July 1997. The following is the full script of Sir Anthony's speech given at the Bar Mess in tribute to Chief Justice Li.

This speech will also be published in a forthcoming issue of the *Hong Kong Law Journal*.

Mr Chairman, Chief Justice Ma, Andrew Li (to whom I shall refer as Chief Justice Li because it is in that capacity I know him), Judges, members of the Bar and guests.

I could yield to the temptation invoking the old formula and simply saying "I agree with Bokhary PJ and have nothing useful to add". But I shall resist temptation and leave it to you to judge whether what I say has any utility.

It did occur to me, but only after some reflection, that when Russell Coleman invited me to speak this evening, he expected that I would speak well of Chief Justice Li. No doubt with this in mind, his minions initially offered me a time limit of 15 minutes. Last week Russell reduced this time limit downwards to 10 minutes, suggesting that I could manage all I had to say within that time. Perhaps the change indicated that he had lowered his estimate of the guest of honour's worth and that he

apprehended that a longer time might tempt me to embark on a critical review of Chief Justice Li's stewardship.

If so, the apprehension was unfounded. One of our guest of honour's strengths is that he is a risk-manager, not a risk-taker. He always plans ahead so he took the precaution of inviting me to lunch tomorrow, an interest which I feel bound to declare and all the more so as past experience, with one exception, has demonstrated that it will be a fine lunch.

The exception relates to an occasion when our guest of honour took me to an establishment, previously unknown to him, but recommended by someone else. The establishment featured a pulsating chanteuse of the torch singer variety who was surrounded by a circle of enthusiastic male admirers. To my great disappointment, the Chief Justice's reaction was to declare that the place was an unsuitable venue. So, after we had one drink, he hustled me away to a more respectable and less exciting venue.

I have often wondered whether one of his colleagues recommended the restaurant. I hasten to add that Justice Patrick Chan is not included in my list of suspects.

My first contact with Andrew was when he telephoned me at the Cambridge University Faculty of Law in 1997 and asked me whether I was willing to be nominated as a NPJ of the CFA then to be set up under Basic Law. He stressed his confidence in the future of the Court and his

commitment to the rule of law and the independence of the judiciary, a commitment which has never wavered. His confidence was compelling. More than that I sensed intuitively that he was a person with whom I would enjoy working.

At that time outside Hong Kong there was some doubt as to whether this confidence was soundly based. The concept of “one country two systems” was entirely novel. The integration of a capitalist system within a region of a communist country was a bold but untested experiment, as was the incorporation of a common law legal system within such a region. Certainly the Basic Law preserved the common law and the judicial independence of the Hong Kong Courts but then there was art.158 of the Basic Law.

That article was the price of accommodation of two different systems existing side by side. It was foreign to common lawyers in two respects. It vested the power to give a binding interpretation of the Basic Law in the Standing Committee of the NPC and it provided for a reference to the Standing Committee by the CFA of the interpretation of certain provisions of the Basic Law. The article marks the point of intersection of the two very different legal systems and at that point of intersection, where there exists the possibility that the different systems may produce different legal answers, it is not at all surprising that the national system is to prevail.

Nor is it surprising that at this point of intersection tensions will occur from time to time, more particularly when the Standing Committee issues an interpretation, as it did early in the CFA's history, when the Standing Committee effectively overruled the CFA in the early right of abode cases. On an occasion of that kind, the common lawyer becomes concerned for the rule of law because central to his understanding of the rule of law is the finality of court decisions. But finality should not be confused with immutability. Court decisions, though usually final as between the parties, may be altered, as they have been in our experience by legislation, subject, of course, to constitutional constraints. And, here in Hong Kong, the provisions of art 158 are a central element in the rule of law in a system which by reason of that very provision is a novel legal system.

I mention these matters because they were thought by some to present a threat to the rule of law and judicial independence in the HKSAR and they were a prominent element in the legal landscape that confronted the incoming Chief Justice in 1997.

The nature of the challenge that confronts an incoming Chief Justice of a court of final appeal varies considerably. At one end of the scale there is a Chief Justice, like myself, the senior member of a long-established court under a long established constitution, a court with its

own settled tradition, legal culture and practices. At the other end of the scale, you have, as you had in 1997 in Hong Kong, an incoming Chief Justice without previous judicial experience who was appointed not only to lead a new court but also to take the responsibility for administering the entire court system of the region under a new constitution which awaited interpretation on many fundamental issues and involved the tensions of which I have spoken.

The magnitude of that task included the gradual replacement of the former generation of judges by Hong Kong judges and the operation of the CFA with its novel composition of four permanent indigenous judges and the panel of exotic itinerant non-permanent judges, including myself, once described by the South China Morning Post as “parachute” judges. At that time I thought the description was mischievous but as Qantas, the airline by which I travel, has experienced the misfortune of using problematic Rolls Royce engines, I trust that the description will not prove to be prophetic.

My experience as a “parachute” judge in Hong Kong and elsewhere, and as an arbitrator, working with judges and lawyers from other jurisdictions, has shown that the strengths and virtues of the common law tradition outweigh the many minor differences that exist across the jurisdictions. That is why sitting here in the CFA reminds me so much of sitting in the High Court of Australia in Canberra – except in

one respect. Here I am addressed as “my Lord” and “your Lordship” – and I must say I like it. It is good for one’s self-esteem. Egalitarianism is all very well – so long as it is confined to egalitarians or those who profess to be egalitarians!

I shall not spell out Chief Justice Li’s qualities. To do so would take me well beyond my time limit. In any event, modesty would induce him to deny them. But he cannot deny his achievements. He left Hong Kong with a court and a court system which met the momentous challenges. He reinforced the rule of law and judicial independence and he saw to it that Hong Kong set about developing a body of jurisprudence suited to its conditions and circumstances. And he always endeavoured to craft judgments in a way that provided guidance to judges and magistrates in courts below the CFA, as well as the legal community, a quality not always evident in judges who sit on final courts of appeal.

Of course, the Chief Justice’s legacy would not have been possible without the strong support of his colleagues and of the Hong Kong judiciary and the co-operation of the legal profession. The quality of judicial work in any jurisdiction - and not least in Hong Kong - depends upon the quality of the work of the profession, in particular the Bar, and its dedication to the rule of law, to the traditions and to the intellectual discipline of the common law. But it was the Chief Justice’s leadership

that guaranteed, and made the most of, that support and the co-operation of the profession.

It remains only for me to pay a personal tribute to the guest of honour as a great Chief Justice and as a person whom I respect and admire as a friend. And, in conclusion, I thank him for giving me the priceless opportunity of working with him and his colleagues. In language with which he would be more familiar than I am, it has been a great ride.
