

**Speech by the Hon Rimsky Yuen, SC, JP
Secretary for Justice
at the Opening Ceremony of the 2017 Criminal Law Conference
on 20 May 2017 (Saturday)**

The Hon Justice William Young, Professor David Ormerod, Members of the Judiciary, Fellow Members of the Legal Profession, Colleagues, Distinguished Guests, Ladies and Gentlemen:

First of all, may I, on behalf of the Department of Justice, extend to all of you our warmest welcome to the “Criminal Law Conference 2017”, the fourth run of this conference series jointly organised by the Department of Justice, the Hong Kong Bar Association and the Law Society of Hong Kong on criminal justice reform in Hong Kong.

2. I trust all of us here would agree that the criminal justice system is one of the most important aspects of our legal system, underpinning the rule of law in Hong Kong. On the part of the Department of Justice and as stressed in our Prosecution Code, we always endeavour to put in place a robust criminal justice system that is transparent and fair, as well as one that strikes the right balance between the protection of human rights and the need to protect the public from criminal activities.

3. To achieve this aim, substantive law as well as procedural measures to ensure a fair trial are of utmost importance. As the late Lord Bingham emphasised in his seminal book “The Rule of Law”, “[t]he right to a fair trial is a cardinal requirement of the rule of law.”¹ The imperative of a fair trial is of such significance that Lord Bingham devoted a whole chapter of his book to it, and quite a few of the points he made are highly relevant to the topics that we are going to address today.

4. This year, our discussion will focus on four topics. The first one concerns “Active Case Management”. As expounded by Lord Bingham, “(i)t must be recognised that fairness means fairness to both sides, not just one. The procedure followed must give a fair opportunity for the prosecutor or claimant to prove his case as also to the defendant to rebut it. A trial is not fair if the procedural dice are loaded in favour of one side or the others, if there is no equality of arms.”² This concept of a fair procedure, which is constitutionally guaranteed in Article 87 of our Basic Law, is inherent in the concept of active case management.

5. While it is in the interest of both the defendants as well as

¹ See Tom Bingham, *The Rule of Law* (Allen Lane 2010), page 90.

² Ibid, page 90.

the community as a whole for criminal cases to be disposed of expeditiously, the means to achieve this goal may sometimes have bearing upon the defendants' right to fair trial. The topical question, namely, "public interest and fair trial rights – where should the balance be struck?" highlights the crux of the issue to be considered in respect of this topic.

6. The concept of fair trial is also engaged in the second topic on "Protecting the Vulnerable in Court". The principle of open justice is undoubtedly another key aspect of fair trial. As Lord Bingham observed in his book, "*the trial should, largely if not wholly, be held and judgment given in public*"³. However, some of the protective measures designed to safeguard the interest of the vulnerable, for instance, the use of screens and secret passageways, may seemingly run contrary to this principle. This gives rise to the question of how can the protection of the vulnerable and the notion of open justice be reconciled?

7. The notion of fairness to the defendant reverberates in the background when we come to the third topic under which the law on joint enterprise will be discussed. One of the interesting points raised is whether the extended form of joint criminal enterprise may arguably amount to over-criminalisation or even

³ Ibid, page 97.

potential human right abuse. One may ask the questions: Has it disproportionately extended the scope of collective liability on participants of a criminal group beyond the traditional principle of accessorial liability? Or can it be justified on policy grounds, namely to give the law a necessary weapon to combat triad-related gang fights and robberies?

8. The fourth topic on “Sentencing Practice in Hong Kong” concerns the issue of sentencing discretion of judges. If I may again quote from Lord Bingham’s book, the learned Judge pointed out that “*(i)t is widely (and rightly) regarded as important that judges should enjoy a measure of discretion when passing sentence on convicted criminals*”, but it would be “*a source of injustice if the severity of a criminal sentence is dictated by judicial prejudice or predilection, or whimsy ...*”⁴. In *Attorney General v Liu Wing-chun* AR 7/74, Briggs CJ explained: “*The courts are aware of their responsibilities to the public in the matter of sentencing, but aware also that one of their primary functions is to maintain a necessary balance, which involves a refusal to be stampeded by public opinion or by the existence of any current campaign into the imposition of penalties which are unduly harsh in all the circumstances of any particular case.*”

⁴ Ibid, page 53.

9. Whilst I am sure every judicial officer in Hong Kong would do their very best when imposing sentences, we should never pause in our quest for a better system. In this regard, a recent Court of Appeal decision (*Ngo Van Nam*) setting out detailed guidelines on discounts in sentences for guilty pleas is highly relevant. The guidelines enhance consistency in treatment for all defendants. They contribute positively not only to parity (and hence justice) but also more effective use of judicial resources.

10. The issues I have highlighted above demonstrate that our four discussion topics today are as mentally challenging as they are important to the development of our criminal justice system. I am sure that with your free and active exchange of views on these issues of common interest in this neutral setting, this Conference will spark lively and constructive debates for changes that will further enhance our criminal legal justice system.

11. Before I conclude, I would like express my gratitude to our co-organisers, namely, the Law Society of Hong Kong and the Hong Kong Bar Association; the renowned speakers for the four discussion topics; as well as conference participants from the Judiciary and the legal profession. Moreover, my special thanks go to our two very distinguished overseas guests, the Honourable

Justice William Young of the Supreme Court of New Zealand, and Professor David Ormerod, the Law Commissioner for Criminal Law and Evidence for England and Wales. No doubt we will benefit immensely from their experience and insights into how we could better deal with the challenges we face.

12. Last but not certainly the least, my special thanks also go to the Director of Public Prosecutions and his team for the time, efforts and dedication they contributed to this Conference which make it possible.

13. On this note, may I declare the formal commencement of the Criminal Law Conference. I wish you all an enjoyable and fruitful day.

Thank you.