律政司
香港特別行政區政府
Department of Justice
The Government of the Hong Kong Special Administrative Region

願景2030・聚焦法治
Vision 2030 for Rule of Law

Hong Kong Legal Week 2020
Inaugural Rule of Law Congress
— Proceedings —

Towards 2030 :
A Decade of Action for Rule of Law

3 November 2020

律政司
香港特別行政區政府
Department of Justice
The Government of the Hong Kong
Special Administrative Region

Disclaimer

This publication is presented under the terms and on the understanding that (1) the statements and opinions contained in this publication are solely those of the individual speakers and authors and do not necessarily reflect those of the organiser of the Congress; (2) transcripts obtained herein have been edited for readability and do not represent a verbatim record of the Congress; (3) the speakers, authors and publisher are not responsible for the results of any actions taken on the basis of information in this publication, nor for any error in or omission from this publication; (4) the publisher is not engaged in rendering legal or other advice of services; (5) the speakers, authors and publisher shall not be held liable or responsible for any person or entity with respect to any loss or incidental or consequential damages caused, or alleged to have been caused, directly or indirectly, by the information contained therein.

Copyright© in this book is vested in the Government of the Hong Kong Special Administrative Region. This book may not be reproduced in whole or in part without the written permission of the Government of the Hong Kong Special Administrative Region or the author of the respective articles herein.

Hong Kong Legal Week 2020
Inaugural Rule of Law Congress
— Proceedings —

"Towards 2030 :
A Decade of Action for Rule of Law"

ORGANISER

Department of Justice

The Government of Hong Kong Special Administrative Region

Table of Contents

Welcome Remarks

The Honourable Teresa Cheng Yeuk-wah, GBS, SC, JP*

Secretary for Justice, Hong Kong SAR Government

**The Honourable Teresa Cheng has been awarded the GBM in the 2021 Honours List (published in the Government Gazette on 1 July 2021).*

Prior to her appointment as the Secretary for Justice, Ms Cheng was a Senior Counsel in private practice. She is also a chartered engineer, a chartered arbitrator and an accredited mediator. Ms Cheng was one of the founders and Chairman of the Asian Academy of International Law. She is also a Past Chairperson of the Hong Kong International Arbitration Centre, a Past Vice President of the International Council of Commercial Arbitration and a Past Vice President of the ICC International Court of Arbitration.

Ms Cheng served as Deputy Judge/Recorder in the High Court of Hong Kong from 2011 to 2017. Besides, Ms Cheng is a member of the International Centre for Settlement of Investment Disputes Panel of Arbitrators and was a member of the World Bank's Sanctions Board.

Introduction

It gives me great pleasure to welcome you to the Inaugural Rule of Law Congress which is to be held every other year in the Hong Kong Legal Week, as an event of the Vision 2030 for Rule of Law (V2030). In line with the United Nations' call for a Decade of Action to achieving Sustainable Development Goals by 2030, the theme this year is "Towards 2030: A Decade of Action for Rule of Law". Let us start with looking at the rule of law.

In 2012, members of the United Nations at the High-Level Meeting of the 67th Session of the General Assembly on the Rule of Law at the National and International Levels adopted the Declaration emphasising on the rights of equal access to justice for all and reaffirmed the commitment of member states to take all necessary steps to promote access of justice for all. In 2015, all members in the United Nations adopted the 2030 Agenda (2030 Agenda) and the 17 Sustainable Development Goals. Goal 16 recognises the importance of the rule of law as an important pillar towards the successful implementation of 2030 Agenda. In particular, Target 16.3 promotes the rule of law at the national and international levels, and ensure equal access to justice for all.

At national levels, there are a number of iterations of the rule of law and the writings and study on the subject tend to suggest that the core common denominators can be broadly categorised into formal elements, substantive elements and procedural elements. The existence of an independent, impartial and efficient judiciary, as the procedural element, is the important safeguard to ensure observance of laws by the government and

the general public.

A fourth category that may be relevant and worthy of further study is the cultural and level of development of the relevant jurisdiction. As noted in the UN Declaration in 2012, the rule of law and development are strongly interrelated and mutually reinforcing. As such, is it appropriate to pass judgment on the practice of the rule of law in a developing state by the same reference points as that of a developed state? Similarly, the diversity in social and legal cultures may explain why in some jurisdictions certain laws or way of dealing with a dispute is perfectly acceptable whilst not so in others. The collection of objective data may also be a helpful and useful tool to help review the practice of the rule of law, and hence, to improve on it as necessary. All these will necessitate more research and study as part of the Vision 2030 projects.

In this Inaugural Rule of Law Congress, we aim to focus on two of the factors that are crucial to access to justice: "Enhancing legal aid services in ensuring access to justice for all" and "Keeping up with the times: Capacity Building for Judicial Officers".

Legal Aid Services

Let me start with legal aid services. In Hong Kong, legal aid is an integral part of our legal system. At the moment, there is no ceiling on legal aid expenditure for both civil and criminal proceedings. Once the statutory means and merits tests are satisfied, legal aid funding will be available. Legal aid is available in a wide range of cases, including criminal cases, judicial review, immigration matters, torture claims, etc. Assistance schemes for eligible persons such as the Legal Assistance Scheme for Convention Against Torture & Non-

Refoulement Claims and pro bono services provided by the private sectors are also available. Statistics show that the total expenditure on legal aid cases over the past 10 years has an increase of over 230% from HK$485.7 million in 2009/2010 to HK$1,133.8 million in 2019/2020.

In a Court of Final Appeal judgment in 2018, Chief Justice Ma (as he then was) remarked that, "As the evidence before the court showed, Hong Kong's relatively generous system of legal aid, compared with many other jurisdictions, has ensured that most cases of public importance have over the years been determined by the courts. This has also been the Judiciary's experience."[1]

One of the challenges to ensuring access to justice for all is how to make effective and efficient use of resources available to provide legal aid and yet to prevent abuse. This is particularly challenging for developing countries where resources available for legal aid may be limited. We will hear how legal aid is made available in various jurisdictions and on whether legal aid should be provided in cases before international courts or tribunals, and how we could ensure access to justice even in cross-border situations, and no doubt referring to the Access to Justice Convention of 1980.

Capacity building for judicial officers

Let me turn to the second topic of the day. Hong Kong's robust and independent judiciary is internationally renowned, where the World Economic Forum Global Competitiveness Report 2019 ranks Hong Kong number 2 in Asia and number 8

[1] Designing Hong Kong Limited v. The Town Planning Board & Anor., FACV 4/2018 (May 5, 2018), paragraph 27.

globally for judicial independence.[2] Article 85 of the Basic Law also guarantees that Hong Kong courts shall exercise judicial power independently, free from any interference. Judgments of the courts are fully reasoned and available on the internet for easy access.

Conflicts and disagreements on social or moral values or politics ought to be dealt with by the politicians as representatives of the people. However, in recent times, some of these issues are legalised so that they are brought before the court. The rights of an individual applicant will be adjudicated and a ruling provided. It may seem to provide a definitive answer to a specific claim, but are the underlying conflicts on the value and interests relating to the social or moral debates in the society on the issue resolved? In Madam Justice McLachlin's words, "Judges no longer live in remote ivory towers; they live in the real world. Judges still speak mainly through judgments, and hold themselves aloof from political controversy and social opinion."[3] In Lord Sumption's words, "If judges assert a power to give legal effect to their legal opinions and values, what is that but a claim to political power without political responsibility?"[4] I cannot wait to hear how our expert panelists would address the question of politics and law and the rigorous judicial methods to be adopted in discharging judicial functions at both national and international levels.

Besides having to deal with the increasingly complicated and

[2] The Global Competitiveness Report 2019 was published on October 9, 2019. The Global Competitiveness Report 2020 has not been released as at November 3, 2020.

[3] "Attack against judges" was one of the issues covered in a talk by the Right Honourable Madam Justice Beverley McLachlin in December 2019 (as part of the training to judges), where Madam Justice McLachlin shared her opinion. See pages 15-23 of www.hkcfa.hk/filemanager/speech/en/upload/2248/20191212%20McLachlin%20NPJ%20-%20Address%20to%20Judic iary%20(final%20for%20uploading).pdf.

[4] Jonathan Sumption, Trials of the State: Law and the Decline of Politics (Profile Books, 2019)

intertwined legal and political issues, the judiciary also has to handle an unprecedented outbreak of the COVID-19 pandemic. In response to COVID-19, the Hong Kong Government has supported the development of the COVID-19 Online Dispute Resolution (ODR) Scheme to provide speedy and cost-effective ODR services to the general public and businesses. Hong Kong courts started to seriously review the use of technology under this new normal. We will hear from our panelists how in their jurisdictions the judiciary is catching up with the changing and challenging times and adapting to the new normal.

Capacity building for judicial officers is by no means an easy subject. We hope that this session will provide a useful exchange on the topics so relevant to judicial qualities and enable us to explore how these messages can be further shared in diverse jurisdictions as part of the "Vision 2030" initiative.

Conclusion

I wish to take this opportunity to extend my sincere gratitude to the moderators and speakers, all of whom have kindly taken out time from their busy schedules to share with us their insights. A special thanks also to those participating online. I must also express my heartfelt gratitude to members of the Task Force on Vision 2030 for Rule of Law who are renowned members of local and international legal communities, and have therefore granted us a lot of advice and guidance on taking the project of Vision 2030 for Rule of Law forward. I hope with technology, through this online arrangement, we will be able to reach out to more of you via the internet. I hope that I will be able to see you all online for the rest of the Hong Kong Legal Week but more importantly, I hope to see you all in Hong Kong in person at the Hong Kong Legal Week 2021. Thank you very much.

Panel 1:

Enhancing Legal Aid Services in Ensuring Access to Justice for All

Speaker

Mr Robert Pé

Independent Arbitrator and Former Adviser on Legal Affairs to Aung San Suu Kyi

Robert S. Pé served as adviser on legal affairs to Aung San Suu Kyi from 2012 and later as an adviser to her government and its justice sector Coordinating Body after she took office in 2016. In those roles, he was heavily involved with efforts to strengthen the legal profession in Myanmar and to improve access to justice for the population at large.

Mr. Pé is a Fellow of the Chartered Institute of Arbitrators and a member of Arbitration Chambers in Hong Kong, London and New York. He was in private practice with major international law firms for over two decades and the Chambers legal directory described him as a "Top-flight" lawyer, who commands "the highest levels of respect in the market". In 2014, his work in Myanmar received the American Lawyer's pro bono award for Asia and in 2015 the Financial Times identified him as one of the most innovative lawyers in Asia. He has spoken on law reform in Myanmar at events hosted by the Asian Academy of International Law, Bingham Centre for the Rule of Law, Chatham House, Economist, Financial Times, Kobe University, University of Hong Kong and US Council on Foreign Relations.

Note: subsequent to the Rule of Law Congress on 3 November 2020, there was a regime change in Myanmar on 1 February 2021 and this has greatly changed everyday life in Myanmar, including access to justice.

Improving Access to Justice in Myanmar

I will talk about improving access to justice in Myanmar. There's a very nascent legal aid system, which I'll come on to, but I'm going to start more broadly by setting the scene. Before I do that, I must thank the Department of Justice and the other organisers for inviting me to join you today. It's a great privilege to be with you. As many of you know, I lived in Hong Kong for two decades, and I'm very much missing Hong Kong, so it's good to reconnect with everyone.

Background to the legal system in Myanmar

[Slide #2] This is a photo of the University of Yangon, Department of Law. I show you this so that I can talk about the background to the legal system in Myanmar. From 1962, for around five decades, Myanmar was under a military regime. During that time, rule of law was very much undermined and the prestige usually associated with the legal profession was completely destroyed.

In fact, most high school graduates viewed as unattractive the prospect of studying law at university. On top of that, the level of legal education was very poor. It involved a system of rote learning whereby a senior individual would stand up and talk at the students, rather than involving any kind of participatory learning.

[Slide #3] This is a courtroom in Myanmar. It may look basic to you, but this is actually one of the better courtrooms. In most courtrooms in Myanmar, until recently, you would be lucky to see someone with a typewriter, let alone the equipment we are

used to seeing in a courtroom.

Indeed the level of justice that was administered was very basic. During the military era, it was relatively common for a military officer to sit in the courtroom and write the judgment, and then the civilian judge would just read out what the military officer had written for him to read.

Legal aid in Myanmar

[Slide #4] As you can see from the slide, nine out of ten cases handled in the state court system are criminal prosecutions, and most of those cases go ahead without the involvement of any lawyers. But Myanmar has had a tradition of being generous and lawyers sometimes provide free legal advice to "the deserving".

In fact, the party that is now (as at the date of the Rule of Law Congress) the governing party, the National League for Democracy, when it was previously a protest movement, had a long tradition of providing free legal advice for political prisoners. This was a point that I heard made by Daw Aung San Suu Kyi when meeting with an INGO (international non-governmental organisation) that was pushing the idea of legal aid. She emphasised that there was already a tradition of free legal advice in Myanmar and that it was important to build on this.

[Slide #5] In 2016, a new legal aid law was enacted. This was drafted by the Bills Committee of Parliament. This, in itself, gives you a sense of some problems in the way things were being done because it's not typically the role of a parliamentary Bills Committee to handle law drafting. But in this case, the Bills Committee did prepare the legal aid law. Many laws in

Myanmar set up a network of committees and commissions. The legal aid law established national and regional Legal Aid Boards, but it did very little in terms of actual implementation of legal aid, and most importantly, failed to specify eligibility criteria.

The intention behind the legal aid law was good and it has created an opening to highlight the importance of access to justice.

Justice Centres in Myanmar

[Slide #6] Various Justice Centres have been established in Myanmar in the last five to six years. Some of these are modelled on South Africa's one-stop-shop legal services centres. They provide free legal representation for the poor in the criminal justice system, and focus on protecting fair trial rights. There has been some progress in that the Union Attorney General's Office has issued a fair trial manual and there is now (as at the date of the Rule of Law Congress) renewed focus on fair trial rights. The Justice Centres have established themselves as competent, credible providers of free legal services. They challenged the status quo in which arrests were essentially rubber-stamped into convictions.

[Slide #7] Additional benefits are that they play a role in disrupting longstanding practices like corruption. During the military era, it was very common for bribes to be paid to judges and other courts officials. In fact, from my own discussions with members of the judiciary and clerks, I learned that it was almost like a system of scale fees. Judicial clerks would take a certain level of bribe to deliver a particular outcome. If you needed a hearing adjourned for two weeks, then you paid a

certain level of bribe. If you needed someone to be acquitted, then it would be a different level of bribe, obviously much higher. The Justice Centres are helping to address such problems. They're developing an understanding of the role of law in delivering justice. They're providing a safe space for lawyers to collaborate. Lawyers can support and challenge each other. The importance of this development cannot be overstated.

For members of a legal profession that has been completely undermined and vilified, the opportunity to collaborate with your peers is a massive improvement. It develops a sense of common cause and empowerment. I've included in my final bullet point a thank you to MyJustice. MyJustice is a European Union-funded project with a big presence in Myanmar, and they have supported these Justice Centres. I've included their website there for anyone who's interested.

[Slide #8] In terms of moving forward, the Justice Centres have shown how you can improve access to justice. They're setting an example of what can be achieved.

[Slide #9] This is a photo of the Yangon Justice Centre or part of it. You can see it's pretty humble, but it does allow people to come together to collaborate to have a sense of common purpose. That's incredibly important. This photo was taken during a visit by the then Chair of the UK Judicial Appointments Commission. It's been great for the Justice Centres to feel connected with the outside world and to feel that they have support.

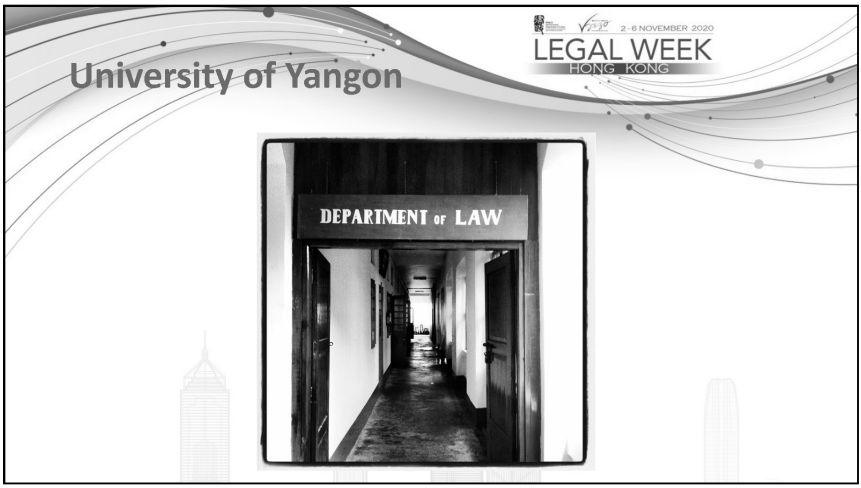
Rule of Law Centres

[Slide #10] This is a Rule of Law Centre and it complements

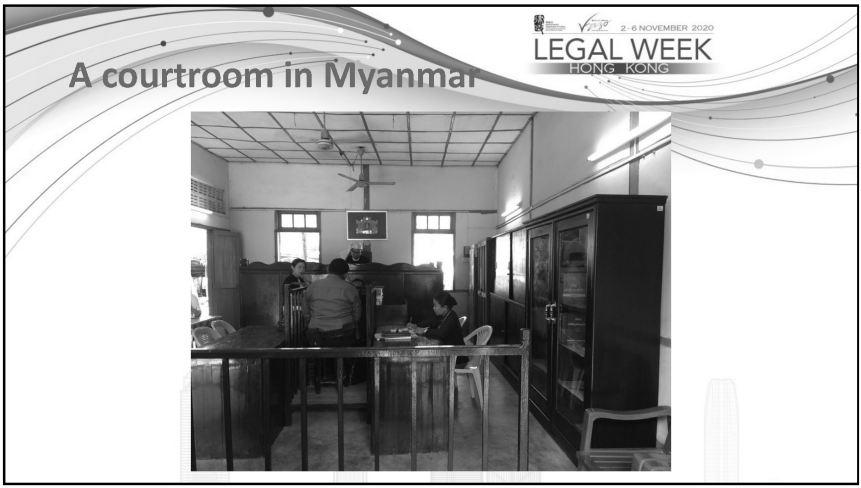
the Justice Centres. The idea behind the Rule of Law Centres was to take a broken legal profession and to start rebuilding it to scale. I talked earlier about the fact that historically legal education in Myanmar was all about rote learning. The Rule of Law Centres are all about participatory learning, practicing advocacy, having an opportunity to debate with your peers or your seniors, and doing that in a very free and open environment. Whenever I take people to visit a Rule of Law Centre, it's very uplifting because you can sense the enjoyment and the pleasure that participants are taking in these learning techniques. So the Rule of Law Centres are delivering (as at the date of the Rule of Law Congress) a new generation of lawyers who will have much stronger professional ethics and much stronger practical skills.

Slide 1

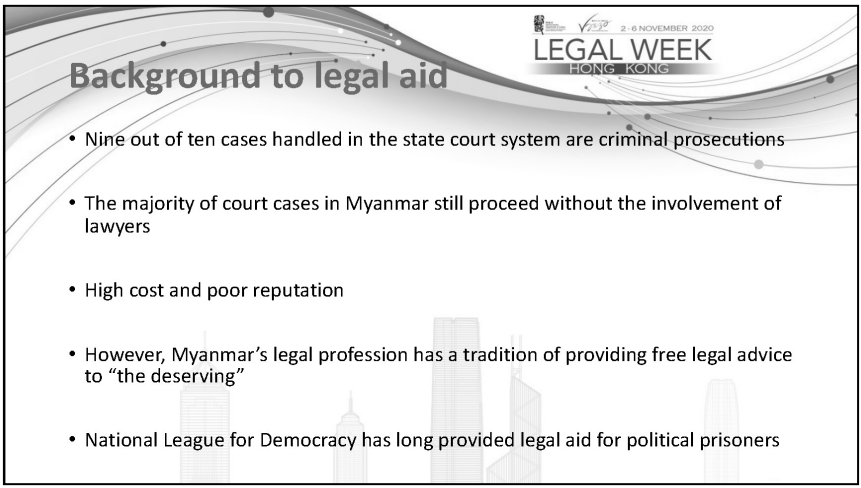
Slide 2



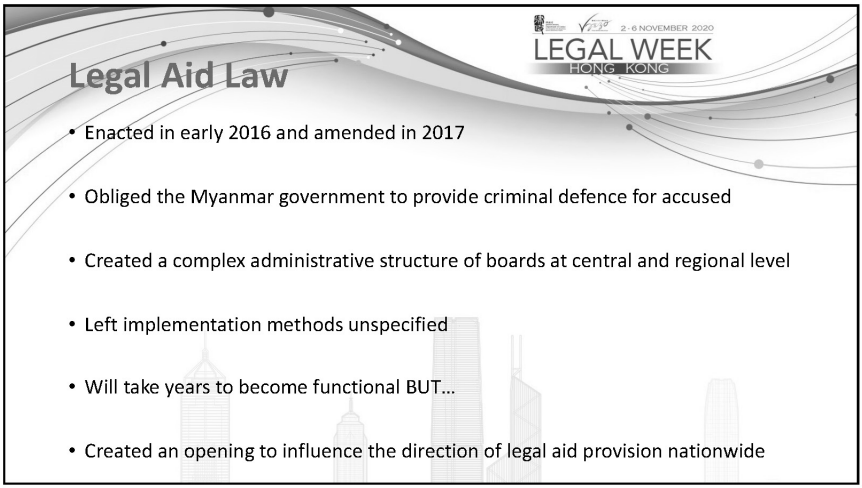
Slide 3



Slide 4



Slide 5

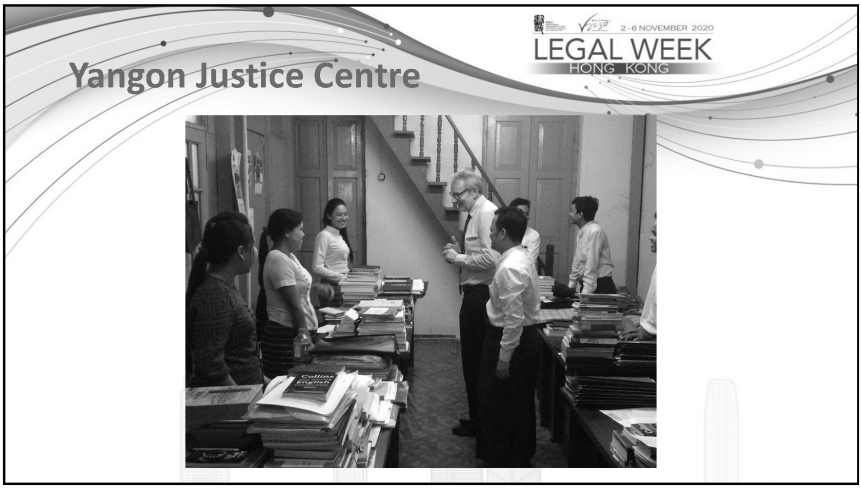


Slide 6

Slide 7

Slide 8

Slide 9



Slide 10

Slide 11

Speaker

Mrs Olufunke Adekoya

Member, World Bank Sanctions Board

Funke Adekoya San is a partner at ÆLEX, based in Lagos, Nigeria and Accra, Ghana where she heads the Dispute Resolution practice group. She is also a past First Vice President of the Nigerian Bar Association where her responsibilities included coordinating the activities of the legal profession in the protection of human rights.

She has over 40 years of experience in corporate dispute resolution and is a past Vice President of the African Users Council of the London Court of International Arbitration; a Governing Board member and immediate past Vice President of the International Council of Commercial Arbitration (ICCA) and a member of the Board of Trustees of the Cairo Regional Centre for International Commercial Arbitration. Funke also sits on the World Bank Group Sanctions Board, which is the final decision maker in contested cases arising out of allegations of fraud, corruption, and collusion in World Bank Group-financed development operations.

An Overview of Legal Aid on the African Continent

Introduction: Legal system in African continent

I'll give you an overview of legal aid on the African continent. By way of a backdrop, I'd like to start by saying that the African continent has 55 different countries. The countries have different legal systems as a result of the colonization of the African continent. Some countries have an English-based common law legal system, Nigeria is one of them. There are other countries that have legal systems based on the Napoleonic Code as a result of French colonization.

There are countries that have a legal system that are a mixture of both the Dutch legal system, some parts have the English legal system, some parts have the Napoleonic. South Africa is one of those countries that have a legal system that has a combination of the various parts of their colonial history. There are other African countries that have a legal system that perhaps looks European but has an Islamic foundation. Therefore, we start from the position that there's a motley of systems on the African continent. However, nearly all of those systems of administering justice depend on a legal profession in one way or the other.

Legal aid in African continent

[Slide #2] From there, I'd like to move to the point that even where these legal systems exist, not all African countries have a state-funded legal system, but that does not mean that legal aid does not exist. We find out that in many countries, faith groups, religious organisations, and the legal profession provide some

sort of unstructured legal aid to support what is called the indigent, or, as we've heard before, the deserving.

Now, in the countries where there is a state-funded legal aid system, it doesn't cover all offences. In some countries, it's criminal law. Nigeria covers both criminal offences and civil offences, but they're restricted. Coverage of state-funded legal aid is also not countrywide, generally, and this is because in most African countries, there's a high rural populace and a not-so-high urban populace.

To the extent that there's a legal system where lawyers are actively involved, and these are the people who tend to provide legal aid on a pro bono basis, you will tend to find such services available in the urban centers. The rural parts of the country are not effectively covered by access to justice, in terms of having legal representation. Even where budgetary allocation exists by way of a state-funded system, it is generally insufficient.

The focus of many African countries has been on developing its infrastructure, developing its health services, developing access to education, and also military defence. The legal system and to that extent, state-funded legal aid, has come a poor third or fourth or fifth or sixth, as the case may be, so the budgetary allocation is insufficient. And even where there is state-funded legal aid, it's generally not available at every stage of the criminal justice system, not to talk about the civil justice system.

So for instance, at police stations, where the citizen will probably have the first interaction with the justice sector, there is very little access to some sort of legal support, either by way of legal advice or legal representation. Where legal aid is

available, it is generally at the point of either incarceration awaiting trial for criminal offences, or when a trial has commenced.

Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in Africa

[Slide #3] What that has resulted in, has been a focus some 15 years ago now by African countries, on having some sort of a country-wide approach to legal aid. There was a conference that was held in Malawi in 2004 and that resulted in the Lilongwe Declaration on Accessing Legal Aid in the Criminal Justice System in Africa. The perception was, civil claims are claims between parties and were not as important as providing aid and access to justice in the criminal justice sector, where it was the might of the state against the individual, noting that in many countries, the access to justice, the rural poor, could be up to 70% of the population.

That conference was attended by 21 African countries and they focused on how we could look at providing access to justice to African citizens, by non-lawyers and other service providers. Noting that in many African countries, the population in terms of the ratio of lawyers to the rest of the community is not great. Therefore, asking lawyers alone to be the providers of legal aid, either by a state-funded system or by voluntary systems, would not provide sufficient legal aid, so that was the focus. What came out of the conference in Lilongwe?

[Slide #4] The Lilongwe Declaration looked at what was supposed to be the objective of legal aid in African countries and focused on three areas. I'm quoting from the Declaration: "reduce reliance upon the police to enforce the law, to reduce

congestion in the courts, and to reduce the reliance upon incarceration, as a means of resolving conflict based upon alleged criminal activity".

Use of ADR Mechanisms

Over the last 15 years, the focus really has not been so much on reducing reliance on the police to enforce the law. The focus has been on how to reduce congestion in the courts. That has been done by focusing on ADR mechanisms to resolve matters either before they get into the courts, or even while the matter is in court, and reducing reliance upon incarceration. That has been using additional correctional techniques.

The two that have been most discussed and talked about, and I'll come to further discussions of that in a moment, have been community service and plea bargaining. You find out that, in many African countries, there has been a focus on moving to ADR mechanisms by way of mediation centres to resolve disputes. We have actually discovered that in many African countries, even when there's a complaint made at the police station, you tend to find out that sometimes even the police themselves will say, "Look, can't you resolve this matter by either having the complainant compensated in some way by the alleged accused?".

Many countries have actually set up established mediation centres. Some are run by the government, as an appendage to the court system, and many are privately set up and supported to reduce the pressure on the court system and thereby reducing the congestion in the court, and as a means of providing some sort of legal advice or legal representation to those who are involved in the court system.

In terms of additional correctional techniques, community service has been much discussed. But as of 10 years ago, the United Nations Office on Drugs and Crimes implemented a survey throughout Africa. Community service whilst was much discussed, had not effectively come into force 10 years ago. As of now, some countries are looking at community service. Nigeria has taken it on board as a country where community service will be an alternative to incarceration. Plea bargaining has also been something that is much discussed and has been implemented in Nigeria as well, and I'll discuss that in further detail in a moment. Those are the objectives of the Lilongwe Declaration.

Legal Aid in Nigeria

[Slide #5] Now, I'll be a bit specific and speak about Nigeria which is where I'm from because as I've said, there are so many different legal systems in 55 African countries. I'd like to be slightly specific. Legal aid in Nigeria established statutorily as far back as 1976. We currently have an updated Legal Aid Act in 2011. The Legal Aid Act says it is to provide free legal advice and legal representation to indigent persons in certain cases, so there is some sort of a means test but it is pretty fluid. The reason being that the majority of the populace especially in the semi-urban areas where the Legal Aid Council works. In the rural areas they tend to be non-existent but in the semi-urban areas, you still find out that a lot of those who seek access to legal aid are clearly in need and cannot afford the services of lawyers who are in fact not in sufficient supply.

Now, legal aid doesn't cover everything. In terms of criminal matters, it's murder, grievous bodily harm, stealing, rape, arm robbery, accessory to those offences, so what you would

probably look at as criminal matters that have the likelihood of a high prison term. In terms of civil matters, the Legal Aid Council is even more selective. They look at civil claims that arise out of employees' compensation. So for instance, if there is an allegation that an employee is entitled to compensation that he or she has not received and cannot fund the litigation by himself or herself, the legal aid would step in.

Obviously, where there're issues of fundamental rights which are guaranteed by the constitution, then the Legal Aid Council would step in, and then other civil claims that arise from criminal activities, for those who are qualified. The idea is still to find a speedier dispensation of justice. So the scope still is restricted and that's the state-funded scheme. Having said that, as I had initially indicated, faith societies as well as church groups provide free legal advice (especially at the prisons) and have lists of lawyers that they can refer inmates in prisons, especially those awaiting trial, to enable them to have access to justice and be properly represented before the court system.

Citizens Mediation Centres

[Slide #6] In light of the Lilongwe Declaration, Nigeria has implemented Citizens Mediation Centres. The Centres are state-based and are usually set up as an accessory to and funded by the Ministry of Justice. Invariably, they are not located within the confines of the Ministry of Justice. They have a separate building with separate staffing. It tends to be a walk-in centre. The idea of the Centres is obviously to improve access to justice for the indigent, for the less privileged and for the vulnerable members.

Sometimes the Citizens Mediation Centres actually read of

incidents in the newspapers and they then themselves go out and investigate and advise as to rights. For instance, if there's a mass collision transport incident or if a building has burnt down in a particular highly populated area, you could find that Citizens Mediation Centres' advocates advising the victims of their rights. In essence, they provide free legal advice, legal representation. Still, the purpose is a speedier dispensation of access to justice whilst trying to ensure that people get out of a court system which is congested, and which is overburdened, and which is slow.

Office of the Public Defender

[Slide #7] In Lagos State, the state government has set up an Office of the Public Defender. The Office of the Public Defender is a state version of the Federal Legal Aid Scheme and is located within the Ministry of Justice. They have been set up in about two or three other states in Nigeria. The idea is to provide defence in criminal and civil matters to the indigent and the oppressed residents.

[Slide #8] There are some issues with the Office and I will talk about the issues with access to justice in Nigeria and the Legal Aid Scheme. Firstly, most ADR centres, mediation centres are walk-in. You go in for a physical meeting. To the extent that technology is used, it is used within the ADR centres to maintain files and to maintain records. Because users are indigent, most of them have no access to digital platforms. They have no access to technology, and therefore holding online mediation meetings is something that has not happened. What we discovered as a result of COVID-19 in Nigeria is that, during the lockdown, a lot of the ADR centres were not able to provide legal services because they had no online platforms.

Even if they did, the clientele didn't have the necessary knowledge to be able to access those platforms.

The second side of it is that even to the extent to which the Ministry of Justice has set up a public defender unit to provide defence in criminal matters, there is a distrust of using the Office of the Public Defender because it's based within the Ministry of Justice. One arm of the Ministry of Justice is seen to be prosecuting and another arm is seen to be defending, and therefore, there is a sense of "this can't work". The public defender can't really defend an accused person when he's sitting across the table or he's sitting next door to the Office of the Public Prosecutor that is defending the same case. The Office of the Public Defender, even where it has been established in two or three states, have not been as well-utilized as people would have hoped.

Most public defender activities are provided by private voluntary organisations. The legal profession, the Nigerian Bar Association has encouraged its lawyers to get involved in pro bono schemes and by that, provide legal access to the courts by way of providing defence, usually in criminal matters. Church groups are also quite active. So, where the access to the legal system is concerned for the rural poor, the public defender unit has not been as successful as the government would have hoped.

Plea Bargaining

Plea bargaining is something that has been looked at with skepticism. The reason why it is being discredited within Nigeria is that you hear of plea bargaining mostly in high-profile, high-value cases, corruption cases, for instance, fraud

cases, where the public actually expects incarceration. You have to do time for what you have done. Those are the cases where you hear plea bargaining. In the lesser value theft cases, where you would expect that plea bargaining could be used, you end up having incarceration.

Now it's not clear whether this is because plea bargaining is not made an option in lesser value cases or whether it is actively progressed by counsel in these high-profile, high-value matters. But to the general populace in Nigeria, plea bargaining is discredited. It seems as if this is something that only the rich and the high and mighty have access to, as a means of avoiding punishment for crimes to which they have admitted.

Restitution

Restitution is something that has also been discussed in the last 2 or 3 years. It has not yet been generally adopted. There's various stage legislation that have indicated that for certain crimes, especially financial crimes, forfeiture of assets is part of the system. But restitution, in terms of criminal matters, has not yet been generally adopted. It's something that's still under discussion.

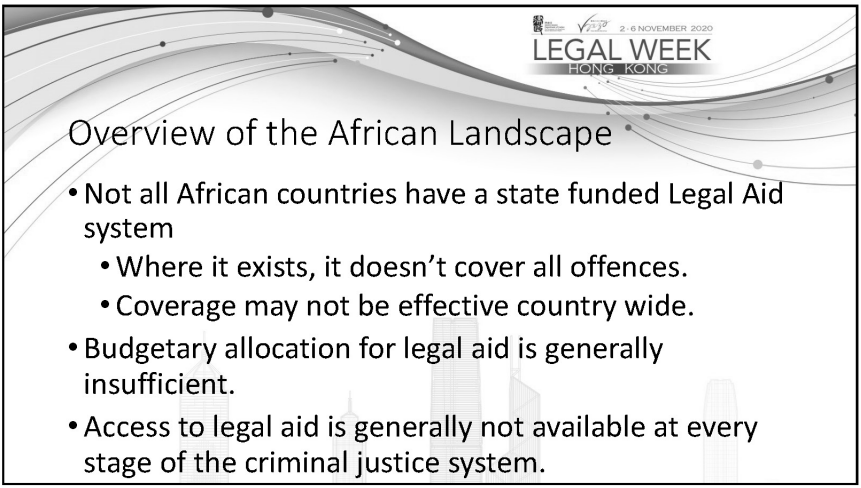
Community Service

Community service is a recent innovation and one that the public has embraced and has supported but has not yet taken off. There are basically two issues that arose from community service. Firstly, how do you ensure that those who are sentenced to community service actually carry out the community service as the alternative to incarceration? Secondly, the cost of monitoring community service would probably be an additional cost in terms of having either a police

warden or someone there to ensure that the community service activity is being carried out. This is where technology may become useful. It's been considered. It would also depend on the type of community service and the belief that perhaps the person who's sentenced to community service can either upload a photograph showing himself or herself performing the community service or upload details confirming that the community service requirements have been complied in. Then, this perhaps would be another way in which community service would be acceptable as being a viable alternative to incarceration.

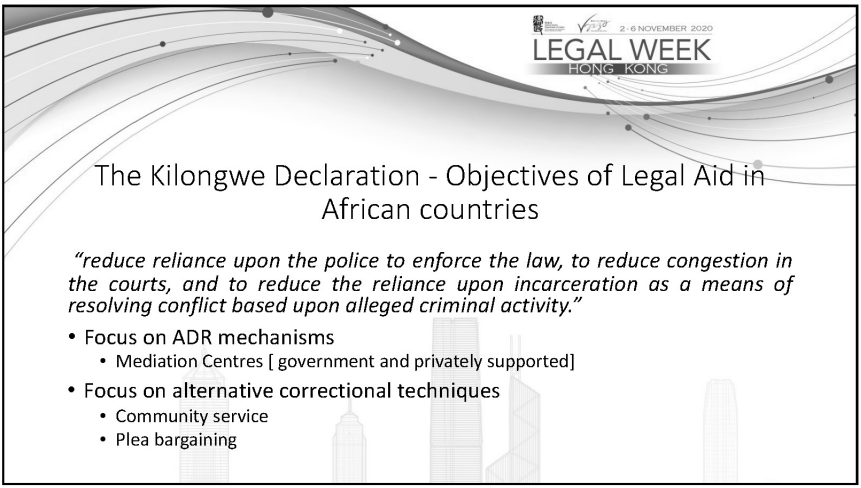
Slide 1

Slide 2

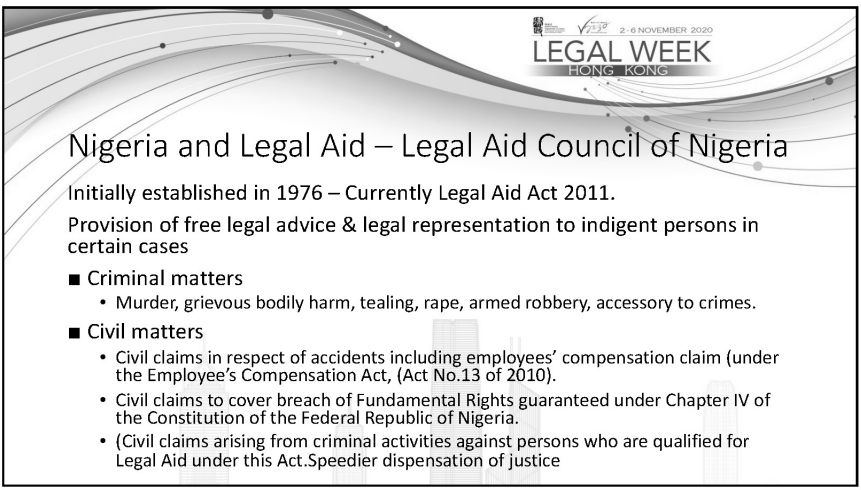


Slide 3

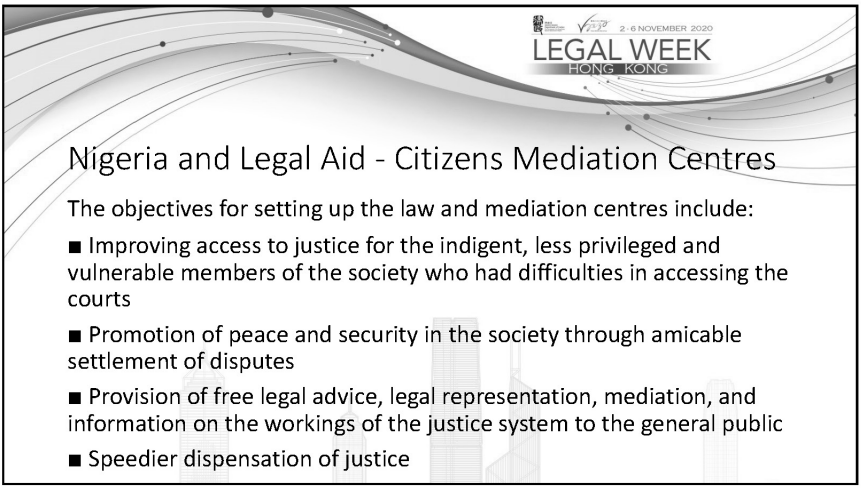
Slide 4



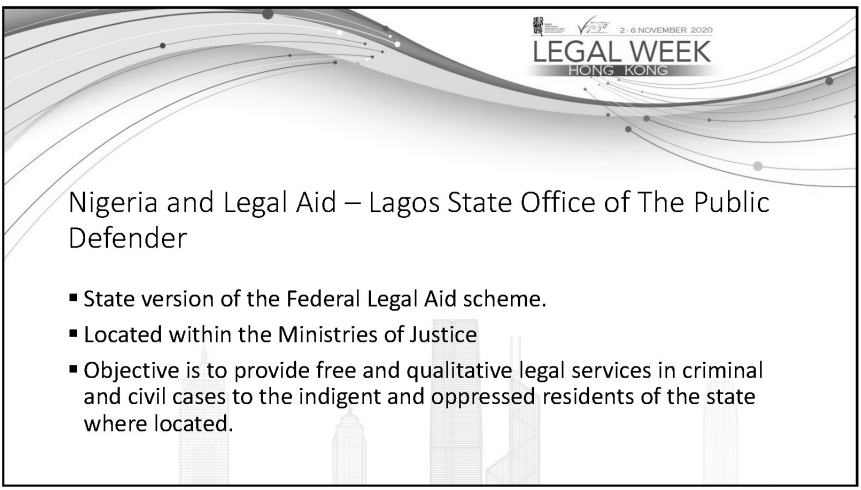
Slide 5



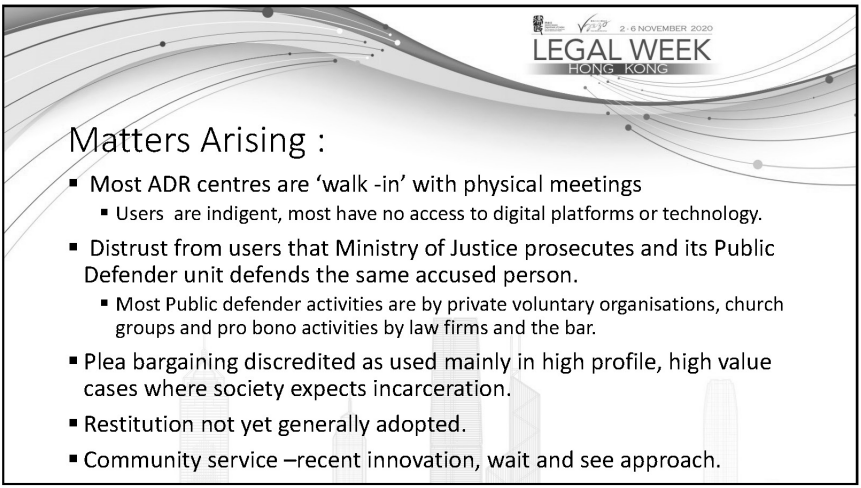
Slide 6



Slide 7



Slide 8



Speaker

Professor Albert Jan van den Berg

Honorary President of the International Council for Commercial Arbitration

Professor Albert Jan van den Berg is a partner at Hanotiau & van den Berg (Brussels, Belgium). He is a sought-after presiding and party-appointed arbitrator in numerous international commercial and investment arbitrations. He also acts as counsel in international commercial arbitrations. Professor van den Berg is Honorary President of the International Council for Commercial Arbitration, having served as President from 2014–2016. He is a Visiting Professor at Georgetown University Law Center, Tsinghua University School of Law, University of Miami School of Law, and National University of Singapore Faculty of Law; Emeritus Professor (Arbitration Chair) at Erasmus University, Rotterdam; and member of the faculty and the advisory board of the University of Geneva Master in International Dispute Settlement Program. He is Honorary President of the Netherlands Arbitration Institute, having served as its President and Secretary General, and former Vice-President of the London Court of International Arbitration. Professor van den Berg has published extensively on international arbitration (see www.hvdb.com), in particular, the New York Convention of 1958 (see www.newyorkconvention.org). His awards include: Global Arbitration Review, Best Prepared and Most Responsive Arbitrator in 2013; The International Who's Who Legal, Arbitration: Lawyer of the Year in 2006, 2011 and 2017, and Arbitration: Global Elite Thought Leader 2021.

Legal Aid in International Arbitration

The topic I'm going to address is legal aid in international arbitration. If you address this topic, the first question, of course, is what is legal aid?

Introduction

[Slide #2] For that purpose, I take the definition proposed by the International Bar Association (IBA) Guidelines on Legal Aid Principles (May 2019) - legal advice, assistance, or representation for people or groups who cannot afford to pay privately for legal help. It's mainly provided by lawyers, for specific legal problems and it's funded in whole or in part by the State and includes court fee, waivers, and other financial concessions. This is how the IBA defines legal aid, and I will adopt that definition here in my presentation.

Now, legal aid, so defined, generally is not available in the field of international arbitration. Referring to the presentations of Robert and Funke, there is legal aid available to a certain extent, and to be improved, as I understood from both speakers. In international arbitration, there's no legal aid available. The question is, why is that so?

Unavailability of Legal Aid in Arbitration

[Slide #3] If you look on the national level, as I just mentioned, one of the characteristics of legal aid is that it's provided at least, by a part of the State, generally in the context of state court proceedings. However, arbitral tribunals are generally considered not to fall under the definition of courts in national

legislation, especially in Europe. I think about the *Deutsche* judgment [5] by the European Court of Justice, which was confirmed in the *Achmea* judgment[6] recently.

Arbitral tribunals are not considered courts in Europe. While arbitral tribunals exercise judicial functions, they are contractual in nature - that's the argument - as the parties have voluntarily agreed to submit the dispute to arbitration. That is always the *theory*. This means that they have renounced the advantages of State proceedings, which includes, indeed, the possibility of requesting legal aid.

[Slide #4] If you look on the international level, international arbitration, both commercial and investment is generally decentralized in nature. Unlike other areas of international law, for example, trade law, I will mention that in a moment, there is no centralized supranational organization capable of adopting and applying universal rules of legal aid. Now, that brings us to a theoretical level of debate.

Theoretical Considerations

[Slide #5] You have conflicting considerations; on the one hand, is party autonomy. In particular, autonomy concerns the choice to submit the dispute to arbitration and such a choice necessarily entails many things, including renouncing State court proceedings, and therefore all its benefits. One of them is indeed legal aid, but that's the one hand. On the other hand, you have to ensure that there is a level playing field for all participants in recognition of the fact that bargaining powers are not always equal.

---

[5] Nordsee Deutsche Hochseefischerei GmbH v Reederei Mond Hochseefischerei Nordstern AG & Co KG (Case C-102/81)

[6] Slovak Republic v. Achmea B.V. (Case C-284/16)

This applies, in particular, to smaller companies and developing countries. You can see here the debate between the *opponents* of legal aid in arbitration, which rely on party autonomy, and the *proponents* of legal aid, which focus on equal opportunity of access to justice. Let's see what is available at present.

Existing Frameworks for Legal Aid

[Slide #6] The first of the existing frameworks that we will look at, for disputes involving at least one State, is the Financial Assistance Fund of the Permanent Court of Arbitration (PCA). It aims at helping developing countries to meet part of the cost involved in international arbitration or other means of dispute settlement offered by the PCA. And the types of costs that may be reimbursed include: (i) the fees and expenses of members of the tribunal; (ii) the expenses of implementing an award or other decisions or recommendations of such a body; (iii) payments to agents, counsel, experts, and witnesses; and (iv) operational and administrative expenses. That is the PCA. My understanding is that it's used from time to time, but not often.

A similar mechanism exists at the International Court of Justice (ICJ), in the form of the Secretary-General's Trust Fund to Assist States in the Settlement of Disputes through the ICJ. A third framework I may mention is the Court of Arbitration for Sport (the 'CAS'), which deals with, at least in part, disputes involving individuals. Legal aid at the CAS is also available to natural persons whose income and assets are not sufficient to allow them to cover the costs of proceedings.

Third-Party Funding

[Slide #7] If none of these frameworks are applicable or

available, parties resort these days to third-party funding in international arbitration. This means that the legal fees and expenses are paid for by persons or entities that are unconnected with a party to the proceedings. That enables the parties to pursue claims or counterclaims who might otherwise not have the requisite funds to do so. But then in exchange for this funding, third-party funders often require that part of the award of damages be shared with them to compensate for the risk of that funding.

There are two problems faced with this third-party funding, at least perceived problems. The first one is that there's a lack of transparency. That is why you now see that a number of jurisdictions and institutions now require the identity of the third-party funder to be disclosed. The other problem that is particular to investment arbitration is that third-party funding is usually available for the claimant investor only, but rarely available to the respondent State, at least third-party funders are not prepared to fund the State respondent, because they're always the respondent and not the claimant. It's very rare that they are counterclaimant.

Advisory Centre on WTO Law

[Slide #8] Another interesting framework for legal aid is the Advisory Centre on the WTO law in Geneva. That was established in 2001 for the benefit of developing and least developed countries that are members of WTO. There are three primary functions as you see on the slide: (i) it provides legal advice on the WTO law; (ii) it provides support during the WTO dispute settlement proceedings; and (iii) it provides training to government officials. Here, the legal advice and training are provided free of charge to these developing

countries, but the Centre does charge modest fees to support in dispute settlement proceedings. The WTO Law Centre also provides capacity building for those who want to be involved in those proceedings.

Reform Proposal by UNCITRAL

[Slide #9] Now, if we leave the existing frameworks aside, briefly, I would like to mention the UNCITRAL proposals of Working Group III for initiatives on legal aid. What they propose is: (i) the establishment of advisory centres similar to the Advisory Centre on WTO law; (ii) they want to create funds to support parties similar to the Secretary-General's Trust Funds that exists before the ICJ; (iii) they would like to use third-party funding for claimant investors (as I mentioned, this already happens frequently); and (iv) to explore the use of third-party funding for respondent States, which as I mentioned, is relatively rare.

Comments and Thoughts

[Slide #10] I would like to offer a few comments and thoughts. First of all, UNCITRAL rightly recognizes that, given the nature of international arbitration, the provision of legal aid in this field will have to be decentralized. Unlike in the case of the WTO, there will not be one body or fund to cover all proceedings, since different rules and different laws apply in different cases.

It also means that different institutions will likely come up with possibly different initiatives. Now, in my view, that is not a bad thing. What is important is that legal aid in whatever form is being provided, and is available. That said, I would like to have an institutionalized body, like ICSID, which might be well

placed to follow the WTO model, and set up an Advisory Centre which goes beyond the provision of financial assistance and includes capacity building.

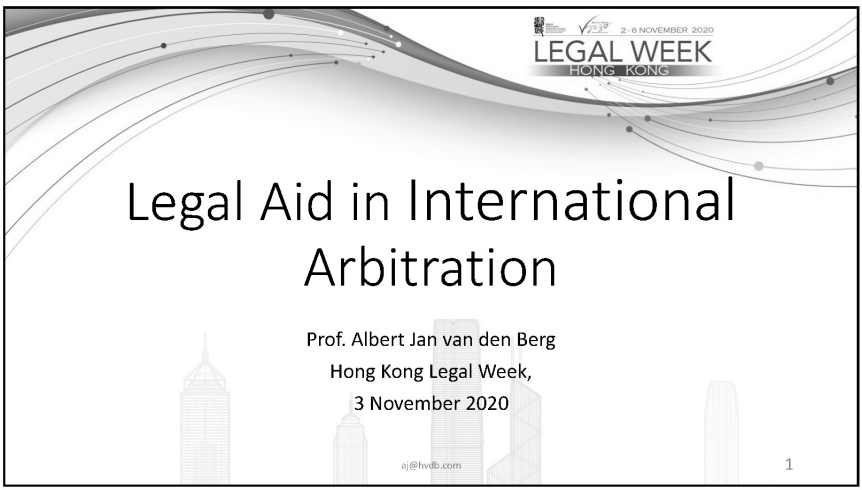
This might be particularly helpful to counter criticisms of investment treaty arbitration as being biased against developing countries. For smaller institutions, a legal fund may be more feasible.

As you know, these proposals are limited to investment arbitration. I would like to go even further and suggest extending legal aid to the realm of commercial arbitration as well. Many of the existing frameworks that I have discussed are (rightly) focused on developing countries; but small and medium-sized enterprises in commercial arbitration may need just as much support. If international arbitration is to remain a viable means of dispute resolution that represents a genuine alternative to State court proceedings, legal aid must be available to both companies and States.

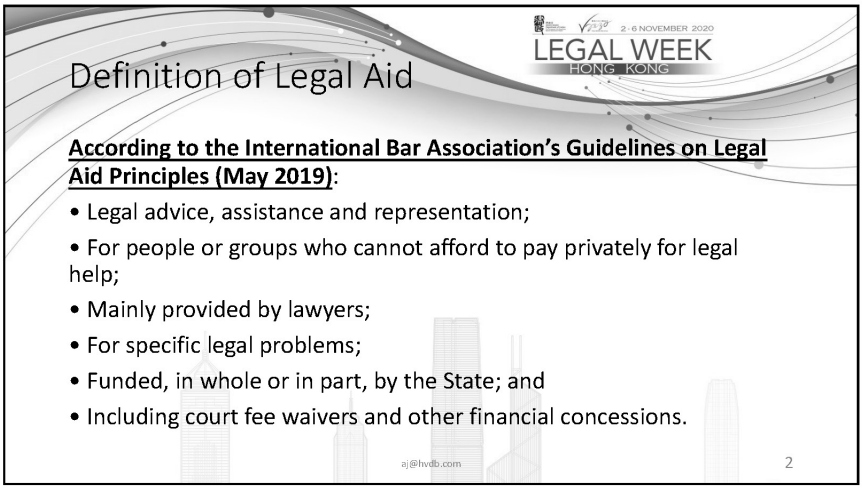
A model that may be practical in this regard is the legal aid available as before the Court of Arbitration for Sport, which takes the following forms: A recipient of legal aid may be released from having to pay the cost of the procedure, or to pay an advance of costs; the recipient may choose a "pro bono" counsel from the list established by the Court; or the recipient may be granted a lump sum to cover his or her own travel and accommodation costs and those of his or her witnesses, experts, and interpreters in connection with any hearing.

These are some thoughts on how to put the principles I have discussed into practice. Thank you very much for your attention, and I look forward to your questions.

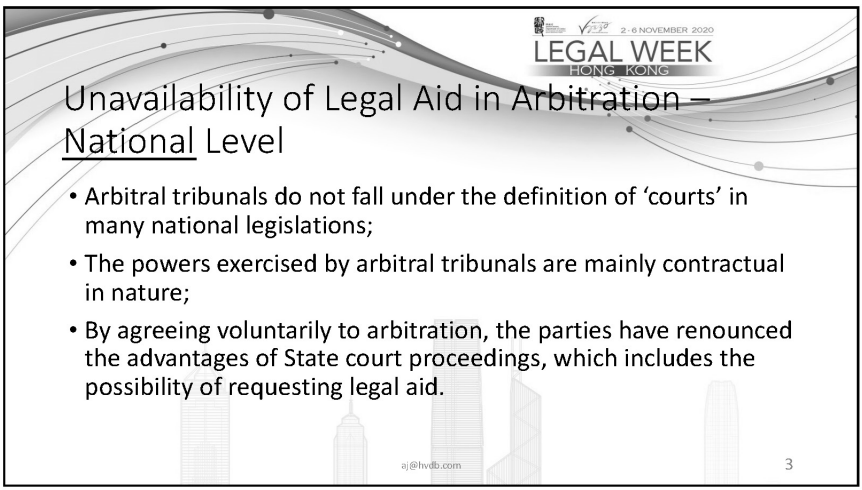
Slide 1



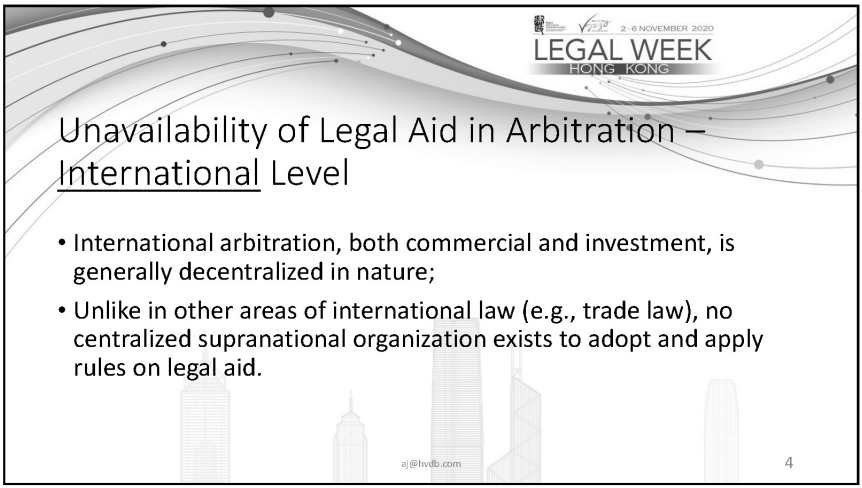
Slide 2



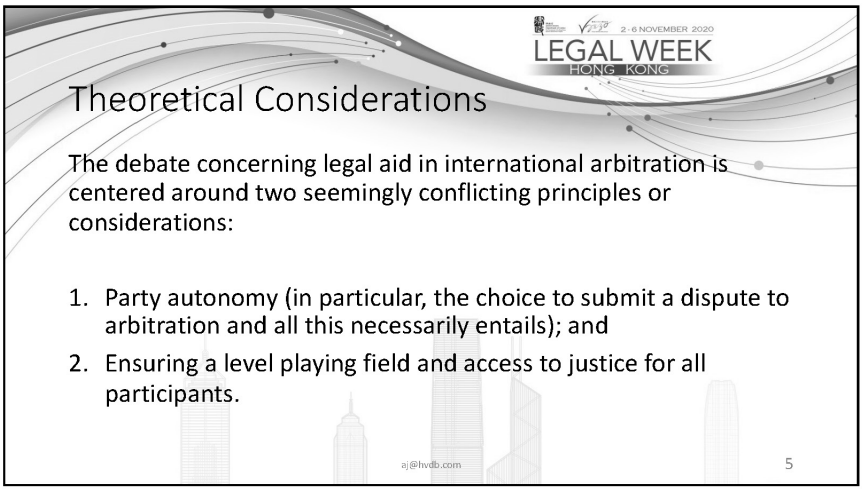
Slide 3



Slide 4

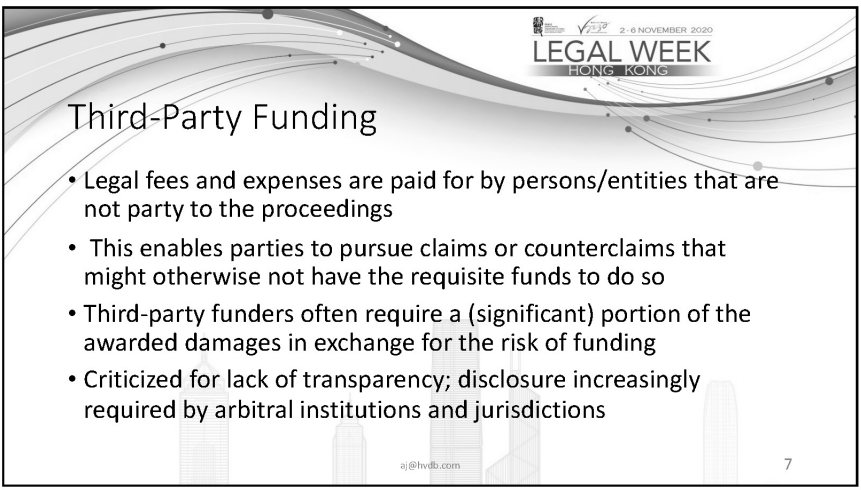


Slide 5

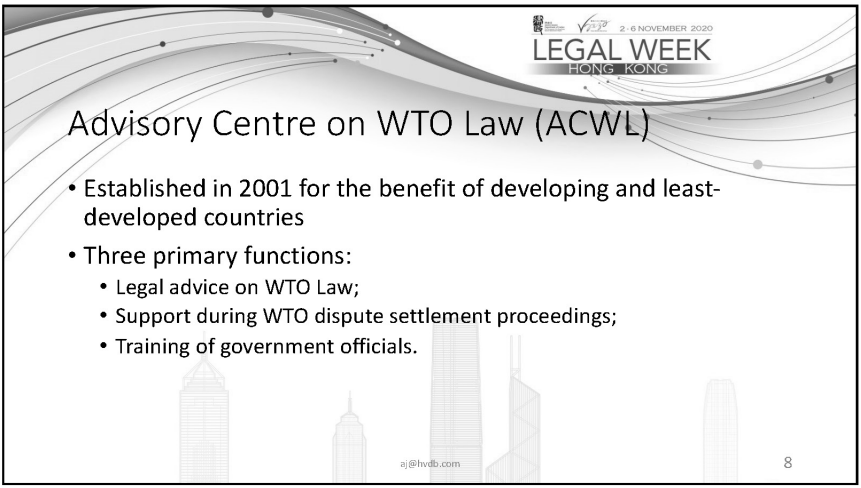


Slide 6

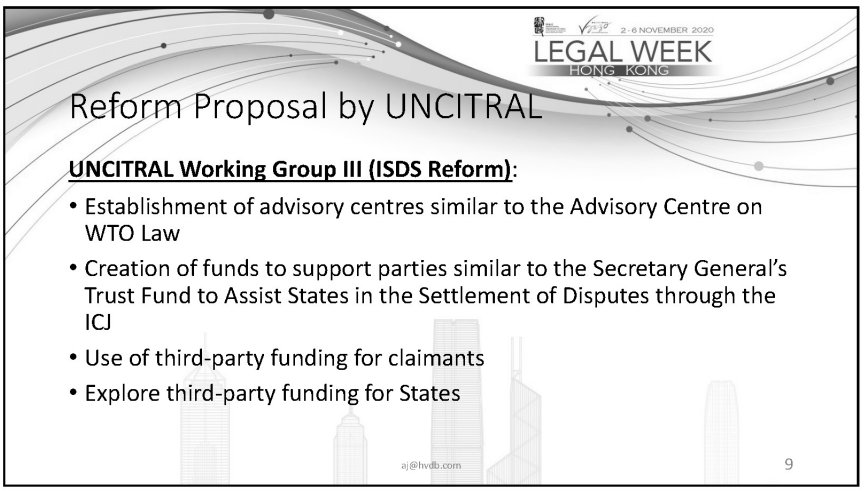
Slide 7



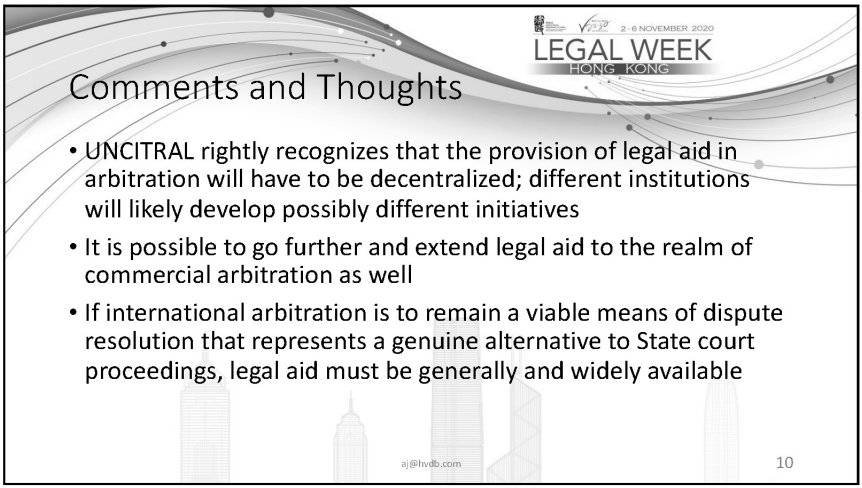
Slide 8



Slide 9



Slide 10



Slide 11

Speaker

Mr Hans van Loon

Former Secretary General of the Hague Conference on Private International Law

Hans van Loon is an independent international consultant. He is the former Secretary General of the Hague Conference on Private International Law (1996-2013) and a member of the Institut de Droit International. Having practiced law before the Supreme Court of the Netherlands, he joined the Hague Conference in 1978. As Secretary General he steered the Conference through a period of rapid expansion of its Membership (including that of the European Union), and of States party to Hague Conventions, as well as the establishment of regional offices for Latin America and the Caribbean, in Buenos Aires, and for the Asia-Pacific Region, in Hong Kong. During his time as Secretary General, the Conference saw a fast growth of its legislative work and its monitoring, support and assistance activities concerning the implementation and practical operation of Hague Conventions. Mr van Loon has been involved in the development of over a dozen Hague Conventions, as well as the revision of the Conference's Statute. He has lectured worldwide and widely published on numerous topics of private international law, stressing the role of private international law in its social and its global context, and as a discipline bridging legal cultures while respecting their diversity.

Access to Justice and Legal Aid in Cross-border Situations

Introduction

[Slide #2]

'Promote the rule of law' and 'ensure equal to access to justice for all' is one of the Goals, Goal 16.3, of the United Nations' 2030 Agenda on Sustainable Development (Agenda 2030) as the Secretary has reminded us. Access to justice is also a fundamental right guaranteed by the International Covenant on Civil and Political Rights which applies in Hong Kong, indeed in most jurisdictions, and which has been signed but not yet ratified by China.

With the rule of law, access to justice is both a target and a founding principle of Agenda 2030. Legal aid services are not specifically mentioned by the Agenda 2030. Yet, as we all know, without legal aid, many people involved in issues at the heart of their lives relating to family, neighbours, employment, housing, criminal proceedings etc. will lack access to the justice system. Issues of access to justice and legal aid are compounded in cross-border situations, where more than one jurisdiction is involved. Such cross-border issues are often complex, and they are becoming increasingly common, as a result, obviously, of globalisation.

What is Access to Justice?

In my contribution, and given my background with the Hague Conference on Private International Law, I will focus on the

role of access to justice and legal aid in cross-border disputes between private actors. But first, let's take a step back. What is access to justice?

Mauro Cappelletti, well-known from his pioneering worldwide project on access to justice in the 1970s, explains that access to justice is more than access to the judge and the organisation of courts. Sure, primarily, the justice system must be equally accessible to all without distinction of any kind, but in addition, states and governments must ensure that the justice system leads to results that are individually and socially just and fair.

[Slide #3] So, yes, legal aid is essential, but it's not enough. Even where legal aid is available, the justice system must avoid arbitrary and discriminatory results. This is, of course, of utmost importance in 'vertical' situations, in criminal and administrative matters, where private people and entities face, the Government and other public bodies. It starts at the legislative level, with statutes that define the powers of the state over private people.

If people can be prosecuted or punished for acts that are broadly or ambiguously defined relating, for instance, to infringement of sovereignty or security, or even more serious for incitement to such broadly and ambiguously defined acts, then there is no predictability anymore, as emphasized yesterday by Chief Justice Ma (as he then was). Everyone has to watch out, and access to justice is no longer guaranteed, no matter how generous the legal system may be. So, precise statutory definitions are crucial.

Access to justice in 'horizontal' situations in disputes between private actors, persons, and small, medium and large

corporations and other entities, also requires independence and impartiality of the justice system and equal and fair treatment of the parties. So, legal aid is crucial, but it is an aspect of the more encompassing fundamental right and principle of access to justice.

Access to Justice and Legal Aid in Cross-Border Civil Disputes

As I said I will focus on access to justice and legal aid in cross-border civil disputes, and not deal with cross-border criminal and administrative matters, although in those fields, the need for legal aid is obviously, at least, as important. Due to the limited time, I've selected three types of civil cross-border issues. The first is how to ensure equal treatment to foreigners where access to justice and legal aid are available to nationals. The second issue is, where in order to resolve a legal issue, the assistance of another jurisdiction is indispensable. How to organise such assistance and provide it free of costs for the applicant? The third type of issue arises where access to justice and legal aid are not available in the home country of claimants who have a dispute with a foreign party, typically a foreign corporation. In such a case, the question is can they have access to the court system of the foreign corporation's home country, and benefit from the legal aid system in that other country?

[Slide #4] First issue, access to justice and legal aid are available to nationals, but not, or not on the same footing to foreigners. Think for instance of a family dispute, a divorce between a spouse in one country and the other spouse in a different jurisdiction, or an employment dispute between an employee and an employer in different jurisdictions. How to ensure equal access to justice of the foreign party to the justice system?

1980 Hague Convention on International Access to Justice

Well, the solution is given by the 1980 Hague Convention on International Access to Justice (Access to Justice Convention). This multilateral treaty provides that foreigners (and that means both nationals and residents of states parties), are entitled to legal aid for court proceedings in each state party without discrimination. That also applies to legal advice, provided the foreigner is living in the state party where he or she seeks such advice.

Also, the Convention removes obstacles to foreigners such as security for costs of proceedings, which normally they should pay before they may even start proceedings in the jurisdiction. As a counterpart to this, the Convention guarantees that if the foreigner loses the proceedings, then any order for payment of costs of the proceedings is made enforceable free of costs in his or her country or in the other state party. The Convention also facilitates the transmission of legal aid requests to the state where the court sits free of charge. The same applies to the orders for payment of costs of proceedings.

The Access to Justice Convention is one of a triplet. Her sisters are the Hague Service Convention and the Hague Convention on the Taking of Evidence. The Service and Evidence Conventions are in force for China and a number of countries in the region and beyond, but the Access to Justice Convention somehow is lagging behind. It has not been ratified by China and, in the whole region, only by Kazakhstan. A lack of understanding may explain this poor record. People may think that the Convention obliges states to offer more legal aid to foreigners than nationals, but that's not the case. It merely offers the same legal aid to foreigners as to nationals living in the

forum country. Moreover, even if your own legal system does not discriminate between nationals and foreigners, other States do, and your citizens will still benefit from the Convention in other States Parties that do not guarantee equal access to justice. All in all, I would say that this Convention is a vital element of the global legal infrastructure and it deserves to be more widely ratified.

1980 Hague Child Abduction Convention

[Slide #5] The second issue is where a request is made by one jurisdiction to another jurisdiction for help to a private applicant. How to provide such assistance and how to provide it free of costs for the applicant? This issue arises for example in the context of proceedings on international child abduction, where a parent has taken a child without permission to another country.

The 1980 Hague Child Abduction Convention sets up machinery through central administrative authorities and courts, to return such wrongfully removed children. That Convention has been ratified by more than 100 jurisdictions, Hong Kong and Macau are parties, but China has not yet joined this instrument. The Convention provides for free legal aid but also allows a reservation, which Hong Kong has made, that restricts legal aid to what is already covered by Hong Kong's legal aid system. So, foreigners will at least have equal access to legal aid as Hong Kong citizens.

2007 Hague Child Support Convention

Likewise, the 2007 Hague Child Support Convention provides for cooperation via central authorities and courts to help mother and child recover maintenance from father in another state

party. That Convention is not yet in force for Hong Kong or for China, but it's also a vitally important instrument because internationally split families are every day's business. Moreover, the treaty reduces reliance of maintenance creditors on the public purse because if mother and child cannot have maintenance from the father in the other country, they will apply to the government and ask for support. That's another advantage of this Convention. Like the Child Abduction Convention, this treaty provides for legal aid. The requested state must give free legal assistance for all applications by a child creditor and it may subject this to a test of the child's own means, which usually are of course quite limited.

Transitional Corporate Responsibility

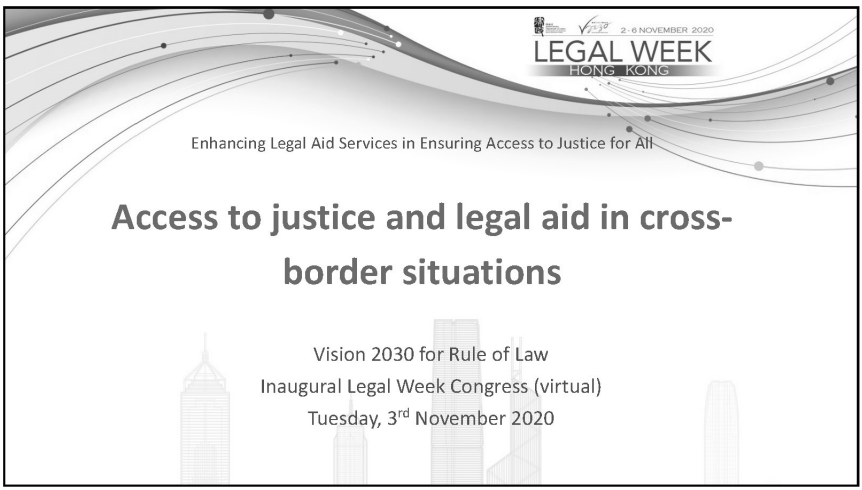
[Slide #6] Briefly on the third issue, which I can best illustrate by last year's judgment of the UK Supreme Court in the Vedanta case. In that case, the claimants from Zambia, victims of damage caused by the exploitation of copper mines in Zambia by a subsidiary of the UK Vedanta company, sued both the parent Vedanta and the Zambian subsidiary in the English courts. They did so because they had found that access to justice and legal aid in Zambia were insufficient. The UK Supreme Court agreed with the lower courts that this was indeed the case. Therefore, the British courts had jurisdiction regarding both the parent and the Zambian subsidiary. This example shows that lack of access to justice and legal aid in developing host countries of investments by foreign parent companies may be a factor driving victims of damage caused by a local subsidiary to sue the subsidiary together with the parent they hold responsible in the parent's home country. With the expansion of the notion of private-sector human rights

responsibility (the 'Ruggie Principles' of the United Nations[7]), such cases may present themselves in future in many more investor countries, including Hong Kong and indeed, China as a whole.

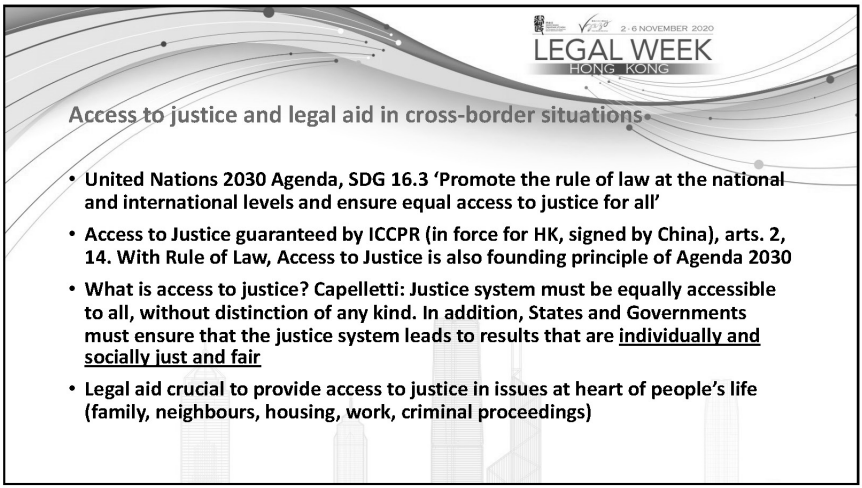
[Slide #7] In conclusion, in our emerging world society where cross-border civil and commercial disputes are growing exponentially in number and complexity, access to justice and legal aid, not just within but across jurisdictions, are of growing importance. The legal infrastructure to provide such access to justice is available, thanks in particular to the Hague Conventions on Private International Law, the Access to Justice Convention and specific Conventions such as the Child Abduction and Child Support Conventions. Agenda 2030 offers an excellent opportunity for states to join these Conventions, where they have not yet done so, as part of their pledge 'to leave no one behind'. Finally, and based on the same pledge, states should also provide access to their courts in cases concerning transnational civil responsibility of corporations based in their jurisdiction.

[7] The Ruggie Principles (i.e. The UN Guiding Principles for Business and Human Rights) outline how States and businesses should implement the UN "Protect, Respect and Remedy" Framework in order to better manage business and human rights challenges. The framework is based on three pillars – the State duty to protect against human rights abuses by third parties, including business, through appropriate policies, regulation, and adjudication; the corporate responsibility to respect human rights, which means avoiding infringing on the rights of others and to address adverse impacts that occur; and greater access by victims to effective remedy, both judicial and non-judicial. (see https://news.un.org/en/story/2011/06/378662 and https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusi ness HREN.pdf)

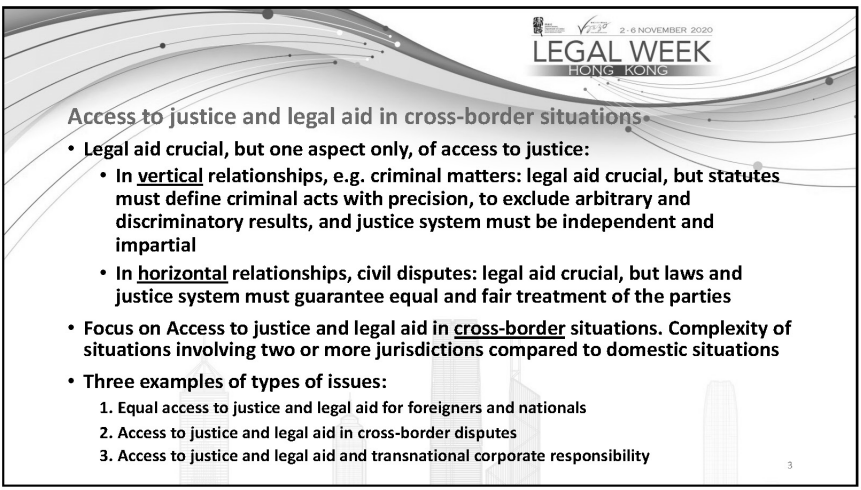
Slide 1



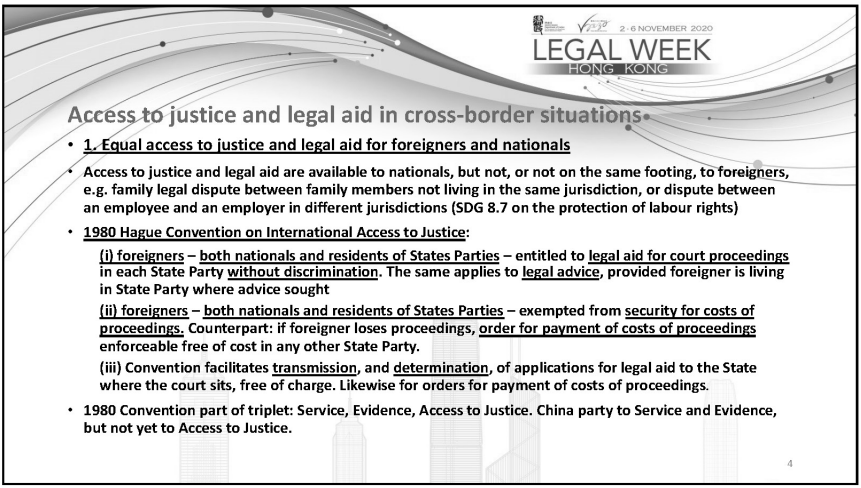
Slide 2



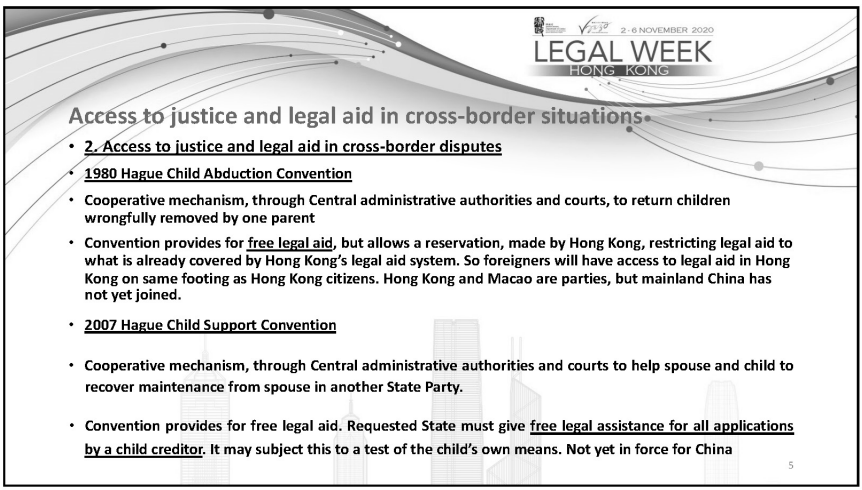
Slide 3



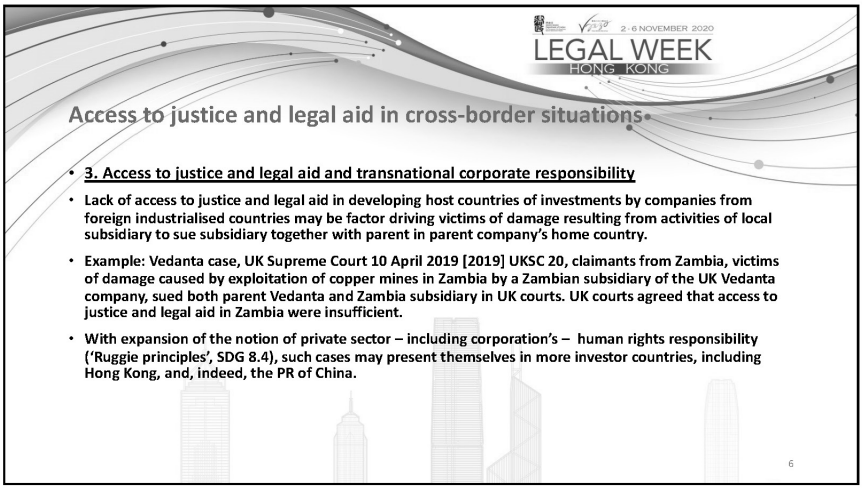
Slide 4



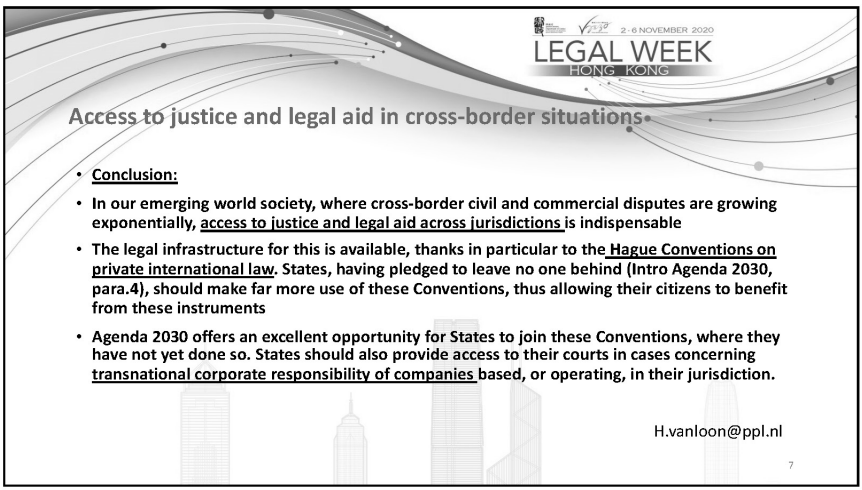
Slide 5



Slide 6



Slide 7


2 - 6 NOVEMBER 2020
LEGAL WEEK
HONG KONG
Access to justice and legal aid in cross-border situations
• Conclusion:
• In our emerging world society, where cross-border civil and commercial disputes are growing exponentially, access to justice and legal aid across jurisdictions is indispensable
• The legal infrastructure for this is available, thanks in particular to the Hague Conventions on private international law. States, having pledged to leave no one behind (Intro Agenda 2030, para.4), should make far more use of these Conventions, thus allowing their citizens to benefit from these instruments
• Agenda 2030 offers an excellent opportunity for States to join these Conventions, where they have not yet done so. States should also provide access to their courts in cases concerning transnational corporate responsibility of companies based, or operating, in their jurisdiction.
H.vanloon@ppl.nl
7

Moderator

Dr Thomas So, JP

Partner, Mayer Brown, HKSAR

Thomas So is a partner of Mayer Brown. He advises on shareholders and equity-related disputes, property related litigation, libel litigation and media-related litigation work, and litigation and arbitration in the PRC. He represents banks and financial institutions, property developers and corporations as well as Mainland China enterprises on securities and equity related disputes.

Thomas has acted as Arbitrator and Mediator in shareholders and other disputes and is on a number of panel of arbitrators in Asia. He has also acted as Deputy Judge at the District Court (18/11/2002–13/12/2002) and Temporary Deputy Registrar at the High Court (8/12/2003–10/1/2004). He is a China Appointed Attesting Officer (appointed by the Ministry of Justice of PRC). He was the President of the Law Society of Hong Kong (6/2016–6/2018) and is a solicitor-advocate with rights to appear in the higher courts in Hong Kong.

Thomas was praised by The Legal 500 Asia Pacific 2010/2011 for providing "sound knowledge" and "practical solutions" to clients. Chambers Asia Pacific 2011 describes Thomas is "instrumental in many cross-border cases". Thomas speaks English, Cantonese and Mandarin.

Dr Thomas So:

There is a question for Robert about the legal aid in Myanmar - How can a person who is criminally accused and with no financial means, get access to free legal representation there and at what stage would they be informed under their criminal procedural code and are there restrictions to such services?

Mr Robert Pé:

I thank you for the question. The system, as I outlined is far from well-developed. So what you would need to do is go to one of the Justice Centres and seek to persuade the Justice Centre that you meet their eligibility criteria. At the moment, they have only limited capacity, so they're not in a position to take on every case. This highlights the need for a more developed legal aid system such as that in Hong Kong, and it also highlights the need for serious government funding of legal aid.

The Justice Centres in Myanmar are funded, essentially, by the lawyers themselves and by international donors and I mentioned earlier that MyJustice organisation, which is European Union-funded. So what we need in Myanmar is proper government funding of legal aid. But I, sadly, am not optimistic that will be forthcoming in the immediate future, given that the country is suffering economically, as many other places are, from the COVID-19 crisis. I hope that goes some way to addressing the question. Thank you.

Dr Thomas So:

Thank you Robert. There is a question for Funke. You mentioned in your presentation about the ADR mechanism, particularly the Mediation Centres in Nigeria. As a matter of interest, would people need to pay for the mediator in those Mediation Centres?

Mrs Olufunke Adekoya:

In the Citizens Mediation Centres, there is no payment to the mediator because it is government-funded and state-supported. In some of the voluntary mediation centres as well, there is no payment. There is, however, a multi-door courthouse structure which has a mediation centre attached to the courts. When matters go into court, the courts may themselves decide that this is a matter that could be resolved through mediation, and they are then transferred to the mediation centre attached to the courts. If it is not resolved in that mediation centre, it will then go back onto the litigation list within the court. Those mediation centres that are part of the high court system, as in a multi-door courthouse, you would have to pay the mediator but the fees are minimal.

Dr Thomas So:

Right, and most of them are paid by the government, is that the position basically? The mediator that you said that the parties do not need to pay.

Mrs Olufunke Adekoya:

It's the Citizens Mediation Centres, which are established as part of the state-funded legal aid. Often, we don't pay the mediators.

Dr Thomas So:

Okay, thank you Funke. Professor Albert, about the possibility of having legal aid in arbitration proceedings that you have just mentioned, do you see any mechanism that one can think of to prevent the abuse of legal aid in an arbitration setting?

Professor Albert Jan van den Berg:

I have not seen instances reported, one way or the other, of abuse of legal aid. I remember when I was Secretary-General of the Netherlands Arbitration Institute, we also had a Fund for those who could not pay their arbitrators. What I did then each time when a party claimed that it had no financial support to pay the arbitrator, I always asked, "Well, you own the company, could you show whether you have fully paid off your shares?" That was usually the end of the discussion. Apart from that, we use it from time to time to work with parties that were genuinely lacking funds, or the financial means for paying the arbitrators. From there, we would then provide the funds. So, we could control the possibility of abuse in that respect.

Dr Thomas So:

Thank you Professor. There is a question coming in for Mr van Loon, about the Access to Justice Convention. Is there any assistance or advice available to help countries which would like to consider joining the Convention?

Mr Hans van Loon:

That is an excellent question. Countries which consider joining the Convention may always turn to the Hague Conference's Secretariat, the Permanent Bureau, for assistance or advice. Beyond this, what could be considered is a slightly wider view of an inclusion of cross-border situations in considering human rights issues generally so that where there are funds, for instance, to upgrade legal aid in countries, they would include the cross-border aspect, taking into account the fact that legal aid is increasingly necessary in cross-border situations.

The traditional view of human rights is like this: you look at a jurisdiction and you expect that human rights are respected within that jurisdiction. But the idea that we increasingly have to do with interaction between jurisdictions is still relatively new, and more attention should be paid to that.

Dr Thomas So:

Thank you, we just hope that, you know, things could improve in the future. We have another question for Robert about Myanmar. There is no assessment criteria under the legal aid law in Myanmar. So what is the biggest challenge in setting criteria? And how to overcome that? Do you have any input on that, Robert?

Mr Robert Pé:

Well, I have some limited input. Obviously, this is the big shortcoming with the legal aid law there. It focuses on setting up legal aid boards and specifying the composition of the legal aid boards, both at the central level and at the regional level. It doesn't specify criteria for eligibility. The reality at the moment is that the legal aid system is not properly functioning and that is why we have seen the Justice Centres become so important and influential. They are functioning outside the government legal aid system and they do rely, as I said, on private lawyers being willing to do the work either free of charge or for very low fees. They also rely on external funding from the European Union and others. The criteria they set at the moment are not as developed as they should be. The system is really in its infancy and I can't overstate that fact.

It's just beginning, but it's a huge improvement from what we had in the past in Myanmar when there was very limited assistance for people who could not afford to pay. At least now, the Justice Centres have been established. Obviously, they're over-stretched. They take on the cases they can and they've had some very big successes, but sadly they also have to turn away a lot of cases. We need to move gradually over time to a proper government-funded legal aid system, but we're not there yet.

Dr Thomas So:

Thank you Robert. I think we are almost there. Just want to say thank you again to the panel speakers. Very, very good show and very eye-opening. Also, thank you for joining us in this session but do stay with us, I think we will have another session later on.

Panel 2:

Keeping up with the times: Capacity building for Judicial Officers

Speaker

Judge Xue Hanqin

Vice President, International Court of Justice

Educated at Beijing Foreign Language Studies University (B.A) and Columbia University School of Law (LL.M. S.J.D.), Judge Xue Hanqin worked in the Law and Treaty Department of the Foreign Ministry of China from 1980 to 2003, as Director-General (1999-2003). She was elected to the International Law Commission in 2002 and worked as a member till 2010. She was one of the first female members and first Chairwoman of the Commission (2010). She was posted in 2003 to the Kingdom of the Netherlands as the Chinese Ambassador and the Permanent Representative to the Organization on the Prohibition of Chemical Weapons. After four and half years of diplomatic service there, she was appointed the first Chinese Ambassador to ASEAN and Legal Counsel of the Foreign Ministry. She held a number of positions at law societies and legal institutions such as the Vice-President of the Chinese Society of International Law (1997-2013), President of the Asian Society of International Law (2009-2011), member of the Hague Academy Curatorium (2010-2016), member and President (since 2019) of the Institute of International Law. She taught and lectured on public international law at a number of universities and law schools in China and abroad. She holds an Honorary Doctor of Law from Macao University. Her publications on public international law are extensive, both in Chinese and English. Apart from numerous articles on various subjects of public international law, her books include Transboundary Damage in International law, (2003); Chinese Contemporary Perspectives on International Law—History, Culture and International Law, (2011); Jurisdiction of the International Court of Justice, (2017). She was elected to the International Court of Justice in 2010 and Vice-President of the Court in 2018.

From an International Court Perspective: Capacity Building in Emergency Cases, and How Judges Handled Law and Politics Issues

Introduction

It's indeed a great honor to be here today. I will first talk about capacity building in the emergency case – to take the example of the COVID-19 pandemic reaction done by the court.

Capacity Building in the Emergency Case

As you know, when the COVID-19 pandemic spread in Europe early this year, the court reacted immediately. Given the priority to the safety and health of the judges and the staff of the registry, the court adopted its working methods to the need to work remotely. First of all, the registry has to prepare all the necessary technical devices, equipment, and make sure that each judge, wherever she or he may be located, has access to the video conference facilities for the conduct of judicial meetings. In practice, when judges are located in different parts of the world, technical support often proves difficult and challenging. Judges not only have to possess the right equipment and devices, but they also have to know how to use them, particularly how to handle technical problems they may encounter during the course of virtual meetings and have the problems resolved with the remote assistance of the coded IT systems. Although, we the judges, as you know, are no longer young and do not belong to the digital generation.

The judges so far have managed to use their devices quite well.

Administratively, the court quickly adopted internal practice directions for the conduct of virtual meetings because constraint measures and international travel ban were imposed in many countries. The court's public hearings scheduled in the first half of the year had to be postponed or rearranged.

First Plenary Virtual Meeting

In late April, the court held its first plenary virtual meeting in its history. The President and the Registry were present in the deliberation room of the Peace Palace, the seat of the Court, while the remaining members of the court participated in the meeting remotely via video conference. As the court indicated on its website, it wishes to assure the member states of the international community that in spite of the current circumstances, it will continue to discharge its judicial functions and to deal with the matters newly submitted to it or already pending before it.

As the judges well adapted to the new working method, the court gradually picked up its work pace and extended a new method to the judicial work. Some states raised issues with the court, questioning whether it's in conformity with the statute and the rules of a court to hold virtual hearings, and what is the legal effect of the judgment that is delivered through video link, since there's no provision on the matter in either the statute or the rules of the court. After careful considerations, the plenary took the view that in the future, in an emergency situation, as the one we are facing, the court may have to adapt to the remote-working methods.

Amend to Articles 59 and 94 of the Rules of the Court

On 25 June 2020, as part of the ongoing review of its procedures and working methods, with the recommendations from the Rules Committee, the court decided to amend Articles 59 and 94 of its rules. The amendment to Article 59 makes clear that the court may decide, for health, security, or other compelling reasons, to hold a public hearing entirely or in part by video link. This amendment is contained in a new paragraph 2 of Article 59. The previous Article 59 has been renumbered as Article 59 paragraph 1. The amendment to Article 94 exists in paragraph 2 and provides that the reading of the court judgment in the case may also take place by video link when this is necessary for health, security, or other compelling reasons. The amended rules took immediate effect on the day of their adoption.

Under the amended rules, on 30 June 2020, the court held public hearings on the question of the court's jurisdiction in the case between Guyana and Venezuela at the Peace Palace in The Hague, the seat of the Court. In view of the current COVID-19 pandemic, for the first time, the hearing took place in the Great Hall of Justice using video conference technology and with the physical presence of some members of the court and some members attending remotely by video link. The representatives of the parties to the case addressed the court by video link. Members of the diplomatic corps, the media, and the public followed the hearings through a live webcast on the court's website as well as on UN Web TV.

One aspect relating to this hybrid method of the court's hearing is that each time the court will make a point of having at least eight to nine judges present in the Great Hall of Justice so as to

maintain the solemnity and authority of the judicial function of the Court, of course, with the social distancing and safety measures in place.

Challenges with Using Modern Technology

There are fifteen members of the Court. Usually, we hear the case by the full court, and oftentimes we have one or two ad hoc judges in each case. With a few months of practical experiences of this hybrid method, it is quite obvious to us that the effectiveness of the remote working method very much depends on the quality and availability of modern technology.

Take the court as an example. At the seat of the Court, we have the full technical support of the IT service. With the judges at their home countries, they must also have such technology and service available. To provide technical assistance remotely from the court's side sometimes could be inadequate. This is the first challenge for us. Coupled with the technical availabilities, the question of confidentiality of the judicial work also requires the Court's serious attention.

According to the rules and the practice, before the public hearing, all the documents and written pleadings of a case should be kept confidential. This is also required of court's deliberations. Certainly this presents a big challenge to us. This is the second challenge. The third one, due to technical constraints, video conferencing has its limitations. First, we have to cope with the different time zones of the judges, the delegations of the parties, and other relevant parties. Sometimes the working hours have to be shortened while working days have to be prolonged.

When a technical problem occurs, for instance, all of a sudden

there's no image or there's no sound of the speaker, the hearing or the meetings have to pause till the problem is fixed. Sometimes it could take quite a long time, and this is especially serious when a court hearing is going on. More importantly, we have to recognise that a video conference is not as effective as direct interaction. Direct interaction could really bring more message between the parties. Remote meetings may not result in thorough exchange of views. So this is another defect.

Lastly, we have to ask ourselves whether this will become really a new normal in the future for the court. In a post-COVID-19 era, video conferencing will likely become much more popular and more used, regardless of the existence of the emergency or any concern over security. To what extent and under what circumstances the court should adapt to this method for judicial activities certainly needs to be further studied and put under constant scrutiny.

Law and Politics

Now I shift to another aspect of the capacity-building theme. I would consider it's not a new challenge under the current circumstances. I would consider that the relationship between law and politics is a perpetual issue in judicial practice. Of course, the judges should be mindful of the issue.

For the court, I must say this is not something new or abnormal with our judicial activities because people have to understand that first of all, the court ICJ only deals with cases relating to disputes between states. When they decide to come to the court, I have to say the decision itself is a political decision. The decision to come to the court itself per se is just as important as the outcome of the case.

Secondly, I have to stress that subject matters of the dispute that are brought to the court often concern territorial disputes, use of force, maritime boundary disputes, terrorist bombing, racial discrimination, serious violations of human rights. In a nutshell, such allegations inherently involve politics.

The third aspect is the situation we often face - a dispute oftentimes arises from a long hostile relationship between states. I give an example of the Hostage case between the United States and Iran where the US embassy and the consulate offices were seized by Iranian students. The US brought the case to the court against Iran and claimed that Iran seriously violated its international obligations under the Vienna Conventions on Diplomatic Relations and Consular Relations. Iran claimed that this was not a single isolated incident but the reaction to the 25 years of serious exploitation by the US of Iran. The whole matter was much more complicated than the single incident. The Court stated that the question for the Court to determine is whether the applicant State had asked the Court to adjudicate on a point of law or fact. Iran did not state such a point of law or fact, but the broader political context from which the dispute arose. The court therefore rejected Iran's claim. This case shows that the relationship between politics and the law is not as simple as people would think.

One can see that disputes before the Court, given their nature, subject matter and context, often involve political elements. This is a very normal situation. We can't separate the two but, for the court, we have to decide only the legal aspect of the issue brought before it. I have to stress, in international law, there's no such doctrine as a political question doctrine as in some national constitutional system. What the court has to

decide, is to see whether the party has raised a point of law or fact that is in dispute, and this is what a court has to do. For the court itself, as it is obliged to fulfil its functions in accordance with the Purpose and Principles of the U.N. Charter to settle disputes between States, thus contribute, in its own way, to international peace and security.

Under the Statute of the Court, the General Assembly, the Security Council and other U.N. organs may also request the Court to give advisory opinion to a legal question. Many of these requests concern questions that arose from a broader political background and the Adviosry Opinions given by the Court unavoidably have political ramifications. For instance, the court gave a number of Advisory Opinions relating to decolonization issues. In recent years, the Court delivered a few important Opinions. For instance, in the cases concerning the legal consequences of Israel's construction of wall in the occupied Palestanian territories and the legality of use or threat of nuclear weapons, the Court made significant legal statements on international law.

Recently, we gave an opinion on legal consequences of the separation of the Chagos Archipelago from Mauritius in 1965. From the topic, one can tell that the issue has political implications. For the court, even if a case has deep political implications, it doesn't mean the court is addressing a political issue. We are only addressing the legal aspect of the issue.

Judicial Fellowship Programme

Last, I like to say a few words about the Judicial Fellowship Programme of the Court. Each year, the court will select fifteen to sixteen young scholars from different universities around the

world to join a fellowship program at the court. These young scholars will each work with the judge for ten months in the court from September till July of the following year. Despite difficulties caused by the pandemic this time, the court decided to go ahead with the program. At the moment, sixteen fellows are now in Hague working remotely with their judges. We consider this is a contribution by the court to the international community for the dissemination and teaching of international law. Despite the difficult situation caused by COVID-19, we're very happy we can continue to contribute in this aspect.

Speaker

The Honourable Mr Justice Michael John Hartmann, GBS

Former Non-Permanent Judge of the Court of Final Appeal, Hong Kong SAR

Mr Justice Hartmann became a Non-Permanent Judge of the Court of Final Appeal in 2010.

Mr Justice Hartmann was born in India in 1944. He graduated with an LLB from the University of London (obtained at University College of Rhodesia, an external college of London) in 1967. In 1971, he was admitted as an attorney, notary public and conveyancer in Zimbabwe.

Mr Justice Hartmann joined the Hong Kong Legal Department in 1983 as a Crown Counsel. He was appointed Senior Crown Counsel in 1984 and Deputy Principal Crown Counsel in 1989. He joined the Hong Kong Judiciary as a District Judge in 1991, was appointed a Judge of the Court of First Instance in 1998. From 2008 to 2012, he served as a Justice of Appeal.

Mr Justice Hartmann was awarded the Gold Bauhinia Star in 2012.

Judicial Methods and Skills when Handling Politically Sensitive Cases and Ways to Overcome Media Pressure

Introduction

I'd like to start, if I may, with a little short history. First, by looking at the nature of Hong Kong judges. Hong Kong judges are bred essentially in the tradition of the English Common Law. At one time, legend would have it, judges liked to remain very much aloof. I think they took a certain pride in the fact that they knew very little about the day-to-day happenings in society. There's a well-trodden saying that one judge had to ask who the Beatles were.

Today, however, certainly in the time that I was in the judiciary, judges have become more informed. They read newspapers, they watch television, they've grown especially to understand the reach of social media and indeed many of them, and I don't include myself here, are members of Facebook and other social media platforms. Judges today, therefore, are well aware of political dynamics and like everybody else, are open to the influence of the media as to the time when I was actively involved in what some may call politically sensitive cases.

Basic Law

I think I need, again, just to give a little history. In 1997, Hong Kong was returned to the sovereignty of the People's Republic of China. The transfer took place under the concept of "One Country, Two Systems". That concept was contained in a document of constitution, our Basic Law. And that Basic Law

contained a justiciable Bill of Rights which provided that any domestic law which offended it would be of no force and effect.

In the years that followed, litigants increasingly looked to the provisions of the Basic Law for what they believed to be declarations of their political rights and protection of what they saw as their fundamental human rights. During that time, over a span of some 10 years, I was the judge in charge of what was called the Constitutional Law and Administrative Law List, at least at First Instance, and I was there as the judge who had to give a great many judgments at First Instance.

A number of matters in that decade came before me, which were undoubtedly both politically sensitive and at exactly the same time of great media interest. Perhaps by way of example, and I give it by example only, one case comes to mind, that was when a number of political activists in Hong Kong sought a declaration that they had been secretly watched by the policing authorities, and that secret surveillance was unlawful. It was unlawful because it was not authorized by law as required by the Basic Law of our constitution. If I found that secret surveillance by the policing authorities was unlawful, as indeed I did, we were then left with the question, what happens now? What happens if the police stop all forms of private secret surveillance, but there are nevertheless criminals plotting crimes, terrorists perhaps plotting terrorism? That required some form of stopgap measure until the legislative assembly was able to actually institute some laws to make secret surveillance lawful.

What I need to emphasise, without going into the details of it all, is that the stopgap measures were legal measures. They were not political measures. What was required therefore was a search

among precedents and looking at other jurisdictions, in this case it was Canada, to come up with a similar situation where a law had been set aside as being unconstitutional, and that then left a lacuna, a gap that needed legally to be covered temporarily until the legislature could put something in its place. I put together what I saw as a legal measure. It was approved, although the Court of Final Appeal didn't like it in certain respects and polished it and made it better.

The issues throughout were legal issues and not in any way political issues. Although of course, it was clear to everybody that the case had political ramifications that were very profound. I think the situation then is that in these type of cases, especially human rights cases, although many of the principles set down in the constitution, our Basic Law, gave me a broad discretion and gave other judges a broad discretion. I did not see that they gave me permission in any way whatsoever to become my own lawmaker. Judges have to learn the art of separating their personal preferences, their personal ideologies from the dictates of law.

For myself, we all create our own little ways of ensuring self-discipline. What I would do whenever I saw in the newspaper that there was something brewing, if I can put it that way, that I knew stood a very good chance of coming before me, I would simply not read it. I would ignore it. If there was an article in the newspaper, which I knew was a preamble to something that was coming before me, I would turn to the next page. It's idiosyncratic, I appreciate that. But the purpose for me was that when I came to look at the matter, in a focused way, I did so solely on the basis of the papers that were put before me in legal arguments.

There's also, of course, built into that, the question of our own ideologies. All of us are rooted in our own ideology. Some of us are conservative by nature. Some of us are more liberal by nature. But that doesn't mean that we have the opportunity simply to give vent to our ideologies. The question then becomes, how do you ensure as best as possible that you do not become a victim of your own ideologies, especially when they are unconscious? We all know you can say to anybody, "What would you do there? Would you take a particular ideology into account?" They'll say "No", and yet they may unconsciously do so because it's built into their nature.

The way I approached it and the way other judges I'm sure have approached it, is to look solely at legal arguments. To look solely at what the law provides, what the facts of the case proven by evidence provide, and then to come to a legal decision. On that basis, those unconscious ideologies find barriers in their way. I'm not saying that that proves itself absolutely. I'm sure all of us from time to time are aware of judges who are known to be conservative coming out with conservative judgments. Indeed, in America recently, the whole issue of the appointment of a new Supreme Court judge has involved exactly that issue.

Media Pressure

The issue of media pressure, which I've also been asked to look at, was perhaps more complex. In determining Basic Law matters, I quickly became aware of the fact that following my judgments, I had to expect not simply press analysis. I had to expect criticism from unsuccessful parties or interest groups or crusading newspapers. This, I think is going to be a matter which will have to be dealt with by judicial authorities in the

years ahead. Increasingly I also became aware of the fact that from time to time, individuals would use social media platforms to pour out a lot of venomous criticism.

With some pride, I like to think of the fact that I have in my time as a judge been labeled. First, a stooge of the government being paid money so that I can buy myself a retirement mansion in the United Kingdom where I have no intention ever of living. But that's beside the point. Equally, I have been branded a dangerous liberal influence, determined to undermine the roots of legitimate government. I was damned if I did and damned if I didn't. I think that a great many judges will share that view with me. I myself didn't know about the workings of social media and so these various venomous attacks on various platforms I was ignorant of. But there's always somebody who will bump into you in a shopping mall and say, "Have you seen this particular website? You should read it. It says awful things about you." All of us are so weak that of course, we do exactly that.

Dealing with "troll attacks"

Let me pause to say, if I may, that these troll attacks, and I think that's exactly what they are, can be dealt with by engagement. But common law judges speak through their judgments and otherwise, they remain silent. In that particular area therefore, to go and engage would be entirely wrong and indeed, in my view, entirely self-defeating. Such attacks can and no doubt do constitute a form of contempt and the more serious, the more threatening, the greater the contempt. The issue, however, is I think that again, by engaging with them, you simply give them exactly what they want and that is some notoriety. For myself personally therefore, never fearing what was coming or what

the consequence might be other than vitriol. I adopted the tactic as all other judges I know have done, of ignoring them.

Aside from these things, however, let me emphasize that all judges are fully supportive of informed public debate. Freedom of speech is integral to Hong Kong society. The judgments of our courts can have profound effects on the workings of society and they must, therefore, be open to rigorous debate. What falls from the lips of judges has no special sanctity about it. Nevertheless, from time to time, criticism does hurt. It does sting. All of us, I think, have a degree of self-esteem. All of us are happy with praise, none of us are too happy when we're told that we have gone grievously wrong. I have spoken of being stung and this has I think for most of us greater strength where the criticism not being legitimate has been misinformed.

Clarity and Simplicity of Expression in Judgments

In order to try and avoid this, therefore, I adopted two ways of attempting to deal with the matter. First was to seek always clarity and simplicity of expression in my judgments. A friend once said to me, "I don't agree with your judgment but at least I understand it sufficiently to know why I'm disagreeing." Accordingly, it became my practice to write and rewrite single paragraphs if necessary a number of times. Plain language is not always absolutely possible but accessible meaning must be. In addition, if a case was running for several days, by reading the newspaper in the morning, you could sense that there was an emerging misunderstanding perhaps of the issues and on such occasions, I would do my best in my judgment to set aside those misunderstandings by plainly spelling out what the basis of my decision was. If necessary, in an early paragraph or two, and I often found this helped, I would state what the case was not

about. Informed temperate criticism, therefore, is never of any real concern. As the saying goes, it goes with the territory.

Trained to a system of Constant Review and Constant Criticism

What must be remembered also I think is that judges in the common law system are trained to a system of constant review and constant criticism. When they take the judicial oath, they know that everything that falls formerly from their lips, literally everything, may be subject to criticism by way of a higher appeal or by way of some form of review. Criticism, of course, as I have tried to emphasise already should not be blown out of proportion. I would add that as far as judges were concerned, the ones I work with and myself, in writing our judgments, we felt very little if any form of external pressure. There was one occasion when I wrote a judgment in respect to the matter and there was at the time a public march taking place to object to exactly what I found to be the case and one of the people in that public march was a retired judge. Afterward, people said to me, "How was it that you were not influenced by that?" I said, "Well, I'll tell you why, because I was in my study writing the judgment and I didn't know it was taking place." But even if I was aware of it, I think judges in Hong Kong know that they have no reason to try and meet the expectations of any particular section of the society.

Appointment of Hong Kong Judges

The expectation they're looking to is a judgment that speaks to the truth legally. Judges are not, for example, in Hong Kong as they are, in certain parts of America elected to office. They are not, therefore, like politicians who need to obtain partisan

approval. Hong Kong judges are appointed, and this is an important issue, by an independent committee which ensures the judges must be individuals of integrity and ability based on appropriate qualifications. When they assume office, therefore, Hong Kong judges, as servants of the community are aware that they have been accepted as men and women of integrity and that they are expected to act in that way. An expectation can be a very palpable thing. When you know you have to live up to a reputation, when you have to live up to a responsibility, it can be a great urging principle.

Rule of Law

I have touched or will touch now on the elusive topic of the rule of law. Different countries have different traditions and experiences. The rule of law, therefore, is not in every facet the same in every jurisdiction. I believe it to be universally effective, however, in the following way that the rule of law demands that all persons, without discrimination, are entitled to a fair hearing conducted by a competent and impartial court. An impartial court is one which decides cases without prejudice or favor. A competent court is one which has the integrity to do so. So much is fundamental.

Protection of the Judiciary

What I believe is equally fundamental is that if judges are to be able to meet these fundamental obligations, they themselves must be protected. Alexander Hamilton, one of the Founding Fathers of the United States, famously wrote that the judiciary was the weakest of the three departments of government. It had no influence either over the sword or the money purse. Accordingly, as he went on to say, all possible care must be put in

place to ensure that the judiciary is protected against attacks from every quarter, including attacks from the executive and the legislature.

In Hong Kong, that protection exists and is inscribed in law. First, judges have no fear of dismissal. They have security of tenure until a mandatory retirement age or the expiry of a fixed term. Second, disciplinary action against judges, as rare as it is, and in my time mercifully I have no knowledge of any such action. Such measures are regulated by clear and precise principles. Third, judges have at all times been appropriately remunerated and have been given an adequate pension. During my term as a judge, the Hong Kong government at a time of particular economic crisis, when other arms of the public service were taking pay reductions, accepted that it would be wrong in principle to reduce the salaries of judges. Fourth, within the judicial system, the distribution of cases has never been politically influenced. There is nobody there to say, this is the man here to hear this matter because he's going to come up with a particular result. Fifth and finally, judgments once given remain of effect until, or unless they have been subject to revision by set procedures of appeal.

In my experience, therefore, these measures result in what I started out with, namely, that politically sensitive cases are no different from any other case which is sensitive to particular complex issues and any pressures from any partisan sections of the public can effectively be ignored.

Speaker

Professor Nico Schrijver

Professor of Public International Law,

Leiden University, the Netherlands

Professor Nico J. Schrijver is State Councillor, Council of State, the Netherlands, Emeritus Professor of International Law at Leiden University and Visiting Professor of the EU and Co-operation with Developing Countries at Université libre de Bruxelles. Previously, he was a Senator and Chair of its Standing Committee on Foreign Affairs and also served as President of the Academic Council on the United Nations System, the International Law Association and the Institut de Droit international. He has published extensively on the UN, including Development Without Destruction. The UN and Global Resource Management (2010) and co-edited volumes on The Security Council and the Use of Force (2005) and Elected Members of the Security Council. Lame ducks or key players? (2020).

Responses to the COVID-19 Pandemic in Maintaining Basic Elements of the Rule of Law: Some Dutch Experiences

Introduction

It's a great pleasure to participate in this vibrant rule of law gathering in Hong Kong. I regret that I cannot be physically with you and only speak to you remotely. However, I am grateful for the opportunity to provide you with some information on the way my country, the Kingdom of the Netherlands, has responded to the COVID-19 emergency and the challenges the Netherlands and so many other countries faced in balancing between the needs to devise an effective response to the pandemic while preserving the rule of law.

COVID-19 in the Netherlands

We had the first wave of the coronavirus during early period, early March/July of this year. Unfortunately, the second wave emerged much earlier than anticipated, and it started to show its ugly hats from late September on. As you may know, the Netherlands is a highly densely populated country with approximately 17 million people. I'm afraid that we score rather high on the world list of the number of positive tested persons as the result of the coronavirus, somewhere around place 20, just between Turkey, the Philippines, and Bangladesh. We so far recorded a number of 375,000 positively tested persons and 7,500 people who died as a result of COVID-19. From an early stage, the drugs authority aimed to go for a maximum control of the virus by adopting on the one hand, a so-called intelligent

lockdown and on the other emphasizing the self-responsibility of citizens.

First of all, we did not call at any time so far for a full lockdown but for a selective one, the so-called intelligent one. The government did not impose a general stay at home for everybody and a total closure of all businesses. Of course, offices in non-essential sectors were closed, schools were temporarily suspended, and nearly all places of worship had to go virtually.

As I indicated already, the government made a strong appeal to the self-responsibility of citizens rather than imposing compulsory measures. All people were called upon to follow strictly the hygienic rules, avoid public venues as much as possible, and maintain a one and a half meters physical distance. For long, face masks were not prescribed in either private life or in public places. But with the arrival of the second wave since October, this policy has been changed, and now there are mandatory rules for wearing a face mask.

Challenges on the Access to Justice

Obviously, access to justice in the usual way, for example, filing of complaints at courthouses and legal proceedings were seriously hindered, while governance and democratic control through parliament, provincial and city councils were as much as possible maintained. The institutions were fully kept in place. Personally, I was quite impressed by the joint declaration on 7 April 2020 by the five highest organs of the state. The Speaker of the House of Representatives, the Speaker of the Senate, the Vice President of the Council of State, the President of the Netherlands Court of Audit, and the National Ombudsman

issued a joint statement and I quote from it, "It is our common view that the democratic process should continue in its ordinary way, despite all restrictions emanating from the needs to protect public health. This means that our five high organs of the state will try to function as optimally as possible during these months. Of course, where necessary and possible supported by new digital information and communication techniques. Especially during challenging times, high quality advice, solid public deliberations and decision making, transparency, effective control over, and accountability for the spending of public means and an adequate assessment of the carefulness and the legality of state behavior should run interruptedly and fully be guaranteed".[8]

From this start up till today, there was a deliberate decision not to go into a state of emergency. The possibility is provided for in the Dutch constitution, but rather for a variety of reasons ad hoc emergency legislation projects were subjected to ordinary parliamentary scrutiny. Obviously, this has proven not to be without challenges. But I do believe that somehow a balance could be maintained with a specific role of all organs within the trias politica consisting of the three departments, the executive, the legislative, and the judicial powers.

In the case of a nationwide outbreak of an infectious disease, there is a central role for the National Institute for Public Health. It provides the statistics and the experts' advice to the government. This institute works closely with the World Health Organization on the one hand, but on the other also with Municipal Public Health Services, with experts, with

[8] For the original joint declaration in Dutch language, please see https://www.tweedekamer.nl/nieuws/kamernieuws/verklaring-hoge-colleges-van-staat-democratisch-proces-gaat-door

representatives of the hospitals and various other organisations. This institute also convened a so-called Outbreak Management Team in which apart from virologists, a wide spectrum of all the experts and disciplines were represented. On a weekly basis, they meet with our cabinet, provide advice directly to the government, and also inform parliament, and on all of this, weekly decision-making is built.

As regards the rule of law, in an early stage, legislation was adopted to replace physical court sessions by electronic ones in civil, administrative, and criminal law proceedings. In certain cases, particularly criminal law cases, physical sessions could not be avoided so as to guarantee the principle of due process, including public access, for example, and allowing for victim's participation. Hence, the principle of physical sessions were maintained in these cases while acknowledging public health. For a good administration of justice, you can't suspend proceedings for too long and public order may justify limitations to openness and public accessibility. In a similar frame, various court's terms, such as deadlines for decisions on complaints, and appeal terms of say normally 6 weeks, were now extended till 12 weeks. It was also emphasised that all these emergency procedures were of a temporary character in principle, mostly for half a year with the possibility for an extension of three months, if necessary.

As regards meetings of public organs, such as parliament and city councils, the starting points remain physical sessions in order to guarantee transparency, public access, public participation, but arrangements were made to meet in a virtual way and even to vote electronically by digital means if necessary. Of course, with the exception for confidential voting,

for example, on persons for certain functions.

The Council of State, the principle legal advisory body of the government and parliament, on which I serve as state councillor, was deeply involved in advising on all kinds of bills and regulations, as well as on issuing advisory opinions on requests of either the government or one of the chambers of parliament. Let me mention by way of example, the advisory opinion on the constitutional dimensions of crisis measures. In this opinion, we spelled out how democratic procedures should be maintained as much as possible and with parliamentary control. We also addressed the sensitive issues of limitations to the exercise of civil rights freedoms, mostly in public and private life. Obviously, we could note that sometimes freedom of demonstration and even the freedom of religion, of worship, had to be balanced with the needs to maintain public health, public order, for example, by observing physical distance of one and a half meters and that sometimes this is impossible during demonstrations.

In the view of the council, necessary exceptions to and limitations of fundamental rights and freedoms can only be justified if they are based, first of all, upon prior law, the principle of legality. Secondly, if they are really necessary and proportionally. These are cumulative and not alternative requirements. All these issues also came to the floor in the legal regulation of the law on contact tracing, popularly known as the Corona App. On the one hand, the Corona App is potentially a very good device in tracing the origin of the spread of the virus and alerting people. But it also raises a host of issues as regards privacy and data protection. We also addressed the issue of emergency ordinances to respond to crisis situations. For

example, also those ordinances by the 25 safety regions in the Netherlands, which are handled by the mayor of the largest town in that region. The Council of State strongly advised that these emergency ordinances would always be of limited duration and need to be replaced by ordinary laws in order to have a solid legal footing.

Parliament itself has demanded in October that such emergency ordinances should always be submitted to parliament for approval or disapproval within one week. There is a strong feeling that the democratic process should remain intact and that democratic control is also essential for generating public support for the restrictive measures which have to be taken. The Council of State also made a plea to always provide for a solid evaluation of the law at regular intervals.

For reasons of time, let me wind up, Madam Chair. With this, I hope to have provided you with some insights how the Netherlands, as a country far away from Hong Kong but we are on one globe, as the virus demonstrates, has responded to the COVID-19 pandemic and had to navigate in seeking to balance between the goal of protecting public health and that of preserving democracy, the rule of law and respect for human rights. Thank you very much.

Moderator

Ms Winnie Tam, SC, SBS, JP

Barrister, International arbitrator and mediator,

Des Voeux Chambers

Winnie Tam SC, SBS, JP is a barrister, international arbitrator and mediator practising from Des Voeux Chambers in Hong Kong. Ms Tam was appointed "Senior Counsel" in 2006 and a Recorder of the Court of First Instance of the High Court of HKSAR since 2016. She served as Chairman of the Hong Kong Bar Association between 2015 to 2017, and currently chairs the Hong Kong Bar Association's Committee on Intellectual Property.

Ms Tam holds qualifications to practise in England and Wales, Singapore and Australian Capital Territory. Her practice area is commercial dispute resolution and international arbitration, with particular expertise in intellectual property. Apart from practising in IP and general civil disputes as a barrister-advocate, Ms Tam has been engaged as presiding arbitrator and co-arbitrator in a wide variety of commercial disputes administered under HKIAC, UNCITRAL, ICC, CIETAC and SCIA rules conducted in English and in Chinese. Ms Tam is a sought-after speaker in international conferences on alternative dispute resolution. She is a WIPO panel mediator, a CEDR-accredited mediator, a panel mediator on Mainland-Hong Kong Investment Disputes under CEPA, a JAMS panel mediator, and a JAMS/SCMC Joint Panel Mediator.

Ms Tam has been decorated for her years of public service in Hong Kong. She currently chairs the Communications Authority, and is a member of the Law Reform Commission, the CE's Council of Advisors on Strategic Development and Innovation, the West Kowloon Cultural District Board, and the Board of Governors of the HK Phil.

Ms Winnie Tam:

The first question is for Madam Judge Xue. You mentioned that in handling political issues, judges will look at the legal aspects. However, that may not offer a full solution to a politically related dispute. In that case, after receiving a judgment from the court, what is the next step to the dispute?

Judge Xue Hanqin:

Thank you. That's a very good question. First of all, as I said that for the court, its function is to settle the legal aspects of the dispute that is brought to the court. As to the implementation of the judgment and ultimate solution to the overall dispute between the parties, that does not fall within the mandate of the court. You're absolutely right that many times when a dispute is submitted to the court, the dispute itself may only represent one aspect of the overall context. You may say the overall bigger picture but it's not up to the court to decide the whole matter. The court's responsibility is only to address the legal aspects. For the implementation of the judgment and for the overall situation, it's up to the parties to decide. Sometimes the case may fall within the domain of the Security Council or the General Assembly.

Ms Winnie Tam:

Thank you very much Judge Xue. Indeed, the court could not see through the implementation of the judgment. The next question is for Justice Hartmann. With the attacks, sometimes without grounds, unjustified attacks on the judiciary and the judges due to

individual's political stance, what advice would you give to those who aspire to join the judiciary?

Justice Hartmann:

If you yourself are a political activist, if you have very strong views which you like to voice, if you want the honest truth, I'd say don't become a judge. I feel strongly that judges when they judge a dispute, must be seen to be neutral. I think that if a judge has any well-known indeed notorious - and it would quickly become notorious - political views, all too often in the eyes of litigants, in any event, those views will color the outcome of the dispute.

The fact that judges get attacked from time to time, obviously, will vary depending on the type of judging you do. If you are in a technical area, you may get attacked in maybe technical journals but you're not likely to have people on the pavement shouting at you. What I would say is that there are many occupations where you must expect criticism and judging is simply one of them.

Ms Winnie Tam:

Thank you very much, Justice Hartmann. It seems that a lot of times when we see personal attacks against judges, it is really not an intention to attack the judge but a way of venting anger in a highly politicised society. That seems to be the case all the time. I think, unfortunately, judges in this kind of environment will have to psychologically prepare themselves for this kind of attack and be able to feel immune from it to a certain

extent without allowing it to push the judge to the other end of the political spectrum, which would be highly undesirable.

Justice Hartmann:

If I could just add one point there that this not only applies to the English Common Law. I think there are novels in many languages going back a couple of hundred years of frustrated litigants, and we would call them vexatious litigants. They often become emotionally unstable and that emotional instability may lead them to fairly venomous attacks. Again, it's simply part of the job if I can put it that way. If it's too dangerous, then you can seek assistance.

Ms Winnie Tam:

Thank you very much. I have a question which could be open to all three speakers. It has been said that judges or the judiciary, as a whole, very often come under attack for political reasons. Is there a way to improve the communications between the judiciary and the people in general, outside the rendering of judgments? Is it desirable, for example, for the judiciary to have its own communications department? What are your views?

Justice Hartmann:

My view is clear, the answer is no. As I said earlier, judges speak through their judgments and otherwise remain silent. I think if you see an efficient, competent, honest judiciary going about its day-to-day work over an extended period of time, that will speak volumes much more than what may be seen as propaganda from the judiciary.

Judge Xue Hanqin:

Yes, I agree with Justice Hartmann. I think for the judiciary judges, maybe at the international level, things are quite different from the domestic level. I think people, states or governments expect that court will deal with highly politically sensitive cases. The public may not be as sensitive to the cases or the judgments as those at a domestic level because they are a little bit remote from what's going on, but that could be the case with the country and a party in the case. But even so, I think for the judiciary, we just do what we are required of to really adjudicate the case in accordance with international law on the basis of evidence or facts. Of course, we are expecting, we have been criticised by the public or by some countries for the judgments. We accepted in the sense that this is part of a job. As to whether the court should go to the public, how to build that relationship, I doubt that we can build up that kind of a relationship. What we have to do is do a good job to deliver good, sound and well-reasoned judgment. That's our job. Thank you.

Professor Nico Schrijver:

I fully agree with the two judges saying that judges cannot be expected to engage with the public and should also not do so. These judgments are not a matter of negotiation. However, I think there is a very important complementary role of parliament and government. First of all, they have to guarantee the independence of the judiciary by lifetime appointments, by an adequate salary as Justice Hartmann pointed out, but also by making the judgments public and by making the

outcome of the judiciary open. I think principles of openness and transparency and accountability for the way the judiciary is organised, rests with the government and parliament. And of course, the parliament as the democratically elected institution and the government really have to engage with the public as opposed to the judiciary. I think that providing access to information, public participation in consultations, in decision-making, transparency, being accountable for the decisions to be taken are extremely important to have public support for measures to be taken including the way the judiciary functions.

Ms Winnie Tam:

Thank you very much. Those are very valuable views indeed. One more question for Professor Schrijver – You mentioned that public health is an exception to the enjoyment of civil rights. If this position is correct, how do we strike a balance in pursuing civil rights without delay due to the pandemic?

Professor Nico Schrijver:

Indeed in the Dutch constitution, we have some limitations to the exercise of civil rights, for example, freedom of demonstration, freedom of religion, freedom of movement can be restricted upon grounds of security and public order, if necessary and proportionally. In addition, public health is also mentioned in our constitution as the ground upon which you can restrict civil rights. However, has to be based upon the law, in this particular case, the law on public health which is a

direct implementation law of the international health regulation of the World Health Organisation. As I mentioned, the government has to be able to show, as the executive, that such restriction is really necessary and that for reasons of public health you can't have a demonstration on the inner square of parliament or in front of the Royal Palace in Amsterdam since people do not maintain a one and a half meters distance. Of course, it has to be proportionate. You can suspend such a demonstration for that particular afternoon, or this week. You cannot just say, "For the next year, we prohibit all demonstrations". In this way, you will have to keep your balance on the very thin line of the cord of maintaining, on the one hand, public order and promoting public health, and on the other respecting the rule of law.

Ms Winnie Tam:

Thank you very much Professor Schrijver. I believe proportionality and balance are the most difficult issues for each government around the world in these very difficult times. Thank you very much for the two speakers from the Hague and from Leiden. Thank you very much Justice Hartmann for joining me in Hong Kong. We have had a very meaningful discussion on how different authorities and courts around the world including international courts and national courts have risen to the challenge in trying to deal with emergency situations and to try to balance civil rights against the needs for health and safety in these very difficult times. We've heard judges sharing experiences on dealing with

politically sensitive cases both at the international court level and in the Hong Kong courts. I hope the audience will go away with the clear idea that judges do not carry a kind of political beliefs in judging cases, not in Hong Kong and definitely not in the ICJ. On that note, I would thank again all that had attended this session. Thank you again for spending the afternoon with us.

Closing Remarks

The Honourable Mr Justice Andrew Cheung Kui-nung*

Permanent Judge of the Court of Final Appeal

**The Honourable Mr Justice Cheung was appointed Chief Justice of the Court of Final Appeal on 11 January 2021.*

Mr Justice Cheung was appointed Permanent Judge of the Court of Final Appeal on 25 October 2018, and was appointed Chief Justice of the Court of Final Appeal on 11 January 2021.

Chief Justice Cheung was born and educated in Hong Kong. He read law at the University of Hong Kong, obtaining a Bachelor of Laws degree in 1983 and a Postgraduate Certificate in Laws in 1984. In 1985, he obtained a Master of Laws degree from Harvard Law School. He was called to the Hong Kong Bar in the same year, and in 1995 he was admitted as an advocate and solicitor of the Supreme Court of Singapore.

Chief Justice Cheung was in private practice in Hong Kong before joining the Judiciary as a District Judge in June 2001. He started sitting as a Deputy High Court Judge in December 2001 and was appointed a Judge of the Court of First Instance of the High Court in 2003. Chief Justice Cheung was made the Probate Judge in 2004 and the Judge in charge of the Constitutional and Administrative Law List in 2008. In 2011, he was appointed Chief Judge of the High Court and became President of the Court of Appeal of the High Court. In 2018, he was appointed a Permanent Judge of the Court of Final Appeal.

Chief Justice Cheung is the chairman of the Judicial Officers Recommendation Commission which makes recommendations to the Chief Executive on judicial appointments.

Chief Justice Cheung is an Honorary Bencher of Lincoln's Inn.

I am honored to be invited to give these closing remarks for the Inaugural Rule of Law Congress held this afternoon.

The Rule of Law is of course a big and important topic. Lord Bingham concluded his celebrated work, *The Rule of Law*, with these words:

> "The concept of the rule of law is not fixed for all time. Some countries do not subscribe to it fully, and some subscribe only in name, if that. Even those who do subscribe to it find it difficult to apply all its precepts quite all the time. But in a world divided by differences of nationality, race, color, religion, and wealth, it is one of the greatest unifying factors, perhaps the greatest, the nearest we are likely to approach to a universal secular religion. It remains an ideal, but an ideal worth striving for, in the interests of good government and peace, at home and in the world at large."

In these closing remarks, I would only like to make a few observations on the meaning of the Rule of Law as practised in Hong Kong, looking at it from the perspective of the courts, which, as all would agree, play a central part in upholding the Rule of Law.

First, what are the aims of the Rule of Law? What do we want to achieve by insisting on the Rule of Law? From the courts' point of view, the Rule of Law ensures and promotes fairness, equality, and justice, which are the core values of the administration of justice in our system of law. These objectives are reflected in our case law and our procedures. Thus, the

courts insist that everyone is subject to the law, nobody is above the law, and everyone is equal before the law. There must be neither favoritism nor discrimination. In Hong Kong, we have a vibrant public law regime, which is found only in advanced common law jurisdictions, for the purpose of ensuring that the government and other public authorities operate within the law, and public powers are exercised in accordance with the requirements of the law. Furthermore, the courts require that laws must be published and generally accessible, and the courts proceed on the general basis that laws should not be retrospective, and they have to be certain. For those who subscribe to a substantive or "thick" concept of the Rule of Law and consider that laws must be just and must protect and uphold fundamental human rights, they can easily see from our judicial decisions that the courts generously interpret and jealously guard the fundamental rights of all people in Hong Kong, which are guaranteed under the Basic Law and the Hong Kong Bill of Rights.

Secondly, the Rule of Law comes with a price tag. The insistence on the requirements of the Rule of Law, the strict adherence to procedural guarantees on fairness of the legal process, and the equal treatment of each and everyone who comes before the court, necessarily mean that even the rights and interests of the unmeritorious are safeguarded, and indeed they are safeguarded in no different way from those of the meritorious. They must also mean that legal proceedings take time and sometimes, much time, to proceed and conclude, as much as we want to speed up the hearing of cases and appeals. The holding of the government to legal accountability means that delays, and even substantial delays, may be caused to the

implementation of government decisions or projects, no matter how important or desirable they may be for the public good. All this represents the price society has to pay in order to maintain the Rule of Law. But not only that. In a society governed by the Rule of Law, members of society must learn to accept that from time to time, the outcomes of judicial proceedings may not be to their liking, or accord with where they consider justice lies. Indeed, one may say that a good way to measure how entrenched the Rule of Law as a core value is in a society is to ask how well its institutions and its members are able to accept and respect unpopular judicial decisions and the judges who made them. Hong Kong prides itself as a society governed by the Rule of Law. The continued validity of this claim is dependent upon the willingness of our community to pay the price that comes with upholding the Rule of Law.

Finally, what makes the Rule of Law work? One important requirement is that we have judges who are independent, impartial, fearless, and competent, and we need to have them in sufficient numbers. Aharon Barak, former president of the Israeli Supreme Court and a renowned jurist, wrote in his thought-provoking work, *The Judge in a Democracy*, that:

> "I do hope that the judicialization of politics will not increase the politicization of judicial appointments. On the contrary: it should reduce such attempts. If politics is judicialized, what is needed is objective, professional, and independent judges. That calls for less politics in the appointment of judges. It seems to me that the trend is toward more professionalism and less politics."

In Hong Kong, Article 92 of the Basic Law specifically provides that judges are to be chosen on the basis of their judicial and professional qualities. There can be no compromise on the qualities required. There should be no politicisation of the appointment process. Equally importantly, it should be pointed out that a prolonged inability to fill judicial vacancies may become a latent threat to the continued maintenance of the Rule of Law. The legal profession, and indeed, our community, should actively encourage lawyers of the requisite qualities to apply to join the bench.

A society which embraces the Rule of Law expects much of its judges. The other side of the same coin is that a society which treasures the Rule of Law treasures its judges; a society which protects the Rule of Law protects its judges. In Hong Kong, we take pride in the fact that judicial independence is not only constitutionally guaranteed in the Basic Law, but is also practised on the ground. Nonetheless, constant vigilance is required to protect judicial independence. And that is a responsibility of everyone who wants to see the Rule of Law continue to flourish in our society. On their part, our judges must remain faithful to the solemn Judicial Oath that they have all taken. Our courts must continue to be manned by judges who are impartial and objective, dedicated and professional; judges who see the upholding of the Rule of Law and the due administration of justice as their mission and responsibility. Whilst there is always room for improvement, I have every confidence that our judges will continue to play their important part in maintaining the Rule of Law in Hong Kong in future, just as they have done in the past.

Thank you very much.

Programme

Language of Conference : English (with Simultaneous Interpretation in both Cantonese and Putonghua)	
Time	**Activity**
15:00 – 15:10	**Opening Session** **Welcome Remarks :** **The Honourable Teresa Cheng Yeuk-wah, GBS, SC, JP*** *Secretary for Justice, Hong Kong SAR Government* **The Honourable Teresa Cheng has been awarded the GBM in the 2021 Honours List (published in the Government Gazette on 1 July 2021).*
15:10 – 16:40	**Enhancing Legal Aid Services in Ensuring Access to Justice for All** *In the words of the late Lord Bingham, "denial of legal protection to the poor litigant who cannot afford to pay is one enemy of the rule of law". The costs of provision of legal aid services have been on the rise and may pose as a challenge to the allocation of public funding. Our distinguished speakers will share with us their views to enhancing existing legal aid systems and their vision for the next decade of legal aid services in ensuring access to justice for all.* **Moderator :** **Dr Thomas So, JP** *Partner, Mayer Brown, HKSAR* **Panel Speakers :** **1. Mr Robert Pé** *Former Adviser on Legal Affairs to Aung San Suu Kyi* **2. Mrs Olufunke Adekoya** *Member, World Bank Sanctions Board* **3. Professor Albert Jan van den Berg** *Honorary President of the International Council for Commercial Arbitration* **4. Mr Hans van Loon** *Former Secretary General of the Hague Conference on Private International Law*

16:45 – 18:10	**Keeping Up with the Times : Capacity Building for Judicial Officers** *Judicial independence is valued by many as fundamental to the rule of law. As the law develops to reflect changes in the society, judges today are faced with increasingly complex legal issues, more knowledgeable in-person-litigants and higher expectations from the public. The Judiciary is not shielded from the challenges arising from COVID-19 and calls for better use of technologies in the court rooms and active case management for an efficient judiciary. This panel will address the need for ongoing capacity building to strengthen and enhance judges' ability in discharging their judicial functions.* **Moderator :** **Ms Winnie Tam, SC, SBS, JP** *Barrister, International arbitrator and mediator, Des Voeux Chambers* **Panel speakers :** **1. Judge Xue Hanqin** *Vice President, International Court of Justice* **2. The Honourable Mr Justice Michael John Hartmann, GBS** *Former Non-Permanent Judge of the Court of Final Appeal, Hong Kong SAR* **3. Professor Nico Schrijver** *Professor of Public International Law, Leiden University, the Netherlands*
18:10 – 18:20	**Closing Remarks** **The Honourable Mr Justice Andrew Cheung Kui-nung*** *Permanent Judge of the Court of Final Appeal* **The Honourable Mr Justice Cheung was appointed Chief Justice of the Court of Final Appeal on 11 January 2021.*

律政司
香港特別行政區政府
Department of Justice
The Government of the Hong Kong Special Administrative Region

願景2030·聚焦法治
Vision 2030 for Rule of Law

www.doj.gov.hk

www.legalhub.gov.hk

dojhk.idar

IDAR Office Page

普惠避免及解決争议办公室