Published on e-First 21 June 2018

Lecture

SINGAPORE ACADEMY OF LAW ANNUAL LECTURE 2017 – "LAWYERS AND THE PUBLIC INTEREST: IS THERE STILL HONOUR IN THE PROFESSION?"*

Geoffrey **MA**
Chief Justice of Hong Kong.

1 I wish to thank the Singapore Academy of Law for the great honour of delivering this year's Annual Lecture.[1] It is one of the most prestigious law lectures one can be asked to give as a lawyer anywhere in the world. The list of eminent jurists who have been accorded the honour of delivering the Academy's Annual Lecture is impressive indeed. It is an ambition I have sought to fulfil ever since I first visited Singapore in 1980. Then, I had just commenced practice as a barrister in Hong Kong and was visiting a close friend, who is now one of the justices of the High Court in Singapore.

2 It is perhaps an incidence of age that one tends to look back and reflect. Most young people rightly look forward and for a young lawyer as I was nearly 40 years ago, there seems so much to look forward to. There was little time to reflect on the profession and more importantly, the responsibilities of the legal profession; these always seemed to be someone else's concern. As I now reach an age when I can perhaps say that I have some experience in the law; what of it? One's experience garnered over the years mean[s] very little unless some useful thoughts can be passed on; otherwise, there is a danger that one is simply being nostalgic and that, as we all know, can be decidedly uninteresting.

3 Looking around in my Chambers in the Court of Final Appeal Building in Hong Kong, I can see directly in front of me a silver plate presented to me by the Hong Kong Bar Association, with its emblem being a composite of the emblems of the four Inns of Court in London.

---

* The lecture was delivered at the Singapore Academy of Law Annual Lecture 2017 on 16 November 2017.

1 I wish also to acknowledge the assistance I have received from the Judicial Assistants of the Hong Kong Court of Final Appeal: Mr Harry Chan, LLB (Hong Kong), BCL (Oxon); Mr Hui Sui Hang, LLB (UCL, London), Solicitor; Mr Franklin Koo, BA (Toronto), LLB (City University of Hong Kong), Solicitor; Ms Katrina Lee, LLB (Dunelm), LLM (Hong Kong), Barrister; and Mr Adrian Lo, LLB (Hong Kong), LLM (LSE, London), Barrister.

Directly below that is a green bag[2] which was presented to me by my former colleagues in Chambers where I practised for over 20 years. These symbols of the practice of law point to a profession but it is more than that. They strongly evoke the sense of an honourable profession. These symbols are by no means confined to Hong Kong or England. The emblem for The Law Society of Singapore evokes honour, together with its motto of "an advocate for the profession, an advocate for the community". The word "honour" itself may sometimes mean different things to different people. Integrity, industry, independence all come to mind and the word "honour" does indeed include these core aspects. Above all, however, the proper context of honour in the law can only be serving the public interest, the very rationale for law itself.

4 Is honour still relevant in the legal profession or are there only the trappings of it left? Is honour in the profession confined merely to works of fiction, so that we only have novels like *To Kill a Mockingbird*[3] to inspire us? For me, however, looking at honour is far from an academic or philosophical exercise, much less a fictional one but one that still defines the legal profession today and also puts firmly in context the role of the law and lawyers in a community. It continues to exist and indeed thrives.

5 Of course, there are still many commentators who are sceptical of the legal profession and I accept that, occasionally, they have had grounds to hold this view. Lawyers have not traditionally, at least by writers, been associated with the public interest. The term "public interest" first attracted philosophical scrutiny in 16th-century England in the ethical discussions over the "common weal" or "commonwealth". Even Sir Thomas More, that figure seen by most to be the embodiment of honour and integrity in the law, had his doubts over the value of lawyers. In 1516, there was published his famous work, *Utopia*, which depicted an ideal society on an island (Utopia) where there was no private property, all land being held communally, and where gold was held in disdain. Laws, such as there were, in Utopia were very few, for it was seen that laws complicated life. More was critical of other nations which were weighed down by obscure legal parlance and procedures that were so complicated that no ordinary person understood them. And, lawyers were seen by him to be clever manipulators of the law. In

2 It is an established tradition of the Bar to have bags (made of cotton damask) to carry robes and wigs. A barrister will usually have a blue bag. A red bag is given by a silk (Senior Counsel or Queen's Counsel) to a junior barrister for excellence when working on a case or cases. I have given only three – one to a junior with whom I worked in a trial in Singapore before Prakash J (as her Honour then was), my last case there. A green bag is given by a set of Chambers to a colleague who has joined the Judiciary.

3 Harper Lee, *To Kill a Mockingbird* (Warner Books, 1960).

Utopia, there were no lawyers. Shakespeare and Dickens were among many other writers who had scant regard for lawyers.

6 Recently, Chief Justice [Sundaresh] Menon had very much in mind the need to remind lawyers of the public interest when he gave the Valedictory Reference in Honour of Justice Chao Hick Tin on his Honour's retirement.[4] The Chief Justice spoke characteristically from the heart; he spoke of Singapore but the words can equally apply anywhere:

> The law is foundational to society, and nowhere is this truer than in our country which has mapped its path to success on the back of a steadfast commitment to the rule of law … I explained to Justice Chao that these foundational truths might be less obvious to a new generation of Singaporeans and, in particular, to young Singapore lawyers.

then, a reference to:

> [P]ractising our craft in a true spirit of public service and to remind Singaporeans that there is ultimately immense good in the law.

7 Underlying these reminders to the younger generation (indeed they are applicable to all lawyers of any generation) is clearly the message that the practice of law involves very much the public interest. The concern here is that lawyers will think only in one-dimensional or at most two-dimensional terms rather than take sufficiently into account the wider public interest. A simple scenario suffices. For the legal profession, the interests that have to be served are complex and involve in practice not just theoretical conflicts but, very real ones. In the course of litigation, a lawyer will have a number of different interests to take into account: the interests of his or her client, his or her own interests, the interests of the firm acting for the client and finally (and most important) the duties owed to the court. At some stage or other in the course of proceedings, some or even all of these interests may collide with one another. It is easy to answer the question in theory of which interest prevails as I shall presently discuss: the duties owed to the court override all others. However, in practice, one can be forgiven for believing that sometimes, thought is given to only some of these interests at the expense of other interests. Law is no doubt regarded by many as a business and it would be far simpler for all concerned simply regard lawyers as business persons or merely as persons carrying on a trade. But it is far from being that simple because the law is a profession and rightly regarded as an honourable one at that.

8 Many lament – and I have on occasion done this myself – the fact that some lawyers regard the law purely as a business and that all

4 This took place on 27 September 2017.

their efforts are directed to an objective of self-interest at the expense of what is required of them both legally and ethically. When eminent judges, many of whom have practised with great distinction, express themselves in strong terms, it becomes necessary to take note to see whether a problem does indeed exist. In an illuminating judicial review case from Singapore involving ethics,[5] V K Rajah J[6] said that ethics for lawyers "should not be perceived as an external and inconvenient imposition of values on the legal profession but rather as an embodiment of the moral compass and aspirations of the profession".[7] He was delivering a simple message, namely that it was unacceptable for there to be any undermining of the moral fibre of the legal profession. The learned judge added, "[i]n a race to the bottom, legal practices will expend more and more valuable time and resources competing with and out-foxing each other for business rather than focusing their efforts on effectively delivering premier services to clients and appropriately discharging their wider obligations to the community".[8]

9 There is no incongruity with a concept of honour that the legal profession is also a means by which legal practitioners make their living. I, for one, am neither so naïve nor hypocritical to advocate that all lawyers ought to be altruistic at all times, and not to have in mind business development, whether for oneself or one's firm. After all, it is sometimes said that the law, in particular commercial law, is a service industry which assists the development of business and commerce.[9] If it does these things, then why should the practice of law not develop business practices itself? The number of impressive firms of lawyers here in Singapore, both national and international, confirms this.

10 Rather, the point I am trying to make about honour is that while it can be accepted that the practice of law is a business, that is not the only or paramount consideration. The conflicts I have earlier alluded to arising out of the duties owed by lawyers are very real and often manifest themselves in one form or another in any given situation, if anything, perhaps too often. Conflicts of interest in the law are nothing new and generally speaking, the law treats this strictly. For example, the

5 *Wong Keng Leong Rayney v Law Society of Singapore* [2006] 4 SLR 934. This case was subsequently appealed to the Court of Appeal where the appeal was dismissed: [2007] 4 SLR 377.

6 V K Rajah J was later V K Rajah JA and then the Attorney-General of Singapore.

7 *Wong Keng Leong Rayney v Law Society of Singapore* [2006] 4 SLR 934 at [84].

8 *Wong Keng Leong Rayney v Law Society of Singapore* [2006] 4 SLR 934 at [85].

9 As was famously said by Devlin J (later Lord Devlin) in *St John Shipping Corp v Joseph Rank Ltd* [1953] QB 267, at 289: "[t]he Commercial Court was introduced … so that it might solve the disputes of commercial [persons] in a way which they understood and appreciated, and it is a particular misfortune for it if it has to deny that service to any except those who are clearly undeserving of it".

law of fiduciaries treats liability arising from conflicts of interest in a breach of trust as almost strict.[10] The cases on bias, presumed bias and apparent bias in the context of judges being disqualified from hearing cases[11] also demonstrate an uncompromising approach. I suggest this strictness in approach ought to be borne in mind as a discipline when lawyers consider the application of the various duties to which they are subject. Of course, save in exceptional cases, a lawyer will not be expected to recuse himself or herself from acting, but in my view, it is important for practitioners to take these duties fully and properly into account when discharging professional obligations. Just paying lip service obviously will not do.

11 Thurgood Marshall J,[12] in a tribute to Prof Charles Houston,[13] said in relation to how law was practised: "[a]nd he taught us how the law was practised, not how it read. Because you see, in those days Harvard, Yale, Columbia – you name them, the big law schools – were bragging that they didn't train lawyers, they trained clerks to start off in big Wall Street law firms".[14] This captures precisely the sentiment I am trying to convey: that the practice (and study) of law is no doubt about business and making a living but it should be much more than that; and that "much more" means the concept of public interest or community interest.

12 In a recent speech made by Menon CJ, one that has very much provided the inspiration to this lecture,[15] he refers to another great American Professor of Law, Dean Roscoe Pound,[16] who was a staunch advocate of the relevance of the law to society; his jurisprudential theory was that the law followed society, not the other way round. In a well-known article in 1944,[17] Dean Pound said this:

---

10 For a recent example of this in Hong Kong, see the judgment of Lord Millett NPJ in *Tang Ying Loi v Tang Ying Ip* (2017) 20 HKCFAR 53.

11 See, *eg*, *Re Pinochet* [2000] 1 AC 119 and *Deacons v White & Case LLP* (2003) 6 HKCFAR 322. The relevant principles are reiterated in Hong Kong Judiciary, *Guide to Judicial Conduct* (October 2004).

12 His Honour was formerly an Associate Justice of the Supreme Court of the US, the first African-American to be appointed to that court.

13 Prof Houston was the former Dean of Howard Law School (the Howard University School of Law in Washington DC), one of the oldest law schools in the US.

14 See Tribute to Charles H Houston [1978] *Amherst Magazine* 12, reproduced in *Thurgood Marshall, His Speeches, Writings, Arguments, Opinions and Reminiscences* (Mark Tushnet ed) (Lawrence Hill Books, 2001) at pp 272–276.

15 Chief Justice Sundaresh Menon, "Law and Medicine: Professions of Honour, Service and Excellence", speech delivered at the 23rd Gordon Arthur Ransome Oration (21 July 2017).

16 Pound was formerly the Dean of Harvard Law School (1916–1936), and before that, the Dean of the University of Nebraska Law School (1903–1911).

17 Dean Emeritus Roscoe Pound, "What is a Profession? The Rise of the Legal Profession in Antiquity" (1944) XIX *Notre Dame Lawyer* 203.

> In the face of the modes of thought engendered by sport, it is not easy to import to this generation the conception of a group of [persons] pursuing a common calling as a learned art and as a public service – no less a public service because it may incidentally be a means of livelihood … Historically, these are three ideas involved in a profession, organization, learning and a spirit of public service. These are essential. The remaining idea, that of gaining a livelihood, is incidental.

13 Therein lies again the key to the concept of honour in the legal profession, the public or community interest. Because if the law means, ultimately, the respect for the rights of individuals and, just as important, the respect for the rights of others, this is what the practice of law must mirror and seek to achieve.

14 What are the manifestations of this honour? I start with an obvious topic, the duties owed by lawyers to the court.

I. Duties owed to the court

15 In order to grasp this topic fully, it is first important to note a fundamental feature of the common law.[18] In common law jurisdictions, legal proceedings are, on the whole, adversarial in nature. This by itself gives a hint as to the role of duties owed to the court. This role is crucial because in the adjudication of disputes, courts must have the proper materials before them. In jurisdictions where proceedings are adversarial, there is much reliance on the legal profession to place the necessary materials before the court. By contrast, in what are commonly called civil law jurisdictions,[19] which place the responsibility on judges not just to adjudicate but also investigate, the role of lawyers (and the nature of their duties) can be quite markedly different. Such systems, the inquisitorial systems, require a substantial staffing of judges. As an interesting historical illustration of the staffing requirements in civil law jurisdictions, in the 18th century, France had some 5,000 Royal judges at a time when in the English courts of Chancery and common law, the judges numbered about 15.[20]

18 Singapore is a common law jurisdiction: see s 2(1) of the Constitution of the Republic of Singapore (definition of "law") and s 3 of the Application of the English Act (Cap 7A, 1994 Rev Ed). Hong Kong is also a common law jurisdiction. This is expressly provided for in The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, essentially the constitutional document for Hong Kong.

19 This is based on the Roman-canon procedure.

20 See John P Dawson, *A History of Lay Judges* (The Lawbook Exchange Ltd, 1999).

16 In criminal proceedings, the jury system can be traced back to Henry II.[21] However, it was not until relatively late in the day that lawyers made a real impact on the shape of criminal proceedings. Until the middle of the 19th century, judges were reluctant to allow much participation by lawyers, for fear that trials would be prolonged. Criminal judges, therefore, entered into a quasi-partnership with jurors, whereby judges and juries would often work together to secure what was seen to be a just result. Lawyers, in short, were seen to be an impediment to the smooth and efficient operation of the wheels of justice. As mentioned earlier, this was certainly the view of Sir Thomas More. However, with the passing of the Prisoners' Counsel Act[22] in 1836, defence counsel had the right to address a jury for the first time. This was the first step towards what is now automatically assumed; it was up to the parties to present before the judge and the jury all relevant materials.

17 On the civil side, the growing importance of lawyers can be traced back to the traditional shortage of judges, particularly on the Chancery side. In an interesting paper headed "Bifurcation and the Bench: The Influence of the Jury on English Conceptions of the Judiciary", delivered at the 2007 British Legal History Conference held in Oxford, Prof John Langbein[23] observed that particularly in the early 19th century, it was baffling, given the volume of cases that had to be dealt with, why there was a severe understaffing of judges. Chancery judges adopted at that time almost an inquisitorial approach – Chancery procedure being based on Roman-canon principles – (the Chancellor had for centuries been religious men, usually a bishop or archbishop (take for example, Sir Thomas More)). Prof Langbein says:[24]

> What kept Chancery from fulfilling its adjudicative promise is that Chancery never came to grips with the staffing implications of the Roman-canon procedures it was employing. Gathering and evaluating witness testimony and documentary evidence is time-consuming work. If you are going to have such a system, you need a large bench …

18 I surmise that a part of the reason for the shortage of judges was the selection process. For example, it was not until 1828 with the repeal of the Test Act[25] that Catholics became eligible (since judges had to take

21 This refers to Henry Plantagenet, father of Richard I, reigned 1154–1189.

22 Prisoners Counsel Act 1836 (6 & 7 Will 4, c 114).

23 Prof Langbein is the Sterling Professor of Law and Legal History at Yale Law School.

24 John H Langbein, *Judges and Judging in the History of the Common Law and Civil Law: From Antiquity to Modern Times* (Paul Brand & Joshua Getzler eds) (Cambridge University Press, 2012) at p 74.

25 Test Act 1828 (9 Geo IV, c 17).

the oath of allegiance).[26] The failure to have adequate staffing in the Judiciary coincided with the decline in the significance of jury trials in civil cases. As cases became increasingly complex, it became apparent that juries were unable to determine cases without considerable assistance (or, more accurately, intervention) from the bench. Juries needed considerable assistance in the law before they could even begin to find the facts (at least the relevant ones) and gradually, more issues were seen to be questions of law rather than fact when hitherto they had been regarded as questions of fact (for example, most notably, the issue of damages). Judges were even at one stage driven to asking jurors to reveal their thinking to the court and, where the judge thought this to be desirable, to send the jury away for deliberation time and time again so that the desired result could be reached.

19 All this led to the noticeable shift from jury to judge in terms of the adjudication process. "Judges effectively froze jury trials out of their court".[27] Nowadays, in Hong Kong, it is almost unheard of to have a jury in civil trials save in defamation actions.[28] Historically, this shift led to the importance of the position lawyers within the overall administration of justice. No longer could judges, particularly when they were in short supply, adopt any sort of inquisitorial process: the parties, or rather the parties' lawyers, came to be relied on by the courts to place all relevant materials before them in order that the dispute could be properly resolved. As was often the case in the 18th and 19th centuries, it was the courts of Chancery which led the way. The work of evidence gathering, perhaps the most time consuming part of the preparations for a case (encompassing as it does not only the location and proofing of witnesses but also the discovery process), was left in the hands of the lawyers, rather than the courts. Prof Langbein says of this change:[29]

> As Chancery's subject-matter jurisdiction grew, Chancery responded by delegating ever more of its workload, especially evidence-gathering. The pattern that emerged was to allow private lawyers acting on behalf of the litigants to control the investigation, by drafting interrogatories to be put to witnesses. This departure from the Roman-canon model of court-conducted evidence-gathering effectively privatised the investigative phase of the adjudicative process.

26 William Cornish *et al*, *The Oxford History of the Laws of England* vol XI (Oxford Scholarship Online, 2010) at p 962.

27 William Cornish *et al*, *The Oxford History of the Laws of England* vol XI (Oxford Scholarship Online, 2010) at p 845.

28 In Singapore, jury trials have been abolished since the late 1960s.

29 John H Langbein, *Judges and Judging in the History of the Common Law and Civil Law: From Antiquity to Modern Times* (Paul Brand & Joshua Getzler eds) (Cambridge University Press, 2012) at p 74.

20 As we only know too well, in the modern context, the volume of cases handled by the courts is high and many of the cases are extremely complex. A shortage of judges, evidently a historical problem, magnifies the pressure on the Judiciary. It is of course beyond argument that the dispensing of justice is not to be compromised, but the administration of justice (in other words, the delivery of justice in practice) is severely tested by these very real challenges. Of course, court procedures have had to become more efficient and effective. In Hong Kong, as in the UK, in order to reduce delay and cut down on the excesses of litigation (particularly excessive interlocutory activity), substantial civil procedural justice reforms have been introduced[30] in order to implement what are seen to be the objectives of civil procedure:[31]

> **1. [Underlying objectives (O. 1A, r. 1)]**
>
> The underlying objectives of these rules are –
>
> (a) to increase the cost-effectiveness of any practice and procedure to be followed in relation to proceedings before the Court;
>
> (b) to ensure that a case is dealt with as expeditiously as is reasonably practicable;
>
> (c) to promote a sense of reasonable proportion and procedural economy in the conduct of proceedings;
>
> (d) to ensure fairness between the parties;
>
> (e) to facilitate the settlement of disputes; and
>
> (f) to ensure that the resources of the Court are distributed fairly.

21 Notwithstanding procedural reforms, court systems continue, nevertheless, to be heavily reliant on lawyers to fulfil their responsibilities in the administration of justice. They, together with judges, form the backbone of the administration of justice and play a pivotal role in this context. Some traditionalists hold the view that only judges have a part to play in the administration of justice. This is quite wrong. One only has to imagine taking away the presence of lawyers to see how any legal system will come to a standstill in practice. As Lord Thomas of Cwmgiedd, who delivered this Academy's Annual

30 In 2009, Hong Kong implemented what was known as the Civil Justice Reform, a project that was, from start to finish, nine years in the making. The reform represented a change in litigation culture: see *Wing Fai Construction Co Ltd v Yip Kwong Robert* (2011) 14 HKCFAR 935. I understand that in Singapore, reforms have been made incrementally since the 1990s.

31 These objectives, in statutory form, are called underlying objectives and are set out in O 1A, r 1 of the Rules of the High Court (Cap 4A) of the Laws of Hong Kong.

Lecture last year, said in *Brett v Solicitors Regulation Authority*,[32] "our system for the administration of justice relies so heavily upon the integrity of the profession and the full discharge of the profession's duties".

22 It is the lawyer's duties to the court that facilitate and make possible the effective administration of justice. This was an inevitable development once the role of lawyers became pronounced and assumed importance in the adjudication process. But what is the content of the duties owed to the court? And, what is it that lawyers are expected to do or not do as far as the court is concerned and how are they to resolve some of the very real conflicts that emerge in the conduct of litigation?

23 Many authorities exist to the effect that no conflict should exist between duties owed to the court and the duties owed to the client or indeed anybody else: the former prevail every time. Statements to this effect have come from the most eminent jurists in the common law world: Mason CJ in *Giannarelli v Wraith*[33] [("*Giannarelli*")]; Gleeson CJ in *D'Orta-Ekenaike v Victoria Legal Aid*;[34] Lord Reid in *Rondel v Worsley*.[35] Warnings have been sounded as to the evils of economic self-interest when ethical demands dictated different course: see the judgment of O'Connor J in *Shapero v Kentucky Bar Association*.[36]

24 Yet, as we all know, very real conflicts do sometimes exist between the interests of the client and the interests of the court. The court is interested in justice overall. The client is usually only interested in achieving the most advantageous position for himself or herself, whether or not this coincides with justice. Then, there is also the interests of the lawyer, or his or her firm. The lawyer can at times be caught wondering what ought to be the appropriate course to take.

25 These types of conflict have, in many jurisdictions, to be viewed against the erosion in the immunity afforded to lawyers in the conduct of litigation. This erosion, quite clearly a policy decision of the courts, serves to heighten the pressures faced by lawyers. This aspect, linked as it is to facets such as compulsory insurance and professional negligence lawsuits, is not to be lightly ignored.

26 I have so far only referred to what can best be described as economic pressures on lawyers. One must also not lose sight of those fundamental principles of law or justice that compel a lawyer to act in

32 [2015] PNLR 2 at [111].
33 (1988) 165 CLR 543.
34 (2005) 223 CLR 1.
35 [1969] 1 AC 191.
36 486 US 466 (1988).

certain ways which will prefer the interests of the client over others. For example, in criminal matters, the constitutional right of silence and the presumption of innocence both require that a lawyer for the defence must act in his client's best interests to avoid conviction, rather than to assist a court, jury or certainly the prosecution. Another obvious example is legal professional privilege, this fundamental principle applying in both civil and criminal proceedings. This is, commonly, a constitutionally protected right: in Hong Kong, Art 35 of the Basic Law refers to the right to confidential legal advice. The responsibility of the lawyer in adversarial proceedings is recognised in statutory provisions regarding aspects such as costs. In Hong Kong, when a court considers making a costs order against a legal representative personally, or an order for wasted costs, account must be taken of "the interest that there be fearless advocacy under the adversarial system of justice".[37]

27 The identification of these potential conflicts brings home the proper context in which one must view any discussion of duties owed to the court. As with so many other aspects of the law, different and at times conflicting – but entirely legitimate – interests come into play. It is, I would suggest, unsatisfactory to approach the topic of duties owed to the court simply by reference to vague notions of truth and justice. One really needs to analyse deeper and attempt to identify those features that are encompassed in the concept of justice, such as a fair trial, a just resolution of a proper dispute, fair and proper representation of the protagonists in a dispute, proper court procedures following the underlying objectives I have earlier identified. Viewed in this way, a clearer picture emerges of the administration of justice, and of the role of judges and lawyers within it.

28 I agree to a certain extent with the view taken in the US that the primary duty of the lawyers is to provide proper legal representation to persons who are not in a position fully or properly to represent themselves. That said, quite clearly the lawyer must also bear firmly in mind his or her role in the overall administration of justice and this includes the concept of duties owed to someone or something other than his or her client. The duties owed to the court are a significant and extremely important part of a lawyer's function. It is part of the historical legacy of the common law. It is no surprise, therefore, that lawyers are regarded as officers of the court.

29 The content of the duties owed to the court is largely similar in all common law jurisdictions. Upon analysis, they reflect (and respect) the different roles a lawyer is expected to play, in the context I have attempted to identify.

37 Section 52A(5) of the High Court Ordinance (Cap 4) (HK).

30 Many authorities, textbooks, articles and speeches have in far greater detail enumerated the content of lawyer's duties to the court. I have found of particular assistance the classic article by David Ipp J, "Lawyers' Duties to the Court".[38]

31 It is neither necessary nor desirable for me to repeat the impressive literature on this topic. I am, however, keen to explore those specific areas where there can at times be a real conflict between the wishes of the client and the duties owed by lawyers to the administration of justice. In those areas where a conflict arises, the duty to the administration of justice (in other words to the court) is of course, as I have earlier mentioned, the dominant one. However, within these areas, there is ample recognition of the fact that lawyers also owe duties to their clients. It is only when certain boundaries are crossed that a lawyer must then adopt certain courses of action. A useful summary of the point can be found in the speech of Lord Hoffmann in *Arthur J S Hall [and Co] v Simons*[39] (the court was concerned with the question of immunity from suit):

> *3. Divided loyalty*
>
> Lawyers conducting litigation owe a divided loyalty. They have a duty to their clients, but they may not win by whatever means. They also owe a duty to the court and the administration of justice. They may not mislead the court or allow the judge to take what they know to be a bad point in their favour. They must cite all relevant law, whether for or against their case. They may not make imputations of dishonesty unless they have been given the information to support them. They should not waste time on irrelevancies even if the client thinks that they are important. Sometimes the performance of these duties to the court may annoy the client. So, it was said, the possibility of a claim for negligence might inhibit the lawyer from acting in accordance with his overriding duty to the court. That would be prejudicial to the administration of justice.

The conflict between duties owed to the court and the duty owed to the client is sometimes known as the "divided loyalty" aspect.

32 It is occasionally posited whether the content of the duties owed to the court only amounts in practice to no more than the duty not to mislead. It is true that the majority of the duties owed to the court can, on analysis, be classified under this head. The first three categories of Ipp J's classification can be said to come within this (namely the duty of disclosure owed to the court, the duty not to abuse the court's process and the duty not to corrupt the administration of justice).

38 (1998) 114 *Law Quarterly Review* 63.
39 [2002] 1 AC 615 at 686E–686G.

33 The duty not to mislead includes the following important facets:

(1) In civil proceedings, there is a heavy duty on a lawyer to ensure full and proper discovery.[40] Severe consequences follow where this duty is breached. The theory here ought to be quite simple: there is an obligation to advise the client that disclosure of relevant documents should be made, *in particular* of documents which are against the client. Yet, it is the latter aspect that in practice can sometimes provide a stumbling block, as increasingly what can best be described as tactical attempts are made to avoid discovery of such documents. There are of course built-in and legitimate limitations to the disclosure of relevant documents or facts. Here, I refer again to the aspect of legal professional privilege: relevant, indeed crucial, documents may not be revealed where this privilege applies. In criminal proceedings, there are no discovery obligations on an accused at all. In contrast, but of course subject to the recognised privileges which can apply, the prosecution must disclose all relevant documentation and materials (the disclosure of unused materials is a manifestation of this obligation).

(2) The duty not to mislead also includes the obligation to ensure that the court is properly apprised of the relevant law; in other words, the duty to inform the court of relevant decisions or statutes on a point of law. In Hong Kong, this duty is confined to civil cases. There is no obligation as far as criminal cases are concerned (unless this coincides with the client's interests).[41] The duty can be a difficult one to fulfil in practice where, for example, non-binding but persuasive authorities are involved, including authorities from outside the jurisdiction.

34 From the foregoing, it can thus be seen that even within the duty not to mislead, there is ample allowance made to recognise the duties owed by a lawyer to his or her client. The borderline between what is acceptable and what is not, seems to me on the whole to be clear in most situations.

35 But do the duties owed to the administration of justice go beyond not misleading the court? In my view – and arguably this is the only other most critical aspect of the duties owed to the court – there is the important duty to assist the court in the effective and efficient resolution of disputes before it. In *Giannarelli*,[42] Mason CJ said this:

40 This is the position both in Hong Kong and in Singapore: see, *eg*, *Teo Wai Cheong v Crédit Industriel et Commercial* [2013] 3 SLR 573.

41 See cll 10.38 and 10.60 of Hong Kong Bar Association, "Code of Conduct".

42 *Giannarelli v Wraith* (1988) 165 CLR 543 at 556.

> [A] barrister's duty to the court epitomises the fact that the course of litigation depends on the exercise by counsel of an independent discretion or judgment in the conduct and management of a case in which he has an eye, not only to his client's success, but also to the speedy and efficient administration of justice. In selecting and limiting the number of witnesses to be called, in deciding what questions will be asked in cross-examination, what topics will be covered in address and what points of law will be raised, counsel exercises an independent judgment so that the time of the court is not taken up unnecessarily, notwithstanding that the client may wish to chase every rabbit down its burrow. The administration of justice in our adversarial system depends in very large measure on the faithful exercise by barristers of this independent judgment in the conduct and management of the case …

36 The duty to assist in the resolution of disputes is of sufficient importance as to be embodied in statute form. In Hong Kong, the rules of civil procedure make it incumbent on the legal representatives in every case to "assist the court to further the underlying objectives of these rules".[43] This is a reminder to lawyers of the critical importance of not indulging in tactical manoeuvres at the expense of the administration of justice, even if this is what the client wants. Furthermore, given the importance of mediation within the administration of justice, many court practice directions, professional rules and professional codes of conduct contain provisions requiring lawyers to advise their clients properly of this procedure.[44]

37 The public interest lies in the effective and just resolution of disputes according to law. However, it is not entirely accurate to refer to duties being owed to the court as such. In truth, these are duties owed to the public interest and to the community as a whole, the community being symbolised in this context by the courts and their judges. It is the same when we show our respect to the judge as he or she enters or leaves the court room: this demonstrates not a respect for the person so much as respect for the institution.

38 Duties owed to the court by legal practitioners is a unique characteristic of a common law system. The uniqueness lies in this: rather than judges and lawyers having a separate role to play each being responsible for their own area of operation – judges judging and lawyers

43 Order 1A, rule 3 of the Rules of the High Court (Cap 4A) (HK). The underlying objectives have been set out earlier: see para 20 above.

44 In Singapore, see para 35B(2) and 35B(4) of the 2016 Supreme Court Practice Directions and r 5 of the Legal Profession (Professional Conduct) Rules 2015 (Cap 161, R 1, 2010 Rev Ed). In Hong Kong, see cl 10.27 of Hong Kong Bar Association, "Code of Conduct" and cl 10.17 of the Hong Kong Solicitors' Guide to Professional Conduct.

acting for their clients – in a common law jurisdiction, judges and lawyers have overlapping duties to the administration of justice. In other words, they work in tandem.

39 There is another important dimension to consider and this is directly relevant to the concept of honour. The furtherance of the public interest in the duties owed to the court is not about abiding by rules as though the conduct of litigation in the courts was a game in which it is left to a referee to enforce the rules. The duties owed by the legal profession are not there only to be observed when someone is watching. Quite the contrary, the duties are to be observed, precisely when no one is watching. Some lawyers may treat litigation as a tactical game where one tries to "get away" with something, especially when the court is not aware. This is precisely the wrong attitude. Acting in accordance with one's duties, even or especially when no one is watching or is there to supervise, is acting in the public interest and to do so honourably. This recognises the overlapping roles of lawyer and judge in the administration of justice. The judge is there to reach a just determination of a legal dispute, not to monitor the legal profession as well.

40 I now move onto another facet of honour in the profession and one that is often forgotten. No doubt when discussing the public interest, the duties owed to the court first spring to mind, but it is not the only aspect. The engagement in *pro bono* legal work is in many ways, just as important.

II. *Pro bono* legal work

41 That this reflects the honour or nobility in the profession was made precisely by Andrew Phang [Boon Leong] JA in *Law Society of Singapore v Ahmad Khalis bin Abdul Ghani*:[45]

> Is the legal profession a place where only economic pragmatism holds sway? This surely cannot be the case. The profession is a noble one – one that exists to serve the ends of justice and fairness. The cynicism that exists *vis-à-vis* the legal profession (unfortunately across jurisdictions) is due precisely to the gap between ideal and actuality, especially in the eyes of the public … There will always be a gap between ideal and actuality in the real world caused by those who do not hold fast to the highest standards of professional conduct required of them. But the numbers of such errant lawyers must be kept to the barest minimum possible. In this regard, we are heartened to note that there are lawyers who are found on the other end of the spectrum. They demonstrate that the ideal is not only attainable but (in some

45 [2006] 4 SLR 308 at [81].

> instances) actually go beyond it. For example, they extend help to their clients beyond the boundaries of their respective retainers. Some go further. They engage in *pro bono* legal work, helping those who would otherwise (for one reason or another) fall between the legal cracks. Such lawyers epitomise what is best and noblest in the profession …

42 The "spirit of public service", a term used by Menon CJ,[46] embodies the ideals of the legal profession. The Chief Justice makes the observation that experience in the law eventually tells us that the purpose of making money, in other words attaining success in one's career, is to allow one's service in the public interest to continue.

43 There is a history of *pro bono* work undertaken by lawyers. In the 16th century, lawyers in England (the serjeants at law)[47] were expected to assist the poor without expectation of reward. This followed the lead of the Statute of 11 Henry VII, c 12 which permitted the right to institute legal proceedings *in forma pauperis*, carrying with it an obligation on counsel to act without reward and be appointed for such cases.

44 The trouble with trying to find materials on the history of *pro bono* work undertaken by lawyers is that this is not a popular subject to write about. More common are references, often in literature, about the avarice of lawyers or the failures of the legal system. One need only read the novels of Dickens.[48] And yet, we all know that *pro bono* work, though low profile, has always been undertaken by lawyers and this has become increasingly stronger, not only among lawyers individually but also collectively among law firms. The Annual Report of 2017 of the Law Society of Singapore has a large section concentrating on *pro bono* services.[49] The Law Society of Hong Kong has an extensive programme of *pro bono* work, including the provision of free legal advice, legal seminars, a free legal helpline and school visits. The Hong Kong Bar Association promotes *pro bono* work as well under the Bar Free Legal Service Scheme providing legal advice and representation to those who are not eligible for legal aid. Legal Aid exists in both Singapore and Hong Kong. In Hong Kong, I encourage Senior Counsel to take on at least one legal aid case a year.

---

46 See Chief Justice Sundaresh Menon, "Law and Medicine: Professions of Honour, Service and Excellence", speech delivered at the 23rd Gordon Arthur Ransome Oration (21 July 2017) at para 16.

47 Serjeants at law were barristers who practised in the Court of Common Pleas, the principal common law court in the judicial hierarchy during the 16th century.

48 See among others Charles Dickens' *Bleak House*, *Great Expectations*, *A Tale of Two Cities, Little Dorrit* and *Pickwick Papers*.

49 See the section headed "Pro Bono, Learning and Support Services" in The Law Society of Singapore, *Annual Report 2017* at pp 35–45.

45 As I mentioned earlier, not much is written about *pro bono* work and there is as a consequence little publicity about it. The public very often is unaware of the time and effort devoted to this very real and tangible public service. For me, those who devote themselves to this service are unsung heroes and I echo the sentiments of [Phang JA] in acknowledging them to represent what is "best and noblest in the profession".

46 If one needs to test empirically the value to the public of *pro bono* legal services, one only has to ask those who engage in providing such services about the more common types of advice given to members of the public to see the importance of such advice and how they impact on the lives of the general public:

> (1) perhaps the area in which advice is most sought (certainly in my experience) is family law. Within this, questions of rights to custody and ancillary relief feature prominently. Not many people in Hong Kong are, for instance, aware of the equal sharing principle being the starting point that in the absence of a pre or post-nuptial agreement, divorcing spouses are entitled to share equally in the matrimonial assets;[50]
>
> (2) following closely to matrimonial law is the law of landlord and tenant – rights as to the termination of tenancies, repair obligations, *etc*;
>
> (3) employment matters – rights arising from termination of employment, notice periods, redundancy, minimum wages;
>
> (4) consumer protection matters; [and]
>
> (5) probate, in particular, intestacies.

There are many other areas. To a lawyer, the answers are relatively straightforward, perhaps even easy, but they affect many people and even to the most educated, the answers are not obvious.

47 Given the importance of the law – after all, law can be defined as that set of norms which govern the often complex inter-relationships in a society – it is perhaps quite surprising that many people are not aware of what the law is and how it operates. Here, lawyers also perform a valuable public service in properly informing lay members of the public of the operation of the law and what it truly means. It is a part of civic education.

50 *LKW v DD* (2010) 13 HKCFAR 537.

III. Civic education

48 Many legal professional bodies have civic education activities as part of their *pro bono* work, but this topic merits special emphasis.

49 One popular misconception is the confusion that arises among the public between the existence of the rule of law and the outcome of cases decided by the courts; the confusion lies in believing that one is synonymous with the other. This has been the recent experience many jurisdictions where the courts have been criticised for decisions which have not been to people's liking. But this is not the role of the court to render decisions to anybody's liking or even in accordance with what are the wishes of the majority of people. The courts' and judges' fidelity is owed to the law itself. As lawyers, we all know that the rule of law involves a strict adherence to the letter and spirit of the law, where all before the courts are treated equally. When one discusses the rule of law, one is referring not only to an ideal defining the relationship between members of society, but a co-existence in which there is a respect for individual rights and, perhaps more important, a respect for the rights of others. This is but one example, albeit arguably the most important, of the meaning of law itself. Most people know that the responsibility of the courts is in adjudicating on and enforcing rights, but it is more than that: in doing so, the courts must often bear in mind wider, societal considerations.

IV. Conclusion

50 This point about respecting not only individual rights but also the rights of others is a real lesson for everyone in society because often in the determination of cases, there can be a number of different, sometimes totally divergent, yet reasonable arguments. The ability to see different points of view is invaluable for a lawyer and essential for a judge. If experience teaches us anything, it teaches us to respect others as we would expect to be respected ourselves. In the synopsis to this lecture, I quoted a well-known passage from *To Kill a Mockingbird*: "[y]ou never really understand a person until you consider things from his point of view … until you climb into his skin and walk around in it". It is a poignant passage to highlight the point that when one is dealing with people and relationships, one cannot approach the resolution of disputes in terms of absolutes as one might in a scientific test. The law does not deal in absolutes such as water becoming a gas at 100 Celsius or a solid at 0 Celsius. The application of law requires balancing and a sense of balance requires, ultimately, wisdom.

51 Atticus Finch, not surprisingly, remains after all these years the supreme iconic legal figure for aspiring lawyers and law students. To

lawyers and all involved in the law, he is the personification of all that is noble and honourable in the law. Honour, which has been the focus of this lecture, involves benefiting society, doing something for the public good, acting in the public interest and ultimately serving a worthy cause, the law itself.
