

Speech by SJ at Hong Kong Association luncheon in London
(English only)

Following is the speech delivered by the Secretary for Justice, Mr Rimsky Yuen, SC, at a luncheon organised by the Hong Kong Association in London yesterday (October 14, London time):

Baroness Dunn, distinguished guests, ladies and gentlemen,

Thank you for coming to this luncheon event. Attending an event organised by the Hong Kong Association gives me a unique feeling. Although I am physically in London, I feel like I'm back in Hong Kong as I see so many faces which are not just familiar, but faces of people whom I know are true friends of Hong Kong. I must express my gratitude to Baroness Dunn and other friends of the Hong Kong Association who have made this event possible, and given me this chance to address this distinguished audience.

Hong Kong has come under the international spotlight in the past few weeks. I guess many, if not all, of you here would have read or watched news about the civil disobedience movement known as the "Occupy Central" campaign in Hong Kong whereby crowds and crowds of students and other people occupy a few areas in Hong Kong.

Their avowed aim is to express dissatisfaction on the way the Hong Kong SAR Government handles the constitutional development of Hong Kong, as well as the "Decision of the Standing Committee of the National People's Congress on Issues Relating to the Selection of the Chief Executive of the Hong Kong Special Administrative Region by Universal Suffrage and on the Method for Forming the Legislative Council of the Hong Kong Special Administration Region in the Year 2016" (Decision) made on August 31, 2014. This Decision made by the Standing Committee of the National People's Congress (NPCSC), which I shall deal with in further details, states

that from 2017, the selection of the Chief Executive (CE) of the Hong Kong Special Administrative Region (SAR) may be implemented by the method of universal suffrage, as well as sets out certain key parameters based on which the future election system shall be designed.

Put shortly, the main complaints include the alleged failure on the part of the Hong Kong SAR Government to fully reflect the views of the Hong Kong people, and that the Decision is too conservative and would deprive people of a genuine choice of CE candidates.

Although there are also discussions and discontent concerning the forming of the Legislative Council (LegCo) in 2016, the key focus concerns the election of CE by universal suffrage. Allow me therefore to confine my discussion on the election of CE by outlining to you the relevant constitutional regime relating to the selection of CE, the consultation that has been done and the contents of the Decision, as well as to make a few observations.

Constitutional Regime

Constitutional development cannot take place in a vacuum. The proper starting point of any constitutional development must be the relevant legal and constitutional regime within which the development can and should take place.

Let us therefore start with Article 45 of our Basic Law (which is in effect our quasi-constitution), which is the key provision concerning the selection of CE and which provides as follows:

"The Chief Executive of the Hong Kong Special Administrative Region shall be selected by election or through consultations held locally and be appointed by the Central People's Government.

"The method for selecting the Chief Executive shall be specified in the light of the actual situation in the Hong Kong Special Administrative Region and in accordance with the principle of gradual and orderly progress. The ultimate aim is the selection of the Chief Executive by universal suffrage upon nomination by a broadly representative nominating committee in accordance with democratic procedures.

"The specific method for selecting the Chief Executive is prescribed in Annex I 'Method for the Selection of the Chief Executive of the Hong Kong Special Administrative Region'."

Apart from Article 45, Annex I to the Basic Law is relevant. As it now stands, Annex I to the Basic Law provides that the CE shall be elected by a broadly representative Election Committee. This Election Committee comprises 1,200 members from four sectors (i.e. 300 members for each sector). These four sectors are: (1) industrial, commercial and financial sectors; (2) the professions; (3) labour, social services, religious and other sectors; and (4) members of the LegCo, representatives of district-based organisations, Hong Kong deputies to the NPC, and representatives of Hong Kong members of the National Committee of the Chinese People's Political Consultative Conference.

An important provision in Annex I is paragraph 7 thereof, which provides as follows:

"If there is a need to amend the method for selecting the Chief Executives for the terms subsequent to the year 2007, such amendments must be made with the endorsement of a two-thirds majority of all the members of the Legislative Council and the consent of the Chief Executive, and they shall be reported to the Standing Committee of the National People's Congress for approval."

As you may recall, the NPCSC has previously dealt with the issue of universal suffrage by, firstly, an

Interpretation made on April 6, 2004 (2004 Interpretation), a Decision made on April 26, 2004 (2004 Decision), and a further Decision made on December 29, 2007 (2007 Decision).

In short, the 2007 Decision made it clear that the election of the CE in 2017 may be implemented by universal suffrage, and that after the CE is selected by universal suffrage, all the LegCo members may be elected by universal suffrage. Besides, by reason of the 2004 Interpretation as well as the 2004 Decision and 2007 Decision, amendments to the two methods concerning the selection of CE and for forming LegCo have to go through a "Five-step Process":

- (1) The CE to make a report to the NPCSC, so as to invite the NPCSC to decide whether it is necessary to amend the method of selection or formation.
- (2) The NPCSC to make a determination on whether any such amendment shall be made.
- (3) If the NPCSC determines that amendments may be made, the Hong Kong SAR Government is to introduce to LegCo a resolution on the proposed amendments to be passed by a two-thirds majority of all LegCo members.
- (4) The CE to consent to the resolution as passed by the LegCo.
- (5) The CE to lodge the relevant bill to the NPCSC for approval.

The above is a snapshot of the constitutional regime relevant to the election of CE by universal suffrage. A few key features stand out.

First, it is clear the Central People's Government (CPG) has a substantive role to play. Not only does the NPCSC have the power to approve or not approve the bill for amending Annex I to the Basic Law (which, as we have seen, set out the method for selecting the CE), the CE-elect has to be appointed by the CPG and that this power of appointment is a substantive one. Such a constitutional role on the part of the CPG is not surprising at all. Hong Kong is neither a sovereign nor an independent state. Instead, it is a Special Administrative

Region of the PRC and an integral part thereof. Besides, if one looks at Article 43 of the Basic Law, the CE has to be accountable to both the CPG and the Hong Kong SAR.

Second, the future selection system is not just an election system, but a system with elements of both election and appointment. This is because, as noted above, Article 45 of the Basic Law provides that any CE-elect shall be appointed by the CPG. This power of appointment, as has been stressed many times, is a substantive power since the CPG may exercise its constitutional power (if not also duty) to decline to make an appointment when the circumstances so warrant. One asks the question: What does this mean? It means that the future election system shall on the one hand allow the people of Hong Kong a genuine choice of suitable CE candidates but at the same time can effectively avoid the scenario where the CPG might decline to appoint the candidate elected under the system on valid grounds. Any failure to properly acknowledge and address this issue might turn the future CE election system into a recipe for constitutional crisis.

Third, it is clear that there are at least four groups of stakeholders involved in the constitutional development of Hong Kong, namely: (1) the people of Hong Kong, whose support is necessary before any constitutional development can be meaningful; (2) the Hong Kong SAR Government; (3) the LegCo members, as they have the right to vote for or against any proposed amendments to Annex I to the Basic Law; and (4) the CPG, which has a substantive role to play in our constitutional development. I have no doubt that it is the common aspiration of all these four groups of stakeholders to attain universal suffrage for the selection of CE in 2017. The difficult question we now face is how to address the divergent views and build the requisite consensus so that we can move forward in the best interests of Hong Kong.

Consultation

Constitutional development is one of the key tasks of the current term of the Hong Kong SAR Government.

On October 17, 2013, the Hong Kong SAR Government announced the establishment of the Task Force on Constitutional Development. On December 4, 2013, the Task Force published the Consultation Document and formally kick-started the five-month consultation process.

During the five-month consultation process, the Task Force attended special meetings of LegCo Panel on Constitutional Affairs (including meeting a total of 277 groups and individuals at two special meetings), and also participated in a total of 226 consultation and district events during which people's views on our constitutional development were gathered. Besides, the Task Force received a total of 124,700 written submissions from different groups and individuals, and also had regard to various opinion polls conducted by different academic, non-governmental or media organisations.

In July 2014, the Task Force published its Consultation Report setting out the result of the consultation. In so doing, we tried to be as objective and comprehensive as possible. In particular, all the written submissions received and opinion polls conducted during the five-month period were included as part of the Consultation Report by way of four Appendices, and they are all available in our website to facilitate easy access by the public. In other words, should anyone have any doubt on whether the Consultation Report has accurately reflected the public's view, one can easily check the written submissions appended to the Consultation Report. Accordingly, there cannot be any suggestion of misrepresentation or failure to reflect the views of the public.

Having considered the Consultation Report, the current CE submitted his Report to the NPCSC on July 15. This completed

the first step in the "Five-step Process" that I mentioned earlier.

In addition to the consultation conducted by the Task Force, I should add that representatives of the CPG have also on different occasions met representatives of the pan-democratic camp in Hong Kong and Shenzhen so as to listen to their views.

The Decision

This brings me to the Decision made by the NPCSC on August 31. As noted earlier, the NPCSC decided that starting from 2017, the selection of CE may be implemented by universal suffrage. In addition, it contains four stipulations concerning the design of our future election system. Two of these stipulations have attracted much discussion and will be dealt with below (Note).

The first stipulation in question states that a broadly representative nominating committee shall be formed. The provisions for the number of members, composition and formation method of the nominating committee shall be made in accordance with the number of members, composition and formation method of the Election Committee for the Fourth CE.

Admittedly, this is one of the controversial provisions in the Decision. The strongest opposition perhaps comes from those who demand civic or public nomination (i.e. a person shall be nominated as a CE candidate if he or she receives support by a certain number of eligible voters) and nomination by political parties. Let us, however, look at this provision in some detail and the rationale behind.

One again starts with Article 45 of the Basic Law. The reference to nominating committee in Article 45 is clear, and so is the language used. In January this year, I wrote an article on the proper interpretation of Article 45 and I shall

not repeat what I have said in that article. Suffice it to say that the clear language of Article 45 is capable of only one interpretation, namely, the nominating power is only vested in the nominating committee and no other individual or institution. Accordingly, it is difficult to see how civic nomination or nomination by political parties can be regarded as consistent with Article 45 of the Basic Law.

It is perhaps also pertinent to remind ourselves of the drafting history of the Basic Law. One relevant aspect of the history is that in April 1988, the Basic Law Drafting Committee published a consultation document. Its annex set out five proposals for selecting CE, two of which suggested the election of CE by universal suffrage. Of these two suggestions, one proposed nomination by one-tenth of LegCo members, whilst the other proposed nomination by a nomination committee comprising four sectors with each sector taking up 25 per cent of its members. After much deliberation and consultation, the Basic Law adopted the nomination committee option and hence Article 45 as it now stands.

Further, it is worth noting that the expression "broadly representative" is the same expression which is used in Annex I to the Basic Law to describe the current Election Committee. As the same expression is used in the very same legal document (i.e. our Basic Law), it is natural and proper to ascribe to it the same meaning (i.e. a nominating committee comprising four sectors). Other relevant considerations aside, this explains why the Decision stipulates that the provisions for the number of members, composition and formation method of the nominating committee shall be made in accordance with the number of members, composition and formation method of the Election Committee for the Fourth CE.

The second stipulation concerns the number of candidates. It states that the nominating committee shall nominate two to three candidates for the office of CE in accordance with democratic procedures, and that each candidate must have the

endorsement of more than half of all the members of the nominating committee.

It is important to note that this stipulation requires a minimum of two CE candidates, as opposed to a requirement of no more than three candidates. Contrary to misunderstanding in some sectors, it does not mean that the nominating committee is at liberty to nominate just one candidate. By imposing the minimum number of two, the rationale is to ensure competition amongst at least two CE candidates. By imposing the maximum number of three, the intention is to avoid confusion arising from an excessive number of candidates and to ensure that each candidate will have sufficient opportunities to introduce their election platform to the voters.

You would note that the nominating committee shall nominate candidates in accordance with "democratic procedures". What constitutes "democratic procedures" is not defined in the Basic Law, nor addressed by the NPCSC Decision. It is an important area which we need to consult the people of Hong Kong on, and will be an important topic to be raised in the second round of consultation. Properly designed, such "democratic procedures" can enhance competition amongst the candidates as well as transparency, which would be an effective way to make the members of the nominating committee accountable to its voters, and thus will in turn reinforce the representativeness of the nominating committee.

Conclusion

Ladies and gentlemen, issues concerning constitutional development have always been controversial. It is exactly for this reason that we have to be rational and pragmatic, so that the people of Hong Kong can reach a consensus and move forward. Irrespective of one's view on the formation and composition of the nominating committee, the election of CE by "one man, one vote" will necessarily be a step forward, and will

certainly be a system more democratic than the current system of election of CE by the Election Committee. There is no reason to allow perfection to be the enemy of the good, and there is no reason not to pursue universal suffrage simply because the community remains to have divergent views on what is the best system.

Further, the election of CE in 2017 by universal suffrage is just the first step. Some people worried that once the election system is fixed, there will not be any chance to review or improve it in future. Such a worry is, with respect, without foundation. Paragraph 7 of Annex I to the Basic Law and the "Five-step Process" mentioned earlier provide the complete answer to such a query.

Before I conclude, allow me to add one remark. I fully appreciate that Hong Kong is an international city as well as a financial centre. It is therefore natural that people around the world have an interest on the events happening in Hong Kong, including her constitutional development. People, whether individuals or the media, also have their right to express their views on events happening in Hong Kong. However, there is a difference, and, if I may say, an important difference, between showing interest and conduct which may be perceived to constitute or even amount to interference in a jurisdiction's internal affairs.

In this regard, I note that the Foreign Affairs Committee (FAC) announced on July 22, 2014, that it would launch a select committee inquiry under the title of "The UK's relations with Hong Kong: 30 years after the Joint Declaration". The term of reference is very wide, and includes "the UK's position on progress on political and constitutional reform in Hong Kong".

The Director-General of Hong Kong Economic and Trade Office in London as well as Ambassador Liu Xiaming have both written to express disagreement on such a move. Besides, the

details of the constitutional reforms in Hong Kong are not matters which were defined in the Joint Declaration. Accordingly, there are no specific obligations on the UK Government on these matters, let alone locus standi for direct or indirect intervention. Furthermore, time and circumstances have changed since the commencement of the FAC inquiry. Continuation of the FAC enquiry at this moment would perhaps attract unintended consequences, which might not be in the best interest of Hong Kong, an aspect which I am sure everyone here would like to safeguard.

On this note, I again thank you all for inviting me to this event and wish you all a good day.

Thank you.

Note: The other two concerns: (a) all eligible voters have the right to vote in accordance with the law; and (b) the CE-elect, after being selected through universal suffrage, will have to be appointed by the CPG.

Ends/Wednesday, October 15, 2014