

Speech by SJ at Chatham House in London (English only)

The following is a speech delivered by the Secretary for Justice, Mr Rimsky Yuen, SC, today (October 15, London time) at the Chatham House:

The Rule of Law and Constitutional Development in Hong Kong

Ms (Isabel) Hilton, Distinguished Guests, Ladies and Gentlemen,

Thank you for attending this event, and thank you for giving me this opportunity to address this distinguished audience. Today, I intend to deal with two areas, namely, the rule of law and constitutional development in Hong Kong. Each of these two areas involves numerous issues which merit separate discussion. In the limited time available, I will seek to highlight certain key aspects so as to give you a snapshot of the fundamental issues involved.

The Rule of Law

Let me begin with the rule of law. As the Secretary for Justice, the single most important duty is to maintain the rule of law in Hong Kong. Recently, I notice from media reports and other materials that there are concerns or queries raised as to the state of the rule of law in Hong Kong. One recent example is the news release issued by the Fraser Institute on October 7. Whilst Hong Kong maintains her position as the number one jurisdiction in terms of economic freedom, the news release suggested that Hong Kong's status "is threatened by encroaching mainland Chinese influence in Hong Kong's legal system and attempts to impose government control on judges and their decisions -- potentially turning the rule of law into a political instrument".

With respect, I do not think this observation made by the Fraser Institute or similar queries recently made in other

contexts are justified. As the Secretary for Justice, I believe it is my duty to defend Hong Kong and I am so glad that I have this chance to speak to you.

Put shortly, the observations and queries that I mentioned earlier are no more than mistaken perceptions or bare assertions devoid of supporting evidence. If one looks at the objective evidence, one will arrive at a very different conclusion. Amongst others, I would invite you to consider three pieces of objective evidence.

First, the composition of our Court of Final Appeal is definitely worth noting. I briefly discussed this aspect on another occasion yesterday, but at the risk of being repetitive, do allow me to reiterate the key message.

Articles 2 and 19 of our Basic Law (which is our quasi-constitution) provide that Hong Kong enjoys independent judicial power, including that of final adjudication. By reason of Article 82 of our Basic Law, such power of final adjudication is vested in the Court of Final Appeal, which has taken over the role of the Judicial Committee of the Privy Council and has acted as the final appellate court of Hong Kong. One important aspect to note is that Article 82 permits the invitation of judges from other common law jurisdictions to sit on the Court of Final Appeal.

Since the establishment of the Court of Final Appeal in July 1997, eminent judges and jurists from the United Kingdom, Australia and New Zealand have been invited to sit on our Court of Final Appeal. Final appeals of all types of cases (including those raising important constitutional issues or concerning important government policies) were and still are being heard by a panel of five judges, which invariably include one overseas judge.

At the moment, we are privileged to have a total of 12 such overseas judges who sit at our Court of Final Appeal from

time to time. They include Sir Anthony Mason, Lord Neuberger, Lord Hoffmann, Lord Millett, Lord Walker, Lord Collins, Lord Phillips and Lord Clarke. One asks these questions: Would these eminent judges be willing to sit in our Court of Final Appeal if they do not enjoy judicial independence? Or would these eminent judges remain silent if they felt any form of interference in the discharge of their judicial duties? The answer is more than obvious. The fact that Hong Kong can continue to attract such eminent overseas judges to sit in our Court of Final Appeal is a strong testimony to the state of judicial independence and the rule of law in Hong Kong.

Second, observations made by the judges and others whose independence can hardly be questioned can also illustrate the state of judicial independence in Hong Kong.

I believe many of you would be aware of the speech delivered by Lord Neuberger in Hong Kong on August 26 (Note 1) and I do not think I need to repeat its contents. Let me perhaps quote from a speech made by Mr Justice Patrick Chan, a former Permanent Judge of the Court of Final Appeal who has served under four Chief Justices (including the current one), which was delivered at his Farewell Sitting in October last year. Mr Justice Chan said as follows (Note 2):

"There is one thing I have wanted to say for a long time to those who still perceive any doubt about the independence of our Judiciary. Since 1995, I have been involved in the selection of judges, either as a member of the Judicial Service Commission or the Judicial Officers Recommendation Commission or the Judiciary's internal selection committee. I can bear witness to the fact that there has never been any interference from any quarter or any person in the appointment of judges. All my colleagues were appointed on their own merits."

One other relevant speech is the one delivered by the current Chairman of the Hong Kong Bar Association on May 17

(Note 3) this year . This speech merits quoting at some length, and the relevant parts read as follows:

"We often hear that "the Rule of Law and an independent judiciary is what marks Hong Kong out in this region uniquely... To many people it simply means that Hong Kong people generally obey the law and do not jump queues, and they do not beat people up lightly when they do not get what they want. But some people do not actually know that it means something more. In particular, some people from within and outside Hong Kong actually think that when it comes to important cases judges and courts are, or can be, subject to unspoken influences or pressure of business interests or the powers that be. Bernard Chan, a member of the Executive Council, wrote in the South China Morning Post last December about examples where American businessmen/lawyers did not want to use Hong Kong as a venue for dispute resolution for fear of outside influence. I have friends, locally born and bred and educated overseas, who think in the same way and who have asked me whether things are done this way.

The truth as we know is that this view is completely and utterly groundless. The Hong Kong Judiciary has a long standing history and tradition of independence. Not one iota of evidence or proof from actual cases had, or could, be produced (even anecdotally) in support of this view. Justice is administered openly and publicly and judgements are openly available for public scrutiny...

It is hard to see how such misconceived notions could even begin to be spread... it could possibly be spread by overseas rivals for legal services or dispute resolution services market; or it may be because it would suit the political agenda of scaremongerers to portray the Hong Kong judiciary as gradually turning red or looking up north."

Third, the situation concerning judicial review applications and legal aid in Hong Kong is also relevant. It

is an important principle of the rule of law that government should not be above the law, and all government action must be within the parameters of the law. In common law jurisdictions including Hong Kong, judicial review is one of the robust means to ensure that this principle is upheld.

On the other hand, legal aid is important to facilitate access to justice, which is another important aspect in the rule of law. In Hong Kong, we have a healthy legal aid system, and that in appropriate circumstances, applicants for judicial review would be granted legal aid so that they would be in a position to challenge administrative action or government policy with funding provided by the government. As far as I know, not too many jurisdictions have such or similar arrangements.

A few figures may perhaps help to illustrate the position (Note 4) :

(1) In 2012, there were a total of 161 applications for leave to apply for judicial review, and leave was granted in 63 such applications. In the same year, the applicants in 92 judicial review applications were provided with legal aid.

(2) In 2013, there were a total of 182 applications for leave to apply for judicial review, and leave was granted in 38 of such leave applications. Besides, the applicants in 119 judicial review applications were granted legal aid.

The advance of technology helps to disseminate information, but it also facilitates the building up of perception which may not always be justified. I hope the three pieces of objective evidence that I have just highlighted would be helpful in clearing up any mistaken perception that the rule of law or judicial independence in Hong Kong is subject to erosion.

The Hong Kong SAR Government fully appreciates the

fundamental importance of the rule of law and judicial independence. It is the cornerstone of Hong Kong's success. We will continue to make every effort to protect and uphold the rule of law and to ensure judicial independence, as it is not in anyone's interest to do otherwise.

Constitutional Development

Let me move on to the constitutional development in Hong Kong, with focus on the selection of the Chief Executive (CE) of the Hong Kong SAR by the method of universal suffrage. Admittedly, the matter has given rise to hugely divergent views amongst different sectors of the Hong Kong community.

One of the core issues is the nomination of candidates for the office of CE. This is no doubt an important issue since it relates directly to the question of whether the people of Hong Kong would have genuine choice of candidates for the CE office, a question which has generated much debate in Hong Kong.

Genuine choice is of course important. However, like any other constitutional issues, the question of genuine choice should be considered in the proper legal and constitutional context of the Hong Kong SAR. This is of paramount importance in the context of the Hong Kong, since her status as a Special Administrative Region of the People's Republic of China (which is a result of the "One Country, Two Systems" policy) is unique and unprecedented in the history of constitutionalism as well as the history of democratic election. In one sense, the implementation of universal suffrage for the selection of CE in the Hong Kong SAR is an uncharted territory, since no other design of democracy in other sovereign states can be said to be directly applicable as they do not operate under the "One Country, Two Systems" policy.

Viewed thus, it is essential that we have a proper

understanding of the CE office as well as the role of the Central People's Government (CPG) of China. In this regard, the provisions in the Basic Law and the relevant Interpretation and Decisions made by the NPCSC are highly pertinent.

Article 15 of the Basic Law provides that the CPG shall appoint the CE and the principal officials of the executive authorities of the Hong Kong SAR in accordance with the provisions of Chapter IV of the Basic Law.

Chapter IV is the chapter in the Basic Law which deals with the Political Structure of the Hong Kong SAR, and the most relevant provisions for the present purpose are Articles 43, 45 and 48 thereof. Article 43 stipulates that the CE, as the head of the Hong Kong SAR, is accountable to both the CPG and the Hong Kong SAR.

Article 45, which is the most pertinent provision concerning the selection of CE, 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."

Annex I, as it now stands, provides that the CE shall be elected by a broadly representative Election Committee comprising a total of 1 200 members from four sectors (i.e. 300 members for each sector). Paragraph 7 of Annex I, which is also highly relevant, 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."

Article 48, on the other hand, deals with the powers and functions of the CE. One can see from the various provisions in Article 48 that the powers and functions of the CE are very wide and extensive.

Based on the provisions of the Basic Law, the NPCSC has previously dealt with the issue of universal suffrage by, firstly, an Interpretation made on April 6, 2004, a Decision made on April 26, 2004 and a further Decision made on December 29, 2007. Put shortly, the effect is that amendments to the method concerning the selection of CE 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-third 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.

From this brief survey of the relevant constitutional regime, it is clear that the CPG has a substantive (as opposed to nominal) role to play in the constitutional development of the Hong Kong SAR. Not only does the NPCSC have the power to decide whether to approve the bill for amending Annex I to the Basic Law which sets out the method for selecting the CE, the CE-elect has to be appointed by the CPG. This power of appointment is a substantive one. This is because Hong Kong is not a sovereign or independent state; instead, it is a special administrative region of the PRC. Besides, as we have seen, the CE has to be accountable to both the CPG and the Hong Kong SAR.

It is equally clear that the future system of universal suffrage concerning the selection of CE does not only include the element of election by eligible voters, there is also the equally important element of appointment by the CPG. As noted above, Article 45 of the Basic Law provides that any CE-elect shall be appointed by the CPG and that this power of appointment is a substantive one. In other words, the CPG may either appoint the CE-elect or, in appropriate circumstances, decline to make an appointment.

Taking into account all these matters, the future system for selecting CE by way of universal suffrage has to satisfy two objectives. On the one hand, the system shall be designed in such a way as to allow the people of Hong Kong a genuine choice of suitable CE candidates. At the same time, the selection system shall also be designed in such a way as to effectively avoid the scenario where the CPG might decline to appoint the CE-elect for good reasons. From the constitutional and political perspective, the need to satisfy these two objectives in an appropriate and effective manner

is most important. Any failure to properly acknowledge and address this fundamental issue might, as I said yesterday on another occasion, turn the future system for selecting CE by way of universal suffrage into a recipe for constitutional crisis.

One can broadly group the stakeholders involved in Hong Kong's constitutional development into four groups: (1) the people of Hong Kong, whose support and participation are 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 both the constitutional right and responsibility to be involved in the constitutional development.

One thing is clear. 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 within the community and foster the requisite consensus so that we can devise a selection system which can strike the right balance and properly address the two objectives that I mentioned earlier, and so that move forward in the best interests of Hong Kong.

On August 31, the NPCSC made the Decision which states that starting from 2017, the selection of CE may be implemented by universal suffrage. In addition, it contains stipulations concerning the design of our future election system. Amongst others, it states that a broadly representative nominating committee shall be formed; and 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. Besides, it also provides that the nominating committee shall

nominate two to three candidates for the office of the 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.

The road ahead is for the Hong Kong SAR Government to conduct another round of consultation on the basis of the recent NPCSC Decision, so as to enable the Hong Kong SAR Government to consider and hammer out the further details of the selection system. Contrary to some suggestions expressed in the community, there remains plenty of room for consultation and discussion. By way of example, the "democratic procedures" to be adopted by the nominating committee will be one of the important issues that the people of Hong Kong need to discuss and deliberate.

After the details are discussed, there remains the need to translate the design details into local legislation. The time table is tight, but the Hong Kong SAR Government will make its best endeavours to take forward the constitutional development.

When universal suffrage is put in place, it is estimated that around five million voters would be entitled to take part in the selection of CE. Viewed from any angle, the election of CE by "one person, 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. Besides, the election of CE in 2017 by universal suffrage is just the first step. Paragraph 7 of Annex I to the Basic Law and the "Five-Step Process" mentioned earlier provide the legal avenue for future refinement of the system when sufficient support from the community exists.

Ladies and gentlemen, we believe we owe it to the people of Hong Kong including her future generations, to move forward in the constitutional development of Hong Kong. Hong Kong has in the past survived different challenges. It is true that

constitutional development presents Hong Kong people with daunting challenges, but we believe Hong Kong people would have the wisdom and courage to tackle them and take the correct stride forward.

Thank you.

Note 1: The speech, entitled "The Third and Fourth Estates: Judges, Journalists and Open Justice", delivered on August 26, 2014 at the Hong Kong Foreign Correspondence Club, is available at the website of the UK Supreme Court.

Note 2: Farewell Sitting for the Honourable Mr Justice Chan PJ (2013) 16 HKCFAR 1012, para. 10 at 1019.

Note 3: This speech is available at the website of the Hong Kong Bar Association.

Note 4: Figures are based on the Department of Justice's answer to a written question posed by Mr Ronny Tong at the session of the Legislative Council on April 9, 2014.

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