

Secretary of Justice's speech at Ceremonial Opening of the Legal Year 2017

Following is the speech by the Secretary for Justice, Mr Rimsky Yuen, SC, at the Ceremonial Opening of the Legal Year 2017 today (January 9):

Chief Justice, Members of the Judiciary, Chairman of the Bar Association, President of the Law Society, distinguished guests, ladies and gentlemen,

On behalf of the Department of Justice, may I extend our warmest welcome to all of you here, especially to our guests from other jurisdictions.

The Rule of Law

This ceremony, previously known as the Opening of the Assizes, was held until 1973. In 1980, this ceremony was revived and its name was changed to the Opening of the Legal Year. Sir Denys Roberts, the Chief Justice at the time, explained at the revival of this ceremony in 1980 that there were three reasons for holding the Opening of the Legal Year (Note 1). One of them is to focus the public's attention on the courts and the legal profession, and also to enhance their knowledge of the system of justice.

Despite the passage of time, this reason remains valid. First, as our community has become more developed and hence more complex, the interests of the different sectors of our community may clash from time to time. The rule of law is the ultimate institution for protecting and balancing those conflicting interests. Second, with better education and free flow of information (especially with the popular use of social media and the Internet), members of the public are more aware of their rights and more active in the discussion of law-related topics. At times, discussions are polarised or politicised. Third, since the concept of "one country, two

systems" is a novel one, it is natural that divergent views do arise during the implementation of the Basic Law.

The combined effect of all these makes it more important now than ever to foster a proper understanding of the concept of the rule of law. In this regard, much efforts have been made by the stakeholders, including the legal profession. However, there are also worrying signs. Perhaps I can start off by quoting from a speech recently delivered by the Honourable Mr Justice Joseph Fok, a Permanent Judge of the Court of Final Appeal (Note 2):

"25. There is a tendency in Hong Kong, although this phenomenon is certainly not unique to this jurisdiction, for litigants to incant the words 'rule of law' in support of their case as if it were a mantra. Thus, in some judicial reviews, it is not unheard of for it to be contended that a decision or an act of a Government department is contrary to the rule of law. In other cases, one finds both sides claiming that a court decision otherwise than in their favour would not comply with the rule of law. In Lord Bingham's book ['The Rule of Law'], he gives the example of the US Supreme Court case of *Bush v Gore*, which decided who won the presidential election in 2000 and in which the rule of law was invoked by both sides. Lord Bingham refers to one academic's commentary recognising 'a widespread impression that utterance of those magic words meant little more than "Hooray for our side"'.

"26. Closer to home here in Hong Kong, there have been many articles in the media about recent court decisions relating to prosecutions arising out of the Occupy Protests in 2014. Some have been in favour of the outcomes and some have criticised them. Different people will, of course, have different points of view. However, it is disheartening ... when one sees a commentator saying that a particular result is, or is not, consistent with the rule of law simply because he disagrees with the particular

outcome. That sort of comment has a tendency to give readers a false impression as to what the rule of law means.

"27. If that impression starts to take root, it will almost certainly do a disservice to the rule of law"

It is indeed unfortunate that the expression "the rule of law" has sometimes been used by some members of the community (including those who are legally trained) as a slogan to advance their own political causes. Due enforcement of the criminal law is sometimes criticised by these people simply because they support the political stance advocated by the defendants, in total disregard to the evidence and the court's ruling. Likewise, due enforcement of solemn obligations laid down in the Basic Law is depicted as the Government's disregard to democracy, as if voters' support is a licence to disregard legal requirements. Needless to say, we need to stay vigilant in safeguarding the rule of law and that Government actions are open to scrutiny and criticism. However, unduly politicised criticism in disregard to one's legal obligation is the very antithesis of the rule of law.

In the same vein, politicised or illegitimate criticisms about judicial decisions should be avoided. As the former Chief Justice Mr Andrew Li once remarked (Note 3):

"Court decisions are and should be subjected to public debate. The right to scrutinise judgments of the courts is a constitutional right which should be vigorously exercised in a free society. Further, such public debate would have the benefit of informing and educating the public about the judicial system and the issues at stake. But to maintain the independence of the Judiciary, it would not be acceptable or desirable for judges to have to defend their judgments in the political arena. It is therefore important that the right to scrutinise court judgments should be responsibly exercised."

The key word in Mr Andrew Li's observation is "responsible". Unless discussions are conducted objectively and rationally, they cannot be "responsible". To achieve this end, one should not simply test the outcome of a judicial decision against one's political belief. Instead, the focus should be the reasons set out in the judgment. Apart from open justice and due process, judicial reasoning is the bedrock of our common law system. Hence, instead of using non-legal (such as political) reasons to attack a judgment, one should try to examine and understand the reasons set out in a judgment.

Unfortunately, from time to time some people feel free to overstep the boundary. Some queried whether a judge's decision was motivated by his political bias; others even deployed foul language to lodge wholly unjustified personal attacks against judges. Worst still, there are cases where threatening objects were sent to judges or other officials responsible for administering the law. All these abuses must be stopped.

As Sir Sydney Kentridge, QC, pointed out (Note 4), "The real mischief of unwarranted attacks on the motives and integrity of the judges ... is not any hurt to the judge's feelings; it is that they undermine that respect for the judiciary without which ... the foundations of the rule of law are undermined."

There is already a trend in our community that discussions of public affairs are polarised and politicised. There may be many reasons for it, and surely achieving good governance is fairly and squarely a responsibility of the Government. However, in the interests of Hong Kong, every effort should be made to prevent this trend from eroding the foundation of the rule of law.

In this regard, I feel obliged to add another point. The

Director of Public Prosecutions recently wrote in the yearly review of the Prosecutions Division for the year 2015 as follows (Note 5):

"... it is saddening to see that when my fellow colleagues attended court, especially in those perceived to be politically sensitive ones, they on growing occasions were subject to groundless, malicious and unfair personal verbal abuse from certain members of the public. It must not be forgotten that that any act of lashing out in court proceedings, committed with no other intention except to bring the Judiciary or prosecution into disrepute, simply cannot be a proper exercise of one's freedom of expression."

I fully echo the views of the Director of Public Prosecutions. A respect for the rule of law includes a respect for the judicial process. When our prosecutors conduct cases in court, they are performing the constitutional duty of criminal prosecution in an apolitical manner. The prosecutors, as part of the system of administration of justice, deserve respect instead of abuse.

NPCSC Interpretation

On 7 November, 2016, the Standing Committee of the National People's Congress (NPCSC), in exercise of its power under Article 158 of the Basic Law, pronounced an interpretation of Article 104 of the Basic Law (the Interpretation), which concerns the constitutional duty on the part of certain specified categories of public officials, when assuming office, to swear to uphold the Basic Law and to swear allegiance to the Hong Kong SAR of the People's Republic of China.

The making of the Interpretation has attracted much attention, both locally and internationally. On my part, I am confident that the rule of law in Hong Kong does and will

remain well and alive after the Interpretation. The way in which our judges professionally handled the relevant legal proceedings during and subsequent to the making of the Interpretation proves my point beyond doubt.

As I stressed earlier, deliberations on the rule of law should be objective and rational. To properly consider the role of Article 158 of the Basic Law, it is worth highlighting the following observations made by Sir Anthony Mason, a leading jurist in the common law world and formerly a Non-Permanent Judge of the Court of Final Appeal:

"The conjunction of a common law system under a national law within the larger framework of Chinese constitutional law is a fundamental aspect of the principle 'one country, two systems'. Article 158 is the link between the two systems. It draws a distinction between the power of final interpretation which is vested in the Standing Committee of the NPC ... and the power of final adjudication which is vested in the CFA." (Note 6)

"Despite the tensions which it may generate from time to time, art 158 is an ingenious link between the two legal systems. Whether it is viewed from a constitutional, legal or political perspective, art 158 is central to the Hong Kong conception of the rule of law. Debate about the rule of law in Hong Kong must recognise and proceed from the centrality of art 158. In the words of Professor Vernon Bogdanor, '[f]or believers in the rule of law ... power should lie ... with the constitution'." (Note 7)

For future purposes, may I also venture to suggest that matters that can be properly handled within Hong Kong's legal or judicial system should be left to be dealt with at the Hong Kong level as much as possible. Such an approach is certainly not a disrespect to the NPCSC's constitutional jurisdiction to make interpretation pursuant to Article 158 of the Basic Law. Instead, it is the best way to demonstrate

that the "one country, two systems" policy does work robustly and successfully, and that the institutions devised under the Basic Law, including the judicial system, possess the quality and competence to meet such challenges as they arise.

Hong Kong as a Centre for International Legal and Dispute Resolution Services in the Asia-Pacific region

The last topic that I wish to touch on relates to our policy in promoting Hong Kong as a leading centre for legal and dispute resolution services in the Asia-Pacific region.

The Department of Justice is pushing for the introduction of two sets of amendments to the Arbitration Ordinance. The first will clarify the law on the arbitrability of intellectual property disputes. The second will allow third party funding of arbitration or mediation. In addition, we are seeking to introduce an apology legislation, which will clarify the legal consequences of making an apology, so as to enhance the chances of reaching amicable settlement (whether in the course of mediation or otherwise). As and when these legislative works are completed, the legal framework of Hong Kong concerning dispute resolution will stay in the forefront of international development.

The other latest development concerns our home-grown Hong Kong International Arbitration Centre (HKIAC), which has established itself as one of the leading arbitration institutes both internationally and within the Asia-Pacific region.

Previously there was a plan to move the HKIAC from its current premises at Exchange Square II to the future legal hub which comprises the three blocks at the Justice Place and the former French Mission Building nearby. Having considered the views of the international arbitration community (including the survey results of the Global

Arbitration Review which gave top rankings to the HKIAC's facilities at the Exchange Square II premises) and the request of HKIAC, I am glad to announce that the Government has decided that HKIAC will continue to stay at its current premises. Not only would this enable the HKIAC to maintain its competitive edge, we would also have more space at the future legal hub to house more internationally reputable legal or dispute resolution organisations.

Concluding Remarks

Ladies and gentlemen, this Opening of the Legal Year is the last one witnessed by this term of the Hong Kong SAR Government. I am deeply honoured to have the opportunity to serve as the Secretary for Justice during such a challenging time of Hong Kong. May I take this opportunity to express my utmost gratitude to all those who have contributed to the maintenance of the rule of law in Hong Kong, including members of the Judiciary and the two branches of the legal profession. My thanks also go to all my colleagues in the Department of Justice (lawyers or otherwise). Many of them are, in my view, the unsung heroes in our efforts to safeguard the rule of law.

On this note, it remains for me to wish all of you and the Hong Kong SAR a fruitful 2017.

Thank you.

Note 1: See the speech of the Chief Justice, Sir Denys Roberts, at the Opening of the Legal Year on January 7, 1980.

Note 2: This is the speech entitled "The Importance of the Rule of Law", delivered by the Hon Mr Justice Joseph Fok to the ICAC Chief Investigators' Command Course No. 36 on November 11, 2016.

Note 3: See the speech entitled "Administration of Justice in the 21st Century", delivered by the then Chief Justice, Mr

Andrew Li, at the 16th Biennial LAWASIA Conference (Judicial Law Section) in Seoul (September 8, 1999).

Note 4: See: Sydney Kentridge, QC, "Free Country: Selected Lectures and Talks", (Oxford and Portland, Oregon) (2012), at p. 156.

Note 5: See: Director's Overview, contained in Prosecutions Hong Kong 2015 (published by the Department of Justice), p. 7-8.

Note 6: See: The Hon Sir Anthony Mason, AC KBE, "The Rule of Law in the Shadow of the Giant: The Hong Kong Experience", 33 [2011] Sydney Law Review 623, at p. 627.

Note 7: Ibid., at p. 644.

Ends/Monday, January 9, 2017