

Speech by Secretary for Justice at event at Asia House in London, UK (English only)

Following is the speech by the Secretary for Justice, Mr Rimsky Yuen, SC, today (May 24, London time) at Asia House in London, the UK.

Mr Michael Lawrence (Chief Executive, Asia House), distinguished guests, ladies and gentlemen,

First of all, may I express my utmost gratitude for inviting me to this event and for giving me this opportunity to address such a distinguished audience.

This year marks the 20th anniversary of the establishment of the Hong Kong Special Administrative Region (HKSAR). An array of celebration activities have been arranged in Hong Kong and beyond, and indeed I understand that some of the activities will take place here in Britain. Against this backdrop, I choose, for the purpose of today, a topic concerning the rule of law in the Hong Kong SAR, as I believe this may be a good opportunity to reflect on the fundamentals as well as to look at the road ahead of us.

The "One Country, Two Systems" Policy – Continuation of the Common Law System

As you are aware, the People's Republic of China (PRC) resumed the exercise of sovereignty over Hong Kong on July 1, 1997. As from that date, the Basic Law of the HKSAR (Basic Law) (which was enacted by the Chinese National People's Congress in April 1990), came into effect. The Basic Law, although strictly speaking a national law under the Mainland legal system, is a constitutional document which provides the legal foundation for the establishment of the HKSAR pursuant to Article 31 of the PRC Constitution and the "one country, two systems" policy.

Apart from maintaining the capitalist system, one of the other most important aspects of the Basic Law is the preservation and continuation of the common law system. In this regard, three Articles in the Basic Law are most relevant.

The first one is Article 8 of the Basic Law, which stipulates that "The laws previously in force in Hong Kong, that is, the common law, rules of equity, ordinances, subordinate legislation and customary law shall be maintained, except for any that contravene this Law (i.e. the Basic Law), and subject to any amendment by the legislature of the (HKSAR)."

The second one is Article 18, which stipulates that the laws in force in the HKSAR shall be the Basic Law, the law previously in force in Hong Kong as provided for in Article 8 (mentioned above), and the laws enacted by the legislature of the HKSAR. Article 18 goes on to provide that unless specified in Annex III to the Basic Law, the national laws of the PRC shall not be applied to the HKSAR. Further, it is important to note that Article 18 specifically confines the types of the PRC national laws that can be extended to the HKSAR, namely, only those national laws relating to defence and foreign affairs as well as other matters outside the limits of the autonomy of the HKSAR as specified by the Basic Law.

The third one is Article 84 of the Basic Law, which states that the courts, when adjudicating cases, "may refer to precedents of other common law jurisdictions". In other words, the common law mentioned in the Basic Law is not confined to the common law of Britain, but the common law of all the common law jurisdictions.

On the face of them, these three Articles of the Basic Law only specify what sorts of law are to be applied in Hong

Kong. However, by continuing the common law system in the HKSAR, these three Articles are some of the important provisions in the Basic Law which provide the constitutional guarantee for the rule of law in Hong Kong. The reason, in my view, is obvious. The rule of law is the very spirit and foundation of the common law system. By providing for the continuation of the common law system in the HKSAR, the Basic Law in the same breath provides the constitutional guarantee for the rule of law in the HKSAR.

Indeed, the rule of law is one of the key factors contributing to Hong Kong's past and continuing success. This occasion is of course not an appropriate occasion to go into the details of the definition or concept of the rule of law. Suffice it to say that the concept of the rule of law encompasses a host of characteristics, which are dealt with in one way or another in the Basic Law. Key examples include equality before the law (Article 25), the right of access to court, the right to fair trial (Article 87), the right to judicial remedy (Article 35) and the protection of fundamental human rights (including the continuous application of the provisions of the International Covenant on Civil and Political rights, the International Covenant on Economic, Social and Cultural Rights, and international labour conventions as applied to Hong Kong) (Articles 26 to 42).

The Judiciary

Apart from the continuation of the common law system, the Basic Law also contains various important constitutional guarantee which are essential for maintaining judicial independence, and which (in my view) is one of the cornerstones of the rule of law.

In this regard, one may begin with Article 2, which states that the HKSAR enjoys independent judicial power, including that of final adjudication. It is pertinent to note

that the same guarantee for independent judicial power (including that of final adjudication) is repeated in Article 19 as well as Article 85 of the Basic Law. Such repetitions, if I may suggest, are unlikely to be purely co-incidental; instead, it reflects the importance attached to the concept of judicial independence by the drafters of the Basic Law.

One aspect which merits specific discussion concerns the final appellate court. Before and when the Basic Law was promulgated in 1990, the final avenue of appeal for cases heard in Hong Kong was the Judicial Committee of the Privy Council. That position was clearly inconsistent with the resumption of the exercise of sovereignty by China over Hong Kong. To resolve this issue, the Basic Law instead provides that a Court of Final Appeal (CFA) should be established in the HKSAR.

There is then my favourite topic, namely, the unique provision in Article 82 of the Basic Law. Not only does Article 82 stipulate that the power of final adjudication of the HKSAR shall be vested in the CFA, it states that the CFA may invite judges from other common law jurisdictions to sit on the CFA. As early as in September 1991, the Sino-British Joint Liaison Group decided that, for each hearing of the CFA, the court should consist of the Chief Justice, three permanent judges (which are not subject to any nationality requirement), and a fifth judge who could either be a judge from another common law jurisdiction or a retired HKSAR judge. This arrangement has since been implemented by the enactment of the Hong Kong Court of Final Appeal Ordinance.

Judges from overseas common law jurisdictions are appointed as overseas Non-Permanent Judges (overseas NPJ) of the CFA, and they are of very high international standing, including leading retired or serving judges of the Supreme Court of the United Kingdom, the former House of Lords, High Court of Australia, and New Zealand Supreme

Court and Court of Appeal. Most, if not all of them, are indeed household names in the Who's Who in the Commonwealth judicial community. Examples include, Lord Hoffmann, Lord Nicholls, Lord Millett and Lord Neuberger. Other examples include Sir Anthony Mason, Mr Justice Gleeson and Mr Justice James Spigelman, all of which are undoubtedly top judges from the Australian Judiciary.

The wisdom of allowing judges from other common law jurisdictions to sit on the CFA has enabled the courts of Hong Kong to benefit from the experience and high standard of these judges. This innovative formula has proved to be a success, both in terms of ensuring the quality of the CFA judgments as well as enhancing confidence of the general public as well as the international business community.

During the colonial days, putting aside Privy Council decisions which were on appeal from Hong Kong, decisions made by the Hong Kong courts were hardly cited by the final appellate courts in other common law jurisdictions. Since the CFA was established, we have seen a significant change of scenario (Note 1). Judgments of the CFA have been referred to in the court judgments of the United Kingdom and Australia as well as leading legal textbooks in the common law world. Best-known examples could be found in the areas of defamation (Note 2) concerning the issue of "malice", criminal law concerning misconduct in public office (Note 3), public law (Note 4) and company law (Note 5).

Viewed from a different angle, Article 82 of the Basic Law illustrates how cross-fertilisation among jurists from different common law jurisdictions can promote the healthy development of common law.

The Rule of Law

What I have said thus far would hopefully give you an overview of the constitutional and legal system of the HKSAR. What about the rule of law situation in Hong Kong? Admittedly, the rule of law has become a very popular topic in the HKSAR, and that it often attracts attention in the media (including, sometimes, overseas media). The views expressed through these channels are admittedly very divergent. On my part, I would invite you to make a distinction between mere assertions on subjective perception on the one hand and objective facts on the other.

In this regard, perhaps I can start off by referring to the Annual International Rule of Law Lecture 2015 delivered by the Chief Justice of the CFA, Mr Justice Geoffrey Ma, PJ, at the invitation of the Bar Council of England and Wales, under the title of "Strength and Fragility in tandem: The Rule of Law in Hong Kong". In that speech, the Chief Justice identified six objective factors to demonstrate the "reality" of the rule of law situation in Hong Kong. Those six objective factors are:

1. Transparency of the legal system: The idea of open justice whereby most court proceedings are open to the public to observe, is an obvious indication of the rule of law. The fact that any member of the public is able to observe court proceedings provides an effective supervision of the whole of the judicial process. Closely connected to this is the general ability of the press to report court proceedings, which is guaranteed in Article 10 of the Hong Kong Bill of Rights.

2. Reasoned judgments: As pointed out by the Chief Justice, reasoned judgments is an important characteristic of the common law, and is also a crucial indication of the existence of the rule of law. This is because reasoned decisions demonstrate to the parties to the dispute, and also to the world at large, the precise thought process of the court in arriving any decision, and thus demonstrate that the court

has discharged its responsibility of determining the outcome of cases strictly according to the available evidence and applicable legal principles.

3. The Court's approach: Connected to the second factor mentioned above is that a reasoned judgment indicates clearly the court's approach to the law, which is of particular relevance in the various areas of law including that of human right cases.

4. Appointment of judges: The appointment (and also removal of judges) is part of the institutional guarantee for judicial independence. In this regard, both the relevant provisions in the Basic Law (including Articles 88 and 89) as well as the relevant local legislation (such as Judicial Officers Recommendation Commission Ordinance (Cap. 92) and the Judicial Officers (Tenure of Office) Ordinance (Cap. 433)) provide a robust framework to guarantee security of tenure for judges.

5. Effective access to the courts or justice: The existence of an independent institution (the court) to enforce laws implicitly carries with it the necessity of ensuring effective access to justice. As will be discussed later, the provision of legal aid in the HKSAR is a relevant factor to be taken into account.

6. Public confidence in the system: Whilst this factor may be regarded as nebulous, the views of the users of the court towards the courts and their confidence in the system provide indication to support the existence of the rule of law.

When the Chief Justice gave the lecture in 2015 (which was after the Occupy Movement that last for 79 days from September to December 2014), he took the view that the HKSAR passed the test after the six indicators mentioned above had been properly considered. I echoed the Chief

Justice's view. Further, I would say that, although about two years have lapse since the Chief Justice gave the said lecture, the HKSAR continues to pass the test if one considers the HKSAR's current situation against the six factors mentioned above.

To begin with, there is no question that the HKSAR's legal system continues to be transparent. The press continues to be at full liberty to report what goes on day-in-day-out in all levels of our courts.

Secondly, the judges in the HKSAR continue to deliver very good reasoned judgments, whether in general civil cases or in controversial public law cases (including those concerning judicial review applications). Examples of such cases include those concerning the Occupy Movement (Note 6), as well as those concerning the dispute over whether two of the Legislative Council Member-elect had properly taken the oath prescribed by the law (Note 7). All these judgments plainly illustrate that judges in the HKSAR dealt with cases in a professional, apolitical and judicial manner, and also strictly in accordance with the available evidence and applicable legal principles. As demonstrated by the reasoned judgments, no one can have any valid justification that the judges have been affected by any political or other undue motives.

Thirdly, judges continue to be appointed on their merits. There can be no question about this. Furthermore, the fact that the HKSAR can continue to attract top judges from other jurisdictions to sit on the CFA is a strong testimony that judges from other common law jurisdictions have no concern about the rule of law situation in Hong Kong, and that they do not feel the slightest interference in the carrying out of their judicial duty.

Fourthly, apart from constitutionally guaranteed, access to justice remains well and alive. Among others, we

have a robust legal aid system in the HKSAR. In appropriate circumstances, applicants for judicial reviews 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 a matter of fact, people of different (or opposing) political views have been provided with legal aid when they face litigation. These include protestors who participated in the Occupy Movement, as well as those who participate in the Mongkok riot which took place in 2016. Indeed, as is evident from the law reports, many leading constitutional or human right cases went before the court with the support of legal aid. To give you a flavour of the extent of legal aid provided, in the year 2016-2017, a total of around HK\$36.3 million was spent for the purpose of providing legal aid to applicants of judicial review against executive decisions.

Concluding Remarks

On the whole, when we take stock of the experience the HKSAR has gone through during the 20 years since 1997, it is beyond doubt that the implementation of the "one country, two systems" policy has been on the whole a success. Insofar as the Basic Law guarantees the maintenance of the HKSAR's common law system, the rule of law and independence of the judiciary, it has been well met.

The overall success so far has also been acknowledged by institutions as the international level. They accept that the rule of law and an independent judiciary remain crucial pillars of Hong Kong's open society, while various freedoms and rights remain respected and defended in Hong Kong. One recent example is the Global Competitiveness Report 2016 – 2017 published by the World Economic Forum in September 2016. The HKSAR is the only Asian economy that was ranked within the top 10 on judicial independence out of 138 jurisdictions, and came

third among common law jurisdictions.

Judging from the events of the past few years, I would not be at all surprised if formidable challenges are awaiting us. To rise up to these challenges, I believe that we must strive to implement the "one country, two systems" policy in a way that preserves the core values of our legal system. Those core values include the rule of law, the independence of the judiciary, the protection of fundamental human rights, and the integrity and quality of our legal system as well as the persons behind. On my part, I am confident that the HKSAR can meet such challenges as they arise, and will remain an international and cosmopolitan city which respect the rule of law.

On this note, thank you again for giving me this opportunity to meet you and may I wish you an enjoyable evening.

Thank you.

Note 1: For further discussion, see Chapter 22 ('Impact of jurisprudence beyond Hong Kong') (by P.Y. Lo) in Simon N.M. Young & Yash Ghai (ed.), *Hong Kong's Court of Final Appeal: The Development of the Law in China's Hong Kong* (Cambridge).

Note 2: *Cheng v Tse Wai Chun* (2000) 3 HKCFAR 339

Note 3: *Shum Kwok Sher v HKSAR* (2002) 5 HKCFAR 381 and *Sin Kam Wah v HKSAR* (2005) 8 HKCFAR 192

Note 4: *Koo Sze Yiu v Chief Executive of the HKSAR* (2006) 9 HKCFAR 441

Note 5: *Waddington Ltd. v Chan Chun Hoo* (2008) 11 HKCFAR 370

Note 6: See, e.g., Chiu Luen Public Light Bus Co. Ltd., unrep., HCA 2086/2014 (Poon J, as he then was) (20 October 2014); (Au J) (10 November 2014) (Au J) (13 November 2014).

Note 7: See: Chief Executive of the HKSAR & Arn. v Sixtus Leung Chung Hang & Yau Wai Ching, HCAL 185/2016, (Au J) (18 October 2016) and (15 November 2016), and also on appeal to the Court of Appeal under CACV 224/2016 (30 November 2016) and application for leave to appeal to the CFA (16 January 2017).

Ends/Thursday, May 25, 2017