

Secretary for Justice's speech at Ceremonial Opening of the Legal Year 2018

Following is the speech by the Secretary for Justice, Ms Teresa Cheng, SC, at the Ceremonial Opening of the Legal Year 2018 today (January 8):

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.

In Hong Kong, the rule of law is the cornerstone of our legal system, which in turn is the cornerstone of our society. With this firmly in mind, I gratefully accepted the appointment as Secretary for Justice, with humility, courage and determination to serve without fear or favour.

The rule of law manifests itself in a multitude of facets. Law exists in practice. However, it should not only be practised by the lawyers, the Judges and the Government. More importantly, the rule of law should be observed and respected by the community as a whole. It is through our daily lives and activities that we become testament to the existence of the rule of law. All of us jointly bear the responsibility to respect, promote and further the rule of law as a fundamental basis of our society.

I would like to focus on three points today: the role of the Department of Justice (the Department) in advising the Government and the Chief Executive, the Department's duty to conduct criminal prosecutions free from interference, and the independence of the Judiciary.

Advice to Government

It is the Department's duty and responsibility to provide honest, independent and professional advice to the Government on the legality of its acts and its compliance with the laws. It is the Government's role to formulate policy for the good of the society as a whole. Some policies can be implemented within the existing legal framework, while others may necessitate new laws to be enacted.

In formulating new laws, the Basic Law, being the constitutional document governing the implementation of the overarching "one country, two systems" policy, provides fundamental principles to be observed. Yet, the drafters of the Basic Law, including those some would agree to be great legal minds from common law traditions, could not have foreseen all specific situations that may arise in the future. The wisdom, one may say, of such drafting is in the inherent flexibility of the Basic Law to allow developments over time whilst preserving the fundamentals that must be observed. The Basic Law straddles two legal systems in a unitary state - it was promulgated by a civil law legislature to be applied in a common law jurisdiction. The Basic Law, like any other law, is open to different interpretations. This diversity is augmented by the differences in the approaches to the understanding and interpretation of laws by the two different legal traditions. Having said that, this difference, like any other legal issue, must be resolved through an appreciation of the ways in which conflict of laws rules and concepts in comparative law studies should be applied. Exchanges of views in good faith, and most importantly, mutual understanding of the reasons for the difference, inform an objective legal analysis. The pursuit of proper interpretation will no doubt challenge the greatest of legal minds. With a common goal to implement a particular policy, a legal solution can be achieved.

Criminal Prosecution

The second aspect relates to the prosecutorial function of the Department. Article 63 of the Basic Law guarantees that the Department of Justice shall control criminal prosecutions, free from any interference.

Decisions to prosecute or not, as the case may be, must be based on an objective and professional assessment of the available evidence and the law and be in accordance with the published Prosecution Code. Politics can have no role to play in such decisions. The legal discussions within the Department will be conducted free from politics, with professionalism and, importantly, in confidence. Some decisions are hard to make, but the Department is duty bound to make decisions that are legally correct and free from any interference, difficult or unpalatable though they may be.

A cause, however noble and honourable, must be pursued in accordance with the law. There are avenues by which views can be expressed and mechanisms in place for changes to be introduced. These are the proper means by which a cause can be pursued legally and with dignity. As the Acting Chief Justice Chan said in *HKSAR v Chow Nok Hang* FACC 12/2012, and I quote, "Resorting to violence or threat of violence or breach of peace in the exercise of this right will not advance one's cause." He continues, "The means to achieve a legitimate end must not only be peaceful, it must also be lawful. Violent or unlawful means cannot justify an end however noble. It may also attract criminal liability."

Judicial Independence

This leads to the third point, an important element of the rule of law - dispute resolution. The importance of an independent Judiciary that provides an accessible adjudicative system ensuring equality before the law, and

observing due process cannot be understated. As evidenced in the judgments that have been rendered, our courts administer justice in full accordance with the law and evidence before it. Judgments set out the reasons by which they come to the decisions. Some may not like the outcome but it does not mean that the independence of the Judiciary is in anyway compromised. We have a strong legal fraternity and a strong and independent Judiciary in which we all take pride. It is my duty to ensure that the independence of our Judiciary, as enshrined in the Basic Law, is respected and not arbitrarily attacked or criticised. I urge the community to take the same stance.

Objective Survey

Some suggest that the rule of law in Hong Kong is under threat. If it means that it is being tested, I have no qualms with such suggestions. But, with respect, I cannot agree with suggestions that our rule of law is in anyway compromised.

Objective studies by international organisations support the existence of an independent Judiciary. In the Global Competitiveness Reports of the World Economic Forum, Hong Kong's judicial independence ranked first in Asia for the past three years. According to the Worldwide Governance Indicators Project of the World Bank, which provides trends over longer periods rather than year on year fluctuations only, Hong Kong's percentile ranking in rule of law has improved from 69.9 per cent in 1996 to 93.3 per cent in 2016 (Note 1) over 20 years, or a leap from a top 70 place to a top 15 place. These statistics suggest an upward trend, but we must not be complacent and must continue to strive to be better.

Whilst we must continue to stand firm to guard and uphold the rule of law, we must also act responsibly and not utter arbitrary statements that underestimate our rule of

law.

Everyone has a right to express opinions. Educated and constructive criticisms and opinions drive positive development, but irresponsible and unprofessional utterances that are transparently baseless do not.

Arbitration and Mediation

I turn to look at Hong Kong's role in international arbitration. Arbitration resolves some of the most important commercial and investment disputes internationally with the arbitral awards enforceable practically universally. It plays an important role in promoting the rule of law at an international level.

Hong Kong has a strong arbitration culture, mature arbitration practice and a sophisticated arbitration community, and we are well placed to further develop our strengths in this area. Whilst Hong Kong has been ranked the third most preferred seat of arbitration worldwide (Note 2), the competition is keen. Yet it is competition that inspires advancement. Hong Kong has clarified the arbitrability of intellectual property rights disputes by way of the Arbitration (Amendment) Ordinance 2017 effective as at 1 January 2018. Members of the legal community have also put their heads together with the information technology sector and are working to develop an online dispute resolution system that will provide an efficient, affordable and accessible platform for arbitration. This platform once completed will take Hong Kong to a new dimension in the provision of dispute resolution services.

Mediation has the benefit of identifying the common goal, of focusing on the interests of those concerned in search for a solution that will be acceptable to them. In the Financial Dispute Resolution Centre, there was an over 80 per cent success rate in 2016 (Note 3) in mediating financial

disputes between investors and the financial institutions. From statistics produced by the Judiciary, mediated cases brought before the Court of First Instance and the District Court have reached a settlement rate of around 65 per cent in recent years. The Mediation Ordinance and the Apology Ordinance provide a sound legal framework for mediation to be further developed. In the online platform that I mentioned, online mediation is to be developed so as to provide a comprehensive dispute resolution service.

In support of our policy on promoting mediation, the West Kowloon Mediation Centre has been constructed and will come into operation soon. It is a unique development that is dedicated to Small Claims Tribunal cases suitable for mediation. It is envisaged that this will greatly enhance the use and understanding of mediation.

International Law

In October 2017, Hong Kong held the 2nd UNCITRAL (Note 4) Judicial Summit, during which views were exchanged amongst judges and practitioners from the Asia Pacific region. This is in line with one of the important principles of UNCITRAL, that of harmonisation of laws and practice in international commercial transactions. Harmonisation creates a level playing field and transparency, thereby promoting international trade and investments. We are actively discussing with UNCITRAL to make this a regular international event in Hong Kong.

To reinforce the above policy initiative, we have taken up the role of a convenor in the work of the Friends of the Chair on Strengthening Economic and Legal Infrastructure under the APEC (Note 5) Economic Committee and will organise an APEC Workshop in March at the margins of the 2018 APEC First Senior Officials Meeting on the Use of Modern Technology for Dispute Resolution and Electronic Agreement Management. This APEC project, together with

the online dispute resolution platform discussed above, creates a synergy that will advance our strengths in arbitration.

With the support of the Department, the Hague Conference on Private International Law is going to hold a global conference in Hong Kong on 18 to 20 April this year to celebrate its 125th anniversary. The event will give us a privileged opportunity to hear from notable experts their views on what private international law may offer in the modern age with expanding global interactions, prompted by, for example, China's Belt and Road Initiative.

Under the Legal Hub project, renovation works in the West Wing of the former Central Government Offices (now renamed Justice Place) and the former French Mission Building to provide space for the operation of international, regional and local law-related organisations are progressing well. The software, through capacity building, must be further developed in parallel in the wake of globalisation and the growth of the Belt and Road Initiative projects.

The Chief Executive, in her Policy Address, stated that the Government will actively seek to conclude free trade agreements, investment promotion and protection agreements and comprehensive avoidance of double taxation agreements with other economies to further the strengths of Hong Kong's position as an international trade, commercial and financial centre. The Hong Kong - ASEAN (Note 6) Free Trade Agreement was signed in November 2017.

All these show the need for expertise and demand for practitioners in this area is steadily increasing. A number of the universities in Hong Kong and the Asian Academy of International Law have continuously provided training in topical areas for students, practitioners, Judges and government officials and will continue to provide a platform

for research and international exchange of views.

Mutual Legal Assistance with the Mainland

Returning to home, we have completed a number of mutual legal assistance arrangements with the Mainland. They were introduced as a result of the developments in society. Arrangements entered into are implemented locally with the passage of enabling legislation.

With increasing cross-border marriages, the Arrangement on Reciprocal Recognition and Enforcement of Civil Judgments in Matrimonial and Family Cases was concluded in June 2017. To implement this Arrangement, the Department is currently preparing a bill.

With a growing number of cross-border transactions, the Arrangement on Mutual Taking of Evidence in Civil and Commercial Matters was concluded in December 2016 and took effect on 1 March 2017. Requests for assistance have been processed enabling litigants to obtain evidence with enhanced efficiency.

Other arrangements, such as the expansion of the scope of the arrangement for reciprocal recognition and enforcement of civil judgments implemented since 2008, will be pursued. These will protect the interests of Hong Kong's residents and businesses through a clear, accessible and efficient legal framework.

Conclusion

Ladies and gentlemen, it leaves me to thank Rimsky, my predecessor, for serving Hong Kong with such dedication, devotion and good temperament, leaving me a hard act to follow. I will strive and do my best to serve without fear or favour in discharging my duties.

Thank you for your kind attention.

Note 1: See website of the Worldwide Governance Indicators (info.worldbank.org/governance/wgi/#doc).

Note 2: See the 2015 International Arbitration Survey: Improvements and Innovations in International Arbitration by Queen Mary University of London (www.arbitration.qmul.ac.uk/docs/164761.pdf)

Note 3: See the 2016 Annual Report of the Financial Dispute Resolution Centre (www.fdrc.org.hk/en/annualreport/2016/files/download/FDRC_annual_report.pdf).

Note 4: United Nations Commission on International Trade Law.

Note 5: Asia-Pacific Economic Cooperation.

Note 6: The Association of Southeast Asian Nations.

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