

**Speech by Mr Wesley Wong, SC, JP
Solicitor General of the Hong Kong SAR
at The World Justice Forum V
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Professor (Tom) Ginsburg [Leo Spitz Professor of International Law, Ludwig and Hilde Wolf Research Scholar, and Professor of Political Science], distinguished guests, ladies and gentlemen,

It is my great honour to be here joining this premier international event which has brought together such a distinguished group of global and community leaders and rule of law advocates.

2. Since it was founded in 2006, the World Justice Project has made great efforts in advancing the rule of law worldwide, through its useful research and global network.

3. The rule of law is not only an important core value for Hong Kong but also the cornerstone of its success. The Department of Justice of the Hong Kong Special Administrative Region (“**Hong Kong SAR**”) is thankful for this opportunity to participate in the World Justice Forum and meet influencers.

The Principles of the Rule of Law and its Origin

4. The idea lying behind “the rule of law” has been traced back to Aristotle, who reckoned: “it is better for the law to rule than one of the citizens” and “so even the guardians of the laws are obeying the laws”.¹

5. It has often been said, however, that it was not until Professor A.V. Dicey, the Vinerian Professor of English law at Oxford, used the expression “the rule of law” in the authoritative text published in 1885, *An Introduction to the Study of the Law of the Constitution*, that the expression was finally coined and the ideas generally associated with the rule of law enjoyed a currency they had never enjoyed before.²

¹ See Tom Bingham, *The Rule of Law* (Allen Lane) (2010), p. 3.

² *Ibid.*

6. As human society has become more developed and hence more complex, the interests of different sectors of it may easily clash. The rule of law is the ultimate institution for protecting and balancing those conflicting interests. In places with better education and free flow of information (especially given the popular use of social media and the Internet), members of the public are now more aware of their rights and find it easier to discuss law-related topics, even actively with those whom they otherwise would not have been able to reach. At times, such discussions are highly politically charged, leading to polarised conclusions.

7. In Hong Kong as in the case elsewhere, “the rule of law” as an expression is sometimes chanted by some as no more than a slogan to advance their own political causes. It is hence more important now than ever to foster a proper understanding of the concept of the rule of law.

The Rule of Law in Hong Kong

8. Media reports and other materials in wide circulation which do not go unnoticed have, from time to time, sought to raise alarm about the rule of law position in Hong Kong. Rather than acting on hunches and surmises, an evaluation of the objective evidence, I dare to suggest, is a far more reliable method to find out what is really happening and it often points one to a very different direction.

9. In this connection, one of the clearest, most authoritative contemporary explanations of the concept of the rule of law was offered by the late Thomas Bingham and set out in his seminal work *The Rule of Law*.

10. In that important publication, Lord Bingham identified eight key elements, or “sub-rules” of the rule of law. For present purposes, I wish to focus on three of them, i.e. the accessibility of the law, human rights and fair trial. In his own words, “the law must be accessible and so far as possible intelligible, clear and predictable”³, “the law must afford adequate protection of fundamental human rights”⁴, and “adjudicative procedures provided by the

³ See *The Rule of Law*, *op. cit.*, chapter 3.

⁴ See *The Rule of Law*, *op. cit.*, chapter 7.

state should be fair”⁵. These elements, among others, are part and parcel of Hong Kong’s legal system.

Accessibility of the Law

11. I shall first turn to the accessibility of the law, which is actually engrained in Hong Kong’s constitutional jurisprudence. The Basic Law, which sets out the constitutional framework for the Hong Kong SAR as “a local administrative region of the People’s Republic of China, which shall enjoy a high degree of autonomy and come directly under the Central People’s Government”, is itself the embodiment of the principle of “one country, two systems” through its enactment as a national law. Whilst we have just celebrated the 20th anniversary of the establishment of the Hong Kong SAR, we commemorated the 25th anniversary of the promulgation of the Basic Law two years ago in 2015. In other words, the people of Hong Kong and the rest of the world were given more than seven years lead time when the National People’s Congress enacted the Basic Law on 4 April 1990 on what to expect upon the resumption of Chinese sovereignty over Hong Kong on 1 July 1997.

12. The Basic Law was, in fact, the product of almost five years’ hard work which started very shortly after the signing, in 1984, of the Sino-British Joint Declaration over the question of the future of Hong Kong. The Basic Law not only covers the relationship between the Central Authorities and the Hong Kong SAR and outlines the latter’s political structure after 1997, it also has dedicated chapters to protect fundamental rights and duties of residents, to preserve Hong Kong’s open and free economic system as we know it and to maintain the city’s capitalist system, way of life as well as the basic features of its common law system.

13. In practical terms, it means that any restrictions or limitations of fundamental rights and freedoms guaranteed in the Basic Law must be accessible and reasonably foreseeable. What this entails was examined in the leading criminal case of *Shum Kwok Sher v HKSAR* which upheld the constitutionality of the common law offence of misconduct in public office after the handover. It is a case which has since been cited widely before the superior courts in the rest of the common law world in developing the relevant jurisprudence and by the English Law Commission exploring ways

⁵ See *The Rule of Law, op. cit.*, chapter 9.

to codify the offence. It is also important to note that all the reasoned judgments of our courts are uploaded on-line.

14. In this case, the Hong Kong Court of Final Appeal (the setting up of which I shall elaborate more in a moment) opined that “a law must be adequately accessible in the sense that it gives a person an adequate indication of the law relevant to his situation so that (if need be with advice) he can regulate his conduct”⁶. This is in line with established jurisprudence enunciated from a long line of authorities including the European Court of Human Rights decision in *Sunday Times v United Kingdom*⁷.

15. It is also important to note that the reasoned judgments of our courts are all uploaded on-line on the Judiciary’s official website and for decisions of substantive appeals to the Court of Final Appeal, they are also accompanied by a press summary to facilitate accurate reporting whereas written submissions filed by the parties (called “printed cases”) are also made available for everyone to know what arguments had been ventilated.

16. Access to law in Hong Kong is further enhanced through the enactment of the *Legislation Publication Ordinance* (Cap. 614). The launch of the free website “Hong Kong e-Legislation” or “HKeL” on 24 February 2017⁸ provides for a searchable and reliable electronic database of updated legislation. Legislative provisions so published on-line in both English and Chinese will progressively be verified so that printed PDF versions marked “verified copy” will enjoy official legal status. I encourage you to try it using your mobile devices.

Adequate Protection of Fundamental Human Rights by an Independent Judiciary

17. But before you may do just that, I wish to turn next to the comprehensive protection of human rights contained in the Basic Law which are vigorously and fairly enforced by an independent judiciary:

⁶ (2002) 5 HKCFAR 381; [2002] 2 HKLRD 793; FACC 1/2002 – *per* Sir Anthony Mason, NPJ at 410F-H [89].

⁷ (1979 – 1980) 2 EHRR 245.

⁸ Press Release dated 20 February 2017 announcing the official launch of Hong Kong e-Legislation is available at: <http://www.info.gov.hk/gia/general/201702/20/P2017022000524.htm> (last accessed on 11 July 2017).

- (a) Article 4 of the Basic Law provides that the rights and freedoms of the people in the Hong Kong SAR are safeguarded in accordance with law;
- (b) Articles 24 to 42 guarantee fundamental rights including speech, press, association and demonstration; and
- (c) Article 39 ensures the continued application 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 the Hong Kong SAR.

18. No adjudicative procedure can be fair unless the adjudicator is fair. Judicial independence is therefore another fundamental aspect of the rule of law, particularly in the protection of fundamental rights and freedoms.

19. Under the Basic Law,

- (a) Articles 2 and 19 provide for independent judicial power, including that of final adjudication;
- (b) Articles 8 and 84 preserve the common law system and permit the courts to refer to precedents from other common law jurisdictions;
- (c) Article 18 provides for inapplicability of the Mainland laws unless included in Annex 3 (which has to satisfy specified conditions and via specified procedure);
- (d) Article 35 provides for the right to confidential legal advice, access to the courts, choice of lawyers and the right to institute legal proceedings in the courts against acts of executive authorities and their personnel; and
- (e) Articles 80 to 96 provide for the constitutional and structural independence of our judiciary.

20. In particular, Article 82 provides that the power of final adjudication is vested in the Court of Final Appeal (the “CFA”). It has acted as the final appellate court of the Hong Kong SAR since 1 July 1997. It is this court which gave judgment on the test of legal certainty and the requirement of accessibility for the common law offence of misconduct in public office I mentioned earlier. The same Basic Law article also permits

the invitation of judges from other common law jurisdictions to sit when adjudicating on cases before it.

21. Over the past twenty years, eminent judges and jurists from the United Kingdom, Australia and New Zealand have been invited to sit on our CFA. Final appeals of all types of cases (including those raising important constitutional issues or concerning important government policies) have been heard by a panel of five judges, which invariably includes one overseas judge.

22. Judges of high international standing from overseas common law jurisdictions are appointed to the CFA as overseas Non-Permanent Judges (“**overseas NPJs**”). Examples of serving overseas NPJs include top judges like Lord Hoffmann, Lord Millett and Lord Neuberger from the United Kingdom, as well as Mr Justice Gleeson, Mr Justice Gummow and Mr Justice Spigelman from Australia’s highest courts. The latest two appointments are Mr Justice French who has just retired as Chief Justice of the High Court of Australia and Lord Reed, a serving judge of the United Kingdom Supreme Court and a member of the panel of *ad hoc* judges of the European Court of Human Rights.

23. One asks these questions: Would these eminent judges be willing to sit on our CFA 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 overseas judges of such high reputation to sit on our CFA speaks for itself. Remember, overseas NPJs do hear and determine cases in which the Hong Kong SAR Government is taken to the courts.

24. Extra-judicial observations made by experienced judges whose independence can hardly be questioned also provide powerful testimony to the rule of law in Hong Kong.

25. In a speech delivered to journalists in Hong Kong in August 2014, Lord Neuberger remarked as follows:

“There has been concern in some quarters in Hong Kong about the possible undermining of judicial independence in the light of the

suggestion from a PRC white paper that judges ‘administrate’ the Special Administrative Region. ... Well, like many legal issues, the argument is ultimately about the meaning of a word, and words are slippery things. ... It may be a somewhat cheap point, but I note that the judicial oath which I took, in common with all Hong Kong Judges, included promising to ‘*administer* justice without fear or favour’.”⁹

A judge taking the promissory oath would, in fact, carry on to say, “[without] self-interest and deceit”.

26. Mr Justice Patrick Chan, a former Permanent Judge of the CFA who has served under four Chief Justices (including the incumbent CJ), made these observations at his Farewell Sitting in October 2013:

“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.”¹⁰

27. That people can regulate their conduct on the basis of clear laws and enforce actionable rights through a fair judicial process is not enough. The administration of justice calls for more than just ticking the right boxes for these three identified sub-rules of the rule of law.

⁹ See paragraph 8 of the speech entitled “The Third and Fourth Estates: Judges, Journalists and Open Justice”, delivered on 26 August 2014 at the Hong Kong Foreign Correspondent’s Club, which is available at the website of the UK Supreme Court: <https://www.supremecourt.uk/docs/speech-140826.pdf> (last accessed on 11 July 2017).

¹⁰ See *Farewell Sitting for the Honourable Mr Justice Chan PJ* (2013) 16 HKCFAR 1012, paragraph 10 at 1019.

The Role of Government

Checks and Balances over the Exercise of Power

28. Another key element of the rule of law identified by Lord Bingham is the exercise of power, in that “ministers and public officers at all levels must exercise the powers conferred on them in good faith, fairly, for the purpose for which the powers were conferred, without exceeding the limits of such powers and not unreasonably”.¹¹

29. In the context of the administration of a criminal justice system, the principle of prosecutorial independence is just as fundamental. Article 63 of the Basic Law therefore entrenches this principle by providing that the Department of Justice of the Hong Kong SAR shall control criminal prosecutions, free from any interference. The Secretary for Justice, being the head of the Department, has overall responsibility for the conduct of prosecutions in Hong Kong.

30. Section 15(1) of the *Criminal Procedure Ordinance* (Cap. 221) states this:

“The Secretary for Justice shall not be bound to prosecute an accused person in any case in which he may be of opinion that the interests of public justice do not require his interference.”

The effect of this provision is to endorse generally accepted and longstanding international practice under the common law – that the decision to prosecute includes two required components: (a) the admissible evidence available is sufficient to justify instituting or continuing proceedings and (b) the general public interest must require that prosecution is warranted.

31. On behalf of the community, prosecutors (whether employees of the government or private practitioners to whom cases are briefed out) take on a heavy responsibility to ensure that justice is dispensed with equal measure and in an even handed manner at all times. When exercising prosecutorial discretion in Hong Kong, they are assisted by a published

¹¹ See *The Rule of Law*, *op. cit.*, chapter 6.

Prosecution Code from the Department of Justice which provide them with a framework of defined and transparent prosecution policy guidelines.

32. More generally, counsel from the Department of Justice carry out the unenviable task of advising policy bureaux and departments (and, sometimes, to their disappointment) on the legality of proposed government legislation and administrative measures. It is, after all, an important principle of the rule of law that the government should not be above the law, and all government action must be within the parameters of the law.

33. Despite all these efforts, judicial review remains in the Hong Kong SAR, like other common law jurisdictions, a robust means to ensure that this principle is upheld. In fact, the legality of laws passed by the SAR legislature is also subject to constitutional review before the courts. It is therefore fundamental that the adjudication of justiciable rights is not shut out from the court system just because a citizen who wishes to pursue such rights cannot afford the legal fees to be properly represented.

Legal Aid

34. This is why an elaborate and comprehensive system of legal aid is another key element of the rule of law. It means more than just the facilitation of a fair trial process.¹² According to Lord Bingham, “means must be provided for resolving, without prohibitive cost or inordinate delay, *bona fide* civil disputes which the parties themselves are unable to resolve”.¹³

35. In the Hong Kong SAR, we have a healthy legal aid system for both criminal as well as civil cases. Legal aid is available for criminal cases tried in the District Court (which may pass a sentence of up to seven years’ imprisonment) and the Court of First Instance (where even more serious cases are heard) and all criminal appeals. For trials, there is no “merits” test for cases before either of these courts, and legal aid will be granted as long as the “means” test is passed. A different but similar system is operated on government subvention through the Duty Lawyer Service to provide legal representation for defendants on trial before the magistrates’ courts, the sentencing powers of which is normally limited to a period of imprisonment not exceeding two years.

¹² See *The Rule of Law*, *op. cit.*, p 97.

¹³ See *The Rule of Law*, *op. cit.*, chapter 8.

36. For civil cases, legal aid does not only cover inter-citizen claims in private law actions and matrimonial causes. As far as public law litigation is concerned, applicants for judicial review would, subject to the applicable “means” and “merits” tests, be placed in a position to invoke the supervisory jurisdiction of the courts. The legality (constitutionality being one facet of it) of legislation as well as government policy or administrative decisions may be challenged with funding provided by the government.

37. You may wish to know, from the latest figures we have, that of the total expenditure of HKD 860.5 million for the 2015-2016 financial year, the Legal Aid Department spent HKD 452.8 million on civil cases and HKD 115.4 million on criminal cases. The total expenditure in the budget estimates for the 2017-2018 financial year is even higher at HKD 996.8 million. This is almost USD 128 million. As a matter of fact, people of different (even unpopular) political views have been legally aided when they engage in litigation. Incidentally, a growing number of lawyers devoting more and more time to *pro bono* work complements the government’s efforts to enhance access to justice.

Concluding Remarks

38. I am therefore confident enough to say that the principle of “one country, two systems” is not mere rhetoric but a reality. This is reflected in the consistently positive outcome of close examinations of Hong Kong’s rule of law situation in international ratings and commentaries and please bear with me if I sounded like preaching to the converted.

39. On this note, it remains for me to thank the World Justice Project for organising this Forum and for inviting me to join the very meaningful discussions to share insights, explore strategies, and develop solutions together for the advancement of peace, equity, and opportunity to which the rule of law, as an institution, is key. Thank you.