

**Keynote Speech by Mr Wesley Wong, SC, JP, Solicitor General
at the ALB Hong Kong In-House Legal Summit 2017
12 September 2017 (Tuesday)**

“Is there something I can do to promote the rule of law?”

Good morning, Ms [Stephanie] Sheng (the Conference Chairperson), Distinguished Guests, Ladies and Gentlemen,

I am deeply honoured to be given this opportunity to speak at another ALB signature event. Under the Asian Legal Business badge, the Hong Kong 2017 In-House Legal Summit provides a platform across corporate counsel, private practitioners, regulators and consultants in specialist fields in the region, both experienced as well as those having recently taken the plunge, to gather together. At this forum, a wide spectrum of relevant legal issues and best practice solutions are identified and ways in resolving them can be fully explored. That the organiser is going for a 14th run in Hong Kong and with the presence of this distinguished assembly of participants, no one can be left with any doubt the usefulness of the exchanges that will take place for the rest of today.

2. It may not come as any surprise at all for me to tell you that, being a legal officer, I am most pleased to be identified as an “in-house counsel” myself. And, I am also proud to say that the Department of Justice, now having almost 400 counsel in it, should rightly be considered the largest legal practice in this city.

3. Over the past two decades, the community of in-house counsel (as in the case of the government legal service) has been growing not just in sheer size but also in the reach of the sectors and industries its members serve. Such an expansion brought with it remarkable changes in the role of in-house counsel. We know for a fact that the role of in-house counsel has evolved from handling day-to-day legal work and supervising external counsel to also managing regulatory change and compliance, providing training, carrying out special projects and technology platforms.

4. For an in-house counsel to be now part of the senior management of the corporation or organisation he or she serves is already a global phenomenon.

5. At present, about 25% of solicitors qualified in Hong Kong and holding practising certificates are not employed by law firms; most of them are likely to be working in commercial entities, government departments, statutory bodies or non-governmental organisations. Apart from local solicitors, many barristers and foreign lawyers in Hong Kong are also working in-house, even if at a lower percentage when compared to local solicitors. I must be stating the obvious that “we”, all the in-house counsel present here today, are a substantial force in the local legal community making important contributions to the rule of law, a point which I can be forgiven to think as having already received judicial notice when the Honourable Mr Justice Tang, Permanent Judge of the Hong Kong Court of Final Appeal spoke as keynote speaker last September.¹

The Role of In-house Counsel in promoting the Rule of Law

6. Just a little over six months ago on 23 February 2017, I attended as a panel speaker at one of the sessions in Hong Kong under the Global Pound Conference Series 2016-17. An important objective of that conference is to create a dialogue on what can be done to improve access to justice and the quality of justice around the world in civil and commercial conflicts. Apart from discussions on the dais, the audience (thanks to innovative technology) was invited to vote, using their cell phone Apps, on various policy questions. Participants that day mainly came from the commercial field including in-house counsel, members of chambers of commerce and dispute resolution services providers.

7. According to the voting results on the question of who has the greatest responsibility for taking action to promote better access to justice in commercial dispute resolution, the government and adjudicative providers (such as judges and arbitrators) or their organisations have been regarded by most as having the main responsibility as an influencer in this aspect.² I hope it was only humility on the part of the lawyers present which prevented them from voting for themselves. In fact, there is so much as I can see that

¹ See para 5, in particular, of the Speech by the Honourable Mr Justice Tang, P.J. entitled “In-house Lawyers & The Rule of Law” delivered on 13 September 2016, a copy is available at: <http://www.hkcfa.hk/filemanager/engagement/en/upload/32/ALB%20HK%20In-House%20Legal%20Summit%202016.pdf>

² See the voting results on Session 4, Question 1 which are available at: <http://globalpoundconference.org/Documents/GPC%20Series%202016-17%20Voting%20Results%20-%20Aggregated%20Data%20of%207%20Events.pdf>

lawyers, in particular in-house counsel, may do to promote and maintain the rule of law.

8. As at today, in-house counsel (irrespective of their background and jurisdiction) are expected to add value to the organisation or corporation to which they belong. Most of you are not just lawyers but also entrepreneurs who are shouldering the important responsibility of formulating policies and making key decisions for your company or organisation. Being part of the senior management, in-house counsel has an important role in enhancing corporate governance and ensuring that all acts and transactions of the organisation are conducted in accordance with the law.

9. Another reason for me to invite you all to promote and maintain the rule of law is that we are all custodians of justice, the very first role of the legal profession we all vouched to assume on our day of admission. It is therefore crucial for us to take it upon ourselves to constantly maintaining and continuously promoting the rule of law in Hong Kong, the very true cornerstone of our success as a global financial centre and an international legal and dispute resolution services hub in the Asia-Pacific region.

The Rule of Law in Hong Kong

10. That the rule of law is alive and kicking in Hong Kong is well-recognised by international ratings. For the past 23 years, the Washington-based Heritage Foundation has consistently named Hong Kong the world's freest economy. In that regard, our high quality legal framework has been praised as providing effective protection of property rights and strong support for the rule of law. Another commendation on our rule of law position can be found in the Worldwide Governance Indicators project commissioned by the World Bank. Since 2003, the aggregate indicator in respect of the rule of law achieved by Hong Kong has been consistently above 90 out of 100, and the latest score given to Hong Kong was 94.7 in the year 2015. Credit must go to each one of you for every time when you live up to your calling in acting professionally and not out of convenience.

11. As unfortunate as the Secretary for Justice said it is in his speech at the Ceremonial Opening of the Legal Year 2017,³ the expression "the rule

³ See para 5 of the Speech by the Secretary for Justice at the Ceremonial Opening of the Legal Year 2017 on 9 January 2017, available at: <http://www.doj.gov.hk/eng/public/pdf/2017/sj20170109e1.pdf>

of law” is sometimes chanted by some (including those who are legally trained) as no more than a slogan apparently for the sake of creating an attractive sound bite to advance their own political causes. As Lord Ken Macdonald, QC (Warden of Wadham College, Oxford and formerly Director of Public Prosecutions, England and Wales) wrote recently on a local newspaper,

*“The rule of law is not a moveable feast. You can’t invoke it when it suits you and then spurn it when it doesn’t.”*⁴

It is hence more critically important now than ever to foster a proper understanding of the concept of the rule of law and faithfully practise what we preach.

12. Even though a discussion of the rule of law can easily be traced back to the teachings of Aristotle in ancient Greece, I hope I can be excused for borrowing directly from the contemporary explanations offered authoritatively by the late Thomas Bingham in his seminal work *The Rule of Law*. Of Lord Bingham’s eight key elements, or “sub-rules” of the rule of law, today I wish to focus on three of them which I consider will be of greater relevance to in-house counsel, namely the **accessibility of the law**, **access to justice** and **compliance under an international legal order**.

Accessibility of the Law

13. The first sub-rule is articulated by Lord Bingham in this manner: “The law must be accessible and so far as possible intelligible, clear and predictable”.⁵ The importance of this sub-rule as a key element is obvious in that we need to know our rights in both criminal and civil law as well as we have to have the means to find out what the law is. Furthermore, there is one other reason which Lord Bingham has described as “extremely compelling”:

⁴ “*Democracy and human rights are vital for the rule of law – and so is legality*”, South China Morning Post (published on 4 September 2017, available at: <http://www.scmp.com/comment/insight-opinion/article/2109596/democracy-and-human-rights-are-vital-rule-law-and-so>)

⁵ See Tom Bingham, *The Rule of Law* (Penguin Books) (2011), on “The Accessibility of the Law” at chapter 3

“It is that the successful conduct of trade, investment and business generally is promoted by a body of accessible legal rules governing commercial rights and obligations.”⁶

Talking about “accessibility of the law”, no doubt you would all be the first port of call for your corporation or organisation in finding out what the law is whenever your colleagues encounter a legal (or, sometimes, even a not-so-legal) problem.

14. For our part, the Government is committed to promoting convenient and free public access to the laws of Hong Kong. In the age of information technology, the launch of the new database “Hong Kong e-Legislation” or “HKeL” in February this year marked the start of a new era of access to legislation. The database contains all of Hong Kong’s legislation. A significant improvement is that verified copies of legislation with legal status are being progressively added to HKeL and the public may rely on these copies for official use (e.g. submission in court). Printed PDF versions marked “verified copy” enjoy this official status.

15. At the same time, there are different viewing and searching features in HKeL to suit the needs of different users. For example, the Chinese and English versions of an item in the database may be viewed side by side and past versions of a piece of legislation or an individual provision of it may be viewed at the click of a button. Also, a subscription function is available to help users keep track of updates to the written law.

16. To ensure a smooth transition from the Government’s previous legislation website, there are multimedia materials on the new HKeL website to guide users through how to use it and we have been cooperating with the Law Society to provide training to practitioners. We greatly value the feedback of our users as this will help us further develop this important legal infrastructure for the benefit of all. I am sure the Law Draftsman will be as keen as I am in looking forward to receiving your feedback so that the Government is able to continue enhancing HKeL as part of our commitment in providing the highest level of accessibility to the laws in Hong Kong.

⁶ *Ibid*

Access to Justice – Dispute Resolution

17. I now turn to the access-to-justice element of the rule of law. When a commercial dispute arises, in all likelihood, you will again be the person to look to for advice on the various options available and how to go about them. In this regard, it is the HKSAR Government’s long-standing policy of promoting Hong Kong as a leading international legal and dispute resolution services centre in the Asia-Pacific region. Of course, a successful implementation of this policy would depend not just on your giving the pertinent advice when needed in these situations but also in formulating a suitable dispute resolution plan to manage the legal risks involved even before a deal is closed.

18. The correctness in pursuing this policy initiative is echoed by Lord Bingham when his lordship wrote on access to justice,

*“Means must be provided for resolving, without prohibitive cost or inordinate delay, bona fide civil disputes which the parties themselves are unable to resolve.”*⁷

By not restricting ourselves to access to court, the Department of Justice is a staunch supporter for the development and promotion of means alternative to litigation, such as arbitration and mediation, as an integral part of the dispute resolution landscape.

19. We are therefore very much encouraged by the outcome of the 2015 International Arbitration Survey by the Queen Mary University of London. Just after London and Paris, Hong Kong has therefore come as the 3rd in the world (and the 1st outside Europe) as the seat that the survey respondents or their organisations had used the most over the past five years. London, Paris and Hong Kong (in that order) are also on the top three preferred seats list.⁸ The results of the same survey indicate that the neutrality and impartiality of the local legal system are the most important reason for the respondents’ preference for certain seats of arbitration.

20. We also subscribe to the firm belief, among others, that dispute resolution has a close relationship with economic development and

⁷ *Ibid*, on “Dispute Resolution” at chapter 8

⁸ See pages 12 and 14 of the 2015 International Arbitration Survey, available at: <http://www.arbitration.qmul.ac.uk/docs/164761.pdf>

competitiveness. In the world of trade and commerce, when it comes to the moment when a party having disputes with its business partners has to decide on the process ahead, apart from the concern over likely financial implications, maintaining goodwill to protect and maintain the relationship and trust with each another is often a serious factor to consider. In fact, it is sometimes the determinative factor which drives cross-border cooperation and human advance for a better world.

21. Against this background, Hong Kong is poised to be the super-connector between China and the Belt and Road countries, many of them are in the Asia region. This is owed no less to the Central Government's support for Hong Kong's participation in the Belt and Road Initiative as announced in the March 2016 "Outline of the 13th Five-Year Plan for the National Economic and Social Development of the People's Republic of China", but also the HKSAR Government's relentless efforts in bringing our legislative framework for dispute resolution up-to-date with changing needs.

22. Two recent revisions to our existing dispute resolution legislation were passed in June this year:

- (a) First, the *Arbitration (Amendment) Ordinance 2017* which amended the *Arbitration Ordinance* (Cap. 609) now clarifies that disputes over intellectual property ("IP") rights are capable of resolution by arbitration, and it would not be contrary to public policy to enforce an award solely because the award involves a dispute over IP rights. The IP amendments will come into operation on 1 January 2018. In the meantime, the Department of Justice and the Intellectual Property Department will continue to liaise with the IP arbitration sector and the local and overseas business communities to promote the Amendment Ordinance; and
- (b) Second, the *Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance* which amended both the *Arbitration Ordinance* (Cap. 609) and the *Mediation Ordinance* (Cap. 620) clarifies that third-party funding for arbitration and mediation is not prohibited by the common law doctrines of maintenance and champerty, and provides for related measures and safeguards. To ensure that safeguards are in place for the

protection of the funded parties in arbitration and mediation, an authorized body to be established will, in accordance with the requisite statutory requirements, consult members of the public before issuing a code of practice with which third party funders are expected to comply in anticipation of the coming into operation of the relevant provisions whereas an advisory body will also be formed to monitor and review the operation of those provisions.

23. Furthermore, to encourage the making of apologies with a view to preventing escalation of disputes and to facilitate their amicable resolution, the Department of Justice accepted the proposal of the Steering Committee on Mediation to enact apology legislation for Hong Kong. The *Apology Ordinance* (Cap. 631) passed on 13 July 2017 is now set to come into operation on 1 December 2017.⁹ Hong Kong is now the first jurisdiction in Asia to have apology legislation enacted and the first amongst 56 common law jurisdictions that we have studied to protect statements of facts in an apology law.

24. As the quote from French microbiologist Louis Pasteur (thanks to whom we can taste fresh milk without getting sick today) goes, “Chance favours the prepared mind.” The better Hong Kong gets prepared, the more able we become in embracing the vast opportunities available.

Compliance under an International Legal Order

25. When Lord Bingham said, “*The rule of law requires compliance by the state with its obligations in international law as in national law*”¹⁰, we all feel its reach whenever we get engaged in compliance issues. Even for those who may not have heard of the Financial Action Task Force (“**FATF**”) which sets international standards on anti-money laundering and counter-terrorist financing measures, many of us are already engaged in our daily work as part of the process in tracking down and combatting criminal and terrorist syndicates, both domestic and international, the existence of which threatens any society governed by the rule of law.

⁹ See the Apology Ordinance (Commencement) Notice L.N. 148 of 2017 gazetted on Friday, 8 September 2017.

¹⁰ See footnote 7, on “The Rule of Law in the International Legal Order” at chapter 10

26. Concerted anti-corruption efforts across jurisdictions are also pivotal in maintaining a level-playing field in transactions or dealings with or between public and private entities. No one is above the law and no one should be given the opportunity to abuse authorities vested by the law, fairness¹¹ and equality¹² before the law being, after all, also key components of the rule of law.

27. The organiser sees it fit (and, I say, for good measure in so doing) to pick “compliance” as the theme for two out of three of today’s panel sessions. The first panel session which will shortly begin this morning will talk about cybersecurity and data protection. In the afternoon, there will be a panel session on “Strengthening Hong Kong’s Anti-Money Laundering Regime”. From today’s agenda, it is self-evident that both the public and private sectors are attaching great importance to compliance, itself a clear manifestation of the rule of law.

28. The remaining time I have only permits me to give you a flavour of the latest developments in relation to the law in fighting money laundering, terrorist financing and corruption:

- (a) The 2012 *Anti-Money Laundering and Counter-Terrorist Financing (Financial Institutions) Ordinance* (Cap. 615) has since imposed customer due diligence (“CDD”) and record-keeping requirements on financial institutions. It also establishes a licensing regime for money service operators whereby they are required to satisfy a “fit-and-proper” test before they can provide money services.
- (b) What the 2017 Amendment Bill introduced to the Legislative Council in June seeks to do is to extend the scope of CDD and record-keeping requirements to solicitors, accountants, real estate agents, and trust or company service providers when these professionals engage in specified transactions. A licensing regime will also be introduced for trust or company service providers which similarly require them to satisfy the

¹¹ See footnote 7, on “Law not Discretion” at chapter 4: “Questions of legal right and liability should ordinarily be resolved by application of the law and not the exercise of discretion.”

¹² See footnote 7, on “Equality Before the Law” at chapter 5: “The laws of the land should apply equally to all, save to the extent that objective differences justify differentiation.”

“fit-and-proper” test. A Bills Committee has been formed to scrutinise it and so, watch this space.

- (c) While the *Prevention of Bribery Ordinance* (Cap. 201) is Hong Kong’s principal anti-corruption legislation, the common law offence of misconduct in public office is a useful supplement to the arsenal of graft-busters. The most notable recent decision of the Court of Final Appeal in *HKSAR v. Rafael Hui Junior & Ors* (2017) 20 HKCFAR 264 is more than just a timely reminder that no one, including those occupying high offices in the public and private sectors, is above the law. I, for one, will also hold my breath to see how the English Law Commission will report on its project in reforming the existing law in the light of the developing jurisprudence.

Concluding Remarks

29. It is therefore not without good reasons that in-house lawyers have been dubbed the “moral compass” of the company or organisation they serve. Together there is a lot we can do in maintaining the rule of law. On this note and with the list of eminent speakers of such diverse background and expertise to follow, I am sure this year’s Summit will be another success.

30. Thank you.