

SJ's speech at Ceremonial Opening of the Legal Year 2020

Following is the speech by the Secretary for Justice, Ms Teresa Cheng, SC, at the Ceremonial Opening of the Legal Year 2020 today (January 13):

Chief Justice, Members of the Judiciary, Chairman of the Bar Association, President of the Law Society, Distinguished Guests, Ladies and Gentlemen,

Rule of Law

This is a time of reflection on the past year and also to plan ahead. The state of turmoil in Hong Kong in 2019 has put us through the most difficult times. Many of the core values of Hong Kong have been under challenge and the core value closest to our hearts, the rule of law, is no exception. There are many intimations of what constitutes the rule of law – some may be described as perpetual truths and inspirational whilst others imaginative or even misleading. There are many ways by which the practice of the rule of law is to be assessed, some based on subjective perception while others on objective indicia.

Two authoritative statements inform us the correct concept:

The late Lord Bingham's inspiring book, the Rule of Law, summarised the core idea as "all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts" (Note 1).

The Declaration of the High-level Meeting of the United Nations' General Assembly on the Rule of Law at the National and International Levels in 2012 recognised that "the advancement of the rule of law is essential for sustained and inclusive economic growth, sustainable development, the eradication of poverty and hunger and the full realization of all human rights and fundamental freedoms" (Note 2).

Given the broad perspective that the rule of law necessarily entails, I seek to highlight some of its substantive and procedural aspects.

Substantive Aspects of the Rule of Law

As held by Lord Diplock, "[t]he acceptance of the rule of law as a constitutional principle requires that a citizen, before committing himself to any course of action, should

be able to know in advance what are the legal consequences that will flow from it" (Note 3). The law must be accessible, intelligible, stable, predictable and fair for the sustainable development of any society. In Hong Kong, our legal infrastructure is set out in the Basic Law. Our legislation is in plain language and accessible at the HKeL website. Our case law is also readily accessible to the public on the internet.

Litigation inevitably involves competing rights. Yet, rights are not necessarily absolute and may be subject to restrictions. As the Court of Appeal stated in *Secretary for Justice v Wong Chi Fung and Others* (Note 4), "if the individual's rights are over-emphasised at the expense of observing the law, people will easily become self-serving, with little regard for other people's rights and the overall interests of society, so that society is prone to fall into disarray."

When disarray such as unchecked acts of violence and vandalism prevails, it will be rule of mob, not rule of law. In ordering the continuation of an interim injunction to restrain doxxing and harassment against police officers on internet-based platform, the High Court reminded that "the promotion and maintenance of the rule of law is not sensibly or rationally pursued by repeated and escalating

breaches of the law" (Note 5), and "[p]ersons who commit such crimes are simply, and properly described as, 'criminals'. Criminal activity does not cease to be criminal activity simply because the actor believes himself or herself to be acting for a particular, perhaps higher, cause" (Note 6).

In *R v Caird & Others* (Note 7), Lord Sachs also held that "[a]ny suggestion that a section of the community strongly holding one set of views is justified in banding together to disrupt the lawful activities of a section that does not hold the same views so strongly or which holds different views cannot be tolerated and must unhesitatingly be rejected."

Procedural Aspects of the Rule of Law

Fair trial and due process are essential elements of the procedural aspects of the rule of law. The judiciary plays the pivotal role. As observed by Chief Justice Ma in the International Rule of Law Lecture of the Bar Council of England and Wales back in 2015, a transparent system of law in which the community can observe that the independent judiciary "administer[s] justice without fear or favour, self-interest or deceit", with reasoned judgments available as evidence that the adjudication is in

accordance with the law and its spirit, indicates the existence of the rule of law (Note 8).

Lord Neuberger's holding on the role of the judiciary in the Brexit case completes the analysis, "In the broadest sense, the role of the judiciary is to uphold and further the rule of law; more particularly, judges impartially identify and apply the law in every case brought before the courts" (Note 9).

Key Achievements of DoJ in 2019

In 2019, the Department continues to provide honest, independent and professional legal advice on a wide spectrum of matters to the Government so that it is fully apprised of the legal implications and acts strictly in accordance with the law. Apart from representing the Government in public law litigation and civil claims, the Department endeavours to ensure that government policies and legislative proposals comply with the Basic Law as well as other fundamental principles of our legal system. The Department also takes seriously its constitutional role of controlling criminal prosecutions, free from any interference under Article 63 of the Basic Law, and all prosecutorial decisions are made after taking into account the available evidence, applicable laws and

the principles set out in the Prosecution Code. To facilitate more convenient access to the laws of Hong Kong, the Department continues to enhance the HKeL database, with more laws as verified version published on it.

On top of that, we have taken a number of new initiatives and in the interest of time, only a few will be mentioned here.

The inaugural annual Hong Kong Legal Week was held in the first week of November 2019, with participating legal experts from over 30 jurisdictions.

This year two examples showcase the unique benefits of the "one country, two systems" policy to Hong Kong.

First, the game-changing and ground-breaking Arrangement between Hong Kong and the Mainland Concerning Mutual Assistance in Court-ordered Interim Measures in Aid of Arbitral Proceedings. It capitalises on the national policy of China in its "Outline of the 13th Five-Year Plan", and recognises the difference of the "two systems" in the legal and arbitration context. This Arrangement has made Hong Kong the first and only jurisdiction outside Mainland China where, as a seat of arbitration, parties to arbitral proceedings administered by

eligible arbitral institutions can apply to the Mainland courts for interim measures.

The second is the Arrangement between Hong Kong and the Mainland on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters, which was concluded in January 2019. The scope of enforcement of this Arrangement goes beyond the Hague Judgments Convention of July 2, 2019. Once in force, Hong Kong will be the only jurisdiction where certain intellectual property related judgments would be enforceable in the Mainland.

With the support from the Central People's Government, the Department entered into a Memorandum of Understanding with the United Nations Commission on International Trade Law during the Legal Week to confirm the co-organisation of the Asia Pacific Judicial Summit on a biennial basis and to explore further collaboration.

In the wake of the promulgation of the Outline Development Plan of the Greater Bay Area, the legal departments in Guangdong Province, Hong Kong and Macao, established a joint conference mechanism in September 2019 to work on projects of mutual interest at the government level. Other initiatives of the Department

include co-organising with the Hague Conference on Private International Law the Inaugural Global Conference on the Hague Judgments Convention concluded last July, and exporting the Hong Kong brand, "Mediate First", to other jurisdictions.

The vast amount of professional work and the initiatives of the Department would not have been possible without the dedication and hard work of my colleagues for which I am most grateful.

New Initiatives of 2020

2020 marks the 30th anniversary for the proclamation of the Basic Law under the Constitution of the People's Republic of China. The Department will organise a conference to commemorate this.

Other new initiatives include the organisation of inter-governmental meetings and conferences to enhance our international stature.

Importantly, the Department will launch a 10-year project entitled "Vision 2030 for Rule of Law". This initiative seeks to promote the proper understanding and recognition of the rule of law by studying its various

elements through research, stakeholders' collaboration and capacity building, thereby contributing to the sustainable development of inclusive and fair societies at both the domestic and international levels.

Closing

Given this will be the last time for Chief Justice Ma to host the Opening of the Legal Year before his Lordship's retirement in January next year, I would like to, on behalf of the Department, convey our sincere appreciation for his Lordship's contribution to the rule of law, and his efforts in retaining and attracting talent of the highest professional quality for our Judiciary to administer justice.

Last but not the least, a happy and peaceful new year to you and your families. Thank you very much.

Note 1: Tom Bingham, "Rule of Law", Penguin Books (2011), at p.37. The late Lord Bingham insightfully explored the eight elements of the rule of law, including "accessibility of the law", "law not discretion", "equality before the law", "exercise of power in good faith", "protection of fundamental human rights", "timely and effective access to dispute resolution procedures", "fair trial" and "observance of international law". At the same

time, he acknowledged the limitation of his view on the rule of law in that it may not be comprehensive and universally applicable.

Note 2: "Declaration of the High-level Meeting of the General Assembly on the Rule of Law at the National and International Levels" (adopted by the General Assembly of the United Nations on 30 November 2012) (A/RES/67/1), at para. 7. See also paras. 3 and 9.

Note 3: *Black Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] A.C. 591, 638D.

Note 4: *Secretary for Justice v Wong Chi Fung and Others* [2018] 2 HKLRD 699, at para. 110

Note 5: *Secretary for Justice v Persons unlawfully and wilfully conducting themselves in any of the acts prohibited under paragraph 1(a) and (b) of the Indorsement of Claim* [2019] HKCFI 2809, at para. 14.

Note 6: *Secretary for Justice v Persons unlawfully and wilfully conducting themselves in any of the acts prohibited under paragraph 1(a) and (b) of the Indorsement of Claim* [2019] HKCFI 2809, at para. 13.

Note 7: *R v Caird & Others* [1970] CR App R 499.

Note 8: Chief Justice Ma's speech, "Strength and Fragility in Tandem: The Rule of Law in Hong Kong", the Bar Council of England and Wales Annual International Rule of Law Lecture 2015, at paras. 16 – 22.

Note 9: *R (on the application of Miller and another)*

(Respondents) v Secretary of State for Exiting the European Union (Appellant), REFERENCE by the Attorney General for Northern Ireland – In the matter of an application by Agnew and others for Judicial Review, REFERENCE by the Court of Appeal (Northern Ireland) – In the matter of an application by Raymond McCord for Judicial Review) [2017] UKSC 5, at para. 42.

Ends/Monday, January 13, 2020