Speech by Solicitor General
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Following is a speech by the Solicitor General, Mr Bob Allcock, on Challenges to Hong Kong's Legal System in view of Hong Kong's Return to Chinese Sovereignty at a Conference on the Bicentenary of the French Civil Code at the City University of Hong Kong today (November 9):

Distinguished speakers and delegates, ladies and gentlemen,

The topic of my presentation this afternoon is of great practical and jurisprudential interest. It is also something that the former Legal Department and the current Department of Justice have been working on for many years.

I joined the former Legal Department of the Hong Kong Government in 1986. As a result, I was privileged to be involved in some of the work undertaken in preparation for the Reunification in 1997. Since Reunification, I have as a member of the Department of Justice been associated with some of the legal issues that arose out of the implementation of 'one country, two systems'.

I therefore welcome this opportunity to discuss the challenges that Reunification has brought about. I propose to divide my talk into three parts, namely pre-Reunification, post-Reunification, and the future.

I. Pre-Reunification Challenges

I will start with the pre-Reunification challenges. The Basic Law of the Hong Kong SAR was adopted by the National People's Congress in April 1990. So far as the legal system was concerned, its underlying philosophy was one of continuity. However, Hong Kong's legal system was an offshoot of England's common law system, which is based on the English language. China has a fundamentally different system, which is based on the Chinese language. No one doubted, therefore, that it would be a real challenge to turn the principle of continuity into a reality.

Language

When the Sino-British Joint Declaration was signed in 1984, all of Hong Kong's hundreds of Ordinances were expressed only in the English language. The Basic Law allows English to be continued to be used in the law, in addition to Chinese. It does not, however, envisage that English alone may be used. It was therefore decided that, before Reunification, all our laws should be bilingual, and all of our courts should be able to operate in either English or Chinese.

The process of producing an authentic Chinese text for hundreds of Ordinances was indeed challenging. Given the many obscure English terms used in the law, many new Chinese expressions had to be invented. Nonetheless, the herculean task, which lasted about ten years, was finished shortly before Reunification. In addition, starting from 1989 all new legislation has been produced in bilingual form.

Legislation was also passed enabling all courts to operate in either English or Chinese, at the choice of the court itself. Even where English is used, translation to and from Chinese is of course available where a party or witness needs it.

Continuity of laws

What about the continuity of the law itself? Article 160 of the Basic Law provides that, upon the establishment of the Hong Kong SAR, the laws previously in force in Hong Kong shall be adopted as laws of the Region, except for those which the Standing Committee of the National People's Congress declares to be in contravention of the Basic Law.

This provision looked reassuring. However, the principle of continuity was at risk in two ways. Firstly, the definition of "laws previously in force" did not include UK legislation that applied to Hong Kong. Hong Kong's law in many important areas was found in such legislation. For example, its laws relating to civil aviation, merchant shipping and copyright were all UK laws.

The challenge was to ensure the continued application of those laws by re-enacting them as Hong Kong legislation before Reunification. That challenge was taken up, and completed before 1 July 1997. As a result, there was no gap resulting from the disapplication of UK laws.

What about the power of the Standing Committee of the National People's Congress to declare that some Hong Kong laws contravened the Basic Law? In

February 1997, the Standing Committee determined that 24 Ordinances (in whole or in part) contravened the Basic Law. Most of those 24 Ordinances were, in fact, colonial relics that would not be missed. However, amongst those laws were the Ordinance relating to the election of members of the Legislative Council, and parts of the Public Order Ordinance and Societies Ordinance. Their non-adoption would create important gaps in our law that would need to be filled. Those gaps were, however, filled by new legislation that was enacted immediately, or shortly, after Reunification. The new SAR therefore started life with a complete set of domestic laws.

Application of Mainland laws

Before leaving the question of the maintenance of Hong Kong's laws, I should point out that Article 18 of the Basic Law provides that national laws shall not be applied in the Hong Kong SAR except for those listed in Annex III to the Basic Law. That Annex contains a short list of national laws in areas such as nationality, diplomatic privileges and immunities, the territorial sea, and the national flag. Those laws would not have a major impact on our legal system. Hong Kong's legal system would, for most purposes, be entirely distinct from that in the Mainland.

The courts

I turn now to the courts. When the Basic Law was promulgated in 1990, the final avenue of appeal for cases heard in Hong Kong was the Privy Council in London. That position clearly could not survive Reunification. The Basic Law provided that a Court of Final Appeal should be established in Hong Kong, and that judges from other common law jurisdictions may as required be invited to sit on that court.

The challenge, which proved to be a difficult one, was to establish a Court of Final Appeal in Hong Kong that would be ready to operate on 1 July 1997 at the latest, and possibly earlier.

There were two serious difficulties. The first was the composition of the court. As I have just said, the Basic Law provides that the Court of Final Appeal may invite judges (in the plural) from other common law jurisdictions to sit on it. The question was how was this provision to be implemented? In September 1991, the Sino-British Joint Liaison Group decided that, for each hearing, the court should consist of the Chief Justice, three permanent judges, and a fifth judge who could

either be a judge from another common law jurisdiction or a retired Hong Kong judge.

This formula, which became known as the "4+1" formula, was highly controversial. Opponents argued that it breached the Basic Law, since the Basic Law says that the court may invite overseas "judges" (in the plural) to sit on it. Those defending the formula said that it would allow overseas judges (in the plural) to be invited, but only one at a time. In December 1991, the Legislative Council passed a motion rejecting the formula. This meant that legislation to establish the court on the basis of the 4+1 formula then stood no chance of being passed.

The second difficulty was that the Chinese side of the Joint Liaison Group did not want the Court of Final Appeal established before Reunification. The British side, on the other hand, wanted the court established as soon as possible, so that it could gain experience and credibility well before Reunification.

For a few years, these two difficulties prevented any progress. Finally, in 1995, there was a breakthrough on the second issue. It was agreed that the legislation to establish the court could be passed before Reunification, but that it should only come into effect on 1 July 1997. A majority of the Legislative Council was then persuaded to adopt the 4+1 formula, and the legislation was enacted in August 1995. The remaining challenge was to ensure that local and overseas judges of the highest calibre would be appointed as judges of the Court of Final Appeal on 1 July 1997.

International Rights and Obligations

The last of the pre-Reunification challenges that I propose to discuss relates to international rights and obligations. No legal system operates in a vacuum. Each jurisdiction is part of a complex web of multilateral and bilateral treaties. Before Reunification, over 200 multilateral agreements, and a large network of bilateral agreements, had been extended to Hong Kong by the United Kingdom. If nothing were done, Hong Kong would lose the benefit of all these agreements when British administration of Hong Kong ceased on Reunification.

The multilaterals were of particular importance to Hong Kong's status as an international trade and financial centre. A sub-group of the Sino-British Joint Liaison Group worked on the idea that China should take over those multilaterals in respect of Hong Kong, and on the mechanism for doing so. Fortunately, that work

succeeded and, as a result, Hong Kong continues to participate in many international organizations, such as the WTO, the Customs Co-operation Council, and the International Maritime Organization.

The position in respect of bilaterals was different. It was not possible for bilateral agreements entered into by Britain to be transferred to China. It therefore became apparent that the network of agreements in such areas as extradition, air services, and mutual legal assistance would all fall away on Reunification. The challenge was to replace them with new ones as soon as possible.

The Joint Liaison Group again proved to be the key to this process. Under an agreement reached in the JLG, Hong Kong was authorised to sign new bilateral agreements in the areas I have mentioned, and those agreements would be recognized after 1997. As a result of that agreement, negotiations for new bilaterals began and, by the time of Reunification, Hong Kong had concluded more than ten air services agreements, a handful of fugitive offenders agreement and one mutual legal assistance agreement.

II. Post-Reunification Challenges

That covers the work done in preparation for Reunification. I now turn to the many challenges we have faced since Reunification.

One could say, in general terms, that having to operate under a new constitution has been a challenge. Before Reunification the colonial constitutional instruments were brief and rather antiquated. In contrast, the Basic Law is a detailed, modern constitution that creates many justiciable rights that did not previously exist.

I believe that Hong Kong's legal system, and the legal profession, have in general adapted to this new order without great difficulty. There are, of course, a few areas of controversy, which I will describe later. But, as a general rule, I believe the Basic Law has been smoothly implemented.

Filling the gaps

At the working level, the challenges have arisen in a number of specific areas. The immediate task, on 1 July 1997, was to ensure that there were no gaps - that nothing fell between the cracks of the transition.

Appointments to the Judiciary made by the British administration all lapsed on 30 June 1997. The Chief Executive therefore needed to make new appointments, in accordance with the recommendations of the Judicial Officers Recommendation Commission. That Commission recommended the re-appointment of all judges serving on 30 June 1997, and the Chief Executive duly re-appointed them on the morning of 1 July.

So far as the new Court of Final Appeal was concerned, appointments were made not only of a Chief Justice and three permanent judges of the highest calibre, but also of a panel of overseas judges and retired Hong Kong judges that inspired the greatest confidence. The overseas judges included, for example, a retired Chief Justice of Australia, and a serving member of the Privy Council.

As a result of all this, the courts were fully functioning on 2 July 1997. However, all the plans for the continuity of the legal system were called in question on that day. The lawyers defending a person who had been charged before Reunification with a common law offence argued that the proceedings could not continue. They argued that the common law no longer applied in Hong Kong, and that proceedings originally brought in the name of Her Majesty the Queen could not be continued in the Hong Kong SAR.

I need hardly tell you how sensational those arguments were at the time. Fortunately for the legal system, although not for the defendant, the court rejected the arguments. We all breathed a sigh of relief.

Adaptation of laws

Another step taken to ensure continuity was the enactment, in the early hours of 1 July 1997, of the Reunification Ordinance. This provided for continuity in various areas - such as existing legal proceedings, and the public service. It is also incorporated principles of statutory interpretation laid down by the Standing Committee of the National People's Congress in February 1997. Under those principles, terminology in laws previously in force that reflected the former British administration of Hong Kong is now interpreted in a way that reflects the new constitutional order. And so, for example, references to the Governor of Hong Kong are interpreted as references to the Chief Executive of the Hong Kong SAR.

Those principles have proved very useful. But it was nevertheless important that the old colonial terminology should be replaced by appropriate new terminology, through legislative amendments. The government therefore initiated what it calls the "adaptation of laws" exercise.

That exercise has not been as easy as it might seem. Replacing 'the Governor' by 'the Chief Executive' may be simple. But there are not always such convenient substitutions. References to 'the Crown' have proved particularly difficult, since it is a concept peculiar to the British constitution. Nevertheless, a steady stream of adaptation Bills were prepared and passed by the Legislative Council. The process is not yet complete - but about 93% of the Ordinances have been adapted.

Bilingualism

The challenge of creating a bilingual legal system is an ongoing process. Everyone agrees that the quality of the administration of justice must not be compromised by the greater use of Chinese. Nevertheless, the figures indicate that Chinese is being increasingly used in the courts, particularly at the lower levels. The latest figures on the use of Chinese in criminal cases are as follow -

Magistracies - over 70%
District Court - over 30%
Court of First Instance - nearly 60% in magistracy appeals and over 20% in criminal trials
Court of Appeal - over 20%

NPCSC Interpretation

The topics I have discussed so far may seem rather mundane. So let me turn to an issue that aroused passionate debate both in Hong Kong and elsewhere. Under Article 158 of the Basic Law, the ultimate power to interpret the Basic Law is vested in the Standing Committee of the National People's Congress. Hong Kong courts are authorised to interpret the Basic Law in adjudicating cases, although in certain cases they must seek an interpretation by the Standing Committee before deciding a case.

The Standing Committee of the National People's Congress is a legislative, not a judicial, body. Lawyers trained in the common law tradition may be uncomfortable

with the idea of a legislative body interpreting the law. But this reflects the Chinese Constitution. All national laws in China are subject to interpretation by the Standing Committee. However, this type of interpretation does not occur as part of judicial proceedings. It is a type of clarification of the relevant legislation, and is therefore described as "legislative interpretation".

Since Reunification, the Standing Committee has on two occasions interpreted provisions in the Basic Law. In 1999, Hong Kong's Chief Executive requested an interpretation by the Standing Committee of provisions relating to the right of abode in Hong Kong of Chinese citizens born in the Mainland. This followed a Court of Final Appeal interpretation that was causing insurmountable problems for Hong Kong. It was estimated that the effect of the court's interpretation was that, within ten years, about 1.67 million people born in the Mainland would have the right to live in Hong Kong. That could have meant a 25% increase in Hong Kong's population.

Faced with this massive immigration problem, and being unable to solve the problem in Hong Kong, the Chief Executive sought an interpretation by the Standing Committee. The Standing Committee confirmed that the provisions in the Basic Law were to be interpreted narrowly. The immigration problem was therefore solved.

Some lawyers claimed that the request for the Standing Committee's interpretation was unconstitutional. However, the Court of Final Appeal itself rejected that claim, deciding in a subsequent case that the interpretation was valid and binding on Hong Kong courts.

Nevertheless, the government recognised that the authority of Hong Kong's courts could be affected by a Standing Committee's interpretation, and made it clear that it would not lightly seek such an interpretation in future. The Chief Executive has not subsequently sought any further interpretation by the Standing Committee.

The other interpretation of the Basic Law by the Standing Committee occurred in April of this year, and was not the result of any request from Hong Kong. It related to the provisions in the Basic Law concerning Hong Kong's democratic development. This time, there were few, if any, allegations that the interpretation was unconstitutional. Some did allege that it was contrary to Hong Kong's high degree of autonomy. However, it is clear that our high degree of autonomy does not preclude the Standing Committee's power of interpretation. As one American

constitutional law expert has said, it is not surprising that the Basic Law, which is a national law of China, should be subject to interpretation by a national body.

Nevertheless, it must be accepted that the Standing Committee's power of interpretation has caused concern about the integrity of our legal system. Some lawyers consider that the challenge ahead is to see if that power can be developed in a way that is more judicial in nature, and more open and transparent.

Article 23 of the Basic Law

Another cause of passionate debate has been Article 23 of the Basic Law. Since Hong Kong is part of China, there is a need for laws in Hong Kong that protect China's national security. Instead of applying the Mainland laws on this subject, the Basic Law provides that Hong Kong shall, on its own, enact relevant laws. Proposals for such laws were set out in a public consultation paper issued by the SAR Government in September 2002. The government emphasized that the new laws would need to comply with the human rights guarantees in the Basic Law. Indeed, an opinion was obtained from a London Queen's Counsel, who specialises in human rights, to the effect that the proposals were consistent with those rights.

The public consultation exercise nevertheless revealed strong concerns about some of the proposals. As a result, the proposals were restricted in many ways before they were incorporated in the draft legislation. For example -

* the offence of treason was limited to times of war or the instigation of an armed invasion

* an express provision was added, requiring the laws to be interpreted in accordance with the ICCPR

* trial by jury was to be available for all offences

After being introduced into the Legislative Council, the Bill was scrutinised by a committee in meetings lasting over eighty hours. Over one hundred individuals or NGOs made representations to that committee. More than ninety papers relating to the Bill were prepared by the government for legislators.

As a result of that process, the government agreed to further restrictions on the

provisions. However, despite assurances that the Bill would not undermine human rights, public concern grew. On 1 July 2003, more than half a million people took to the streets in protests against many things, including the proposed legislation.

In the face of this concern, the government announced three further liberalisations. However, even those amendments were not sufficient to ensure the passage of the Bill. Eventually, in September last year, the Chief Executive announced that the Bill would be withdrawn.

The challenge of enacting national security legislation has, so far, proved too difficult. Why is this? The approach to national security issues in the Mainland in the past has caused concern in Hong Kong. In addition, the text of the draft of Article 23 was extended after the events in Tiananmen Square in June 1989. There was therefore a deep suspicion in Hong Kong that laws to implement Article 23 would be draconian and would be aimed at suppressing dissent. That suspicion continued even when a Bill was produced that was, by any standards, liberal.

The suspicion may have been fuelled by the process adopted. The government's attempt to complete the whole project - from consultation paper to enactment - in less than twelve months was ambitious. Its decision not to carry out a separate consultation exercise in respect of a draft Bill led to accusations of high-handedness. And its refusal to extend the timetable because of the impact that SARS - Severe Acute Respiratory Syndrome - had on Hong Kong was regarded as insensitive.

There is, as yet, no timetable for the resurrection of this project but the government has promised to learn from its experience. The implementation of Article 23 will, however, be one of the greatest challenges in the implementation of 'one country, two systems'.

New bilateral agreements

Let me now return to more mundane challenges. I mentioned earlier that bilateral agreements applied to Hong Kong by the UK all fell away on Reunification, but that Hong Kong had been authorised to enter into new bilaterals.

That process is an ongoing one - the challenge being to create an adequate network of agreements with jurisdictions we most need to deal with. In the absence

of this, Hong Kong could, for example, become a haven for fugitives from the law of other jurisdictions. The progress to date has been good. The current figures for relevant bilaterals are as follows -

Surrender of Fugitive Offenders Agreements: 13
Transfer of Sentenced Persons : 7
Mutual Legal Assistance in Criminal Matters : 16

Legal co-operation with the Mainland

As well as developing legal arrangements with other countries, Hong Kong has, of course, to develop those arrangements with the Mainland. Historically, there have been few of these.

Before Reunification, arbitral awards made in Hong Kong were enforceable in the Mainland, and vice versa, by virtue of the New York Convention. Ironically, they ceased to be enforceable after Reunification, because the Convention applies only as between separate countries. Since Hong Kong markets itself a regional centre for dispute resolution, this development was a cause of great concern.

The problem was, however, short-lived. In June 1999, an agreement was reached with the Mainland for the mutual enforcement of arbitral awards, and this came into effect in February 2000. As a result, Hong Kong continues to develop as one of the leading centres for international and domestic arbitration.

In most other areas, there are still no arrangements with the Mainland. For example, there is no arrangement for the surrender of fugitives and no arrangement for the reciprocal enforcement of judgments. Talks have begun in both areas. However, the differences between the two legal systems are such that, even if agreement is reached, it may be difficult to enact the necessary legislation unless the arrangements are hedged around with adequate safeguards.

Legal services in the Mainland

The fact that the two legal systems are fundamentally different also means that there is no prospect that a legal qualification in one jurisdiction will be recognised in the other. However, it is now possible for a Hong Kong lawyer to become qualified in the Mainland, and vice versa.

Moreover, Hong Kong law firms are able to set up representative offices in the Mainland. As a result of the Closer Economic Partnership Arrangement between Hong Kong and the Mainland, local lawyers have certain advantages over foreign lawyers when it comes to providing legal services in the Mainland. For example, a representative office of a Hong Kong firm (but not of a foreign firm) can enter into an association with a Mainland law firm.

As the Mainland's economy continues to expand dramatically, there is a great demand for sophisticated legal services there. Many Hong Kong lawyers are taking up that challenge and, in so doing, can contribute to the development of legal services in the Mainland.

III.Future Challenges

That is the progress report so far. What of the challenges ahead? The implementation of 'one country, two systems' is, of course, an ongoing and evolving process. As well as unfinished business in some areas, new issues are bound to arise. In order that we can resolve problems in a constructive manner, there needs to be understanding and co-operation between Hong Kong and the Mainland.

Ever since Reunification, the Department of Justice has been seeking to develop mutual legal understanding in many ways. There has been a regular flow of legal visits, in both directions; government lawyers from each jurisdiction have attended courses in the law of the other jurisdiction; mock trials have been conducted in Mainland cities to demonstrate how civil and criminal proceedings are conducted in Hong Kong; and a series of co-operation agreements have been signed with the departments of justice in various Mainland cities. I should add that the Law Society and Bar Association have also been active in developing understanding and ties with Mainland lawyers.

Let me sum up my views on the current position. In so far as the Basic Law guarantees the maintenance of Hong Kong's common law system, the rule of law and independence of the judiciary, I believe it has been an unqualified success. The more challenging issues have tended to arise from the interface between the two legal systems. Examples include the Standing Committee's power of interpretation, the implementation of Article 23, and the proposed arrangements for the surrender of fugitive offenders and the reciprocal enforcement of judgments.

In each of these areas, we must strive to implement 'one country, two systems' 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 of now, seven years after Reunification, I consider that those core values remain intact. And I believe that they will remain intact as we seek to resolve outstanding, and new, issues that confront our legal system.

Ends/Tuesday, November 9, 2004
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