

Speech by Solicitor General

The following is an address by the Solicitor General, Mr Bob Allcock, to the Presidents of Law Associations of Asia Conference today (November 20):

Presidents of Law Associations of Asia, representatives of the Hong Kong Law Society, ladies and gentlemen,

It is a great honour for me to host this lunch for so many distinguished visitors from many countries in the Asia-Pacific Region. It is a great pity that the Secretary for Justice, Miss Elsie Leung, is away from Hong Kong this week and so cannot be here to speak in person. I am a poor substitute for her, but I will do my best. I propose to say a few words about Hong Kong's legal profession under the new constitutional order.

I. The Framework

Colonial background

In order to understand the current position, it is necessary to begin with Hong Kong's colonial era. From 1842 until 1997, Hong Kong was under British administration. During that period the common law was applied in Hong Kong, and Hong Kong's legal system, and legal profession, were modelled on those in the UK. The constitutional instruments applying to Hong Kong were rather antiquated and, until 1991, they did not contain any entrenched human rights guarantees. Hong Kong, of course, had a capitalistic system, with its own currency, customs and immigration laws.

Joint Declaration and Basic Law

In 1984, the Sino-British Joint Declaration was signed, providing for the resumption of the exercise of sovereignty over Hong Kong to the PRC and for the preservation of Hong Kong's economic, political and legal systems. The Joint Declaration is a binding international agreement registered with the United Nations. For 50 years beyond 1997, it guarantees "One Country, Two Systems".

The Joint Declaration guarantees the continuance of the legal system. This is repeated in the Basic Law - the law enacted by the National People's Congress of the PRC as the constitutional framework for Hong Kong since 1 July 1997. Article 8 of the Basic Law is worth citing in full -

"The laws previously in force in Hong Kong, that is, the common law, rules of equity, ordinances, subordinate legislation and customary law shall be maintained, except for any that contravene this law, and subject to any amendment by the legislature of the Hong Kong Special Administrative Region."

In addition, there are specific guarantees in the Joint Declaration and Basic Law relating to the legal system. These include -

- * provision for a Hong Kong based Court of Final Appeal, to replace the Privy Council in London as the final appellate court for Hong Kong; and

- * a requirement that the International Covenant on Civil and Political Rights as applied to Hong Kong shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region.

Since the Basic Law came into operation on 1 July 1997, Hong Kong has, for the first time, a detailed written constitution, containing 160 articles and three annexes. This has had great significance for our legal system. The Basic Law is not simply a statement of intentions nor is it merely a policy document. It is part of Hong Kong's domestic law and it has created a new era of constitutional law in Hong Kong.

Laws previously in force

Nevertheless, a central theme of the Joint Declaration and Basic Law is one of continuity. Article 8 of the Basic Law is supplemented by Article 160, which 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.

In February 1997, the Standing Committee of the National People's Congress, acting under Article 160 of the Basic Law, adopted all the laws previously in force,

save for 24 Ordinances which were found (in whole or in part) to contravene the Basic Law. This means that the common law principles, and nearly all the 600-odd Ordinances, that were previously in force, continue to apply in the Hong Kong SAR.

The courts and judges

So far, I have been emphasising the continuity of the law. What about the courts and the judges?

Article 81 of the Basic Law provides that the judicial system previously practised in Hong Kong shall be maintained except for those changes consequent upon the establishment of the Court of Final Appeal of the Hong Kong SAR. I understand that you have received a briefing from the Chief Justice. You may therefore be aware that our judges are appointed on the recommendations of an independent commission, and have security of tenure. Judicial independence is fully protected by the Basic Law.

So far as individual judges are concerned, every single judge who had been in office on June 30, 1997, was re-appointed the following day. New judicial appointments since then have, I believe, been entirely uncontroversial. And the judges from overseas common law jurisdictions, appointed as non-permanent members of the Court of Final Appeal, are of the highest international standard. They include five serving members of the House of Lords.

II. The Experience

So much for the constitutional framework. What about the experience since Reunification? Before 1997, there were many sceptics who thought that the guarantees in the Basic Law would be of no value. Those sceptics have now been proved to be wrong.

The guarantees in the Basic Law, particularly those relating to human rights, have been the source of much litigation. The courts have interpreted and enforced those guarantees without fear or favour. For example, they have made rulings on the constitutionality of

* the Provisional Legislative Council

* provisions on right of abode in the Immigration Ordinance, challenged in a number

of cases

- * the law prohibiting the desecration of the national and regional flags
- * village elections
- * the abolition of the two former municipal councils
- * a reduction in civil service salaries.

The decisions in these cases, some in favour of the government and some against, demonstrate that the Basic Law is not a piece of window-dressing. It is a powerful and enforceable constitutional document.

III. The Legal Profession

Let me now turn to the legal profession in Hong Kong. Article 94 of the Basic Law provides that -

"On the basis of the system previously operating in Hong Kong, the Government of the Hong Kong Special Administrative Region may make provisions for local lawyers and lawyers from outside Hong Kong to work and practise in the Region."

Article 35 states that -

"Hong Kong residents shall have the right to confidential legal advice, access to the courts, choice of lawyers for timely protection of their lawful rights and interests or for representation in the courts, and to judicial remedies.

"Hong Kong residents shall have the right to institute legal proceedings in the courts against the acts of the executive authorities and their personnel."

The effect of those provisions, both formally and in practice, is that Hong Kong continues to have a strong and independent legal profession. It consists of about 5,200 practising solicitors, about 840 practising barristers, and about 650 foreign lawyers. The legal profession continues to be a vital source of strength for Hong Kong in many ways.

Legal services

Firstly, the legal profession provides a full range of legal services to local and international clients, making Hong Kong a regional hub for legal advice and dispute resolution services.

China's WTO entry will undoubtedly have a major impact on global trade and investment. All of this extra trade and investment will require a sound legal underpinning, because foreign companies will not readily and consistently invest or trade in markets where they cannot enforce contracts or judgments.

Some Mainland lawyers are extremely sophisticated in their practice, have a good command of English and IT, and have up-to-date information on legal developments elsewhere in the world. There are approximately 110,000 lawyers in the Mainland. However, only about 5,000 to 6,000 of them have the language proficiency and experience to handle international legal practice. So there will be considerable scope for Hong Kong-based law firms - local and international - to fill this gap.

Local and international law firms compete for business in our market, and this has led to a cross-fertilisation of experience and cultures. As a result, we have a sophisticated legal sector that deals with the entire spectrum of legal work in areas such as capital markets, corporate finance, securities, intellectual property, information technology, and maritime law.

Hong Kong's legal system also offers a reassuring setting for litigation, arbitration, mediation and other forms of alternative dispute resolution. Awards made by the Hong Kong International Arbitration Centre are enforceable in the Mainland and in all contracting states of the New York Convention. That centre already handles about 300 cases per year, and this is likely to increase further as alternative dispute resolution becomes more popular.

It is not just international corporations that find comfort in the depth and breadth of experience we have in our legal sector. Mainland parties may also find there are benefits in using Hong Kong as a dispute resolution centre. We share the same language and culture, and we are extremely familiar with the way the Mainland market operates. So it is clear that the Hong Kong legal sector possesses unique advantages in serving the legal needs of both international and Mainland business.

Those advantages have been reinforced by special privileges given to Hong Kong lawyers under the recently concluded Closer Economic Partnership Arrangement made between Hong Kong and the Mainland.

Human rights

The second, and more specialised, role that Hong Kong lawyers play is in respect of human rights. There is thankfully no shortage of lawyers who are prepared to help individuals to protect their human rights if they are considered to have been breached. And lawyers are in the forefront of those commenting on, and sometimes criticising, government proposals on the basis of human rights. I would add that lawyers in the Department of Justice, myself included, are equally committed to ensuring that fundamental human rights are respected by the government. Indeed, one of the main functions of the Legal Policy Division, which I head, is to vet all government proposals for compliance with human rights guarantees. Although there are sometimes differences of opinion between government lawyers and some private practitioners on these issues, no one should doubt the sincerity and professionalism of our work.

Reforms

What of the challenges faced by the profession? Alongside the global economy comes global competition. If future Hong Kong lawyers are to be able to compete with the best in the world, we must ensure -

- * firstly, that their legal education and training is world class; and
- * secondly, that the laws relating to the legal profession enable lawyers to provide their services most efficiently and cost-effectively.

So far as legal education is concerned, a review of the existing system by consultants has revealed deficiencies that we are anxious to overcome. As a result of recommendations made by the consultants, our three-year LLB programme will be extended to four years, starting next year. And the one year Postgraduate Certificate in Laws - the professional training programme - is being substantially revised to make it more skills orientated. We are hopeful that these reforms, supported by continuing legal education throughout lawyers' careers, will ensure that Hong Kong's legal profession will remain world class.

With regard to the laws relating to the legal profession, the former Hong Kong Government initiated some reforms shortly before Reunification. These included provisions enabling solicitors to operate through solicitor corporations. The Law Society has been preparing detailed regulations relating to such corporations, which will soon be promulgated. Thereafter, solicitors will have the ability to offer their services either as sole practitioners, through a partnership or through a solicitor corporation.

Another matter that is under consideration is the question of higher rights of audience. As you may know, Hong Kong has a split legal profession. Only barristers have rights of audience in the higher courts. The Law Society has proposed that solicitors should be able to acquire higher rights of audience through an accreditation system, similar to that in England and Wales. The Administration is giving careful consideration to that proposal, which is opposed by the Bar Association.

A third area in which reform is being considered concerns conditional fees. At present, Hong Kong lawyers are not permitted to enter into arrangements under which the client only pays the lawyer if the case is successful. In the light of developments in the UK, where such conditional fee arrangements are possible, there have been some calls for a similar reform here. The issue has been referred to our Law Reform Commission, which is likely to consult widely before making its recommendations.

Conclusion

Ladies and gentlemen, I have tried to give a brief overview of our new constitutional arrangements and the role that Hong Kong lawyers play under them. The overall picture is one of continuity - continuity of our legal system, of the rule of law, of judicial independence, and of a strong and independent legal profession. At the same time, new opportunities and challenges are now presented to the legal profession, particularly through China's accession to WTO and the CEPA. In order to help the profession to meet these challenges, the SAR Government is doing its best to assist the profession to modernise and remain competitive.

Finally, may I wish you all a productive and enjoyable conference, and hope that many of you will return to Hong Kong in the years to come.

Thank you.

Ends/Thursday, November 20, 2003