

Speech by Secretary for Justice

Following is the speech by the Secretary for Justice, Ms Elsie Leung, at the Ceremonial Opening of the Legal Year today (January 12):

Chief Justice, Chairman of the Bar Association, President of the Law Society, distinguished guests, ladies and gentlemen,

I wish to say a few words about my department's roles in promoting Mainland-related legal services, and in the governance of Hong Kong. First, Mainland-related legal services.

WTO and CEPA

China's accession to the World Trade Organisation will have a profound impact on its markets for both goods and services. So far as legal services are concerned, the WTO's requirements of transparent market regulation, of improved dispute resolution procedures, and of respect for the sanctity of contracts will stimulate further reform and modernisation.

Hong Kong lawyers can contribute to that historic process. In particular, our experiences of the rule of law, of international trade and finance, and of WTO compliance can be shared with our Mainland colleagues.

The Closer Economic Partnership Arrangement (CEPA), which came into effect on the first of this month, enables Hong Kong lawyers to expand into the Mainland market in ways that are not available to foreign lawyers. For example, they may enter into an association with a Mainland law firm; become employed by a Mainland law firm as a Hong Kong legal consultant; or, after qualifying as a PRC lawyer, have limited practising rights as such. Residence requirements for Hong Kong law firms setting up offices in the Mainland have also been shortened or, in some cases, dropped entirely.

CEPA offers a win-win situation: Hong Kong lawyers can take advantage of the continuing economic growth in the Mainland and, at the same time, they can help to develop international trade and financial expertise there.

My department has already contributed to this process by assisting in the negotiation for the legal services provisions in the CEPA. It will continue to contribute in the following ways.

Legal Services Co-operation Agreements

First, it will help to foster systematic co-operation between Hong Kong and Mainland lawyers. This co-operation will be mutually beneficial. For example, Hong Kong lawyers can benefit by improving their understanding of legal terminology used in the Mainland, and by learning more about PRC laws and regulations. Mainland lawyers can acquire more knowledge of our concept of due legal process, and of international practices.

My department proposes to foster such systematic co-operation, under the framework of CEPA, by entering into Legal Services Co-operation Agreements with provincial and municipal authorities. These agreements will strengthen exchanges of information and the training of legal personnel. They will also provide a context within which technical or procedural problems arising from the implementation of CEPA in a province or municipality can be resolved without troubling the central authorities.

So far, my department has entered into Co-operation Agreements with the Justice Bureaus of Qingdao, Chongqing, Beijing, Nanjing and Shanghai. It has also reached preliminary agreement with the Justice Bureaus of Zhejiang, Guangdong and Shenzhen. Further agreements are expected in due course.

Promoting Hong Kong

A second way in which my department will help to develop Mainland-related legal services is by continuing to promote Hong Kong as a legal services and dispute resolution centre. I believe that international investors and businessmen with projects in the Mainland will be particularly attracted by the quality and convenience of the legal services and dispute resolution offered here.

Legal services information network

A third initiative in this area is our proposed creation of a website containing

information on lawyers in Hong Kong and the Mainland and, eventually, in Macau and Taiwan. This will enable members of the public not only to identify those who can provide relevant legal services but also to obtain advice via the Internet. The legal market of greater China is vast, and an internet platform offers an ideal way to tap into it.

Other initiatives

I have outlined three initiatives concerning Mainland-related legal services. My department will explore other possibilities as CEPA is implemented and, possibly, extended. In all these activities, I look forward to continuing co-operation with the Bar Association and the Law Society.

Some members of the legal profession doubt whether CEPA will bring financial benefits to their practices. This is something that I cannot guarantee. The role of the government is to provide an additional platform from which local lawyers can expand their practices; to facilitate their entry into the Mainland market; and to develop Hong Kong as a legal services centre. This we will do with fullest respect for the wishes of practitioners. In that respect, I note that both the Bar Association and the Law Society have pursued CEPA with enthusiasm.

It is up to individual practitioners to seize opportunities that are available. For example, barristers may make use of their overseas practice rules to accept certain types of instructions from clients outside Hong Kong, without the assistance of a Hong Kong law firm. I have been told by some solicitors that, through participation in promotional activities in the Mainland, they received instructions for listings and raising capital in the Hong Kong market, for acquisition of shares in Mainland enterprises, and for arbitrations in Hong Kong in which both parties are Mainland enterprises. I would like to think that those law firms which once relied almost solely on conveyancing work will diversify their services and stride into new areas of business. Now that the property boom has ended, such firms cannot expect to survive unless they transform their practices. I believe that our legal services sector, like other service sectors, will be bold enough to ride through the metamorphosis of economic transformation and will go from strength to strength.

The Governance of Hong Kong

I turn now to the role of my department in the governance of Hong Kong. It is

important that the nature of that role should be fully understood.

As a Principal Official, I am a member of the Executive Council and am politically accountable for the work of the Department of Justice. But my department is unique in that it exists to provide professional legal advice and services to the government. The counsel who provide the advice and services are politically-neutral civil servants. In providing their services, my colleagues must observe the same high-standards of professionalism and integrity as lawyers in the private sector.

So far as prosecutions are concerned, Article 63 of the Basic Law provides that the Department of Justice shall control criminal prosecutions, free from any interference. Over the years, the Director of Public Prosecutions and I have emphasized that, in discharging that constitutional duty, we follow established prosecution policies and practices. I am pleased to note that there appears to be a growing recognition of the importance of this approach, and of the fact that prosecution decisions should not be dictated by political considerations.

That encourages me to discuss my department's approach to other areas of work. My colleagues sometimes have to give advice on, and to explain publicly, highly controversial government initiatives. As a result, they may be perceived to be taking a political position in respect of those initiatives. But that is not the case. The role of lawyers in my department in such cases is as follows:

* Firstly, they may provide the relevant bureau with legal information from other jurisdictions, indicating how the issue is tackled elsewhere.

* Secondly, they advise whether the bureau's proposals are consistent with the Basic Law, particularly in respect of its human rights guarantees.

*Thirdly, they advise whether the proposals are acceptable as a matter of legal policy. This involves vetting the proposals against fundamental principles which underpin the common law system.

*Fourthly, law drafting counsel may need to prepare draft legislation to give effect to the policy proposals.

*And, fifthly, counsel from my department will assist the bureau in explaining the legal effect of the proposals both to the community and to members of the Legislative

Council.

The fact that Government Counsel help to promote the proposals does not, of course, mean that these are the only proposals that would be legally acceptable. There may be many ways of dealing with an issue that are constitutional, and consistent with human rights and legal policy. My department's support of the proposals selected by a policy secretary merely reflects a view that those proposals are one such way.

I am emphasizing this point in order that political and legal considerations can be separated as far as possible. When controversial proposals are being debated, members of the public should know whether arguments supporting or rejecting those proposals are legal or political. This is particularly important when lawyers in my department participate in the debate. If the distinction is not made, it may appear that lawyers are constantly disagreeing on fundamental questions of law. That may not promote confidence in our legal system.

As we move forward to tackle new issues of constitutional importance, I will be encouraging my colleagues to discuss the legal parameters of those issues with the Bar Association and the Law Society. By so doing, I hope that we will be able to develop a consensus on those parameters or, if not, at least find some common ground. If that can be achieved, subsequent debates on how the controversial issue should be taken forward can focus, and can be seen to focus, on political rather than legal considerations.

Conclusion

Chief Justice, it only remains for me to wish you, and everyone else here today, a productive, healthy and happy New Year. Thank you.

Ends/Monday, January 12, 2004

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