

## Speech by the Secretary for Justice

\*\*\*\*\*

Dr. Chow, Mr. Chiu, Hon Consul General Umezu San, Distinguished Guests, Ladies & Gentlemen,

It gives me great pleasure to be here to-day, meeting some of my old friends and making new ones.

I am grateful to Mr. Albert Sanguinetti, the Vice President, for inviting me to this Luncheon so that I may have the opportunity to speak to you on the rule of law and human rights situation in Hong Kong shortly after the 4th Anniversary of the establishment of the HKSAR. The rule of law and civic freedoms are two of the quintessential qualities that have made Hong Kong a unique and successful city. These continue to be robust in Hong Kong and are qualities that the Government will continue to protect vigorously. I shall illustrate how.

### The Rule of Law

The rule of law has a number of meanings and corollaries. In brief, it means that everything must be done in accordance with the law - the principle of legality. It means nobody is above the law. In the context of the Government, its powers must derive from the law and be exercised in accordance with the law. Therefore, even where the Government is vested with certain discretionary powers, such discretion must be exercised judiciously and the courts are in a position to prevent its abuse. Citizens have the right to challenge in courts the legality of acts of the government (including the validity of the law under which it acts) and the disputes are to be decided by an independent judiciary. Justice must also be reasonably speedy and affordable because if access to the courts is slow and costly, the rule of law will be diminished. The law should also be even-handed between government and citizens, striking a balance between the needs of fair and efficient administration and the rights of the individual. Hence representative democracy, bringing with it the necessary checks and balances, is also essential for the rule of law. The observance of the rule of law makes a government one of laws and not of men (or women!).

### Basic Law Protection

The HKSAR Government's powers derive from the Basic Law, which has enshrined into its Articles the ingredients of the rule of law. Hence the Basic Law provides for: No law enacted by the legislature of the HKSAR shall contravene the Basic Law (BL11). The

Government of the HKSAR must abide by the law and be accountable to the elected Legislature (BL64). The courts of the HKSAR shall adjudicate cases in accordance with the laws applicable in the Region (BL84) with power to adjudicate on the legality of laws and of government action (BL19). The courts of the HKSAR shall exercise judicial power independently, free from interference. Members of the judiciary shall be immune from legal action in the performance of their judicial functions (BL85). Judges of the courts of the HKSAR shall be appointed by the Chief Executive on the recommendation of an independent commission (BL 88) and they enjoy security of tenure of office (BL89). The legal system practised in Hong Kong before the reunification remains unchanged (BL 11) and, with the exception of 24 ordinances which were in contravention of the Basic Law in whole or in part, the laws previously in force in Hong Kong, including the common law, were adopted as the laws of the HKSAR (BL 8 & 160). The fundamental rights and duties of the residents of the HKSAR are specified in and protected by Chapter III of the Basic Law. Constitutionally and structurally, therefore, the rule of law is safely entrenched in the Basic Law.

#### Judicial Reviews since Reunification

What has happened in reality? Since the establishment of the HKSAR, its Government has continued to abide by and positively promote the rule of law. As before, Government's and the legislature's actions have from time to time been challenged under the law. Cases such as:

- \* the validity of the Provisional Legislative Council,
- \* the legality of the Immigration Ordinance as amended in July 1997,
- \* the power of the Chief Executive to prescribe conditions of civil service by executive order,
- \* the right of Legislative Council to debate the removal of one of their members sentenced to imprisonment on conviction of a criminal offence before he exhausted all venues of appeal,
- \* the constitutionality of the law prohibiting the desecration of the national and regional flags,
- \* the requirement of subvented agencies to engage only registered social workers,
- \* the validity of village elections,
- \* the abolition of the two municipal councils,

- \* the imposition of rates on certain development sites,
- \* the restriction on appointability of principals over the age of 60 years in aided schools,
- \* the refusal to employ candidates with relatives suffering from schizophrenia in disciplined services,
- \* and recently the allocation of school places to cater for the different pace of development of boys and girls

have all been challenged in courts. These cases clearly showed that the parties involved were neither afraid nor hesitant to assert their rights in the courts of Hong Kong. Although, on the whole, the courts have upheld the legality of the relevant legislation and Government actions, in some of these cases the judges did not hesitate to pronounce judgment against the Government when they found the law or administrative action contravening the fundamental rights of the individuals as protected by the Basic Law and human rights legislation. This is the essence of an independent Judiciary, which we shall continue to cherish. You will notice that many of these issues under dispute related to new legislation, e.g. anti-discrimination legislation, which was only enacted in recent years: or they relate to the Basic Law which is new in our constitutional order. The Government abides by the decisions of the courts - rightly so. This does not of course prevent the Government from seeking further redress available under the law. The fact that sometimes the Government decides to appeal the judgment of a lower court is not due to any disrespect for the courts or for human rights, but rather because until final adjudication of the issue, frequently controversial, and unless with the guidance of the highest judicial organ, one may never be certain that any amendment of the law or administrative measures, if made or taken, would not be held again to be inconsistent with the law by another court. But once the matter is finally adjudicated, the Government would introduce legislative amendments or administrative measures to rectify the matter in accordance with the development of the law.

### Perceptions defended

Decisions to prosecute, or not to prosecute, are of course vital examples of the rule of law in action. Each case must be carefully and impartially examined as to admissible evidence and, where relevant, public interest principles. Inevitably some decisions attract public concern. In this respect, the Department of Justice has, wherever possible, sought to modernise the traditional practice whereby no reason would be given in respect of non-prosecution. This rule exists for good reasons, namely, to protect a person from unfair public trial by the media. However, in face of the natural community expectation of more transparency and accountability, we now consider, where possible,

how best to account to the public without abandoning the purpose for which such rule exists. However, to give an example of how people might be misled by perception: when in early 1998 the Department of Justice made a decision not to prosecute the then Director of Xinhua News Agency under the Personal Data (Privacy) Ordinance, some people said that it raised grave doubts for the rule of law in future because the Director was a Mainland official stationed in Hong Kong. A legislator took out a private prosecution but after judicial examination the summons was struck out.

Some critics claimed that there has been deterioration of the rule of law since the Reunification because the Government supposedly abdicated jurisdiction to the Mainland in Cheung Tze-keung and Li Yu-hui's cases. In the absence of a rendition agreement, I cannot see how the Government could have lawfully procured the return of those accused to Hong Kong for trial following their arrest in the Mainland, bearing in mind that these persons also committed crimes in the Mainland, and I expect that the public would require the Government to act only in accordance with the law.

There has however been a change of people's attitude towards the interpretation of certain provisions of the Basic Law by the Standing Committee of the National People's Congress over the Right of Abode : the objection slid from 'unconstitutional' to 'unlawful' to 'should not have done it' to 'understandable but don't do it again'. The domestic Legislature has no power to amend the Basic Law to deal with the increase of population which Hong Kong could not sustain - only the NPC has the power to amend, and the NPCSC the power to interpret the Basic Law. Although the Government has repeatedly said that the power of interpretation would only be exercised by the NPCSC sparingly and would only be requested by the Government to resolve a problem which we could not resolve, it would be irresponsible for the Government to commit itself never to make any request for interpretation in future as there may be problems which cannot at present be foreseen.

Hong Kong legal system amongst the best in Asia

Since the Interpretation of the Right of Abode provisions, three additional judges of the highest courts in Britain, Australia and New Zealand of highest international standing have been appointed to our Court of Final Appeal. This reflects the continuing confidence placed in Hong Kong's judicial system by other major common law jurisdictions. Their appointments and that of the other Non-Permanent Overseas Judges have played an important part in establishing the excellent reputation of the Court. Any one fearing the erosion of judicial independence underestimates the wisdom and integrity of the judicial officers who administer justice conscientiously day in and day

out in our courts. They, together with the overseas judges, are our pillars in upholding the rule of law.

Four years after the Reunification, the rule of law continues to be maintained, not only by the independent judiciary, but by the concerted efforts of the law enforcement agencies, the independent legal profession, the prosecuting counsel in my Department and the independent Bar in private practice, most of whom you do not see in newspaper headlines or on the television, and of course by the Government in abiding by the law.

In the Asian Intelligence published by the Political & Economic Risk Consultancy Ltd. on the 30 May, 2001, the legal systems in Singapore and Hong Kong continue to receive top marks. The assessment of 'trend of perception change' was expressed to be 'improving on the year'. International businessmen are impressed with the independence of the judiciary and its professionalism. They are not worried about political interference and are of the view that the legal system of Hong Kong works efficiently in the traditions of common law.

A survey conducted among Hong Kong residents by the Chinese University's Institute of Asia Pacific Studies, the results of which were released a few days ago, showed that 66 per cent of the respondents were satisfied with the current rule of law situation. These are good indications that the rule of law in Hong Kong is a reality.

#### Convention obligations under ICCPR & ICESCR

Some commentators have questioned the Government's sincerity in complying with the obligations under the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic Social and Cultural Rights (ICESCR) because the UNHR Committee and the ESCR Committee dealing with the reports by Hong Kong expressed concern in their Concluding Observations that some of their previous recommendations had not been implemented. Both of these Conventions continue to apply in Hong Kong under Article 39 of the Basic Law, which states that the provisions of the ICCPR and ICESCR and International Labour Conventions as applied to Hong Kong shall remain in force and shall be implemented through the laws of the HKSAR. Therefore, subject to existing reservations, it is clear that Hong Kong must respect its legal obligations to comply with these covenants. However, one must also understand the nature of these obligations. The ICCPR is implemented in various ways, including provisions in the Basic Law, the Hong Kong Bill of Rights Ordinance (which only applies to the public sector), the 3 anti-discrimination Ordinances, substantive provisions in other ordinances and administrative measures. Although there is no single statute which implements the ICESCR, the rights protected by this Convention are

ensured by provisions in the Basic Law and over 50 ordinances. By Article 2 of ICESCR, all State Parties are required to take steps to achieve progressively the full realization of the rights recognised in it. The steps to be taken include not only legislative, but also administrative, judicial, policy, economic, social and educational measures and other steps. The obligations are therefore described by many legal experts as 'promotional' and 'aspirational' and are accepted as such by our courts, the most recent judgement having been delivered on the 11 April 2001. One must also understand that whilst the Committees mentioned above comprise esteemed experts on human rights, there are other experts holding different views. Although the Committee on ESCR disagreed with the view that the State Party's obligation is aspirational and promotional, the courts in Hong Kong took into consideration other experts' views, and held that it was so. Furthermore, these Committees are neither courts nor quasi-judicial bodies. They do not perform judicial or quasi-judicial functions in considering the States Parties' reports. The Concluding Observations therefore must be looked at in such light: they facilitate dialogue between the Committee and the State party to assist the latter in the implementation of its treaty obligations, which in the case of ICESCR is to achieve the realization of economic and social rights progressively.

#### Implementation of treaty obligations by HKSAR

Hong Kong has been implementing the obligations under ICCPR and ICESCR by the application of the Conventions under the Basic Law, the enactment of Hong Kong Bill of Rights Ordinance and other legislation. The government has taken steps to implement many of the recommendations of the Committees, e.g. by the establishment of the office of the Ombudsman, the Personal Data Privacy Commission, the Equal Opportunity Commission, and lately the Women's Commission, all within recent years. It has conducted training programmes for unskilled women and provided them with allowances during training courses. It has undertaken to consult the public on the need for anti-racial discrimination law, and has made a preliminary decision to raise the age of criminal liability of children. That Hong Kong has made progress in relation to human rights is generally accepted, but there is of course always room for improvement since society continues to develop. Indeed, in the Concluding Observations of the Committee on ESCR upon consideration of Hong Kong's report in May this year, the Committee identified 11 positive aspects of the report, one of which was that "the Committee notes with appreciation that the Committee's General Comments are valuable source materials consulted frequently by the Human Rights Unit of the Justice Department".

There is sometimes disagreement on how the Conventions are to be implemented. For example, some people thought that unless the Chief Executive is elected by universal suffrage, there is a breach of the Convention obligation. This is not necessarily correct.

There are authorities which hold that the obligation is fulfilled if the executive is accountable to an elected legislature even though the members of the executive are not elected.

I would also add that the rights and freedoms protected by the Conventions can only be restricted on reasonable and rational grounds, such restrictions must be prescribed by law; any such law must be passed by the elected Legislature and the restrictions cannot contravene the two Covenants.

### Human Rights Situation in Hong Kong

In October 2000, the Committee on Foreign Affairs, Human Rights, Common Security and Defence Policy reported to the European Parliament that "the 'One Country, Two Systems' principle remains reasonably intact and, while requiring constant vigilance, Hong Kong nonetheless remains one of the freest societies in Asia". In the Six-monthly Report on Hong Kong July-December 2000 by the Secretary of State for Foreign & Commonwealth Affairs of United Kingdom, presented on the 27 February 2001, he said that the people of Hong Kong continue to enjoy freedom of association and freedom of worship, and freedom to hold peaceful and orderly demonstrations, and concluded that Hong Kong remains a free and open society and a great international city, that it continues to look out to the world and the international community continues to engage with Hong Kong as a place where essential rights and freedoms are respected.

However, in almost all of the reports I have just referred to above, the issue of Falun Gong was touched upon and a few days ago, newspapers reported that the Hong Kong Journalists' Association criticised the Chief Executive for vilifying Falun Gong in an unwarranted manner. The Association saw that as a move to encourage self-censorship. The reality is rather different. Falun Gong remains in operation in Hong Kong. It is not banned by law, and is practised publicly with its members continuing to hold public processions and demonstrations without any interference by the Government. Furthermore, the Chief Executive said recently that it was (and is) not the right time to legislate for its control. Articles on Falun Gong appear in newspapers frequently and their activities reported. How the Chief Executive's remarks could be described as threatening freedom of expression in Hong Kong is difficult to understand.

### Falun Gong

The Chief Executive described Falun Gong as a cult.

The term 'cult' is used to describe an organization, religious or otherwise, the behaviour of which may be problematic. Although there is no definition of 'cults', their existence in

Hong Kong has from time to time been recognised and for most people, the concept of a "cult" is, at the very least, a matter of public concern. The Cour de Cassation (French supreme judicial court) held that "to assimilate a community as a sect does not constitute a defamation because of the imprecise concept of sect" (the equivalent of cult).

The Chief Executive's statement was based on the doctrines preached by Li Hongzhi which are available on the website of Falun Gong, and on reported incidents of injury (physical and mental), death and self-immolation in the Mainland. Furthermore, Falun Gong followers claim that they have tens of millions of believers in the world and in the Mainland, whilst Chinese official figures indicate that there are 1.5 to 2 million followers. Some people argue that Falun Gong in Hong Kong has not caused any harm or injury to its followers. However, since it is fair to assume that all Falun Gong followers share the same beliefs and practise the same doctrines originating from the same leader, Hong Kong cannot wait until actual damage is done before expressing any concern or exercising any monitoring over the actions of this cult in Hong Kong. Hence, for the Government to remain mute on this issue would be irresponsible. We respect freedom of religion and of association. These are protected by the Basic Law. However, whilst one has absolute freedom of belief, the way in which one manifests his religion or belief may be subject to limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others. To give an example, a person may believe that he can fly and the Government cannot and should not interfere with that belief. But it would be very different if he takes 12 followers to the top of a high building and persuades them to jump off because he believes they can fly. Would you not try to stop them in such circumstances?

### The Chief Executive has a Duty to Speak

The first item of the Chief Executive's powers and functions described in BL48 is 'to lead the government of the Region'. He certainly has a duty to speak on a matter of public concern and to warn people about the problematic behaviour of an organization that has reportedly caused damage in the Mainland when we find its presence in Hong Kong. He has the duty to warn such an organisation not to cause any social disorder in the territory, just as he has a duty to speak on drugs, rave parties, smoking, air pollution and any apparent deficiencies in our educational system and other social issues. If those in public office cannot be allowed to state frankly and openly what they see as important issues of concern to our society, how can they discharge their duties towards the public? In the absence of malice, it is absurd to suggest that the Chief Executive could be sued for defamation when he expresses such concerns. A statement is not defamatory if it is true or expresses an opinion which is a fair comment. To accuse the Chief Executive of

defamation instead of examining the substance of the problem is a disservice to our community.

### The Government's Way of Dealing with Falun Gong

If HKSARG had sought legislative powers to proscribe or interfere with Falun Gong when it was banned in the Mainland in 1999, it might justify some people's claim that Hong Kong is just another Chinese city. If HKSARG had rushed a bill to Legislative Council immediately upon France passing its anti-cult law on the 30 May, 2001, you might say that Hong Kong has succumbed to pressure from the Central People's Government. But, by monitoring the activities of Falun Gong in Hong Kong and researching into means whereby other governments have been dealing with cults, whilst indicating that it is not legislating to outlaw it, the Government displays responsibility, prudence, rationality and a high degree of autonomy in the handling of this issue. Such an attitude manifests its respect for the principle of "One Country, Two Systems", for the rule of law and of human rights and, I venture to suggest, is supported by the people of Hong Kong and the international community who all wish Hong Kong to handle the matter in a way which is most beneficial to Hong Kong. The fact that the Central People's Government is not intervening shows that it adheres to the concept of 'One Country, Two Systems', that it well understands the situation of Hong Kong and has confidence in Hong Kong people ruling Hong Kong. I am sure that the public and our friends in the international community would all support the way in which the issue of Falun Gong is handled in Hong Kong.

Now, ladies and gentlemen, I have tried to account to you on the situation of the rule of law and human rights in Hong Kong as I see it, and I thank you for your interest. I have also explained the Government's position on Falun Gong and why the Chief Executive has a duty to speak on the subject. I hope to have convinced you that the Government respects the rule of law and human rights and that it will continue to protect them vigorously. You have heard many people lamenting over the erosion of the rule of law and infringement of human rights since the Reunification. You will of course judge for yourself whether that is the case. It is said that appreciation is the mother of all virtues. If one is devoid of the power of appreciation, it is much like sitting in the dark with a treasure trove. We cherish the rule of law and human rights. It takes appreciation to enjoy them.

Thank you.

End/Thursday, July 5, 2001