

Speech by Secretary for Justice

Following is a speech entitled "Implementation of One Country, Two Systems in HKSAR - Some Legal Aspects" delivered by the Secretary for Justice, Ms Elsie Leung, at the Hong Kong Association Members' Lunch in London yesterday (January 24):

Chairman of the Hong Kong Association, Baroness Dunn, Ambassador Zha, ladies and gentlemen; thank you Lydia, for a very succinct introduction on the situation in Hong Kong.

It is an honour to be invited by the Hong Kong Association to speak at this luncheon and despite my whirlwind visit, I am indeed glad to be able to meet so many old friends here. If I were to visit you one by one it would probably take two or three weeks. My last visit to London was in March 2001 when I spoke of the smooth transition of Hong Kong from a British colony to a Special Administrative Region of the People's Republic of China. Seven and half years into the establishment of the Hong Kong SAR, I do not think it necessary to repeat the story, particularly when present at this luncheon are so many distinguished persons who have made enormous contributions towards our smooth transition. To give a few examples, The Rt. Hon. Lord Howe, who was instrumental to the negotiation and the signing of the Sino British Joint Declaration; the Chairman, Baroness Dunn, who made persuasive and forceful representations to both the British Government and the Chinese Government on behalf of Hong Kong people; Mr. Michael Thomas, who was not only the legal expert who advised on the negotiation and implementation of the Joint Declaration, but has also contributed towards the evolution of the constitutional law in Hong Kong by appearing frequently in our courts, representing the government and private citizens at different times, both before and since the Reunification; and of course Mr Jeremy Mathews, my predecessor holding the office of Attorney General before the handover; Mr. Justice Nazareth, who served before and after the handover, and sat in the Court of Final Appeal which made several decisions important to the installation of our new constitutional order; Mr Justice Mortimer who was a distinguished judge in Hong Kong making a significant contribution to law reform through the Law Reform Commission; Mr. Hugh Davies, who served on the Sino-British Joint Liaison Group; Sir Andrew Burns who was the first British Consul General of the Hong Kong Special Administrative Region and many others, who in different ways have contributed towards the stability, prosperity and development of Hong Kong. If I were to continue that would leave me very little time. To recapitulate the path that has led us to where we are today would be carrying coals to Newcastle because we walked the path together. Standing here today, I feel the strong bond amongst us, that is, the genuine affection and passion for Hong Kong and sincere wishes for its well being, success

and prosperity.

Because of that, and because I anticipate that you would like to find out how Hong Kong is doing from your own perspectives, I would keep my speech as short as possible, concentrate on a few legal aspects and leave it to you to ask questions, no matter how sensitive they may be, and I shall try to answer them as best I can.

Fundamental rights and freedoms

Before July 1st, 1997, many commentators were making alarming predictions including "the death of Hong Kong". People were most concerned about whether Hong Kong residents could continue to enjoy their established rights and freedoms; whether the social, economic and legal systems could be maintained; and whether the way of life would remain unchanged. Of course, we all know that the pessimistic prophecies did not come true. The many things people were afraid would happen simply did not happen, and will not.

So far as rights and freedoms are concerned, the guarantees in Hong Kong's Basic Law are not empty promises. They are enforceable through Hong Kong's fiercely independent judiciary. Article 39 of the Basic Law provides that the rights and freedoms enjoyed by Hong Kong residents under International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights and such International Labour covenants as are applied to Hong Kong will not be restricted unless as prescribed by law. Such restrictions shall not contravene the provisions of these international conventions, which means that the restrictions must be reasonable, rational and proportionate to the purpose for which they are imposed. By Article 11 of the Basic Law, no law enacted by our Legislature shall contravene the Basic Law, which means that any legislation which contravenes Article 39 of the Basic Law will not be given effect to.

At times, when there were controversial issues concerning fundamental rights and freedoms, prosecutorial decisions, or political issues, some people queried whether the rule of law had been eroded or judicial independence infringed. With more and more judicial precedents on the subject, and despite such controversies, it is internationally recognized that judicial independence in Hong Kong is intact and the rule of law robust. To give one example, my decision not to prosecute Jiang Enzhu for failure to respond to a personal data request was criticised as showing favouritism to a State organ stationed in Hong Kong. The Honourable Emily Lau took private prosecution against him for such a failure and her summons was struck out. In the latest Six-monthly Report on Hong Kong presented to Parliament by the Secretary of State for Foreign and Commonwealth Affairs in July 2004, the Secretary raised concern that freedom of expression was under threat when three popular radio-show hosts abruptly resigned. Things speak for themselves. Of the

three radio-show hosts, two of them have resumed their appearances on the radio talk shows, and the remaining one has since been elected and become a Legislative Councillor. If their temporary absence were due to any kind of threat to their personal safety, we would have expected them to abstain from the publicity they now continue to enjoy.

Each year since Reunification with China, there has been significant constitutional litigation covering issues such as the right of abode, freedom to travel and freedom of expression. The courts have been vigilant in giving a broad interpretation of provisions guaranteeing fundamental human rights, and in giving a narrow meaning to permissible restrictions.

The Rule of Law

Until the 1990s, judicial proceedings to review the constitutionality of law were few. More often, the challenges raised the question whether certain subsidiary legislation was ultra vires the primary legislation. With the promulgation of the Hong Kong Bill of Rights Ordinance in 1991, which enabled the courts to strike down legislation that contravened the Hong Kong Bill of Rights, litigation ensued and it took several years for issues like the legality of presumptions of guilt to be settled. With the Basic Law coming into operation on 1st July 1997, issues such as the constitutionality of the provisional legislature was raised in court. The number of applications for judicial review has risen sharply in recent years in untrodden areas of the law, in the early stage of the interface between the Basic Law and domestic legislation. Following the world trend since the Second World War, the exercise of discretion by governmental departments is also more readily challenged. Although most of the time the government's authority has been re-affirmed through such proceedings, there were occasions when the courts held against the government on the constitutionality of legislation or the exercise of discretions.

In the recent Link case, people queried whether the challenge of the Housing Authority's power to dispose of its assets through REITS was an abuse of the process of the court and the issue has become very controversial. We believe, however, that the rule of law has many facets, and access to the courts is one important factor. Any abuse of judicial process only happens rarely and should be left to the sanction of the courts. I believe the swing of the pendulum will in due course find the right balance and ultimately, to the public, it is what is fair and just that counts. The Department of Justice is conducting a survey through experts to look into the unmet needs of the community for legal services in order to improve on the allocation of resources in making justice more accessible to the public and, at the same time, dispensed more efficiently and effectively.

The Judiciary

As from July 1st, 1997, a new strata was added to the structure of our courts, that is, the Court of Final Appeal. The Hong Kong Court of Final Appeal Ordinance provides that judges of that court shall be the Chief Justice, not less than three permanent judges and another judge from other common law jurisdictions. We are fortunate to have nine eminent judges from United Kingdom, Australia and New Zealand forming the panel of our overseas judges. We are also fortunate to retain the services of eight retired Hong Kong judges who are familiar with the Hong Kong law to be non-permanent judges of our Court of Final Appeal. This enhances the reputation of our Court of Final Appeal and the fact that any of the judges may have a dissenting judgment is also an added assurance that judicial independence will be observed.

Article 84 of the Basic Law particularly states that, in the adjudication of cases, the courts may refer to precedents of other common law jurisdictions. This enables us not only to maintain our legal system, but also to continue to develop it.

Development of the common law legal system

The common law is a living law. Its development depends very much on the quality of our judges and of the judgments they deliver, since each judgment may become the ratio decidendi for subsequent cases. Since Reunification, some of the judgments in our Court of Final Appeal have been cited by the judiciary of other jurisdictions. Despite a lot of misunderstanding of the Interpretation of the Basic Law by the Standing Committee of the National People's Congress, our courts enjoy a good reputation for being independent. This is not surprising because judicial independence is guaranteed not only by Article 85 of the Basic Law, but also by the whole system of appointment of judges, provision for security of tenure etc. We rely upon the system and not only individual judges for upholding the rule of law and judicial independence.

The lawyers

The development of the legal system also depends on the expertise of lawyers, including practising members of the Bar, solicitors and Government Counsel. The Department of Justice is to control criminal prosecutions without any interference, and private members of the Bar are often briefed to prosecute on fiat, to represent the government in civil proceedings including judicial reviews, and their advice on administrative law is frequently sought. Amongst them are also prominent members of the English Bar, experts in constitutional law, human rights and public administrative law. Training courses provided by, and exchanges with, our counterparts in other common law jurisdiction continue. Since Reunification, we have undertaken reform in our legal education, civil justice reform, and continue to participate in international law conferences and maintain our links with other common law jurisdictions. To provide a benevolent infrastructure for

the development of the legal profession, the government spares no efforts in promoting Hong Kong as a regional legal services centre and assisting Hong Kong lawyers to gain entry into the Mainland market under the scheme of Closer Economic Partnership Arrangement between Mainland and Hong Kong (CEPA). Time does not permit me to go into details of CEPA but I shall be glad to answer questions on it. With a strong independent legal profession, the legal system will continue to develop healthily, and in turn, it will ensure that the rule of law will be maintained.

It will not be a complete description of our legal system without mentioning the legislature and our constitutional development. However, each of these could be the subject matter of a long discussion. I would only refer to a passage of the speech of Mr. Ji Pengfi upon presenting the draft Basic Law of the HKSAR of the PRC to the National People's Congress on the 28th March, 1990 in which the design of our political structure was described. It reads:

"The political structure of the Hong Kong Special Administrative Region should accord with the principle of "one country, two systems" and aim to maintain stability and prosperity in Hong Kong in line with its legal status and actual situation. To this end, consideration must be given to the interests of the different sectors of society and the structure must facilitate the development of the capitalist economy in the Region. While the part of the existing political structure proven to be effective will be maintained, a democratic system that suits Hong Kong's reality should gradually be introduced. In accordance with this principle, Chapter IV and Annexes I and II of the Basic Law contain the [following] major provisions concerning the political structure of the Hong Kong Special Administrative Region...."

The passage must be read in light of the circumstances that were then existing, i.e. partial elections to the Legislative Council, non-existent at the time of the signing of the Sino-British Joint Declaration, came into being in the form of functional constituencies in 1985 and partial direct elections came into force in 1991. Election of the Chief Executive and of the Legislative Council are important parts of our political structure and political structure is a pivotal part of the system of the HKSAR, which was decided by the National People's Congress in accordance with Article 62(13) of the Constitution of the PRC. You will understand therefore why the Central People's Government has reserved a role in our constitutional development as provided by Article 45 and Article 68 and Annexes I & II of the Basic Law. Of course, Hong Kong's political structure should not and cannot remain as it was in 1984 or 1990. In the past seven and a half years we have had one election of the Chief Executive, three elections of the Legislative Council and two elections of the District Councils. On each occasion, representation became wider and more democratic but any progress must comply with the principle of gradual and orderly progress and in accordance with the situation of Hong Kong at the time.

At the end of seven and half years, how are we progressing? In 1993, Mr. Michael Thomas

wrote the introduction for the book entitled Trade and Investment Law in Hong Kong, and I quote him:

"Among the specific commitments of the Sino-British Joint Declaration are included these words: 'The socialist system and socialist policies shall not be practised in Hong Kong Special Administrative Region and ... Hong Kong's previous capitalist system and life-style shall remain unchanged for 50 years'.

Other important points spelled out in the detailed annexes and since enacted in the Basic Law include:

- * The maintenance of the common law, equity and existing statute law and customs;
- * An elected legislature;
- * An independent judiciary with security of tenure selected by an independent commission;
- * The use of English in the courts and legal precedents from other common law jurisdictions;
- * An independent public prosecutor;
- * Provision for local and overseas lawyers to work and practise in Hong Kong;
- * Guarantees that individuals will have the right to confidential legal advice and access to the courts;
- * Representation in the courts by lawyers of their choice;
- * The right to challenge the actions of the executive in the courts."

I am glad to tell Mr. Thomas that all of these are alive and well in our society and proven so from what I have said this afternoon. These are the core values on which our visions and missions are projected. We treasure them, we guard vigorously against any infringement of them and we are vigilant that they will not be lost.

I would like to close my speech and proceed to Q and A, and before I do that, I would like to come back to the beginning of my speech about your affection, passion and good wishes for Hong Kong. How could you contribute towards the continuing stability, prosperity and development of Hong Kong? I hope that you will keep a continuing interest in Hong Kong, seek accurate information from our Economic and Trade Office and keep in touch. Judge us not by the number of crises we have had to deal with, but how we rose to these challenges and we survived them. We are most grateful for the support that Lord Irvine, the former Lord Chancellor, and the present Lord Chancellor, Lord Falconer, have given us in allowing serving Law Lords to sit in our Court of Final Appeal, and for the expertise of your legal profession that adds to our strength. The legal link between Hong Kong and the UK will certainly continue and enables our legal system to evolve and develop in accordance with the Basic Law. The fact that two of my predecessors are present at this lunch is strong evidence that it will. Make use of our legal services for the making of contracts and for the resolution of disputes, particularly when you invest into the Mainland of China, and if you do not do any of these, at least you can contribute towards our economy by patronizing our gourmet cuisine and shopping in Hong Kong.

Thank you very much.

Ends/Tuesday, January 25, 2005

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