

Speech by SJ in London

Following is the full text of the address by the Secretary for Justice, Mr Wong Yan Lung, SC, entitled "The Rule of Law and Legal Services in Hong Kong: The Future", at the Breakfast Meeting with the English Law Society, the English Bar Council, and Hong Kong Economic and Trade Office, London, today (London Time, June 7):

Good morning ladies and gentlemen,

Thank you for getting up so early to come here. This is my first trip to London since taking up the post of Secretary for Justice in October last year. Actually it is my first overseas trip in this post.

Before joining the Government, I had been a barrister in private practice. I studied law here in England, and was called to the Bar in England and Wales, before returning to Hong Kong to start my career at the local Bar. I have many fond memories of my time in the UK, and very much cherish the intellectual stimulation while studying in Cambridge and London.

I have been on a steep learning curve these past eight months, and still have a great deal to learn. But the experience so far has been deeply rewarding, and challenging.

Future for legal services in Hong Kong

Today, I would like to concentrate on one topic that I hope will be of interest and relevance to some of you, and that is what the future holds for legal services in Hong Kong.

Many of you ladies and gentlemen are familiar with Hong Kong, but perhaps not all. So allow me to briefly describe the constitutional and legal settings which underpin all activities in Hong Kong, and some experience in the past 9 years since the reunification.

The new constitutional order of the HKSAR

With the signing of the Sino-British Joint Declaration in 1984 and the

implementation of the Basic Law in 1997, Hong Kong is under a completely new constitutional order under the "One Country, Two Systems" principle. The pre-1997 economic, political and legal systems have been preserved for 50 years.

Since the Basic Law came into operation on July 1, 1997, Hong Kong has, for the first time, a detailed written constitution, containing 160 articles and three annexes. It sets out the principles governing the relationship between the Central Authorities of the PRC and the Hong Kong Special Administrative Region, lays down fundamental rights and duties, and provides the framework for the political structure, the economy and other important institutions of society.

More specifically, in respect of the legal system, there are many specific guarantees in the Joint Declaration and Basic Law. First and foremost, the laws previously in force in Hong Kong shall be maintained, except for any that contravene the Basic Law, and subject to amendment by Hong Kong's legislature. Secondly, judicial independence is fully protected. A Hong Kong based Court of Final Appeal was set up to replace the Privy Council here as the final appellate court for Hong Kong. Third, under Article 35 of the Basic Law, Hong Kong residents shall have the right to inter alia, access to the court and choice of lawyers.

9 years since Re-unification

The UK Government has been watching Hong Kong closely since 1997. In the latest report on Hong Kong prepared by your former Secretary of State to Parliament covering the second half of 2005, there is the following conclusion:

"We conclude that the 'One Country, Two Systems' principle has generally worked well in practice and that the rights and freedoms promised to Hong Kong in the Joint Declaration and the Basic Law continue to be upheld."

It is no small achievement against the ups and downs in the past nine years. The Asian Financial Crisis set in shortly after the Re-unification in late 1997. There were outbreaks of unprecedented epidemics like birds flu and SARS in 2003. There were the controversies caused by the interpretation of some articles of the Basic Law by the Standing Committee of the National People's Congress. Issues get politicised and society has become more litigious.

Rapid growth in public law

For the lawyers, one of the most noticeable phenomena in the past nine years is the rapid development of public law. First, the unprecedented constitutional order itself provides fertile grounds for interpretations and debates. Secondly, the guarantees in the Basic Law, particularly those relating to human rights, have been the source of much litigation. The growth of human rights jurisprudence in Hong Kong has been exponential. Its development is also interesting because of the breadth of case law references. Relevant authorities from almost the entire common law world have been cited in our courts.

The courts have interpreted and enforced those guarantees most judiciously without fear or favour. For example, they have made rulings on the constitutionality of provisions on right of abode in the Immigration Ordinance, on restrictions on the right of assembly under the Public Order Ordinance, the law prohibiting the desecration of national and regional flags, reduction in civil service salaries, and police operations of interception of communication and covert surveillance, etc. 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.

There is, however, certain facet of this development which has led the Chief Justice of the HKSAR to sound a word of warning. Many have brought to the Court, through judicial reviews, problems which are of political, social or economic nature and expected the Court to make fresh Government decisions which are being challenged. The Chief Justice earlier this year warned that the Court cannot provide an answer which should have been explored through the political process. Although I fully agree with the sentiment expressed, I fear that the line between what is and what is not a legitimate dispute to be taken to the public law court is a very fine one indeed.

NPCSC Interpretations

Of course I cannot leave the issue of the rule of law since 1997 without touching on the power of the Standing Committee of the National People's Congress to interpret the Basic Law.

This power to interpret the Basic Law, which is a national law enacted by the Mainland, is vested in the Standing Committee under the PRC Constitution. It is also expressly provided for in Article 158 of the Basic Law. It is an inherent part of the

"One Country, Two Systems" design. A common law lawyer will find it strange. However, as Sir Anthony Mason, one of our non-permanent judges on the Court of Final Appeal, said in one case, this is how the two systems are linked under the Basic Law.

The NPCSC interpretation of the Basic Law, though part of the new constitutional order, is of course not to be resorted to lightly. Since 1997, our Courts have been rapidly developing Hong Kong's own jurisprudence in handling the interface between the Mainland and Hong Kong legal systems under the Basic Law. We in Hong Kong have gained a much greater understanding of the Mainland legal system. Likewise, the Mainland legal circles and authorities have also become more familiar with our common law tradition and why concerns over rule of law issues are raised by Hong Kong lawyers from time to time.

I believe that through a common goal to make Hong Kong better, through frank and frequent communications, understanding and trust will be built up. "One Country, Two Systems" will no longer be a cause of concern as a matter of law, but an opportunity for the advancement of rule of law in both Hong Kong and the Mainland. Many of you know how rapidly the legal landscape of the Mainland is changing, especially after entry into WTO.

Rapid expansion of the Mainland market

An important aspect of the Hong Kong legal scene is of course the rapidly expanding market and business opportunities in the Mainland.

For example, the listing of Bank of China in Hong Kong last week broke many records. More than 6.1 billion shares worth HK\$20 billion were traded, making it the heaviest trading in an IPO listing debut in Hong Kong so far, accounting for 37.1 per cent of the total stock market turnover. There are many more listings of PRC enterprises to come. The need for professional legal services is phenomenal. Of course, Hong Kong lawyers have to compete with their international counterparts on large scale listings of this kind. But proximity, physical and otherwise, is a definite advantage.

The Mainland is the biggest trading partner of HKSAR. Our world-class financial market and facilities, supported by also world-class legal services, are precisely what is urgently required by the Mainland's rapidly developing manufacturing and services

industries. All these are further strengthened by the advent of Closer Economic Partnership Arrangement (CEPA) which I will further elaborate on in due course.

Legal Services in Hong Kong

Let me now focus on what Hong Kong has to offer, now and in the future, by way of legal services.

Prior to joining the Government, I have served on the General Council of the Hong Kong Bar Association for a number of years. I know how important it is for the legal profession to play its part in scrutinising important legislations touching on the rule of law. Of course, it goes without saying that the best way for the legal profession to help safeguard the rule of law is by maintaining a high standard in their practice and services.

The two branches of the legal profession in Hong Kong are especially vigilant to ensure that public authorities comply with the law. There is no shortage of lawyers to represent individuals who wish to take on the government in court. Also many of the more vocal politicians and opinion leaders in the Legislative Council are lawyers.

The Legislative Council exercises scrutiny of any proposals that impinge on human rights. For example, it is currently considering a Bill to regulate interceptions of communications and covert surveillance.

At the moment, Hong Kong is home to about 5,500 practising solicitors, some 950 practising barristers, and more than 800 foreign lawyers. There are about 200 lawyers from England and Wales practising in Hong Kong. English lawyers can qualify to practise as Hong Kong solicitors, and each year about two dozen English lawyers sit the qualifying examination. A dual qualification, of course, offers many advantages. Hong Kong law firms can employ foreign lawyers. Many Hong Kong firms provide advice on both local law, and various foreign laws, including English and Mainland laws.

Local and international law firms compete for business in Hong Kong, 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.

Legal services in the Mainland

The Mainland itself has just about 120,000 lawyers. Some 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.

However, only about 5,000 to 6,000 have the language proficiency and experience to handle international legal practice. So there is considerable scope for Hong Kong-based law firms – local and international – to fill this gap.

Foreign lawyers in the Mainland

Foreign lawyers have been able to provide services on the Mainland since Interim Provisions were promulgated in 1992. Originally, a foreign law firm could only establish one representative office in the whole of Mainland China, and that could only be in one of 19 specified cities.

But when China joined the WTO in December, 2001, new and more relaxed regulations were enacted. Since the implementation of those regulations on January 1, 2002, representative offices of foreign law firms are no longer required to register centrally. They are only required to register with the provincial judicial administrations. The previous restriction on having only one office in one of 19 designated cities has also been abolished.

China, however, made no commitment to open its legal services market to other WTO members. The current position is that representative offices of foreign law firms can engage in the provision of advice on laws of their jurisdictions, international treaties, international commercial laws and practices. But they are not allowed to engage in legal services relating to Mainland law. These law firms cannot employ Mainland lawyers, and foreign lawyers are not allowed to obtain Mainland legal qualifications. There are currently about 120 representative offices of foreign law firms in the Mainland, of which about two dozen represent English law firms.

Hong Kong lawyers and the Mainland

Originally, Hong Kong lawyers who wished to practise on the Mainland were regulated in the same way as foreign lawyers. But that changed on January 1, 2004,

when the Closer Economic Partnership Arrangement (CEPA) between Hong Kong and the Mainland came into effect. CEPA is a type of free trade pact between Hong Kong and the Mainland – made possible because we are both separate members of the WTO. If ever you were looking for a good example of how "One Country, Two Systems" works, CEPA is it.

CEPA offers enhanced access in goods and services, including legal services. The advantages offered to Hong Kong law firms under CEPA include the following:

- * Hong Kong law firms with representative offices on the Mainland are allowed to operate in association with Mainland law firms. Currently 67 Hong Kong law firms have representative offices in the Mainland.

- * Mainland law firms are allowed to employ Hong Kong lawyers and barristers as consultants on Hong Kong law;

- * Hong Kong permanent residents with Chinese citizenship are allowed to sit the Mainland legal qualifying examination and, if they become qualified on the Mainland, are allowed to engage in non-litigation legal work in Mainland law firms; and

- * The minimum residency requirement applying to representative offices of Hong Kong law firms located on the Mainland is shorter than that for other representative offices (and is waived entirely in two neighbouring cities).

I should add that some law firms in Hong Kong that originally began life as foreign law firms have, after their members qualified as Hong Kong solicitors, switched to become Hong Kong law firms. As a result, they can not only offer advice on Hong Kong law, but their representative offices on the Mainland can enjoy the benefits of CEPA.

Attracting Mainland-related legal business in Hong Kong

So far, I have talked about legal services in Hong Kong and those in Mainland. Hong Kong's constitutional status and its geographical location also provide a unique opportunity to provide dispute resolution services for Mainland-related contracts.

Hong Kong's legal system 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 on the Mainland, and in all contracting states of the New York Convention. That centre currently handles about 300 cases per year, but this is likely to increase further as ADR 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 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.

The Hong Kong SAR Government is actively promoting the development of Hong Kong as a centre for resolving disputes arising out of international business transactions on the Mainland. We encourage parties to foreign-related contracts or joint ventures to negotiate and execute their contracts in Hong Kong, to choose the law of Hong Kong as the applicable law, and to choose our courts or arbitral institutions as the fora for dispute solution.

As I mentioned earlier, Hong Kong arbitral awards are enforceable on the Mainland. As regards court judgments, we are working hard on reciprocal enforcement. During my trip to Beijing in April this year, I have finalised the discussion with the Supreme People's Court of the Mainland regarding an agreement on reciprocal enforcement of the certain money judgments arising from a commercial contract.

Under the proposal, judgments given by certain, designated Mainland courts would be enforceable in Hong Kong if similar criteria are satisfied. The courts in question are at the Intermediate People's Court level or higher, plus a small number of Basic Level People's Courts also designated to handle foreign-related commercial cases.

I hope that a formal agreement can be signed later this year and legislation can be put in place very soon to implement the agreement. Once this is in force, those doing business in China will have the option of resolving their disputes in Hong Kong by way of litigation (as well as arbitration), knowing that the resulting award can be enforced in the Mainland, and many other jurisdictions.

Mediation

Any discussion of dispute resolution would not be complete without mentioning mediation services available in Hong Kong, which are also becoming more popular.

Earlier in March this year, some of us in Hong Kong had the opportunity of hearing from two leading mediation specialists from London, Mr Michel Kallipetis QC and Mr Stephen Ruttle QC, on the effectiveness and increasing popularity of mediation in the UK.

We have to catch up fast on mediation in Hong Kong. Many in the legal profession are still sceptical. However, both the Judiciary and the Government are taking steps to promote mediation.

Conclusion

Ladies and gentleman, it has been said that if Hong Kong has a defining ideology it is the rule of law. I certainly agree with that. And this has been impressed upon me emphatically and repeatedly by everyone I met. Now, I will be very happy to answer any questions that you may wish to raise.

Ends/Wednesday, June 7, 2006

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