

Speech by SJ at the Brookings Institution

Following is the speech by the Secretary for Justice, Mr Wong Yan Lung, SC, entitled "The Rule of Law in Hong Kong", at the Brookings Institution, Washington DC, today (September 13, Washington DC time)

Ladies and Gentlemen,

Introduction

This is my first trip to the USA in my capacity as Secretary for Justice of the Hong Kong SAR since my appointment last October. It is indeed a great honour for me to be delivering my first speech on this first trip to your world-renowned institution.

In the past 10 months, two major banking corporations in the People's Republic of China got listed in the Hong Kong Stock Exchange, breaking records on the amount of capital raised. Firstly, it was the China Construction Bank which raised a staggering HK\$71.6 billion or around US\$9.2 billion in October last year. Then, this record was broken when the Bank of China, one of the top four banks in the PRC, raised HK\$86.7 billion or US\$11.14 billion in June this year. Later on this year, the Industrial and Commercial Bank of China, China's largest bank, is planning to float its shares in Hong Kong, and it is widely expected another new IPO record will be set.

Why are these mega banks in the PRC seeking listings in the Hong Kong Stock Exchange, instead of the home stock exchanges in Shanghai and Shenzhen? Obviously, they believe Hong Kong is still more effective in attracting international capital investment. And why is Hong Kong still superior in this regard? Apart from our longer experience and wider pool of talent, I venture to say it is because the international investors have confidence in the rule of law in Hong Kong upon which the financial market is buttressed.

New constitutional order and the Basic Law

Hong Kong is absolutely unique in the world. We are a part of China and yet we operate an entirely different legal system from the Mainland.

The Sino-British Joint Declaration, signed in 1984, provided that China should resume the exercise of sovereignty over Hong Kong on the basis that Hong Kong would retain its capitalist system and its common law legal system, and would exercise a "high degree of autonomy". Except for foreign and defence affairs, which were to be the responsibility of the Chinese Central People's Government, the Hong Kong Special Administrative Region was to be vested with executive, legislative and independent judicial power, including that of final adjudication.

Upon China's resumption of sovereignty over Hong Kong in 1997, a new constitutional order was put in place. This is found in the Basic Law of the Hong Kong Special Administrative Region, a law enacted by the National People's Congress and based upon the Sino-British Joint Declaration. The Basic Law faithfully reflected the guarantees contained in the Joint Declaration. Hence the guarantee of "One Country, Two Systems" was further extended from an international treaty to the national law of the Mainland and the mini-constitution of Hong Kong.

Continuity of laws

I attended the Ceremonial Opening of Legal Year in January this year in my capacity as Secretary for Justice together with the Chief Justice and judges of the HKSAR, in full wig and robes. It was a most remarkable and inspiring moment when we all stood up for the Chinese national anthem in those most English regalia.

The promise of continuity in the laws and legal system has been honoured, not just in form, but in full substance. Hong Kong remains a common law jurisdiction. The English language continues to be one of the official languages. It is still the predominant language of the law. The two branches of the legal profession remain strong and independent. There are currently about 5,500 practising solicitors and about 950 practising barristers in Hong Kong. In addition, over 800 foreign lawyers are offering their services in the SAR, including more than 300 from the USA.

Independence of the Judiciary

As to the Judiciary, judicial appointments are made on the basis of recommendations by an independent Commission. Article 92 of the Basic Law provides that judges of the courts of the HKSAR shall be chosen on the basis of their judicial and professional qualities.

Judicial independence is cardinal to the rule of law and the protection of rights and freedoms. Here, in Hong Kong, we are very proud not only of our courts' independence but also their competence. I can do no better than quoting the US State Department's 2005 Country Reports on Human Right Practices:

"The law provides for an independent Judiciary, and the government generally respected this provision in practice. The judiciary, underpinned by the Basic Law's provision that the common law tradition be maintained, provided citizens with a fair and efficient judicial process."

Hong Kong has been getting a favourable grading year after year in the survey on "Confidence in Asian Judicial Systems" conducted by the Political and Economic Risk Consultancy Ltd. As reported in its 19 July 2006 Report, Hong Kong's grade is 1.55 in a 10 grade range with zero being the best grade possible and 10 worst. That is the best grade obtained among the Asian Judicial Systems, with Singapore being the next (scoring 1.87). For comparison, Hong Kong's grade of 1.55 is only second to that of Australia which is 1.35, but better than that of US which is 1.83.

Our highest court, the Court of Final Appeal, is headed by the Chief Justice and comprises three Permanent Judges and a Panel of Non-Permanent Hong Kong Judges and Non-Permanent Judges from other common law jurisdictions. Those judges coming from other common law jurisdictions are eminent judges of high international standard, including 4 serving and retired Law Lords from the UK. Many of the judgments delivered by the Court of Final Appeal are of high jurisprudential value in Hong Kong and in other common law jurisdictions. CFA judgments have been cited in the House of Lords in UK, Federal Court of Australia, Supreme Court of Canada, and many leading law books.

The most internationalised city in China run on the common law system

As I mentioned at the outset, Hong Kong's economy is benefiting considerably because our dual capacity as part of China and at the same time a most international city with the most sophisticated financial and legal infrastructure.

No doubt large cities in China particularly Shanghai have been rising rapidly. However, while Shanghai has been described as "the Tokyo of China", Hong Kong remains "the London of Asia" because of our international dimensions.

Just last week on September 7, in the Economic Freedom of the World: 2006 Annual Report published by the Cato Institute of the United States in conjunction with the Fraser Institute of Canada and over 60 other research institutes around the world, Hong Kong is again ranked the world's freest economy. Apart from the top overall ranking, Hong Kong also ranks first in "freedom to trade internationally".

Since 1997, Hong Kong has negotiated and concluded some 140 bilateral agreements with foreign governments. Over 200 multilateral treaties continue to apply to Hong Kong and almost 80 of these multilateral agreements do not apply to the Mainland of China. These bilateral and multilateral agreements cover a wide range of subjects such as air services, merchant shipping, investment promotion and protection, mutual legal assistance in criminal matters, surrender of fugitive offenders, transfer of sentenced persons, trafficking in narcotic drugs, and so on. Subjects like human rights protection, intellectual property rights and private international law are covered as well.

Hong Kong has also been authorised to participate in international organisations and international conferences either on our own or as members of the Chinese delegation. At APEC meetings, our Chief Executive sits at the same table as the President of China and the President of the United States of America and they all wear the same outfit for the group photo.

And you might also have read about Hong Kong hosting the 6th Ministerial Conference of the WTO last year. As in Seattle and other places who hosted the events, we had to face protests of a scale Hong Kong has never experienced before. The police estimated there were about 4,000 overseas and 2,500 local protestors who took part in various demonstrations and processions. As the host government, we had an obligation to ensure that the conference would be safely and smoothly held. At the same time, we were committed to act strictly in accordance with the law, respecting and upholding the constitutional rights of protestors to free speech and peaceful assembly. I am pleased to say, as most people agreed, we have struck the right balance and the Hong Kong police force had done a very good job.

Actively participating in international co-operation against crime

In connection with rule of law matters, Hong Kong is authorised to make appropriate arrangements with foreign jurisdictions for reciprocal juridical assistance. Such arrangements include agreements for the extradition of fugitive

offenders, for mutual legal assistance in criminal matters, and the transfer of sentenced persons.

Today, particularly when we are still sadly commemorating 9-11, you should be pleased to know that although we do not see ourselves as a major terrorist target, following the attacks in New York in 2001, we have also stepped up significantly our anti-terrorism measures. These include the enactment of local legislation, principally to give effect to the UN Security Council Resolution 1373 and the Financial Action Task Force's Special Recommendations on Terrorist Financing. Our legislation, amongst other things would empower our Secretary for Security to "freeze" terrorist properties, prohibit the supply of weapons to terrorists, and require the reporting of suspicious financial transactions. It would also enable our law enforcement agencies to provide relevant intelligence to overseas agencies.

As a major international financial centre, Hong Kong is also joining hands with the international community in maintaining an effective anti-money laundering regime. We are a member of the Financial Action Task Force ("FATF"). In fact, during 2001 and 2002, Hong Kong took up presidency of FATF and it was during this time that much work was done on the revision of the Task Forces' 40 Recommendations Against Money Laundering subsequently adopted in 2003, and which have become the benchmark for international anti-money laundering standards.

Development of Rule of Law in China and Hong Kong's role

Seen in the above perspectives, I hope you can see that Hong Kong is also occupying a unique position vis-a-vis the development of the rule of law in China.

I know there are areas on the rule of law where the West considers China has not done enough. However, it is undeniable that we are seeing very significant improvements in recent years. With her entry into the WTO, globalisation has gone past the point of no return. The concept of the rule of law has been expressly written into the Constitution of the PRC in 1999. The Constitution was further amended in 2004 to provide that the State respects and preserves human rights.

The legal reform proceeded rapidly in tandem with China's impressive economic development in recent years. To facilitate economic development, a series of important commercial laws have been introduced or amended in the past decade, such as the Arbitration Law, the Contract Law, the Company Law and the Securities Law. The implementation of these laws calls for better trained judicial and legal personnel.

I would like to think Hong Kong has played a part in the Mainland's development on the rule of law. Hong Kong is uniquely placed to contribute because of our common nationality, shared language and culture. Since the Reunification, my department, the Department of Justice, has launched different projects to enhance the understanding of Hong Kong's common law legal system among Mainland officials and lawyers.

Further, the presence of Hong Kong lawyers in the Mainland's legal services market is further reinforced by the liberalisation measures under the Mainland and Hong Kong Closer Economic Partnership Arrangement ("CEPA"). CEPA made it easier for Hong Kong lawyers to go into association with their Mainland counterparts, and enable Hong Kong lawyers to sit for the Mainland judicial examination and to carry on limited practice upon qualification.

More controversial topics

My introduction of the rule of law in Hong Kong will not be complete if I were to skip topics which may court more controversies.

Protection of Human Rights

Since 1997, one of the most prominent phenomena in the eyes of a lawyer is the significant increase of public law litigation in Hong Kong, particularly cases touching on fundamental human rights and freedoms.

I do not think these challenges suggest our system is hitting problems. Instead, they are the best illustrations of the breadth of the human rights protection conferred by the Basic Law, and its potency to override inconsistent domestic legislation and to streamline government actions. Another reason for the growth of court cases is the greater use of the Chinese language in court, which has made the courts more accessible to the ordinary citizens. So far, as the records show, our courts have been interpreting and enforcing those guarantees in the most judicious manner, without fear or favour.

I know that, with over 200 years of American constitutional law, you will appreciate that public law litigation is a sign of a healthy legal system.

NPCSC Interpretations and the interface between two systems

Then, there is the power on the part of the Standing Committee of the National People's Congress to interpret the Basic Law. A common law lawyer will find it strange that the ultimate power to interpret the Basic Law should vest with a non-judicial body. 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.

One has to understand that the People's Republic of China is a unitary system. Under this system, all powers enjoyed by the local governments are conferred by the National People's Congress. The NPC is the source of all power and authority in Hong Kong. It is the NPC who enacted the Basic Law, who conferred on the HKSAR its executive, legislative and judicial power.

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.

Constitutional Development

Progress is also needed in Hong Kong order to move towards the Basic Law's ultimate aim of universal suffrage.

In October last year, the Government introduced a package of proposals for amending the two election arrangements, that is, the election of the Chief Executive

and the election of the members of the Legislative Council.

These proposals had the majority support in the community and of more than half of the Legislative Council Members. However, they did not have the required two-thirds majority support of all the members of the Legislative Council when they were put to the vote in December last year.

Although the SAR Government was disappointed by the rejection of these proposals, both the Central Authorities and the SAR Government are fully committed to promoting constitutional development in accordance with the Basic Law and the Decision of the NPCSC of April 2004, with a view to achieving the ultimate aim of universal suffrage.

In November last year, the Chief Executive initiated the discussion on formulating a roadmap for universal suffrage through the Commission on Strategic Development. The Commission aims to draw conclusions on the discussions by early 2007 and hopes that this will provide a basis for us to commence our next phase of work.

Conclusion

Ladies and gentlemen, Hong Kong and the US have many strong links - trade, finance, and co-operation in anti-terrorism, to name just a few. But perhaps the most significant link is our shared inheritance of the common law system. And along with that inheritance we have adopted the same core legal values, including in particular the adherence to the rule of law.

I hope this overview of the rule of law situation in Hong Kong has been useful. During the nine years since Reunification there were, of course, some issues that raised concerns. However, overall, I believe that the legal system is as strong as ever.

In my capacity as Secretary for Justice for the Hong Kong SAR Government, I will do my utmost to preserve the rule of law and to protect fundamental human rights. They were the foundations of Hong Kong's success in the past and, I believe, will remain so in the future.

Ends/Thursday, September 14, 2006

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