

Speech by SJ at International Criminal Law Conference (English only)(with photos)

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Following is the speech by the Secretary for Justice, Ms Teresa Cheng, SC, at the International Criminal Law Conference under Hong Kong Legal Week 2021 today (November 2):

Distinguished guests, ladies and gentlemen,

May I first extend our warmest welcome to you all, both here in the audience and on-line, for participating in the 2021 International Criminal Law Conference.

Hong Kong is a society and an economy premised on the rule of law. In this regard, the Department of Justice enjoys an independence which is constitutionally guaranteed. Article 63 of the Basic Law stipulates that the department "shall control criminal prosecutions, free from any interference". Our prosecutors act independently without fear or favour, and free from political interference or undue influence.

Hong Kong's judicial independence is premised on the solid infrastructure that has been laid down in the Basic Law, including the security of tenure, the immunity of judges, and importantly the express provision in Article 85 of the Basic Law that guarantees judicial independence, free from any interference. All judges are required to administer justice without fear or favour, and to adjudicate only in accordance with the law and evidence.

In today's ever changing society, technological advances are accelerating in many areas. Therefore, in addition to keeping our core values intact, we must remain vigilant of the need for changes and reform to ensure that our criminal justice system remains fair and effective. To this end, this conference provides a platform for exchanges, to examine experience from other jurisdictions and to review our own practices with a view to enhancing the development of the criminal justice system. Four topics have been chosen for today's discussion.

Topic One: "Human rights considerations in the criminal law context"

Both the Basic Law and the Hong Kong Bill of Rights guarantee the freedom of expression and peaceful assembly as fundamental rights. These rights are precious and are of cardinal importance for the stability and progress of society.

Yet, none of these rights is absolute and they may be subject to lawful restrictions. For example, as pointed out by the Court of Final Appeal (Note 1), under Article 17 of the Bill of Rights, the freedom of assembly is not absolute but is subject to lawful restrictions including the interests of public safety, public order and the protection of the rights and freedoms of others. The freedom of speech and expression is similarly subject to lawful restrictions as apparent from the wording of Article 16(3) of the Bill of Rights.

When assessing the bearing of human rights against other interests, the Courts in Hong Kong recognise that a balance has to be struck. In a case (Note 2) involving a challenge to the constitutionality of a permission scheme that required applications to be made for use of government premises for holding public order events, the Court of Appeal acknowledged that the Government has to strike a balance between the need for public order and public safety and the orderly operation of the offices, and the need to facilitate public expression of opinion.

Similarly, the European Court of Human Rights has acknowledged that the right to freedom of assembly is subject to exceptions (Note 3), and interferences with such right could be justified for the prevention of disorder or crime and for the protection of the rights and freedoms of others where demonstrators engage in acts of violence (Note 4).

These considerations highlight the importance of putting in place a system that strikes the right balance between the protection of human rights and the need to protect the community from criminal activities.

Topic Two: "Sentencing offenders: maintaining public confidence in criminal justice"

Sentencing is an essential part of the administration of criminal justice, which has always been exercised by the Court's independent judicial power. Some suggested that this should be revisited. But should we not first identify the problem that has to be addressed? Is there not a well-structured system already in place to ensure proper principles are actually applied in accordance with the laws as opposed to merely paying lip service? We will hear the views from experts on this, taking into account, I believe, the experience overseas.

Another aspect of sentencing relates to the role of the prosecutor. In a 1989 case,

AG v Jim Chong-shing (Note 5), the Court endorsed the principle set out in the Conduct of Counsel for the Bar of Hong Kong that a prosecutor should not attempt by advocacy to influence the Court in regard to sentence. The Court further held that a prosecutor should not submit to the sentencing Court decisions which merely uphold, reduce or increase a particular sentence, or say anything that could be taken as advocating severity.

On the other hand, there has been suggestion that a prosecutor should be allowed to assist the sentencing Court more actively. It was observed that the more the prosecution can play a part in the sentencing process, the less likely it is that the need will arise for the prosecution to appeal against a manifestly inadequate sentence (Note 6). This may have the effect of saving judicial resources.

We look forward to the stakeholders' views on these matters, and we are also keeping an open mind on suggestions as to how we may better assist the Court.

Topic Three: "Combating corruption in the Mainland and Hong Kong"

A comprehensive legal and structured framework to combat corruption is an important aspect of the rule of law. We will hear from the Commissioner of ICAC (Independent Commission Against Corruption) on their experience in Hong Kong and the representative from the Supreme People's Procuratorate on the practice in the Mainland.

In Hong Kong, the common law offence of misconduct in public office is a powerful tool in combating public sector corruption since it covers various forms of abuse of power by officials.

I take pride to say that Hong Kong's commitment to combating corruption is recognised internationally. In the Corruption Perceptions Index 2020 published by Transparency International, among 180 jurisdictions or territories covered in the report, Hong Kong was ranked the 11th least corrupt place. Nonetheless, we must not be complacent and must continue to evaluate the system and improve.

Topic Four: "Crowdfunding or crime-funding?"

With the rapid development of the Internet and social media, crowdfunding activities have become increasingly prevalent over the past few years.

There is currently no specific legislation to regulate crowdfunding in Hong Kong. However, depending on the specific structure or features of the relevant arrangement, certain types of crowdfunding activities may constitute criminal offences. For example, a charge of fraud might be applicable to a crowdfunding scam where the culprits induce potential investors to contribute or invest in their companies by making false representations as to the prospect of their product or business plans.

There have been suggestions that crowdfunding should be specifically regulated in Hong Kong so as to set up a framework to facilitate the proper and legitimate development of crowdfunding. Different jurisdictions have their own ways of responding to crowdfunding. We will hear from an expert on the practice in the United Kingdom. The overseas experience in this area of law will certainly provide us with useful reference.

## Conclusion

I wish to take this opportunity to extend my sincere gratitude to the moderators and speakers, all of whom have kindly taken time out of their busy schedules to share with us their insights. No doubt we will benefit immensely from their sharing.

Last but not least, my special thanks go to the organising team of the Prosecutions Division, especially Mr William Tam, SC, Deputy Director of Public Prosecutions, for the time, efforts and dedication they put into this Conference, which made it possible.

I look forward to the insightful and stimulating discussions to come. Thank you very much.

Note 1: *Kwok Wing Hang v Chief Executive in Council* (2020) 23 HKCFAR 518, para. 100.

Note 2: *Cheung Tak Wing v Director of Administration* [2020] 1 HKLRD 906.

Note 3: *Kudrevičius and Others v Lithuania* (2016) 62 E.H.R.R. 34, para. 142.

Note 4: *Kwok Wing Hang v Chief Executive in Council* (2020) 23 HKCFAR 518, para. 135.

Note 5: [1990] 1 HKLR 131.

Note 6: *Sentencing in Hong Kong*, Ninth Edition, para. 35-9.

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