

SJ's speech at Ceremonial Opening of the Legal Year 2022

Following is the speech by the Secretary for Justice, Ms Teresa Cheng, SC, at the Ceremonial Opening of the Legal Year 2022 today (January 24):

Chief Justice, Members of the Judiciary, Chairman of the Bar Association, President of the Law Society, ladies and gentlemen,

The rule of law, and with it the common law, remains the cornerstone of Hong Kong's status as an international financial centre and an international legal and dispute resolution hub. It underpins our capitalist system and way of life. These attributes are protected in the Basic Law which codifies the innovative "one country, two systems" constitutional policy of China. The original aspiration of the Basic Law, as set out in its preamble, is upholding national unity and territorial integrity, and maintaining the prosperity and stability of Hong Kong. If we are able to uphold, honour and respect the fundamental precondition of "one country", there is no reason why the two systems underpinned by the common law would not continue.

First, Article 5 of the Basic Law (Note 1) guarantees that Hong Kong shall retain the capitalist system and way of life for 50 years. It does not mean that this will cease thereafter. Secondly, as a matter of common sense, if "one country, two systems" functions effectively and serves our country and Hong Kong well, there is no reason for it to change. Thirdly, as can be seen in the discussions surrounding the formulation and implementation of "one country, two systems", and as stated by Mr Deng Xiaoping, 50 years was just "a figure of speech", and "for the first 50 years it cannot be changed, and after that, it would not be necessary to change" (Note 2). Importantly, President Xi Jinping and various leaders of the Central People's Government have repeatedly expressed unequivocal support and stern determination to implement "one country, two systems". It is therefore a matter for us to uphold the root of "one country" so that the "two systems" continue to flourish, and with it the continued application of the common law.

Judicial independence

One of the most valuable assets of the common law is the reasoned judgment, upon which stare decisis is premised and which, by reflecting transparency, is a testament to judicial independence (Note 3). In exercising judicial function, it is a

constitutional duty to act impartially and independently, free from any interference. This duty has not wavered notwithstanding the contemptible attempts to threaten our judicial officers and their families, made with a view to undermining the core value of our rule of law. The statements made judicially and extra-judicially by members of the permanent judiciary expressing commitment to judicial independence are supported by their unbiased consideration of law and evidence when adjudicating cases, as evidenced in the reasoned judgments.

25th anniversary of the establishment of the HKSAR

2022 is the 25th anniversary of the establishment of the Hong Kong SAR. The fundamental foundation of "one country" that underpins our constitutional order has been reinforced in the past two years. 2021 has seen case law reaffirming the constitutional order, protecting national security whilst observing human rights safeguards guaranteed under the Basic Law.

National Security Law

In the enforcement of the National Security Law (NSL), case law has laid down with certainty and clarity how the NSL is to be applied. In the case of *Lai Chee Ying* (Note 4), Article 42(2) (Note 5) was considered. The Court of Final Appeal examined the background, context, and purpose of the NSL, observing that it is intended to operate in tandem with constitutional rights and freedoms and other applicable statutory norms as part of a coherent whole, noting:

"The cardinal importance of the primary purpose of the NSL, namely to safeguard national security and to prevent and suppress acts endangering national security, is clear. That is why changes, including the NSL 42(2) exception applying more stringent conditions to the grant of bail in relation to offences endangering national security have been introduced." (Note 6)

Another significant case on the NSL in 2021 is the case of *Tong Ying Kit* (Note 7). The Court of First Instance comprising three judges (Note 8), analysed the elements of the offences of incitement to secession and terrorist activities under Articles 21 and 24 of the NSL respectively, held that the slogan "Liberate Hong Kong Revolution of Our Times" was, in the relevant circumstances, capable of carrying a secessionist meaning, and the defendant was convicted.

The Appeal Committee in the case of Ng Hau Yi Sidney (Note 9) considered the scope of the phrase "offence(s) endangering national security" referred to in various provisions of the NSL and held that such phrase should be construed as referring to all offences under the NSL and offences of that nature under existing Hong Kong laws without distinction. The Court further clarified that the offence of publishing seditious publications under section 10 of the Crimes Ordinance qualified as an offence endangering national security.

Basic Law

The wisdom of the Basic Law lies in facilitating development over time whilst preserving the fundamentals that must be observed. The Court of Appeal, in upholding the constitutionality of the Co-location Ordinance (Guangzhou-Shenzhen-Hong Kong Express Rail Link (Co-location) Ordinance) (Note 10), affirmed the important principle that the Basic Law is a living instrument which meets changing needs and circumstances, noting:

"The Basic Law is accordingly drafted with an eye to the future. ... Maintaining the Hong Kong system under the "one country, two systems" principle, however, does not mean stagnation. On the contrary, the Hong Kong system is expected to and indeed should continue to develop within the confines of the Basic Law to suit the contemporaneous needs and circumstances of our society, some of which may even be beyond the drafters' contemplation." (Note 11)

Improving the Electoral System

Another vital development made in the light of the actual situation in Hong Kong is the passing of the Improving Electoral System (Consolidated Amendments) Bill 2021 pursuant to the amended Annexes I and II of the Basic Law as promulgated by the National People's Congress Standing Committee. The enhanced electoral system aims to promote a consultative environment towards a common goal and minimises polarisation, leading to the gradual and orderly progress towards universal suffrage as provided for in Articles 45 and 68 of the Basic Law.

Rule of law education

The Department of Justice (DoJ) complemented these developments through education under the three "Es" program of our "Vision 2030 for Rule of Law"

("Vision 2030") initiative by taking an active role in educating students and teachers on the Constitution, the Basic Law and national security. At the professional level, the 2021 National Security Law Legal Forum entitled "Security Brings Prosperity" drew together distinguished speakers sharing experiences on national security legislations locally and abroad. The "Articles and Reference Materials on the Law of the People's Republic of China on Safeguarding National Security in the HKSAR" and the proceedings of the Basic Law 30th Anniversary Legal Summit "Back to Basics" held in 2020, were also published, providing a learned source for the proper understanding of the Basic Law and NSL.

Insolvency framework with the Mainland

As mentioned in my speech in 2019, an expert group has been formed to look at mutual recognition of and assistance in insolvency and corporate debt restructuring matters with the Mainland. In May 2021, we have completed the first stage by signing a Record of Meeting with the Supreme People's Court. I understand that cases have already benefitted from this framework.

International collaboration

In 2019, I also announced the establishment of the Inclusive Dispute Avoidance and Resolution Office (IDAR Office) and since then, with the support from the Central People's Government, a number of international collaborations have been concluded. Of particular importance is the hosting of the 59th Annual Session of the Asian-African Legal Consultative Organization (AALCO) in Hong Kong and, for the first time, in hybrid mode. Premier Li Keqiang delivered the Opening Remarks and announced the setting up of the AALCO Hong Kong Regional Arbitration Centre, stating that it will "provide more accessible and efficient dispute settlement services to Asian and African countries, and add more brilliance to Hong Kong as the Pearl of the East". AALCO, as an inter-governmental international organisation, provides a unique and important platform for collating perspectives from Asian and African states in engagement with international law. I have the honour of being elected as President of this 59th Annual Session, and active steps are taken to bring the Regional Arbitration Centre into operation.

Another inter-governmental meeting, the Intersessional Meeting of Working Group III of UNCITRAL (Note 12) was held in hybrid form in Hong Kong last year. The UNCITRAL Commission in July 2021 endorsed the suggestion of its Secretariat

to collaborate with the DoJ Project Office for Collaboration with UNCITRAL to take part in the Inclusive Global Legal Innovation Platform on Online Dispute Resolution (iGLIP on ODR) that was set up in Hong Kong as referred to in my speech in 2021. We hope that, through projects with UNCITRAL, we will be able to cooperate in promoting, raising awareness and providing bespoke capacity building for online dispute resolution.

Last year's Legal Week featured the biennial UNCITRAL Asia Pacific Judicial Summit and the launch of our Rule of Law Database. The latter was a milestone event in our Vision 2030 initiative, and its study aims to bring together empirical and objective data to review the practice of the rule of law.

In terms of capacity building, arrangements with various international organisations have been concluded and practitioners from the public and private sectors would be seconded to HCCH (Note 13) in The Hague and UNIDROIT (Note 14) in Rome. Under the JPO program (Note 15), we will be seconding a legal officer to the headquarters of UNCITRAL in Vienna.

As for the legal profession, the implementation of the Greater Bay Area (GBA) Legal Professional Examination, allowing our practitioners to practice PRC law in the GBA, is vital to opening up the legal market and merging with developments of the Motherland. The dual qualification of Hong Kong lawyers will put ourselves in a most advantageous position to serve the businesses in the GBA.

Amendments to the Legal Practitioners Ordinance

Finally, I am pleased that the Legal Practitioners Ordinance (Note 16) has been amended, permitting all legal officers (be they barristers or solicitors) who satisfy the eligibility requirements to be considered for appointment as Senior Counsel as a recognition of their competence.

Looking forward

Looking ahead, the first and foremost task for the HKSAR as a whole is to fulfil its constitutional duty to enact local legislation to implement Article 23 of the Basic Law to safeguard national security. This constitutional duty is not only expressed in the Basic Law but also in paragraph 3 of the National People's Congress' Decision on May 28, 2020 (the "528 Decision") (Note 17) and Article 7 of the NSL. The DoJ will

continue to provide full support and independent professional legal advice to the Security Bureau and draft the relevant laws.

The Law Reform Commission has published a report on Outcome Related Fee Structures for Arbitration (ORFSA). The Advisory Committee on Promotion of Arbitration has expressed support to adopt its recommendations and the DoJ is actively pursuing this. The adoption of the proposal is necessary to preserve and promote Hong Kong's competitiveness as a leading arbitration centre, enhance access to justice, and respond to increasing client demand for pricing and fee flexibility, and is supported by the business community.

Apart from arbitration, Hong Kong has also been promoting international mediation, in particular in the area of investor state mediation. Our trainings with ICSID (Note 18) on this have received good rapport and we will continue to capitalise on this strength. Mediation is well suited to resolve international commercial disputes, especially those arising from long term projects involving states. It is the best form of conflict resolution between states, focusing on common interests whilst preserving relationships, in line with international principles of peaceful co-existence and the peaceful settlement of disputes as set out in key documents such as the United Nations Charter (Note 19). We are also actively promoting the use of mediation under Working Group III of UNCITRAL. We are primed to provide services for and to promote international mediation. We have also worked with our counterparts in the GBA to have the GBA Mediator Accreditation Standards and the GBA Mediator Code of Conduct Best Practice, endorsed by the third Guangdong-Hong Kong-Macao Bay Area Legal Departments Joint Conference last December, and will continue to work together on other areas. We will spare no efforts in the pursuit of these matters and hope to bring to fruition some ideas that have been explored.

Various projects under Vision 2030 will continue and in particular, the study on the use of objective data launched in the 2021 Legal Week. This year we will hold the Basic Law Legal Summit entitled "Stability to Prosperity", and launch a publication titled "Basic Law: Selected Drafting Materials and Significant Cases". The National Security Legal Summit entitled "Thrive with Security" will be held to further the better understanding of the concept of national security.

Conclusion

Ladies and gentlemen, with the present consolidation of "one country" as the

fundamental premise in place and national security protected, I am confident that the common law will continue to apply in Hong Kong beyond 2047. It is high time we genuinely appreciate the "one country, two systems" policy. The DoJ will continue to further the proper understanding of the rule of law and the constitutional order, to protect the independence of our judiciary, to perform our professional role as government legal advisor, and to discharge our prosecution duties independently as required under the Basic Law. None of the above could be achieved without the full support from all my brilliant colleagues in the DoJ. I am most grateful to them for their dedication, resilience and professionalism.

On this note, I wish you all a very happy and healthy year of the tiger, and flourish and forge ahead with vigor and vitality. Thank you.

Note 1: Article 5 of the Basic Law reads: "The socialist system and policies shall not be practised in the Hong Kong Special Administrative Region, and the previous capitalist system and way of life shall remain unchanged for 50 years."

Note 2: Original text in Chinese: "對香港的政策，我們承諾了一九九七年以後五十年不變，這個承諾是鄭重的。為什麼說五十年不變？這是有根據的，不只是為了安定香港的人心，而是考慮到香港的繁榮和穩定同中國的發展戰略有著密切的關聯。中國的發展戰略需要的時間，除了這個世紀的十二年以外，下個世紀還要五十年，那麼五十年怎麼能變呢？現在有一個香港，我們在內地還要造幾個「香港」，就是說，為了實現我們的發展戰略目標，要更加開放。既然這樣，怎麼會改變對香港的政策呢？實際上，五十年只是一個形象的講法，五十年後也不會變。前五十年是不能變，五十年之後是不需要變。所以，這不是信口開河。" in "We Should Draw on the Experience of Other Countries" (《要吸收國際的經驗》), 3 June 1988, in Selected Works of Deng Xiao-ping, Vol. III.

Note 3: Article 85 of the Basic Law reads: "The courts of the Hong Kong Special Administrative Region shall exercise judicial power independently, free from any

interference. Members of the Judiciary shall be immune from legal action in the performance of their judicial functions."

Note 4: HKSAR v Lai Chee Ying (2021) 24 HKCFAR 33, [2021] HKCFA 3

Note 5: Article 42(2) of the National Security Law reads: "No bail shall be granted to a criminal suspect or defendant unless the judge has sufficient grounds for believing that the criminal suspect or defendant will not continue to commit acts endangering national security."

Note 6: HKSAR v Lai Chee Ying (2021) 24 HKCFAR 33, [2021] HKCFA 3 at 62.

Note 7: HKSAR v Tong Ying Kit [2021]HKCFI 2200 (verdict); [2021] HKCFI 2239 (sentence). The Court of Appeal (before Hon Poon CJHC, Yeung VP and Lam VP) also considered in separate proceedings [Tong Ying Kit v Secretary for Justice [2021] 3 HKLRD 350, [2021] HKCA 912] a challenge to a direction by the Secretary for Justice for the criminal proceedings in the Court of First Instance to be tried without a jury under Article 46 of the NSL, and ruled that the said direction is a prosecutorial decision protected from interference under Article 63 of the Basic Law which can only be reviewed on limited grounds under common law and is not open to challenge on conventional judicial review grounds based on the principle of legality and procedural safeguards as contended. The Court of Appeal also ruled that jury trial should not be assumed to be the only means of achieving fairness in the criminal process.

Note 8: Before Hon Toh J, Hon Anthea Pang J (as she then was), and Hon Wilson Chan J.

Note 9: HKSAR v Ng Hau Yi Sidney [2021] HKCFA 42

Note 10: Kwok Cheuk Kin, Lui Chi Hang, Hendrick, Leung Chung Hang, Sixtus, Leung Kwok Hung v Secretary for Justice, Chief Executive of HKSAR and Secretary for Transport and Housing [2021] 3 HKLRD 140 (CACV 8, 10, 87 and 88/2019, June 11, 2021)

Note 11: Kwok Cheuk Kin, Lui Chi Hang, Hendrick, Leung Chung Hang, Sixtus, Leung Kwok Hung v Secretary for Justice, Chief Executive of HKSAR and Secretary for Transport and Housing [2021] 3 HKLRD 140 (CACV 8, 10, 87 and 88/2019, June 11, 2021) at 40.

Note 12: United Nations Commission on International Trade Law

Note 13: Hague Conference on Private International Law

Note 14: International institute for the Unification of Private Law

Note 15: United Nations Junior Professional Officers Programme

Note 16: Cap. 159.

Note 17: "Decision on Establishing and Improving the Legal System and Enforcement Mechanisms for the Hong Kong Special Administrative Region to Safeguard National

Security" made by the 13th National People's Congress in its meeting on May 28, 2020.

Note 18: International Centre for Settlement of Investment Disputes

Note 19: See, e.g. Chapter VI of the United Nations Charter, and the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations passed by the United Nations General Assembly on October 24, 1970.

Ends/Monday, January 24, 2022