

SJ's speech at Ceremonial Opening of Legal Year 2023

Following is the speech by the Secretary for Justice, Mr Paul Lam, SC, at the Ceremonial Opening of the Legal Year 2023 today (January 16):

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

The maintenance of the common law system (including its judicial system) in Hong Kong is one of the most important features of the principle of "one country, two systems".

Article 5 of the Basic Law provides that the previous capitalist system and way of life practised in Hong Kong shall remain unchanged for 50 years. As to what will happen after that, President Xi Jinping gave a clear answer in his speech delivered on July 1, 2022, in Hong Kong by stating that "[t]here is no reason for us to change such a good policy, and we must adhere to it in the long run."

It is most significant to note that President Xi mentioned the common law twice in his speech. First, he said that, in the past 25 years "[Hong Kong's] previous laws including the practice of the common law have been maintained and developed" Second, he said that "The Central Government fully supports Hong Kong in its effort ... to maintain the common law"

The Central Government demonstrates its commitment in this respect by assigning important missions to Hong Kong, which cannot be accomplished unless the common law system is maintained and the rule of law in Hong Kong is upheld. First, under both the National 14th Five-Year Plan and the Outline Development Plan for the Guangdong-Hong Kong-Macao Greater Bay Area, the Central Government has positioned Hong Kong as a centre for international legal and dispute resolution services in the Asia-Pacific Region. Second, the International Organization for Mediation Preparatory Office will be set up in Hong Kong soon.

The preservation of the common law in Hong Kong is expressly guaranteed by Articles 8 and 18 of the Basic Law. Article 82 provides that the Court of Final Appeal may as required invite judges from other common law jurisdictions to sit on it. Article 84 provides that the Hong Kong courts may refer to precedents of other common law

jurisdictions. And Article 92 provides that judges may be recruited from other common law jurisdictions. These provisions contribute to imbuing Hong Kong's common law with international linkage.

Judicial independence is one of the most essential components of Hong Kong's common law system. The judiciary's independent judicial power including that of final adjudication is entrenched in the Basic Law, including the general provisions in Articles 2 and 19; and various provisions in Section 4 of Chapter 4, in particular Article 82. Article 85 provides specifically that "The courts of the Hong Kong Special Administrative Region shall exercise judicial power independently, free from any interference" It is again significant to note that in his speech delivered on July 1, 2022, President Xi acknowledged that "the judiciary exercises its power independently."

Although the common law system has been and will be maintained in Hong Kong, it is based on the constitutional order founded on the Constitution of the People's Republic of China. As Sir Anthony Mason (former Non-Permanent Judge of the Court of Final Appeal) observed in the Court of Final Appeal's judgment in *Lau Kong Yung v The Director of Immigration* (1999) 2 HKCFAR 300 at 344, "[The] conjunction of a common law system under a national law within the larger framework of Chinese constitutional law is a fundamental aspect of the principle of 'one country, two systems'."

Therefore, there must be some linkages between the two systems; one of which is the power of the Standing Committee of the National People's Congress (NPCSC) under Article 67(4) of the Constitution to interpret laws, including those national laws applicable to Hong Kong. There are corresponding provisions in Article 158 of the Basic Law and Article 65 of the Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region (Hong Kong National Security Law).

On December 30, 2022, the NPCSC interpreted Articles 14 and 47 of the Hong Kong National Security Law (the Interpretation). There are some suggestions that the Interpretation has expanded the powers of the Chief Executive and the Committee for Safeguarding National Security of the Hong Kong Special Administrative Region (the Committee), eroding the judiciary's independent judicial power and even putting the Chief Executive and the Committee above the law. Such suggestions are plainly wrong and misconceived. The Interpretation is, by definition, a clarification of the

original intent and purpose of those provisions; it does not confer any new power on anyone.

Article 47 of the Hong Kong National Security Law provides that the courts shall obtain a certificate from the Chief Executive to certify whether an act involves national security or whether the relevant evidence involves State secrets when these questions arise in the adjudication of a case. It does not apply to any question, other than the two specific questions prescribed by that article. The certificate issued by the Chief Executive constitutes a piece of conclusive evidence binding on the court. The Chief Executive does not, however, exercise any judicial power. There is indeed a similar provision in Article 19 of the Basic Law under which the courts shall obtain a certificate from the Chief Executive on questions of fact concerning acts of state such as defence and foreign affairs.

Under Article 14 of the Hong Kong National Security Law, the Committee, chaired by the Chief Executive and consisting of other members, is empowered to make decisions concerning the safeguarding of national security, such as formulating policies and advancing the development of the legal system and enforcement mechanisms. The Committee shall have a National Security Adviser designated by the Central People's Government and provide advice to the Committee. While decisions made by the Committee shall not be amenable to judicial review, the Committee must of course act within the scope of its duties and functions prescribed by Article 14. It does not confer any judicial power or function on the Committee.

Articles 14 and 47 of the Hong Kong National Security Law as interpreted by the NPCSC are entirely consistent with the well-established common law principle that, on matters concerning national security, it shall be for the executive authorities, rather than the judiciary, to decide and have the final say. In an authoritative passage in the judgment of the Privy Council in *The Zamora* [1916] 2 AC 77 at 107 decided back in 1916, Lord Parker of Waddington said "Those who are responsible for the national security must be the sole judges of what the national security requires. It would be obviously undesirable that such matters should be made the subject of evidence in a court of law or otherwise discussed in public." In another landmark judgment of the House of Lords in *Council of Civil Service Unions and others v Minister for Civil Services* [1985] 1 AC 374 at 412 decided in 1985, Lord Diplock said "National security is the responsibility of the executive government; what action is needed to protect its interest is, as ... common sense dictates, a matter upon which those upon whom the responsibility rests, and not the courts of justice, must have the

last word. It is par excellence a non-justiciable question. The judicial process is totally inept to deal with the sort of problems which it involves."

Not only that the Government of the Hong Kong Special Administrative Region, being the executive authorities of the Region, will not interfere with the Judiciary in strict compliance with Article 85 of the Basic Law, it has also been taking proactive steps to defend the Judiciary. Back on July 5, 2022, five days after I became the Secretary for Justice, in a press statement issued in response to a suspected case of intimidation against a staff member of the Judiciary, I said "In Hong Kong where the rule of law is upheld, no act of intimidation or violence which ... constitutes contempt of court will be tolerated. The Hong Kong Special Administrative Region Government will pursue seriously against any person who commits any such act ... to defend the integrity of the court, ensure the due administration of the justice and maintain public order." More recently, the Government issued press releases to express strong opposition to false accusations made by a foreign government against the verdict and sentence in a fraud case.

As another example, the Secretary for Justice, as the guardian of public interest and the due administration of justice, had brought contempt proceedings against those who breached an injunction to restrain doxxing against judges and their families. In a recent decision *Secretary for Justice v Chan Po Hong* [2022] HKCFI 1468, a defendant who made nuisance calls to a judicial officer and his wife was sentenced to 14 days' imprisonment suspended for 12 months.

On this occasion, I wish to make a solemn pledge that the Government will do its best to defend the Judiciary so that it may exercise their constitutional powers, and discharge its constitutional duties, independently free from any interference.

If one has to ask what the most unique strength of Hong Kong's common law system is, I would say it is its resilience. It has a long tradition of over a century, and has stood the test of time. We have the exceptional ability to prove sceptics and pessimists wrong.

That said, there is no room for complacency. It is crucial to maintain and enhance people's trust and confidence in the legal and judicial system. Since false and misleading information may spread from time to time, it is important to educate the general public on some basic and correct knowledge about our system. While we must hold on to the core values of the system such as the importance of judicial

independence, it is necessary for us to adapt to needs and changes in society, in particular, to ensure that people will have access to justice in an affordable and efficient manner. To promote rule of law education and to enhance access to justice are precisely the overriding objectives of various initiatives which my Department is implementing in the coming year.

The resilience of Hong Kong's common law system is largely built on the unshakable faith in the doctrine of the rule of law held by all those who contribute to the system, whether they are judges, barristers, solicitors or government lawyers. Despite the different roles we play, we shall unite to strive to earn the people's respect, trust and confidence. My dear fellow citizens of Hong Kong, my dear countrymen and friends from overseas, the rule of law cannot be safeguarded by judges and legal professionals alone. If you do care about and love Hong Kong, which I am sure you do, I would urge you to show and give us your support and understanding.

We celebrated the new year about two weeks ago, and the Chinese New Year of Rabbit is approaching. I wish to conclude by wishing you and your families a happy and healthy new year!

Ends/Monday, January 16, 2023