

HKSAR Government strongly disagrees with opinions expressed by Lord Sumption

The Hong Kong Special Administrative Region (HKSAR) Government spokesman today (June 11) expressed strong disagreements with the personal opinions on the rule of law and independent judicial power of Hong Kong made by Lord Sumption, who recently resigned as a non-permanent judge of the Court of Final Appeal of the HKSAR. Most importantly, there is absolutely no truth that the HKSAR courts are under any political pressure from the Central Authorities or the HKSAR Government in the adjudication of national security cases or indeed any case of any nature; or that there is any decline in the rule of law in Hong Kong. Anyone who suggested otherwise, no matter what the reasons or motives may be, would be utterly wrong, totally baseless, and must be righteously refuted.

The Government will not comment otherwise on any ongoing criminal proceedings as commented by Lord Sumption, but has to point out that regarding the case of conspiracy to commit subversion, the Court of First Instance held that the Legislative Council members had the duty to examine and approve budgets and Government public expenditure proposals based on their merits. Indiscriminate vetoing of the Government's budget and public expenditure proposals, in order to compel the Government to accede to political demands and force the Chief Executive to dissolve the Legislative Council and ultimately resign, thus rendering the Government unable to introduce any new policies or implement existing policies on benefitting people's livelihood, was an act in violation of the constitutional duty under Article 73 of the Basic Law which amounted to an abuse of powers and hence unlawful means for the purpose of the offence of subversion of State power. If anyone twisted the Court's judgment and exerted pressure on the Court of Appeal, in attempt to interfere with the judicial process, the HKSAR Government must not acquiesce it and must set the record straight.

HKSAR's constitutional order guarantees independent exercise of judicial power

Every sovereign state has the inherent right under public international law to adopt the constitutional order, political and legal systems that best suit its actual situation and the overall interests of its people.

The constitutional order of the HKSAR as established by the Constitution and the Basic Law is underpinned by the "one country, two systems" principle. Under Article 2 of the Basic Law, the National People's Congress authorises the HKSAR to exercise a high degree of autonomy and enjoy executive, legislative and independent judicial power, including that of final adjudication, in accordance with the provisions of the Basic Law. Although national security is a matter outside the high degree of autonomy of the HKSAR, the Hong Kong National Security Law authorises the HKSAR courts to

exercise jurisdiction over most of the cases concerning offences endangering national security. Such arrangement not only reflects the "one country, two systems" principle, but also demonstrates the fullest confidence of the Central Authorities in the ability of the HKSAR courts to exercise judicial power independently according to law, and to discharge the constitutional duty to safeguard national security.

The quintessential function of the Judiciary is to administer justice according to law. This entails that the jurisdiction of the courts in any given legal system is delineated by the constitutional order and laws of the legal system in which they operate. For example, in the United Kingdom (UK) where the constitutional model of parliamentary sovereignty is practised, Parliament is supreme and the courts of the UK have no jurisdiction to strike down any legislation passed by Parliament even if the courts consider it to be incompatible with the human rights principles. In the United States (US), Section 2, Article III of the US Constitution empowers Congress to make regulations to limit the jurisdiction of the US Supreme Court. No one could seriously suggest that the courts will be unable to exercise judicial power independently simply because their jurisdiction is limited in these circumstances.

The judicial system of the HKSAR is protected by the Basic Law. According to Articles 2, 19 and 85 of the Basic Law, the HKSAR shall be vested with independent judicial power, including that of final adjudication; the courts shall exercise judicial power independently, free from any interference. All judges and judicial officers abide by the Judicial Oath and administer justice in full accordance with the law, without fear or favour, self-interest or deceit. When adjudicating cases of offences endangering national security, as in any other cases, judges remain independent and impartial in performing their judicial duties, free from any interference.

Recent cases have vividly demonstrated that the HKSAR courts have continued to exercise judicial power independently. In line with the principle of open justice, the courts' judgments set out in detail the courts' analysis of the law and evidence, and the reasoning for their conclusions. For example, the reasons for verdict of the Court of First Instance in the case of conspiracy to commit subversion comprise over 300 pages, as well as two annexes totalling over 400 pages which summarised the evidence of the prosecution and defence witnesses. The Court of Appeal's judgment on the application by the Secretary for Justice for an interim injunction to prohibit four criminal acts relating to a song lasts over 60 pages, containing citations of numerous case authorities including those decided by the UK Supreme Court. Any reasonable, objective and fair-minded person who has read the publicly accessible judgments would certainly be satisfied that the judges have exercised judicial powers independently and decided the cases strictly in accordance with the law and evidence, free from any interference; nothing more, nothing less.

It is noted that despite his resignation from the Hong Kong Court of Final Appeal, Lord Collins of Mapesbury expressed "the fullest confidence in the court and total independence of its members". When expressing her wish to retire upon completion of the term of office as a Non-Permanent Judge

recently, the Right Honourable Madam Justice Beverley McLachlin also reiterated her "confidence in the members of the Court, their independence, and their determination to uphold the rule of law". The HKSAR Government expressed gratitude to Madam Justice McLachlin for her contribution to the Hong Kong judicial system during her term of office and for her objective appraisal of rule of law in Hong Kong.

Indeed, Lord Sumption made a similar observation when he declined to participate in the political boycott of the Hong Kong Judiciary instigated by the UK Government in March 2021, and pledged that the Hong Kong judges "deserve to be supported, not abandoned by their overseas colleagues". It is, hence, most disappointing that he has now opted to abandon them.

Real threats to the independent exercise of judicial power currently faced by the HKSAR courts indeed come from foreign government officials, politicians and political organisations, including blatant attempts to interfere with ongoing legal proceedings, and the despicable threats to impose so-called "sanctions" against judges on account of their performance of judicial functions in cases where the outcomes are not to the liking of these external forces, which are plainly contrary to fundamental principles of international law and international relations. It raises people's eyebrows when Lord Sumption considered the US threats of "sanctions" against Hong Kong judges to be unjust on the one hand, but offered such unfair comments on the judicial work of Hong Kong judges on the other hand. The HKSAR Government has never hesitated to defend the independent exercise of judicial power when it was under malicious and slanderous attack, whether by external forces or locally, and will continue to do so. This is an objective and indisputable fact that Lord Sumption has also apparently overlooked.

The Chief Executive, Mr John Lee said, "the HKSAR Government has never, and also will not allow anyone to, interfere with the prosecutions of the Department of Justice and trials by the court; and it has always respect and safeguard their independent prosecutorial power and independent adjudication power. These two powers are fully and affirmatively protected by the Basic Law. The prosecutorial decisions of the Department of Justice has not been subject to any interference. Likewise, the court has always exercised its independent judicial power without any interference. This is how it was in the past, how it is at present, and how it will be in future. The rule of law in Hong Kong is strong and will not change."

NPCSC's interpretation of law accords with "one country, two systems" principle

The authority of the Standing Committee of the National People's Congress (NPCSC) to interpret the Basic Law and national laws that apply in the HKSAR is a fundamental aspect of the "one country, two systems" principle and has long been recognised in the jurisprudence of the HKSAR. Under Article 158 of the Basic Law, the HKSAR courts are authorised to interpret the provisions of the Basic Law in adjudicating cases, whereas the ultimate power to interpret the Basic Law is vested in the NPCSC. As Sir Anthony Mason, a Non-Permanent Judge from another common law jurisdiction of the Hong Kong Court of Final Appeal, pointed out in *Lau Kong Yung & Others v Director of*

Immigration (1999) 2 HKCFAR 300, the NPCSC's power to interpret the Basic Law is in conformity with Article 67(4) of the Constitution which vests the power to interpret national laws in the NPCSC, and such power is free-standing. Sir Anthony Mason further pointed out that the NPCSC's power of interpretation provided the link between the two legal systems under the "one country, two systems" principle.

It is therefore entirely in line with the "one country, two systems" principle that the general power to interpret the Hong Kong National Security Law being a piece of national law, as stipulated in Article 65 thereof, is also vested in the NPCSC. The interpretation given by the NPCSC on Articles 14 and 47 of the Hong Kong National Security Law in December 2022 does not directly deal with any specific judicial proceedings or cases. Rather, it clarifies the meaning of the relevant legal provisions and the basis for application of the Hong Kong National Security Law. It does not in any way impair the independent judicial power and the power of final adjudication of the HKSAR courts as guaranteed by the Basic Law. It is for the HKSAR to resolve specific cases and issues by itself.

It is indeed not uncommon under different constitutional models to resort to the highest organ of state power to resolve questions of constitutional, political or legal significance arising from cases decided by the courts, even though it may bring about changes to, or even overturn, the legal principles established in the judicial decisions. Take the UK as an example, Parliament recently passed the Safety of Rwanda (Asylum and Immigration) Act which in effect overrides the decision of the UK Supreme Court which declared a proposed scheme of transferring asylum claimants to Rwanda unlawful.

National security laws protect human rights

The highest principle of the "one country, two systems" policy is to safeguard national sovereignty, security and development interests. The HKSAR is under a constitutional duty to safeguard national security. The HKSAR is entitled, and obliged, to safeguard national security in the best possible way; nothing less will do.

During the Hong Kong version of "colour revolution" in 2019, massive riots and violence occurred incessantly. Shops and public facilities were vandalised, set on fire and destroyed. Terrorist activities intimidated the community. People expressing opinions different with that of the black-clad mobsters would be intimidated, doxxed and beaten up.

Any responsible government facing the same chaos experienced by Hong Kong in 2019 would take decisive action to curb the insurrection and violence in order to safeguard national security and protect the rights and freedoms of its citizens. Lord Sumption's claim that the ordinary laws of Hong Kong were perfectly adequate for dealing with the riots is in total disregard of the actual situation of the insurrection. Those he described as "pro-democratic" were all supporting and glorifying violence at the time, and resorted to every means possible to obstruct the Police actions to stop the chaos in accordance with law. At the time, there was simply no law that could

effectively tackle acts such as secession or collusion with a foreign country or external force to endanger national security. The enactment of the Hong Kong National Security Law was precisely to fill the lacuna of the then existing law, and to restore the stable environment under which all Hong Kong residents and other people in Hong Kong could enjoy and exercise their rights and freedom without fear of repression.

Article 4 of the Hong Kong National Security Law clearly stipulates that human rights shall be respected and protected in safeguarding national security in the HKSAR; the rights and freedoms which the residents of Hong Kong enjoy under the Basic Law and the provisions of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights as applied to Hong Kong, shall be protected in accordance with the law. Article 5 further provides that the principle of the rule of law must be adhered to in safeguarding national security and a defendant's right to a fair trial is to be protected.

All law enforcement actions and prosecutorial decisions are taken based on the law and evidence, targeting acts and activities endangering national security and have nothing to do with the political stance, background or profession of the persons concerned.

Furthermore, court judgments demonstrate clearly that the courts have always examined the issues in this respect independently and critically to ensure that these principles laid down in the Hong Kong National Security Law are applied faithfully. Any suggestion that the Hong Kong National Security Law is "illiberal"; or that the court have paid mere "lip service" to the protection of fundamental human rights and freedoms, is totally unfounded.

Notwithstanding the Hong Kong National Security Law, all persons and organisations are entitled to continue to exercise the right to freedom of expression and freedom of the press guaranteed by the Basic Law and the Hong Kong Bill of Rights within the boundaries of the laws which are necessary for the protection of national security, public safety, public order and the rights and freedoms of others. As of May this year, there are over 200 media organisations registered under the Government News and Media Information System. The Hong Kong National Security Law is not a piece of legislation to suppress the media or to stifle the freedom of expression or freedom of the press. But no one is above the law. Actions taken against the acts of an individual press were targeted at offences endangering national security and had nothing to do with normal journalistic activities.

Both the Hong Kong National Security Law and the recently enacted Safeguarding National Security Ordinance have express provisions to protect expression of opinions or even criticisms against Government policies. What is prohibited are merely statements with seditious intention to incite overthrowing or hatred against the constitutional order of the country (including that of the HKSAR). To give one out of many examples, the recent public debate on the municipal solid waste charging scheme contributed to the Government's decision to suspend the implementation of the scheme and to pursue a review. Such objective and constructive expressions of opinions are plainly distinguishable from the dissemination of extremism and hate speech

which no country and no place in the world would tolerate.

There is no truth in saying that Hong Kong is becoming a "totalitarian" city. Objective facts and statistics prove unequivocally that Hong Kong has remained to be an open and vibrant international city, and will be more so in future. InvestHK has assisted 380 overseas enterprises to set up or expand their businesses in 2023 representing an increase of about 30 per cent as compared to last year. Start-up businesses (about 25 per cent of which originated from overseas) exceeded 4 200 last year, which is more than 30 per cent as compared with four years ago. The number of tourists keeps increasing and reached 34 million in 2023, which is a drastic increase after resumption to normal from the pandemic. No less than 210 mega events of different types, including international conferences will take place in Hong Kong this year.

Mr Lee said, "all countries in the world are duty bound to safeguard their national security, and the HKSAR, as an inalienable part of the People's Republic of China, is no exception. When the HKSAR discharges its constitutional duty in this respect, what we demand is fair and objective treatment as well as respect from others. The national security in the HKSAR cannot and must not be 'second class'; it must be given the same respect and its lawfulness is the same as that in any other country. The HKSAR will continue to steadfastly, in strict adherence to the principle of the rule of law, discharge the duty to safeguard national security. We are confident that well-informed members of the international community will afford the HKSAR an objective and impartial appraisal."