

SJ's speech at Ceremonial Opening of the Legal Year 2019

Following is the speech by the Secretary for Justice, Ms Teresa Cheng, SC, at the Ceremonial Opening of the Legal Year 2019 today (January 14):

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

In the past year, our commitment to the rule of law has helped inform, augment and re-energise our work in confronting a range of challenges – from providing professional, impartial and independent deliverables, to promoting good governance and legality in governmental decisions and actions, and ensuring equal and fair opportunities for all.

PRC Constitution, Basic Law and common law of Hong Kong

One fundamental aspect of the constitutional order of Hong Kong that is sometimes overlooked is that it is premised on both the Constitution of the People's Republic of China (PRC) and the Basic Law of the Hong Kong Special Administrative Region (HKSAR). As the Court of Final Appeal stated in *Democratic Republic of the Congo v FG Hemisphere Associates LLC (No. 1)* (Note 1): "The HKSAR was established by the National People's Congress (NPC) pursuant to Article 31 of the Chinese Constitution. It did so by promulgating the Basic Law on April 4, 1990"

The PRC Constitution has also been referred to in a number of important judgments, including those of the Court of Final Appeal. In one case, Sir Anthony Mason, non-permanent judge (NPJ), reminded us that the Basic Law "is a national law of the PRC, being an enactment of the National People's Congress made in the exercise of legislative powers conferred upon the NPC by the PRC Constitution". (Note 2) In another case, Lord Cooke of Thorndon NPJ referred to the Preamble of the PRC Constitution when dealing with the question of recognition of Taiwan court orders. (Note 3)

That the PRC Constitution and the Basic Law together form the constitutional basis of the HKSAR cannot be seriously disputed, whether as a matter of law or fact. Like any other legal problem, the interpretation and extent of the application of the provisions of these two laws will be a matter that has to be analysed by applying the proper applicable law, and in context, in particular with Article 11 of the Basic Law in mind, so as to derive a legally correct answer.

Another matter that cannot be disputed is that the common law is maintained and continues to develop in Hong Kong, as guaranteed by Article 8 of the Basic Law. One should appreciate that, here, the common law refers to the common law of Hong Kong. As pithily stated by Lord Millett NPJ in *China Field Ltd v Appeal Tribunal (Buildings)* (No. 2) (Note 4):

"... our judges must develop the common law of Hong Kong to suit the circumstances of Hong Kong. It is well recognised that the common law is no longer monolithic but may evolve differently in the various common law jurisdictions ... [The Court of Final Appeal] will continue to respect and have regard to decisions of the English courts, but it will decline to adopt them not only when it considers their reasoning to be unsound or contrary to principle or unsuitable for the circumstances of Hong Kong, but also when it considers that the law of Hong Kong should be developed on different lines."

Writing extra-judicially, Sir Anthony Mason put it this way:

"The differences that distinguish the jurisprudence of the various common law jurisdictions are largely doctrinal. The variations in doctrine may be attributed, however, to different judicial responses to variations in the material circumstances and conditions of society in the various jurisdictions or to different judicial perceptions about particular societal values"
(Note 5)

Bearing in mind these basic jurisprudential notions allows us to appreciate the beauty of the common law – the ability to adapt to evolving circumstances in the development of a legal system that tailors to what is asked of it given the social, cultural and economic fabric of our society.

Another major appeal of the common law, of which case law forms an indispensable part, is that detailed reasons, including the legal analysis and findings of fact, are set out in the judgments. Unfortunately, we have seen totally baseless, arbitrary and even malicious attacks on some of our judges simply because the outcome of particular cases was not to the liking of those making the attacks. Such acts and utterances are not to be tolerated and where evidence and circumstances justify, legal action will be taken.

Careful reading and correct understanding of court judgments would often dispel any unwarranted misunderstanding. With a view to raising public awareness and assisting the public to better understand significant decisions of the courts, the Department of Justice has prepared summaries of judgments of notable cases with substantial media or public interest. They are made available on the department's website shortly after the judgments are handed down. We hope that this initiative, together with the Hong Kong e-Legislation database which provides free access to all legislation of Hong Kong, would enhance accessibility of the law for the general public and foster better understanding of the law so as to encourage healthy and informed discussions.

Establishment of IDAR Office

Our rule of law and common law system have together formed a solid foundation for Hong Kong's status as the leading centre for international legal and dispute resolution services in the Asia-Pacific region. It is reported that "[t]o a majority of developing countries covered by the Belt and Road routes, Hong Kong believes it offers the promise of a mature and independent legal system and a neutral venue to resolve disputes arising between parties from the region's complex political and legal cultures".
(Note 6) While it is also reported that the Department of Justice recently

"has been more proactive in getting Hong Kong's name out as a dispute resolution hub for Asia-related cases" (Note 7) and launched other initiatives, we should not be complacent about our existing competitive edge.

Indeed we have not overlooked the keen competition posed by other jurisdictions in this region and beyond. No doubt, there is a pressing need for our legal practitioners and the Department of Justice to be more proactive and join hands to strengthen the interface between the local and international legal communities, thereby facilitating the export of our legal services, enhancing Hong Kong's position as a leading legal and dispute resolution centre, and importantly, conveying the strength of our rule of law.

To better cope with the challenges and to harness the additional opportunities offered by the Belt and Road Initiative and the Guangdong-Hong Kong-Macao Greater Bay Area plan, the Inclusive Dispute Avoidance and Resolution Office (IDAR Office) has been established within the Department of Justice, which will work directly under my steer.

The establishment of the IDAR Office will help better co-ordinate and implement various initiatives that the department has been undertaking in the areas of dispute avoidance and resolution.

The IDAR Office will pursue and conclude co-operation or partnership arrangements with other jurisdictions and international organisations. It will also organise, support or encourage a number of important international events and activities in Hong Kong, as well as raise the international profile of Hong Kong in deal making and dispute resolution through capacity building and promotional activities overseas.

The IDAR Office's objective is to facilitate access to justice and provide equal opportunities for people from all walks of life and for all sectors of the economy without boundary, advancing Goal 16 of the United Nations 2030 Sustainable Development Goals in this region and beyond.

Goal 16 emphasises the promotion of peaceful and inclusive societies for sustainable development, the provision of access to justice for all and the building of effective, accountable and inclusive institutions at all levels. As President Xi Jinping explained, the United Nations 2030 Sustainable Development Goals are part of our national development strategies, and we should "promote coordinated advances in the economic, social and environmental fields, pursue inclusive development in keeping with our respective national conditions, and forge equal and balanced global development partnerships". (Note 8)

Mediation

The promotion of mediation has long been an important focus. Domestically, last year saw the milestone of the opening of the West Kowloon Mediation Centre and the implementation of a Pilot Mediation Scheme for Small Claims Tribunal and other suitable cases. At the cross-boundary level, the Mediation Mechanism for investment disputes established in accordance with

the Investment Agreement under the framework of the Mainland and Hong Kong Closer Economic Partnership Arrangement (CEPA) was implemented in December 2018. The lists of mediation institutions and mediators mutually agreed by the two sides have been published.

In light of the international trend and with the CEPA Mediation Mechanism in place, we have, together with the International Centre for Settlement of Investment Disputes of the World Bank Group and Asian Academy of International Law, launched a training course on investment law and investment mediation skills in mid-October 2018, which was the first in Asia. We plan to conduct further rounds of such training with the goals of building up a team of investment mediators in Asia and developing Hong Kong into an international investment law and international investment dispute resolution skills training base.

The department is actively pursuing and formulating how to capitalise on Hong Kong's strengths established over the years in mediation to better serve the local and international communities in light of the opportunities that are available under the Belt and Road Initiative and the Greater Bay Area plan.

Arbitration

Turning to arbitration, the Code of Practice for Third Party Funding of Arbitration was issued on December 7, 2018. On the same day, a commencement notice to bring the relevant provisions of the Arbitration Ordinance into operation was gazetted. The new regime for third party funding of arbitration will come into operation on February 1.

Legal Hub

All these advances in legal infrastructure are complemented by new physical infrastructure which supports dispute resolution and other legal services in a most tangible way. The renovation works for the Legal Hub at the West Wing of the former Central Government Offices and the nearby heritage-listed former French Mission Building are making good progress and due to be completed by the first quarter of this year and mid-2020 respectively.

LawTech

Another important area of development is the use of technology in the provision of legal services. In 2016, the United Nations General Assembly observed that online dispute resolution (ODR) "can assist the parties in resolving the dispute in a simple, fast, flexible, and secure manner, without the need for physical presence at a meeting or hearing". (Note 9) More recently, the Asia-Pacific Economic Cooperation (APEC) has responded to the call and is currently embarking on a project to establish an ODR platform with micro, small and medium-sized enterprises as major beneficiaries.

The Chief Executive announced in her 2018 Policy Address that the Government supports the development by non-governmental organisations of a

Belt and Road e-arbitration and e-mediation platform, so that Hong Kong will be able to provide efficient and cost-effective online dispute resolution services. The Government will provide funding for the cost of development of this meaningful project. We are now working very closely with the stakeholders in the development of the ODR platform and also taking the lead in the ODR project under APEC.

Law Reform Commission's study on cybercrime

While we seek to reap the benefits of new technologies, the challenges posed by them cannot be ignored. The Law Reform Commission is well aware of the rapid developments in this area, as well as the potential for new technologies to be exploited for carrying out criminal activities. Therefore, a sub-committee has recently been formed to study the topic of cybercrime.

Mutual legal assistance with the Mainland

I am pleased to announce that the long-awaited arrangement between Hong Kong and the Mainland on reciprocal recognition and enforcement of judgments in civil and commercial matters will be concluded and signed in the near future.

With the generous and expert assistance from the legal sector, efforts have also been stepped up in the department to pursue the study of establishing a legal mechanism between Hong Kong and Mainland for mutual recognition of and assistance in insolvency and corporate debt restructuring matters. Other measures and arrangements that will enhance Hong Kong's position as a dispute resolution hub are being actively discussed with promising feedback.

Legal profession

Since taking the office, I have been eager to engage and hear from the legal profession. Through quarterly meetings with the Bar Association and the Law Society, we have established a channel of communication for frank and open exchange of issues of concern to legal practitioners. The department's briefing out policy has been under review since our first meetings and some fruitful outcome has been achieved last year, with emphasis on the exploration of opportunities for young practitioners. Measures to facilitate wider use of Hong Kong's high-quality, renowned and professional legal services will continue to be pursued.

Conclusion

None of the progress achieved in the past year would have been possible without the dedication and devotion of my colleagues in the department and the contributions of legal practitioners in private practice. I express my sincerest gratitude to them for their efforts. In these efforts to strengthen the rule of law, the department that I am privileged to lead is honoured to be part of Hong Kong's strong, robust and professional legal fraternity. Like you, we approach the challenges ahead with resolve, humility and professionalism. We are eager to join hands in driving this work into the

future.

Thank you very much.

Note 1: (2011) 14 HKCFAR 95, at [307].

Note 2: *Lau Kong Yung & Others v Director of Immigration* (1999) 2 HKCFAR 300, at 344.

Note 3: *Chen Li Hung & Others v Ting Lei Miao & Others* (2000) 3 HKCFAR 9, at 25.

Note 4: [2009] 5 HKLRD 662, at [78] and [81].

Note 5: Sir Anthony Mason, "The Common Law", in "Hong Kong's Court of Final Appeal: The Development of the Law in China's Hong Kong", eds. Young and Ghai (Cambridge University Press, 2014), p. 338.

Note 6: See "Does Hong Kong Have What It Takes to Be Asia's Arbitration Hub?" (November 25, 2018) (www.law.com).

Note 7: *Ibid.*

Note 8: See President Xi Jinping's speech at the APEC CEO Summit on November 17, 2018 (www.xinhuanet.com/english/2018-11/17/c_137613904.htm).

Note 9: Resolution adopted by the United Nations General Assembly on December 13, 2016 (A/RES/71/138).