

SJ's speech at Ceremonial Opening of the Legal Year 2021

Following is the speech by the Secretary for Justice, Ms Teresa Cheng, SC, at the Ceremonial Opening of the Legal Year 2021 today (January 11):

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

The holding of the opening of the legal year here at the Court of Final Appeal, with its live broadcast to the public, is testimony to Hong Kong's strong legal traditions and the resilience and tenacity of the legal community notwithstanding unforeseeable challenges beyond one's control. The coronavirus has posed immense challenges to the world and Hong Kong is not spared.

Judicial Independence

In my 2019 speech, I condemned the totally baseless, arbitrary and even malicious attacks on some of our judges, urging the community to dispel such unwarranted misunderstanding by reading the court judgments. Last year, I have witnessed multiple occasions by which similar reminders have had to be made.

Our judicial independence is premised on the solid infrastructure that has been laid down primarily in the Basic Law – the security of tenure (Note 1), the immunity of judges (Note 2), the non-revolving door (Note 3), and importantly the expressed provision in Article 85 of the Basic Law that guarantees judicial independence, free from any interference (Note 4). The judicial oath, taken by all judges, requires them to safeguard the law and administer justice, without fear or favour. Judges are required to adjudicate cases independently and impartially. Comments and discussions on court decisions are always permissible within the boundary of the law if done rationally and objectively. Yet some remarks that have surfaced are nothing like that. Any unfair or unfounded remarks with the ulterior motive of exerting pressure or undue influence on our judges in dispensing justice will be to no avail.

Doxxing

Doxxing activities towards judges and other persons involved in the administration of justice were on the rise and must be curtailed. As "guardian of the public interest" (Note 5), I sought and obtained an injunction order to restrain the conduct of such activities towards Judges, Judicial Officers and their family members. In granting this injunction, the Court noted:

"It remains fundamental to the rule of law that litigants and the

general public are able to place reliance on and have confidence in a Court system that is free from bias, and that the Judge or Judicial Officer in any case is the person who decides that case according to its evidence and the applicable law." (Note 6)

It is a serious matter to act in breach of an injunction order. Any person who acts in violation of an injunction order may be held in contempt of court and is liable to a fine or imprisonment, including an immediate custodial sentence as ordered by the Court in a recent decision (Note 7).

As I have stated in 2018, "(a)ll of us jointly bear the responsibility to respect, promote and further the rule of law as a fundamental basis of our society" (Note 8). It lies in every individual and institution to be forthcoming in defending our judiciary and the rule of law against these baseless and malicious attacks and, for some, to refrain from blindly uttering such statements.

National Security Law

Another baseless challenge to our rule of law relates to the promulgation of the National Security Law in Hong Kong. National security is within the purview of the Central Authorities. The National People's Congress (NPC) is the highest organ of state power in the People's Republic of China and its Standing Committee was entrusted to formulate the National Security Law. Pursuant to Article 18 of the Basic Law, it was added to Annex III, promulgated and became applicable to the HKSAR.

Article 23 of the Basic Law does not change the fundamental principles set out above. It imposes a constitutional responsibility on the HKSAR to enact legislation in respect of certain offences relating to national security. Yet the Central Authorities always have the power and duty to legislate on matters of national security, especially when this responsibility of the HKSAR has not been fulfilled. It is entirely misconceived to say that the principle of "one country, two systems" has been undermined.

Many unfair and ill-informed criticisms have been made against the designation of judges by the Chief Executive, with remarks that it will undermine Hong Kong's judicial system. It should be reiterated that the Chief Executive only designates a list of judges in different levels of courts to hear cases involving issues of national security, rather than assigning which judge to preside over a specific case.

Understanding the Basic Law

The National Security Law brings into sharp focus the constitutional order of Hong Kong. China is a unitary state, and the powers of the branches of the HKSAR emanate from the Central Authorities. The Constitution and the Basic Law form the constitutional basis of the HKSAR. A proper understanding of this concept is of utmost importance to comprehend our legal system.

The Basic Law 30th Anniversary Legal Summit with the theme "Back to Basics" reminds us of the fundamentals necessary for the proper understanding of the Basic Law. A key takeaway from the Summit is entirely the same as a finding in the Court of Appeal decision dealing with the Emergency Regulations Ordinance (ERO): that the HKSAR Government is "very much an executive-led government" (Note 9).

The Emergency Regulations Ordinance

The judgment delivered by the Court of Final Appeal regarding the ERO (Note 10) is particularly significant. It upheld the compatibility of the ERO with the Basic Law, and recognised that in circumstances of public danger, it is "'essential' to give the executive 'wide and flexible legislative powers' whether or not the legislature is sitting" (Note 11). The court continued:

"It should be remembered that the purpose of the ERO is to provide the (Chief Executive in Council) with wide and flexible legislative powers in times of emergency or public danger in order to deal quickly and adequately with the situation in question." (Note 12)

In upholding the constitutionality of the ERO and the proportionality of the Prohibition on Face Covering Regulation which restricted the use of facial coverings during public order events we saw in 2019 with deteriorating law and order (Note 13), the Court took the view that when striking a fair balance between the societal and individual interests, the interests of Hong Kong as a whole is important. I echo this view – rights and freedoms are not absolute but are subject to lawful restrictions including the interests of public safety, public order and the protection of the rights and freedoms of others (Note 14). One final statement in the judgment is noteworthy:

"... And finally, the interests of Hong Kong as a whole should be taken into account since the rule of law itself was being undermined by the actions of masked lawbreakers who, with their identities concealed, were seemingly free to act with impunity." (Note 15)

Criminal Appeals

This year marks a significant increase in the amount of applications for the review of sentence lodged under section 81A of the Criminal Procedure Ordinance (Note 16), with 17 applications lodged in 2020 compared to four in 2019. Of the 12 such applications decided in 2020, 11 were allowed. In four of the cases, the Court of Appeal repeated the sentencing principle as set out in Wong Chi Fung (Note 17) of the necessity to emphasise deterrence and punishment in large-scale unlawful assembly cases involving violence be applied.

Vision 2030

Under the "Vision 2030 for Rule of Law" initiative, and benefiting from the guidance of the Task Force formed under it, we noted that objective data shall be referred to in ascertaining the practice of the rule of law and

important elements including cultural, socio-economic and local traditions (both legal and indigenous) are features that must be taken into account.

Locally, we have started projects that will promote the proper understanding and recognition of the rule of law, the Constitution and the Basic Law at various levels of society, through a multi-faceted approach such as animated short videos, drama, interactive workshops, and exposure to international conferences. These "3Es" projects – representing "Engagement, Empowerment, and Enrichment", aim to raise awareness of a law-abiding society, equip youth with the correct understanding of the rule of law, and provide the legal community with opportunities to broaden their knowledge and international exposure.

Other DoJ Initiatives

The coronavirus has changed the way we deliver conferences. The use of technology and live feed has enabled us to reach out to more people in more jurisdictions and to provide recordings on the legalhub.gov.hk website. In a way, it is a blessing in disguise. Yet, some of our events which are best conducted by way of physical meetings to facilitate personal interactions have to be postponed. They include the Asian-African Legal Consultative Organization annual meeting, the United Nations Commission on International Trade Law (UNCITRAL) Working Group III Intersessional Meeting and the Advanced Course that my department is co-organising with The Hague Academy of International Law and the Asian Academy of International Law.

We have also reached a Supplemental Arrangement (Note 18) with the Supreme People's Court to bring the 1999 Arrangement Concerning Mutual Enforcement of Arbitral Awards (Note 19) more in line with the spirit and intent of the New York Convention (Note 20) and international arbitration practice (Note 21). Legislative measures will be needed to implement the same.

As to new initiatives, the Department of Justice will continue to pursue and promote the development of LawTech. As set out in the Policy Address, we will be facilitating the development of the Hong Kong legal cloud to provide safe, secure and affordable data storage services for local legal and dispute resolution communities. Furthermore, with the use of online dispute resolution (ODR) being more prevalent, and apart from already signing up to the Asia-Pacific Economic Cooperation ODR Framework, we have also established a DOJ Project Office for Collaboration with UNCITRAL to study pertinent legal issues stemming from the increasing use of emerging technology. With input from UNCITRAL, we are planning to set up an Inclusive Global Legal Innovation Platform to facilitate studies in this particular aspect.

Last year, an online international conference to celebrate the 40th anniversary of the United Nations Convention on Contracts for the International Sale of Goods (CISG) was conducted. A public consultation on Hong Kong's proposed application of the CISG was completed and we are analysing and compiling the results.

WTO Case with US

In protecting our legitimate rights, Hong Kong has formally taken steps under the World Trade Organization framework to resolve its dispute with the United States with respect to its origin markings requirement imposed on Hong Kong products. We believe that the US requirement is contrary to a number of WTO-covered agreements, undermines the rule-based multilateral trading system, and does not respect Hong Kong's status as a separate customs territory.

Conclusion

Ladies and gentlemen, today is a very special day: the Ceremonial Opening of the Legal Year 2021, the former Chief Justice Mr Geoffrey Ma's 65th birthday, and Chief Justice Cheung's first day in assuming the role of Chief Justice. To the new Chief Justice I offer my heartfelt congratulations, and I am confident that he will continue to safeguard the independence of the Judiciary and the rule of law in Hong Kong. With this, I wish you all a very happy and healthy new year.

Note 1: Article 89 of the Basic Law guarantees the security of tenure for judges, and states that they can only be removed for inability to discharge his or her duties or for misbehaviour.

Note 2: Article 85 of the Basic Law provides that members of the judiciary shall be immune from legal action in the performance of their judicial functions.

Note 3: Upon appointment, judges at the District Court level and above are precluded from returning to practice in Hong Kong as a barrister or solicitor. This "non-revolving door" system prevents perceived conflicts of interest and enhances the independence of the judiciary.

Note 4: 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 5: Secretary for Justice v Persons unlawfully and wilfully conducting themselves in any of the acts prohibited under paragraph 1(a), (b) or (c) of the indorsement of claim [2020] HKCFI 2785 (HCA 1847/2020, 13 November 2020) at paragraphs 8 and 35.

Note 6: Secretary for Justice v Persons unlawfully and wilfully conducting themselves in any of the acts prohibited under paragraph 1(a), (b) or (c) of the indorsement of claim [2020] HKCFI 2785 (HCA 1847/2020, 13 November 2020) at paragraph 37.

Note 7: Secretary for Justice v Chan Kin Chung [2020] HKCFI 3147, (HCMP 744/2020, 28 December 2020) at paragraph 59.

Note 8: Speech by the Secretary for Justice at the Ceremonial Opening of the Legal Year 2018 at

www.doj.gov.hk/en/community_engagement/speeches/20180108_sjl.html.

Note 9: See the Court of Appeal judgment in Kwok Wing Hang & Others v Chief Executive in Council & Anor [2020] 2 HKLRD 771, [2020] HKCA 192 and Leung Kwok Hung v Secretary for Justice & Anor [2020] 2 HKLRD 771, [2020] HKCA 192

at paragraph 92.

Note 10: Kwok Wing Hang & Others v Chief Executive in Council & Anor [2020] HKCFA 42 and Leung Kwok Hung v Secretary for Justice & Anor [2020] HKCFA 42.

Note 11: Kwok Wing Hang, Leung Kwok Hung [CFA] at paragraph 44.

Note 12: Kwok Wing Hang, Leung Kwok Hung [CFA] at paragraph 61.

Note 13: Kwok Wing Hang, Leung Kwok Hung [CFA] at paragraphs 87 to 97.

Note 14: Kwok Wing Hang, Leung Kwok Hung [CFA] at paragraph 100.

Note 15: Kwok Wing Hang, Leung Kwok Hung [CFA] at paragraph 146.

Note 16: Criminal Procedure Ordinance, Cap. 221.

Note 17: Secretary for Justice v Wong Chi Fung [2018] 2 HKLRD 699, which was endorsed by the Court of Final Appeal in Secretary for Justice v Wong Chi Fung (2018) 21 HKCFAR 35.

Note 18: Supplemental Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and the Hong Kong Special Administrative Region, signed on November 27, 2020.

Note 19: Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and the Hong Kong Special Administrative Region, signed on June 21, 1999.

Note 20: Convention on the Recognition and Enforcement of Foreign Arbitral Awards, signed on June 10, 1958.

Note 21: The Supplemental Arrangement amends the 1999 Arbitration Arrangement in four aspects, namely: (i) expressly including the term "recognition" when referring to enforcement of arbitral awards; (ii) providing that a party may apply for preservation measures before or after the court's acceptance of an application to enforce an arbitral award for greater certainty; (iii) aligning the scope of arbitral awards with the prevalent approach of "seat of arbitration"; and (iv) removing the current restriction and allow parties to make simultaneous applications to both the courts of the Mainland and the HKSAR for enforcement of an arbitral award.