

The Past, Present and Future of the Rule of Law in Hong Kong

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(Following is the speech by the Secretary for Justice, Mr. Rimsky Yuen, delivered at the AGM and Luncheon of the Hong Kong Public Administration Association, held in the Police Officers' Club on 22 May, 2015.)

Professor (Peter) Fong (President of the Hong Kong Public Administration Association), members of the Hong Kong Public Administration Association, distinguished guests, ladies and gentlemen,

First of all, may I express my gratitude to the President and all the members of your Association for inviting me to this annual event, as well as to give me this opportunity to address such a distinguished audience.

The importance of the science, or perhaps the art, of public administration to a modern society hardly requires further elaboration. Over the years, your Association has made significant contributions in enhancing public understanding on important issues concerning public administration, as well as providing a forum for discussing relevant issues. The works and contribution of your Association are highly commendable.

The luncheon today no doubt also provides a good platform for us to exchange views on issues relevant to public administration. As the Secretary for Justice, the topic I have chosen is "**The Past, Present and Future of the Rule of Law in Hong Kong**".

The Past

For many decades, Hong Kong has been one of the most affluent cities in Asia. Many factors have contributed to our success. One of such factors undoubtedly is the fact that Hong Kong is amongst the very first jurisdictions in the region which recognized the importance of the rule of law and made conscious efforts to safeguard its well-being. Let's take a brief look at the rule of law in our past¹.

In 1842, Hong Kong became a British colony. One of the most significant consequences was the introduction of the common law system, and with it the introduction to Hong Kong of the notion of the rule of law.

It has been suggested that the expression "the rule of law" was coined by the English law professor, Professor Dicey, in 1885, although it has also been suggested that the idea lying behind the expression had a far longer history that could even be

traced back to the time of Aristotle. In short, Professor Dicey's concept of the rule of law is that no one is above the law, and all are subject to the same law administered in the same courts. It was in that spirit that, despite the shortcomings and imperialist assumptions of Hong Kong's early legal system, Chinese men charged with the attempted poisoning of the European community in 1857 were allowed to be tried by jury and acquitted in spite of demands from powerful colonists for their summary execution. It was also in that spirit that the then Chief Justice of Hong Kong, Sir Francis Piggott, had directed rather strongly worded remarks at the then Governor of Hong Kong, Sir Francis May, on the principle that the Government must act in accordance with laws enacted by the legislature in the unreported Supreme Court case of *Lugard v Chu Ping* in 1909.

Since then, Hong Kong has continued to demonstrate its staunch commitment to the rule of law, surviving the testing and controversial Sino-British negotiations that determined Hong Kong's fate in the early 1980s. The importance of the rule of law for the continued prosperity of Hong Kong was well acknowledged by all parties concerned, as evident from the fact that the Basic Law promulgated on April 4, 1990 has included many provisions that protect the rule of law in Hong Kong, to which I will return later.

It is not possible to mention exhaustively all the past events that are responsible for shaping the rule of law in Hong Kong as we know it today on this occasion. But I hope that what I just mentioned would serve to remind ourselves that the present state of the rule of law in Hong Kong did not emerge and continue out of a vacuum. Rather, this remarkable achievement is made possible only because of the hard work and perseverance of the past generations, and it is because of their extraordinary efforts that we are now able to confidently claim that the rule of law is deeply rooted in Hong Kong. Hence, we should treasure the strong foundation built by our past generations by continuing to cherish, safeguard, and strengthen the rule of law for our community's benefit.

The Present

This brings me to the rule of law in the present day world.

Modern Concept of the Rule of Law

The concept of the rule of law has been discussed by many leading commentators and jurists both local and overseas. This is not the occasion to embark upon a detailed analysis of the numerous expositions that have been put forward. However, allow me to highlight a few explanations of the concept, so as to set the scene for further discussion.

One of the most well-known expositions of the concept of the rule of law is the one put forward by the late Lord Bingham, an eminent United Kingdom (UK) judge, who explained that the concept of the rule of law comprises the following eight "sub-

rules", namely²:

- (a) the law must be accessible and so far as possible intelligible, clear and predictable;
- (b) questions of legal right and liability should ordinarily be resolved by applications of the law and not the exercise of discretion;
- (c) the laws of the land should apply equally to all, save to the extent that objective differences justify differentiation;
- (d) public officials must exercise the powers conferred on them in good faith, fairly, for the purpose for which the powers were conferred, without exceeding the limits of such powers and not unreasonably;
- (e) the law must afford adequate protection of fundamental human rights;
- (f) means must be provided for resolving, without prohibitive cost or inordinate delay, bona fide civil disputes which the parties themselves are unable to resolve;
- (g) adjudicative procedures provided by the state should be fair;
- (h) the rule of law requires compliance by the state with its obligations in international law as in national law.

In a similar vein, the former Chief Justice, Mr. Justice Andrew Li, has identified three over-arching principles under the rule of law³:

- (a) first, under the rule of law, everyone, both those who govern and those who are governed, is subject to the same laws;
- (b) second, disputes between citizens and disputes between citizen and government are resolved fairly and impartially by an independent judiciary; and
- (c) third, the rule of law involves the effective protection of human rights.

As I said earlier, there are various other expositions, as well as methodologies and approaches to test the rule of law situation in a specific jurisdiction. Examples include the approach adopted by the Venice Commission's Report on the Rule of Law (2011)⁴, as well as the nine factors adopted in working out the World Justice Project Rule of Law Index⁵. This occasion is also not an occasion to debate which one provides the best definition or methodology. More importantly and pertinently, if I may suggest, is the fact that each of the core elements of the rule of law identified by those leading jurists and institutions is vigilantly safeguarded in Hong Kong. Whilst time does not allow me to discuss each element in detail, let us look at two key aspects so as to have an overview of the current situation in Hong Kong.

Before I do so, I would like to make this preamble. From time to time, some commentators and public figures, both local and overseas, made observations that might

cause concern over the situation of the rule of law in Hong Kong. I would leave it to you to judge whether those observations are correct or justified. However, I would invite you to look at the objective facts, rather than subscribing to subjective or simply bare assertions that cannot withstand scrutiny when tested against objective facts.

The Constitutional Framework

With that preamble, let me start with the first aspect, namely, the constitutional framework. The Basic Law, our quasi-constitution, contains provisions that provide solid safeguards for the rule of law.

A good starting point is Article 8 of the Basic Law, which provides that the laws previously in force in Hong Kong, that is, the common law, rules of equity, ordinances, subordinate legislation and customary law shall be maintained. This Article enables the common law system to continue to operate in Hong Kong, which is crucial to the maintenance of the rule of law in Hong Kong.

Article 73 of the Basic Law provides that the Legislative Council of Hong Kong shall exercise the powers and functions of enacting, amending, and repealing laws in accordance with the Basic Law and legal procedures. This Article ensures that legislation is properly scrutinized through a transparent process before it is enacted.

Insofar as the judiciary is concerned, Article 84 of the Basic Law provides that Hong Kong courts shall adjudicate cases in accordance with the laws applicable in Hong Kong and may refer to precedents of other common law jurisdictions. Article 85 of the Basic Law, on the other hand, provides that the courts of Hong Kong shall exercise judicial power independently, free from any interference, and that members of the judiciary shall be immune from legal action in the performance of their judicial functions.

Insofar as protection of human rights is concerned, the relevant provisions in the Basic Law (such as Articles 25 to 39), together with the Hong Kong Bill of Rights Ordinance (which contains our Bill of Rights), provide firm and clear safeguards.

Independent Judiciary

The second aspect concerns our judiciary. It is well established that an independent judiciary is a core and fundamental element of the rule of law. In Hong Kong, there cannot be any question whatsoever that we have a truly independent judiciary.

One point I have stressed on other occasions, and which I would stress again today, concerns the composition of our Court of Final Appeal. Articles 2 and 19 of our Basic Law provide that Hong Kong enjoys independent judicial power, including that of final adjudication. By reason of Article 82, such power of final adjudication is vested in the Court of Final Appeal, which has taken over the role of the Judicial Committee of the Privy Council.

One important aspect to note is that Article 82 permits the invitation of judges from other common law jurisdictions to sit on the Court of Final Appeal. Since the establishment of the Court of Final Appeal in July 1997, eminent judges and jurists from the United Kingdom, Australia and New Zealand have been invited to sit on our Court of Final Appeal. Final appeals of all types of cases (including those raising important constitutional issues or concerning important government policies, as well as commercial disputes involving huge amounts) were and still are being heard by a panel of five judges, which invariably include one such overseas judge.

At the moment, we are privileged to have more than 10 such overseas judges who sit at our Court of Final Appeal from time to time. They include Sir Anthony Mason, Lord Neuberger, Lord Hoffmann, Lord Walker and Lord Phillips. All of them are top leading jurists in the common law world. One may therefore legitimately ask these questions: Would these eminent judges be willing to sit in our Court of Final Appeal if they do not enjoy true and complete judicial independence? Or would these eminent judges remain silent if they felt any form of interference in the discharge of their judicial duties? The answers are more than obvious. The fact that Hong Kong can continue to attract such eminent overseas judges to sit in our Court of Final Appeal is a strong testimony to the state of judicial independence and the rule of law in Hong Kong.

Before leaving this area, may I briefly touch on the appointment of judges. In this regard, I would like to quote from a speech made by Mr. Justice Patrick Chan, a former Permanent Judge of the Court of Final Appeal who has served under four Chief Justices (including the current one), which was delivered at his Farewell Sitting in October 2013. Mr. Justice Chan said as follows⁶ :

"There is one thing I have wanted to say for a long time to those who still perceive any doubt about the independence of our Judiciary. Since 1995, I have been involved in the selection of judges, either as a member of the Judicial Service Commission or the Judicial Officers Recommendation Commission or the judiciary's internal selection committee. I can bear witness to the fact that there has never been any interference from any quarter or any person in the appointment of judges. All my colleagues were appointed on their own merits."

Other remarks

Since I am wearing the hat of the Secretary for Justice, you may wonder whether I am somehow biased in favour of the positive side of the picture. If you harbour such a thought, let me invite you to look at reports which the Hong Kong Special Administrative Region (SAR) Government could not possibly have any control over. To give you one example, the latest European Commission's Joint Report to the European Parliament and the Council, which is the Annual Report 2014 on the Hong Kong SAR contains these observations:

"The judiciary continued to demonstrate its independence and consistent adherence to due process. During the large civil disobedience campaign, the rule of law remained the guiding principle for the Government, economic actors and the population at large. ... "

"The rule of law was generally respected and the judiciary maintained its high standards in 2014. On several occasions, parties filed for court rulings with significant political implications, but the courts continued to function independently and professionally and were not influenced by extraneous factors or political considerations."

Indeed, the way Hong Kong withstood the Occupy Movement last year, which had created social disorder in our society to levels not seen in decades, is a clear testament to our ability and conviction to uphold the rule of law in times of tremendous difficulties.

The Future

Let's move on to look at the future. I have no crystal ball, but would like to share with you a few thoughts on how to maintain and enhance the rule of law in Hong Kong.

First, to safeguard the rule of law requires the joint efforts of the entire community. To this end, a proper understanding of the concept is of importance. During the Occupy Movement, strange or even fundamentally wrong ideas about the rule of law were put forward. It is fortunate that the Court, when dealing with the injunction applications, has made clear explanations on the rule of law. In this regard, it is pertinent to remind ourselves of the following observations made by the Honourable Mr. Justice Au in the case of *Chiu Luen Public Light Bus Co Ltd*, unrep., HCA 2086/2014, in which he said:

"139. The concept of the rule of law must include and embrace the notion that every resident and the government alike should obey and comply with the law ... the concept of rule of law means that every resident of Hong Kong are governed by and bound to the operation of the law.

...

141. It is therefore wrong for any suggestions that the rule of law is not undermined or under challenge if people can freely or intentionally disobey the law first and then accept the consequences of breaking the law."

Just as we would take measures to prevent bad weather from damaging our homes, so we should be vigilant and always strive to prevent misconceived ideas from dampening our commitment to the rule of law. Promotion and education on the concept of the rule of law are therefore matters of importance.

Second, the Hong Kong SAR is an international and cosmopolitan city. To continue Hong Kong's success story, it is important to ensure that Hong Kong will, on

the one hand, continue as an effective springboard to the Mainland market, and on the other hand, remain an international and cosmopolitan city. It is only by so doing that the Hong Kong SAR can maintain or enhance its competitive edge. To this end, the legal community should remain international, and we should continue to make efforts to attract the best legal talents from relevant jurisdictions so that, first, there could be cross-fertilization (as well as sharing of experience) between the local and overseas talents, and secondly, to maintain the confidence of the international community.

Third, the Hong Kong SAR should prepare itself to stand up to challenges brought about by globalization, regional integration and the advance of technology. These three driving forces that I just mentioned have brought about fundamental changes to the legal landscape at both the international and domestic levels, with direct or indirect impact on the rule of law. Not only should the current generation of the legal community be prepared to embrace the changes, steps should be taken to prepare the future generations of our legal community (if not indeed the entire community) to face such challenges and convert such challenges into opportunities.

Conclusion

Ladies and gentlemen, the rule of law, as many have repeatedly said, is the bedrock or cornerstone of our society. We owe it to ourselves, to Hong Kong as a whole as well as to our future generations to steadfastly maintain the rule of law, so that Hong Kong can continue to prosper, and so that we would all continue to feel proud to call the Hong Kong SAR our "home, sweet home".

On this note, it remains for me to wish you all good health and a well-deserved rest during the long weekend.

Thank you.

Notes

1. For those who are interested in this area, reference can also be made to Steve Tsang (ed), *Judicial Independence and the Rule of Law in Hong Kong* (HKU Press) (2001), Chapter 2 (The Rule of Law and Criminal Justice in the Nineteenth Century).
2. See Tom Bingham, *The Rule of Law* (Allen Lane) (2010).
3. See Andrew Li, "The Importance of the Rule of Law", (2013) 43 *HKLJ* 795 at 795.
4. European Commission for Democracy Through Law (Venice Commission), *Report on the Rule of Law* (adopted at its 86th plenary session on 25-26 March 2011).
5. They are (1) constraints on government powers; (2) absence of corruption; (3) open government; (4) fundamental rights; (5) order and security; (6) regulatory enforcement; (7) civil justice; (8) criminal justice; and (9) informal justice: see *The World Justice Project: Rule of Law Index 2014*, p. 8.
6. *Farewell Sitting for the Honourable Mr. Justice Chan PJ* (2013) 16 *HKCFAR* 1012, para. 10 at 1019.