

Hong Kong Legal Week 2020
The Inaugural Rule of Law Congress
on 3 November 2020 (Tues)
Closing Remarks by the Hon Mr Justice Andrew Cheung PJ

1. I am honoured to be invited to give these closing remarks for the Inaugural Rule of Law Congress held this afternoon.

2. The Rule of Law is of course a big and important topic. Lord Bingham concluded his celebrated book, *The Rule of Law*, with these words:

“The concept of the rule of law is not fixed for all time. Some countries do not subscribe to it fully, and some subscribe only in name, if that. Even those who do subscribe to it find it difficult to apply all its precepts quite all the time. But in a world divided by differences of nationality, race, colour, religion and wealth it is one of the greatest unifying factors, perhaps the greatest, the nearest we are likely to approach to a universal secular religion. It remains an ideal, but an ideal worth striving for, in the interests of good government and peace, at home and in the world at large.”¹

3. In these closing remarks, I would only like to make a few observations on the meaning of the Rule of Law as practised in Hong Kong, looking at it from the perspective of the courts, which, as all would agree, play a central part in upholding the Rule of Law.

4. First, what are the aims of the Rule of Law? What do we want to achieve by insisting on the Rule of Law? From the court’s point of view, the Rule of Law ensures and promotes fairness, equality and justice, which are the core values of the administration of justice in our system of law. These objectives are reflected in our case law and our procedures. Thus, the courts

¹ p 174.

insist that everyone is subject to the law, nobody is above the law, and everyone is equal before the law. There must be neither favouritism nor discrimination. In Hong Kong, we have a vibrant public law regime, which is found only in advanced common law jurisdictions, for the purpose of ensuring that the government and other public authorities operate within the law, and public powers are exercised in accordance with the requirements of the law. Furthermore, the courts require that laws must be published and generally accessible, and the courts proceed on the general basis that laws should not be retrospective, and they have to be certain. For those who subscribe to a substantive or “thick” concept of the Rule of Law and consider that laws must be just and must protect and uphold fundamental human rights, they can easily see from our judicial decisions that the courts generously interpret and jealously guard the fundamental rights of all people in Hong Kong which are guaranteed under the Basic Law and the Hong Kong Bill of Rights.

5. Secondly, the Rule of Law comes with a price tag. The insistence on the requirements of the Rule of Law, the strict adherence to procedural guarantees on fairness of the legal process, and the equal treatment of each and everyone who comes before the court, necessarily mean that even the rights and interests of the unmeritorious are safeguarded, and indeed they are safeguarded in no different way from those of the meritorious. They must also mean that legal proceedings take time and sometimes, much time, to proceed and conclude, as much as we want to speed up the hearing of cases and appeals. The holding of the government to legal accountability means that delays, and even substantial delays, may be caused to the implementation of government decisions or projects, no matter how important or desirable they may be for the public good. All this represents the price society has to pay in order to maintain the Rule of Law. But not only that. In a society governed by the Rule of Law, members of society must learn to accept that from time to time, the outcomes of

judicial proceedings may not be to their liking, or accord with where they consider justice lies. Indeed, one may say that a good way to measure how entrenched the Rule of Law as a core value is in a society is to ask how well its institutions and its members are able to accept and respect unpopular judicial decisions and the judges who made them. Hong Kong prides itself as a society governed by the Rule of Law. The continued validity of this claim is dependent upon the willingness of our community to pay the price that comes with upholding the Rule of Law.

6. Finally, what makes the Rule of Law work? One important requirement is that we have judges who are independent, impartial, fearless and competent, and we need to have them in sufficient numbers. Aharon Barak, former President of the Israeli Supreme Court and a renowned jurist, wrote in his thought-provoking work, *The Judge in a Democracy*, that:

“I do hope that the judicialization of politics will not increase the politicization of judicial appointments. On the contrary: it should reduce such attempts. If politics is judicialized, what is needed is objective, professional, and independent judges. That calls for less politics in the appointment of judges. It seems to me that the trend is toward more professionalism and less politics.”²

7. In Hong Kong, article 92 of the Basic Law specifically provides that judges are to be chosen on the basis of their judicial and professional qualities. There can be no compromise on the qualities required. There should be no politicisation of the appointment process. Equally importantly, it should be pointed out that a prolonged inability to fill judicial vacancies may become a latent threat to the continued maintenance of the Rule of Law. The legal profession, and indeed our community, should actively encourage lawyers of the requisite qualities to apply to join the bench.

² p 313.

8. A society which embraces the Rule of Law expects much of its judges. The other side of the same coin is that a society which treasures the Rule of Law treasures its judges; a society which protects the Rule of Law protects its judges. In Hong Kong, we take pride in the fact that judicial independence is not only constitutionally guaranteed in the Basic Law, but is also practised on the ground. Nonetheless, constant vigilance is required to protect judicial independence. And that is a responsibility of everyone who wants to see the Rule of Law continue to flourish in our society. On their part, our judges must remain faithful to the solemn Judicial Oath that they have all taken. Our courts must continue to be manned by judges who are impartial and objective, dedicated and professional; judges who see the upholding of the Rule of Law and the due administration of justice as their mission and responsibility. Whilst there is always room for improvement, I have every confidence that our judges will continue to play their important part in maintaining the Rule of Law in Hong Kong in future, just as they have done in the past.

9. Thank you very much.