

**Speech by The Honourable Chief Justice Andrew Cheung
at the Rule of Law Signature Engagement Event
“SEE – A Journey of Transformation for a Sustainable Future”
on 5 November 2021, Hong Kong**

Secretary for Justice, Distinguished Guests, Ladies and Gentlemen,

I am honoured to be invited to deliver the Opening Address for the Rule of Law Signature Engagement Event.

2. The rule of law is often described as a cornerstone of our society and an indispensable key to the continued success of Hong Kong. However, different people may have different ideas about the rule of law. In this Opening Address, I would like to explore with you, from the perspective of the Hong Kong Judiciary, some of the more often asked questions about the rule of law, that is, what is the rule of law? Why do we need the rule of law? What is the cost of the rule of law? Who and what makes the rule of law work? What are the limits of the rule of law?

What is the rule of law?

3. The rule of law, while being a commonly invoked and discussed concept, is elusive in meaning because there is considerable room to debate what the rule of law actually means or how far the rule of law can go.¹

4. In Lord Bingham of Cornhill’s seminal work, *The Rule of Law*, he said,

¹ Lord Neuberger of Abbotsbury, ‘Judges, Access to Justice, the Rule of Law and the Court of Final Appeal under “One Country Two Systems”’ (*Hong Kong Court of Final Appeal*, 13 September 2017) <<https://www.hkcfa.hk/filemanager/speech/en/upload/1195/Judges,%20Access%20to%20Justice,%20the%20Rule%20of%20Law%20and%20the%20Court%20of%20Final%20Appeal%20under%20%E2%80%9COne%20Country%20Two%20Systems%E2%80%9D.pdf>> accessed 26 October 2021, at [2].

“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.”²

5. We must therefore remind ourselves that the term “rule of law” can bear a variety of different meanings which ultimately hinge on, among other things, the different culture, traditions, history and experiences of a particular jurisdiction. Moreover, a society’s concept of the rule of law may evolve and change over time. As said by Lord Neuberger of Abbotsbury in a talk he gave in Hong Kong in 2017:

“... what is taken for granted as part of the rule of law in one country today may well have been thought to be revolutionary or even ridiculous in the same country centuries, or sometimes even decades, earlier.”³

6. Besides, there is also the difference between the “thin” and “thick” conceptions of the rule of law. The former has been described in these terms:

² Lord Bingham of Cornhill, *The Rule of Law* (1st edn, Allen Lane 2010) 174.

³ Lord Neuberger of Abbotsbury (n 1).

“‘The rule of law’ means literally what it says: the rule of the law. Taken in its broadest sense this means that people should obey the law and be ruled by it.”⁴

7. This version of the rule of law requires the State to be subject to the laws made publicly and administered openly by the courts which apply the laws equally to all persons and authorities within the jurisdiction.

8. Or, as Lord Neuberger put it, a society which subscribes to this version of the rule of law must be a society governed by laws which are:⁵

1. properly enacted;
2. clearly expressed;
3. publicly accessible;
4. generally observed; and
5. genuinely enforceable.

I pause to note that the laws we have in Hong Kong satisfy all these requirements.

9. Notably, the thin rule of law does not require any specific content of the law, and has been criticised for that reason. Thus, Lord Bingham roundly rejected the thin rule of law in favour of the thick version which embraces the protection of human rights.⁶ This version of the rule of law has been described as follows:

⁴ Joseph Raz, ‘The Rule of Law and its Virtue’ in Joseph Raz (ed), *The Authority of the Law: Essays on Law and Morality* (1st edn, Oxford University Press 1979) 212.

⁵ Lord Neuberger of Abbotsbury (n 1) at [3].

⁶ Lord Bingham of Cornhill (n 2) 67.

“The rule of law can be defined as a system in which the laws are public knowledge, are clear in meaning, and apply equally to everyone. They enshrine and uphold the political and civil liberties that have gained status as universal human rights over the last half-century. In particular, anyone accused of a crime has the right to a fair, prompt hearing and is presumed innocent until proved guilty. The central institutions of the legal system, including courts, prosecutors, and police, are reasonably fair, competent, and efficient. Judges are impartial and independent, not subject to political influence or manipulation. Perhaps most important, the government is embedded in a comprehensive legal framework, its officials accept that the law will be applied to their own conduct, and the government seeks to be law-abiding.”⁷

10. This Opening Address is of course not the occasion to dwell on the merits and demerits of the two versions of the rule of law. Rather, it is useful to remember that a particular version of the rule of law which functions well in one jurisdiction may not necessarily be transplanted to another jurisdiction seamlessly and without any hiccup. It is a fact that there is no consensus as to how the rule of law should be defined and administered among jurisdictions, and due regard must be given to the unique circumstances and context of the particular jurisdiction concerned.

11. In Hong Kong, fundamental human rights are constitutionally guaranteed and protected under Chapter III of the Basic Law and the Hong Kong Bill of Rights. The Bill of Rights is based on the International Covenant on Civil

⁷ Thomas Carothers, ‘Rule of Law Revival’ (*Carnegie Endowment for International Peace*, n.d.) <<https://carnegieendowment.org/1998/03/01/rule-of-law-revival-pub-165>> accessed 26 October 2021 (originally published in *Foreign Affairs*, c.1998, Vol. 77, No. 2 1998); Adriaan Bedner, ‘An Elementary Approach to the Rule of Law’ (2010) 2 *Hague Journal on the Rule of Law* 48, 54.

and Political Rights, which is constitutionally entrenched under Article 39 of the Basic Law. Moreover, although many of these rights are not absolute, the courts have consistently given them generous interpretations and jealously guarded against any restrictions.

12. So regardless of whether one subscribes to the thin or thick version of the rule of law, it can be confidently asserted that Hong Kong is a society which is governed by the rule of law.

Why do we need the rule of law?

13. There are many reasons why we need the rule of law, and I would mention just some obvious ones.

14. First, the rule of law affects us on a global scale. According to the United Nations:

“... the rule of law is fundamental to international peace and security and political stability; to achieve economic and social progress and development; and to protect people’s rights and fundamental freedoms. It is foundational to people’s access to public services, curbing corruption, restraining the abuse of power, and to establishing the social contract between people and the state.”⁸

⁸ United Nations, ‘What is the Rule of Law’ (*United Nations*, n.d.) <<https://www.un.org/ruleoflaw/what-is-the-rule-of-law/>> accessed 26 October 2021.

15. Likewise, research by the World Justice Project shows that the rule of law correlates to higher economic growth, greater peace, less inequality, improved health outcomes and more education across the globe.⁹

16. Secondly, the rule of law affects us domestically. The rule of law is the bedrock of justice because it ensures that everyone, whether an individual or a public body, is equal before the law and has equal access to justice. Under the thick version of the rule of law, it also upholds fundamental human rights.

17. As a mature common law jurisdiction, Hong Kong has an established public law regime which ensures that the government and other public bodies operate within the law and that public powers are exercised in accordance with the relevant legal requirements. The courts also 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.

18. Thirdly, the rule of law is very much tied to Hong Kong's success as a leading financial hub of the world. Our impartial, independent and transparent judicial system provides individuals and organisations with a secure business environment and a level playing field. They can be confident that whatever disputes that may come their way will be resolved in a fair manner, by a court system that administers justice without fear or favour, bias or deceit.

19. In short, the maintenance of the rule of law is an essential safeguard to the continued success and prosperity of Hong Kong.

⁹ World Justice Project, 'What is the Rule of Law?' (*World Justice Project*, n.d.) <<https://worldjusticeproject.org/about-us/overview/what-rule-law>> accessed 26 October 2021.

What is the cost of the rule of law?

20. The rule of law is not free and in fact it comes at a price. 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 are all achieved at a price.

21. Legal proceedings take time and sometimes, very substantial time, to proceed and conclude, as much as the courts want to speed up the hearing of cases and appeals. The pursuit of efficiency cannot be at the expense of justice.

22. Likewise, the holding of the government to legal accountability means that the implementation of government decisions, policies or projects might be reversed or substantially delayed, no matter how important or desirable they may otherwise be for the public good.

23. Members of our society must learn to understand and respect that the outcomes of judicial proceedings may not be to their liking, or accord with where they consider justice lies. The decisions of the courts are based on legal principles, not on a quantitative measurement of overall social satisfaction. Indeed, a good way to measure how entrenched the rule of law is as a core value in society is to ask how well its institutions and members are able to respect unpopular judicial decisions and the judges who made them.

24. Hong Kong prides itself as a society governed by the rule of law. The continued validity of this claim depends upon our community's willingness to pay the price that comes with upholding the rule of law.

Who and what makes the rule of law work?

25. The successful maintenance of the rule of law is supported by multiple pillars, and one foundational pillar is judicial independence. This is specifically provided for in various Articles of the Basic Law.

26. Article 2 of the Basic Law states that:

“The National People’s Congress authorizes the Hong Kong Special Administrative Region 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 this Law.”

27. Article 19(1) says:

“The Hong Kong Special Administrative Region shall be vested with independent judicial power, including that of final adjudication.”

28. Article 85 states that:

“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.”

29. To give effect to these Articles, we need judges who are independent, impartial, apolitical, fearless and competent. And we need to have them in sufficient numbers. 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 important to note is 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.

30. Closely allied to judicial independence as an essential requirement for the rule of law is the public's confidence in the Judiciary's independence. Without such public confidence, people may choose to resolve their disputes with each other or with the government by other means, and the rule of law may suffer as a result.

31. It follows that unfounded doubts cast on the Judiciary's independence or on individual judges' impartiality are damaging to public confidence in the Judiciary and harmful to the rule of law.

What are the limits of the rule of law?

32. The rule of law, like all important doctrines or concepts, has its own limits.

33. I would like to touch on only two points here. First, whilst some have suggested that the rule of law means the rule of good law both in terms of the law making process and the substance of the law (that is, the protection of fundamental rights), it has to be recognised that fundamental rights aside, even the thick rule of law does not dictate what the law's content should be. The making of "good" law is primarily the responsibility of the government and the

legislature. In a common law jurisdiction like Hong Kong, where judges do from time to time make law on an incremental basis in suitable cases, that is also the responsibility of our judges, but only to that limited extent.

34. It follows that the rule of law does not provide an answer to many issues, including social and political ones, that society faces. Over and over again, the courts have emphasised in public law cases that one must recognise the different constitutional roles played by the courts, the executive and the legislature. It is not the function of the courts under our constitutional setup to interfere with, still less to rewrite, government policies and decisions, or to disapply laws enacted by the legislature, save where that is the necessary result of upholding the provisions of the Basic Law or other overriding legal requirements. It should be remembered that court decisions are based on the relevant legal principles and the facts of individual cases. It is the courts' role to administer the law and decide legal issues; it is never their function to resolve any underlying political or social controversies. The courtroom is not the forum for the promotion or ventilation of political or other non-legal views. All this simply mirrors a broader and more general point, that is, the rule of law does not solve issues in society that belong to the province of the government or the legislature.

35. In short, the essential importance of the rule of law to our society is beyond dispute. Nonetheless, it is not a panacea to all problems in society.

Conclusion

36. Once again, I thank the Department of Justice for inviting me to give the Opening Address for this very important event. It cannot be over-emphasised that the continued success of Hong Kong is very much tied to the upholding of

the rule of law. Let's work together and make sure that the rule of law will continue to flourish in Hong Kong.

37. Thank you.

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