

## The cornerstone of Hong Kong's success

(Relevant to AAT Examination Paper 6 -- Fundamental of Business Law)

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There are many crucial factors leading to Hong Kong's success. The rule of law is definitely one of them, if not the most crucial one. This talismanic phrase has been much used by senior government officials, both in Hong Kong and elsewhere, in their speeches discussing the advantages of Hong Kong. Hong Kong is proud of having the rule of law and not rule by law. Below are some recent examples of government officials praising Hong Kong's rule of law:-

*"Our business-friendly environment also provides some pretty appealing advantages too. We have the **rule of law** upheld by an independent judiciary; we have a free flow of information, capital, people and goods; we have low taxes; and we have a level playing field for business. And most of all, we have a very law-abiding government in the sense that we are being sued almost every day."* (HKSAR Chief Executive Donald Tsang, June 2010)<sup>1</sup>

*"It is often said the **Rule of Law** gives Hong Kong a competitive edge when one talks in terms of investment in Hong Kong. This may well be the case. Its particular importance, however, lies in the assurance to all who live here, all who work here, all who invest here and all institutions as well, that one's rights and liberties are fully recognised and protected."* (HKSAR Hon Chief Justice Geoffrey Ma, January 2011)<sup>2</sup>

*"The rule of law is the cornerstone of Hong Kong's success as a leading international commercial and financial centre. It provides a secure environment for individuals and organisations. It also helps to ensure a level playing field for all businesses."* (HKSAR Secretary for Justice, Wong Yan Lung, SC, December 2010)<sup>3</sup>

*"Hong Kong is a testament to the power of transparency, good governance, **the rule of law**, freedom of the press, an independent judiciary, and a vibrant civil society, all of which help to explain why so many people choose to do business here."* (US Secretary of State Hillary Rodham Clinton, July 2011)<sup>4</sup>

So, what is the rule of law? The principle of the rule of law can be illustrated in one of the landmark English cases on civil liberty, *Entick v Carrington* (1765). In that case, Entick sued the King's Chief Messenger Carrington because the King's messengers had broken into his house with "force and arms" and seized many of his private papers, although the messengers were acting on the warrant of the Secretary of State. However, the court did not agree that the warrant had been issued properly – there was no legal basis for doing so: *"We can safely say there is no law in this country to*

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<sup>1</sup> Speech by the Chief Executive Donald Tsang at the annual reception for new investors (22 June 2010)

<sup>2</sup> Chief Justice's speech at Ceremonial Opening of the Legal Year 2011 (10 January 2011)

<sup>3</sup> Speech by the Secretary for Justice Wong Yan Lung SC at the 11th Hong Kong Forum Luncheon organised by the Federation of Hong Kong Business Associations Worldwide at the HKCEC (2 December 2010)

<sup>4</sup> Speech by US Secretary of State Hillary Rodham Clinton to the Chambers of Commerce in Hong Kong: "Remarks on Principles for Prosperity in the Asia Pacific" (25 July 2011)

*justify the defendants in what they have done; if there was, it would destroy all the comforts of society; for papers are often the dearest property a man can have.*" The court in this case has essentially limited the power of the executive and the government could only act in accordance with case law or statute.

The rule of law is an elastic concept and is rich in underlying values. It is not easy to give it a positive definition. Although the rule of law is built on the notion of justice, legal scholars have disagreed for example on whether it is a principle merely based on process and procedures or whether in addition it has more substantive requirements. But the general consensus is that the principle prevents the exercise of arbitrary power by the executive and safeguards human rights, and it has been said that the rule of law is part of an inseparable trinity: human rights, democracy and rule of law. One early explanation of the concept can be found in Professor Dicey's work "Introduction to the Study of the Law of the Constitution."<sup>5</sup> He gave three meanings to the rule of law:

- In the first place, the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government ...; a man may with us be punished for a breach of law, but he can be punished for nothing else.
- Equality before the law, or the equal subjection of all classes to the ordinary law of the land administered by the ordinary law courts.
- That with us the law of the constitution, the rules which in foreign countries naturally form part of a constitutional code, are not the source but the consequence of the rights of individuals, as defined and enforced by the courts; that, in short, the principles of private law have with us been by the action of the courts and Parliament so extended as to determine the position of the Crown and of its servants; thus the constitution is the result of the ordinary law of the land.

The three meanings of the rule of law by Professor Dicey have raised some difficulties in interpretation. For example, the terms "regular law", "wide discretionary authority" and "arbitrary power" are not clearly defined. Different persons like employers and employees, directors and shareholders are subject to different legal rules. Common law nowadays cannot be the primary legal means of protecting an individual's liberty against the government.

A more recent formulation of the rule of law has been expressed by Lord Bingham in his book "The Rule of Law."<sup>6</sup> He viewed the rule of law as the foundation of a fair and just society and identified eight important principles:

1. The law must be accessible and so far as possible intelligible, clear and predictable.
2. Questions of legal right and liability should ordinarily be resolved by application of the law and not the exercise of discretion.
3. The laws of the land should apply equally to all, save to the extent that

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<sup>5</sup> Introduction to the Study of the Law of the Constitution, Albert Venn Dicey, (1923) Reprinted, BiblioBazaar (2010)

<sup>6</sup> The Rule of Law, Tom Bingham, Penguin, 2010

- objective differences justify differentiation.
4. Ministers and public officers at all levels 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.
  5. The law must afford adequate protection of fundamental human rights.
  6. Means must be provided for resolving without prohibitive cost or inordinate delay, *bona fide* civil disputes which the parties themselves are unable to resolve.
  7. Adjudicative procedures provided by the state should be fair.
  8. The rule of law requires compliance by the state with its obligations in international law as in national law.

Has the HKSAR attained the rule of law? Some of the principles enunciated by Professor Dicey and Lord Bingham are enshrined in the Basic Law of the HKSAR (the Basic Law). Article<sup>7</sup> 4 states that the HKSAR shall safeguard the rights and freedoms of the residents of the HKSAR and of other persons in the Region in accordance with law. What then are the laws of the HKSAR and are they accessible, intelligible, clear and predictable? The laws in force in the HKSAR are the Basic Law, the laws previously in force in Hong Kong as provided for in Article 8 of the Basic Law, and the laws enacted by the legislature of the Region (Article 18). Article 8 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, except for any that contravene the Basic Law, and subject to any amendment by the legislature of the HKSAR.

Also, the courts of the HKSAR at all levels shall be the judiciary of the Region, exercising the judicial power of the Region (Article 80). In other words, bodies which are not courts may not exercise judicial powers. Thus questions of legal right and liability are ordinarily resolved by application of the law in courts. Article 87 provides that in criminal or civil proceedings in the HKSAR, the principles previously applied in Hong Kong and the rights previously enjoyed by parties to proceedings shall be maintained. Anyone who is lawfully arrested shall have the right to a fair trial by the judicial organs without delay and shall be presumed innocent until convicted by the judicial organs.

Further, the laws of the land shall apply equally to all. This is seen in Article 25 where all Hong Kong residents are equal before the law. Chapter III of the Basic Law states the fundamental rights and duties of the residents in the HKSAR. Hong Kong residents shall have freedom of speech, of the press and of publication; freedom of association, of assembly, of procession and of demonstration; and the right and freedom to form and join trade unions, and to strike (Article 27). Article 28 states that the freedom of the person of Hong Kong residents shall be inviolable. No Hong Kong resident shall be subjected to arbitrary or unlawful arrest, detention or imprisonment. Arbitrary or unlawful search of the body of any resident or deprivation or restriction of the freedom of the person shall be prohibited. Torture of any resident or arbitrary or unlawful deprivation of the life of any resident shall be prohibited. Arbitrary or unlawful search of, or intrusion into, a resident's home or other premises is also prohibited

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<sup>7</sup> The Articles hereinafter referred to are Articles under the Basic Law of the HKSAR.

(Article 29). Also, Hong Kong residents shall enjoy the other rights and freedoms safeguarded by the laws of the HKSAR (Article 38) and the provisions of the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and international labour conventions as applied to Hong Kong will remain in force and will be implemented through the laws of the HKSAR (Article 39). The rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless as prescribed by law.

The rule of law and judicial independence are two important concepts closely associated with each other. Article 2 spells out clearly that the HKSAR shall exercise a high degree of autonomy and enjoy executive, legislative and independent judicial power, including that of final adjudication. This is repeated in Article 19 which goes on to say that with some exceptions, the courts have jurisdiction over all cases in the HKSAR. Article 85 also repeats the principle of judicial independence: "The courts of the HKSAR 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." Moreover, judges can only be appointed and removed by prescribed procedures.

How far then has the rule of law been practised in the HKSAR under "one country, two systems"? A number of cases relating to the interpretation of the Basic Law have gone to courts since 1997. Cases like *Ng Ka Ling v Director of Immigration*<sup>8</sup> and *Chan Kam Nga v Director of Immigration*<sup>9</sup> are amongst the first few on the list. The courts have on various occasions guarded constitutional rights in the HKSAR. In *Equal Opportunities Commission v Director of Education*,<sup>10</sup> the court referred to Article 25 and stressed that equal treatment is an individual's fundamental right. In *Leung Kwok Hung & Others v HKSAR*,<sup>11</sup> the court has put emphasis on the right to freedom of assembly guaranteed by Article 27. Another example is the protection of the freedom and privacy of communication under Article 30 in *Leung Kwok Hung and Koo Sze Yiu v Chief Executive of the HKSAR*.<sup>12</sup> Where at times public officers are not seen exercising the powers conferred on them reasonably, administrative decisions are challenged by judicial review and the number of judicial reviews is increasing. This can be seen as a sign of public confidence in the judicial system and the rule of law. The success of Hong Kong and the success in the implementation of "one country, two systems" after all to certain extent depend on the attainment the rule of law the purposes of which, among others, are to guarantee a responsible government and to contribute to economic growth.

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<sup>8</sup> [1999] 1 HKLRD 315

<sup>9</sup> [1999] 1 HKLRD 304

<sup>10</sup> [2001] 2 HKLRD 690

<sup>11</sup> [2005] 8 HKCFAR 229

<sup>12</sup> [2006] 9 HKCFAR 441

## Summary

There are many crucial factors leading to Hong Kong's success. The rule of law is definitely amongst one of them, if not the most crucial one. This talismanic phrase has been much used by the senior government officials in their speeches and Hong Kong is being proud of having the rule of law and not rule by law. The principle of rule of law can be illustrated in one of the landmark English cases on civil liberty, *Entick v. Carrington* (1765). So, what is the rule of law? Professor Dicey in his work "Introduction to the Study of the Law of the Constitution" gave three meanings to the rule of law. A more recent formulation of the rule of law has been expressed by Lord Bingham in his book "The Rule of Law." Some of the principles enunciated by Professor Dicey and Lord Bingham are enshrined in the Basic Law of the HKSAR. The courts have on various occasions since 1997 guarded this constitutional right in the HKSAR. Overall speaking, the public has confidence towards the judicial system and the rule of law in Hong Kong.