

**The Importance of the Rule of Law
to
Hong Kong SAR**

The importance of the Rule of Law to HKSAR

Talk (3 February 2021)

Topics to be discussed in this talk

The Rule of Law

Separation of Powers

Judicial Independence

Rights and freedoms

Protection of the Rule of Law under the Basic Law

Approach of Courts towards protection of rights & freedoms

The Rule of Law

No precise definition of this concept

There is no definition in any statute or court decision.

It is subject to different understanding & formulations.

There are different emphases with changes in society.

Meaning of concept

Origin of concept

Aristotle (c 300 BC): “It is better for the law to rule than one of the citizens ... even the guardians of the laws obey the law.”

- Everyone, even the ruler/officials, should obey the law.

The objective is to protect citizens from abuse of power.

Other formulations

Different emphases on different aspects:

- Equality before the law; no one is above the law – All are subject to the same law administered in the same courts. Every citizen and official is under a duty to obey the law.
- Absence of arbitrary powers by the government – A person must not be punished except for a proven breach of the law before an independent court.
- Protection of rights and freedoms – The rights and freedoms of individuals are protected by the law as enforced by the courts, to avoid abuse of power

[依法守法 公平公正 權力的制衡 權利的保障]

Important principles to put rule of law into practice

- (1) the law must be accessible, intelligible, clear and predictable
- (2) laws should be prospective rather than retroactive
- (3) the law should apply equally to all, save to the extent of objective difference that justifies differentiation
- (4) the law must afford adequate protection of fundamental rights and freedoms
- (5) public officers must exercise powers reasonably, in good faith, for the purpose for which the powers were given, without exceeding the limits

(6) legal rights and liability should ordinarily be resolved by the application of the law, not discretion

(7) the judiciary must be independent, requiring open & fair hearing

(8) there must be means for resolving civil disputes without prohibitive cost or inordinate delay

(9) adjudicative procedures should be fair

A standard to evaluate system & state practice

“... the rule of law enforces minimum standards of fairness, both substantial and procedural.” (Lord Steyn [1998])

Related concepts resulting from the Rule of law

- (1) principle of legality - everything must be done according to law
- (2) separation of powers - disputes as to legality of law (made by legislature) and government acts (by executive) are to be decided by the courts (judiciary)
- (3) judicial independence - judges are to be independent of the legislature and executive

The rule of law as basis for judicial review

- (1) provides *justification* for courts to review laws and government acts, applying principles of legality;
- (2) sets *limits* on the powers of courts in judicial review ensuring separation of powers.

Social aspect of the rule of law

Law and order – rule of law ensures law and order,
order & stability are pre-conditions for legal system & society

Political aspect of the rule of law

Government according to law – rule of law ensures
principle of legality and government conducts
according to law

Legal aspect of the rule of law

Justice of the system and values of the law – rule of law
upholds system of justice, ensures protection of
human rights and affects what the law ought to be

Cornerstone for the rule of law

- Respect for the law, court decisions and legal system
- Respect for the rights and freedoms of others
- Obedience of the law based on respect better than fear for punishment

The rule of law involves the following components

- (1) *separation of functions or powers* - to avoid concentration of power in 1 institution of government, with a check and balance mechanism
- (2) *independence of judiciary* – as a means to ensure effective check and balance
- (3) *protection of rights and freedoms* - to protect the rights and freedoms of citizens through an independent judiciary

Separation of powers

- division of functions

- check & balance

Independent judiciary

- principle of legality

- judicial review

Rule of law

Protection of rights & freedoms

- BOR / ICCPR

- guaranteed by BL

Separation of powers

The concept of separation of powers

- To prevent abuse of powers, it is necessary that:
 - (1) the functions of government should be exercised by different institutions;
 - (2) there should be effective control on the performance of functions and exercise of powers by the different institutions.
- These requirements form the basis of the concept.

Separation of functions or powers?

- An institution of government is only conferred by law with the necessary powers to carry out the duty to perform its functions. Duty and functions come before powers.
- When an official is not discharging his duty or performing his functions, he should not exercise the powers conferred on him by the law.

Political structures of government

- The functions of government are usually exercised by the executive, legislature and judiciary, each performing different functions and exercising different powers.
- Different places have different political structures, depending on their history, culture, tradition, social circumstances and political set-up.
- The formation, functions and powers of each institution of government are usually provided by law or in the constitution or both.

Different roles played by each institution

Executive: maintains law and order; administers public services; formulates policies; promotes social welfare; conducts external relations with other places/countries

Legislature: enacts laws and rules; scrutinizes executive policies; passes budgets; reflects the views of the citizens

Judiciary: interprets and declares the law; enforces the criminal law; adjudicates civil disputes; reviews legality and constitutionality of laws made by the legislature and the decisions and policies of the executive

Separation of powers in practice

Strict requirement under the concept entails:

- (1) The same person should not form part of more than one of the 3 institutions
- (2) One institution should not control or intervene in the work of another
- (3) One institution should not exercise the functions of another

In practice, no country has a strict separation of powers:

- (1) most often, there is an overlap;
- (2) very often, it is either executive led or legislative led.

Constitutional principle of check and balance

Check and balance

Executive – formulates public policies; initiates bills for new laws; controls revenues and expenditures

Legislature – scrutinizes executive policies; requires officials to explain decisions and policies; approves public funding

Judiciary – reviews (by judicial review) the constitutionality of laws passed by the Legislature and the legality and constitutionality of Executive policies, decisions and acts

Limitations

Executive – must not intervene with the normal and lawful activities of Legislature; and not to attack judicial proceedings and court decisions

Legislature – must not hinder or intervene enforcement of the law by the Executive; and not to attack judicial proceedings and court decisions

Judiciary – must not make new laws for the Legislature or make decisions or policies for the Executive (this is different from declaring a law unconstitutional or a government decision or policy unlawful or unconstitutional)

Check and balance – its effect

- The effectiveness of the check and balance mechanism is a yardstick of the maturity of the whole system of government.
- But intervention by one institution with the other in the name of check and balance may reduce efficiency of the government and weaken the rule of law.
- An independent judiciary is an indispensable component of this check and balance mechanism in upholding the rule of law.

Independent judiciary

The concept of independence of judiciary

- It is an essential component of the rule of law and closely related to the concept of separation of powers.
- It is an indispensable part of the check and balance mechanism and plays a vital constitutional role.

Legal basis of judicial independence

This is different in each place and is usually provided by (i) statutes & court decisions; or (ii) the constitution.

Meaning of judicial independence

As an institution of government

In the broad and general sense, the judiciary, as an institution of government, is separate from and independent of the legislature and the executive.

As a judicial decision maker

In the narrow and practical sense, this refers to the absence of interference by or influence from the legislature, the executive or any person in the court's decision making process.

Need to have judicial independence

- (1) for upholding the rule of law & separation of powers;
- (2) for fostering confidence in the rule of law and administration of justice;
- (3) required by the law or constitution or ICCPR.

Judges also subject to check and balance

- (1) judges decide cases on the available evidence; and are bound to follow legal principles and previous decisions of higher courts;
- (2) there is an appeal mechanism to correct wrong decisions of the lower courts;
- (3) if a final court decision is considered by the public to be wrong or unworkable or if there is no appeal against a wrong court decision, court decision, a new law and can be passed to remedy it.

Protection of rights & freedoms as essential objective of Rule of Law

Nature of human rights & freedoms

- All persons are born equal and have the same rights and freedoms.

- Rights and freedoms, by nature, have the following features:
 - (1) no right or freedom is absolute (except possibly a few); they are derogable, i.e. can be restricted or reduced

(2) a few rights and freedoms are regarded as so fundamental that they are sometimes said to be non-derogable, but this is controversial; e.g. right to life, freedom from torture, freedom from slavery.

(3) most rights and freedoms are subject to the law and the rights and freedoms of others;

(4) some rights and freedoms are subject to public order, public health or morals, national security,

(5) some rights and freedoms can only be exercised “as prescribed by law” or “in accordance with the law”.

International covenants on human rights

- Universal Declaration of Human rights (1948)
- International Covenant of Civil and Political Rights (1966) – ICCPR
- International Covenant of Economic Social and Cultural Rights (1966) – ICESCR

The Bill of Rights in Hong Kong (BOR)

- (1) This was passed into law in 1991 to implement most of the rights and freedoms protected under the ICCPR.
- (2) It had a higher status than other laws and the rights and freedoms set out were guaranteed by the Royal Instructions and Letters Patent. This was removed in 1997.
- (3) After 1997, there are new safeguards provided in the Basic Law (BL): a breach of the BOR will be a breach of the BL.

Protection of the Rule of Law under Basic Law

The status of Basic Law

- The BL was enacted in 1990 by the NPC pursuant to the Joint Declaration (1984). It is more detailed and much wider in scope than the undertakings in the JD.
- The BL implements the one country two systems policy; the previous capitalist system and way of life shall remain unchanged for 50 years; HK will enjoy a high degree of autonomy.
- The Basic Law is a constitutional document for HK. It:
 - (1) provides for the political structures of government;
 - (2) protects and guarantees the rights and freedoms;
 - (3) has a status above all other laws in HK.

Interpretation of the Basic Law

- It is both a law in HK and a national law.
- As a national law, SCNPC has the power to interpret BL (BL 158(1)).
- SCNPC delegates power to HK courts to interpret BL in court cases (BL 158(2)).
- In case of difference, SCNPC interpretation binds HK courts
- Affairs concerning the responsibility of CPG and relationship between HK and CPG can only be interpreted by SCNPC before final decision. (BL 158(3))
- SCNPC does not affect independence of HK judiciary: only on BL and not other laws; only binding for the future

Protecting the rule of law through enforcing essential principles

The BL protects the rule of law in 2 ways:

(1) Directly, by making express provisions which protect the important components of the rule of law;

(2) Indirectly, by maintaining the previous system which contains laws which protect these important components.

Separation of functions & powers under the Basic Law

- In HK, the formation, functions and powers of each institution of government are provided by the BL & other laws
 - (1) Pre-1997: Letters Patent, Royal Instructions & other laws
 - (2) Post-1997: Basic Law and & other laws

- The division of functions & powers are set out in the BL:
 - (1) Chief Executive – BL 43-58
 - (2) Executive Authorities – BL 59-65
 - (3) Legislature – BL 66-79
 - (4) Judiciary – BL 80-96

Check and balance maintained under the Basic Law

(1) Under the common law, the courts can review by way of judicial review the legality & constitutionality of the laws, decisions and policies of the government.

(2) The previous system which had the mechanism of judicial review is maintained under BL 8, 18(1), 19(2), 81(2).

The independence of judiciary under the Basic Law

- The independence of judiciary is guaranteed by the BL and court decisions. [Basic Law art. 2, 19 & 85]

- There are further safeguards:
 - (1) judges should not handle a case in which he may have a direct or indirect interest or there is a real risk of bias
 - (2) there is an independent system in the appointment of judges [BL88]
 - (3) judges enjoy security of tenure (safe from dismissal) [BL89-91] and immunity from civil liability [BL85]
 - (4) the principle of contempt of court protects the dignity of the court and judges and safeguards the administration of justice.

Protection of human rights under Basic Law

BL 4 – HKSAR shall safeguard the rights and freedoms of residents and other persons in accordance with law.

BL 6 – HKSAR shall protect the right of private ownership of property in accordance with law.

BL 8 – The laws previously in force (including the common law, rules of equity, etc) shall be maintained except those which contravene the BL.

BL 11 – The system for safeguarding the fundamental rights and freedoms shall be based on the BL.

BL 39(1) – the rights and freedoms in the ICCPR and ICESCR as applied to Hong Kong remain in force and shall be implemented through HK laws (i.e. BOR).

BL 39(2) – these rights and freedoms are guaranteed by the BL.

BL 25-38 – set out the fundamental rights and freedoms protected under BL.

BL 41 – non HK residents also enjoy these rights and freedoms.

BL 42 – all residents & other persons in HK have the duty to obey the law.

Some of the fundamental rights and freedoms

- Equality before the law: BL 25; BOR 10; ICCPR 14.1
- Freedom of speech, expression, the press, publication:
BL 27; BOR 16; ICCPR 19
- Freedom of assembly, procession, demonstration:
BL 27; BOR 17; ICCPR 21
- Freedom of the person: BL 28; BOR 5; ICCPR 9
- Freedom of movement: BL 31; BOR 8; ICCPR 12
- Freedom of conscience and religion:
BL32; BOR 15; ICCPR 18
- Right to life: (BL38) BOR 2; ICCPR 6
- Freedom from torture: (BL38) BOR 3; ICCPR 7
- Right of accused person: BL 35; BOR 10, 11; ICCPR 14

Grounds for permitting restrictions on rights and freedoms

- The usual permissible grounds for restricting rights and freedoms are:

“ ... those which are provided by law and are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others ...”

- These permissible grounds are expressly contained in:
BOR 8, 9, 10, 16, 17, 18 which are also present in
ICCPR 12, 14.1, 14.2-14.7, 19, 21, 22.

Approach of the Courts towards protection of human rights

General approach towards interpreting the BL or BOR

- The court's task is to ascertain the meaning of a provision according to the intention of the legislature as expressed in its language.
- The court applies a generous and purposive approach in finding out the meaning of the particular BL or BOR in question.

- The court may refer to precedents of other common law jurisdictions (BL 84) and also to decisions on the meaning of similar provisions in other covenants e.g. the ICCPR or the ECHR.
- The court applies a narrow approach when finding out the meaning of a restriction on the BL or BOR.
- The court will not give effect to a restriction if this would undermine the right or freedom conferred by the BL or BOR.

In deciding whether a law or decision or policy affecting rights & freedoms

Steps taken by the courts:

- (1) What is the law, decision or policy in question?
- (2) What is the right or freedom (in the BL/BOR) to be protected?
- (3) What does that right or freedom mean and what is its scope?
- (4) Does the law, decision or policy restrict that right or freedom?
- (5) Does the restriction serve any legitimate social purpose?
- (6) Is it necessary to achieve that purpose?
- (7) Is it proportionate to achieve that purpose?
- (8) What is the effect on the interest of the person affected?

The Basic Law protects the Rule of Law by:

- (1) Setting out the separation of functions and powers of the CE and different institutions of government
- (2) Providing for an independent judiciary with adequate protection for judges
- (3) Maintaining the common law procedure of judicial review as a means of check and balance
- (4) Protecting and guaranteeing rights and freedoms by making any infringement as a breach of the Basic Law
- (5) Imposing obligation on residents to obey the law