

CJ's speech at Ceremonial Opening of the Legal Year 2021

The following is issued on behalf of the Judiciary:

Following is the full text of the speech delivered by the Chief Justice of the Court of Final Appeal, Mr Andrew Cheung Kui-nung, at the Ceremonial Opening of the Legal Year 2021 today (January 11):

Secretary for Justice, Chairman of the Bar, President of the Law Society, fellow judges, distinguished guests, ladies and gentlemen,

On behalf of the Hong Kong Judiciary, I extend a warm welcome to all of you to the Opening of the Legal Year. I thank you for your support in attending or in watching the live broadcast of this event online. 2020 was an extraordinary and difficult year for Hong Kong, and for the world. The COVID-19 pandemic has taken a great toll everywhere, and thoughts and well wishes are extended to all of those who have lost family and friends to the virus. The Judiciary and its operations have also been affected, and thanks must be extended to our Judiciary staff who have worked so hard in such difficult circumstances to keep the courts functioning. As the world looks to 2021 with hope and guarded optimism that the pandemic will eventually be overcome, the Judiciary continues to take precautions in the meantime, including for the first time the arrangements that have been taken for this Opening of the Legal Year. The Opening of the Legal Year is an important occasion for the Judiciary as well as our community, as it focuses public attention on the administration of justice and the rule of law, and in particular the challenges we face. In this, my first Opening of the Legal Year as Chief Justice, I would like to outline three fundamentals of the Judiciary that we are committed to.

First, the Judiciary must be and must remain an independent and impartial judiciary. In Hong Kong, judicial independence is both mandated and guaranteed under the Basic Law. The judicial power, including that of final adjudication, enjoyed by the Hong Kong Special Administrative Region under the Basic Law is exercised by the Judiciary independently, free from any interference, as Articles 2, 19 and 85 of the Basic Law provide. An independent judiciary is essential to the rule of law in Hong Kong and the due administration of justice. It is equally crucial to public and business confidence – whether local or overseas – in our judicial system, as well as to the international reputation of Hong Kong as a society that is governed by the rule of law under the "one country, two systems" arrangement. Amongst other things, judicial independence means the Judiciary, the courts, the judges and judicial officers (whom I shall refer to collectively as judges), when discharging their judicial functions, must not be subject to improper extraneous pressure or influence.

The Basic Law and the relevant legislation provide clear and strict provisions regarding the appointment and removal of judges. In particular,

Article 88 of the Basic Law provides that judges are appointed by the Chief Executive on the recommendation of the independent Judicial Officers Recommendation Commission, which is chaired by the Chief Justice. Appointment of judges, whether local or from overseas, must be based on and only based on judicial and professional qualities, as stipulated under Article 92. Judicial appointments must be free from political or other irrelevant considerations.

Inevitably, cases with political overtones come before the courts for adjudication. Judges hearing such cases often come under intense scrutiny in the media and social media, and the decisions in these cases are almost always subject to partisan criticisms. Comments and criticisms, sometimes extreme and harsh ones, are unavoidable. Whilst the freedom of speech of everyone in society must be fully respected, there must not be any attempt to exert improper pressure on the judges in the discharge of their judicial functions.

In this connection, it has to be stressed that attempts to exert undue pressure on our judges by means such as threats of violence or doxxing are as futile as they are reprehensible.

Judges decide cases independently. When deciding a case, a judge is not subject to the control or interference by other judges, including more senior judges. The appropriate way to question a decision is by means of appeal or review. Our appellate courts exist precisely for the purpose of correcting mistakes made in the lower courts, ironing out discrepancies in decisions and sentences among different first instance courts, and where appropriate, clarifying the law and laying down sentencing guidelines. Admittedly, appeals and reviews take time, and patience is required. Nonetheless, we must have faith in our common law system and allow the appeals process to run its course. The positive and authoritative role played by our appellate courts can simply not be replaced.

An impartial judiciary means that everyone is equal before the law. Whereas judicial independence means that judges must not be subject to improper influence from outside, judicial impartiality requires judges to be free from bias and prejudice of their own. Judges are human. It is only natural that, like others in society, judges may have and are indeed entitled to their own personal views and beliefs. However, a judge must decide cases objectively and professionally, independent of his own personal views or beliefs, political or otherwise. A judge must put them aside and apply only the law to decide cases. By his words and conduct, he must treat everyone that comes before the court equally and fairly. In this regard, perception is as important as reality. The public's expectation of the impartiality of our judges is very high, and rightly so. A judge must therefore exercise self-restraint. When dealing with high profile cases or cases with a political flavour, judges must be particularly careful with their appearance of impartiality in terms of what they say in court or write in their judgments, or how they treat the parties, their lawyers or the witnesses. Any lapses in this regard, given the potentially polarising nature of these cases, could lead to suspicion of partiality, which is not conducive to maintaining public

confidence in our judicial system.

It is only understandable and natural that different people may view the merits of a judicial decision from different perspectives and come to different conclusions. To some, only the outcome of the case matters, regardless of what the judge's reasons or reasoning may be. However, disagreement with a decision on the basis of one's political view or stance is never in itself an acceptable reason to call into question the judge's or the Judiciary's independence or impartiality. Unfounded allegations against our judges would only risk undermining public confidence in the Judiciary.

Independence does not mean a lack of accountability. There are built-in features in our judicial system that ensure that the Judiciary and judges are accountable to the public for their works. These include, amongst other things, the requirement that save for well-defined limited exceptions, all proceedings are open to the public, as well as the requirement that reasoned judgments which are accessible to the public on the internet be given for the decisions of the courts. Moreover, we also have a well-used system of appeals; transparent target dates for listing of cases for hearing and for delivery of judgments; a published guide to judicial conduct; an established system of complaints against judges; an annual budget that is approved by the legislature; and stringent financial control measures. There is of course further room for improvement in relation to these features, but our community should be assured that there are important features in place to ensure that whilst the Judiciary is independent in its organisation and operations, it is nonetheless fully accountable to the public in the discharge of its functions.

Judges are of course not above criticisms and complaints. Under our existing system, complaints against judges are handled by court leaders responsible to the Chief Justice. Where appropriate, input from senior judges is also sought. Annual reports of complaints received and handled are published by the Judiciary. In some cases, the results of investigation into complaints are posted on the Judiciary website and subject to public scrutiny. In the most serious of cases, Article 89 of the Basic Law provides for the removal of judges (including the Chief Justice) by the Chief Executive upon the recommendation of a tribunal consisting of judges only, on the ground that they are unable to discharge their duties, or for misbehaviour. The fact that even in the case of possible removal, the tribunal making the recommendation to the Chief Executive on the course to take comprises only judges speaks volumes of the importance the Basic Law attaches to judicial independence and non-interference with the Judiciary by any outside interests. That said, I do agree that subject to the overriding consideration that there can be no undermining of judicial independence, there is still room for further enhancement of the transparency and accountability of our complaint handling mechanism. Accordingly, a review of our existing mechanism, which was last reviewed in 2016, will be undertaken with a view to further enhancing its transparency and accountability.

The second fundamental of the Judiciary, which overlaps to some extent with the first one I have just outlined, is that the Judiciary must comprise judges who are upright and who are prepared to uphold rights. A judiciary can

only be as good as the judges that man its courts. The Judicial Oath is a requirement under Article 104 of the Basic Law. It requires every judge to uphold the Basic Law, to bear allegiance to the Hong Kong Special Administrative Region, to serve Hong Kong conscientiously, dutifully, in full accordance with the law and with integrity, and to safeguard the law and administer justice without fear or favour, self-interest or deceit. It can only be fulfilled by judges who are upright; judges who are persons of integrity. It is worth repeating that judges must be impartial, free from bias or prejudice. Judges must be fearless and be prepared to make decisions in accordance with the law, regardless of whether the outcomes are popular or unpopular, or whether the outcomes would render themselves popular or unpopular. A judge must be honest and intellectually honest. Binding laws and precedents must be dispassionately applied and applicable rules and procedures faithfully observed, even if this means getting a result the judge personally might not prefer. Powers and discretions must be exercised judicially. Judgments must set out the true and entire reasons for the decisions made.

Society has every right to insist that our judges must be faithful to the Judicial Oath. On behalf of my colleagues in the Judiciary, I would like to assure the public that we expect nothing less of ourselves.

Why do we need upright judges with integrity to administer justice? We need these judges because courts exist to adjudicate disputes, to enforce rights, to punish the wrongdoers and to acquit the innocent, all in accordance with law and evidence. Of all the rights that are recognised under our legal system, there are no rights more precious than the fundamental rights that are guaranteed under Chapter III of the Basic Law and those that are set out in the Hong Kong Bill of Rights, such as the freedom of speech, the freedom of assembly, the procedural and other safeguards in criminal proceedings, and other personal freedoms and liberties. Society expects the courts and our judges to generously interpret and jealously protect these rights when they are threatened or are otherwise interfered with. The courts are the place where these rights must be enforced. Our courts must continue to enforce and give effect to these fundamental rights.

All this said, three observations should be borne in mind. First, the Basic Law is the ultimate guarantee of the fundamental rights enjoyed by the people of Hong Kong, and of the jurisdiction of the courts to enforce them. The importance of the Basic Law cannot be over-emphasised.

Secondly, whilst fundamental rights must be given a generous interpretation, most fundamental rights are not absolute in the sense that they are liable to be restricted for the sake of others or for the common good. However, any restriction must be justifiable by reference to its aim, relevance, necessity and proportionality.

Thirdly, fundamental rights are equally enjoyed by the people of Hong Kong, each and everyone of them. When rights are exercised or sought to be enforced in courts, the fundamental rights of others, where relevant, must equally be borne in mind and respected. When different rights pull in different directions, as is quite often the case, the court's task is to

balance these competing rights and come up with a decision that best gives effect to these rights.

The third fundamental of the Judiciary that I would like to discuss is that our Judiciary must remain a professional and efficient judiciary that moves with the times.

A modern judiciary must be an efficient judiciary. The annual number of leave applications for judicial review relating to non-refoulement cases has risen from 60 in 2016 to over 3,700 in 2019, even though the number of leave applications in other types of judicial review cases has remained stable at around 160 per year. The resulting stress on our judicial capacity is tremendous and it is not helped by the outbreak of the COVID-19 pandemic last year which seriously disrupted court operations, nor the large number of criminal cases arising from the social events in 2019. Whilst we will continue to deal with these workloads with determination and perseverance, specific attention will be given to the prioritisation of different types of cases so that backlogs and bottlenecks can be tackled more strategically and effectively. In particular, steps to enhance the practice and procedure of the Constitutional and Administrative Law List in the High Court will be taken, and important public law cases and appeals will be given priority and fast-tracked for hearing so as to reduce the delays and social costs that these litigations involve. Likewise, hearing of selected criminal appeals or sentence reviews that are of general importance or otherwise draw wide public attention will be expedited so as to enable the Court of Appeal to clarify the law where appropriate or give authoritative sentencing guidance in a timely manner. Enhanced administrative measures will be put in place to help ensure that judgments are delivered within a reasonable time.

On the question of manpower, judicial vacancies at all levels should be filled by competent and efficient judges and lawyers of the appropriate qualities. Our top court must continue to be composed of judges of the highest caliber and professional qualities, in order to maintain full confidence in our legal system and the hard earned reputation of the court in the common law world. In this regard, the substantial contribution made by our overseas Non-Permanent Judges to the work of the court deserves full recognition. Despite occasional difficulties in recruitment for judges in the Court of First Instance of the High Court in recent times, there can be no lowering of judicial and professional requirements for our judges. We will continue to explore ways to attract lawyers of the right caliber and character to join the bench. Society, and in particular, the legal profession, must help the Judiciary in encouraging suitable lawyers to apply to become judges. This is vital to the Judiciary in discharging its functions to uphold the rule of law and to administer justice impartially and competently. One means to alleviate the workloads of judges in the High Court is the gradual expansion of the judicial associate scheme to support judges in the Court of First Instance.

To help maintain and further develop the professional qualities and efficiency of our judges, efforts will be made to strengthen and expand the work of the Judicial Institute, one essential function of which is to provide continuing judicial education for our judges. Workloads permitting, judges

will be given more "protected time" to attend judicial seminars and workshops on subjects such as court craft, judicial ethics, judgment writing and sentencing, just to name a few.

As a modern judiciary, we will continue to strengthen our exchanges with the judiciaries and judges in other common law jurisdictions as well as our counterparts on the Mainland.

We are in the middle of a huge, substantial project to digitise our legal procedures and support systems. The Court Proceedings (Electronic Technology) Bill was passed into law on July 17 last year. The relevant court procedural rules, which are subsidiary legislation, will hopefully be tabled before the Legislative Council in the first quarter of this year. In the coming few years, processes will go electronic in our courts, in the court registries, in the preparation for and conduct of cases, and in the interaction with the courts.

The COVID-19 pandemic has prompted initial attempts to conduct remote hearings in our courts. The use of technology has proved to be effective in many areas. It is envisaged that remote hearings will become a permanent feature of our legal system, particularly in civil cases. For criminal cases, using remote means to conduct hearings requires amendments to be made to existing laws. There are ongoing consultations with relevant stakeholders. Our target is to introduce a Remote Hearing Bill into the Legislative Council in the second quarter of this year.

On behalf of all my colleagues in the Judiciary, I wish to assure the community that we are committed to meeting the expectations that I have just outlined to you. We are committed to the rule of law and to administering justice in full accordance with the law without fear or favour, self-interest or deceit.

Last but not the least, tribute must be paid to my predecessors, Chief Justice Li and Chief Justice Ma, for their great and dedicated contributions to the upholding of the rule of law. They have laid a sure and strong foundation for the post-1997 Judiciary, enabling the rule of law to continue to flourish. They have maintained the independence of the Judiciary, and they have led by example in the due administration of the law. The legacies they have left are rich and substantial. I have had the good fortune of working under the leadership of both of them as my Chief Justice. Like many of my colleagues, I am grateful to their leadership and guidance all these years. On a more personal note, I would like to take this opportunity to wish Chief Justice Ma a very happy birthday today, as well as a long and fulfilling retirement, and the best of health and happiness.

It only remains for me to wish you and your families good health and much happiness in the New Year.