

Statement by The Honourable Chief Justice Geoffrey Ma

23 September 2020

1. In view of the commentaries, opinions and criticisms in relation to recent decisions of the courts, particularly at the Magistrates' Court level, involving the conviction or acquittal of defendants and the granting or refusal of bail, the Judiciary wishes to remind the community of certain basic, essential principles governing the administration of justice in Hong Kong. The proper administration of justice is crucial to the existence of the rule of law.

Principles

2. These principles derive from the Basic Law of the Hong Kong Special Administrative Region (HKSAR). The courts and judges cannot derogate from their responsibilities as contained in this document. The Basic Law was enacted by the National People's Congress (NPC) in accordance with the Constitution of the People's Republic of China prescribing the systems to be practised in Hong Kong in order to ensure the implementation of the PRC's basic policies regarding Hong Kong.

3. The Basic Law sets out provisions that deal with the political structure of the HKSAR. Chapter IV contains provisions dealing with the Chief

Executive (Section 1), the Executive Authorities (Section 2), the Legislature (Section 3) and the Judiciary (Section 4). We are particularly concerned in this paper with matters relating to the Judiciary.

4. In Article 2 (in Chapter I enumerating General Principles), it is stated that the NPC authorises the HKSAR to “enjoy independent judicial power”. Article 19 (in Chapter II setting out the Relationship between the Central Authorities and the HKSAR) states again that the HKSAR is to be “vested with independent judicial power”. Then Article 85 (in Chapter IV in Section 4 in relation to the Judiciary) states:-

“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.”

5. The exercise of judicial power essentially means the responsibility of adjudicating cases and dealing with legal disputes, whether civil or criminal, according to law. This is the object of the administration of justice. This responsibility is placed on the Judiciary and Article 85 so states in explicit terms.

6. It is important to bear in mind that the exercise of judicial power requires judges to determine and handle cases strictly in accordance with the law and legal principles. As has been stated on numerous occasions in the past, the responsibility of our courts is to determine legal disputes according to the law. It is no part of the courts' function to determine, for example, political controversies, to promote any political viewpoint, or to adjudicate in accordance with any mainstream media or public opinions. Courts and judges do not have the power to do this. Neither should they seek to do this. It follows from this that clearly, judges must not be influenced by political considerations of whatever nature in the discharge of their duty to apply the law. Relevant in this context is Article 92 of the Basic Law, which states that judges shall be chosen on the basis of their judicial and professional qualities.

7. The requirement in Article 85 that Hong Kong courts shall exercise judicial power independently, free from any interference underlines the responsibility to ensure that everyone is equal before the law and that no one is above it. The concept of equality is stipulated in Article 25 and reiterated in Articles 1 and 22 of the Hong Kong Bill of Rights (which embodies the provisions of the International Covenant on Civil and Political Rights which apply to Hong Kong by reason of Article 39 of the Basic Law).

8. To exercise judicial power free from any interference means exactly what it says, in embodying the fundamental concepts of fairness and impartiality. Together with the concept of equality, it means that in the discharge of their judicial responsibilities, judges must act honestly and with integrity, without fear or favour. This is precisely what the Judicial Oath taken by all judges solemnly requires. The Oaths and Declarations Ordinance Cap.11 requires judges at all levels of court to swear to uphold the Basic Law and to serve the HKSAR “conscientiously, dutifully, in full accordance with the law, honestly and with integrity, safeguard the law and administer justice without fear or favour”. It is also to be observed here that under Article 104 of the Basic Law all judges must swear to uphold the Basic Law.

9. In terms of criminal trials at all levels of court, the following principles are fundamental to the concept of justice and fairness in Hong Kong and these principles apply irrespective of the crime involved or of the person charged:-

- (1) Foremost is the requirement of a fair trial. This is implicit in Article 35 of the Basic Law but Article 10 of the Hong Kong Bill of Rights (which as stated earlier is given force by Article 39 of the Basic Law) expressly states: “All persons shall be equal before the courts and tribunals. In the determination of any criminal charge

against him, or of his rights and obligations in a suit of law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.”

In the case of criminal cases, such tribunals are the courts.

- (2) A fair trial in the context of criminal trials means that no one will be convicted of a crime except on legal grounds and in accordance with legal procedures. Article 5(1) of the Bill of Rights expressly states that “No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.”
- (3) A fair trial means that no one will be convicted without sufficient evidence as to guilt. Such evidence must also have the requisite quality. The burden to prove that a criminal offence has been committed is on the prosecution. The prosecution authority in Hong Kong is the Department of Justice (which is headed by the Secretary for Justice): see Article 63 of the Basic Law. The standard of proof that must be satisfied before there can be any criminal conviction is proof beyond reasonable doubt. No one should be convicted of a crime and be subject to punishment,

including imprisonment, unless the evidence against him or her proves guilt beyond a reasonable doubt.

- (4) There is a presumption of innocence until a person is proven guilty in a trial. Article 11(1) of the Bill of Rights states this: “Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.”

- (5) As Article 11(4) of the Bill of Rights makes clear, everyone “convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law”. In other words, any person convicted of a crime can appeal to a higher court, whether to the Court of First Instance (in the case of an appeal from the Magistrates’ Court), the Court of Appeal (from the District Court and Court of First Instance), ultimately to the Court of Final Appeal. In the case of acquittals, the prosecution (the Department of Justice) may also appeal.

10. It is now convenient to deal with some particular topics: the granting of bail, sentencing, appeals and reviews, and impartiality of judges.

Bail

11. The granting of bail by the courts arises at a stage before a person has been tried. There is a presumption that bail should be granted. Article 5(3) of the Bill of Rights states: “It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings” These guarantees are also known as conditions of bail. This presumption that bail should be granted is reinforced by s.9D of the Criminal Procedure Ordinance Cap.221.

12. The presumption of bail is consistent with the presumption of innocence referred to earlier. There is one qualification to the presumption of the granting of bail: see Article 42 of the National Security Law.

13. Part IA of the Criminal Procedure Ordinance contains detailed provisions regarding the granting or refusal of bail. Section 9G sets out the circumstances whereby an accused person may be refused bail. Thus, s.9G(1) states:-

“The court need not admit an accused person to bail if it appears to the court that there are substantial grounds for believing, whether

or not an admission were to be subject to conditions under s.9D(2), that the accused person would—

- (a) fail to surrender to custody as the court may appoint; or
- (b) commit an offence while on bail; or
- (c) interfere with a witness or pervert or obstruct the course of justice.”

14. Where bail is an issue before the courts, particularly if bail is resisted, the position of the parties as presented to the court becomes relevant. Accordingly, if it is sought to be argued that bail should not be granted, the prosecution has the responsibility to state its position and provide the court with adequate grounds and evidence to support its stance.

15. It should also be borne in mind that where bail is granted by a magistrate or the District Court, if the prosecution is dissatisfied with it, the Secretary for Justice may apply to a judge to review the decision; on the application of the Secretary for Justice, the relevant accused will be detained in custody pending such review: see ss.9H and 9I of the Criminal Procedure Ordinance.

Sentencing

16. In this respect, we would refer to that part of the Reply relating to sentencing made by the Chief Secretary for Administration in relation to the meeting of the Legislative Council held on 10 June 2020:-

“According to the Judiciary, a substantial part of the courts’ work consists of the administration of criminal justice. Sentencing is an essential part of this process. It is an exercise of the courts’ independent judicial power. Where a defendant pleads guilty or is found guilty after trial in a particular case, it is the court’s duty to impose a just and appropriate sentence, applying the relevant principles to the circumstances of the crime and those of the offender. Reasons for the sentence are given. Where such sentence is regarded by a convicted person as excessive, that person may appeal. Where the Secretary for Justice considers the sentence to be manifestly inadequate or excessive, he/she may apply to the Court of Appeal for the sentence to be reviewed.

The main objectives of sentencing are retribution, deterrence, prevention and rehabilitation. All of them serve the public interest.

Sometimes, seeking to attain one objective may lead to a more severe sentence whilst seeking to achieve another may tend towards a more lenient sentence. The judge has to consider all the circumstances of each case and decide on the appropriate degree of significance that should be given to each objective in that case. When setting sentencing levels, the courts take into account all relevant factors. These include the prevalence of certain types of offences and public concern over such prevalence.

For certain types of crime, the Court of Appeal has laid down guidelines for sentencing for the purpose of promoting broad consistency. For example, for the offence of trafficking in dangerous drugs, guidelines have been laid down depending on the type of drug and the quantity involved. They provide guidance to judges in the exercise of their sentencing power. In the past three years (2017-2019), the court has given sentencing guidelines to the lower levels of courts once.

From time to time, views have been expressed in the public arena that a “sentencing committee” be established to set binding sentencing standards for all criminal cases. The Judiciary emphasises that sentencing is a judicial function to be exercised by

the courts independently and exclusively. The courts make sentencing decisions day in and day out in a very large number of different cases. The circumstances which arise in the cases are of an infinite variety. Deciding on a just and appropriate sentence in each case is a challenging and difficult task for the courts and is a matter for balanced judicial judgment.

It is important that sentencing decisions by the courts command the respect and confidence of the community. Further, in a society which values freedom of speech as a fundamental right, all court decisions, including sentencing decisions, are open to public discussion. Such discussion is most meaningful when it is well informed and well considered, taking into account the circumstances of the case in question and the reasons of the sentencing judge. Where sentences are regarded as being inconsistent, excessive or inadequate, as stated above, the parties (which include the Secretary for Justice) can appeal or apply for a review of sentence.”

17. There are two aspects of sentencing that should be emphasised. First, sentencing is a legal question to be determined in accordance with legal principles. It is part of the judicial function and process. It is not a political

question. The fundamental principles identified earlier apply as much to sentencing as they do to any other exercise of judicial power.

18. Secondly, it is crucial to bear in mind that where there is any dissatisfaction over the sentences imposed by the courts, any redress ought to be taken up by means of an appeal or review. Where, for example, a sentence imposed by the Magistrates' Court, the District Court or the Court of First Instance is regarded as being wrong in principle or manifestly inadequate or manifestly excessive, the Secretary for Justice can apply to the Court of Appeal for the review of any sentence on the grounds that the sentence is not authorised by law, is wrong in principle or is manifestly inadequate or manifestly excessive: see s.81A of the Criminal Procedure Ordinance. This is the only proper means by which a sentence regarded as inadequate or excessive can be redressed, and the responsibility here lies with the Secretary for Justice representing the prosecuting authorities.

19. For completeness, it should also be pointed out that where a sentence is regarded as excessive, an accused can also appeal to the Court of Appeal under s.83G of the Criminal Procedure Ordinance (from the Court of First Instance or the District Court) or to a judge of the Court of First Instance under s.113 of the Magistrates Ordinance.

Appeals and Reviews

20. The availability of an appeal or review from decisions of the courts has already been touched upon in dealing with aspects of bail and sentencing. The right to appeal a conviction or sentence, as pointed out earlier, is guaranteed under Article 11(4) of the Bill of Rights.

21. In the event of an acquittal, there are a number of options open to the Secretary for Justice:-

- (1) In the Magistrates' Court, where the prosecution is dissatisfied with a determination by a magistrate, it may ask the magistrate to review the decision: s.104 of the Magistrates Ordinance Cap.227. The Secretary for Justice is also able to appeal any decision by way of case stated under s.105 of that Ordinance.
- (2) As far as the District Court and Court of First Instance are concerned, the Secretary for Justice is able to refer to the Court of Appeal any question of law following an acquittal: s.81D of the Criminal Procedure Ordinance. There is an appeal also against an acquittal by way of case stated: s.84 of the District Court Ordinance Cap.336. Where an indictment is quashed, the Secretary

for Justice may appeal under s.81F of the Criminal Procedure Ordinance.

22. The Secretary for Justice, representing the public interest in the prosecution of crimes, is given the sole responsibility under the law to appeal or apply for a review where it is thought that an acquittal or sentence is wrong.

Impartiality of Judges

23. As stated earlier, the exercise of judicial power free from any interference embodies a number of fundamental concepts, including that of impartiality. The Judicial Oath requires judges to administer justice without fear or favour. It follows from this that judges must not be biased in any way in the discharge of their judicial duties. This includes in particular being influenced by political considerations. Put simply, a judge must not be influenced by any political bias of whatever persuasion.

24. In this context, mention has already been made of Article 92 of the Basic Law stating that judges are chosen on the basis of their judicial and professional qualities.

25. The Judiciary's Guide to Judicial Conduct sets out in detail the need to guard against accusations of bias, whether actual bias or presumed bias.

Under the heading of "Impartiality", the following is stated:-

"18. Impartiality is the fundamental quality required of a judge. Judges should conduct themselves in and out of court in a way that maintains confidence in their impartiality and that of the Judiciary.

19. Justice must be done and must be seen to be done. Impartiality must exist both as a matter of fact and as a matter of reasonable perception. If partiality is reasonably perceived, that perception is likely to leave a sense of grievance and of injustice having been done, which is destructive of confidence in judicial decisions.

20. The perception of impartiality is measured by the standard of a reasonable, fair-minded and well-informed person, as discussed more fully in relation to questions of apparent bias."

26. In response to some views about judges' being influenced by other more experienced judges in their decisions, it is clear in the Guide to Judicial Conduct that judicial independence also means that judges are independent from

each other. Judicial decision-making is the responsibility of the individual judge, including each judge sitting in a collegiate appellate court.

27. If there are any grounds to suggest that a judge's handling or determination of a case has been influenced by extraneous matters or that a judge has not been impartial, a number of courses are available. Once a determination has been made, the most obvious redress is by means of an appeal, as stated earlier. Where before the start of a case, there are grounds to argue that a judge may not be impartial, an application for recusal can be made. In a criminal trial, such an application should be made by the accused or the Secretary for Justice.

28. Complaints about the judge's conduct may also be made. Each complaint will be handled by the relevant court leaders in the Judiciary in accordance with established procedures, with the Chief Justice being ultimately responsible. Where there are a large number of complaints in relation to any controversial case, the outcome will be made public on the Judiciary's website. There are also provisions under both the Basic Law and the Judicial Officers (Tenure of Office) Ordinance Cap.433 regarding disciplinary procedures for judicial officers of certain courts and tribunals.

Criticisms of the Courts

29. Where fundamental principles have been breached or other errors have occurred in a criminal trial, as stated above, there is an established appeal process leading up ultimately to the Court of Final Appeal. The community is able to see for itself and verify whether fundamental principles are followed by the courts by observing court proceedings (all of which at every level, save for some very limited exceptions, are open to the public) and reading the judgments of the courts at all levels to see precisely the reasons why a court has arrived at a determination (judgments of the District Court and above are published on the Judiciary's website). Where decisions and their reasons are not in written form, they are delivered in open court. Open justice and transparency enable the community to observe the judicial process in full, and to provide meaningful and informed comments, opinions or criticisms.

30. Where fundamental principles have been breached on the part of judges or the courts, criticisms can of course justifiably be made. But it is crucial that such criticisms are both informed and supported with proper grounds and reasons. The reason for this is that such criticisms are likely to contain extremely serious allegations and they should not be lightly made.

31. It is wrong and detrimental to public confidence in the administration of justice to level criticisms against judges and the courts without

being informed, and without proper grounds and reasons, or to base such criticisms on bare assertions or matters taken out of their proper context. Furthermore, it is wrong to make serious accusations of bias or breach of fundamental principles merely based on a result of a case not to one's liking. The Judiciary is not above criticism by any means but any criticism must be solidly based and properly made. In particular, there must not be a politicisation of the Judiciary and its functions.

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