

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 warmly welcome you to this year's Ceremonial Opening of the Legal Year. After a two year absence from this venue due to Covid restrictions, I am pleased we are able to hold the Opening of the Legal Year at its traditional venue once again. This is an important annual event which focuses our community's attention on the rule of law, the administration of justice, and the central role played by the Judiciary in this regard. Indeed, the role of the Judiciary in our society is the main theme of my address this afternoon, apart from two new initiatives which I will briefly describe in the latter part of this address.

It is essential that the public is well informed of the role the Judiciary plays under the "One Country, Two Systems" arrangement, an arrangement which will, as President Xi has recently made clear, continue unchanged beyond 2047. An accurate understanding of the Judiciary's role forms the proper basis of public oversight and scrutiny of judicial work. This understanding informs meaningful comments or views of court decisions, enabling constructive suggestions that help improve our work to be made. All this serves to enhance public confidence in the courts and the judicial system, which reinforces public belief in the rule of law. Conversely, an inaccurate, incomplete or misconceived understanding of the role of the Judiciary is often the reason for misplaced or inappropriate criticisms of court decisions, or even personal attacks against our judges. Sometimes, misconceptions of the judicial role may lead to unrealistic expectations of the courts, which cannot and should not be met. This is not conducive to public confidence in our judicial system or the upholding of the rule of law.

What are the main functions of the Judiciary in our society? I will identify three of them here.

First and foremost, the primary role of the Judiciary is to uphold the rule of law and administer justice in strict accordance with the law. This is the most important function of the Judiciary and the courts must do it well. It cannot be achieved without the Judiciary being an independent, impartial and effective one. In adjudicating cases, the courts' duty is to interpret and apply the law in accordance with the evidence placed before them. The courts must treat everyone equally, whether in litigation between individuals, corporations, or involving the Government, and whether the case is civil, criminal, or public law in nature. Everyone is equal before the law. All defendants are presumed innocent unless and until proven guilty, and everyone is entitled to a fair trial.

Pausing here, it should be noted that the courts do not control whether, and what, cases are brought before them. It is a matter for the parties in dispute, and in criminal matters, the prosecution authorities and law enforcement agencies. Nor do the courts have a choice in the matter. Once a case is brought before the court, it must be dealt with by the court strictly in accordance with law.

In administering the law, judges put aside their own personal views. Their role is not to re-make the law that they have to apply. Nor is it permissible for them to only apply those parts of the law which they personally agree with. The Judicial Oath requires judges to apply the law faithfully. Their personal views and preferences do not enter the equation. It is therefore entirely proper for someone, if there are good grounds, to criticise the court or a judge for misapplying the law. It is, however, wrong to criticise a judge simply for applying laws which one does not like or agree with. As will be explained, laws are not enacted by judges; they simply apply them as required by the Judicial Oath.

It is therefore simply right that judges should ignore this latter type of criticism and carry on with their judicial duties. In this regard, full acknowledgement is due to our judges who have handled with great professionalism cases attracting public or even international attention in the past few years. Whether as designated judges under the Hong Kong National Security Law or not, they have all faithfully applied the law to the best of their ability, in accordance with the evidence presented before them.

Views on judicial decisions may sometimes reflect an inadequate understanding of the adjudication process. Judges administer justice by applying the relevant law to the facts and evidence placed before them. In litigation, there are well established rules of procedure and of evidence governing, for instance, the presentation of arguments, the burden and standard of proof, and the admissibility of evidence. These procedural and evidential requirements are as binding on the courts as the substantive laws. Under our adversarial system of litigation, the parties play a crucial role in presenting their arguments and evidence before the court. The way issues are argued or the quality of the evidence adduced before the court will obviously have an important impact on the outcome of a case. A good example is where a defendant is acquitted because there is reasonable doubt regarding his guilt arising from the evidence before the court.

Another common type of criticism of court decisions has its origin in the failure to understand that in many disputes, more than one right or interest is in issue. Many legal disputes in public law cases, particularly those involving underlying social, economic or political issues, concern rights or interests that pull in opposite or even multiple directions. The court has to put all these rights and interests in the balancing scales before a decision can be made. The outcome of the balancing exercise may not always be pleasing to everyone, or even anyone. For, by definition, different stakeholders and different interests are involved. It does not mean that the court has failed in its function in administering justice fairly and equally.

All this brings me to the second role that the Judiciary plays in society, that is, the protection of fundamental rights. It is the function of the courts to uphold fundamental rights. This is an important facet of the rule of law as practised in Hong Kong. In Hong Kong, fundamental rights are set out in Chapter III of the Basic Law, as well as the Hong Kong Bill of Rights, which is constitutionally entrenched under Article 39(1) of the Basic Law. These important, fundamental rights must be jealously guarded by the courts.

Whilst fundamental rights must be, and are given by our courts, a generous interpretation, most fundamental rights are not absolute - they are liable to be proportionately restricted for the sake of others or for the public interest.

Fundamental rights are equally enjoyed by the people of Hong Kong. When rights are exercised or sought to be enforced in our courts, the fundamental rights of others, where relevant, must equally be borne in mind and respected. In this regard, what is often termed as the public interest may simply be understood as the sum total of the fundamental or other rights and interests enjoyed by other members of society or a portion thereof. As explained, when different rights and interests pull in opposite or different directions, as happens quite often, the court's task is to balance these competing rights and interests and arrive at a decision that best gives effect to them.

A further point to note is that the ultimate duty of a court is to administer justice in strict accordance with the law - this includes all laws that are binding on the court. Moreover, there are boundaries to the court's jurisdiction and judicial power. When fundamental rights are restricted by law that is binding on the court, or law that is put beyond the court's jurisdiction to review, the court must take the law as it is and accept the limit of its jurisdiction, and administer justice accordingly.

The third role played by the courts relates to their lawmaking function under the common law system. Under our legal system, the courts, particularly the higher courts, do make law from time to time on a case-by-case basis. When a new situation is encountered which is not addressed by any binding law or precedents, the court may, where appropriate, develop and extend the law by adopting and applying comparable precedents by analogy. Moreover, the highest court may from time to time regard a particular case law as no longer being correct, making it necessary to restate or change the law. In this way, the common law evolves incrementally over time, whereby older and outdated authorities are gradually replaced by newer ones which suit the modern circumstances better.

However, the courts' lawmaking role should not be exaggerated. In most of the cases that come before our courts, the court's task is either to interpret and apply written laws, or to apply binding authorities applicable to the dispute before it. Where circumstances justify, the court may give a written law a modern or "updated" interpretation in order to address changes that have occurred after the law was initially framed. This is permissible so long as it is in accordance with the original legislative intent, and does not do unacceptable violence to the language of the law. What the court cannot do is to use this as an opportunity for legislating or, put another way, filling in a perceived legislative gap. That is not the function of the courts, but that of the Legislature. Likewise, provisions in the Basic Law, which is regarded as a "living instrument" by the courts, are capable of being given modern meanings where circumstances justify. However, given its constitutional status and significance, the courts would be particularly careful when interpreting the Basic Law as a "living instrument".

Having thus outlined the three main functions of the Judiciary, it is perhaps also instructive to explain what is not the role of the Judiciary. First, subject to the limited role they play in developing the common law which I have just mentioned, it is not the role or function of the courts to make laws. Rather, their responsibility is to apply them. In particular, the written laws in Hong Kong are made either by the Legislature or other bodies or persons vested with delegated legislative powers, or, in the case of national laws that are applicable to Hong Kong, by the National People's Congress or its Standing Committee. The courts do not make the written laws, and indeed play no part in their enactment. The courts' role is to faithfully apply them.

Secondly, it is not the function of the courts to make public policies, or for that matter, political decisions. Public policies and political decisions are made by the Government as part of its functions and duties to govern and run Hong Kong. The courts only play a role when a particular policy or decision is challenged in court for its consistency with the Basic Law or the Hong Kong Bill of Rights, or for its lawfulness or reasonableness in the public law sense. In all such litigations, the court's focus is invariably on the constitutionality or lawfulness of the policy or decision, as opposed to

its merits or drawbacks. Whilst inevitably, the court's decision may sometimes have a political impact, this does not mean the court has made a political decision, or made its decision on a political basis as opposed to a legal one when deciding the dispute. Still less does it mean that the court has involved itself politically in the making or unmaking of any government policy.

Underlying the two points that I have just made is a larger, more fundamental principle, that is, the courts must respect and indeed uphold the constitutional order of the Hong Kong Special Administrative Region under the Constitution of our country. Put shortly, the Judiciary is part of the constitutional setup of the Hong Kong SAR under the Constitution. Its role is defined and governed strictly under that setup. Constitutionally, Article 2 of the Basic Law specifically provides that the National People's Congress authorises the Hong Kong SAR to exercise a high degree of autonomy and enjoy, among other things, independent judicial power, including that of final adjudication, in accordance with the provisions of the Basic Law. Article 19 again vests the Hong Kong SAR with independent judicial power, and the courts of the Hong Kong SAR are specifically designated as the organ in the Region to exercise the independent judicial power. The Basic Law and other relevant laws in Hong Kong therefore set out as well as delimit the jurisdiction of the courts. It is the duty of the courts to fully exercise that jurisdiction in cases falling within it. However, it is equally important that they do not usurp the functions, powers or jurisdiction vested in other organs or bodies under the Basic Law, or, for that matter, the Constitution, or to purport to exercise judicial power that they have not been conferred with.

This is not something unique to Hong Kong. In jurisdictions where there is a written constitution, the jurisdiction and positioning of the courts are entirely dependent on what is provided for in the Constitution, which governs what the courts can and cannot do. Where a jurisdiction does not have a written constitution and the legislature is supreme, it is not for the courts to challenge what the legislature has chosen to enact, and the jurisdiction of the courts is ultimately a matter for the legislature to decide.

In conclusion of this part of my address, I would simply reiterate it is important that our community has a clear and accurate understanding of the role and functions of the Judiciary. This is, ultimately, conducive to maintaining public confidence in the courts and the rule of law as practised in Hong Kong.

Turning to enhancements and changes, as I have said before, the Judiciary must remain a modern one that moves with the times. This, too, is an important aspect of maintaining public confidence in the courts. Over the past two years, we have, among other things, enhanced our mechanism for handling complaints against judicial conduct, published a new edition of the Guide to Judicial Conduct, laid down timeframes for handing down judgments, promoted remote hearings and strengthened our judicial education and exchanges. The procedural reform on family law litigations has reached an advanced stage, and further mediation initiatives are also in the pipeline.

Apart from these measures, I would quickly mention two further initiatives that we are actively exploring. First, the live broadcasting of selected judicial proceedings. Open justice is a key to maintaining public confidence in our judicial system and upholding the rule of law. Open justice mandates that subject to limited and justified exceptions, judicial proceedings shall be conducted in a transparent manner in the plain view of the public. It safeguards the right of those appearing before the court. It also serves to educate the public on the judicial process and make uninformed and inaccurate comments about the proceedings less likely. With the advent of technology, and given the limited seating capacities of our courtrooms and public health considerations, live broadcasting of proceedings is a natural way forward to further enhance the transparency of court procedures and public confidence in the judicial process. Yet, the due administration of justice must always remain the primary and overriding consideration. Not all proceedings are inherently suitable for live broadcasting. Criminal trials, particularly trials by jury and those involving vulnerable witnesses, may not be suitable for unrestricted live broadcasting. On the other hand, for appellate proceedings, particularly hearings in the Court of Final Appeal, the case for live broadcasting is a strong one. But even then, legitimate concerns, such as the possible misuse of the

broadcast material, or doxxing of judges or legal representatives, must also be carefully taken into account.

It is with these, and other, considerations in mind that I have decided to appoint a working group within the Judiciary, to be chaired by a senior judge, to examine the guiding principles as well as the implementation practicalities of live broadcasting of court proceedings, with a view to introducing live broadcasting of at least some court proceedings or at some court level within sometime this year, if reasonably practicable.

The second initiative under consideration relates to our Information Technology Strategy Plan. Since last year, we have been rolling out our electronic litigation system by stages. Thus far, this new e-litigation system has been made available as an alternative option to the traditional paper-based system. Understandably, the initial response of the legal profession and others to this new litigation platform is slow. The Judiciary will of course continue with our support service and publicity efforts to boost participation. However, the community is fully entitled to expect a quicker and wider adoption of technology in court operations, and I think it is time that we make a greater stride in driving the migration to e-litigation. Without seeking to downplay the short-term inconvenience and the cultural change that will be required, the legal profession is strongly urged to give serious consideration to switching to the e-litigation system. With the ultimate aim of making the electronic platform the primary litigation system, we are considering the setting of a target timeframe, such as a period of three to five years from the rolling out of the relevant parts of the new system, for requiring all represented litigants to conduct their litigations electronically, unless otherwise exempted in particular circumstances. Full consultation will of course be held with the legal profession as well as other stakeholders, and safeguards of the right of access to court will be put in place. Adequate support and training will also be rendered to our judges and support staff in adapting to the migration. I believe this is a strategically important direction to take in modernising Hong Kong's mode of litigation in this digital era. After all, a modern judiciary must not only be independent and impartial, but must also be efficient and effective. This is and remains our goal and commitment.



It only remains for me to wish you and your family good health and every happiness in 2023. Not only that, the Chinese New Year is just days away. I wish everyone here a very blessed Chinese New Year. Thank you.

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