

Following is the full text of the speech delivered by the Chief Justice of the Court of Final Appeal, Mr Geoffrey Ma Tao-li, at the Ceremonial Opening of the Legal Year 2016 today (January 11):

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

On behalf of the Judiciary, I extend a warm welcome to all of you to this year's Opening of the Legal Year. This occasion enables us to reflect on the law's impact on the community, and on the roles of the Judiciary and the legal profession within it. If society puts any value on the concept of the rule of law as a cornerstone or pillar in our community, it is important to understand Hong Kong's legal system and how justice - for, conceptually, this is after all the purpose of law - is administered. Hong Kong's legal system is based on the common law and on that system's characteristics of fairness, transparency and access to justice. The key players include of course those who are most intimately connected with the law's operation, the courts and the legal profession, but of considerable importance is also the understanding and acceptance by everyone, especially those with influence or power (chief among whom is of course the Government and all those within it), of the purpose of the law. The law is there to facilitate the well-being of our society, and not to be seen as somehow obstructing it.

One may perhaps start with certain fundamentals. Laws of course regulate the activities and the often complex interactions between persons or institutions. The object is to enable members of society to lead dignified lives, to enable them and their families to realise ambitions as best as possible, and to achieve mutual respect between all those within the community. To realise these objects, it is necessary to have in place an infrastructure to ensure that these objects can be fulfilled.

The infrastructure of the law begins with the important requirement that all laws must conform to certain minimum requirements; these are the constitutional norms and requirements. All laws in Hong Kong must conform to the Basic Law. As we all know, the Basic Law sets out fundamental rights and liberties which are constitutionally protected. Chapter III of the Basic Law sets out the vast majority of such rights and liberties:

- (1) Equality before the law: Article 25.
- (2) Rights of permanent residents: Article 24. Included here are the freedom of movement and the right to enter and leave Hong Kong: Article 31.

- (3) Freedom of speech, of the press and publication, freedom of association, of procession and of demonstration: Article 27.
- (4) Freedom from arbitrary or unlawful arrest, detention or imprisonment: Article 28.
- (5) Freedom of conscience and religious belief: Article 32.
- (6) Freedom of choice of occupation: Article 33.
- (7) Freedom of marriage: Article 37.

The Basic Law also contains two provisions that help define Hong Kong's system of law:

(1) First, that the laws in force in Hong Kong shall be, apart from specific provisions of the Basic Law, the common law and rules of equity previously in place: Article 8. This makes Hong Kong, as everybody recognises, a common law jurisdiction.

(2) Secondly, Article 39 of the Basic Law provides that the International Covenant on Civil and Political Rights (ICCPR) as applied to Hong Kong shall remain in force and be implemented through Hong Kong's laws. The ICCPR is implemented in Hong Kong by the Hong Kong Bill of Rights Ordinance Cap. 383. The reference to this international convention in the Basic Law should be noted. Many of the rights I have referred to earlier are to be found in the ICCPR as well. The reference to the ICCPR suggests that in examining the content and substance of the rights contained in the Convention, one must have regard to recognised international jurisprudence.

The concept of equality is key to an understanding of Hong Kong's system of law. I have said (as many have said before me) that the law applies equally to every person. No one person or institution is above the law and the application of the law. Thus, the Government and all within it are subject to the law in precisely the same way as everybody else. No special group, institution or person is above the law and the equal application of the law. Equality is a fundamental component of the rule of law itself. A proper acceptance of this means a proper respect for the rule of law.

This brings me to the role of the courts in our community. The courts only become active when legal disputes require adjudication. This may be in a criminal context when the guilt of a person has to be determined. It may be in a civil context when civil rights, commonly about money or property, have to be resolved. It may be in a public context which engages not only the rights of the parties actually before the court, but perhaps more importantly, the public interest as a whole. I shall say more later about public law cases and judicial review.

The constitutional role of the courts is clear from the Basic Law: Hong Kong courts have "judicial power" and the courts are to act independently. The independence of the Judiciary is enshrined in the Basic Law in three articles. Much has been said about the independence of the Judiciary but it always bears repetition to say that an independent Judiciary is pivotal to the existence of the rule of law.

I move onto that part of the infrastructure that represents the practice of the courts. This is the day to day activity of the courts: what judges do in dispensing justice, how we do it and how litigants access justice.

The determination of legal disputes by the courts is what is meant by the exercise of "judicial power" stipulated in the Basic Law. This is a constitutional responsibility. I emphasise the term "legal disputes" because the business of the courts is to determine disputes in accordance with the law. The types of dispute coming to the courts for determination arise from a variety of circumstances and the motives behind the cases brought in our courts also vary a great deal. Be that as it may, as far as the courts are concerned, it is only the legal outcome of the dispute that is relevant. As has been pointed out on numerous occasions, courts only deal with the legal questions that arise for consideration. This is after all the concept of justice itself: the adherence to the law, legal principle and the spirit of the law.

In the handling of legal disputes, judges must give fair consideration to the viewpoints of all parties. Fairness - one of the principal characteristics of the system of law in operation in Hong Kong I have earlier identified - requires that everybody who comes to court will have their arguments fully and properly considered. It is sometimes said that all litigants should have "their day in court", but it is more accurate to say that each party has a right to be heard. This is the essence of a fair hearing. The disputes before the courts are often complex, requiring different viewpoints to be carefully analysed before a just outcome can be reached. Sometimes, hearings can be lengthy and this is reflected in the judgments of the court, but the reason for this is almost always indicative of the complex nature of the dispute and, more important, the need to deal carefully and fairly with the arguments before the court. This is an indication to the public that the court has come to a properly considered view and has acted fairly. A losing party is entitled to know the reasons for an adverse decision. The public is entitled to be assured that a fair hearing is always guaranteed by the courts.

It is important that the work of the courts and the way cases are handled by judges is open for all to see. Openness is an objective indicator to test the effectiveness and fairness of our legal system; if you like, it is a measure of the rule of law operating in practice. Transparency in the judicial process becomes critical in our legal system, and

this takes the form of almost all court proceedings being open to the public or in the publication of almost all of the written judgments of the courts. I say "almost all" to exclude those few cases where the subject matter is of such sensitivity that it would not be in the public interest to make them public. I should also perhaps at this point say something about bilingualism and the judgments of the courts. Chinese and English are the official languages in Hong Kong so one will find judgments written in both languages. Where there are judgments of jurisprudential value, these judgments will be translated into Chinese or English, as the case may be, in order to enhance the transparency of the court system.

Transparency in the activity of the courts accordingly provides a useful objective tool to measure the effectiveness of the legal infrastructure I have described. But there must also be access to justice - the last of the three characteristics of our legal system. The existence of user-friendly and effective court procedures contributes to this and was one of the main reasons for the Civil Justice Reform, which came into operation nearly seven years ago. Though there is still room for improvement, I believe that our courts and judges have risen well to the challenges, and this again can be measured objectively. Objectivity is important. Many people have different points of view - and they are entitled to them - but in the final analysis, the only way properly to assess these views, positive or negative, is to do so objectively.

Access to justice can also be measured by reference to the existence of legal aid in Hong Kong. Legal aid has over the years provided the necessary access to justice for many litigants. These have included people who have suffered serious injuries, their families, those persons who have had matrimonial problems and other people who have needed the protection of the law but who did not have the private means to engage legal representation. Certainly, in the important area of public law, legal aid has played its part in ensuring that Hong Kong's public law and constitutional law have properly developed, thus helping us to reach a greater understanding of our system of law. It is to public law cases and judicial review I now turn.

For the public, it is in this type of case where the three important characteristics of fairness, transparency and access to justice can best be seen and tested. Public law cases, very often with constitutional principles at stake, involve by definition the public interest. Thus, since 1997, Hong Kong courts have had to deal with constitutional and public law issues involving, for example:

- (1) The right of abode in Hong Kong of children born to Hong Kong permanent residents;
- (2) The freedom of speech, of procession and of demonstration;
- (3) Environmental issues;

- (4) Marriage;
- (5) Social welfare;
- (6) Elections.

Public law cases on the whole involve the very rights and liberties that are protected by the Basic Law and which, as a community, we hold dear. These rights and liberties are enjoyed by every member of the community. They reflect fundamental societal values. A greater awareness of rights and liberties means that in the public sphere, proper responsibility and accountability for decisions affecting every aspect of life and activity in Hong Kong are now expected by the community. Proper responsibility and accountability in the public sphere is called good governance, and good governance is another term for an adherence to the requirements of the law and to its spirit. In other words, it embodies the concept of the rule of law. This is the essence of that type of case known as judicial review and, most often, this type of case involves the Government or a department within the Government, although it can also involve other public bodies. In judicial reviews, the public interest is always engaged and the effects of a decision of the court in this type of case will almost always affect sections of the public beyond the immediate parties in court. Sometimes, the whole community is directly affected. A decision of the court in public law litigation will often serve as a guide to good governance, whether looking at events in the past or perhaps more important, the future. Although there may occasionally be inconveniences, judicial review overall serves the public interest and facilitates the well-being of our society. This status should properly be recognised.

It is precisely because of the public interest being engaged in this way that in dealing with judicial review cases, the court will be anxious to ensure that all proper legal arguments are permitted to be ventilated before a decision is made. Owing to the fact that in public law case, reliance is often placed on various rights and liberties that operate in different directions, the court is faced with difficult and complex arguments. As in any other type of case, a judge must fairly hear all proper points of view. I have earlier referred to the aspect of fairness as being a characteristic of justice in the courts. Judicial review cases are certainly to be treated in no different a way. It cannot be otherwise when the public interest is engaged.

It is inevitable given the nature of the type of case that is involved in a judicial review that political, economic and social factors form a part of the background to such cases. However, as both my predecessor Chief Justice Andrew Li and I have said on numerous occasions, the court is only involved in the legal questions which arise. It is usually simply irrelevant to inquire into the motives, political or otherwise, of the parties before the court: what matters are the legal merits. To be preoccupied with the motives of

the parties before the court will not be helpful in reaching a proper legal outcome. I reiterate this point: that judicial reviews are all about legality and not the merits or demerits of a political, economic or social argument.

It is for this reason that in judicial review cases, the court is required to be particularly astute in ensuring that only proper cases ought to be considered. Unlike most other types of originating process, the permission of the court is required before any application for judicial review can be instituted. The requisite standard - one that was laid down by the Court of Final Appeal in 2007 - is a high one because potential applicants are required to show their arguments to be reasonably arguable with a realistic prospect of success. The Court of Final Appeal reasoned as follows: the purpose of the requirement of leave "is to prevent public authorities from being unduly vexed with unarguable challenges. Whilst in a society governed by the rule of law, it is of fundamental importance for citizens to have access to the courts to challenge decisions made by public authorities on judicial review, the public interest in good public administration requires that public authorities should not have to face uncertainty as to the validity of their decisions as a result of unarguable claims. Nor should third parties affected by their decisions face such uncertainty."

Where this test is satisfied, a court will proceed to consider the arguments in the same way as any other case to arrive at a result that is in accordance with the law. The infrastructure of the law is there to ensure such a result. And it is open for all to see and ultimately to judge for themselves.

The importance of the law in Hong Kong makes it imperative that the quality of our Judiciary should be of the highest possible standard. Recent judicial appointments have reflected this. There is, however, a continuing need to be aware of practicalities as well. For this reason, following a detailed internal review, the Judiciary has recently written to the Government with proposals to improve the Conditions of Service of judges. There is also the ongoing review of the statutory retirement age for judges, as to which progress has been made. These matters are of considerable importance to the community to ensure and encourage recruitment of the best lawyers to the Judiciary. The maintenance and improvement of the calibre of the Judiciary is key to the judicial functions I have earlier described.

The Government has over the years fully supported the needs of the Judiciary, and we acknowledge and are grateful for this support. The Judiciary has for some time also been discussing with the Government its mid- and long-term accommodation requirements, and the Government has also shown much support here. As you are aware, in September the Court of Final Appeal moved into new premises at the old Supreme

Court located on Jackson Road. This was a significant milestone in the history of the Judiciary and the tangible representation of the rule of law is for everyone to see. This coming year will see the completion of the West Kowloon Law Courts Building in Sham Shui Po. This court building will house Magistrates' Courts, the Small Claims Tribunal, the Coroner's Court and the Obscene Articles Tribunal, providing much needed space for the effective operation of these courts. The architecture of the building is in keeping with the dignified stature of a court building.

I have attempted today to give a brief overview of the way justice is administered in Hong Kong. No doubt improvements can be and will be made but I believe that structure to be sound. I welcome the public's greater awareness of our legal system, for therein lies the key to its continuing utility and acceptance.

It only remains for me on behalf of the Judiciary to wish you and your families a happy and fulfilling new year. Thank you.

Ends/Monday, January 11, 2016

Issued at HKT 19:34

