Speech delivered at the Ceremonial Opening of the Legal Year 2022 in Hong Kong

Continuity of Judicial Independence[1]

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On the 1st July, 1997, Hong Kong's constitutional order lifted a new page and it comprises the Constitution of the PRC and the Hong Kong Basic Law. Judicial Independence is protected by our constitutional order.

Article 85 of the Basic Law reads: "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 function."

Judicial independence is safeguarded not only by the words of Article 85, but is entrenched by our system of the appointment of judges and security of tenure. By Article 88, Hong Kong judges are appointed by the Chief Executive on the recommendation of an independent Judicial Officers Recommendation Commission composed of the Chief Justice, the Secretary for Justice, 2 High Court Judges, representative of the Hong Kong Bar Association, representative of the Law Society and 3 lay members. A candidate must be supported by seven out of the nine members before his or her name will be submitted to the Chief Executive for appointment. The Chief Executive may only reject the recommendation, but he or she, unlike the President of the United States, cannot nominate any one of his/her own choice.

Once appointed, and having served the probationary period, the magistrate or judge will serve until he or she retires. Article 89 of the Basic

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[1] This was a speech delivered by the author at the 26 January 2022 in the Leadership Insights Session on the occasion of the Ceremonial Opening of the Legal Year 2022 in Hong Kong.

Law states that a judge of a court of the HKSAR may only be removed for inability to discharge his or her duties, or for misbehavior, by the Chief Executive on the recommendation of a tribunal appointed by the Chief Justice of the Court of Final Appeal and consisting of not fewer than 3 local judges.

Therefore, a judge may fulfil the judicial oath taken upon assumption of office to serve Hong Kong 'conscientiously, dutifully, in full accordance with the law, honestly and with integrity safeguard the law and administer justice without fear or favour, self-interest or deceit'. In his farewell speech on the 6th January, 2021, the former Chief Justice the Hon. Geoffrey Ma Tao-li said: "When I became a judge in 2001, like all judges, I took an oath of office …The judicial oath is a solemn promise to ensure that justice is done, is seen to be done, and that nothing and no one will be allowed to influence a judge to act or compromise in any way the demands of this oath'. He served as a judge of the High Court for 10 years and became the Chief Justice of the Court of Final Appeal from September 2010 to January 2021. He said that throughout his tenure as a judge and particularly in the last ten years as Chief Justice, he could say that he remained proud of all the judges in the way they have fearlessly and without compromise upheld the law and been true to their oath. His views are echoed by overseas non-permanent judges appointed to sit on our Court of Final Appeal.

That is further proven by the fact that according to the World Justice Project, Hong Kong stands 19th amongst 139 countries in the rule of law index in 2021, taking into consideration that 2019 was a year of disturbances in Hong Kong when law and order were challenged.

The constitutional guarantee on judicial independence was explained in the speech of the Chief Justice of the Court of Final Appeal the Hon. Andrew Cheung Kui-nung who was appointed in January 2021. He also explained

why judicial independence has not been affected by the Hong Kong National Security Law which came into effect on the 30th June 2020 because the assignment of national security cases is still conducted by the Judiciary and not by the Chief Executive. Judgments are published and hearings are open to the public in most cases. He described judicial independence as the lynchpin of the rule of law in Hong Kong.

The Hon. Chief Justice also mentioned the challenges to judicial independence in the past year, not from the executive or legislative branches of the Government, but from external forces including : comments locally and overseas based on surmise, controlled media programs and social media, political stances or geopolitical considerations without first ascertaining the facts in a case or reading and understanding the reasons for the courts' decision, as well as unsubstantiated doubt over the court's independence.

Not that judges should be free from criticisms. Mr. Justice Johnson Lam said in his judgment on Vallejos Evangeline Banao v. Commissioner of Registration & Anor. (HCAL 124/2010):

"The court respects the freedom of expression of our citizens. At the same time, public discussions on the case often go beyond the legal issues which the court can properly resolve in the litigation. Again, this is not surprising since the socio-economic and political implications of a particular outcome necessarily transcend the legal analysis of the issues before the court.

In the light of public attention drawn to this case and the intensity with which the question of right of abode for foreign domestic helpers have been addressed at various quarters in the public arena, it is right and I should state clearly the nature of judicial process at the outset. As mentioned, I can quite understand why this case generates so much public interest. I have no intention of stopping people from having discussion on the topic based on

their own perspectives. However, what I should not allow to happen is to let such discussion influence this court in the process of judicial adjudication. Unlike the political process, the judicial process is not subject to any lobbying. It is important that judges are able to perform their judicial function independently, impartially and fearlessly. Our judicial oath requires judges to serve the Hong Kong Special Administrative Region conscientiously, dutifully in full accord with the law, honestly and with integrity, safeguard the Law and administer justice without fear or favour, self-interest, or deceit.

I say these not because I feel any pressure in the present case. As far as I am aware, the public discussions so far represent different views on the topic held by different persons and none of them seek to influence this court in the judicial process"

He truly displayed the judicial temperament and magnanimity required of a judge.

Unfair criticisms disparaging the judge personally tends to impugn all his ruling, and is destructive to the justice system, for the rule of law depends on people's trust in it and that the courts will administer justice fairly and efficiently. It is often inappropriate for the judiciary to defend its own judgment other than through judgments of the higher court, it is for the Government and the legal professional bodies and individuals to stand up and to give staunt support to the judiciary in defence of judicial independence. In the past 2 years, the Chief Executive, the Secretary for Justice as well as the Hong Kong Bar Association and the Law Society have from time to time strongly condemned criminal conduct that threatened the safety of judges and their families, whilst security measures in court buildings are stepped up to protect their personal safety, it needs tremendous courage for our judges to withstand such pressure in the performance of their duties which they have

done remarkably. In Britain, the government was criticized for not defending adequately judicial independence when the judges were called "Enemies of the People" in 2016.

The Chief Justice also mentioned that in recent months, attempts to intimidate or otherwise exert improper pressure on judges involved in trying cases arising from the events in 2019 or national security cases. Doxxing of judges and juries and even members of the bar instructed from overseas were threatened, although such attempts are futile because judges remain committed to defend justice as it ought to be.

Here in Hong Kong, we do not have "Obama judges" or "Trump judges". However, some people would brand judges "Blue" or "Yellow", depending on their own political stance and whether the judgment goes against their wish. This would put the judge in a disadvantageous position of facing political attacks as his reason for the verdict or judgment would be blurred by the colour with which he is painted due to the bias of the critic.

You can see therefore that judicial independence has continued since the reunification of Hong Kong with China. Some also raised the point whether this will continue after 50 years. The Secretary for Justice [2]gave a good answer to it – that is if the concept of 'One Country, Two Systems' is implemented well during the 50 years promised by Article 5 of the Basic Law, there is no reason why it needs to be changed after 2047 as indicated by the founder of the concept Mr. Deng Xiaoping. Judicial independence is the keystone of the rule of law, it needs to be cherished and safeguarded vigilantly and it must be emphasized in civic education so that citizens will respect it as an important fabric of an orderly and harmonious society.

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[2] At the speech given at the Ceremonial Opening of the Legal Year 2022.

Thank you.