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INFORMATION PAPER

LEGAL AID SERVICES COUNCIL

Speeches at the Ceremonial Opening of the Legal Year 2021

The Ceremonial Opening of the Legal Year 2021 was held on 11 January 2021. For Members' information, copies of the speeches delivered by the Chief Justice of the Court of Final Appeal, the Secretary for Justice, the Chairman of the Hong Kong Bar Association and the President of The Law Society of Hong Kong at the Ceremonial Opening are attached at *Appendices I to IV* respectively.

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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-ning, 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.

Ends/Monday, January 11, 2021

Issued at HKT 17:16

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

Following is the speech by the Secretary for Justice, Ms Teresa Cheng, SC, at the Ceremonial Opening of the Legal Year 2021 today (January 11):

Chief Justice, members of the Judiciary, Chairman of the Bar Association, President of the Law Society, distinguished guests, ladies and gentlemen,

The holding of the opening of the legal year here at the Court of Final Appeal, with its live broadcast to the public, is testimony to Hong Kong's strong legal traditions and the resilience and tenacity of the legal community notwithstanding unforeseeable challenges beyond one's control. The coronavirus has posed immense challenges to the world and Hong Kong is not spared.

Judicial Independence

In my 2019 speech, I condemned the totally baseless, arbitrary and even malicious attacks on some of our judges, urging the community to dispel such unwarranted misunderstanding by reading the court judgments. Last year, I have witnessed multiple occasions by which similar reminders have had to be made.

Our judicial independence is premised on the solid infrastructure that has been laid down primarily in the Basic Law - the security of tenure (Note 1), the immunity of judges (Note 2), the non-revolving door (Note 3), and importantly the expressed provision in Article 85 of the Basic Law that guarantees judicial independence, free from any interference (Note 4). The judicial oath, taken by all judges, requires them to safeguard the law and administer justice, without fear or favour. Judges are required to adjudicate cases independently and impartially. Comments and discussions on court decisions are always permissible within the boundary of the law if done rationally and objectively. Yet some remarks that have surfaced are nothing like that. Any unfair or unfounded remarks with the ulterior motive of exerting pressure or undue influence on our judges in dispensing justice will be to no avail.

Doxxing

Doxxing activities towards judges and other persons involved in the administration of justice were on the rise and must be curtailed. As "guardian of the public interest" (Note 5), I sought and obtained an injunction order to restrain the conduct of such activities towards Judges, Judicial Officers and their family members. In granting this injunction, the Court noted:

"It remains fundamental to the rule of law that litigants and the general public are able to place reliance on and have confidence in a Court system that is free from bias, and that the Judge or Judicial Officer in any case is the person who decides that case according to its evidence and the applicable law." (Note 6)

It is a serious matter to act in breach of an injunction order. Any person who acts in violation of an injunction order may be held in contempt of court and is liable to a fine or imprisonment, including an immediate custodial sentence as ordered by the Court in a recent decision (Note 7).

As I have stated in 2018, "(a)ll of us jointly bear the responsibility to respect, promote and further the rule of law as a fundamental basis of our society" (Note 8). It lies in every individual and institution to be forthcoming in defending our judiciary and the rule of law against these baseless and malicious attacks and, for some, to refrain from blindly uttering such statements.

National Security Law

Another baseless challenge to our rule of law relates to the promulgation of the National Security Law in Hong Kong. National security is within the purview of the Central Authorities. The National People's Congress (NPC) is the highest organ of state power in the People's Republic of China and its Standing Committee was entrusted to formulate the National Security Law. Pursuant to Article 18 of the Basic Law, it was added to Annex III, promulgated and became applicable to the HKSAR.

Article 23 of the Basic Law does not change the fundamental principles set out above. It imposes a constitutional responsibility on the HKSAR to enact legislation in respect of certain offences relating to national security. Yet the Central Authorities always have the power and duty to legislate on matters of national security, especially when this responsibility of the HKSAR has not been fulfilled. It is entirely misconceived to say that the principle of "one country, two systems" has been undermined.

Many unfair and ill-informed criticisms have been made against the designation of judges by the Chief Executive, with remarks that it will undermine Hong Kong's judicial system. It should be reiterated that the Chief Executive only designates a list of judges in different levels of courts to hear cases involving issues of national security, rather than assigning which judge to preside over a specific case.

Understanding the Basic Law

The National Security Law brings into sharp focus the constitutional order of Hong Kong. China is a unitary state, and the powers of the branches of the HKSAR emanate from the Central Authorities. The Constitution and the Basic Law form the constitutional basis of the HKSAR. A proper understanding of this concept is of utmost importance to comprehend our legal system.

The Basic Law 30th Anniversary Legal Summit with the theme "Back to Basics" reminds us of the fundamentals necessary for the proper understanding of the Basic Law. A key takeaway from the Summit is entirely the same as a finding in the Court of Appeal decision dealing with the Emergency Regulations Ordinance (ERO): that the HKSAR Government is "very much an executive-led government" (Note 9).

The Emergency Regulations Ordinance

The judgment delivered by the Court of Final Appeal regarding the ERO (Note 10) is particularly significant. It upheld the compatibility of the ERO with the Basic Law, and recognised that in circumstances of public danger, it is "'essential' to give the executive 'wide and flexible

legislative powers' whether or not the legislature is sitting" (Note 11). The court continued:

"It should be remembered that the purpose of the ERO is to provide the (Chief Executive in Council) with wide and flexible legislative powers in times of emergency or public danger in order to deal quickly and adequately with the situation in question." (Note 12)

In upholding the constitutionality of the ERO and the proportionality of the Prohibition on Face Covering Regulation which restricted the use of facial coverings during public order events we saw in 2019 with deteriorating law and order (Note 13), the Court took the view that when striking a fair balance between the societal and individual interests, the interests of Hong Kong as a whole is important. I echo this view - rights and freedoms are not absolute but are subject to lawful restrictions including the interests of public safety, public order and the protection of the rights and freedoms of others (Note 14). One final statement in the judgment is noteworthy:

"... And finally, the interests of Hong Kong as a whole should be taken into account since the rule of law itself was being undermined by the actions of masked lawbreakers who, with their identities concealed, were seemingly free to act with impunity." (Note 15)

Criminal Appeals

This year marks a significant increase in the amount of applications for the review of sentence lodged under section 81A of the Criminal Procedure Ordinance (Note 16), with 17 applications lodged in 2020 compared to four in 2019. Of the 12 such applications decided in 2020, 11 were allowed. In four of the cases, the Court of Appeal repeated the sentencing principle as set out in *Wong Chi Fung* (Note 17) of the necessity to emphasise deterrence and punishment in large-scale unlawful assembly cases involving violence be applied.

Vision 2030

Under the "Vision 2030 for Rule of Law" initiative, and benefiting

from the guidance of the Task Force formed under it, we noted that objective data shall be referred to in ascertaining the practice of the rule of law and important elements including cultural, socio-economic and local traditions (both legal and indigenous) are features that must be taken into account.

Locally, we have started projects that will promote the proper understanding and recognition of the rule of law, the Constitution and the Basic Law at various levels of society, through a multi-faceted approach such as animated short videos, drama, interactive workshops, and exposure to international conferences. These "3Es" projects - representing "Engagement, Empowerment, and Enrichment", aim to raise awareness of a law-abiding society, equip youth with the correct understanding of the rule of law, and provide the legal community with opportunities to broaden their knowledge and international exposure.

Other DoJ Initiatives

The coronavirus has changed the way we deliver conferences. The use of technology and live feed has enabled us to reach out to more people in more jurisdictions and to provide recordings on the legalhub.gov.hk website. In a way, it is a blessing in disguise. Yet, some of our events which are best conducted by way of physical meetings to facilitate personal interactions have to be postponed. They include the Asian-African Legal Consultative Organization annual meeting, the United Nations Commission on International Trade Law (UNCITRAL) Working Group III Intersessional Meeting and the Advanced Course that my department is co-organising with The Hague Academy of International Law and the Asian Academy of International Law.

We have also reached a Supplemental Arrangement (Note 18) with the Supreme People's Court to bring the 1999 Arrangement Concerning Mutual Enforcement of Arbitral Awards (Note 19) more in line with the spirit and intent of the New York Convention (Note 20) and international arbitration practice (Note 21). Legislative measures will be needed to implement the same.

As to new initiatives, the Department of Justice will continue to

pursue and promote the development of LawTech. As set out in the Policy Address, we will be facilitating the development of the Hong Kong legal cloud to provide safe, secure and affordable data storage services for local legal and dispute resolution communities. Furthermore, with the use of online dispute resolution (ODR) being more prevalent, and apart from already signing up to the Asia-Pacific Economic Cooperation ODR Framework, we have also established a DOJ Project Office for Collaboration with UNCITRAL to study pertinent legal issues stemming from the increasing use of emerging technology. With input from UNCITRAL, we are planning to set up an Inclusive Global Legal Innovation Platform to facilitate studies in this particular aspect.

Last year, an online international conference to celebrate the 40th anniversary of the United Nations Convention on Contracts for the International Sale of Goods (CISG) was conducted. A public consultation on Hong Kong's proposed application of the CISG was completed and we are analysing and compiling the results.

WTO Case with US

In protecting our legitimate rights, Hong Kong has formally taken steps under the World Trade Organization framework to resolve its dispute with the United States with respect to its origin markings requirement imposed on Hong Kong products. We believe that the US requirement is contrary to a number of WTO-covered agreements, undermines the rule-based multilateral trading system, and does not respect Hong Kong's status as a separate customs territory.

Conclusion

Ladies and gentlemen, today is a very special day: the Ceremonial Opening of the Legal Year 2021, the former Chief Justice Mr Geoffrey Ma's 65th birthday, and Chief Justice Cheung's first day in assuming the role of Chief Justice. To the new Chief Justice I offer my heartfelt congratulations, and I am confident that he will continue to safeguard the independence of the Judiciary and the rule of law in Hong Kong. With this, I wish you all a very happy and healthy new year.

Note 1: Article 89 of the Basic Law guarantees the security of tenure for judges, and states that they can only be removed for inability to discharge his or her duties or for misbehaviour.

Note 2: Article 85 of the Basic Law provides that members of the judiciary shall be immune from legal action in the performance of their judicial functions.

Note 3: Upon appointment, judges at the District Court level and above are precluded from returning to practice in Hong Kong as a barrister or solicitor. This "non-revolving door" system prevents perceived conflicts of interest and enhances the independence of the judiciary.

Note 4: 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 functions."

Note 5: *Secretary for Justice v Persons unlawfully and wilfully conducting themselves in any of the acts prohibited under paragraph 1(a), (b) or (c) of the indorsement of claim* [2020] HKCFI 2785 (HCA 1847/2020, 13 November 2020) at paragraphs 8 and 35.

Note 6: *Secretary for Justice v Persons unlawfully and wilfully conducting themselves in any of the acts prohibited under paragraph 1(a), (b) or (c) of the indorsement of claim* [2020] HKCFI 2785 (HCA 1847/2020, 13 November 2020) at paragraph 37.

Note 7: *Secretary for Justice v Chan Kin Chung* [2020] HKCFI 3147, (HCMP 744/2020, 28 December 2020) at paragraph 59.

Note 8: Speech by the Secretary for Justice at the Ceremonial Opening of the Legal Year 2018 at www.doj.gov.hk/en/community_engagement/speeches/20180108_sj1.html.

Note 9: See the Court of Appeal judgment in *Kwok Wing Hang & Others v Chief Executive in Council & Anor* [2020] 2 HKLRD 771, [2020] HKCA 192 and *Leung Kwok Hung v Secretary for Justice & Anor* [2020] 2 HKLRD 771, [2020] HKCA 192 at paragraph 92.

Note 10: *Kwok Wing Hang & Others v Chief Executive in Council & Anor* [2020] HKCFA 42 and *Leung Kwok Hung v Secretary for Justice & Anor* [2020] HKCFA 42.

Note 11: *Kwok Wing Hang, Leung Kwok Hung* [CFA] at paragraph 44.

Note 12: *Kwok Wing Hang, Leung Kwok Hung* [CFA] at paragraph 61.

Note 13: Kwok Wing Hang, Leung Kwok Hung [CFA] at paragraphs 87 to 97.

Note 14: Kwok Wing Hang, Leung Kwok Hung [CFA] at paragraph 100.

Note 15: Kwok Wing Hang, Leung Kwok Hung [CFA] at paragraph 146.

Note 16: Criminal Procedure Ordinance, Cap. 221.

Note 17: Secretary for Justice v Wong Chi Fung [2018] 2 HKLRD 699, which was endorsed by the Court of Final Appeal in Secretary for Justice v Wong Chi Fung (2018) 21 HKCFAR 35.

Note 18: Supplemental Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and the Hong Kong Special Administrative Region, signed on November 27, 2020.

Note 19: Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and the Hong Kong Special Administrative Region, signed on June 21, 1999.

Note 20: Convention on the Recognition and Enforcement of Foreign Arbitral Awards, signed on June 10, 1958.

Note 21: The Supplemental Arrangement amends the 1999 Arbitration Arrangement in four aspects, namely: (i) expressly including the term "recognition" when referring to enforcement of arbitral awards; (ii) providing that a party may apply for preservation measures before or after the court's acceptance of an application to enforce an arbitral award for greater certainty; (iii) aligning the scope of arbitral awards with the prevalent approach of "seat of arbitration"; and (iv) removing the current restriction and allow parties to make simultaneous applications to both the courts of the Mainland and the HKSAR for enforcement of an arbitral award.

Ends/Monday, January 11, 2021

Issued at HKT 17:43

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**Speech Given at the Opening of the Legal Year, 11 January 2021
by the Chairman of the Hong Kong Bar Association
Philip J. Dykes, S.C.**

Chief Justice, Judges and Magistrates, Secretary for Justice, President of the Law Society, Distinguished Guests, Ladies and Gentlemen

1. I wish to address you on the subject of independence. Of course, I mean judicial independence under the Basic Law and sometimes overlooked lawyers' independence, which is necessary for judicial independence.
2. Both types of independence are necessary if the HKSAR is to hold itself out as a place where, in these difficult days, people can put their hands on their hearts and say that the Rule of Law is maintained.
3. What is the function of an independent judiciary? You find the answer in the Basic Law. It is the branch of government that wields the HKSAR's judicial power under Article 85.
4. When the Judiciary uses judicial power, it must do so 'independently, free from any interference'. These words mean that the Executive and Legislative branches cannot usurp the power, or share in its exercise, or suggest how the courts use the power in a particular case or class of cases.
5. Of course, the essence of judicial power is the duty to render dispositive judgments in all cases concerning legal rights and obligations, whether those concern private parties or public bodies, including the Government.
6. Subject only to the extraordinary power of interpretation vested in the SCNPC, when the Court of Final Appeal exercises judicial power, its judgements are final. Court rulings must be obeyed by all persons and bodies subject to the jurisdiction of the courts.

7. Judicial power is vested in the judges recruited, by and large, from an independent legal profession that is not beholden to the executive branch of Government in any way. Without independent-minded lawyers, you will not have independent-minded judges.
8. Independence at the Bar means being bold in defence and, where necessary, bold in aggression. It means barristers will take on unpopular causes and stick doggedly with them and not being swayed by negative opinions about them or their clients. The Bar's Code of Conduct does not merely encourage these attributes; it requires them as a matter of professional conduct.
9. The qualities that the Bar Association demands from its members are also required of it as an institution. The Bar Association is committed to the defence of the Bar's honour and upholding the Judiciary's independence. These are aims and objectives written into the Bar Association's foundation documents.
10. This requirement is the reason why the Bar speaks out when the media vilifies judges for their decisions.
11. I am not referring to harsh criticism of judges and their judgements, because sometimes that is wholly justified and can have beneficial effects if some serious shortcoming is exposed. I am talking about attacks that impute partiality or bad faith on the judges' part for no reason other than that they happened to decide a case one way rather than another. Or because the result does not fit a political or moral agenda.
12. Attacks like this are pure poison. They undermine people's confidence in the Judiciary because they set at nought the judicial oath. This oath requires judges and magistrates to *'serve the Hong Kong Special Administrative Region 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.'*

13. They can sometimes constitute a contempt of court if made when a case is before the court, and the attack is made in the hope or expectation that it will affect a judge's decision.
14. Attacks on judges are, moreover, cowardly because the authors know that judges cannot answer back.
15. Although the Bar Association may protest, what it cannot do is bring to book the authors and publishers of unprincipled attacks on judicial independence. Assuring accountability in these circumstances is primarily the job of the Secretary for Justice.
16. The Secretary for Justice has an unenviable task here. She accepts, of course, that people have a right to criticise judges even if the criticisms are half-baked and couched in offensive language.
17. She knows too that judges are not shrinking violets and that the law of contempt does not exist to massage bruised judicial egos. However, there are limits to judicial forbearance.
18. The US Supreme Court Justice, Hugo Black, put it well in a 1941 case:

“The assumption that respect for the Judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion. ... an enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect.”
19. Although individual judicial sensibilities are neither here nor there, there is another legal principle in play: the integrity of the Judiciary as an institution.
20. The Judiciary is, notoriously, weaker than the other branches of Government whose functions, duties and powers are described in Chapter IV Basic Law.

21. The Judiciary commands no army or police force nor can it appeal to a sympathetic political electorate for support. It must demonstrate its worth in the constitutional order by commanding the people's respect through its commitment to the Rule of Law, which means, essentially, administering justice '*without fear or favour, self-interest or deceit.*'
22. When there is a creeping barrage of baseless criticism that supposes that judges are politically biased, incompetent or dishonest, the damage is done not so much to the judges, who have broad backs, but to the Judiciary as an institution.
23. If nothing is done about attacks, they will undermine confidence and respect for the courts and the administration of justice will slowly evaporate.
24. I can do no better than to recount the High Court of Australia's explanation in a 1983 case called *Gallagher v Durack* of why it is sometimes necessary to come down hard on speech critical of the courts or judges.

"The law endeavours to reconcile two principles, each of which is of cardinal importance, but which, in some circumstances, appear to come in conflict. One principle is that speech should be free, so that everyone has the right to comment in good faith on matters of public importance, including the administration of justice, even if the comment is outspoken, mistaken or wrong-headed. The other principle is that "it is necessary for the purpose of maintaining public confidence in the administration of law that there shall be some certain and immediate method of repressing imputations upon Courts of justice which, if continued, are likely to impair their authority" (per Dixon J. in *R. v. Dunbabin; Ex parte Williams* (1935) 53 CLR, at p 447). The authority of the law rests on public confidence, and it is important to the stability of society that the confidence of the public should not be shaken by baseless attacks on the integrity or impartiality of courts or judges."

25. I was Chairman of the Bar from 2005 to 2007, in what seems a different age.
26. In my two years' service, I did not have to issue any statements censoring what appeared to be, in the words of the Australian High Court, 'baseless attacks on the integrity or impartiality of courts or judges.'

27. I end my current three-year stint as Chairman in a couple of weeks. Looking back, I find to my surprise that the Bar Council has issued about a dozen statements on the topic in that time.

28. I hope that common sense prevails and that people see that conscienceless attacks on the Judiciary do no one any good. They eat away at society's respect for the Law, which is necessary for judicial independence.

29. And without judicial independence, a pearl of great price, we might as well pack up our bags and steal away for Hong Kong is nothing without it.

30. I conclude by wishing that you enjoy better times in the coming year of the Ox.

Philip J. Dykes, S.C.
Chairman
Hong Kong Bar Association

**SPEECH OF MS MELISSA K PANG
PRESIDENT OF THE LAW SOCIETY OF HONG KONG
AT THE OPENING OF THE LEGAL YEAR 2021
11 JANUARY 2021**

Good afternoon. Chief Justice, Secretary for Justice, Chairman of the Hong Kong Bar Association, Members of the Judiciary, Members of the Legal Professions, Distinguished Guests, Ladies and Gentlemen,

1. It is my immense honour to be speaking on behalf of the Law Society of Hong Kong on this solemn occasion.

Rule of Law

2. In the Opening of Legal Years that I have attended either as an audience or as the President of the Law Society, the phrase “Rule of Law” comes up for discussion without exception. I had wondered whether we, citizens of Hong Kong, were too slow to grasp this concept, or important things have to be repeated many times. I used to believe that it was the latter. However, given what happened to Hong Kong from 2019 to 2020, I now believe it may be both.

3. We have rather eminent legal practitioners and scholars who openly advocate that obedience of the law is not necessary for, and is sometimes contrary to, the Rule of Law. Our Court of Final Appeal recently notes that “*Hong Kong, a city long regarded as safe, experienced an exceptional and sustained outbreak of violent public lawlessness.*” In a well-reasoned judgment in the “Anti Mask” Case, our Court of Final Appeal reminds us in a timely manner that:

- (1) The freedoms of speech and peaceful assembly are “precious and lie at the foundation of a democratic society. But it is important to stress that their cardinal importance hinges on their *peaceful* exercise.”
- (2) None of the freedoms of assembly, procession, demonstration, speech and expression and the right to privacy are absolute but may be subject to lawful restrictions.

4. In considering whether a fair balance has been struck, the Court of Final Appeal rightly informed us that “*the interest of Hong Kong as a whole should be taken into account since the rule of law itself was being undermined by the actions of masked lawbreakers who, with their identities concealed, were seemingly free to act with impunity.*”

The Judiciary

5. It is said that “*The Court has on many occasions emphasized the special role in society of the judiciary, which, as the guarantor of justice, a fundamental value in a law-governed State, must enjoy public confidence if it is to be successful in carrying out its duties.*” (ECHR 27 May 2014, 20261/12 (*Baka v Hungary* §164))

6. Our Judiciary weathered an unprecedented amount of criticisms last year. This is by no means a phenomenon unique to Hong Kong. We live in an era where the public’s trust and confidence in the Establishment, including the Judiciary, is unfortunately fading. Unfair and misinformed criticisms against the Judiciary, if not responded to or clarified immediately, will undermine trust in the long term and open the way for measures that may affect judicial independence.

7. To maintain trust in the Judiciary and to prevent unreasonable attacks on judges, the Law Society has taken it as its duty to clarify misunderstandings and unfair criticisms at the first available opportunity. It is important that the Law Society remains a professional body and not some pseudo political party. It is only by maintaining its apolitical stance that the Law Society’s views, and hence our members’ interests, can be taken onboard by all our stakeholders.

8. Needless to say, our legal profession and the Judiciary need to improve continuously. The technological challenge brought about by COVID-19 is a prime example. Factors relating to the operations of the Judiciary, which might influence the level of confidence, include, for example, the outcome of a case, the reasoning of the judgment, the proceedings as well as how the parties to the proceedings are treated by members of the Judiciary.

9. We also need to learn how to engage with the public. There is no point in telling the public that they should not express their views on judges and judgments simply based on the outcome. It is only natural and human. Rather, the duty rests on us as professionals to explain clearly to the public the correct legal principles and procedures. Disengagement is not an answer. The Law Society and our members can and will certainly engage with the public meaningfully.

10. In the international arena, the Law Society also sees it to be its duty to explain Hong Kong’s situation fairly and impartially. To begin with, we do not tell our international friends that a simple exchange with them will risk breaches of the National Security Law. Such attitude is, to say the least, unhelpful. Constructive dialogue is the key.

Solidarity

11. I would like to take this precious opportunity to convey my deepest appreciation to the local and international legal fraternity for the assistance, support and encouragement unreservedly shared among one another during these times of adversity. In November 2019, notwithstanding the disruptions arising from the social unrest, 600 participants from 30 jurisdictions around the world supported the Law Society and travelled long distances to Hong Kong to attend in person the LAWASIA Conference jointly organized by the Law Society with LAWASIA.

12. Another more recent example relates to the media report on judicial intimidation in early December 2020. In support of the Law Society's statement on 7 December condemning the criminal act that threatened judicial independence, the Commonwealth Lawyers Association acted swiftly and issued a strong statement on 9 December reiterating the importance of judicial independence and urged an investigation into the matter by the Hong Kong authorities.

13. We look forward to collaborating closely with the international community and contributing actively in the global united effort in promoting the rule of law and access to justice.

Our New Chief Justice

14. This year's Opening of Legal Year is also special in the sense that we are here to welcome the appointment of Mr. Justice Andrew Cheung as our new Chief Justice. The Law Society warmly supports this new appointment and I am confident that Mr. Justice Cheung is the right leader to lead the Judiciary and our legal community to brave the challenges ahead.

15. As we enter 2021, I take the opportunity to wish everyone a healthy and fulfilling year ahead. Thank you.