

## CJ's Speech at Conference on Effective Judicial Review: A Cornerstone of Good Governance

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The following is the full text of the opening address delivered by the Hon Chief Justice Mr Andrew Kwok-nang Li at the Conference on Effective Judicial Review: A Cornerstone of Good Governance today (December 10):

It gives me great pleasure to be here this morning to open this important Conference on Judicial Review. And I am delighted to see so many of you here.

This Conference will discuss many challenging questions arising in judicial review. In doing so, it will draw on the rich experience of many jurisdictions. The speakers, both Hong Kong and overseas, are from the Bench, the practicing profession and the academic community. They make up a galaxy of talent which has not previously been assembled in one forum in Hong Kong.

I must congratulate the Centre for Public Law of Cambridge University and the Faculty of Law of the Chinese University under the distinguished leadership of Professor Forsyth and Professor McConville respectively, for organising such an impressive Conference. I would like to thank all speakers for their participation. To our overseas participants, I would like to warmly welcome them to Hong Kong and to wish them an enjoyable stay in our metropolis.

### Increase in judicial review

It is of course a cardinal feature of a society governed by the rule of law that the citizen is protected through judicial review against any abuse of public power. In recent decades, as is the case in many other jurisdictions, Hong Kong has experienced a tremendous increase in judicial review litigation. These involve challenges to the validity of administrative decisions as well as challenges to the constitutional validity of legislation. Questions relating to the proper interpretation of the Basic Law, the construction of statutes and common law principles arise in these cases.

As far as the Basic Law is concerned, many articles have been considered since 1997. They include those concerning individual rights, such as the freedom of speech and the freedom of assembly as well as those relating to property and economic interests. Many cases concern the validity of restrictions on individual rights. In these

cases, the essential question for the courts is where the proper balance between individual rights and community interests should be struck.

In Hong Kong, as elsewhere, the phenomenon of the striking growth in judicial review cases has resulted mainly from three factors. First, modern life has become increasingly complex. Inevitably, many areas of activities have to be subjected to state regulation in the public interest. This has led to a very substantial growth in the volume of legislation, with an increasing range of discretions vested in public officials.

Secondly, new constitutional instruments have been enacted. Executive and legislative acts may be challenged on the ground of inconsistency with the constitutional provisions, including the guarantees of fundamental rights and individual freedoms. In the Hong Kong context, the Basic Law and the Bill of Rights have enabled such challenges to be made.

Thirdly, with better education, citizens have higher expectations of public institutions and are more conscious of their rights and freedoms. With improved access to legal representation, including that through legal aid, they are more prepared to invoke the law in seeking to protect their rights and freedoms.

### Comparative jurisprudence

In dealing with judicial review cases, the courts in Hong Kong have derived great benefit from examining comparative jurisprudence, including the decisions of supranational courts such as the European Court of Human Rights. Since the resumption of the exercise of sovereignty in July 1997, Hong Kong has entered a new constitutional order under the principle of "one country, two systems" and is the only common law jurisdiction in the People's Republic of China. In searching for the appropriate solution for Hong Kong, it is of great importance that our courts should consider the approaches which have been adopted by courts in other jurisdictions in similar areas.

Indeed, the significance of comparative jurisprudence to Hong Kong is underlined by the Basic Law itself which contains an express provision that our courts "may refer to precedents of other common law jurisdictions" (Article 84). As a judge in a jurisdiction where the citation of overseas jurisprudence is so much a part of one's everyday work, I must confess to being somewhat bemused by the debate in the United States Supreme Court on whether it is permissible to refer to comparative jurisprudence at all.

This Conference recognises and emphasises the importance of considering

comparative materials. The Conference includes sessions focused on developments in a number of overseas common law jurisdictions. We will also learn about interesting developments in administrative law in Mainland China. I am sure that the legal community in Hong Kong will learn a great deal from our exchanges during this Conference.

#### Cornerstone of good governance

It is true to say that the growth of judicial review has changed the legal landscape in Hong Kong as elsewhere. All concerned with the conduct of the business of government must adapt to this new constitutional environment. The phenomenon of the growth of judicial review should be viewed in a constructive and positive way by all concerned.

It is fundamental to good governance that public powers should be exercised within legal limits and with fairness. This is essential for commanding the confidence and respect of the community in the process of government. In short, as is so aptly captured by the title to the Conference, judicial review is a cornerstone of good governance. It enhances the quality of governance by ensuring its legality and fairness.

#### Proper role of courts

Court decisions in judicial review cases can have important repercussions for various political, economic and social problems which arise in our society. But it is important for the public to understand the proper role of the courts on judicial review. The role of the court is only to determine the limits of legality in accordance with the relevant constitutional and statutory provisions and the applicable common law principles. The court is only concerned with what is legally valid and what is not, in accordance with legal norms and principles. The court does not assume the role of the maker of the challenged decision and does not deal with the merits of the decision as such as if the court were the decision maker.

Having regard to their proper role on judicial review, the courts cannot provide a solution to any of the various political, economic and social problems which have to be dealt with by society in modern times. Within the limits of legality as determined by the courts, the appropriate solution to any political, economic or social problem can only be found through the political process.

The problems are usually complex involving many conflicting interests and may involve the use and allocation of limited resources. It is only through the give and take of the political process after consultation and dialogue that a viable solution may be found. Solutions found through the political process can reconcile various interests and

take into account short term needs and long term goals. It is to the political process that the citizen must look for an appropriate resolution of these problems. The responsibility for the proper and effective functioning of the political process in the interests of the community of course rests with the Executive and the Legislature.

With these remarks, I wish the Conference every success. Thank you.

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