Speech by the Chief Justice at the Ceremonial Opening of Legal Year 2002

The following is the full text of the speech by the Hon Chief Justice, Mr Andrew Kwok-nang Li at the Ceremonial Opening of the Legal Year 2002 at the Hong Kong Convention and Exhibition Centre today (January 14):

Secretary for Justice, Mr Chairman, Mr President, Distinguished Guests, Ladies and Gentlemen,

On behalf of all my colleagues in the Judiciary, I would like to welcome all of you warmly to this Opening of the Legal Year. Your support by your presence is greatly appreciated.

This important occasion hosted by the Judiciary focuses public attention on our legal system. Our legal system with the rule of law and an independent Judiciary is an invaluable community asset. It is universally accepted to be a cornerstone of our society and one of Hong Kong's main competitive advantages. This occasion provides an opportunity for us to speak about the exciting challenges which we face. And it enables the Judiciary, together with the Bar, the Law Society and government lawyers, to re-affirm our common purpose in serving the community by maintaining the rule of law.

Court of Final Appeal

The Court of Final Appeal has now been functioning for four and a half years. With the benefit of experience, we shall be reviewing our practice and procedure and considering whether improvements can be made. At the same time, we shall be reviewing the criteria for appeals. The present criteria broadly replicated the previous criteria for appeals to the Privy Council. They should now be revisited. In particular, the criteria for appeal as of right in civil cases from final judgments involving more than $1 million.

With the benefit of experience, it has become clear that the present building at Battery Path is inadequate for the Court's functioning. In particular, the Court room for all its charm is manifestly inadequate in various aspects : For the judges, for counsel and solicitors, for the parties, for the media and for the public. As serious consideration is being given to relocating the Legislative Council to a new site, I have written to the Administration stating my firm request that the Judiciary should be given the existing LegCo Building for the Court of Final Appeal after the relocation. I trust that this request will receive sympathetic consideration in due course.

The Court has dealt with and will continue to face challenging questions of law and principle in many interesting areas. As far as constitutional litigation is concerned, the Court's judgments will no doubt continue to arouse controversial debate. In a free society, such debate is to be expected. Indeed, reasoned debate should be welcomed as it plays a

constructive role in the development of jurisprudence in the new order. That development can only take place gradually with the passage of time.

Working Party on Civil Justice Reform

The Working Party on Civil Justice Reform which was established in early 2000 issued its Interim Report and Consultative Paper in last November. The Working Party is to be commended for the breadth and depth of its work. It has put forward for consultation 80 proposals to address the problems of cost, delay and complexity. These are problems which our system shares with other jurisdictions, and the Working Party has examined their experience. The consultation period of 5 months will end at the end of April. The Working Party will then consider the submissions made and will make recommendations for reform in its final report. It is estimated that it will be ready early next year.

It is unnecessary for me to go into details of the Working Party's proposals on this occasion. The Working Party has already presented them to various audiences and will continue to do so. There are however a number of points which it is important to make at this stage of the discussion.

First, it is important to appreciate that there is no magic wand which can be summoned and waved to provide a complete solution to the problems. By their nature, the problems have many aspects and need to be tackled from a number of perspectives. What is needed is a combination of inter-related measures. Working together in the same direction, they should provide better access to justice at reasonable cost and speed.

Secondly, the proposals put forward do not attempt to control or limit fees. Fees are and will continue to be determined by market forces. What the proposals seek to do is to ensure that the litigation dollar spent is well spent so that the litigant will get better value for his money. Further, the proposals promote transparency in costs; transparency in the fees a party is paying to his own lawyers as well as transparency in the costs being incurred by the opposite party which, in the event of success, may be recoverable from the losing party. Such transparency will provide better information for market forces to work and will enable litigants to make better informed decisions at various stages of litigation.

Thirdly, the cost of full blown litigation involving full trial and exhausting all appeals, cannot be cheap under any adversarial system. So the proposals seek to avoid a full blown battle where possible by encouraging earlier settlement. Where parties wish to settle, earlier settlement can save substantial costs. And the proposals put forward for consideration include the use of mediation for the purpose of attempting earlier settlements. In this regard, the experience of the pilot scheme on family mediation is instructive. Mediation under this scheme is voluntary. It is undertaken with the parties' consent. So far, the success rate has been 80%. Of the cases which have so far been mediated, full agreement was reached in 72% and partial agreement reached in another 8%. The Judiciary has commissioned the Hong Kong Polytechnic University to evaluate this 3 year pilot scheme which commenced in May 2000.

Fourthly, under the proposals, judges will be involved in more active management of cases. This is put forward for consideration in order to enable the courts to deal with cases justly. Active case management is considered necessary in order to prevent abuses and excesses of the adversarial system. The proposals suggest that when properly exercised, it is not inconsistent with fairness; on the contrary, it enables the courts to deal with cases justly. In particular, it enables the courts to prevent oppressive use of the adversarial system by a party who may be stronger and with a deeper purse at the expense of a weaker one. With appropriate and continuous training, and with more members of the profession, particularly the Bar with civil experience taking up full time and temporary appointments, I believe that if these proposals are eventually recommended, the Judiciary will be well placed to take on the challenges involved.

The Working Party looks forward to receiving considered and constructive responses from the legal profession and all concerned. I doubt if anyone would seriously suggest that we should maintain the status quo with no change at all. I must emphasise that reform is essential if our civil justice system is to remain credible and command confidence domestically and internationally. I trust that in the reform process, all concerned will regard the community's interest as paramount. In this exercise, it must be demonstrated to the public that the civil justice system is there to serve them so that they have access to justice at reasonable cost and speed.

Unrepresented litigants

As with other jurisdictions, there is an increasing number of parties in civil proceedings who appear in person without any legal representation. It would appear that a number of factors have led to this phenomenon. Although according to the Government, 58% of households are eligible for legal aid, there are still many people who are not eligible and find that legal representation is not affordable. The "sandwich class" would be in this position. Other factors may include a greater awareness by citizens of their rights and the greater use of Chinese in legal proceedings. Research in this area would be beneficial.

The fact that a litigant is not legally represented tends to add considerably to the courts' burden. Of course, the citizen has a constitutional right of access to the courts for the resolution of disputes. The increasing number of unrepresented litigants poses challenges for the courts. In responding to these challenges, it is essential to have regard to the fundamental principle that the courts must be and must be seen to be impartial in adjudicating disputes. The courts must of course be fair to the unrepresented litigant. But equally important, the courts must be fair to the other parties in the case, including those that are legally represented. The courts have to be conscious of this, particularly in cases where one party is represented but the other party is not.

Because the courts' impartiality must not be compromised, assistance which the courts could properly give to unrepresented litigants would be limited. For example, the courts could explain the procedure and give guidance on matters such as the filling in of forms and the submission of court bundles. But, as a matter of fundamental principle, the courts

cannot cross the line and act as lawyer for the unrepresented litigant, giving legal advice or acting as advocate.

The challenges posed by unrepresented litigants will be a continuing one. The Judiciary's response to these challenges will in the next few years be focused in two areas.

The first is in the area of procedural reform. Unrepresented litigants will be able to benefit from civil justice reform in the High Court. Proposals of the Working Party of particular relevance to them include the simplification of procedure and the possibility of mediation. Suggestions that also merit consideration include the establishment of a special list for cases, in which at least one party is unrepresented, so that the case can be managed as appropriate, and the introduction in the High Court of the rule in the District Court Rules which give the court a discretion to adopt a simplified procedure.

The second area we will focus on is in the provision of assistance to unrepresented litigants to the extent that it is proper. At present, such assistance is somewhat diffuse. It is given at various counters in the registry and at hearings before the master and the judge. The efforts involved are labour intensive. We need to streamline the assistance given and ensure that it is as helpful as possible.

In order to achieve this, I have decided to establish a resource centre for unrepresented litigants in civil proceedings in the High Court and District Court. The purpose is to provide facilities to enable them to deal with the rules and procedure and in the conduct of cases. I shall be appointing a Steering Committee to advise on its establishment and operation. It will be chaired by Madam Justice Carlye Chu Fun Ling. An internal working group under her has already done a lot of work on unrepresented litigants, including putting together better explanatory materials on the courts' rules and procedure. Apart from judges, the Committee will have members of the legal profession and members of appropriate Non-Governmental Organizations (NGOs) and other interested bodies. It will consider the appropriate facilities and the possible use of technology. It is important that information and materials should be presented as simply as possible and be easily understood. It is also important that Judiciary staff at the resource centre are trained and have experience in dealing with unrepresented litigants.

As I have stated, the courts cannot act as lawyer for unrepresented litigants. Here, the legal profession has an important role to play in providing pro bono services to them. This is the position in a number of overseas jurisdictions. In Hong Kong, the legal profession is already making a significant contribution in offering pro bono services through the Free Legal Advice Scheme of the Duty Lawyer Service, the Bar Association's Free Legal Services Scheme, and various NGOs. And the Honourable Ms Margaret Ng and the Honourable Ms Audrey Eu are making a most valuable contribution to efforts to make legal advice and pro bono services more accessible.

To enable unrepresented litigants to have convenient access to pro bono services, the Steering Committee will explore with the legal profession and interested NGOs and other

bodies opportunities for them to provide assistance to unrepresented litigants at or through the resource centre.

I should point out that the courts are faced not only with unrepresented litigants with genuine and respectable claims but also those whose claims are frivolous and without foundation and constitute an abuse of the courts' process. The courts would have to consider adopting a more summary procedure to deal with the latter. It must be borne in mind that unnecessary time taken up with claims which are frivolous and without foundation will work unfairly to the detriment of other litigants.

Legal Education

The Consultants' Report on Legal Education and Training was published in August 2001. It has had the beneficial effect of focusing discussion and stimulating change.

There is serious and widespread concern about the quality of entrants to the profession. This problem must be urgently addressed. In my view, the most effective way forward is to concentrate immediately on the Postgraduate Certificate in Laws course (PCLL). I understand that the universities are in the course of establishing Academic Boards with 40% representation from the profession which will be responsible for the PCLL course; its entry and exit standards as well as its curriculum. This should be welcomed.

The Boards should commence work as a matter of urgency. It should immediately address the entry standards for the intake into the PCLL course commencing in September 2002 and curriculum reform. In my view, the entry standards should be substantially raised. And the curriculum should be extensively revised to teach the up to date knowledge and skills required in the provision of legal services in Hong Kong, bearing in mind the different requirements of the two branches of the profession.

I have to point out that there is understandable scepticism in some quarters of the commitment and the ability of the universities to raise standards and to reform the PCLL course. Change will require strong leadership in the universities. It is now up to them to demonstrate that such scepticism is not justified.

Conclusion

Ladies and gentlemen, it remains for me to wish you on behalf of all my colleagues in the Judiciary good health and good fortune in the New Year.

End/Monday, January 14, 2002

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