The Chief Justice's Address at the Opening of the Legal Year

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 extend to you our warmest welcome to this Opening of the Legal Year. This new venue, which we are trying out, enables very wide participation in this function, including by young people from schools and universities.

We are most grateful to you all for attending. Your presence is a demonstration of your support for the rule of law and the administration of justice. Such continued support is highly valued and of the greatest importance.

Retirements and succession

This is the fourth Opening of the Legal Year since the resumption of the exercise of sovereignty in 1997. Compared to a few years ago, you see on the platform today a number of new faces, particularly in the senior ranks of the Judiciary. Apart from new judges in the District Court and new magistrates, there are two new Permanent Judges of the Court of Final Appeal, a new Chief Judge of the High Court, new Vice Presidents of the Court of Appeal and Justices of Appeal and new judges of the Court of First Instance. It is important to appreciate that they succeed judges most of whom were already well beyond the retirement age of 65. At the Court of Final Appeal level, one permanent judge retired at the retirement age whilst the other was already on an extended term. At the level of the High Court (comprising the Court of Appeal and the Court of First Instance), with an establishment of 36 judges, nine judges have retired since 1997. Seven of them were on extended terms, in some cases on a second extended term.

As a matter of approach, the retirement age laid down by law for various levels of court should usually be adhered to. Extensions beyond the retirement age should be regarded as the exception rather than the rule. Whilst each instance should be considered on its merits, the criterion for any extension should be what is in the best interests of the Judiciary, having regard to its operational needs.

During the period shortly before and shortly after the resumption of the exercise of sovereignty, it was understandable that extensions of service were granted in many cases in the interest of a smooth transition. But there came a time when it was no longer appropriate to rely on judges who had contributed their fair share and indeed more than their fair share. Like old generals, most of them wanted to fade away to enjoy their well earned retirements and were staying on out of a sense of duty.

It was time to move on and to bring forward younger judges. Like any dynamic institution, the Judiciary has to be rejuvenated. Younger judges have been elevated to the Court of Final Appeal and the Court of Appeal. Vacancies in the Court of First Instance, arising from elevations and retirements, have been filled by appointments from the Bar and also by appointments made from within. It is important to appreciate that the new appointees have all had considerable experience and established reputations, with many years spent in the law. In the coming few years, further appointments have to be made at various levels apart from the Court of Final Appeal.

Progress means that one generation will build upon and advance the achievements of the previous generation. I am sure that whilst following in the footsteps of their distinguished predecessors, the new appointees will make their own distinctive contribution and leave their own mark on our jurisprudence. Whilst I understand the concern that has occasionally been expressed about retirements from the senior echelons of the Judiciary in recent years, I firmly believe that there is no cause for concern. There must be proper succession planning looking at the long term. I am confident that the ongoing process of rejuvenation is in the best interests of the Judiciary.

Court of Final Appeal

The Court of Final Appeal is functioning smoothly. In the last three and a half years, the Court has disposed of 85 appeals and over 190 applications for leave to appeal. This far exceeds the number of cases which went to the Privy Council from Hong Kong within a similar period before 1997.

The Court is a collegiate court of five judges. Each judge has to come to his own decision in the case and is entitled to give a separate judgment whether concurring or dissenting. As to the participation of judges from other common law jurisdictions as one member of the Court, as the Secretary for Justice publicly stated recently, this "has received widespread support both locally and overseas". Indeed, the Hong Kong model in having a non-permanent judge from other common law jurisdictions is being seriously examined

in a jurisdiction such as New Zealand which is considering establishing its own final appellate court to replace the Privy Council.

As I have pointed out on a number of previous occasions, some judgments are by reason of their subject matter controversial, whatever their outcome. This is particularly so in the constitutional area. The challenging concept of "one country, two systems" presents a new frontier and it is understandable that different people of goodwill can disagree on constitutional issues. The Court of course neither seeks nor shirks controversy. Its duty is to decide cases according to law.

A few judgments have understandably attracted worldwide media attention. But apart from them, the Court has delivered a number of judgments which would be of great interest to judges and academics in the common law world. These include decisions concerning criminal procedure in jury trials, the limitation of actions for latent building defects, the conflict of laws in relation to the recognition of a bankruptcy decree granted by a Taiwanese court, the use of confessions obtained in police undercover operations, the defence of fair comment in defamation and the common law approach when faced with tax avoidance schemes.

There is widespread interest among jurists from many jurisdictions in the work of the Court of Final Appeal and the challenges it faces under the concept of "one country, two systems". This was evident when I attended the Global Constitutionalism Seminar at Yale Law School and the Conference to commemorate the 125th anniversary of the Supreme Court of Canada in Ottawa last September.

When the Court was established, the criteria for appeal replicated by and large those of the Privy Council. The Privy Council used to function principally as the final appellate court for colonies of the United Kingdom. In the post colonial era, it has functioned as the final appellate court for a diminishing number of jurisdictions. As our own final appellate court progresses, what were once appropriate criteria for Hong Kong appeals to the Privy Council may no longer be suitable today.

An example of this is the proposal to introduce a leapfrog procedure in civil proceedings. The Privy Council did not have such a procedure. But after consultation with the Legislative Council's Panel on Administration of Justice and Legal Services, it is now considered appropriate to introduce such a procedure for the Court of Final Appeal and Government will soon be proposing legislation for this purpose. Under such a procedure, a civil case could proceed in exceptional circumstances from the Court of First Instance directly to the Court of Final Appeal bypassing the intermediate Court of Appeal. The Court of Final Appeal will have to grant leave. And the Court of First Instance will have

to certify first, that a sufficient case for an appeal to the Court has been made out; secondly, that all parties consent; and thirdly, that the case involves a point of law of great general or public importance and either (i) the point relates to the construction of primary or subsidiary legislation, or (ii) the point of law is one in respect of which the judge is bound by a previous decision of the Court of Appeal or the Court of Final Appeal.

At an appropriate time, one feature in the criteria for appeal taken from the Privy Council would need to be re-examined. That is, the appeal as of right in civil cases from final judgments involving more than $1 million. First, this is in contrast to judgments in criminal cases and other civil judgments where appeal is with leave on defined criteria. It could be argued that civil final judgments involving more than $1 million should not be in a different position. Secondly, having a category of judgments which are appealable as of right is unusual compared to final appellate courts in other jurisdictions; the norm is that the appeal must be with leave of the Court which would consider whether a point of law or principle is involved. The Privy Council is the exception probably because of history. Thirdly, the $1 million threshold is now far too low, having regard to the value of assets and the size of commercial transactions.

Another aspect of the Court's procedure that merits review at the appropriate time is that at present, leave applications are invariably the subject of oral hearings by the Appeal Committee. As with most final appellate courts including the Privy Council, the Appeal Committee should dispose of the straightforward applications without an oral hearing.

As with any institution especially a new one, respect for it cannot be assumed. It has to be earned. I would venture to suggest that the Court of Final Appeal has made good progress and this bodes well for the future.

Reform of civil rules and procedures

As announced last year, I have established a Working Party "to review the civil rules and procedures of the High Court and to recommend changes thereto with a view to ensuring and improving access to justice at reasonable cost and speed".

The Working Party has made steady progress in its work. Its aim is to publish a paper for public consultation by about September 2001. By that time, the Working Party expects that its deliberations will have reached a stage when options for reform could be put

forward for consultation. After considering the responses to the consultation paper, the Working Party will then finalise its recommendations.

At this stage, there appears to me to be two broad scenarios. First, Hong Kong can follow the reforms in England pioneered by Lord Woolf. Those reforms have been in operation since April 1999 and there have been assessments of how they have been working. Secondly, Hong Kong can retain the essentials of its present procedure and introduce reforms aimed at specific areas. I am sure that the Working Party will give thorough consideration to these possible scenarios and perhaps others.

Eventually, the way forward will have to take into account the particular circumstances in our own jurisdiction. And we must end up with reforms which give our citizens reasonable access to justice and which are appropriate for the 21st century.

Increase in jurisdiction of the District Court

The increase in the civil jurisdiction of the District Court to $600,000 took effect on 1 September last year. Comparing the figures in 2000 with those in 1999 for the period from 1 September to 31 December, the writs filed in the civil jurisdiction in the District Court have more than doubled. The full impact of this increased caseload will be felt this year when these cases will be coming on for disposal.

The District Court is ready and prepared to meet the challenges ahead. We will be monitoring the impact of the increase in civil jurisdiction. As has been announced, it is proposed to further increase it to $1 million in late 2002 subject to review.

Magistrates' Courts and Tribunals

The Magistrates' Courts and Tribunals have a very substantial caseload. That is the venue where the citizen is most likely to encounter the law in action. I am confident that they will go from strength to strength and meet community expectations.

Solicitors' rights of audience in the High Court

The question of whether solicitors should have the right of audience in the High Court has been raised from time to time. It was again debated during the run up to the elections for the Legislative Council Legal functional constituency last year. As this question has an important impact on the administration of justice, it is right that I should state my views publicly on this matter.

It is fundamental to consider what is best in the public interest. A most important facet of the public interest is that there must be the highest standards of advocacy before the courts. In an adversarial system, this is essential for the proper administration of justice.

It has not been seriously suggested that all solicitors (over 4,500 in number) have at present the necessary standards for advocacy in the High Court. Solicitors do not all aspire to be advocates, and they generally devote themselves to the other important ways in which the law is served. What has been proposed is that consideration be given to the introduction of an accreditation system whereby solicitors with advocacy experience can seek accreditation for advocacy in the High Court.

In my view, it is premature to explore such a proposal. The recent increase in the civil jurisdiction of the District Court has substantially expanded the scope of advocacy work for solicitors. This will further expand with the proposed increase to $1 million subject to review in two years' time. Further, solicitors at present have certain rights of audience in the High Court, for example, in magisterial appeals and chambers hearings. Such existing rights of audience are not extensively exercised. It would be appropriate to consider further extension when solicitors' rights of audience in the District Court and their existing rights of audience in the High Court are extensively and competently exercised.

Eventually, any consideration of an accreditation system for solicitors' rights of audience in the High Court should be considered by a committee comprising judges, legal practitioners and community leaders.

This is an issue on which there may well be divided opinion as different interests are involved. But it is important for all concerned to appreciate that there should be the common objective of how the community would be best served.

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.

15 January 2001

At the Ceremonial Opening of Legal Year 2001 held at Hong Kong Convention and Exhibition Centre today (Monday), the Honourable Chief Justice Mr Andrew Kwok-nang Li,
inspecting the Guard of Honour mounted by the Hong Kong Police Force at the Expo Promenade.

The Honourable Chief Justice Mr Andrew Kwok-nang Li, addressing at the Ceremonial Opening of Legal Year 2001 in Grand Hall, Hong Kong Convention and Exhibition Centre today (Monday).