Administration of Justice in the 21st Century

The following is the full text of the speech delivered by the Hon Chief Justice Andrew Kwok Nang Li today (Wednesday) at the 16th Biennial LAWASIA Conference Judicial Law Section in Seoul:

As we stand at the threshold of the new millennium and ask ourselves the question: What does the future hold, what challenges do we face, one thing is certain. The new millennium will bring rapid changes in all spheres of society. Above all, the continuing advances in science and technology will have a far reaching impact in all areas of human endeavour. This follows the trend set in the last few decades of this century. But the pace of change is likely to accelerate.

The 21st century has been hailed as the Asian century. Many have predicted and continue to predict in spite of recent setbacks that by as early as 2020, Asia will account for a very major slice of the world's economy. This will enhance substantially Asia's economic power and its influence in world affairs.

Whether this optimistic scenario will come to pass, only time will tell. Whether it does or not, there is little doubt that economic development will continue in the numerous jurisdictions represented here. Our societies will be more affluent and better educated. Our citizens will be more conscious of their rights. And they will have greater and rising expectations of the institutions of government. These expectations will find expression, and articulation through opinion makers such as political leaders and the media.

It is in this context, the context of greater and rising community expectations, that the Judiciary, the judicial branch of government, will have to face the challenges of the new millennium in the administration of justice.

In the Beijing Statement of Principles of the Independence of the Judiciary in the Lawasia Region adopted in 1995 and revised in Manila in 1997 (which has now been signed and subscribed to by 32 Chief Justices in the Region), the role of the Judiciary is defined as follows:

“10. The objectives and functions of the Judiciary include the following:

(a) to ensure that all persons are able to live securely under the Rule of Law;

(b) to promote, within the proper limits of the judicial function, the observance and the attainment of human rights; and

(c) to administer the law impartially among persons and between persons and the State.”

The first two objectives and functions focus on the constitutional role of the courts whilst the third focuses on its role in dispute resolution, whether between citizens or between citizens and state.

The fundamental importance of an independent Judiciary for the maintenance of the rule of law is beyond question. The challenge for the Judiciary will be to perform these roles, the constitutional role and the adjudicative role, in a rapidly changing environment in a manner which commands the respect and confidence of society.

Constitutional role

As to the Judiciary's constitutional role, the Beijing Statement stated:

"5. It is the duty of the Judiciary to respect and observe the proper objectives and functions of the other institutions of government. It is the duty of those institutions to respect and observe the proper objectives and functions of the Judiciary."

It is not the function of the Judiciary to meddle in matters which are properly within the responsibility of the Executive and the Legislature. But the Judiciary has a vital constitutional role to ensure that the Executive and the Legislature act within the constitution and the law, that there is no abuse of power and that the fundamental rights and freedoms of citizens are safeguarded. This constitutional role of the courts will continue to grow in importance. The increasing complexity and sophistication of human affairs has led and will continue to lead to a growth in legislation and administrative regulation.

The effective discharge of this constitutional role is a difficult task for the courts. The courts are faced with balancing, and it is often a difficult balance, between the rights of the individual on the one hand and the interests of society as a whole. The situations are usually grey and different people of goodwill can come to different conclusions. Court decisions in the constitutional area are often controversial.

In this difficult and controversial area, the challenge for the courts is to uphold the constitution and the law and maintain the enduring values of a civil society. These values are constitutionally guaranteed in many jurisdictions and are recognised in various international convenants. Judges should act fearlessly, irrespective of popular acclaim or criticism.

Court decisions are and should be subjected to public debate. The right to scrutinise judgments of the courts is a constitutional right which should be vigorously exercised in a free society. Further, such public debate would have the benefit of informing and educating the public about the judicial system and the issues at stake. But to maintain the independence of the Judiciary, it would not be acceptable or desirable for judges to have to defend their judgments in the political arena. It is therefore important that the right to scrutinize court judgments should be responsibly exercised.

The adjudicative role

Turning to its adjudicative role, the challenge for the Judiciary will be to maintain and improve the court system so that it meets the rising expectations of society. This means a fair and efficient system for the resolution of disputes. Such a system would have to tackle and tackle successfully the interrelated problems of cost and delay. Whilst the many jurisdictions represented here with their different systems will have different approaches to these problems, the following considerations may be relevant to many.

Judges will have to recognise that court time is a public resource and that as with all public resources, it is limited. They therefore have to ensure that this public resource is fairly and efficiently allocated and used. Judges will find that they will be increasingly held publicly accountable for its use. Courts will have to ensure that its procedures are appropriate to minimise cost and delay in dispute resolution. They should be user friendly and minimise the scope for tactical abuse. It is important that the procedures should ensure that all cards are put on the table by the parties as soon as practicable so that they know where they stand. This would encourage the resolution of claims by compromises at as early a stage as possible.

But however sound the procedural framework, it would only be effective to minimise cost and delay if judges adopt a proactive approach in case management. With effective case management, the court (and not the parties) would supervise and ultimately control the amount of judicial time spent between the commencement of proceedings and the trial, on the trial itself and any appeal. With an appropriate procedural framework, effective case management is essentially a matter of judicial culture and attitude and is of vital importance.

Leaving aside the use of judicial time, rising legal costs for litigants is a serious concern. The affordability of legal representation directly affects the citizen's constitutional right of access to the courts. Many jurisdictions have legal aid funded by the state and indeed in some jurisdictions, the amount of taxpayer money spent is very substantial. Inevitably, an eligibility line must be drawn somewhere. The consequence is that increasingly, the backbone of society, the middle class, is in the worst position. The rich can afford to litigate. So can the poor, funded or subsidised by the state through legal aid. But the middle class is squeezed in the middle.

Continuing to increase the burden on the state cannot provide the ultimate answer, having regard to the many competing demands on the public purse. There is no easy solution. The charging of legal fees by reference to the time spent is a common feature in many jurisdictions and has been criticised as inevitably leading to higher costs. One possible solution is to have fixed or maximum legal costs by reference to the amount of the claim. This can be laid down in legislation and enforced by the courts when they exercise their power to award costs in favour of the winning party against the losing party. Another possible solution is to have contingency fee arrangements. Any such arrangements will give the lawyer a direct pecuniary interest in the outcome of the litigation and this immediately gives rise to many temptations, risks and pitfalls. If contingency fees are

allowed, there must be strict ethical standards which must be rigorously enforced. Some jurisdictions have useful experience in this area. Each jurisdiction will have to consider carefully for itself whether, having regard to its own tradition and the stage of development of its legal institutions, contingency arrangements will be in the public interest.

Related to the question of rising legal costs is the challenge posed to court systems of litigants in person, that is parties conducting their own cases without the benefit of legal representation. The appearance of litigants in person is a rising trend in many jurisdictions. Both parties may be litigants in person. And where only one party is in person and the other is legally represented, the court would be faced with a situation where there is inequality of strength or inequality of arms as between the parties. The litigant in person poses a difficult challenge for the courts, especially those operating an adversarial system. Whilst a judge should be conscious of the disadvantages which a litigant in person would be under and should be sympathetic, there is a limit to what the judge can properly do to assist him to conduct his case since the judge must not be biased and must avoid any perception of bias.

To cope with litigants in person, one possibility is to establish tribunals with a special jurisdiction which would operate a simple and informal procedure and would not allow legal representation. For example, Hong Kong has a Small Claims Tribunal to deal with claims up to HK$15,000 (which is due to be substantially increased) and a Labour Tribunal to deal with labour disputes. Legal representation is not allowed and the procedure is inquisitorial. Our experience has been satisfactory. Tribunals of this type could adjudicate disputes within their remit expeditiously and economically, with litigants in person well able to cope with their procedures.

The emergence and growth in alternative dispute resolution methods, namely, arbitration and mediation, is and will continue to be part of the administration of justice landscape. The courts should regard them as complementary to the court system.

To meet the challenges in the administration of justice, courts would increasingly have to gather and analyse data and information on the workings of the courts. This will enable the courts to propose solutions to problems and to measure the effectiveness of solutions. This will also enable the courts to discharge better their accountability for the use of public resources.

To improve efficiency, the courts must get up to speed and keep pace with the use of technology in the court system in all respects; including for listing, for the trial process and for judges to do their work. There must also be ongoing training for the judges so that standards can be maintained and improved.

There is no magic solution to the challenges which have to be faced. With increasing globalisation, it is important for there to be cross-fertilisation between jurisdictions so that we can learn from each other's thinking and experience.

In conclusion, the courts in the 21st century face exciting challenges in the administration of justice. The Judiciary is an institution of government that belongs to and serves the community and all societies would have rising and greater expectations of their Judiciary. To enable the rule of law to continue to thrive, we must rise to the challenges and meet those expectations.

End/Wednesday, September 8, 1999

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