

Chief Justice's speech at Ceremonial Opening of the Legal Year 2006

The following is the full text of the speech delivered by the Hon Chief Justice Mr Andrew Kwok-nang Li at the Ceremonial Opening of the Legal Year 2006 today (January 9):

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

With half of the present decade already past, we are at the threshold of a new year. 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. I thank you sincerely for your support by your presence.

The new Secretary for Justice

In particular, I would like to welcome the new Secretary for Justice, the Honourable Mr Wong Yan Lung SC. As I had stated publicly, Mr Wong "is widely respected for his dedication, integrity and professionalism". In assuming this most important office, he has enjoyed widespread support and goodwill.

The Secretary for Justice, as a key member of the Administration, plays a pivotal role in upholding the rule of law and in maintaining judicial independence. The Secretary's responsibilities in this regard are indeed unique, especially as judges have no role to play and cannot defend their judgments in the political arena. As Mr Wong publicly stated at the time of his appointment, he fully appreciates the fundamental importance of these responsibilities.

On this occasion, I wish to reiterate my tribute to Ms Elsie Leung. As Secretary for Justice during the last momentous eight years, she had served with selfless dedication. Her important contribution to the rule of law and the independence of the Judiciary should be given its due and be fully recognised.

Judicial review

Since I commenced legal practice over three decades or so ago, one of the most

striking developments has been the increase in judicial review proceedings and the rapid evolution of public law. This phenomenon is not peculiar to Hong Kong but is a common one in jurisdictions around the globe, including Australia, New Zealand and the United Kingdom, with whose legal traditions we have the closest affinity.

In the Hong Kong context, as elsewhere, I believe that this phenomenon has resulted mainly from three factors. First, modern life has become increasingly complex. Inevitably, many areas of activities have to be subjected to regulation in the public interest. Since the 1970's, the statute book has grown very substantially, with an increasing range of discretions conferred on public officials, the exercise of which may be subject to judicial review.

Secondly, new constitutional instruments have been enacted. Executive and legislative acts may be challenged on judicial review 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.

Whilst the number of judicial review challenges has grown tremendously compared to the 1970's, the number appears to have settled down in recent years. In 2000 and 2001, there was a flood of right of abode claims. It is only as from 2001 that the Judiciary has kept separate figures of right of abode claims as opposed to other judicial review proceedings. In 2001, leaving out the right of abode claims, the number of judicial review proceedings commenced numbered 116. It dropped to 102 in 2002, increased from 125 in 2003 to 146 in 2004. In 2005, it stood at 149. Whilst the number appears to have settled down at around 150, the range of areas covered by judicial review proceedings has broadened considerably in recent years. Inevitably, from time to time, there would be high profile challenges and the courts' decisions on them would have important political, social and economic repercussions for society.

With judicial review passing into everyday parlance and with "JR" rolling readily off everyone's lips, it is important for the public to understand the courts' proper role. On judicial review, the courts do not assume the role of the maker of the challenged decision. The courts are concerned and only concerned with the legality of the decision in question, adjudged in accordance with common law principles and the relevant statutory and constitutional provisions. It follows that the courts' judgment can only establish the limits of legality. The courts could not possibly provide an answer to, let alone a panacea for,

any of the various political, social and economic problems which confront society in modern times.

Within the parameters of legality, the appropriate solution to any political, social or economic problem can only be properly explored through the political process. Such problems are usually complex involving many dimensions and there are no easy or ready solutions to them. It is only through the political process that a suitable compromise may be found, reconciling the conflicting interests and considerations in question and balancing short term needs and long term goals. The responsibility for the proper functioning of the political process in the interests of the community rests with the Administration and the Legislature.

Criminal legal aid

The proper and effective representation of defendants in criminal cases is an important guarantee for individual liberty and is essential to the proper administration of criminal justice. A great majority of criminal work is funded by legal aid. In 2004-5, the Legal Aid Department expended \$93 million for criminal legal aid costs for both in-house and assigned-out cases.

Both branches of the legal profession have for some time been seriously concerned that the existing system for criminal legal aid remuneration established some decades ago is outdated and inadequate and should be reviewed. They have made submissions to the Administration during 2005. The Legal Aid Services Council also supports a review.

I share the concerns of the profession and consider that a review is plainly necessary. It should be conducted by the Administration, involving all parties concerned, as it is responsible for the provision of legal aid and as there may be implications for the public purse. I am glad to see that the Administration is moving ahead with a review, involving the Department of Legal Aid, the Department of Justice, the Judiciary, the Bar Association and the Law Society. In late December, it called for nominations from the parties concerned and the aim is to agree on the scope and timetable of the review at the first meeting of those involved.

I believe that it is in the public interest that the review should be conducted as speedily as possible and I look forward to seeing progress on this matter.

Value for money for legal aid

Whilst the system for criminal legal aid remuneration should be reformed, at the same time, it is important for value to be obtained from the expenditure of legal aid funds. This applies of course to civil as well as criminal legal aid. In addition to the \$93 million spent on criminal legal aid, civil legal aid costs in 2004-5 amounted to \$308 million, making a total of about \$400 million. This is a substantial amount of public funds.

The Legal Aid Department has a duty to ensure that these funds are well spent and value for money is obtained. In particular, it has to exercise sound judgment in assigning cases so that counsel and solicitors of appropriate competence are instructed. Further, it should explore developing mediation as an alternative method of dispute resolution. In many jurisdictions, this is now a fast developing process and is proving effective. Successful mediation would not only result in savings in legal costs but would bring about considerable social benefits.

Wasted costs

At present, the statutory power of the courts to award wasted costs against a legal or other representative or their employee is limited to wasted costs resulting from failure to appear or lateness at the hearing without reasonable cause, leading to an otherwise avoidable adjournment. It applies to those acting for the defence as well as those appearing for the prosecution. In the past few years, experienced criminal judges have consistently expressed their view in various judgments that this power is too narrow and that its scope should be widened. I fully agree with this view and note that in a recent public statement, the Director of Public Prosecutions also supports it. Our provision should be contrasted with that in England which covers wasted costs resulting from any improper, unreasonable or negligent act or omission.

However, it is important to give careful consideration to the extent to which the present power should be widened. A wasted costs order is a severe order. The power to make it should be confined to serious acts or omissions resulting in wasted costs and would only be exercisable in exceptional circumstances. It is an essential feature of our criminal justice system that an advocate must, consistently with his duties to the court, be able to advocate his client's cause fearlessly and this should not be jeopardised.

Open Justice

To enhance transparency in the judicial process, practice directions have been promulgated to open up chambers hearings generally to the public and they are working satisfactorily.

Civil Justice Reform

The implementation of Civil Justice Reform under the Steering Committee chaired by the Chief Judge High Court is proceeding as planned. The necessary primary and subsidiary legislation is being drafted. We should be ready to consult the profession on the formulation of the draft legislation in the course of this year.

Solicitors' rights of audience

The Working Party to consider the question of solicitors' rights of audience chaired by Mr Justice Bokhary is making good progress and will be issuing a consultation paper early this year.

Relocation of the Court of Final Appeal

As I had previously stated, with the benefit of experience, it has become clear that the present building at Battery Path is inadequate for the functioning of the Court of Final Appeal. 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 the public. With the reactivation of the plan to re-provision the Legislative Council to the Tamar site, I have reiterated my request to the Administration for the relocation of the Court to the present LegCo Building.

That building was built as and formerly housed Hong Kong's Supreme Court. It is a prestigious historic building on a prominent site. The location of the Court there would not only provide it with sufficient space but would be fitting, having regard to the Court's position at the apex of our judicial system. I trust that the request will receive favourable consideration in due course.

Conclusion

Ladies and gentlemen, it remains for me to wish you on behalf of all my colleagues in the Judiciary good health and every happiness in the new year.

Ends/Monday, January 9, 2006

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The Honourable Chief Justice, Mr Andrew Kwok-nang Li, inspecting the Guard of Honour mounted by the Hong Kong Police Force at Edinburgh Place during the Ceremonial Opening of the Legal Year 2006 today (January 9).



The Honourable Chief Justice, Mr Andrew Kwok-nang Li, addressing around 830 people including judges and judicial officers, members of the legal profession and guests at the Ceremonial Opening of Legal Year 2006 held at the Concert Hall of the City Hall today (January 9).