

Speech by the Secretary for Justice

Following is the speech by the Secretary for Justice, Ms Elsie Leung, at the Ceremonial Opening of the Legal Year 2005 today (February 17):

Chief Justice, Chairman of the Bar Association, President of the Law Society, Distinguished Guests, Ladies and Gentlemen,

Seven and a half years have passed since Reunification. The challenge for the Hong Kong SAR during that time has been to turn the theory of “one country, two systems” into a practical reality. In my opinion, this challenge has been successfully met.

We are all aware of controversial issues that have arisen, and of constitutional challenges that have been instituted. But such events are inevitable in an open society, governed by the rule of law. The resolution of each controversy has left us with a better understanding of “one country, two systems”, and a greater ability to tackle new problems. If we stand back to look at the big picture, instead of being absorbed in each new controversy, we can appreciate how much has been achieved since 1 July 1997.

In my view, the new constitution is now firmly rooted in Hong Kong’s soil. Given the unique nature of our constitutional arrangements, this is a historic achievement. In my address this afternoon, I would like to pay tribute to all who have contributed to this achievement.

The Judiciary

Chief Justice, with your permission, I would like to acknowledge the invaluable role that the Judiciary has played in elucidating the text of the Basic Law, and in ensuring that its written promises create enforceable rights and obligations.

As with other constitutional instruments, the Basic Law is necessarily expressed in broad and general terms. It is no easy task to apply those terms to the countless circumstances that are thrown up by everyday life, and that develop into disputes that need resolution.

However, as each case involving the interpretation of the Basic Law is determined, more light is thrown on its meaning, and the task becomes easier. Over the past seven and a half years, more than one third of the 160 Articles in the Basic Law have been interpreted by Hong Kong’s courts. The judgments in these cases not only determined the particular dispute in issue, but also created a body of precedents that strengthens our understanding of the Basic Law. Important aspects of the Basic Law that have been clarified include the right of abode, the continuity of the common law, freedom of expression, the right of peaceful

assembly, the protection of property rights, and the rights of public servants.

A constitution has been compared to a “living tree”. Precedents on the meaning of the Basic Law can therefore be regarded as the growing roots and branches of our constitution. This process of growth is of immense value to the government, to the legal profession and to the community as a whole. The government will acquire more guidance as to what it may, and may not, lawfully do. The legal profession will be better able to advise clients. And members of the community will see that the core values set out in the Basic Law are protected by independent judges.

The judicial review of governmental action has also been a vital part of the maintenance of the rule of law. The government must, of course, comply with the law. If, on occasions, it unwittingly fails to do so, it is only right that the courts should intervene. More often than not, the government’s administrative decisions have withstood court challenges, and hence its authority has been enhanced. In addition, court decisions that clarify what is legally required of public administrators provide valuable guidance for future government action, and thereby help to improve public administration.

The Legislative Council

The Legislative Council also has an important role in helping to implement “one country, two systems”. Article 11 of the Basic Law provides that no law enacted by the legislature of the Hong Kong SAR shall contravene the Basic Law. When scrutinizing draft legislation, members of the Legislative Council have been diligent in considering whether or not it does comply with the Basic Law. On many occasions, questions have quite properly been raised about this. Members have consistently emphasized the need to be satisfied that a Bill does comply with the Basic Law before agreeing to support it. Although this is only to be expected, it is nevertheless right to record their contribution publicly.

The President of the Legislative Council has also made a number of important decisions on aspects of the Basic Law relating to the legislature. It is not for me to comment on the substance of any of these decisions. However, they do provide invaluable guidance, particularly on whether or not a Bill relates to public expenditure, political structure or the operation of the government. These questions are important, since they determine the manner in which a Bill may be introduced into the Legislative Council.

The Legal Profession

The legal profession is another key player in the implementation of the Basic Law. Practising lawyers advise members of the community on their constitutional rights. Where appropriate they provide professional assistance in litigation to enforce those rights. Without such assistance, it is doubtful whether the Basic Law would have become such an effective constitutional instrument. The courts’ ability to make sound judgments depends to a large extent on the depth of research and the quality of advocacy of lawyers appearing

before them. Since every judgment in respect of the Basic Law is precedent for future cases, advocates and litigation lawyers have already had a great influence on the development of our constitutional law.

On a broader front, the provision of expert legal services in respect of all types of personal, property and business matters ensures that we have a society based on law. Hong Kong's strong and independent legal profession has played a vital part in the maintenance of the rule of law both before and after Reunification.

I would also like to acknowledge the role of the two branches of the legal profession in helping to develop mutual understanding with Mainland lawyers, and in extending their services into the Mainland. These processes have helped to bridge the gap in understanding between the two legal systems, and to improve the quality of legal services in the Mainland. This has undoubtedly helped "one country, two systems" to thrive.

The Department of Justice

The Department of Justice will continue to assist the profession to grow, and to remain strong and independent. It will participate in the work of the new statutory Standing Committee on Legal Education and Training, which is tasked with monitoring and improving standards. Reforms are already in hand – with the first intake of the four-year LLB taking place last September, and improvements to the Postgraduate Certificate Laws being implemented progressively.

I am keenly aware of the desire by most solicitors to replace the current Professional Indemnity Scheme with a less burdensome scheme. I agree that this is desirable, and my department will try to be as constructive as possible when considering any proposed new scheme. Needless to say, we must consider the public interest in protecting consumers, as well as the interests of solicitors.

My department will also do its best to promote the services of Hong Kong lawyers. This is being done in two ways. First, we are promoting Hong Kong internationally as a centre for dispute resolution, particularly in respect of disputes in the Mainland involving overseas businessmen. Secondly, we are promoting Hong Kong legal services in the Mainland, where local lawyers enjoy certain advantages over others by virtue of the two Closer Economic Partnership Arrangements.

My department will continue to participate in law reform projects designed to strengthen our legal system. These projects include studies relating to the possible introduction of higher rights of audience for solicitors, and conditional fees. Although continuity is a central theme of the Basic Law, this does not mean that our legal system has become fossilized. "One country, two systems" will continue to succeed only if Hong Kong remains a vibrant and competitive region. For this, we need a legal system that evolves to meet modern demands on it.

Joint efforts

Chief Justice, in the past seven and a half years, the new constitutional order has become firmly embedded in Hong Kong through the combined efforts of all sectors of the community. The rule of law is not in doubt. Judicial independence is as strong as ever. Human rights are protected at three levels – domestic, constitutional and international. The legal system is thriving. And Hong Kong's way of life has been maintained, including the vital ingredient of free and critical media.

These are achievements to be proud of. There will no doubt be many new challenges to face in the future. But we have a solid constitutional base from which to work. With the continuing contribution of all sectors of the community, I have no doubt that "one country, two systems" will continue to be an inspiration to the world. Thank you.

Ends/Thursday, February 17, 2005

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