

Speech by Secretary for Justice

Following is a speech by the Secretary for Justice, Mr Wong Yan Lung, SC, at the Fifth China Lawyers' Forum in Tianjin today (November 4): (Translation)

Ladies and gentlemen:

I am very pleased and honoured to attend the Fifth China Lawyers' Forum held here in Tianjin. I would like to express my gratitude to the host and co-organisers for offering me this precious opportunity to share experiences and exchange ideas with the distinguished leaders and the leading members of the legal profession from various parts of China on the theme of "Fostering Harmony in the Community and the Development of the Legal Profession".

I assumed office as the Secretary for Justice of the Hong Kong Special Administrative Region on October 20. Apart from being the principal legal adviser to the Chief Executive and to individual government bureaux, departments and agencies, I am also in charge of five legal divisions of the Department of Justice, namely, the Prosecutions, Legal Policy, Civil, Law Drafting and International Law Divisions. It is my duty to assist the SAR Government in maintaining the legal system of Hong Kong, upholding the rule of law and preserving the traditional independence of the judiciary in order to ensure that the people of Hong Kong will continue to enjoy the rights and way of life enshrined in the Basic Law. To perform these tremendous tasks and duties, I very much need the full support of the Central Government, local authorities and all my colleagues in the Department of Justice.

A robust legal system is the foundation for a harmonious society, and the recognition of, and commitment to, the rule of law by both the public and the government is the central pillar of such a society. It would be ideal if we could all agree with every law and adopt them as the basis for the resolution of all disputes. But the law-abiding spirit is most clearly reflected in the acceptance of the supremacy of law, which entails strict compliance with all laws including those one may consider unfavourable or inconvenient. This is the best safeguard for social stability. No person should be liable to any punishment or suffer any personal or financial penalties unless he has been convicted by the court of a breach of certain express provisions. Government officials or authorities should exercise the

discretionary powers conferred on them by law in a lawful, procedurally fair, and rational manner; otherwise, their decisions may be challenged and overruled by the court. No government authorities, officials or individuals can be above the law. Today I have the opportunity to hear from Mayor Dai and Justice Ministry officials the importance they attach to the rule of law, I feel very encouraged.

Moreover, in order to create a harmonious society and uphold the rule of law, the public and the Government should implement to the full the principle of “equality before the law”. All persons, regardless of their race, origin, political opinion, religion and sex, should be entitled to the same rights under the law and, at the same time, should respect each other's entitlement to these rights. In drawing up and enforcing legislation, the government should adhere to this principle in order to promote justice and tolerance in the community.

The robustness of a legal system hinges on the quality of the legal profession. Apart from the impartial judiciary and law enforcement agencies, a strong and independent legal profession of high standard also plays a vital role in upholding and fortifying the rule of law.

The legal profession in Hong Kong has a history of more than a century, but it was not until three or four decades ago that the profession started to develop substantially. There are now 942 barristers (including 71 Senior Counsel) and 5,445 solicitors in Hong Kong, making up a total of just under 6,400 lawyers (some 300 of which are among the staff of the Department of Justice). Since the establishment of the first local law school by the University of Hong Kong in 1969 and the second one by the City University of Hong Kong in 1987, the legal profession of Hong Kong has been developing and improving rapidly. With the establishment of the third law school next year by the Chinese University of Hong Kong, legal education will become even more accessible and a larger pool of local legal talents will be formed.

Two professional bodies - the Law Society of Hong Kong and the Hong Kong Bar Association - are responsible for the operation and development of the legal profession. Under the “self-regulatory approach” adopted in Hong Kong, the two bodies are entirely independent in their operation, from processing applications for admission, granting practising certificates to taking disciplinary actions, and the Government plays no part in it. Nevertheless, the Department of Justice has all along maintained a close working relationship with the two bodies. The department consults them from time to time on legislative amendments and, whenever the two

bodies need to amend the ordinances or subsidiary legislation relating to the legal profession, the department will provide assistance and introduce and move the relevant bills through the Legislative Council. In this regard, the Department of Justice has to strike a balance between the interests of the two bodies and of the public, with a view to strengthening the legal system of Hong Kong. Now, let me brief you on the trend of development of the legal profession in Hong Kong in recent years and on some proposed measures to facilitate its development in the coming years.

While the form of practice chosen by a lawyer will affect the cost, quality and effectiveness of the legal services provided, it has also a strong implication for the competitiveness of the entire legal profession. The relevant ordinance was amended a few years ago to allow practising lawyers to form a "solicitor corporation" to run their business. The advantage of operating as a company is that the corporation is allowed to raise capital, borrow money and enter into contracts in its own capacity as a legal person. A "solicitor corporation" provides an alternative to lawyers who wish to take up practice other than by practising as "sole proprietor" or in a "partnership". The subsidiary legislation is expected to be promulgated towards the end of this year or early next year. The Law Society, however, points out that this new form of legal practice cannot resolve the liability or compensation problems arising out of the negligence of legal practitioners. Last year, the Law Society suggested that the form of "limited liability partnership" should be studied, so that innocent partners will have the privileges of insulating their personal assets from claims incurred by the fault of other partners.

Another new development is how to ensure clients who sustain loss through the default of practising solicitors will obtain compensation. At present, where an insurer becomes insolvent, all solicitors who have taken out insurance from the insurer will then become insurers of last resort. As solicitors have to bear a heavy financial burden under the existing arrangements of the professional indemnity scheme, the Department of Justice fully understands why the Law Society of Hong Kong has put forward proposals to relieve their burden. However, we also have to ensure that consumers will be given adequate protection in case an insurer becomes insolvent. The Department of Justice is now actively working with the Law Society to find a solution in the interest of the public.

On September 14, 2005, a sub-committee of the Law Reform Commission released a consultation paper and recommended, amongst other proposals, that existing prohibitions against the use of conditional fees should be lifted for certain

types of civil litigation, so that lawyers may choose to charge conditional fees in appropriate cases. If the case is unsuccessful, the lawyer will charge no fees. In the event of success, the lawyer charges his normal fees plus a percentage "uplift" on the normal fees. "Conditional fees" are different from the American form of "contingency fee", where the lawyer's fee is calculated as a percentage of the amount of damages awarded by the court. Discussion on the feasibility of the proposal by different sectors of the community is under way. In addition, a working group was established last year by the Chief Justice of the Court of Final Appeal to study whether solicitors' rights of audience should be enhanced.

Like other departments of the Hong Kong SAR Government, the Department of Justice considers the promotion of mutual understanding of and the establishment of good working relationships with Mainland authorities crucial to the implementation of the "One Country, Two Systems" principle. All along the Department of Justice has maintained a close liaison and cooperation with the judicial authorities and other political-legal organs in the Mainland, in particular in the areas of cross-boundary legal co-operation and assistance to the Hong Kong legal profession in opening up the legal services market in the Mainland. Thanks to the Central Government, in particular the strong support given by the Ministry of Justice to the Hong Kong legal profession, and to the former Secretary for Justice, Madam Elsie Leung Oi-sie, who has painstakingly planned and offered guidance on this matter, legal services were included in the first batch of professional services liberalised under the Closer Economic Partnership Arrangement (CEPA). Thus, the Hong Kong legal profession is able to gain earlier and easier access to the Mainland market under the framework of CEPA.

According to the latest measures under CEPA just announced last month, Hong Kong law firms would enjoy greater flexibility when forming associations with Mainland law firms. Besides, the lifting of the restrictions on Hong Kong lawyers practising in the Mainland by effectively allowing them to carry on their practice in Hong Kong at the same time is a reciprocal treatment the Hong Kong legal profession has been seeking. I am sure this will be greatly welcomed by the legal profession. I understand that CEPA is an arrangement based on reciprocity. However, I have also noticed a steady rise in the number of civil, commercial and criminal cases involving Hong Kong residents in the Mainland. In future, could Hong Kong barristers and solicitors, together with their counterparts in the Mainland, represent their clients in court in the capacity as agent ad litem to conduct the proceedings and pay visits to Hong Kong residents held in custody in the Mainland based on the needs of individual

cases? Could the residency requirement of Hong Kong lawyers stationed in the Mainland representative offices be further shortened? Could the forming of associations between Hong Kong and Mainland law firms be further relaxed? These issues will continue to be the concerns of the two branches of the legal profession.

Another move welcomed by the people of Hong Kong is that the Ministry of Justice has agreed to the Department of Justice's proposal for setting up examination venues in Hong Kong for the State Judicial Examination from 2005 onwards. This new arrangement makes it more convenient for Hong Kong legal professionals and other interested residents to sit for the examination and acquire Mainland legal professional qualification, which is the key to practising Mainland law in the Mainland. A total of 240 Hong Kong residents completed the State Judicial Examination in 2005, which took place on September 17 and 18. I sincerely hope that they will get good results.

It is my firm belief that increased communication and exchanges between the judicial authorities and legal sectors of the Mainland and Hong Kong will continue to be conducive to interaction between the legal systems and professions of the two places. Today, we find the delegations of both legal professional bodies in Hong Kong attending the Forum together for the first time. This marks a new milestone in the exchanges and cooperation between the Mainland and Hong Kong. I look forward to seeing the legal professions of the two places making the most of this Forum by sharing and learning from each other's experiences, thereby enhancing their respective competitive edge and professional standards. I wish this year's Forum every success. Thank you.

Ends/Friday, November 4, 2005

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