

**SPEECH TO BE DELIVERED AT OPENING OF LEGAL YEAR
13 JANUARY 2003**

The Honourable Chief Justice, the Secretary for Justice, the President of the Law Society, Honourable Judges, Distinguished Guests, Members of the Legal Profession, Ladies and Gentlemen:

1. 2002 was a very eventful year.
2. When the Court of Final Appeal delivered its judgment in **Ng Siu Tung's Case**, we saw the end of the right of abode saga so far as the law could take it. To reach that legal conclusion, however, Hong Kong had sacrificed social harmony and judicial autonomy. The price paid is indeed a dear one. Since the political decision of the Government to ask National People's Congress Standing Committee ("NPCSC") for a reinterpretation in June 1999, it has been perceived that any decision of the Court of Final Appeal ("CFA") is only final if the Government wants it to be.
3. Only recently were we haunted by such a perception in **Lau Fong's Case** when the Department of Justice apparently doubted the finality of a point of law already decided by the CFA. Shortly thereafter, noises were made suggesting that any decision of the Government to consult the public on how to implement Article 23 of the Basic Law using a White Bill could call for the interference of the NPCSC if the Courts do not declare the process unconstitutional in a judicial review. Such noises fully illustrate how the autonomy of the HKSAR is constantly under threat and how the referral mechanism is being exploited by some quarters to their desired political ends.
4. The Government is well advised to restore judicial autonomy to the HKSAR by undertaking that it will never seek a reinterpretation by the NPCSC after the CFA has finally spoken on an interpretation of the Basic Law. It will also confirm that only the courts can initiate any

future referral to the NPCSC for interpretation of the Basic Law under Article 158.

5. The next administration of justice issue that caught the Bar's attention was the apparently selective arrests in May and the subsequent prosecutions of **Leung Kwok-hung and two others** who participated in a public procession held on 10 February, which was peaceful, as expressly found by the Chief Magistrate in a judgment delivered in November 2002, but unlawful because it did not have the prior approval of the Commissioner of Police.
6. The incident has suggested to many that the law is being used more as an instrument to govern than for protecting rights and freedoms and keeping government acts under checks. The need for certainty of legal prescriptions and predictability of consequences, being core values of the Rule of Law that used to have been taken for granted, are repeatedly questioned as impractical and impracticable. This is dangerous. If law means what the enforcers want it to, then we can no longer expect people to respect the law. People will resort to *guanxi* to get things done because after all it is what the people in power think, and not what the law says, that matters.
7. In handing down the verdict in **Leung Kwok-hung's Case**, the Chief Magistrate queried whether it had been appropriate for issues of a political nature to be resolved in a legal forum. That is a timely reminder to the Administration not to abuse the Courts as the forum for prosecuting under draconian laws in order to agonize political dissenters with anxieties of the criminal process thus bringing maximum pressure to bear on them.
8. The Government is well advised to undertake a territory wide consultation on the Public Order Ordinance with a view to bringing it in line with human rights standards commensurate with a pluralistic society as modern as Hong Kong. It is only by amending the law on the basis of a new consensus reached with the people that the

Government would enable law enforcement agencies to strictly enforce the law against all offenders. This will also spare frontline police officers of the criticisms that they have lent themselves to be used as instruments of political persecutions when they are just executing orders taken from above.

9. I said at the Opening of Legal Year 2002 that in highly controversial, and at times politically-charged, debates on public issues, the Government should not adopt a defensive mentality but ought to genuinely engage the public in true dialogues by explaining its policies and the legal principles it sees as involved. Such a more constructive approach will help not only to better educate the public about the Rule of Law, but will definitely help to minimize unnecessary antagonism that leads inevitably to wastage of time and resources from within that could be more meaningfully deployed elsewhere.
10. It is, however, regrettable to note that in consulting on proposals to implement Article 23 of the Basic Law, the Government continues to adopt a paternalistic mentality and be highly defensive of what were contained in the Consultation Document published on 24 September. It seems content to deploy the same political tactics of orchestrating and rallying support for the Government's position so as to overwhelm rational dissenting views, when what it should have done is to meaningfully engage the dissent. Notwithstanding the strongest of cross-sectorial consensus for a second round of public consultation to be undertaken based on a legislative text before the legislative process starts, the Government has insisted on gazetting a blue bill right away. The unjustified and unjustifiable insistence by the Government of not acceding to such a humble and modest request has not only invited speculation about the genuineness of its intention to consult but has brought polarization and division of the society to new heights.
11. The Government must realize that laws to be made under Article 23 are very much at the most sensitive interface of the "Two Systems" within the "One Country". Whether we can satisfy the requirements of

Article 23 and yet keep intact the fundamental human rights and freedoms enshrined in our constitutional document will be the litmus test of the feasibility of “One Country Two Systems”. We owe it to history, ourselves and our children to do it right and make sure the concept works.

12. To have a vibrant, responsible and committed civil society not afraid of speaking up for the good of Hong Kong is no cause for fear. Rather, there is every reason for celebration and to be thankful. The Government should feel encouraged by Hong Kong people’s anxious engagement of the Government in the law making process. It shows that we respect the law and want to abide by it when it has been passed. Assurances from officials can never substitute for the black letter laws of the legislative texts that we are entitled to see before saying Yes or No to Government’s proposals. We want to be consulted and be able to indicate our likes and dislikes directly to the Government. We do not want to do it through legislative councilors and be circumscribed by procedures of a forum that do not cater for public consultation at all.
13. The Government is well advised to announce immediately that there will be a second round of public consultation on its proposals to implement Article 23 based on a legislative text and that the Government will not be slow to amend such a text in order to address the public’s concerns and anxieties, however substantial these amendments may be. This is not only conducive to social cohesion but is seen by the Bar as the only way forward if the Government is at all concerned about not further dividing and polarizing the society.
14. The right of abode saga has already left Hong Kong with a divided society when the ugly side of humanity was nakedly and explicitly exploited to political ends when the Government wanted popular support for the NPCSC reference. It will be very sad indeed if the Government bulldozes a blue bill for implementing Article 23 through Legislative Council without a broad social consensus and leaves Hong Kong even more divided than it is now.

15. If the Chief Justice would allow me, I want to state once again for the record that the Rule of Law is a fundamental attribute that the Special Administrative Region possesses which stands it apart from any other city on the Mainland. The Rule of Law as an institution in which men and women present in this auditorium have learnt to believe and trust is based on its staunch respect for rights of individuals, whether it be rights we are born with or rights created by consensual legal documents.
16. The Rule of Law is never a means to an end. It insists on due process being observed and demands a justification fully grounded in the law for every act of the Government. The Rule of Law does not and should never yield in the name of alleged expediency and efficiency of government. Regrettably, however, what Hong Kong has witnessed since July 1997 is quite to the contrary. The political will of the Government has prevailed over due process. The law is here to serve political objectives; the law has been relegated to a means to achieving political ends. Examples are numerous. The more obvious ones were the hasty introduction of the ministerial accountability system, legislating for civil servants pay cut and the repeated assertion of July 2003 to be the Government's target date for passage of laws implementing Article 23.
17. The Rule of Law is uncompromising: any government that is not just paying lip service to the institution must insist on observing the due process. Fundamental principles of and core values pertaining to the Rule of Law must be strictly adhered to at all times without exception. Short of a state of emergency being declared, such principles and values must prevail over any other consideration whenever there are conflicts between them.
18. The concept of "One Country Two Systems" depends for its success on our ability to stand up for and preserve these values and principles of the Hong Kong System, which are not presently shared by the other System within the One Country.

19. My Lords, Ladies and Gentlemen, what remains is for me to wish all of you a happy and fulfilling 2003. Thank you.

Alan Leong SC, 13 January 2003