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INFORMATION PAPER

LEGAL AID SERVICES COUNCIL

Speeches at the Ceremonial Opening of the Legal Year 2023

The Ceremonial Opening of the Legal Year 2023 was held on 16 January 2023. For Members' information, copies of the speeches delivered by the Chief Justice of the Court of Final Appeal, the Secretary for Justice, the Chairman of the Hong Kong Bar Association and the President of The Law Society of Hong Kong at the Ceremonial Opening are attached at *Appendices I to IV* respectively.

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Date : January 2023

CJ's speech at Ceremonial Opening of Legal Year 2023

The following is issued on behalf of the Judiciary:

Following is the full text of the speech delivered by the Chief Justice of the Court of Final Appeal, Mr Andrew Cheung Kui-nung, at the Ceremonial Opening of the Legal Year 2023

Secretary for Justice, Chairman of the Bar, President of the Law Society, fellow judges, distinguished guests, ladies and gentlemen,

On behalf of the Hong Kong Judiciary, I warmly welcome you to this year's Ceremonial Opening of the Legal Year. After a two year absence from this venue due to Covid restrictions, I am pleased we are able to hold the Opening of the Legal Year at its traditional venue once again. This is an important annual event which focuses our community's attention on the rule of law, the administration of justice, and the central role played by the Judiciary in this regard. Indeed, the role of the Judiciary in our society is the main theme of my address this afternoon, apart from two new initiatives which I will briefly describe in the latter part of this address.

It is essential that the public is well informed of the role the Judiciary plays under the "One Country, Two Systems" arrangement, an arrangement which will, as President Xi has recently made clear, continue unchanged beyond 2047. An accurate understanding of the Judiciary's role forms the proper basis of public oversight and scrutiny of judicial work. This understanding informs meaningful comments or views of court decisions, enabling constructive suggestions that help improve our work to be made. All this serves to enhance public confidence in the courts and the judicial system, which reinforces public belief in the rule of law. Conversely, an inaccurate, incomplete or misconceived understanding of the role of the Judiciary is often the reason for misplaced or inappropriate criticisms of court decisions, or even personal attacks against our judges. Sometimes, misconceptions of the judicial role may lead to unrealistic expectations of the courts, which cannot and should not be met. This is not conducive to public confidence in our

judicial system or the upholding of the rule of law.

What are the main functions of the Judiciary in our society? I will identify three of them here.

First and foremost, the primary role of the Judiciary is to uphold the rule of law and administer justice in strict accordance with the law. This is the most important function of the Judiciary and the courts must do it well. It cannot be achieved without the Judiciary being an independent, impartial and effective one. In adjudicating cases, the courts' duty is to interpret and apply the law in accordance with the evidence placed before them. The courts must treat everyone equally, whether in litigation between individuals, corporations, or involving the Government, and whether the case is civil, criminal, or public law in nature. Everyone is equal before the law. All defendants are presumed innocent unless and until proven guilty, and everyone is entitled to a fair trial.

Pausing here, it should be noted that the courts do not control whether, and what, cases are brought before them. It is a matter for the parties in dispute, and in criminal matters, the prosecution authorities and law enforcement agencies. Nor do the courts have a choice in the matter. Once a case is brought before the court, it must be dealt with by the court strictly in accordance with law.

In administering the law, judges put aside their own personal views. Their role is not to re-make the law that they have to apply. Nor is it permissible for them to only apply those parts of the law which they personally agree with. The Judicial Oath requires judges to apply the law faithfully. Their personal views and preferences do not enter the equation. It is therefore entirely proper for someone, if there are good grounds, to criticise the court or a judge for misapplying the law. It is, however, wrong to criticise a judge simply for applying laws which one does not like or agree with. As will be explained, laws are not enacted by judges; they simply apply them as required by the Judicial Oath.

It is therefore simply right that judges should ignore this latter type of criticism and carry on with their judicial duties. In this regard, full

acknowledgement is due to our judges who have handled with great professionalism cases attracting public or even international attention in the past few years. Whether as designated judges under the Hong Kong National Security Law or not, they have all faithfully applied the law to the best of their ability, in accordance with the evidence presented before them.

Views on judicial decisions may sometimes reflect an inadequate understanding of the adjudication process. Judges administer justice by applying the relevant law to the facts and evidence placed before them. In litigation, there are well established rules of procedure and of evidence governing, for instance, the presentation of arguments, the burden and standard of proof, and the admissibility of evidence. These procedural and evidential requirements are as binding on the courts as the substantive laws. Under our adversarial system of litigation, the parties play a crucial role in presenting their arguments and evidence before the court. The way issues are argued or the quality of the evidence adduced before the court will obviously have an important impact on the outcome of a case. A good example is where a defendant is acquitted because there is reasonable doubt regarding his guilt arising from the evidence before the court.

Another common type of criticism of court decisions has its origin in the failure to understand that in many disputes, more than one right or interest is in issue. Many legal disputes in public law cases, particularly those involving underlying social, economic or political issues, concern rights or interests that pull in opposite or even multiple directions. The court has to put all these rights and interests in the balancing scales before a decision can be made. The outcome of the balancing exercise may not always be pleasing to everyone, or even anyone. For, by definition, different stakeholders and different interests are involved. It does not mean that the court has failed in its function in administering justice fairly and equally.

All this brings me to the second role that the Judiciary plays in society, that is, the protection of fundamental rights. It is the function of the courts to uphold fundamental rights. This is an important facet of the rule of law as practised in Hong Kong. In Hong Kong, fundamental rights

are set out in Chapter III of the Basic Law, as well as the Hong Kong Bill of Rights, which is constitutionally entrenched under Article 39(1) of the Basic Law. These important, fundamental rights must be jealously guarded by the courts.

Whilst fundamental rights must be, and are given by our courts, a generous interpretation, most fundamental rights are not absolute - they are liable to be proportionately restricted for the sake of others or for the public interest.

Fundamental rights are equally enjoyed by the people of Hong Kong. When rights are exercised or sought to be enforced in our courts, the fundamental rights of others, where relevant, must equally be borne in mind and respected. In this regard, what is often termed as the public interest may simply be understood as the sum total of the fundamental or other rights and interests enjoyed by other members of society or a portion thereof. As explained, when different rights and interests pull in opposite or different directions, as happens quite often, the court's task is to balance these competing rights and interests and arrive at a decision that best gives effect to them.

A further point to note is that the ultimate duty of a court is to administer justice in strict accordance with the law - this includes all laws that are binding on the court. Moreover, there are boundaries to the court's jurisdiction and judicial power. When fundamental rights are restricted by law that is binding on the court, or law that is put beyond the court's jurisdiction to review, the court must take the law as it is and accept the limit of its jurisdiction, and administer justice accordingly.

The third role played by the courts relates to their lawmaking function under the common law system. Under our legal system, the courts, particularly the higher courts, do make law from time to time on a case-by-case basis. When a new situation is encountered which is not addressed by any binding law or precedents, the court may, where appropriate, develop and extend the law by adopting and applying comparable precedents by analogy. Moreover, the highest court may from time to time regard a particular case law as no longer being correct, making it necessary to restate or change the law. In this way, the common

law evolves incrementally over time, whereby older and outdated authorities are gradually replaced by newer ones which suit the modern circumstances better.

However, the courts' lawmaking role should not be exaggerated. In most of the cases that come before our courts, the court's task is either to interpret and apply written laws, or to apply binding authorities applicable to the dispute before it. Where circumstances justify, the court may give a written law a modern or "updated" interpretation in order to address changes that have occurred after the law was initially framed. This is permissible so long as it is in accordance with the original legislative intent, and does not do unacceptable violence to the language of the law. What the court cannot do is to use this as an opportunity for legislating or, put another way, filling in a perceived legislative gap. That is not the function of the courts, but that of the Legislature. Likewise, provisions in the Basic Law, which is regarded as a "living instrument" by the courts, are capable of being given modern meanings where circumstances justify. However, given its constitutional status and significance, the courts would be particularly careful when interpreting the Basic Law as a "living instrument".

Having thus outlined the three main functions of the Judiciary, it is perhaps also instructive to explain what is not the role of the Judiciary. First, subject to the limited role they play in developing the common law which I have just mentioned, it is not the role or function of the courts to make laws. Rather, their responsibility is to apply them. In particular, the written laws in Hong Kong are made either by the Legislature or other bodies or persons vested with delegated legislative powers, or, in the case of national laws that are applicable to Hong Kong, by the National People's Congress or its Standing Committee. The courts do not make the written laws, and indeed play no part in their enactment. The courts' role is to faithfully apply them.

Secondly, it is not the function of the courts to make public policies, or for that matter, political decisions. Public policies and political decisions are made by the Government as part of its functions and duties to govern and run Hong Kong. The courts only play a role when a particular policy or decision is challenged in court for its

consistency with the Basic Law or the Hong Kong Bill of Rights, or for its lawfulness or reasonableness in the public law sense. In all such litigations, the court's focus is invariably on the constitutionality or lawfulness of the policy or decision, as opposed to its merits or drawbacks. Whilst inevitably, the court's decision may sometimes have a political impact, this does not mean the court has made a political decision, or made its decision on a political basis as opposed to a legal one when deciding the dispute. Still less does it mean that the court has involved itself politically in the making or unmaking of any government policy.

Underlying the two points that I have just made is a larger, more fundamental principle, that is, the courts must respect and indeed uphold the constitutional order of the Hong Kong Special Administrative Region under the Constitution of our country. Put shortly, the Judiciary is part of the constitutional setup of the Hong Kong SAR under the Constitution. Its role is defined and governed strictly under that setup. Constitutionally, Article 2 of the Basic Law specifically provides that the National People's Congress authorises the Hong Kong SAR to exercise a high degree of autonomy and enjoy, among other things, independent judicial power, including that of final adjudication, in accordance with the provisions of the Basic Law. Article 19 again vests the Hong Kong SAR with independent judicial power, and the courts of the Hong Kong SAR are specifically designated as the organ in the Region to exercise the independent judicial power. The Basic Law and other relevant laws in Hong Kong therefore set out as well as delimit the jurisdiction of the courts. It is the duty of the courts to fully exercise that jurisdiction in cases falling within it. However, it is equally important that they do not usurp the functions, powers or jurisdiction vested in other organs or bodies under the Basic Law, or, for that matter, the Constitution, or to purport to exercise judicial power that they have not been conferred with.

This is not something unique to Hong Kong. In jurisdictions where there is a written constitution, the jurisdiction and positioning of the courts are entirely dependent on what is provided for in the Constitution, which governs what the courts can and cannot do. Where a jurisdiction does not have a written constitution and the legislature is supreme, it is not for the courts to challenge what the legislature has chosen to enact,

and the jurisdiction of the courts is ultimately a matter for the legislature to decide.

In conclusion of this part of my address, I would simply reiterate it is important that our community has a clear and accurate understanding of the role and functions of the Judiciary. This is, ultimately, conducive to maintaining public confidence in the courts and the rule of law as practised in Hong Kong.

Turning to enhancements and changes, as I have said before, the Judiciary must remain a modern one that moves with the times. This, too, is an important aspect of maintaining public confidence in the courts. Over the past two years, we have, among other things, enhanced our mechanism for handling complaints against judicial conduct, published a new edition of the Guide to Judicial Conduct, laid down timeframes for handing down judgments, promoted remote hearings and strengthened our judicial education and exchanges. The procedural reform on family law litigations has reached an advanced stage, and further mediation initiatives are also in the pipeline.

Apart from these measures, I would quickly mention two further initiatives that we are actively exploring. First, the live broadcasting of selected judicial proceedings. Open justice is a key to maintaining public confidence in our judicial system and upholding the rule of law. Open justice mandates that subject to limited and justified exceptions, judicial proceedings shall be conducted in a transparent manner in the plain view of the public. It safeguards the right of those appearing before the court. It also serves to educate the public on the judicial process and make uninformed and inaccurate comments about the proceedings less likely. With the advent of technology, and given the limited seating capacities of our courtrooms and public health considerations, live broadcasting of proceedings is a natural way forward to further enhance the transparency of court procedures and public confidence in the judicial process. Yet, the due administration of justice must always remain the primary and overriding consideration. Not all proceedings are inherently suitable for live broadcasting. Criminal trials, particularly trials by jury and those involving vulnerable witnesses, may not be suitable for unrestricted live broadcasting. On the other hand, for appellate proceedings, particularly

hearings in the Court of Final Appeal, the case for live broadcasting is a strong one. But even then, legitimate concerns, such as the possible misuse of the broadcast material, or doxxing of judges or legal representatives, must also be carefully taken into account.

It is with these, and other, considerations in mind that I have decided to appoint a working group within the Judiciary, to be chaired by a senior judge, to examine the guiding principles as well as the implementation practicalities of live broadcasting of court proceedings, with a view to introducing live broadcasting of at least some court proceedings or at some court level within sometime this year, if reasonably practicable.

The second initiative under consideration relates to our Information Technology Strategy Plan. Since last year, we have been rolling out our electronic litigation system by stages. Thus far, this new e-litigation system has been made available as an alternative option to the traditional paper-based system. Understandably, the initial response of the legal profession and others to this new litigation platform is slow. The Judiciary will of course continue with our support service and publicity efforts to boost participation. However, the community is fully entitled to expect a quicker and wider adoption of technology in court operations, and I think it is time that we make a greater stride in driving the migration to e-litigation. Without seeking to downplay the short-term inconvenience and the cultural change that will be required, the legal profession is strongly urged to give serious consideration to switching to the e-litigation system. With the ultimate aim of making the electronic platform the primary litigation system, we are considering the setting of a target timeframe, such as a period of three to five years from the rolling out of the relevant parts of the new system, for requiring all represented litigants to conduct their litigations electronically, unless otherwise exempted in particular circumstances. Full consultation will of course be held with the legal profession as well as other stakeholders, and safeguards of the right of access to court will be put in place. Adequate support and training will also be rendered to our judges and support staff in adapting to the migration. I believe this is a strategically important direction to take in modernising Hong Kong's mode of litigation in this digital era. After all, a modern judiciary must not only be independent and impartial, but must

also be efficient and effective. This is and remains our goal and commitment.

It only remains for me to wish you and your family good health and every happiness in 2023. Not only that, the Chinese New Year is just days away. I wish everyone here a very blessed Chinese New Year. Thank you.

Ends/Monday, January 16, 2023

Issued at HKT 18:30

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SJ's speech at Ceremonial Opening of Legal Year 2023

Following is the speech by the Secretary for Justice, Mr Paul Lam, SC, at the Ceremonial Opening of the Legal Year 2023:

Chief Justice, Members of the Judiciary, Chairman of the Bar Association, President of the Law Society, distinguished guests, ladies and gentlemen,

The maintenance of the common law system (including its judicial system) in Hong Kong is one of the most important features of the principle of "one country, two systems".

Article 5 of the Basic Law provides that the previous capitalist system and way of life practised in Hong Kong shall remain unchanged for 50 years. As to what will happen after that, President Xi Jinping gave a clear answer in his speech delivered on July 1, 2022, in Hong Kong by stating that "[t]here is no reason for us to change such a good policy, and we must adhere to it in the long run."

It is most significant to note that President Xi mentioned the common law twice in his speech. First, he said that, in the past 25 years "[Hong Kong's] previous laws including the practice of the common law have been maintained and developed" Second, he said that "The Central Government fully supports Hong Kong in its effort ... to maintain the common law"

The Central Government demonstrates its commitment in this respect by assigning important missions to Hong Kong, which cannot be accomplished unless the common law system is maintained and the rule of law in Hong Kong is upheld. First, under both the National 14th Five-Year Plan and the Outline Development Plan for the Guangdong-Hong Kong-Macao Greater Bay Area, the Central Government has positioned Hong Kong as a centre for international legal and dispute resolution services in the Asia-Pacific Region. Second, the International Organization for Mediation Preparatory Office will be set up in Hong Kong soon.

The preservation of the common law in Hong Kong is expressly guaranteed by Articles 8 and 18 of the Basic Law. Article 82 provides that the Court of Final Appeal may as required invite judges from other common law jurisdictions to sit on it. Article 84 provides that the Hong Kong courts may refer to precedents of other common law jurisdictions. And Article 92 provides that judges may be recruited from other common law jurisdictions. These provisions contribute to imbuing Hong Kong's common law with international linkage.

Judicial independence is one of the most essential components of Hong Kong's common law system. The judiciary's independent judicial power including that of final adjudication is entrenched in the Basic Law, including the general provisions in Articles 2 and 19; and various provisions in Section 4 of Chapter 4, in particular Article 82. Article 85 provides specifically that "The courts of the Hong Kong Special Administrative Region shall exercise judicial power independently, free from any interference" It is again significant to note that in his speech delivered on July 1, 2022, President Xi acknowledged that "the judiciary exercises its power independently."

Although the common law system has been and will be maintained in Hong Kong, it is based on the constitutional order founded on the Constitution of the People's Republic of China. As Sir Anthony Mason (former Non-Permanent Judge of the Court of Final Appeal) observed in the Court of Final Appeal's judgment in *Lau Kong Yung v The Director of Immigration* (1999) 2 HKCFAR 300 at 344, "[The] conjunction of a common law system under a national law within the larger framework of Chinese constitutional law is a fundamental aspect of the principle of 'one country, two systems'."

Therefore, there must be some linkages between the two systems; one of which is the power of the Standing Committee of the National People's Congress (NPCSC) under Article 67(4) of the Constitution to interpret laws, including those national laws applicable to Hong Kong. There are corresponding provisions in Article 158 of the Basic Law and Article 65 of the Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region

(Hong Kong National Security Law).

On December 30, 2022, the NPCSC interpreted Articles 14 and 47 of the Hong Kong National Security Law (the Interpretation). There are some suggestions that the Interpretation has expanded the powers of the Chief Executive and the Committee for Safeguarding National Security of the Hong Kong Special Administrative Region (the Committee), eroding the judiciary's independent judicial power and even putting the Chief Executive and the Committee above the law. Such suggestions are plainly wrong and misconceived. The Interpretation is, by definition, a clarification of the original intent and purpose of those provisions; it does not confer any new power on anyone.

Article 47 of the Hong Kong National Security Law provides that the courts shall obtain a certificate from the Chief Executive to certify whether an act involves national security or whether the relevant evidence involves State secrets when these questions arise in the adjudication of a case. It does not apply to any question, other than the two specific questions prescribed by that article. The certificate issued by the Chief Executive constitutes a piece of conclusive evidence binding on the court. The Chief Executive does not, however, exercise any judicial power. There is indeed a similar provision in Article 19 of the Basic Law under which the courts shall obtain a certificate from the Chief Executive on questions of fact concerning acts of state such as defence and foreign affairs.

Under Article 14 of the Hong Kong National Security Law, the Committee, chaired by the Chief Executive and consisting of other members, is empowered to make decisions concerning the safeguarding of national security, such as formulating policies and advancing the development of the legal system and enforcement mechanisms. The Committee shall have a National Security Adviser designated by the Central People's Government and provide advice to the Committee. While decisions made by the Committee shall not be amenable to judicial review, the Committee must of course act within the scope of its duties and functions prescribed by Article 14. It does not confer any judicial power or function on the Committee.

Articles 14 and 47 of the Hong Kong National Security Law as interpreted by the NPCSC are entirely consistent with the well-established common law principle that, on matters concerning national security, it shall be for the executive authorities, rather than the judiciary, to decide and have the final say. In an authoritative passage in the judgment of the Privy Council in *The Zamora* [1916] 2 AC 77 at 107 decided back in 1916, Lord Parker of Waddington said "Those who are responsible for the national security must be the sole judges of what the national security requires. It would be obviously undesirable that such matters should be made the subject of evidence in a court of law or otherwise discussed in public." In another landmark judgment of the House of Lords in *Council of Civil Service Unions and others v Minister for Civil Services* [1985] 1 AC 374 at 412 decided in 1985, Lord Diplock said "National security is the responsibility of the executive government; what action is needed to protect its interest is, as ... common sense dictates, a matter upon which those upon whom the responsibility rests, and not the courts of justice, must have the last word. It is par excellence a non-justiciable question. The judicial process is totally inept to deal with the sort of problems which it involves."

Not only that the Government of the Hong Kong Special Administrative Region, being the executive authorities of the Region, will not interfere with the Judiciary in strict compliance with Article 85 of the Basic Law, it has also been taking proactive steps to defend the Judiciary. Back on July 5, 2022, five days after I became the Secretary for Justice, in a press statement issued in response to a suspected case of intimidation against a staff member of the Judiciary, I said "In Hong Kong where the rule of law is upheld, no act of intimidation or violence which ... constitutes contempt of court will be tolerated. The Hong Kong Special Administrative Region Government will pursue seriously against any person who commits any such act ... to defend the integrity of the court, ensure the due administration of the justice and maintain public order." More recently, the Government issued press releases to express strong opposition to false accusations made by a foreign government against the verdict and sentence in a fraud case.

As another example, the Secretary for Justice, as the guardian of public interest and the due administration of justice, had brought

contempt proceedings against those who breached an injunction to restrain doxxing against judges and their families. In a recent decision *Secretary for Justice v Chan Po Hong* [2022] HKCFI 1468, a defendant who made nuisance calls to a judicial officer and his wife was sentenced to 14 days' imprisonment suspended for 12 months.

On this occasion, I wish to make a solemn pledge that the Government will do its best to defend the Judiciary so that it may exercise their constitutional powers, and discharge its constitutional duties, independently free from any interference.

If one has to ask what the most unique strength of Hong Kong's common law system is, I would say it is its resilience. It has a long tradition of over a century, and has stood the test of time. We have the exceptional ability to prove sceptics and pessimists wrong.

That said, there is no room for complacency. It is crucial to maintain and enhance people's trust and confidence in the legal and judicial system. Since false and misleading information may spread from time to time, it is important to educate the general public on some basic and correct knowledge about our system. While we must hold on to the core values of the system such as the importance of judicial independence, it is necessary for us to adapt to needs and changes in society, in particular, to ensure that people will have access to justice in an affordable and efficient manner. To promote rule of law education and to enhance access to justice are precisely the overriding objectives of various initiatives which my Department is implementing in the coming year.

The resilience of Hong Kong's common law system is largely built on the unshakable faith in the doctrine of the rule of law held by all those who contribute to the system, whether they are judges, barristers, solicitors or government lawyers. Despite the different roles we play, we shall unite to strive to earn the people's respect, trust and confidence. My dear fellow citizens of Hong Kong, my dear countrymen and friends from overseas, the rule of law cannot be safeguarded by judges and legal professionals alone. If you do care about and love Hong Kong, which I am sure you do, I would urge you to show and give us your support and understanding.

We celebrated the new year about two weeks ago, and the Chinese New Year of Rabbit is approaching. I wish to conclude by wishing you and your families a happy and healthy new year!

Ends/Monday, January 16, 2023

**Speech given at the Opening of Legal Year on 16 January 2023 by the
Chairman of the Hong Kong Bar Association**

Victor Dawes SC

Chief Justice, Secretary for Justice, Deputy Secretary for Justice, President of the Law Society, Judges, distinguished guests, ladies and gentlemen.

1. This time last year, the Ceremonial Opening of Legal Year was held amidst the pandemic's "5th wave". A small group of us gathered in the Court of Final Appeal before our judges. Other members of the profession and the public could only participate remotely. We all knew the situation was going to get worse before getting better.

Developments in 2022

2. 2022 has indeed proved to be an eventful year for the legal community in Hong Kong, on multiple fronts. A number of events were particularly significant.
3. The resignation of Lord Hodge and Lord Reed as non-permanent judges of the Court of Final Appeal in February triggered debates over the future of the Court. The decision of the other overseas judges to remain was warmly welcomed by the legal profession in Hong Kong and the community at large. We are also delighted that Mr Justice Patrick Keane AC, retired justice of the High Court of Australia has agreed to join our Court of Final appeal as an overseas NPJ. This is a clear vote of confidence to our apex court.

4. The address by President Xi in Hong Kong on the 1st of July injected much confidence into our system. The President affirmed in clear, strong terms that there was no reason to change the “One Country Two Systems” in the long run and that to maintain Hong Kong’s distinctive status and advantage, the common law system should also be maintained. He emphasised the system of checks, balances and cooperation between the executive and legislative branches. Most significantly, he also reiterated that the judiciary should continue to exercise its power independently.
5. In the same month, the new administration was sworn in. My learned friend Mr Paul Lam SC became our 5th Secretary for Justice since 1997.
6. Last but certainly not least, the decision by the Chief Executive to seek the interpretation of the Standing Committee of the National People’s Congress (“NPCSC”) under Article 65 of the National Security Law (“NSL”), and the decision that was made on 30 December 2022, have understandably prompted discussions about the rule of law and judicial independence in Hong Kong. In line with the principle of “One Country Two Systems”, the NPCSC clarified the power vested in the Chief Executive and the Committee for Safeguarding National Security of the Hong Kong Special Administrative Region (“the Committee”). The subject matter of the request is to be decided in Hong Kong rather than in Beijing.
7. Perceived tensions between the imperatives of safeguarding national security and judicial independence are far from unique to Hong Kong. Sir Jack Beatson who was a Law Commissioner in England and Wales who

subsequently became a Lord Justice of Appeal had this to say in a lecture he delivered in 2008:

“The consequent tension is an inevitable feature of the relationship between an independent judiciary and the executive. Lord Bingham has said the tension is “entirely proper” because, particularly at times of perceived threats to national security: “governments understandably go to the very limit of what they believe to be their lawful powers to protect the public, and the duty of the judges to require that they go no further must be performed if the rule of law is to be observed.” Notwithstanding this understandable tension, however, the executive, legislative and judicial branches of the state should show appropriate respect for the different positions occupied by the other branches when fulfilling their respective constitutional roles.”

8. As the Bar recently explained, the exercise of any power by the Chief Executive and the Committee has important ramifications on several cornerstone features of our legal system - the right to be legally represented, the right to a fair trial, and the perception of fairness in a trial. These are all fundamental and foundational matters to the rule of law and the administration of justice in Hong Kong.
9. We urge and expect the Chief Executive and the Committee to exercise their power with great caution and restraint, with these fundamental matters in close view. We have likewise urged the Chief Executive and the Committee to have close regard to the guaranteed constitutional rights of a defendant in a criminal trial – rights that are notably preserved in NSL cases by Articles 4 and 5 of the NSL. In so doing, they will foster the

public's trust in the rule of law, judicial independence and the protection of human rights – all to the benefit of the common goal of effective and just public administration.

Developments in 2023

10. As we now press ahead through 2023, the focus of the legal community and the public will no doubt be on the various high profile public order and NSL trials that will be heard this year. We will have to demonstrate that defendants at the receiving end of the most serious allegations will be dealt with fairly and impartially. We owe a duty to society to ensure that the justice system, and in particular the trial process, is effective, fair, and compliant with the rule of law. I wish to take this opportunity to explain to the public the duties owed by those involved in the criminal trial process.

Prosecutors and defence counsel

11. For those of us prosecuting cases – the international legal community will be watching closely. With high profile prosecutions, the comments, criticisms or expectations of those outside the process may not always be fully informed, fair or reasonable. In such circumstances, Section 3 of the Prosecution Code shines a clear guiding light. The prosecutor's duty is to comply with and promote the rule of law. To ensure that the defendant has a fair trial, rather than securing a conviction. To act impartially on behalf of the community as a "minister of justice". To assist the Court to arrive at the truth and uphold justice. When situations are delicate, you must sometimes go out of your way to be fair without compromising your duties.

12. The task of those on the other side of the Bar table defending criminal complaints is of course challenging. As a reflection of their central role in the legal process, the duty owed by advocates has over the years been the subject of much careful consideration and discussion. In his recent speech at Gray's Inn in September last year, entitled "Fearless Advocacy – More Relevant and Practical than Romantic", our former Chief Justice Mr Geoffrey Ma had this to say:

"... There is something more to being an advocate that is often hard to pin down or to define with any degree of precision. It reflects the duty owed to the public interest while at the same time acknowledging the duty owed to the client, and the recognition that these two pillars of an advocate's professional duty must be in practice be reconciled. Put another way, the traditional duties owed by advocates to the administration of justice (duties owed to the court) and to the client - both of which in equal measure represent the public interest – demand a certain quality of advocates. What is this quality and why is it relevant?"

I identify this vital quality as fearless advocacy. Its relevance is that it underlies the practice of law in our courts. These days, and this applies the world over, when the law and the work of the courts are often viewed through the multi-faceted prism of politics and geopolitics, and of hyperbole and diametrically opposite - and seemingly irreconcilable - positions taken, it is crucial that the law and its proper purpose remain intact. When cases come to be dealt with by courts, however controversial they may be or however far-reaching the consequences, it is critical that we do not lose sight of

the fundamentals. And these fundamentals ultimately represent the foundation of the rule of law and the concept of justice itself.”

13. Many of our members have taken up sensitive and difficult criminal cases over the past few years. Members of our criminal bar ought to be commended for living up to the best traditions of the bar in taking up these difficult cases and in defending their clients fearlessly.
14. What is of course unfortunate is that our members continue to be criticized because of the brief to defend these clients. The public must appreciate that lawyers briefed to defend appear in court are expected and required to do so not because of any sympathy on their part with the aims or methods of the accused, but by dint of their professional duties to take on cases that are within their range of experience and competence. This duty includes what is known as the “cab rank” rule. That rule precludes barristers from turning away clients based on any personal opinions the barrister may have about matters such as the client’s character, reputation or cause.

Legal Aid

15. There is another key player in our criminal justice system that is often overlooked but to which credit should also be given – and that is our robust and comprehensive legal aid system. Our situation is in sharp contrast to the difficulties faced by members of the English bar. I visited London for their opening of legal year in October last year when the English Bar was on strike because of issues over fees in publicly funded cases. Speaking with Bar leaders around the world on this subject, it is clear that our system compares favourably to other jurisdictions and the good work of the

Director of Legal Aid and his team in assisting fair access to the legal system should be acknowledged.

The Judiciary

16. The role of our judges is of course paramount. The proper administration of justice depends on judges discharging their duties and responsibilities with excellence and fidelity. Judges must ensure that a fair trial takes place and adhere strictly to the requirements of the law. In the discharge of their responsibilities, judges look only to the letter and spirit of the law, and nothing else. Their personal views on the legislation in question, and broader political, economic or social considerations, as opposed to legal considerations, simply do not enter into the equation.
17. The duties and responsibilities on judges are constitutional duties and responsibilities and the exercise of judicial power means that all judicial decisions are based on the law and nothing else. Article 92 of the Basic Law states that judges are only chosen on the basis of their judicial and professional qualities. The judicial oath, which Article 104 of the Basic Law states must be taken, requires all judges to uphold the Basic Law and serve the HKSAR conscientiously, dutifully, in full accordance with the law, honestly and with integrity, safeguard the law and administer justice without fear or favour, self-interest or deceit.
18. It is of great and continuing importance that the role of our judges is understood and that the public are reminded of the nature and limits of that role. The task of our judges has never been easy and their heavy workload is something that the public may not appreciate. At the Ceremonial Opening of Legal Year in January 1997 which was held shortly before the

establishment of the HKSAR, Mr Justice Power, the then Acting Chief Justice of Hong Kong had these concluding remarks:

“Let me finally assure all of the people of Hong Kong that they have an independent, capable and hard-working judiciary, versed in the common law and that they have a judiciary which will, without fear or favour, administer the law in the coming years.”

19. I can say with confidence that our judges have fulfilled that promise over the years and I am confident and they will discharge their duties without compromise and without fear or favour in the years to come.
20. Hong Kong has a unique history and place in the world. It has long flourished amidst many challenging currents and “waves”. With the deep harbour of our legal system and shared values, I am confident that our community will continue to thrive in times ahead.
21. On this note, on behalf of the Bar, I wish all of you and your families a fruitful and fulfilling 2023 and a healthy and peaceful Year of Rabbit.

Victor Dawes SC

Chairman of Hong Kong Bar Association

**SPEECH OF MR C M CHAN
PRESIDENT OF THE LAW SOCIETY OF HONG KONG
AT THE OPENING OF THE LEGAL YEAR 2023
16 JANUARY 2023**

Good afternoon, Chief Justice, Secretary for Justice, Chairman of the Hong Kong Bar Association, Members of the Judiciary, Members of the Legal Profession, Distinguished Guests, Ladies and Gentlemen,

1. 2022 has been an eventful year filled with celebrations in various forms marking the 115th anniversary of the establishment of the Law Society of Hong Kong, and the 25th anniversary of the establishment of the Hong Kong Special Administrative Region.
2. I am honoured to be speaking at this important occasion on behalf of the Law Society, an organisation that has stood the test of time for 115 years witnessing the development of the profession for over a century. I would like to start by sharing a brief overview of the profile of the profession.
3. In Hong Kong, the legal profession is self-regulatory, an important characteristic that reinforces the independence of the profession.
4. The Law Society is the professional and regulatory body of solicitors in Hong Kong. Our membership maintains a steady annual growth of 4 to 5%. At the end of 2022, there were over 13,100 Hong Kong solicitors, 931 Hong Kong law firms, 1,442 foreign lawyers from 34 jurisdictions and 77 foreign law firms from 20 jurisdictions registered with the Law Society.

One Country, Two Systems

5. 2022 also marks the 25th anniversary of the implementation of “One Country, Two Systems”. Principles underlying this unique system are enshrined in our Basic Law.
6. In his address at the meeting celebrating the 25th Anniversary of Hong Kong’s return to the Motherland on 1 July 2022, President Xi Jinping reiterated that “Hong Kong’s distinctive status and advantages” and “the common law” shall be maintained.

7. The commitment to preserve the characteristics of each of the two co-existing and distinct systems while maintaining the Central Government's sovereignty and allowing Hong Kong a high degree of autonomy is evident in the provisions of the Basic Law. Here are two prominent examples.
8. First, notwithstanding its status as a local administrative region of the People's Republic of China, Hong Kong is authorised under Article 8 of the Basic Law to maintain the common law system. Further, with English and Chinese both being official languages under our Basic Law, Hong Kong is the only city in the world that has a truly bilingual common law system.
9. Second, while the Basic Law provides that the power of its interpretation vests in the Standing Committee of the National People's Congress ("NPCSC"), the Hong Kong courts not only enjoy independent judicial power including that of final adjudication under Article 19 (which before the Reunification on 1 July 1997 lay with the Privy Council in London), but have also been authorised by NPCSC to interpret on their own, in adjudicating cases, the provisions of the Basic Law which are within the limits of Hong Kong's autonomy under Article 158.

Legislative interpretation

10. The commitment to faithfully implementing "One Country, Two Systems" in accordance with the Basic Law is also evident through the tremendous effort placed in according proper respect for the core values and legal principles in each of the two distinct systems while resolving the differences arising from their co-existence. The manner in which the power of legislative interpretation has been invoked is a good example of this commitment.
11. The Basic Law is enacted by the National People's Congress in accordance with the People's Republic of China Constitution and Article 67(4) of the Constitution states that the NPCSC has power to interpret laws. Further, under Article 67(1), the NPCSC is charged with the duty and function to interpret the Constitution and oversee its enforcement.
12. Legislative interpretation is an interpretation of the law by the law maker. In China, it is a constitutionally entrenched concept which, however, is novel to the common law system being practised in Hong Kong. For those who are not familiar with the concept, any misunderstanding of how it fits in the judicial process in a common law system may cause confusions.
13. Over a span of 25 years since 1997, the power of legislative interpretation, though constitutional and legal, has been invoked sparingly with caution and with public explanation on, firstly, the reasons why the power has to be invoked (for example, the need to clarify the legislative intent on matters of principles from the maker of the law); secondly, the legal basis on which the power is exercised (for example, the relevant sections in the Constitution and

the Basic Law); and thirdly, the impact, if any, on the specific judicial process out of which the legislative interpretation arises.

14. So far, there have been five instances where the NPCSC has interpreted the Basic Law pursuant to Article 158.
15. The sixth legislative interpretation related to the National Security Law (“NSL”) made by the NPCSC recently on 30 December 2022 upon the request of the Chief Executive on issues arising out of an application for admission of an overseas counsel for a case involving the NSL.
16. Article 65 of the NSL provides that the power of interpretation of the NSL vests in the NPCSC. This sixth interpretation provided procedural guidance on existing provisions in the NSL. The adjudication of the relevant case itself based on the facts and evidence adduced before the court has been left entirely in the remit of the judiciary.

Judicial officers as staunch defenders of judicial independence

17. In recent years, attempts to politicise some of the court’s work have presented challenges to the perception of judicial independence, a core value of the rule of law. We are grateful to all judicial officers for maintaining a strong, independent and internationally respected judiciary, particularly during these difficult times, and to all overseas non-permanent judges serving on the Court of Final Appeal who bring with them a diversity of international judicial experience. Their support speaks louder than words about the respect they have for the commitment of Hong Kong’s judiciary to the rule of law and judicial independence.

Looking Ahead

Huge opportunities

18. Looking ahead, huge post-pandemic opportunities await us.
19. The 14th Five-Year Plan is the blueprint guiding the future national development of China to 2035. It continues to support Hong Kong to enhance its status as an international financial, transportation and trade centre, a global offshore Renminbi business hub, an international asset management centre and a risk management centre; establish itself as a centre for international legal and dispute resolution services in the Asia-Pacific region; and promote service industries for high-end and high value-added development.
20. The 14th Five-Year Plan also raises for the first time the support for Hong Kong to enhance its status as an international aviation hub, to develop into an international innovation and technology hub, a regional intellectual property

trading centre and a hub for international cultural exchange between the East and the West.

21. With all these initiatives, coupled with the opportunities brought by the Belt & Road Initiative and the Greater Bay Area development, a steady supply of quality legal services will be in great demand. As always, we welcome legal talent from around the world to enrich our legal service supply to tap into the huge potential of these future developments.

Modern infrastructure

22. It is pleasing to note that much progress has been made in the use of electronic technology in the courts. Since April 2020, the judiciary has been conducting remote hearings in civil proceedings where appropriate through using video conferencing facilities or phones. From January 2021, all levels of civil courts may make use of remote hearings where necessary and appropriate.
23. The integrated Court Case Management System offers electronic services including sending and receiving case-specific court documents to and from the e-Courts, inspecting or searching filed documents and other case-related information held by the e-Courts, searching cause books, and making electronic payments.
24. The integrated Court Case Management System has already been implemented in personal injuries action, tax claim proceedings, civil action proceedings and employees' compensation cases in the District Court as well as summons cases of the Magistrates' Courts.
25. At present, remote hearings cannot be used for criminal matters because of legal impediments. A consultation by the judiciary on the drafts of the Courts (Remote Hearing) Bill, Practice Directions and Operational Guidelines aiming to provide a general framework to enable the use of remote hearings for all types of court proceedings was launched in June and completed in September 2022. The Law Society has provided its views on the draft Bill.
26. Application of electronic technology will be the future norm. We look forward to embracing a court management system that improves the access to justice by taking advantage of the advancement in technology to enhance its efficiency and its ability to continue operation despite physical disruptions like the COVID pandemic, which I hope is now a thing of the past.
27. On this note, may I wish you all a fulfilling 2023!
28. Thank you.