

Speech by Victor Dawes SC, Chairman of the Hong Kong Bar Association at the Ceremonial Opening of Legal Year 2024

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

Welcome and the year in review

1. On behalf of the Hong Kong Bar Association, a very warm welcome to this Ceremonial Opening of the Legal Year. We are particularly grateful to those who have travelled to Hong Kong from other jurisdictions for this special occasion.
2. Today's gathering is a strong reflection of a precious reality: the ongoing commitment of so many to the rule of law and the administration of justice in Hong Kong. The continued wellspring of support and dedication – to the rule of law, to our legal system, and to our way of life – is highly valued and indeed never to be taken for granted. This is a strong anchor in currents of challenges and change.
3. The past year has indeed seen remarkable currents of global economic uncertainty; ongoing international armed conflicts; social conflicts and distrust within many communities across the world; and the rapid advancement of generative artificial intelligence. With these challenges come distinct needs and

opportunities for closer co-operation within the international legal community. Cross-jurisdictional understanding and co-operation are more important than ever.

4. Thankfully, 2023 was a year where Hong Kong was finally able to leave the pandemic behind and reconnect afresh with the Mainland and the rest of the world.
5. 2023 was also a year where our judges and members of the legal profession once again demonstrated their strong commitment and capacity to serve the people of Hong Kong.

Decisions of our courts

6. I shall begin by taking you to the work of our apex court, the Court of Final Appeal. As always, the matters heard by the Court over the past year have involved complex questions of law intertwined with wider social and political issues.
7. In the limited time available, I will highlight 2 examples of the ongoing commitment of our Courts in safeguarding the fundamental rights of the people of Hong Kong. As always, the Court has sought to discharge its critical role as guardian of the rule of law while and steering clear from matters that belong properly to the political or governmental arena.

8. In the case of *Sham Tsz Kit v Secretary for Justice*, which concerned issues around same-sex marriage in Hong Kong, the Court did not decide on the general question of whether same-sex marriage should be recognised in Hong Kong, making it clear that this is a matter of public policy. The Court confirmed that Article 37 of the Basic Law protects the right to marry in terms of opposite-sex marriage and not same-sex marriage, and that specific constitutional provision addressing marriage was one that prevails over general provisions such as Article 25, which states in general terms that all Hong Kong residents should be equal before the law.
9. At the same time, by a majority, the Court held that the Government was in breach of its positive obligations under Article 14 of the Hong Kong Bill of Rights in failing to provide same-sex couples with an “*alternative framework conferring legal recognition on their relationship in order to meet basic social requirements and to provide them with a sense of legitimacy, dispelling any sense that they belong to an inferior class of persons whose relationship is undeserving of recognition*”.
10. The Court’s carefully balanced and articulated decision has been welcomed not only by scholars and activists but also by the international business community in Hong Kong.

11. Moving onto criminal law, the longstanding vigilance of our Courts in protecting freedom of speech and the press against unwarranted or disproportionate interference is well illustrated by the decision of ***Choy Yuk Ling*** in the Court of Final Appeal. There, the journalist in question successfully overturned a conviction of making a false statement when she applied for a Certificate of Particulars of a vehicle involved in an alleged crime when seeking to gather evidence for the purpose of investigative journalism.
12. Again, the careful and clear approach of the Court in protecting the freedom of speech and of the press enshrined in Article 27 of the Basic Law and Article 16 of the Hong Kong Bill of Rights was very much welcomed by the legal profession and journalists in Hong Kong.
13. It would be remiss of me here if I did not pay tribute to Derek Chan SC, one of our Vice-Chairmen, for appearing *pro bono* for the appellant in ***Choy Yuk Ling*** when the case reached the Court of Final Appeal. This and other instances of members of the Bar acting *pro bono* or in the independent role of *amicus* in important cases before the Courts over the past year stand as valuable examples to the public and our junior members of the best traditions of the Hong Kong Bar, and in particular our core values

of independence and integrity in service to the community.

14. The Secretary for Justice will forgive me for only referring to the two decisions where he was on the losing side. In fact, a Government Minister once asked me if the state of our rule of law is measured by how many cases they have lost. I said this is certainly not how I would put it. But what is true is that decisions like those just referred to vividly illustrate the way in which our apex court, like all Courts in Hong Kong, exercises its independent power of adjudication in resolving the disputes in ways that are just and legally sound, and which reaffirms the core tenet that all of us in Hong Kong are and must remain equal before the law.

Sub judice

15. It will come as no surprise that there are those who were unhappy with the decisions I mentioned. This is entirely natural when it comes to decisions featuring both complex and controversial issues of public concern. And as always, it is worth reiterating that, while there exists ample room for debate over court decisions, it is very much in the interest of the justice system and public interest as a whole that these debates – and any criticisms made within them – be informed and grounded by proper reasons.
16. Put simply, it is misguided and wrong to sit in judgment of the judicial process based on either one's liking or dismay of the

outcome of a particular case without regard to the reasons given by the Court for a particular result, and the process by which that result was reached.

17. Relatedly, it is a worrying trend when anyone chooses to pay no regard to the *sub judice* rule when seeking to express opinions on ongoing cases and decisions of our courts.
18. The *sub judice* rule prohibits reference being made by the public to a case pending or under consideration by a court of law which might carry a real risk of prejudice to the case. There need not be actual prejudice. The rule applies as long as there is a “real risk” of prejudice.
19. For criminal proceedings, the *sub judice* rule applies once a person is arrested, a warrant or a summons has been issued. The temporal scope of the rule extends until the determination of guilt of the defendant.
20. The *sub judice* rule exists to protect the defendant’s right to fair trial, a fundamental right enshrined in Article 87 of the Basic Law and Article 10 of the Bill of Rights Ordinance. It also exists to maintain public confidence in the legal system. I urge all members of our community to exercise caution and restrain when exercising their freedom of expression in commenting on ongoing cases.

The Bar in 2023

International Engagement

21. Moving onto the work of the Bar Association - 2023 has certainly been an eventful year. Moving away from the pandemic years, we have focused on reminding the world of the ongoing importance of the strong and independent Bar in Hong Kong, and raising awareness in the Mainland of the distinct strengths and value of the independent Bar and the legal system in Hong Kong.
22. On the international front, together with our 2 Vice Chairmen and numerous members of our council, we had the privilege in the past year of representing the Bar and speaking at international conferences in the United Kingdom, France, India, Finland, Singapore and Malaysia.
23. Given the centrality of the topic, I am particularly grateful to the English Bar for inviting me to speak at their roundtable at their Opening of Legal Year in October on the importance of the independent Bar.
24. Over the past year, we also had the opportunity to connect with many of the non-permanent judges of our Court of Final Appeal from other jurisdictions. Their contribution to the administration of justice in Hong Kong is well-recognised and we are also grateful for their support to the Hong Kong Bar.

25. The international legal community count on the Hong Kong Bar to give them a fair and unbiased view of the situation regarding the rule of law and administration of justice in Hong Kong. We will continue to discharge that role by laying out all the important facts for them from our distinct and close vantage point. In so doing, we will continue our commitment to neither sugar-coating nor sounding unduly alarmist notes over the varied and continuously evolving aspects of our system and situation.

Engagement with the Central People's Government

26. With the opening of the border, we have had one of the busiest years in our history, reconnecting with representatives from the Central People's Government, regional agencies and our counterparts in the Mainland.
27. In April, the Bar visited Beijing for the first time in 5 years. We were received warmly by representatives of the Central People's Government and the legal community in the Capital. Our interactions were most encouraging and have reaffirmed the great value in resuming and continuing with frank and good faith dialogue in this sphere. Such exchanges are not only vital to the future of the Bar but much aligned with the ethos of the Hong Kong community, and the importance we place on having wide-ranging and candid exchanges of views on important legal issues.

28. In all our meetings, our friends in Beijing were genuinely interested in the honest views of the Bar on a wide range of topics to do with the situation in Hong Kong. The conversations were frank and also forward-looking.
29. The discussion also covered the future of the independent Bar in Hong Kong. Given that there is no independent barristers' profession in Mainland China and in many other jurisdictions around the world, some of our young members were understandably concerned about the future of the Bar as we know it in Hong Kong. Yet in all my conversations with Central Government representatives in the past year, the message to us has been crystal clear, and highly encouraging: they recognise the independent Bar as an integral part of the common law tradition in Hong Kong, and that tradition should remain unchanged.

Looking ahead

30. Looking ahead, I am sure 2024 will be an equally eventful year for Hong Kong, with important national security cases being tried before our courts and with the imminent promulgation of the Article 23 legislation. Hong Kong will definitely be watched closely by the international legal community and we will have to demonstrate that we are capable of meeting these challenges.

Article 23

31. The headlines in the past couple of weeks have been partly dominated by Article 23. We have in the past acknowledged that there is a constitutional duty on the part of the HKSAR Government under Article 23 to enact domestic law, and this reality is now part of the legislative agenda for 2024 submitted by the Government.
32. Following the enactment of the National Security Law, the Article 23 legislation will no doubt trigger a fresh round of debate over the future of our city. Hong Kong has long prided itself on the high degree of freedom it has enjoyed as an international city with a distinct position and role in the wider region. Over the years, this freedom has underpinned a unique and hugely successful ecosystem for business activities, cultural exchanges and the tourism industry. Paired with a first class legal system, our freedoms have supported Hong Kong's role as an international financial centre.
33. Given the challenging geo-political currents around us, there will likely be attacks on the legislation contending that Hong Kong is no longer a free city and the rule of law is dead. Whilst some of these remarks may not be bona fide, many people do have genuine concerns.

34. To truly serve and protect Hong Kong and its people, the new legislation will have to be clear and precise. The consultation process will have to be transparent and thorough in order to refute any suggestion that our Government is not prepared to listen. The balance between safeguarding national security and protecting fundamental rights as enshrined in the Basic Law ought to be carefully calibrated.
35. I am confident that our Government will give serious consideration to the views of the Bar in the legislative process. We will do our very best in making the most out of the expertise amongst our members to convey our honest comments and professional insights.

Our 75th Anniversary

36. The Hong Kong Bar will be celebrating its 75th anniversary in 2024. Over the past 75 years, the Bar has played a vital role in the administration of justice in Hong Kong. We have had the great privilege of contributing to the wellbeing of the city and its people. We can assure the people of Hong Kong that the determination to do so will not waver.

The Judiciary

37. Turning finally to our judges. The public may not appreciate the pressure and workload faced by our judicial officers. Internally,

most of our judges have been dealing with extremely heavy workloads. Externally, there are often unfair criticisms and pressure applied against our judges from overseas. In the face of such challenges, it is most noteworthy that some of our judges have chosen to defer their retirement or stayed on as part-time deputy judges in order to support the organisation and are handling important and difficult cases.

38. In the Chief Justice's Address at the Opening of Legal Year in 2001, Chief Justice Andrew Li had this to say about the judges who were resolved to stay on to steady the ship shortly after the 1997: "Like old generals, most of them wanted to fade away to enjoy their well earned retirements and were staying on out of a sense of duty". On behalf of the Bar, we would likewise like to thank and pay tribute to you for your service and dedication.
39. Amidst the realities of our complex world and its challenging times, we in Hong Kong have a very great asset: that of hardworking and capable judicial officers who discharge their judicial functions tirelessly and with integrity.
40. Whilst there are no doubt challenges awaiting us, the sun will always shine after the storm, and new growth awaits. To weather the challenges before us, the Judiciary and the legal community will need the support of the public. I urge the public to support our judiciary. On the part of the Bar, we promise to do our very best

for Hong Kong in the coming year.

41. On behalf of the Bar, I wish you a safe and prosperous 2024 and a healthy year of the Dragon.

Victor Dawes SC
Chairman of the Hong Kong Bar
Association

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