SPEECH OF THE CHAIRMAN
OF THE HONG KONG BAR ASSOCIATION

AT THE OPENING OF THE LEGAL YEAR 2012
9TH JANUARY 2012

1. **Chief Justice, Secretary for Justice, President of the Law Society, members of the Judiciary, members of the legal professions, Distinguished Overseas Guests and Leaders of the various Legal Organisations from around the world, Ladies and Gentlemen.**

2. **This is a special occasion that marks the gathering of all ranks of the judiciary together with members of the two branches of the legal profession as well as friends and well wishers of the legal community both from home and from afar. It is a time to reflect and take stock of what has transpired over the last year as well as to identify and address the challenges that lie ahead of all the stakeholders involved in the administration and dispensation of the system of justice in and the practice of law in the Hong Kong Special Administrative Region.**

3. **The past year has been a busier than usual year for the Bar Council. We issued five Press statements as well as a set of submissions to respond to and deal with the Administration's**

proposals regarding the replacement mechanism in the event of a vacancy arising in the Legislative Council by reason of a resignation.

4. **The Bar felt compelled to speak out and explain to the public the concerns we had about these proposals as it concerned and affected their right and choice of vote. Apart from being a strong, vibrant and independent professional organisation we are a vital pillar engaged in upholding the rule of law in the HKSAR.**

5. **The Bar is fully conscious of its responsibility to speak freely and fearlessly on issues that affect the fundamental rights of the community at large. This is a role that the Bar has discharged in the past, and I am certain one that we will continue to do so in the years to come.**

6. **I turn, with some regret and concern, to address a matter which is, and has been, a perennial concern of the Bar, and that is Legal Aid. My predecessor had at last year's opening of the legal year espoused the hope that this may not need to be addressed again.**

7. **The advent and the successful implementation of the Civil Justice Reforms can only be realised if they are accompanied by a process whereby there is genuine and tangible access to justice. In the October 2010 Policy address, the Chief Executive promised that the Administration would provide the seed money of an additional $100 million for the expansion of the Supplementary Legal Aid Scheme {SLAS}. This was to extend and expand the type and scope of cases which would become eligible for legal aid.**

8. **Almost 15 months have passed by, and regretfully, the Administration has still to put in place the necessary legislative changes to provide this extended umbrella of legal aid to those deserving and in need of it. This brings to mind what Winston Churchill said: "*Sometimes it is not enough to do our best; we must do what is required*."**

9. **I would call upon the Administration to stop dragging its feet in this matter and to respond expeditiously to this long overdue expansion. Denial or delay in providing access to justice is a denial of justice. The consequence of this denial/delay is that it**

will undermine the rule of law in general and impact on the due administration of justice in Hong Kong in particular.

10. The Bar is concerned that a possible corollary consequence of the delay in expanding the scope of legal aid is the increase in the number of cases where one or more parties are unrepresented and are litigants in person {LIP}.

11. Following the implementation of the CJR, the number of cases where at trial at least one party is a LIP is as much as 35% in the Court of First Instance and over 47% in the District Court. These are quite large percentages and are of considerable concern to the Bar.

12. It is accepted and recognised that there may be a few litigants who may simply choose to act in person for reasons of their own. On the other hand, it seems more likely that the majority are acting in person because they fall outside the legal aid net either due to the Financial Eligibility Limits and/or because their cases are of a type that are outside the scope of cases presently within the umbrella covered by legal aid.

13. The increased Financial Eligibility Limits for Legal Aid came into effect on 1st June 2011. Although the Bar welcomes the

increase, it is nevertheless well below what the Bar has over the years been recommending. Initial reports seem to suggest that despite the increase in the eligibility limits, there has not been correspondingly any dramatic increase in the number of applications for legal aid.

14. This perhaps highlights and underscores the inadequacy of the increase. There would appear to be a reasonably large pool of Hong Kong people who are still unable to filter into the legal aid umbrella and thereby gain access to justice.

15. Although Judges do try and help unrepresented parties, there are limits to the extent to which they can help. Given the adversarial system under which we operate, understandably the Judge has to be fair to both sides. LIP are a drain on the limited judicial resources both in terms of time and effort. Furthermore, they also impose a strain on the party with legal representation, as issues or matters of evidence cannot be discussed or agreed by the parties so as to reduce the trial length and the use of Court time.

16. A paper introducing a 2-year Pilot Scheme to Provide Legal Advice to Litigants in Person has been put forward by the

Administration in late November 2011. The proposal effectively is for members of both branches of the profession to undertake pro bono work by giving advise on "procedural" matters. I am proud to say that members of the Bar do contribute considerable amount of their time and services undertaking pro bono work. The Bar has been operating its own "Bar Free Legal Service Scheme" since about 2000.

17. The concern of the Bar is whether this Pilot Scheme will adequately and sufficiently address the problem of LIP. This is something that we will have to wait and see. The Bar is studying the proposals and we will be providing our response in due course. It must however be recognised and acknowledged by the Administration that the proposed Pilot Scheme cannot be the panacea or the solution to the Administration's primary responsibility to the community as a whole – namely, to ensure there is implemented a sufficiently wide and extensive legal aid scheme so that people who cannot genuinely afford private legal representation are not denied access to justice.

18. Each year a new generation of young lawyers are brought into the fold of the Bar possessing keen minds, compassionate heart

and with strong and independent character. In the ever changing legal landscape, they face tremendous challenges in terms of securing work and earning sufficiently to make a living at the Bar.

19. The Bar Council is fully aware of the difficulties they face. Since assuming the office of Chairman almost a year ago, I have been working closely with the Director of Public Prosecutions to help the junior end of the Bar.

20. In February 2011, the Bar in conjunction with the Law Society and the Department of Justice organised a seminar that enabled newly qualified barristers and those solicitors who were interested but who were ineligible to undertake fiat prosecution work in the Magistracies, to be given an intensive one day training session on how to prosecute in the Magistracy. Thereafter they would be briefed for two weeks of prosecution work and would be paid for 10 days of work. This seminar was repeated in July as well for another batch of junior barristers and solicitors.

21. The feedback from this programme has been positive, and quite a number of the members of the Junior Bar have benefited from

it. In the February session, there were a total of 50 persons who attended the one-day session and 34 of them were briefed to undertake two weeks of fiat work; in the July session 45 persons attended the one–day training session and a total of 27 of them were briefed to prosecute. The difference in numbers between those attending the training sessions and being given fiat work is attributable to fact some of them are already in the prosecution list, but simply wished to nevertheless attend the training session.

22. It is anticipated that we will continue this programme this year. The programme is intended to provide an opportunity for junior members of both branches of the profession to be exposed to prosecution work; at the same time it benefits the Department of Justice in being able to readily source, access and utilise a pool of legally qualified young professional lawyers, which will ensure that the prosecutions are undertaken both procedurally and substantively in a fair and proper manner. This will hopefully eliminate unnecessary appeals which are a drain on public funds and a strain on the judicial system.

23. Another initiative the Bar has implemented with the assistance of the Department of Justice is for senior members who have

been instructed to prosecute on fiat in appropriate and complex cases to ask the DPP to enable a junior member of the Bar to be instructed also to assist in the case. This would provide junior members the opportunity to gain exposure and experience as to how difficult/complex cases are prosecuted and defended and to be remunerated at the same time. I would like to acknowledge the strong support, commitment and cooperation extended by the DPP, Mr. Kevin Zervos, to help the junior end of the Bar.

24. **The Bar now has over 1,140 members and we have been growing at the rate of about 4-5% over the last few years. The Bar is a honourable profession with a long and strong historical tradition. One of those long cherished traditions is what is termed the "cab rank rule".**

25. **This rule dates back to 1660, when John Locke was tried for treason at the Old Bailey. His crime was to accept English history's most fateful brief, which was the instructions from Parliament in January 1649 to prosecute Charles I for fomenting two civil wars. Although his pupils all urged him to refuse the brief, he simply answered: "*I cannot avoid it. You see, they put it upon me.*"**

26. **In the course of this year, some members of the Bar have been criticised for representing parties and/or seeking relief from the Courts in respect of causes or issues that were considered as unpopular by some sections of the community. These attacks, some of which were rather brutal and personal, were unjustified, unwarranted and in ignorance of the duty, obligation and traditions of a barrister.**

27. **In his seminal book "*The Rule of Law*" in the chapter on A Fair Trial Lord Bingham said: "*Scarcely less important than an independent judiciary is an independent legal profession, fearless in the representation of those who cannot represent themselves, however unpopular or distasteful their case may be.*"**

28. **In that single sentence Lord Bingham, one of the world's most acute and brilliant legal minds, identified what I consider are the three elements crucial to the Bar's ethos: *availability, fearlessness and independence – the greatest of these being independence.***

29. **It is the availability as much as the quality of representation that is the guarantee provided by the Bar. The cab rank rule ensures no one is left without representation, even the most unpopular**

and anti-social. Under the rule any barrister who is not otherwise engaged or conflicted out and competent in the relevant area of law, must appear for any client willing and able to pay an appropriate fee, even if he/she disapproves of the client's character or cause.

30. The cab rank rule is for barristers what the Hippocratic Oath is to doctors. The rule negates the identification of the advocate with the cause of his client and therefore provides the advocate with protection against governmental or popular victimisation. The only duty that is more important to an advocate than the duty to his own client is his duty to the Court.

31. In a sense, a barrister has a divided loyalty between the Court and the client. In his customary succinct and pithy style, Lord Denning gave a classic enunciation of that duty's pith and purpose: "*He has a duty to the Court which is paramount. It is a mistake to suppose that he is the mouthpiece of his client to say what he wants, or his tool to do what he directs. He is none of these things. He owes allegiance to a higher cause; it is the cause of truth and justice.*"

32. **I hope the public will learn to understand and appreciate that when a barrister accepts a brief to argue an issue which, or represent a party who, is perceived to be unpopular or distasteful, the barrister is only carrying out his duty in accordance with his obligations under the cab rank rule, which is a well established and time honoured tradition going back over 350 years.**

33. **This is the bedrock principle of the Hong Kong Bar, namely that it is the duty of each and every counsel to accept any brief that is offered with an appropriate fee and to make the best arguments that he/she can for the client's cause, irrespective of the danger to himself or his reputation.**

34. **The year ahead will pose considerable pressure on the Judiciary as a number of its experienced members at all levels will be retiring. The task will be to replace them both by internal promotions and by recruitment from the ranks of the profession. It will be a delicate and difficult task. On behalf of the Bar I would like to extend to the Chief Justice the commitment and cooperation by our members to assist him in the process of**

rebuilding and reshaping the Judiciary for the challenges that lie ahead.

35. I believe that the time has come for me to follow the golden rule about public speaking "*Make sure you have finished speaking before your audience has finished listening.*"

36. I, on behalf of the Bar, wish everyone a fruitful, successful and healthy year ahead which is both productive and rewarding.

Kumar Ramanathan, SC
Chairman
Hong Kong Bar Association