SPEECH OF THE CHAIRMAN
OF THE HONG KONG BAR ASSOCIATION
AT THE OPENING OF THE LEGAL YEAR 2013
14TH JANUARY 2013

1. **Chief Justice, Secretary for Justice, President of the Law Society, members of the Judiciary and both branches of the legal profession, Distinguished Guests and Leaders of the Various Legal Organisations from around the world, Ladies and Gentlemen.**

2. **This annual conclave of the Judiciary and the legal professions of Hong Kong together with members of the public from all walks of life of the Hong Kong Special Administrative Region as well as guests from the international legal community signals an important milestone event in the Hong Kong Legal Calendar Year. It is an occasion when the Bench, the Administration and the profession review the important events of the past year, taking stock of what they have each done and provide an overview of what are the issues and challenges that they envisage they will face in the year ahead.**

3. **I will endeavour to make my speech, I hope, like the latest fashion trends: "*long enough to cover the subject but short enough to be interesting!*"**

4. **The ceremonial opening of the legal year is always looked upon by the profession as a significant event that sets the agenda for the Judiciary for the ensuing year. The occasion provides an opportunity for judicial self-introspection whilst also setting benchmarks for delivery of justice to the community.**

5. **In my view, it is a particularly important occasion which publicly and transparently highlights the close relationship between the Bench and the legal profession and signposts the re-affirmation by all the stakeholders in the administration of justice in the HKSAR by highlighting the importance of upholding the independence of the Judiciary and maintaining and preserving the Rule of Law in the HKSAR. The Bar proudly sees it as its public duty to be in the vanguard in defending the Judiciary's independence at all times and to ensure that the Administration governs in conformity with and in accordance with the Rule of Law, rather than Rule by Law.**

6. **I believe that it is appropriate and timely occasion to echo what was said in 1994 by the United Nations Commission on Human Rights that they were convinced that, and I quote:**

> **".. *an independent and impartial judiciary and an independent legal profession are essential pre-requisites for the protection of human rights and for ensuring that there is no discrimination in the administration of justice.*"**

7. **Historically, one of the Bar's greatest strengths has been that its members have been utterly independent of any commitment other than to the Rule of Law. An independent judiciary is closely connected to and dependent on the independent legal profession as a whole, which itself depends on the independence of law. The Bar will actively participate in defending judges and the Courts from unwarranted attacks. We will try to help build trust and confidence by exposing any or any perceived threats to judicial independence. The reality today is that the Judiciary is being targeted increasingly for specific case rulings.**

8. **As we move forward into new and challenging times ahead, the Hong Kong Bar and the community as a whole must respond promptly and courageously to any attempt, deliberate or otherwise, that seeks to undermine the independence and autonomy of our Courts within the autonomy granted under the Basic Law.**

9. **In my view, we all have to be alert and vigilant to ensure that neither political demagoguery nor special interest groups, be they from whatever quarter, be allowed to undermine the genius of our unique constitutional and judicial system under the umbrella of the One Country Two Systems principle. The bedrock of our fledgling new constitutional order under the Basic Law is the Rule of Law and that means we have to have an independent Judiciary, so that judges can make decisions independent and free of influence of the political winds that may be blowing.**

10. **The Bar is not an ordinary profession or occupation. As the late eminent Australian jurist Sir Frank Kitto aptly put it:**

> ***"These are not empty words nor is it their purpose to express or encourage professional pretensions. They should be understood as a reminder that a barrister is more than his client's confidant, adviser and advocate, and therefore must possess more than honesty, learning and forensic ability. He is, by virtue of a long tradition, in a relationship of intimate collaboration with the judge, as well as with his fellow members of the Bar in the high task of endeavouring to make successful the service of the law to the community. That is a delicate relationship, and it carries exceptional privileges and exceptional obligations."***

11. **I am proud to say that members of the Bar are fully aware of their privileges and their heavy responsibilities. I believe it is important to emphasise that the independence of the Bar is as valuable to the client as it is to the community at large. To the client it gives an assurance of such accuracy as knowledge and skill can contribute; to the community, it gives the service of law applying the law in the manner in which the law is intended to be applied. It is independence that makes the barrister essential to the administration of justice according to law. This is independence that cannot be bought in a market; independence that will not be bartered for money, or for privilege, status or even for a momentary success. In my view, it is this characteristic of independence that, more than any other facet, which stamps the Bar as a profession and not a service industry!**

12. **The past year has seen changes to the political landscape around the world with elections in the USA, a change of the guard in the People's Republic of China and not forgetting, closer to home, the election of a new Chief Executive, the establishment of a new Administration with a new Secretary for Justice in the HKSAR.**

13. **The Euro crisis combined with the 3rd Quantitive Easing in the USA and the slowdown across the border in the PRC's economy have all had some impact on the HKSAR's own economy. In the light of these difficult economic winds, the Bar has been busy looking after the interests of its members in general and of the Junior Bar in particular. The Prosecution training session accompanied by two weeks of fiat work for newly qualified members of the Bar which was initiated in 2011 between the Bar and the DPP has been well received and proven to be a remarkable success. The initiative was therefore continued for a second year in 2012 with training sessions in February and July. A**

total of 113 junior barristers have undertaken the training and benefited both in terms of training, prosecutorial working experience as well as remuneration from the two weeks of fiat work that they were thereafter given. This represents 9.6% of the practising Bar having receiving the fiat training and at the same time being financially remunerated in the last two years alone.

14. **I am glad to report that the DPP has been particularly pleased with the success of this programme as it provides the Department of Justice with a larger and reliable pool of fiat counsel to undertake prosecution work in the Magistracies. The DPP has promised to continue with the programme in 2013, with the next training session scheduled to be held in February. I would like to take this opportunity to publicly acknowledge and thank the DPP, Kevin Zervos SC, for the strong support that he has provided for the junior Bar.**

15. **I would like to remind senior members of the Bar that when they are instructed to prosecute on fiat, they should take advantage of the understudy programme for junior members of the Bar that I and the DPP have agreed to implement. In appropriate cases the DPP would be prepared to brief a relatively newly qualified member of the Bar to act as a junior in respect of fiat prosecutions. This would provide them with valuable experience and learning while at the same time providing them with remuneration as well. All it requires is a phone call to the DPP directly!**

16. **In June I had the privilege of leading a Bar delegation to Beijing where we had frank and useful discussions with senior officials from the Ministry of Justice, the Vice-President and senior judges of the People's Supreme Court, the Chairman of the Basic Law Committee.**

The visit culminated in a visit to Peking University where the Bar awarded 8 scholarships to the best LLM students who participated in the series of common law lectures and moot programme organised by the Bar.

17. **This is the second year that this programme has been running and has proven to be very popular with both the teaching staff as well as the students of Peking University. It is a unique programme where members of the Bar fly over to Beijing and give lectures on topics such as the Rule of Law, independence of the judiciary, rights of a detainee/arrested person, amongst other topics. I would like to take this opportunity to thank all those members of the Bar who have been generous and unselfish with their time and in their efforts to help the Bar in this programme.**

18. **I also led a Bar delegation to visit Shanghai in October where agreement was reached for future co-operation and mutual assistance. In my view, it is important for the Bar to remain engaged with the legal fraternity and continue with regular contacts and mutual assistance with our counterparts in the Mainland. Such contacts, I believe, help in building better understanding and appreciation of how the unique concept of One Country Two Systems is being implemented and practised and help avoid misunderstandings and clear misconceptions.**

19. **I am happy to report that a new Special Committee for International Relations has been established to cater for the increasing contacts that we have had with overseas legal associations. It is essential that the Hong Kong Bar remains engaged internationally in order to leave a clear and recognisable footprint that we have a thriving and independent Bar in Hong Kong practising the common law under the**

new constitutional order of the Basic Law. Unless this is done regularly, there is a danger that the international legal community will forget that although we are part of One Country, we do practice Two Systems of law. This important banner message must be flown high and proudly in the international arena.

20. The Bar has in the past year issued various Press statements dealing with a wide variety of issues of public interest including statements attributed to the former and first Secretary for Justice, calls for judges of the Court of Final Appeal to be permanent residents of the HKSAR, including more recent comments about the arguments being advanced by the Secretary for Justice in relation to the FDH appeals to the Court of Final Appeal.

21. The Bar felt compelled to make these Press statements in order to emphasise the importance of an independent Judiciary and to help protect that independence. The well-deserved accolade and recognition both internationally and locally that our judiciary has earned for being impartial, independent and free of corruption is a cherished and valuable attribute that has been hard earned. It is an attribute that each one of us must strive to defend and protect as it can very easily be undermined by forces more concerned with political expediency and convenience rather than upholding and maintaining the Rule of Law.

22. In this regard, I would like to draw attention to the results of the 2012 World Justice Project Rule of Law Index Report that was released on 28th November. The project reviewed 97 countries in terms of the following 8 factors in assessing the state of the rule of law in these countries:

(i) Limited Government Powers;

(ii) **Absence of Corruption;**

(iii) **Order and Security;**

(iv) **Fundamental Rights;**

(v) **Open Government;**

(vi) **Regulatory Enforcement;**

(vii) **Civil Justice;**

(viii) **Criminal Justice;**

23. **Hong Kong ranked in the top 10 in four of these categories, namely:**

(a) **2nd in providing order and security;**

(b) **8th for the effectiveness of its criminal justice system;**

(c) **9th for absence of corruption;**

(d) **10th for open government.**

24. **We however lagged behind other countries in the region in guaranteeing fundamental rights and freedoms to its people. We ranked 31st in that category behind such countries as New Zealand, Australia, Japan, S. Korea and Singapore. Clearly the message to the new Administration is that it needs to do much more to ensure that the fundamental rights and freedoms of our community are better protected and maintained.**

25. **The Civil Justice Reforms have been in place for 3 years now since their introduction in 2009. In my speech at the Opening of the Legal Year last year I drew attention to the fact that the successful**

implementation of the civil reforms can only be realised when there is for the ordinary and less advantaged members of our community real and meaningful access to the courts and justice.

26. The number of people bringing cases to court without a lawyer is increasing. The latest statistics available in respect of civil cases reveal that in almost 28% of the trials heard in the Court of First Instance and over 60% of the cases heard in the District Court are with at least one of the litigants being in person. For an advanced and developed economy as ours, these are, I believe alarming and unacceptable figures and reflect a real and growing gap where the ordinary citizen has not been afforded the opportunity of legal representation. This representation can mainly be provided by the expansion of Legal Aid both in terms of the scope of cases covered as well as by increasing the eligibility limits for legal aid under both the Ordinary Legal Aid Scheme {OLAS} as well as the Supplementary Legal Aid Scheme {SLAS}.

27. The Bar has been in the forefront in pushing for such changes for over a decade. There was some increase made in the eligibility limits last year, although well short of what the Bar and other stakeholders had been seeking and pressing for. However, I note with regret that there appears to be institutional inertia to the widening the scope of cases where legal aid is made available. In particular, the Home Affairs Bureau has disappointingly pushed aside the provision of legal aid for class actions by fobbing it to be dealt with by the Consumer Council. Despite the sterling work done by the members of that Council in terms of consumer protection, I believe that they already have stretched financial resources as well as limited manpower to take on the huge task of undertaking class actions as well.

28. **On this point I believe what Dr. E.J. Cohn wrote almost 60 years ago is particularly apposite to the state of legal aid in Hong Kong and the duties and obligations of the Government in respect of the same:**

> ***"Legal Aid is a service which the modern State owes to its citizens as a matter of principle. It is part of the protection of the citizen's individuality which, in our modern conception of the relation between citizen and State, can be claimed by those citizens who are too weak to protect themselves. Just as the modern State tries to protect the poorer classes against the dangers of life, such as unemployment, disease, old age, social oppression, etc., so they should protect them when legal difficulties arise. Indeed the case for such protection is stronger, than in the case of any other protection. The State is not responsible for the outbreak of epidemics, for old age or economic crises. But the State is responsible for the law. That law is again made for the protection of all citizens, poor and rich alike. It is therefore the duty of the State to make its machinery work alike for the rich and poor."***

29. **I would like to emphasise that legal aid is not a favour bestowed upon a poor applicant by members of the Bar. It is –or at least should be by now- a right granted to every citizen of our city State as part of the protection that the Administration is under a paramount duty to bestow on every one if its citizens.**

30. **It has to be acknowledged that our law makes access to Courts dependent on the payment of fees and renders assistance by skilled lawyers indispensable. Under such a legal system the question of legal aid to those who cannot pay must not be allowed to play a *Cinderella* role. Its solution decides nothing less than the extent to which the**

Government in which that system is in force is willing to grant legal protection to its citizens. When there is no legal protection, there is in effect no law. In so far as Hong Kong citizens are precluded from access to the Courts, the rules of the law which they would like to invoke are for them as good as non-existent.

31. **The new Administration has a golden opportunity to reveal and dedicate its commitment to the Rule of Law by implementing measures for the provision of legal assistance to the middle class in order to ventilate their legal rights. I invite them to take concrete steps to expand the scope of legal aid. In doing so, I also invite them to heed the call by the Bar that the time has now come for the establishment of an Independent Legal Aid Authority {ILAA} and take the operation of legal aid scheme outside the portfolio of the Home Affairs Bureau.**

32. **It is of fundamental importance that the operation and grant of legal aid from an institutional perspective, and particularly in cases involving judicial reviews is transparently and manifestly seen to be carried out fairly, independently and without any or any perceived interference. With the increase in public law cases, it is imperative that this can be best achieved by setting up an Independent Legal Aid Authority. The new Administration can take the high moral ground that previous Administrations failed and/or refused to do. It will be a significant step towards reinforcing the commitment that this Administration has towards upholding and maintaining the Rule of Law in Hong Kong.**

33. **It would be remiss of me not to extend the Bar's deep appreciation and my personal thanks to the small band of dedicated members of the Bar's Special Committee on Legal Aid under the guidance of Ruy**

Barretto SC. They have unstintingly devoted immense time and efforts in addressing issues involving legal aid over the last decade on behalf of the Bar. They are, like many other members of the Bar, the silent but committed soldiers on whom the Bar regularly depends on.

34. **I am happy to report that the Special Committee which was tasked to overhaul the Bar's Code of Conduct has completed its task. This mammoth undertaking took almost 2 years to complete. I would like to thank all members of the Special Committee, and particularly their Chairman Lisa Wong SC, for the time and efforts they have generously contributed in completing this task. The overhaul will hopefully bring the Code into the 21st century in terms of language and content and at the same time be more user- friendly to members as a whole. Members will be consulted on the changes in the coming months. I also anticipate that the overhaul of the Disciplinary Rules undertaken by Russell Coleman SC and his committee will be in members' hands as well soon for their consideration and comments.**

35. **The Administration of Justice is a cooperative effort. The Bench, the legal professions, the public and private sectors all play an integral part in its success. The law does not operate in a vacuum. It operates through people, with all their strengths and weaknesses. I believe our task is to support each other. We must build on the strengths of each other and support each other in our weaknesses. As I see it, we must all as a community re-dedicate ourselves to make that extra effort to make our new and unique constitutional model work.**

36. **In three days' time my term as Chairman of the Bar will come to an end. I have been honoured and humbled for being given the opportunity to serve the Bar and the community for the last two years.**

I thank all members of the Bar, the dedicated Bar secretariat and in particular my hardworking Council for their unstinting support and help over these two years. You all helped make my task that much more easier to handle whilst at the same time making it, dare I say it, enjoyable and exciting. You will appreciate that I need to say that in order to encourage and entice my successor not to withdraw his nomination!

37. **Almost 2,500 years ago Confucius is reported to have said:**

"What I hear I forget; what I see, I remember; what I do I understand.

Let us do it together. We have heard what we have to do. We've seen what we have to do. Now is the time to do it, and together we can do it."

38. **I was advised that for my swansong speech as Chairman, that my speech should be like a comet: Dazzling, eye-opening and over before the audience knows it. I do not know how well I fared in the first two categories, but I will now focus and achieve the third by stopping now.**

39. **It only remains for me on behalf of the Bar, to wish everyone of you a fruitful, successful and healthy year which I hope is both productive and rewarding.**

Kumar Ramanathan SC
Chairman
Hong Kong Bar Association