

**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 "5<sup>th</sup> 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 1<sup>st</sup> 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 5<sup>th</sup> 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