Speech Given at the Opening of the Legal Year, 14 January 2019
by the Chairman of the Hong Kong Bar Association
Philip J. Dykes SC

(Chief Justice, Secretary for Justice, President of the Law Society, Judges, Distinguished Guests, Members of the Legal Profession, Ladies and Gentlemen)

1. On this occasion last year, the Chief Justice spoke about a precious constitutional asset in which we all share. That asset is an independent judiciary.

2. The Chief Justice rightly explained and dwelled upon the significance of independence when judges and magistrates exercise on a daily basis the judicial power that is vested in them and the courts under Article 80 Basic Law.

3. I speak to you today also about another kind of independence. That is independence of the Bar as an organization and of the personal independence of its members.

4. I will, I hope, demonstrate to you that an independent Bar is important as an independent judiciary and that there is a symbiotic relationship between Bar and Bench so that you can say that where there is a strong Bar you will find a strong Bench.

5. I believe it right to choose this as the theme of my speech because it is a time when old certainties seem to be no longer quite so certain and some people question the Law's future direction in the HKSAR. I feel that I need, on behalf of the Bar, to give some assurances about the Bar's role under the constitutional settlement that is our Basic Law.

6. I start by going to the ancient heritage of both the Bar and Bench, the common law.

7. I would say that, in my view, the most precious gift to the HKSAR on its establishment just over twenty years ago was the common law.

8. The common law is, as you all know, hundreds of years old. It grew to maturity in England but spread across the world. Its basic principles are the same in New Delhi and New York, Melbourne and Manchester.

9. Its jewels include *habeas corpus*, trial by jury, the Petition of Right of 1628, the body of mercantile law developed by 18th century judges that even now continues to regulate international commercial arrangements, judicial review, its inherent flexibility and adaptability and, finally, the legacy of judicial wisdom and experience through the doctrine of precedent which is the distillation of the best principles that resonate and shape civil society.

10. The doctrine of precedent even made it into a poem by Alfred Lord Tennyson when describing life in a land under the common law:

> '*… A land of settled government,*
> *A land of just and old renown,*
> *Where freedom slowly broadens down*
> *From precedent to precedent.'*

11. Common law practitioners have inherited the habit of independent thought and attitude that developed as the common law emerged from dangerous tussles with medieval English kings and even more perilous confrontations in the courts with the more powerful Stuart monarchs in the seventeenth century.

12. That habit of independence born out of constitutional struggles is needed for the common law to survive and prosper.

13. Our judges, many of them former barristers, depend on the Bar's independence to ensure that legal arguments are presented honestly and with force and vigour.

14. When barristers argue difficult points in cases of importance in this way judges can have confidence that, whatever the decision in a case might be, it should have a solid foundation in the wisdom and the values of the common law. The judgment may be the that of Judge X or Y but, in reality, it is the product of a collaborative effort of Bench and Bar to ascertain the legal principle that governs the facts of a case.

15. A U.S. Supreme Court Justice, Oliver Wendell Holmes, paid a handsome tribute to the role of the Bar when he said *"Shall I ask what a court would be, unaided? The law is made by the Bar, even more than by the Bench"*.

16. A more fulsome and flowery tribute to the Bar's independence was made by a legal scholar, Sir Frederick Pollock, writing just over a century ago.

17. Pollock described the relationship of Bench and Bar in this way in his book "The Genius of the Common Law' where the common law is given a female personality, 'our lady'. The language is dated, but the message is still relevant and will continue to be relevant so long as the common law endures.

> *"[Our lady] looks for trusty servants who will stand by her in the day of need. She demands fearless and independent judges drawn from a fearless and independent Bar, men who will not swerve from the straight path to the right hand for any pleasure of rulers, be they aristocratic or democratic, nor be drawn aside to the left by the more insidious temptation of finding popular favour in opposition. If our lady's servants are not of that spirit, all the learning of all their books will not save them from disgrace or her realm from ruin. If they are, we shall never see the enemy whom she and they will be afraid to speak with in the gate."*

18. The benefits of independent counsel arguing a case fully and with conviction are not just for judges. The public are the beneficiaries. Many provisions of the Bar's Code of Conduct are there to promote independence of thought and action out of court.

19. This independence is, paradoxically, qualified by a professional rule that binds all practising barristers and limits their freedom of action. It is the rule that constrains a barrister to accept instructions in types of cases which he normally undertakes on terms that are not exorbitant, no matter the personality of the client or the nature of the case.

20. The 'cab-rank' rule ensures that no one will be denied representation because they are who they are, or their cause is unpopular.

21. The rule is also meant to ensure that barristers do not suffer adverse consequences that might follow from taking on a particular client or cause.

22. A former Non-Permanent Judge of our Court of Final Appeal, Gerard Brennan, described the importance of the rule in an Australian case in 1988.

> *Whatever the origin of the rule, its observance is essential to the availability of justice according to law. It is difficult enough to ensure that justice according to law is generally available; it is unacceptable that the privileges of legal representation should be available only according to the predilections of counsel or only on the payment of extravagant fees. If access to legal representation before the courts were dependent on counsel's predilections as to the acceptability of the cause or the munificence of the client, it would be difficult to bring unpopular causes to court and the profession would become the puppet of the powerful."*

23. This is a rule of professional conduct that I wish were better known and understood because some people still associate individual counsel with the cause of their clients, which is quite unfair to the barristers concerned.

24. Out-of-court independence means also giving legal advice that persons seeking advice may rather not receive. Clients should not go to a barrister to hear what they want to hear. They need, rather, to go to hear what they need to hear.

25. When in court, it means a barrister not giving up the all-important discretion as to how to conduct litigation–"on the unworthy terms"-as a Victorian judge once put it-"that he should be the mouthpiece of his client".

26. I emphasise that the Bar's professional services are available to all who might seek to use them whether the clients are private individuals, small businessmen, big corporations, public bodies and even the Hong Kong Government, a long-time user of the many talents available at the Bar, whether an advocate's skills are sought for court or just frank, independent advice is required.

27. To the individual barrister, these clients are all the same under the Law. They all command counsel's unstinting efforts to see that they have the opportunity of access to equal and exact justice in our courts

28. I turn now to the Bar as an institution. The Bar demonstrates its independence when its governing body, the Bar Council, occasionally makes public statements about current legal issues concerning the public.

29. Sometimes the Bar speaks out because criticism of court judgments questions the independence and neutrality of judges.

30. Sometimes it may be because there is blatant misinformation about a case or, more shockingly, personal attacks on judges. This was a topic addressed by my predecessor last year. I make no apologies to returning to the subject because unwarranted attacks on our judges have not stopped. Unless rebutted promptly and effectively, they will have a corrosive effect on trust in the Judiciary.

31. Sometimes the Bar feels constrained to speak out on legal issues which concern the general public. The Bar has done this for many, many years. Where people take a view on a legal issue which also has a political dimension the Bar is often accused of playing politics should its views coincide with one side and not another's.

32. I can assure you that the Bar holds that the state of the Law is equal for all people and cannot depend on a political stance or attitude. In any event, issues which cannot be solved by the executive branch of government or the legislature have a tendency to end up in the courts, particularly when those issues concern one or more articles of the Basic Law.

33. I take comfort in the fact that it was ever so, at least for a society existing under a written constitution that is not a mere tinselled edifice, a catalogue of wordy aspirations rather than a table of effective, enforceable rights.

34. Alexis de Tocqueville, a nineteenth century French historian, who studied early American democracy, said of the subject of his study, *' Scarcely any question arises in the United States which does not become, sooner or later, a subject of judicial debate...'*. He should be living now in Hong Kong.

35. I have boasted of the independence of individual barristers and of the Bar collectively. But fine words butter no parsnips. In order to remain strong and continue to serve both the public at large and the Judiciary, the Bar needs to move with the times.

36. The Bar Council has recently initiated changes which will only work to strengthen the Bar by making it more accessible to men and women who want to become barristers.

37. First, the Bar Council has approved changes to the rules about pupils and will require pupil masters to see that they are paid a minimum sum by way of remuneration from September.

38. Starting out at the Bar has always been challenging to most entrants, daunting even. This change will, I hope, mean that no one will be unable to join the Bar only because of a lack of finances.

39. Second, the Bar Council has also removed paternalistic rules restricting barristers from having other occupations that are not incompatible with practice at the Bar.

40. It is no longer necessary to seek the Bar Council's approval to undertake additional remunerated work. A barrister must be sure though that whatever they do, it will not bring the profession into disrepute. It will be possible to be both a barrister and a barista now, but not at the same time.

41. Third, the Bar Council decided last year to introduce a scheme for continuing legal education. This change has been long overdue.

42. I expect that the next Bar Council will plan the kinds of courses can be taken so as to satisfy a new requirement that members must demonstrate each year that they have met their obligation. Until such time as a full range of educational options is drawn up, members will be encouraged to sample what can be offered by way of a 'soft opening' to the scheme.

43. Lastly, I was pleased to see the Bar Council agree to establish a new standing committee on Equality and Diversity.

44. I expect the committee to advise on best practices to chambers to ensure that no discriminatory practices exist that may affect the recruitment of new members and inhibit the development of barristers' individual practices.

45. The Bar Council is aware of the fact that many women barristers have difficulties maintaining their practice when bringing up a family. Some give up practice when they can no longer combine legal work with the demands of a family.

46. This is bad for the Bar. It is also bad for the Judiciary who lose potential judges and magistrates when women drop out of practice at the Bar. I hope that this new standing committee can suggest ways to solve this problem.

47. I conclude by wishing you all a happy and prosperous New Year and, for those who may be having difficulty in sticking to rash resolutions made just a fortnight ago, take comfort from Oscar Wilde who observed that New Year resolutions were just 'cheques that men draw on a bank where they have no account.'

Philip Dykes, SC
Chairman
Hong Kong Bar Association