

**Speech of the Chairman of the Hong Kong Bar Association,
Winnie Tam SC, at the Opening of the Legal Year, 11 January 2016**

Chief Justice, Secretary for Justice, President of the Law Society, Members of the Judiciary, Members of the Legal Profession, Distinguished Overseas and Local Guests, Ladies and Gentlemen:

1. We welcome your presence here to bear witness to this annual ceremony where citizens and spectators are reminded of the importance of the role that the rule of law serves in Hong Kong.

Magna Carta and the Rule of Law

2. The past year marked the 800th anniversary of the Magna Carta, signed as a truce between King John and his feuding barons in 1215. As Lord Denning described it, the Magna Carta is “the greatest constitutional document of all times – the foundation of the freedom of the individual against the arbitrary authority of the despot”. It would be fair to suggest that the Basic Law of Hong Kong is one of the beneficiaries of the Magna Carta’s lasting legacy.
3. The 1215 Charter did not provide for a lot of the rights we take for granted these days in our judicial system, say, independence of the judiciary. It did, however make the King subject to the same law as his people, and provided for a machinery to oversee the exercise of his powers. This was seen as the very foundation of the rule of law, the concept that puts the law above all authority to protect people from arbitrary government.

Recent Rhetoric on Judicial Review

4. Few would disagree that the judicial review procedure is essential in realizing the rule of law in any civilized society. Judicial scrutiny of acts of the executive and the legislature deters arbitrary and unfair exercise of power at the expense of the individual and encourages good governance.
5. Recent comments made by retired former Permanent Judge of the Court of Final Appeal, Mr Henry Litton QC on this topic has generated considerable media and public attention. Litton’s comments suggested that the judicial review process has been widely abused in recent years, leading to a draining of our resources and causing substantial delays in public works, and that judges hearing leave

applications ought to have been more robust, or else they would become accomplices of those who abuse the system.

6. I would argue that the mechanism in guarding against abuse has performed its intended function, with no evidence of any significant, not to mention widespread, abuse.
7. As rightly pointed out by the learned author of the book *The Judicial Construction of Hong Kong's Basic Law*¹, the procedure for application for judicial review is, in fact, one of the most stringently supervised litigation procedures in Hong Kong, perhaps second only to the procedure that restricts vexatious litigants from bringing fresh proceedings in courts unless permitted by order of the court.
8. Apart from the established pre-requisites for a viable application, the Court of Final Appeal has in 2007 further raised the threshold for leave, such that grounds for review must be reasonably arguable with a realistic prospect of success.² The case management powers enjoyed by the judge determining the leave application enables him to tailor the leave application to the needs of the case, in order to ensure efficient disposal of the application.
9. Between 2008 and 2013, less than half of the judicial review applications made were allowed to proceed beyond leave application. By 2014, the success rate in obtaining leave had dropped further to 40%.
10. While a 56% increase in the number of judicial review applications filed in the year of 2015 is unsettling, that does not mean the mechanism against abuse has failed. While numbers are high, the types of cases involved cover a wide spectrum of complaints, most of which had no implications for the wider public.
11. Neither is there any question of the Judiciary not being able to cope with the caseload. As our former Chief Justice Mr Andrew Li QC has pointed out, justice and convenience do not often go hand in hand, but expedience must not be at the expense of fairness. A well-reasoned decision particularly in refusing leave in highly charged cases is often what it takes to let justice be seen to be done.

¹ P.Y. Lo, *The Judicial Construction of Hong Kong's Basic Law*, HKU Press (2014).

² *Po Fun Chan v Winnie Cheung* (2007) 10 HKCFAR 676.

12. On the same subject of judicial reviews, an official of the Chief Executive's office suggested that there was widespread abuse of procedure as there exists apparent conflict of interests on the part of barristers in generating work for themselves at the expense of public funds.
13. Here let me lay out the figures: In 2014, out of the 168 applications for leave, 52 cases (30%) had at least one party legally aided. Only 38 of those cases (22%) proceeded to the stage of substantive hearing, with at least one party legally aided. In the past few years, the success rate for legal aid applications in judicial review cases has consistently been around 25%, representing 5% of the total legal aid funds used.
14. Legal aid applications for the purpose of judicial reviews are vetted for prospect of success by counsel applying exactly the same test as that to be applied by the court in considering whether to grant leave. The decision is a matter of experience and judgment. It is in this step that the Legal Aid Department is the gatekeeper and is duty bound to ensure that the system and public resources are not abused. The quality and independence of judgment of the advice from barristers is carefully monitored by the Legal Aid Department, which would reserve final decision to itself.
15. Subject to the applicant being eligible for legal aid, an application seen to be reasonably arguable with a realistic prospect of success cannot by any standard be viewed as an abuse of process. Viewed in this light against the figures given above, the claim of massive abuse is more exaggerated than real.
16. Tensions between the Government and the pro-establishment on the one hand, and those who are in opposition on the other, may continue to fuel suspicion of abuse or collusion. However, to quote our former Chief Justice again, the attributing of improper motives, indeed to any party, would hardly contribute to a constructive dialogue on this matter.

Judicial Independence in Hong Kong and the Role of the Bar

17. I feel unable to leave this topic without saying something about judicial independence. If the rule of law is to be upheld, it is essential that there should be an independent judiciary. With the executive branch being the most frequent litigator in the courts, it is executive pressure or influence from which judges require particular protection.

18. So far, it is fair to say that there is no evidence of any undue pressure being exerted upon the judiciary by the Hong Kong Government in this regard, whether in words or in action. In the Global Competitiveness Report 2015-2016 published by the World Economic Forum, Hong Kong ranks 4th in the world in respect of judicial independence, up one place from last year. The index places Hong Kong right after New Zealand, Finland and Norway, with the U.K. placed at the 10th position and Singapore trailing in the 23rd place.

19. However, that is no cause for complacency. Constant vigilance is of paramount importance. Even in a jurisdiction such as England from where the idea of the rule of law originated, the executive might see the way in which judges perform their role as an inconvenience that should be resolved by some form of co-operation between the two branches of the government. When the House of Lords in England ruled that locking up terrorist suspects without trial was contrary to the Human Rights Convention, the then Home Secretary Charles Clarke invited the Lord Chief Justice Lord Bingham for a discussion on how he could lawfully deal with the terrorist problem. The invitation was firmly declined as inappropriate and against the principle of the separation of powers.

20. This sparked a complaint from the Tory political leader that “more and more decisions were being made by unelected unaccountable judges, instead of accountable, elected Members of Parliament who have to answer to the electorate”. Lord Phillips, one of the Non-Permanent Judges of our Court of Final Appeal, characterized these statements as a failure to understand the role of the judiciary, which he described succinctly as follows³:-

“When we review administrative action we do not substitute our decision for those of the executive. We check that the executive has acted in accordance with the law, as laid down by the Parliament.”

21. The story is a sobering reminder of how the government of even an old democracy could sometimes succumb to the temptations of convenience, expedience and control at the expense of jeopardizing the bedrock of its democratic system.

³ In his speech “Judicial Independence & Accountability: A View from the Supreme Court” delivered on 8 February 2011 at University College London.

22. Under the One Country Two Systems framework, differences in the understanding and expression of legal and political concepts are bound to exist. I believe the duty of the legal profession of Hong Kong is not only to be vigilant guardians of the core values of the rule of law, but to take every opportunity to explain and communicate these values to our Mainland Chinese counterparts in the legal profession and, where necessary, to the authority, and to encourage discussions and dialogues on these concepts. In line with the proud tradition of the advocacy Bar, I believe even the strongest of views are more effectively expressed in a firm and calm manner, rather than in inflammatory and controversial language.

Globalization and the Bar

23. In the past year, I have been reflecting a lot on the role of the independent Bar. I have been compelled to face up to how globalization, accelerated by advances in technology, has radically changed the legal practice environment around the globe.

24. General legal knowledge has become far more accessible than before, thanks to the digitization of information and increased connectivity. In today's world, physical attendance of the client by the lawyer in a one-to-one bespoke service is no longer the norm. The demand from clients of less-for-more in legal service drives the need for streamlining tasks that do not require legal skills. For higher-value legal services that clients are willing to pay for, the requirement of specialized knowledge is inevitable.

25. Yet, many a barrister and trial lawyer is still in a state of denial. In the book "*Tomorrow's Lawyers*" written by legal futurist and economist Professor Richard Susskind⁴, the author recognized that while oral advocacy at its finest is probably the quintessential bespoke legal service reserved for cases of high value with complex legal issues, it is less clear that instructing barristers or trial lawyers for lower-value or less complex disagreements will continue to be commercially justifiable.

26. In 2012, Susskind predicted that a shift towards alternative dispute resolution and the development of other new techniques of handling disputes will further reduce the number of cases that will find closure

⁴ (2013) Oxford University Press. A new book along the same vein has just been published in October 2015, written by Richard and Daniel Susskind on *The Future of Professions* (2015) Oxford University Press.

in courts of law, while online dispute resolution and virtual court hearings (such as interlocutory hearings in civil and criminal cases) not limited to civil cases will become increasingly prevalent.

27. The convenience of on-line communication and transmission of information continue to blur the borders between jurisdictions for the purpose of provision of legal services. Globalization has increased the intensity in competition amongst qualified professionals across the global legal markets. Lawyers across the globe are compelled to expand their scope of work beyond the local jurisdiction.
28. In Hong Kong, there have been complaints about foreign lawyers with no right of practice providing legal advice on Hong Kong law under various guises of practicing foreign law. Active marketing and promotional activities were seen undertaken by overseas barristers and their marketing teams on our own turf for legal services that the local Bar was traditionally expected to provide.
29. What do these facts mean to us? It drives me into the firm conviction that the Bar must wake up to these fundamental changes in the landscape of legal practice. We must grapple with the fact that economic forces, liberalization and technology will not leave any profession untouched. Rather than to resist these changes and devise protective measures, we should embrace them, step up our own game and innovate.
30. It is imperative that the Bar adapts to these changes by adjusting its own regulations, and even more importantly, by adjusting its own mindset, so as to put ourselves on a level playing field with our competitors.
31. Further, the Bar must no longer adhere to the traditional narrow view of the scope of its practice. Apart from embracing alternative dispute resolution as a new paradigm, the Bar should avail itself of the full scope of freedom within the boundaries of its Code of Conduct. In particular, we should be more ready than ever to receive direct instructions from the local professions that are permitted to instruct us, and from lawyers of other jurisdictions – including Mainland China – requiring advice or dispute resolution based on Hong Kong law. More importantly, the Bar should come out from its protective shell and make that readiness known.

32. In response to the demands for services from Hong Kong barristers amongst Mainland law firms, a pilot scheme has already commenced with the approval of the Ministry of Justice for individual Hong Kong barristers to be appointed as Legal Consultants to law firms in Shanghai. The potentials this development has unleashed is evident in the similar demands that have immediately followed from law firms in other major cities in China.
33. This year, the Bar Association will undertake studies followed by consultation with a view to inducing stronger collaboration with solicitors and in-house lawyers. This will include potential liberalization of traditional norms of our practice, such as secondment to law firms in Hong Kong for limited periods. An ongoing exercise to revamp the Code of Conduct in respect of pupillage and rules governing the practice of the Bar will also be tabled in the Bar Council in the coming months. This will herald necessary reforms to enhance the standards of new entrants to the Bar and bring our mode of practice up to date.
34. Last but not least, I believe it is imperative that the Bar protects its good name locally and internationally by regulating continuous professional development of its members in order to match the long-established standards adopted by most other lawyers' organizations around the world. A wider consultation on this issue will commence in due course. In the meantime, apart from stepping up with the provision of structured seminars through its training arm, the Hong Kong Advocacy Training Council, the Bar Council has resolved to transform the committees in the various practice areas into knowledge sharing platforms. Members with established practice in specific areas will contribute and benefit from the teaching and sharing of knowledge for the building of expertise within the Bar.
35. I would like to conclude by borrowing the words of Chief Justice Ma in a speech he made in 2014⁵ as a reminder for what distinguishes the legal profession from other vocations:-

“The concept of honour in the legal profession is one that very much survives in modern legal practice because the concept represents the safeguarding of values and enables the legal profession to serve the community fully and properly. Globalization is a fact of life – but in the middle of changes, one never loses sight of fundamental values that go to the heart of

⁵ at the International Malaysia Law Conference 2014, Kuala Lumpur.

the concept of justice and fairness. This is what makes the legal profession as properly an honourable one and not, as many people or even lawyers think, a business.”

36.Despite all the challenges we face, I believe the Bar will continue to attract the best talent. The latest batch of astonishingly bright Bar Scholars is proof. I am of the firm belief that they have chosen to join the legal profession not only for its lure of personal success, but also for the honour of being part of it.

37.Thank you, and I wish all of you a rewarding and fruitful year ahead.

Winnie Tam SC
Chairman, Hong Kong Bar Association
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