

CHAIRMAN'S REPORT FOR 2015

1. It has been an eventful year for Hong Kong in terms of the constitutional and societal development since the resumption of exercise of sovereignty by the People's Republic of China (PRC) on 1st July 1997. In keeping with the apolitical stance of the Bar Association, we have continued to comment fearlessly on legal issues affecting public interest, particularly, on the Rule of Law and civil liberties.

2. After the decision of the National People's Congress Standing Committee (NPCSC) promulgated on 31st August 2014 (the "Decision") laying down the highly restrictive parameters within which the intended electoral reform was to be conducted, the polarization of public opinion and the division within Hong Kong society were accentuated. One can be forgiven to think the unreasonable restrictions imposed by the Decision was an impetus for the Occupy Movement, which lasted for 79 days between the end of September to mid-December in 2014.

3. Amidst the repercussions of the Occupy Movement, the HKSAR Government pressed ahead with the second round of consultation on political reform on 7th January 2015 on the basis of the Decision. It is noteworthy that constitutionality of the Decision itself was raised in an application for leave for judicial review against various decisions of the HKSAR Government in the consultation process. The application has since been dismissed, *inter alia*, on the ground that Hong Kong Courts have no jurisdiction to review decisions of the NPCSC (Leung Lai Kwok Yvonne v. The Chief Secretary for Administration & Ors, HCAL No. 31 of 2015 (unrep), Au J, 5th June 2015).

4. Meanwhile, on 6th March 2015, the Bar Association furnished a detailed written Submission together with a Press Summary (reinforcing its previous exposition of the law contained in a written submission made on 28th April 2014 in the course of the first round of consultation) that:

- (a) the method of selecting the Chief Executive should not contain discriminatory distinctions or unreasonable restrictions;
 - (b) the permanent residents of Hong Kong should enjoy the right and opportunity to vote, and be elected, in genuine periodic elections which should ensure that the will of the electors are freely expressed.
5. A close examination of the Decision and the corresponding Consultation Paper in light of the foregoing fundamental principles has led the Bar Association to take the view that the proposed reforms based on the Decision were unduly and disproportionately restrictive on public participation in terms of (a) the formation of the nomination committee; (b) the number of candidates that can be nominated; (c) the proceedings and voting process of the nomination committee.
6. In due course, a final report on the second consultation was published on 22nd April 2015 by the HKSAR Government, which set out the proposals for the method of selecting the Chief Executive along with a Draft Motion to be put before the Legislative Council. The blunder of the 31 pro-government legislators aside, it is hardly surprising that the motion, which required 2/3 majority of the Legislative Council, was not carried on 18th June 2015.
7. This is the 800th Anniversary of the Magna Carte signed in 1215. It is apt to reflect on the true meaning of the Rule of Law, which has almost become a term of art in the parlance of politicians and public officials as a result of misuse or overuse.
8. There may be an infinite number of ways in which the Rule of Law can be characterized or expressed as legal scholars and political theorists alike have attempted to do over the last eight centuries. However, in my view, the observation made by Chief Justice Ma at the Bar Council of England and Wales' Annual International Rule of Law Lecture (May 2015) is timely, refreshing and instructive.

9. In the words of the Chief Justice, the Rule of Law “encapsulates two important but related concepts:- first, there must exist laws which respect the dignity, rights and liberties of the individual in any society and secondly, there must exist an independent institution which enforces rights, liberties and freedoms both in letter and, more important, in spirit. There is nothing original in this definition which I adopt : the two facets of the rule of law constitute in essence the lasting themes of Magna Carta”.
10. Probably because of the wide array of political and social events that have recently taken place in Hong Kong, including the Occupy Movement, there has been concerns about the fragility of the Rule of Law in Hong Kong. In fact, these concerns had already been precipitated by the promulgation of the White Paper on the Practice of “One Country, Two Systems” in the HKSAR on 10th June 2014 by the State Council of the PRC (the “White Paper”) wherein judges were included in the description “*those who administer Hong Kong*”. It carries the connotation that judges as administrators are expected and required to be patriotic. Under the chairmanship of my predecessor, Mr. Paul Shieh, SC, the Bar Association duly registered its concerns by issuing a written response on 11th June 2014.
11. However, the lasting effect of the White Paper was felt in a speech delivered by Director Zhang Xiaoming of the Liaison Office of the Central People’s Government in Hong Kong SAR at a seminar held on 12th September 2015 marking the 25th Anniversary of the Promulgation of the Basic Law. The shade put by Director Zhang on the non-application or limited application of the doctrine “separation of powers” in Hong Kong echoed the tune of the White Paper, which struck at the tenet of the Rule of Law and independence of the judiciary. The notion of the Chief Executive of HKSAR enjoying “*a special status that transcends the institutions*” introduced by Director Zhang for the first time and in such a nebulous manner that it raised more questions than it answered.

12. Once again, the Bar Association promptly issued a public statement on 14th September 2015 to urge Director Zhang to clarify his statements in order to rectify any misconception caused by such statements and to eliminate any unnecessary concerns and doubts that citizens of Hong Kong SAR and the international community may have in relation to the implementation of the Rule of Law under “One Country, Two System”.
13. Looming in the horizon are difficult constitutional issues that confront Hong Kong in anticipation of the completion of the High Speed Railway between Hong Kong and China. The co-location issue is under study by the Special Committee on Constitutional and Human Rights Affairs. The Bar Association will be closely monitoring the development and would comment on this issue as and when necessary and appropriate.
14. It is no exaggeration that a strong and independent Bar is essential in upholding the Rule of Law so that the rights of individuals involved in litigation can be competently and fearlessly canvassed and enforced. In the best tradition of the Bar, members appearing before the court would faithfully and dutifully assist the court in the exposition of the law in the resolution of disputes.
15. The appointment of 10 Senior Counsel in May 2015 has resulted in an increase in the total number of Senior Counsel in private practice to 99. This is a recognition of the importance of developing and maintaining a strong and independent Bar.
16. Undeniably, the common law owes its origin to the English legal system and jurisprudence. Naturally, it makes sense to foster and maintain a close tie with the Bar of England and Wales, in particular, during this taxing time. It will be conducive to enhancing professional standards of the local Bar and maintaining and upholding the Rule of Law in Hong Kong. To this end, *ad hoc* admission of overseas counsel is provided for under s.27(4) of the Legal Practitioners Ordinance (Cap. 159).

17. The number of overseas admissions per year (ranging from 37 to 54 out of 45 to 64 applications respectively) between 2011 and 2014 has given rise to the perception and concerns at some quarters that overseas counsel might have been admitted in underserving cases to the detriment of the development of the local Bar. In this regard, the Bar Council is mindful of its role as a professional body having a right to be heard in these applications.
18. With the assistance of selected Bar Scholars, a comprehensive survey was done on the decisions of the Court pertinent to applications for overseas admission since 1999. The “Practice Guidelines for Ad Hoc Admission of Overseas Counsel” was revised in July 2015 to ensure that only meritorious applications concerning cases of “exceptional difficulty or complexity” would be brought.
19. Upon the advice and with the assistance of the Special Committee on Overseas Admissions, the Bar Council closely scrutinized each proposed application, which had to be accompanied by a Junior Counsel Certificate. Under the revised Practice Guidelines, where a proposed application was considered by the Bar Council to be hopeless, the applicant would be forewarned with a view to invoking the power of the Court to award costs in favour of the Bar Council in the event that the application was dismissed. The decision of the Court in one such costs application is still pending.
20. In 2015, there were only 34 applications for Overseas Admissions (including 13 with a criminal origin) as compared to 47 (including 14 with a criminal origin) in 2014. The Bar Council consented to 25 of the 34 applications and the applicants therein were admitted accordingly. One application concerned the Bar as a party to the underlying judicial review and the Bar Council saw fit to take a neutral stance and hence the application was admitted without contention. One application was withdrawn.

21. The Bar Council opposed to the remaining 7 applications (including 2 with a criminal origin). Three of those applications (including 1 with a criminal origin) were dismissed by the Court and 1 was allowed despite the opposition of the Bar Council. Three applications are still pending. The fact speaks for itself and it would be fair to say that the right balance has been struck.
22. In order for the Bar to stay strong and independent, it is necessary for the Bar Council to take all necessary measures to attract and nurture new entrants on the one hand, and to enhance the knowledge, skill, competency and professional ethics of existing members on the other. This is the only way for the Bar to command the respect of both the local and international communities.
23. As of 30th November, there were 90 newly admitted barristers in 2015 bringing the total number of practising members to 1331. By the look of the qualifications and calibres of the 6 Bar Scholars and 2 Charles Ching Memorial Scholars this year, it would appear that the Bar continues to attract the most talented and committed amongst the fresh law graduates.
24. There is of course no place for complacency. The Bar Council continues to supervise and monitor the Advanced Legal Education programme for pupils which are funded by members' subscriptions and effected through the Hong Kong Advocacy Training Council (HKATC). Stringent standards are set for the ALE programme to the extent that some pupils found themselves having to retake the advocacy assessment necessitating an extension of their pupillage beyond 12 months.
25. With the help of Douglas Clark and members of the Council including Kim Rooney, Robert Pang SC, William Wong SC and Andrew Mak, a series of practice seminars were designed and held to cover core skills in practice management for barristers, and in practice development particularly with regard to extending one's practice under Annex 14 of the Code of Conduct. The practice management seminars have attracted considerable positive feedback from members attending. However, it was felt that the Bar has yet to

wake up to the potential of the wider scope of practice made possible under Annex 14.

26. The Young Barristers Committee (YBC) plays a pivotal role in tapping the pulse and sensation of the junior members of the Bar. In 2015, the YBC organized various talks on different areas of practice such as that on Interlocutory Applications delivered by Master Herbert Au-Yeung and Vincent Lung on 16th November 2015. This is a good supplement to the talks organized by HKATC, which tend to focus more on specialist topics delivered by visiting silks.
27. Lamentably, it remains a concern that the Bar is now bottom-heavy with a number of junior members finding themselves less than gainfully employed. On a rough-and-ready approach, the rate of attrition of junior members after the first few years' of full practice is about 20%. It is therefore necessary to put more effort in practice development.
28. In October 2015, two members of the YBC, Lareina Chan and Robert Chan, were nominated to attend the annual Young Bar Conference in London as representative of the Hong Kong Bar with subsidy provided by Bar Association. They were commissioned to write a report on a certain aspect of liberalization of the Bar as experienced in the English Bar, namely a periodic secondment to law firms while retaining the role and status as barrister. Suitable members of the English Bar were lined up for interview by them, and they researched on the rules in the Bar Standard Board handbook on how the arrangement was supposed to work. They were to focus on how it had worked to the benefit of the younger members of the English Bar, and to research on the *pros and cons* of secondment particularly from the point of view of maintaining the independence of the Bar. A report was produced that forms the basis of further studies by a Task Force headed by Council member Norman Hui to provide recommendations on how the Code of Conduct may be brought up to date to enable barristers to have the option of forging such an arrangement with solicitors firm to the mutual benefit of the two branches of

the profession, and to better serve clients, without sacrificing the core values of the Bar.

29. I am acutely aware that as a profession, the Bar cannot live in its past glory. With globalization taking place at unprecedented pace, it is necessary for the Bar to grow and move along in modern times while harnessing onto its traditional virtues and values. Further, a stronger tie between the PRC and HKSAR is both inevitable and necessary.
30. Shortly after assuming office as Chairman, I led a delegate of the Bar Association to pay an official visit to Beijing in April 2015 and made contacts with the Ministry of Justice, the Supreme People's Court, the Basic Law Committee of NPCSC and the Hong Kong and Macau Affairs Office of the State Council.
31. In August 2015, the Bar Council resolved to establish a Special Committee on China Practice Development, which is expected to work *in tandem* with the Special Committee on International Practice (renamed from the Special Committee on International Relation) to explore opportunities for extension of barristers' scope of practice outside Hong Kong, and to build relationships with the legal sectors in overseas jurisdictions as would benefit the continued development and standing of the Hong Kong Bar. Despite the new direction, the Special Committee on International Practice is to continue with their work in supporting our counterparts in overseas jurisdictions on matters pertaining to the rule of law.
32. In collaboration with the Special Committee on Greater China Affairs, the Special Committee on China Practice Development successfully co-hosted a joint legal forum with the Shanghai Lawyers' Association held at Lujiazui on 20th November 2015.
33. Riding on the crest of the "Belt and Road" Initiative of the PRC Government and pursuant to the relevant terms under the Closer Economic Partnership Arrangement (CEPA) made between HKSAR and the PRC since 2004, 7

members of various seniority accepted appointment as legal consultants of Mainland law firms as part of a pilot scheme. Although the detailed mechanics of this scheme has yet to be mapped out, it is anticipated that it would be a first step for the local Bar to tap into the source of work in the mainland and beyond. It is understood that a member of the junior Bar has already received instructions pursuant to the arrangement, which required barristerial services performed both in China and in Hong Kong.

34. On the international front, the Special Committee on International Relation (now renamed as aforesaid), in collaboration of the Special Committee on Legal Aid Reform offered friendly assistance and comments in February 2015 on the “Republic of the Union of Myanmar Legal Aid Provision Law”. The Bar Association also participated in a Roadshow “Hong Kong – In Style” organized by the Department of Justice and the Hong Kong Trade Development Council in Jakarta on 16th and 17th September 2015.
35. In addition, the Bar Association played hosts to visitors from various overseas legal professional bodies, governments and universities in 2015, including representative(s) of the Russian Bar Associations, *Union Internationale des Avocats* (UIA), European Union Office in Hong Kong, Ministry of Justice of Cambodia, Association of Mongolian Advocates, Office of the Secretary General of the Hague Convention on Private International Law, Chinese Lawyers in Europe (ACLE), Oxford University, Singapore Management University and many others.
36. I have attended international legal events and conferences during my term including the Global Law Summit in London, the Opening of the Legal Year of England and Wales in October and the incidental meetings of international bar leaders, the annual conference of the International Bar Association (IBA) held in Vienna, and the Law Asia Conference in Sydney. Vice Chairman Paul Lam SC attended the POLA (The Presidents of Law Associations in Asia) conference in Goa in September. The presence of the Hong Kong Bar at these conferences is important for the profile of the Hong Kong advocacy Bar. The way in which an independent Bar functions under One Country Two Systems

has drawn much curiosity, empathy and admiration from other sister organizations. Important relationships were forged with other Bar leaders from all over the world for future cooperation.

37. International conferences is an important source of inspiration for the local Bar, but understandably, not everyone finds the incentive to pull resources and time together to attend such a conference in a distant country. It is strongly felt that middle juniors of 5 years or more would particularly benefit from these conferences, and individuals and chambers with rich resources should consider funding its younger members to attend with a view to broadening their horizons on the future of legal practice, and forging relationships amongst lawyers. The Bar Association would be looking into subsidizing or funding limited places for such purposes in selected conferences in the future.
38. With a view to enhancing the knowledge, skill, competency and professional ethics of existing members, a Task Force has been set up to look into the desirability and feasibility of a compulsory Continuing Professional Development (CPD) particularly in light of the IBA Policy Guidelines for Training and Education of the Legal Profession.
39. Members will be consulted on this important topic once the report of the Task Force is completed probably in early 2016. In this connection, it is instructive to note that in a Submission of the Bar Association to the Standing Committee on Legal Education and Training (dated 16th December 2015), the Bar Association did not support the introduction of a Common Entrance Examination along the line proposed by the Law Society of Hong Kong for admission of solicitors.
40. It is true that the Hong Kong Bar remains to be a pure referral profession, which may distinguish it from the legal professionals in other jurisdictions including the Bar of England and Wales. However, CPD may be seen by many as a centrepiece amongst the measures to ensure professional standards and maintain public confidence in the long run.

41. In the meantime, I have taken the step to secure the support of all special committees of the various areas to make each of such committees function as an educational core group apart from only performing consultative functions on legal issues arising in their respective practice area. These special committees will from now on take a more proactive role in organizing and providing opportunities to members at large to acquire knowledge on the specific areas of law, and will form a core group of established and up-and-coming practitioners for knowledge sharing in the form of periodic seminars and discussions on topics within the purview and expertise of the respective committees. It is hoped that this will be the early development of specialist bars within the Bar. It was further emphasized that the committees should each maintain a ladder for succession, to include members who are enthusiastic to contribute in performing the aforesaid roles for the development of other members, and to weed out members who are unable or unwilling to contribute.

42. The task of revising the Code of Conduct of the Bar turned out to be more onerous and time-consuming than expected. A comprehensive draft prepared by the Special Committee under the chairmanship of Lisa Wong SC was promulgated for consultation in January 2014. Upon expiry of the 3 month's consultation period, the Bar Council continued to come across important issues pertinent to practice and professional conduct, which had required further deliberation and adjustment, for instance, the human right dimension relating to the requirement to apply for approval to engage in Supplementary Occupation under Paragraph 23 of the current Code of Conduct, which is the subject matter of a judicial review taken out by a member now under appeal before the Court of Appeal. It is intended that the next Bar Council will expedite matters to finalize the revised Code of Conduct in 2016.

43. This year also marks the commencement of the Competition Ordinance (Cap. 619). In the run-up to the operation of Competition Commission and Competition Tribunal on 14th December 2015, the Special Committee on Competition Law under the chairmanship of P.Y. Lo has substantially contributed towards the drafting of the law and formulation of the rules and procedure. This is a potential new area of practice for members at all levels.

44. As the Chairman of the Special Committee on Constitutional Affairs and Human Rights, P.Y. Lo is also to be credited for his incessant and tireless effort in keeping the Security Bureau and the Immigration Department on check in the introduction and revision of the Unified Screening Mechanism (USM) for assessing claims under the “Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment”.
45. Through the good work of his Special Committee, the Security Bureau has deferred the introduction of certain proposed “enhancement” measures under USM such as that involving the use of a “screening bundle” of documents selected by the Immigration Department. But for the deferral of its implementation, it would be tantamount to forgoing fundamental rule of procedural fairness for administrative exigencies.
46. On a lighter note, I observe that there is no lack of talents amongst members of the Bar. The catalogue of sporting and social activities with participation by members of the Bar as epitomized in the Report of the Special Committee on Welfare and Sports is remarkable.
47. I would like to thank all the Chairmen and members of the Special Committees, as well as individual members who have so tirelessly assisted the work of the Bar in producing consultation papers as and when called upon to do so. Special thanks go to Robert Kotewall SC who has dutifully looked after the investments of the Bar for many years, and has recently requested to step down in retirement. Under his faithful watch, the Bar’s funds have been carefully preserved and have seen a steady growth even in times of volatile market conditions. This enables us to put resources to good use for the advancement of the Bar. There are too many unsung heroes, and I look forward to the opportunity to thank them properly at the Bar Mess, which will take place in March 2016.

48. It leaves me to thank the two Vice Chairmen and all members of the Bar Council for their work in the past year. They have been a tower of strength behind me in the way they have provided me with intelligent alternative views, the courage and incentive to push for reforms, and the much needed support on challenging issues that have confronted me in the past year. I also acknowledge the Honorary Secretary and his deputy who have worked extremely hard on the many time-consuming affairs of the Bar.

Winnie Tam SC
Chairman

4 January 2016