

Report of the Special Committee on Constitutional Affairs & Human Rights

There should not have been much to report for 2011, had not the HKSAR Government decided to make several moves just before the summer.

As mentioned in the report for 2010, the enduring concerns of this Special Committee have been the proper implementation of the Basic Law of the HKSAR, equal opportunities and data privacy legislation, and human rights conditions in Hong Kong and Mainland China.

Electoral legislative reform was the first and it had turned out, the most engaging matter this Special Committee was concerned about. It began with the a consultation of the Government on how the election petition mechanism under the Legislative Council Ordinance, the District Council Ordinance and the Village Representatives Election Ordinance can be reformed following the Court of Final Appeal's judgment in *Mok Charles Peter v Tam Wai Ho* (FACV 8/2010). The Bar Association argued for a right of appeal to the Court of Appeal in all election petition cases as opposed to a discretionary jurisdiction on the part of the Court of Final Appeal to grant leave to appeal. This argument was not accepted and the Legislative Council eventually enacted the Electoral Legislation (Miscellaneous Amendments) Ordinance 2011 to provide for appeals to the CFA subject to leave.

It was the Government's proposal to abolish by-elections for the Legislative Council and to substitute for it a "replacement mechanism" and to rush through that proposal by the Legislative Council (Amendment) Bill 2011 in the month of June 2011 that had excited the minds of this Special Committee and the Bar Council. In a collaborative effort done mostly by email and in the small hours, the Bar Association managed to issue five statements in a month to point out the flaws in the legislative proposal and to seek a genuine public consultation. The Government eventually halted the legislative process and produced a consultation paper after more than 200,000 Hong Kong people made their point in a peaceful public procession in Hong Kong Island on 1 July 2011. The Bar Association responded to the consultation paper on 31 August 2011, criticizing the genuineness of the consultation, the presentation of the consultation paper and the legal merits of the options set out in the consultation paper.

Judicial review as a means for Hong Kong residents to seek redress for administrative wrongs and constitutional invalidities came under fire following the successful application for judicial review by Madam Chu Yee Wah against the environmental impact assessment reports for infrastructure projects associated with the Hong Kong-Zhuhai-Macau Bridge, a project specially mentioned in the National 12th Five Year Plan for Development. Inappropriate statements were made. The Bar Association and the Law Society issued a statement on 20 May 2011 to emphasize the role of the courts in judicial review, the availability of the avenue of appeal, and the extent of proper public comments while a case was currently under appeal.

The telephone of the Bar Secretariat kept on ringing on 8 June 2011. There were calls and email messages from the local and international press and electronic media seeking the Bar Association's views on the decision on that day by the Court of Final Appeal to refer four questions of interpretation of the Basic Law of the HKSAR to the Standing Committee of the National People's Congress for interpretation in the case of *Democratic Republic of the Congo & Ors v FG Hemisphere Associates LLC* (FACV 5, 6, 7/2011). The timing of the decision was not favourable to the Bar Council as many Bar Council members were flying to Beijing as part of a visiting delegation to various governing institutions there. The questions raised were important ones, pertaining to whether the judicial autonomy of the HKSAR courts had been compromised. They should be answered clearly. Incidentally, the Chairman of this Special Committee had to stay in Hong Kong to finish his Ph D Thesis on the "Judicial Construction of the Basic Law" and Paul Shieh SC, one of the Vice-chairmen, was to take a latter flight to Beijing. It was in these conditions that a press statement was put together stating that the CFA followed the *Ng Ka Ling* approach laid down in 1999 in deciding whether to make a judicial reference in the *Congo* case and "[there] is no question of the judicial autonomy of the courts of the HKSAR being compromised or otherwise harmed when the [CFA] acting in accordance with the Basic Law, which assigns and allocates powers as between the Central Authorities and the HKSAR, makes a reference".

The visit of Vice-Premier Li Keqiang was a boon to Hong Kong's economic development but the security arrangements by the Hong Kong police for the visit were awful. This Special Committee prepared a statement of the Bar Association indicating the relevant HKSAR jurisprudence on the freedom of speech, the right to assembly and demonstrate, and the role of press in a free society, as well as pointing out that "security zone" or "core security area" were not terms known to the law in Hong Kong, and ending with a call for the HKSAR Government to explain.

The proper screening of torture claimants with a "high standard of fairness" has been the joint concern of the Bar Association and the Law Society ever since the HKSAR Government decided to implement an administrative scheme of screening with legal assistance through the offices of the Duty Lawyer Service. A Working Group of the Joint Profession met throughout 2011 to monitor and to consider making submissions on the administrative scheme and the proposed statutory replacement under the Immigration (Amendment) Bill 2011. The legislative process of this Bill will continue to engage the legal profession in the coming year.

The Bar Association has also responded, with the assistance of this Special Committee, to a number of public consultations including the LegCo Bills Committee's consultation on the Adaptation of Law (Military References) Bill 2010, the invitation for views by the LegCo Subcommittee to Study Issues Relating to the Power of the Legislative Council to Amend Subsidiary Legislation, the Security Bureau's consultation on the review of the Interception of Communications and Surveillance Ordinance, the Transport Department's consultation on arrangements for issuing certificates of particulars of motor vehicles, the Judiciary's public consultation on the adjudication of equal opportunity claims by the

District Court, and the Law Reform Commission's public consultation on charities.

The Chairman of this Special Committee met with a delegation from the National Democratic Institute in November 2011 as part of this institution's regular assessment of the situation of Hong Kong. He also met a delegation from the German Bar Association in September 2011, discussing the rule of law and human rights conditions in Mainland China (including Mainland lawyers who took up unpopular or minority causes and subsequent became subjects of state monitoring and harassment, perhaps the Mainland Chinese equivalents of Hans Litten, the German lawyer who cross-examined Adolf Hitler for one afternoon in 1931). Members of this Special Committee also attended meetings of the Human Rights Forum hosted by the Constitutional and Mainland Affairs Bureau of the Government of the HKSAR, and meetings hosted by other parties, including the Office of the European Union in Hong Kong and Macau.

The Chairman of the Bar Association and members of the Bar Council had a lunch meeting in October 2011 with Professor Sir Jeffrey Jowell, the Director of the Bingham Centre for the Rule of Law in the United Kingdom. This was a fruitful meeting in exploring matters for collaboration between the two organizations, with this Special Committee immediately charged with the task of translating into Chinese for subsequent distribution a report of the Venice Commission of the Council of Europe on the Rule of Law.

The membership of this Special Committee has in the last few years been a balance between seniority and quality. Young post-80s blood have been drafted in to give the opportunity for them to gain some experience in this Special Committee's work and "to get their hands dirty" with drafting submissions. This effort has proved to be quite useful as the younger members did provide valuable assistance in the summer to the Bar Council's efforts in pleading for a public consultation over the LegCo "replacement mechanism" saga.

The chairman of this Special Committee again thank to present and past members, as well as members of the Bar Secretariat, for their support. Some of the work of this Special Committee this year was accomplished in fact with the assistance of some past members, including Earl Deng and Tim Parker. As mentioned in last year's report, the chairman is subject to the good Christian rule 6(2) of the Rules and Regulations of the Hong Kong Bar Association and will not be eligible to hold office on the Bar Council in the coming year, he will relinquish chairmanship of this Special Committee and retire from the frontline to become a "market hermit" (大隱隱於市). He wishes the "new leadership and his/her team" every success in tackling the challenges in 2012, including the Chief Executive and Legislative Council elections, and the foreign domestic helper right of abode litigation (which might end up before the NPCSC).

Membership:

P. Y. Lo (Chairman)

Raymond Leung

Lin Feng

Newman Lam

Jocelyn Leung

Ann Lui

Lau Wan Ching

Bonnie Cheng

P. Y. Lo

Chairman

Special Committee on Constitutional Affairs and Human Rights

6 December 2011