

Secretary for Justice's Statement on the Term of the  
New Chief Executive of the HKSAR

**Statement of the Hong Kong Bar Association**

*'There is a strong presumption that the literal meaning is the true one,  
especially as against a construction that is not interpretation, but perversion.'*

HOLMES, Oliver Wendell, *United States v. Pulsaki Co.*, 243 U.S. 97, 106

1. The Hong Kong Bar Association ("the Bar") wishes to record its disappointment at the statement of the Secretary for Justice dated 12 March 2005 on the subject of the term of the new Chief Executive of the HKSAR.
  
2. The Bar is disappointed because the Secretary for Justice has apparently caused the HKSAR Government to change its long-held views on the term of office of the new Chief Executive. She has done this by accepting the views of the Mainland scholars that she has consulted. Although the Secretary for Justice stated that she had considered the views of local legal professionals, the Bar is not aware of any consultations the Secretary for Justice held with lawyers, scholars and former drafters of the Basic Law living in Hong Kong.
  
3. The Secretary for Justice's actions acknowledge, for the first time in HKSAR history, a preference for the Mainland interpretative approach to the Basic Law. That is significant because hitherto fundamental differences in interpretation of the Basic Law were resolved, for better or worse, by resort to formal interpretation under the Basic Law by the Standing Committee of the National People's Congress ("NPCSC"). It was not done by the HKSAR Government adopting the interpretation of Mainland scholars who, however learned and eminent they may be, cannot issue an authoritative interpretation of the Basic Law.

4. The Bar is extremely concerned that the Secretary for Justice's statement may mark the beginning of a movement by the HKSAR Government towards taking views of Mainland legal scholars on other issues arising under the Basic Law. The Bar asks whether the Secretary for Justice is prepared to canvass the views of Mainland scholars on, for example, the meaning of any of the fundamental rights guaranteed under Chapter III of the Basic Law?
5. The Bar makes the following observations on the consequences that flow from the Secretary for Justice's statement.
6. The Secretary for Justice's statement impugns the validity of section 3(1) of the Chief Executive Election Ordinance (Cap 569) in so far as that provision states, without qualification, that the term of office of the Chief Executive is five years. Section 3(1) is, and has been since its coming into force, liable to challenge in the courts for inconsistency with the Basic Law, notwithstanding that this provision had, together with other provisions of the Ordinance, been reported in 2001 to the NPCSC for the record. The NPCSC did not then exercise its power under Article 17 of the Basic Law to return it on the ground of inconsistency with a provision of the Basic Law regarding affairs that are the responsibility of the Central People's Government or affects the relationship of the Central Authorities and the HKSAR.
7. The Bar considers that the Secretary for Justice's proposal to amend the Chief Executive Election Ordinance to give effect to the views of the Mainland scholars does not settle the matter. The amendment would be open to court challenge on the ground that it is inconsistent with Article 46 of the Basic Law, which states, in clear language, that the term of office of the Chief Executive is five years.
8. In the event of such a challenge the Bar apprehends that it is probable that the Secretary for Justice would oppose it and, if the case progressed that far, require the Court of Final Appeal to make a reference under Article

158 of the Basic Law of the “relevant provisions of the Basic Law” for interpretation by the NPCSC before final adjudication. This would be most undesirable, especially if the courts expressed a view contrary to the Secretary for Justice.

9. The Bar further comments on the contents of the Secretary for Justice’s statement.
10. The Secretary for Justice relies on practices and understandings communicated to her by Mainland scholars which she believes to be the assumptions behind the intent of the Basic Law Drafting Committee (“BLDC”) and the National People’s Congress (“NPC”) in adopting the Basic Law.
11. That such assumptions, not expressed at the time, are now recalled nearly or more than 15 years after the event to control the interpretation of a constitutional instrument illustrates, in the Bar’s view, the advantages of accessibility and certainty of the common law approach of construing legislative intent by reference to the language of text in its context and its purpose. That is a technique which is easily understood and is accessible to all.
12. The Secretary for Justice also relies on what she considers to be the “legislative intent of the original design” of the Election Committee to argue that having the new Chief Executive elected under Article 53 of the Basic Law to serve a fresh term of five years would allow the Election Committee to exert its influence far beyond the time that was originally intended (i.e. the five year term provided for the Election Committee).
13. The Bar does not consider this argument to be sound. As the Secretary for Justice has acknowledged, the “legislative intent of the original design”, of the Election Committee was, if it ever existed, not carried out in practice because the term of the present Election Committee does not coincide with the term of office of the Chief Executive that it elected, Mr Tung Chee

Hwa. It is purely fortuitous that Mr Tung resigned at a date that was slightly more than 120 days before the present Election Committee is due to be dissolved. If Mr Tung had served a further six months before resigning, a differently constituted body would have to elect the new Chief Executive.

14. The Secretary for Justice argued that “a CE who vacates his office prematurely and the CE returned in the by-election can be regarded as consecutive office holders of the same term of office” and that “such an interpretation is not inconsistent with Article 46 of the Basic Law”. The Bar disagrees.
15. The Secretary for Justice does not appear to have realised that the office of the Chief Executive is a unique public office that may only be occupied by a constitutionally qualified holder and which office, when vacated, falls to be filled by another similarly qualified person.
16. The office is therefore different from membership of a collegiate electoral body where members may come and go through by-elections but the body itself endures for its appointed term. The Bar considers that it is misleading to speak of the new Chief Executive selected under Article 53 of the Basic Law on the occasion of a vacancy to be “a substitute Chief Executive returned in a by-election”. The Chief Executive selected under Article 53 is a new Chief Executive returned under a fresh election held in accordance with the provisions of the Basic Law.
17. The Bar does not consider those parts of drafting history narrated by the Secretary for Justice to be determinative or conducive to the resolution of the issue. The Secretary for Justice’s reading of the drafting history appears to have been based upon an understanding communicated to her by the Mainland scholars relying on their memories and studies of notes and records in archives which are strictly off limits to the ordinary researcher. It is interesting to note that if the BLDC did intend that the expressions “xindeyijie xingzhengzhangguan” and “xinde

xingzhengzhangguan” to have different legal consequences different expressions would have been used in the English translation of the respective drafts. The fact is that both expressions were translated into “new Chief Executive” in the Draft Basic Law for Solicitation of Opinions and the Basic Law (Draft).

18. The Bar lastly does not consider the Secretary for Justice’s reliance of the text of the Decision of the NPCSC of 26 April 2004 to be sound. It must be stated that the Decision of the NPCSC of 26 April 2004 is not an interpretation of the NPCSC under Article 158 of provisions of the Basic Law. Its text at most stated an understanding based on facts and circumstances known at the relevant time. The NPCSC could not have possibly known that on 26 April 2004 that Mr Tung was to resign the office of Chief Executive a year later. Accordingly, the Secretary for Justice erred in relying on the view of the NPCSC on 26 April 2004 that the election of the Chief Executive to be held in 2007 is the election of “the third term Chief Executive” for present purposes.

Dated 17<sup>th</sup> March 2005.

Hong Kong Bar Association