

**Statement of the Hong Kong Bar Association (“HKBA”) on
the Proposed Designation of Judges by the Chief Executive
in National Security Cases**

1. On 20 June 2020, Xinhua News Agency (“Xinhua”) reported a blueprint of the proposed national security law to be applied in the Hong Kong Special Administrative Region (“HKSAR”) as presented by the Legislative Affairs Working Committee of the Standing Committee of the National People’s Congress (“NPCSC”).
2. One worrying disclosure about the proposed law in the Xinhua report is that the Chief Executive of the HKSAR (“CE”) is to designate judges to be responsible to preside in trials of offences under the new law.
3. Any such arrangement, if implemented, would be unprecedented and would undermine judicial independence in the HKSAR. HKBA notes that the former Chief Justice, the Honourable Mr. Andrew Li in his statement published on 23 June 2020 also commented that the arrangement would be detrimental to the independence of the Judiciary.
4. Judicial independence is a cornerstone of the legal system in the HKSAR and embodies at least three aspects. First, judges are appointed on the basis of their professional qualifications and experience. Secondly, government involvement in the process of appointment of judges is kept to a minimum. Thirdly, it is for the judiciary itself to determine how to arrange its business and judicial resources, including the assignment of judicial duties.

5. Pursuant to Article 88 of the Basic Law, judges of the courts of the HKSAR shall be appointed by the CE “on the recommendation of an independent commission composed of local judges, persons from the legal profession and eminent persons from other sectors”, namely the Judicial Officers Recommendation Commission (“**JORC**”).
6. Once appointed, judges serve at different levels of Courts according to their expertise and experience, and assignment of specific duties to judges is within the province of the respective leaders of each level of court such as the Chief Justice of the Court of Final Appeal and the Chief Judge of the High Court; and similarly in the lower courts. The Judiciary operates according to its own procedures to decide which judge would hear which specific case or type of cases.
7. Under the present system, the executive arm of the Government (including the CE) does not on its own assign or designate any particular type of cases to be adjudicated or tried by specific judges.
8. Justice should not only be done, but should manifestly be seen to be done. It is vital for judicial decisions in the HKSAR to be perceived by the public as being made by judges on exclusively the legal and factual merits of the case as, in the exercise of their own judgment, they consider them to be, free from any actual or perceived influence or interference from the executive arm of the Government (including the CE).
9. However, under the proposed national security law (as reported by Xinhua), what is proposed is distinct from the CE’s general power to appoint judges under Article 88 of the Basic Law, but confers a power upon the CE (a power which is currently exercised by the Judiciary) to designate a judge or group of judges to try a particular type of criminal offence. This is contrary to the intent and spirit of the Basic Law, and poses a threat

(perceived or actual) to judicial independence. In particular, the HKSAR Government is the prosecuting party in criminal cases that may be brought in the future under the proposed national security law, and the CE will be the chairperson of the proposed National Security Commission. Empowering the CE to designate a group of judges to try a particular class of criminal cases impairs justice and fairness in the judicial process.

10. The NPCSC is yet to pass any national security law for the HKSAR. It is of utmost importance that no law be passed that will change the constitutional fabric of the HKSAR as designed under the Basic Law.
11. The HKBA reiterates the concerns expressed in its statements dated 25 May 2020, 12 June 2020 and 19 June 2020.

Hong Kong Bar Association

Dated: 23 June 2020