

White Paper on the Practice of “One Country, Two Systems” Policy in the  
Hong Kong Special Administrative Region

**Response of the Hong Kong Bar Association**

1. The HKBA responds to three aspects of the White Paper on the Practice of the “One Country, Two Systems” Policy in the Hong Kong Special Administrative Region (“the HKSAR”) issued by the Information Office of the State Council of the People’s Republic of China (“the White Paper”) on 10 June 2014. All three aspects concern the Judiciary of the HKSAR and Hong Kong’s core value of judicial independence.

2. First, Division 2 of Part V of the White Paper concerns the theme of resolutely safeguarding the authority of the Constitution of the PRC and the Basic Law of Hong Kong. One paragraph exhorts as follows:

“We should respect and uphold the power of interpretation and amendment of the Basic Law vested in the NPC and its Standing Committee.”

“尊重和維護全國人大及其常委會對香港基本法的修改權和解釋權。”

After referring to the power of interpretation vested in the Standing Committee of the National People’s Congress (“NPCSC”) under Article 158 of the Basic Law, the same paragraph ends by stating:-

“The fact that the Standing Committee of the NPC exercises the power of interpretation of the Basic Law in accordance with the law is aimed at maintaining the rule of law in Hong Kong, as it oversees HKSAR’s implementation of the Basic Law and protects the high degree of autonomy of the Region.”

全國人大常委會依法行使基本法解釋權是維護「一國兩制」和香港法治的應有之義，既是對特別行政區執行基本法的監督，也是對特別行政區實行高度自治的保障。

3. It is correct that under Article 158(1) of the Basic Law, the power of interpretation of the Basic Law is vested in the NPCSC. However, at the same time under Article 158(2) of the Basic Law, the courts of the HKSAR are constitutionally

authorized by the NPCSC to interpret *on their own* in the course of adjudicating cases provisions of the Basic Law which are within the limits of the autonomy of the HKSAR. This is part and parcel of the high degree of autonomy guaranteed by the Sino-British Joint Declaration and the Basic Law. Whilst the NPCSC undoubtedly possesses the power to interpret the Basic Law, the HKBA has consistently maintained that an “NPCSC interpretation” (outside of Article 158(3) which is subject to its own rules, and requires an act of judicial reference) should be rarely and cautiously undertaken. Otherwise there would be a perception of undermining the independence of the judiciary in the eyes of people in Hong Kong, on the Mainland, and in the international community.

**4. THE HKBA REPEATS THAT RESPECT FOR THE RULE OF LAW (AS UNDERSTOOD IN HONG KONG AND THE COMMUNITY OF CIVILIZED NATIONS) MEANS FAR FAR MORE THAN MERELY “DOING THINGS ACCORDING TO LAW” (依法辦事) OR “GOVERNING ACCORDING TO LAW” (“依法施政”). IT INCLUDES PROPER SELF-RESTRAINT IN THE EXERCISE OF POWER IN A MANNER WHICH GIVES PROPER WEIGHT AND REGARD TO THE IMPORTANCE OF THE INDEPENDENCE OF THE JUDICIARY.**

5. Second, Division 3 of Part V of the White Paper concerns the theme that the Hong Kong People who govern Hong Kong should above all be patriotic. It contains the following statement:

“Hong Kong must be governed by the Hong Kong people with patriots as the mainstay, as loyalty to one's country is the minimum political ethic for political figures. Under the policy of "one country, two systems," *all those who administer Hong Kong*, including the chief executive, principal officials, members of the Executive Council and Legislative Council, *judges of the courts at different levels and other judicial personnel*, have on their shoulders the responsibility of correctly understanding and implementing the Basic Law, of safeguarding the country's sovereignty, security and development interests, and of ensuring the long-term prosperity and stability of Hong Kong. In a word, loving the country is the basic political requirement for Hong Kong's administrators. If they are not consisted of by patriots as the mainstay or they cannot be loyal to the country and the HKSAR, the practice of "one country, two systems" in the HKSAR will deviate from its right direction, making it difficult to uphold the country's sovereignty,

security and development interests, and putting Hong Kong's stability and prosperity and the wellbeing of its people in serious jeopardy.” (italics supplied)

對國家效忠是從政者必須遵循的基本政治倫理。在「一國兩制」之下，包括行政長官、主要官員、行政會議成員、立法會議員、各級法院法官和其他司法人員等在內的治港者，肩負正確理解和貫徹執行香港基本法的重任，承擔維護國家主權、安全、發展利益，保持香港長期繁榮穩定的職責。愛國是對治港者主體的基本政治要求。如果治港者不是以愛國者為主體，或者說治港者主體不能效忠於國家和香港特別行政區，「一國兩制」在香港特別行政區的實踐就會偏離正確方向，不僅國家主權、安全、發展利益難以得到切實維護，而且香港的繁榮穩定和廣大港人的福祉也將受到威脅和損害。

6. On 9 July 2008 the HKBA, under the Chairmanship of Mr Rimsky Yuen SC (the current Secretary of Justice), issued a press statement which emphasized that:

“The Judiciary in Hong Kong has always been, and under the Basic Law it shall remain, separate and independent from the Executive and the Legislature. It is not, and should not be regarded as, part of the governance team. Legality of government action is subject to judicial scrutiny. Unless the Judiciary is truly independent, it cannot fulfill its role of ensuring that the Government is acting in accordance with the law. Nor can it discharge its function of ensuring that legislation passed by the Legislature is consistent with the Basic Law and the international legal obligations of the HKSAR.”

7. These words of the HKBA in 2008 are as valid now as they were then. Judges and judicial officers of the HKSAR are *not* to be regarded as part of “Hong Kong’s administrators” or part of the governance team upon whom a political requirement is imposed. Any erroneous public categorization of Judges and judicial officers as “administrators” or official exhortation for them to carry out any *political* mission or task will send out the wrong message to the people of Hong Kong, people on the Mainland and the wider international community that Courts here are part of the machinery of the Government and sing in unison with it. Irrespective of whether this is the case with Courts elsewhere, this most definitely is NOT the case in Hong Kong.

8. Lastly, the words “肩負正確理解…香港基本法的重任” (“have on their shoulders the responsibility of correctly understanding .... the Basic Law”) in the White Paper quoted above seem to suggest that there is a “correct” meaning of the Basic Law which exists separately as an objective fact that is capable of being understood or learned by Hong Kong judges from someone else, somewhere else. However, under the common

law system, statutes and constitutions mean what the Courts interpret them to mean, based on well-established and long-developed principles of statutory and constitutional interpretation, upon hearing adversarial arguments between the parties and considering the facts and evidence placed by the parties (including the Government) before the Court, in an open and transparent judicial setting. It is not the case (subject to any interpretation made under Article 158 of the Basic Law) that in deciding cases judges and the Courts in Hong Kong need to (or can) learn, understand, or take instructions, about any definitive “correct” meaning (一錘定音式的最終解讀) of the Basic Law from anyone else, be they public officials or scholars, here or elsewhere.

Dated 11 June 2014.

HONG KONG BAR ASSOCIATION