HONG KONG BAR ASSOCIATION
Secretariat: LG2 Floor, High Court, 38 Queensway, Hong Kong
E-mail: info@hkba.org Website: www.hkba.org
Telephone: 2869 0210 Fax: 2869 0189

PRESS RELEASE

TO : **All Press**

DATE : **9 November 2012**

NO. OF PAGES : **1+8 (including cover page)**

If any portion of the facsimile transmission is not received or is illegible, please notify the sender at tel. no. 2869 0210 immediately.

Statement of the Hong Kong Bar Association on

The Judiciary of the HKSAR

Statement of the Hong Kong Bar Association on The Judiciary of the HKSAR

1. The Hong Kong Bar Association ("**HKBA**") notes that there have recently been reported statements, comments or suggestions on the composition of the Judiciary of the Hong Kong Special Administrative Region, including the Court of Final Appeal. It has apparently been suggested that all judges in the Judiciary of the HKSAR, including all judges of the Court of Final Appeal, should be Chinese nationals and/or persons who are permanent residents of the HKSAR.

2. The HKBA considers that this suggestion is inconsistent with the following provisions of the Sino-British Joint Declaration 1984:

   - "Judges of the Hong Kong Special Administrative Region courts shall be appointed by the chief executive of the Hong Kong Special Administrative Region acting in accordance with the recommendation of an independent commission composed of local judges, persons from the legal profession and other eminent persons. Judges shall be chosen by reference to their judicial qualities and may be recruited from other common law jurisdictions." (Annex I, Section III)

   - "The power of final judgment of the Hong Kong Special Administrative Region shall be vested in the court of final appeal in the Hong Kong Special Administrative Region, which may as required invite judges from other common law jurisdictions to sit on the court of final appeal." (Annex I, Section III)

3. The above provisions of the Sino-British Joint Declaration 1984 have been given effect in Articles 82, 88, 90, 92 of the Basic Law of the HKSAR. By Article 82, it is stipulated that the power of final adjudication of the HKSAR shall be vested in the Court of Final Appeal, which may as required invite judges from other common law jurisdictions to sit on the Court of Final Appeal. By Article 92, it is

stipulated that members of the Judiciary of the HKSAR shall be chosen by reference to their judicial qualities and may be recruited from other common law jurisdictions.

4. The question of nationality and right of abode of judges in Hong Kong has received specific consideration and treatment in the Basic Law, Article 90(1) of which provides that only the Chief Justice of the Court of Final Appeal and the Chief Judge of the High Court of the HKSAR have to be Chinese citizens who are permanent residents of the HKSAR with no right of abode in any foreign country.

5. Both the Joint Declaration and the Basic Law confirm that the laws previously in force in Hong Kong, including the common law and rules of equity, shall be maintained. The legal system of the HKSAR is based on the common law.

6. The Hong Kong Court of Final Appeal Ordinance (Cap 484) was enacted in 1995 by the Legislative Council of Hong Kong on the basis of a composition of the Court of Final Appeal agreed upon by the Chinese and British sides of the Joint Liaison Group. This composition, as stipulated in section 16 of the Hong Kong Court of Final Appeal Ordinance, provides for the hearing and determination of appeals by a court consisting of the Chief Justice, three permanent judges and one non-permanent judge, who can be either a non-permanent Hong Kong judge (a retired Chief Justice or permanent judge of the Court of Final Appeal, a retired or current judge of the Court of Appeal, or a barrister who has practised as a barrister or solicitor in Hong Kong for at least 10 years) or a non-permanent judge from another common law jurisdiction selected by the Chief Justice and invited by the Court. Thus it is clear that a non-permanent judge from another common law jurisdiction sits as only one member of a court of five judges if and when he or she is invited to sit in the hearing and determination of an appeal and where the other four judges are invariably Hong Kong judges.

7. Further, it has been observed by the late Lord Cooke of Thorndon, a non-permanent judge of the Court of Final Appeal, in 2000 that "[having regard to Articles 2, 8, 11, 19, 82 and 159 of the Basic Law] and to the purposes of the Basic Law as a whole, I think that it may be intended that, in appropriate cases, a function of a judge from other common law jurisdictions is to give particular consideration to whether a proposed decision of this Court is in accord with generally accepted principles of the common law" (*Chen Li Hung & Anor v Ting Lei Miao & Ors* (2000) 3 HKCFAR 9).

8. It is the HKBA's view that, in order to maintain the link with and continuity of the common law in Hong Kong, it was and remains important to invite eminent judges of international repute from other common law jurisdictions to be non-permanent judges of the Court of Final Appeal, whilst at the same time appointing suitably qualified persons from both the ranks of the Judiciary and the profession to be judges of the HKSAR based on their ability and not on the basis of nationality.

9. The historical circumstances and considerations surrounding Hong Kong's reunification with the Mainland, involving two systems with different social, ideological and legal traditions as well as a different outlook towards the Rule of Law, are unique. Arrangements and legal provisions concerning the nationality and right of abode of judges, and the composition of the Court of Final Appeal, reflect the understanding and acceptance of these unique circumstances. They were deliberately devised in an open-minded manner through careful and detailed consultation.

10. The HKBA sees no justification or need to change the basis upon which judges are and have been selected for appointment to the Judiciary of the HKSAR. The Hong Kong Judiciary enjoys a well earned reputation of ability, credibility, integrity and independence not only within the Greater China region but most importantly also internationally. The HKBA believes that this reputation is due in

a substantial part to the current basis and arrangements as to the approach and manner of selection for appointment of judges to the Hong Kong Judiciary.

Dated 9th November 2012

HONG KONG BAR ASSOCIATION

香港大律師公會聲明

香港特別行政區的司法機構

1. 香港大律師公會近日從媒體獲悉，有一些意見提出香港司法體系內的所有法官(包括終審法院法官)均應擁有中國國籍，或應爲香港的永久性居民，甚至有說兩者俱全方可勝任。

2. 香港大律師公會認爲此等建議不符合 1984 年簽訂的《中英聯合聲明》內下述條款:

   • 香港特別行政區法院的法官，經當地法官和法律界及其他方面知名人士組成的獨立委員會推薦，由行政長官予以任命。法官應根據本人的司法才能選用，並可從其他普通法適用地區聘用。(附件一，第三條)

   • 香港特別行政區的終審權屬於香港特別行政區終審法院。終審法院可根據需要邀請其他普通法適用地區的法官參加審判。(附件一，第三條)

3. 香港特別行政區《基本法》第 82，88，90 及 92 條是按照《1984 年中英聯合聲明》制定。《基本法》第 82 條明確規定香港特別行政區的終審權屬於香港特別行政區終審法院。終審法院可根據需要邀請其他普通法適用地區的法官參加審判。根據《基本法》第

92 條，香港特別行政區的法官和其他司法人員，應根據其本人的司法和專業才能選用，並可從其他沿用普通法的地區委聘。

4. 《基本法》已充份和具體地考慮法官的國藉及在港的居留權問題，並已作出特別的處理。第 90 條(1) 規定只有香港特別行政區終審法院和高等法院的首席法官，才須在外國無居留權並且爲香港特別行政區永久性居民和中國公民。

5. 《中英聯合聲明》及《基本法》都確認香港原有的法律，包括普通法及衡平法規則，維持不變，香港的法律體制以普通法爲基礎。

6. 《香港終審法院條例》（第 484 章）於 1995 年由立法會制定，根據聯合聯絡小組中英雙方協議定終審法院法官的人數的組成，《香港終審法院條例》第 16 條明文規定，上訴須由終審法院審判庭聆訊及裁決，而終審法院審判庭須由首席法官、三名常任法官、及一名非常任法官組成。該名非常任法官可以由終審法院首席法官挑選並由終審法院邀請的一名來自其他普通法適用地區的法官，或者是一名非常任香港法官。"非常任香港法官"必須符合下列其中一項條件: (i) 已退休的高等法院首席法官或終審法院常任法官；(ii) 現職或已退休的上訴法庭法官；(iii) 在香港以大律師或律師身分執業最少十年的大律師。法例已明確表明，如有來自其他普通法適用地區法官的非常任法官應邀參予終審法院的聆訊

及裁決，該名法官不過是五名法官的其中一名，其餘四名均必定是香港的法官。

7. 已故終審法院非常任法官顧安國勳爵(Lord Cooke of Thorndon)在2000年《 Chen Li Hung & Anor v Ting Lei Miao & Ors》(2000) 3 HKCFAR 9 一案的判決書中指出：- "考慮到《基本法》第 2，8， 11， 19， 82 及 159 條和《基本法》的整體立法原意，我認爲來自其他普通法管轄區法官的其中一項職能是在審理個案時，考慮判決是否符合廣泛爲人接受的普通法原則。"

8. 香港大律師公會認爲終審法院能委聘其他普通法管轄區傑出的法官爲非常任法官，對維持和延續普通法法制在香港的施行，尤其重要。與此同時，法院能夠從司法機構及法律業界中，只依據專業才能和不分國藉地委任符合資格的人士當法官，對普通法在香港的承傳也起着相輔相承的作用，不可或缺。

9. 香港回歸祖國涉及種種獨特的歷史背景和因素，包括兩地在社會制度、意識形態及司法傳統的分別，以至對〝法治精神〞理解的差異。有關特區法院法官的國藉、居留權及終審法院法官組成的安排，是當年在理解和接受上述各樣獨特因素的前提下，以開明的方式作出謹慎及詳盡的諮詢，在深思熟慮後所制訂的方案。

10. 香港大律師公會認爲沒有任何理據、亦無需要改變香港特別行政區司法機構行之有效的法官委任機制。香港大律師公會相信，香

港司法機構的能力、公信力、獨立性和專業操守之所以獲得大中華區內及(更爲重要的是)世界各國尊崇，正是基於現時就挑選及委任香港司法機構法官的方式所採用的準則及安排。

香港大律師公會

二零一二年十一月九日