



**Speech on “A Correct Understanding of the
Characteristics of the Political System of the HKSAR”
by Zhang Xiaoming, Director of Liaison Office of the
Central People’s Government in the HKSAR on 12 September 2015**

Statement of The Law Society of Hong Kong

1. The Law Society notes the recent discussions in the community concerning the speech on “*A Correct Understanding of the Characteristics of the Political System of the HKSAR*”, given by Mr. Zhang Xiaoming, Director of the Liaison Office of the Central People’s Government in the Hong Kong SAR, at a Seminar on the 25th Anniversary of the Promulgation of the Basic Law on 12 September 2015 (the “Speech”).
2. Whilst respecting the various views that have been expressed on the Speech, the Law Society would not comment on political issues.
3. However, the Law Society would reiterate two fundamental principles deserving the strongest support from the community: (1) the importance of an independent Judiciary to the Rule of Law; and (2) the professionalism and integrity of the Judiciary in Hong Kong.

The Rule of Law and the Independence of Judiciary

4. The Rule of Law is a fundamental principle which should be respected in all societies. It embraces three basic maxims: first, all persons and institutions, public and private, including the State itself, are equally subject to the same publicly promulgated laws; second, disputes between citizens and disputes between citizens and the state are resolved by an independent Judiciary in a fair and impartial manner; and third, international human rights norms and

standards are effectively protected and respected by all.¹ The Rule of Law necessitates measures to ensure adherence to such axioms as the supremacy of law, equality before the law, accountability to the law, fairness in the application of law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness, and procedural and legal transparency.

5. An independent Judiciary is an essential cornerstone to the above. It is of paramount importance for the Judiciary to be independent from the other two branches of government, if it is to act as an effective check against any abuse of power by the executive authorities or the legislature.
6. In Hong Kong, judicial independence is widely recognized and highly respected by the community. It is also constitutionally entrenched in the Basic Law, as follows:
 - Article 2 guarantees Hong Kong's right to enjoy independent judicial power, including that of final adjudication in accordance with the provisions of the Basic Law;
 - Article 19 provides that Hong Kong shall be vested with independent judicial power;
 - Article 85 provides that the courts shall exercise judicial power independently, free from any interference; and
 - Article 88 provides for the appointment of judges by the Chief Executive on the recommendation of the Judicial Officers Recommendation Commission, which is an *independent* statutory body composed of local judges, persons from the legal profession and eminent persons from other sectors.
7. The above constitutional position has been equally entrenched into the fabric of Hong Kong's judicial system. In his speech at the Opening of the Legal Year 2014 the Chief Justice Geoffrey Ma highlighted the following:

“The Basic Law sets out clearly in quite specific terms, the different roles of [the legislature, the executive and the judiciary]. So far as the Judiciary is concerned, the ambit of its constitutional role is the exercise

¹ Andrew KN Li, 'The Importance of the Rule of Law', (2013) 43 *Hong Kong Law Journal* 795, 796-797.

of judicial power, that is, the adjudication of disputes that come before the courts in accordance with the law. The independence of Hong Kong's judges, the respect for the integrity of the law and the constitutional duty on the Judiciary are key aspects of Hong Kong's legal system.”

8. Judicial independence has been recited repeatedly by the Courts. Extracts of judgments by different courts illustrate this principle clearly.
 - “It follows from the grant of independent judicial power to the courts [by the Basic Law] that the interpretation of laws is a matter for the courts. This principle, which follows from the doctrine of the separation of powers, is a basic principle of the common law and is preserved and maintained in Hong Kong by the Basic Law.”²
 - “The Basic Law enshrines the principle that there must be a separation of powers between the executive, the legislature and the judiciary.”³
 - “The Basic Law incorporates the principle of the separation of powers; namely, that it gives to Hong Kong a system of government based on the Rule of Law and in so doing gives crucial recognition to the principle that the primary functions of law-making, law-executing and law-adjudicating are to be distinguished from each other.”⁴

Professionalism of Hong Kong's Judiciary

9. The Law Society also notes with concern certain comments that some of Hong Kong's judges have not fully comprehended or have misunderstood the Basic Law.
10. The Law Society has full confidence in the professionalism of the Hong Kong Judiciary.
11. Among other things, the selection of Hong Kong judicial officers is extremely stringent and only those with the required ethical standards of

² *Director of Immigration v. Chong Fung Yuen* (2001) 4 HKCFAR 211, 223G-H, per Li CJ

³ *Lau Cheong & Anor v. HKSAR* (2002) 5 HKCFAR 415, para. 101, per Li CJ and Ribeiro PJ

⁴ *Lau Kwok Fai Bernard & Ors v. Secretary for Justice* HCal 177 and 180/2012, 10 June 2003, para. 17, per Hartmann J

integrity, independence, professionalism and substantial legal experience are considered and appointed to judicial office.

12. Notably, there are examples where Hong Kong judicial officers have carried out their duties in an independent and impartial manner despite personal threats made against them.
13. Professionalism of the Hong Kong Judiciary is underpinned, in a staunch manner, by invaluable contributions made by highly respected overseas judges who sit in the Court of Final Appeal in Hong Kong. Article 82 of the Basic Law provides that the Court of Final Appeal may “as required invite judges from other common law jurisdictions to sit” on the Court of Final Appeal. Thus all decisions are ultimately subject to adjudication by a final appellate court comprising of judges of the highest calibre both locally and internationally. There are only few jurisdictions that adopt such an open and independent constitution to encompass judges from other overseas jurisdictions.
14. These overseas common law judges, who themselves are held in high esteem in their own jurisdictions, have significantly helped to maintain the enviably high standards of the Hong Kong Judiciary.

Checks and Balances

15. The Law Society notes the Speech also raised discussions on the checks and balances of the Executive, the Legislature and the Judiciary. Undoubtedly checks and balances do exist in the political structure of the HKSAR. Observations on the checks and balances between the Executive and the Legislature are set out in the Annex.
16. Hong Kong’s socio-economic success can only be founded upon the strict adherence to the Rule of Law and the uncompromising principle of judicial independence.

Conclusion

17. The Rule of Law, as well as an independent and professional Judiciary, are widely respected by the Hong Kong community. These are also regarded

highly by the international community to be the cornerstone for economic success of Hong Kong. This high level of respect and the confidence in the Hong Kong judicial system are instilled through long judicial history, hard-earned tradition and constitutional entrenchment, as well as the continual efforts of the distinguished and professional judges. That should not and can never be undermined or compromised or be dragged into the political arena.

The Law Society of Hong Kong
20 September 2015

Observations on the Checks and Balances on the Executive and the Legislature in the Existing Political Structure of the HKSAR

Executive Authorities

- a. In accordance with Article 48, the Chief Executive (CE) leads the Government of the HKSAR, decides on government policies, nominates and reports to the Central People's Government (CPG) for appointment of principal officials and recommends to the CPG the removal of them; to conduct, on behalf of the HKSAR, external affairs and other affairs as authorized by the Central Authorities.
- b. According to Article 62, the CE leads the HKSAR Government to exercise relevant powers and functions, including drawing up and introducing budgets, and drafting and introducing bills, motions and subordinate legislation.
- c. The CE plays an important role in the legislative process, including the signing of bills and the promulgation of laws (Articles 48 and 76).
- d. According to Article 74, members of the Legislative Council (Legco) may not introduce bills relating to public expenditure or political structure or the operation of the government. The written consent of the CE shall be required before bills relating to government policies are introduced by members.
- e. Article 59 states that the HKSAR Government is the executive authorities of the HKSAR, Article 60 states that the CE is the head of the HKSAR. Article 64 further provides that the HKSAR Government must abide by the law and is accountable to the Legco. Therefore the CE, as part of the executive branch of the Government, must abide by the law.

Legislature

- f. The functions of the Legco include enacting laws; examining and approving budgets, taxation and public expenditure; and monitoring the work of the Government. It also has the power to endorse the appointment and removal

of judges of the Court of Final Appeal and the Chief Judge of the High Court, and to adopt a motion of impeachment against a CE for any serious breach of the law or dereliction of duty (Article 73).

- g. Under the Basic Law, the executive authorities and the legislature can check and balance each other. For example, if the CE considers a bill passed by the Legco to be incompatible with the overall interests of Hong Kong, he may return it to the Legco within three months for reconsideration. If the Legco passes the original bill again by not less than a two-thirds majority of all the members, the CE must sign and promulgate it within one month. If the CE refuses to sign the bill passed the second time by the Legco and consensus still cannot be reached after consultations, he may dissolve the Legco after consulting the Executive Council. If the new Legco again passes the disputed bill by a two-thirds majority, then the CE must resign from office (Articles 49, 50 and 52).
- h. At the same time, the HKSAR Government is accountable to the Legco. For example, the Government is obliged to execute the laws passed by the Legco and respond to questions raised by the Legco on the work of the Government. The CE is required to deliver policy addresses regularly to the Legco to elaborate on the Government's policy vision. The Government's proposals on taxation and public expenditure also require approval by the Legco (Article 64).