

**Submission of the Hong Kong Bar Association on
the Rule of Law**

1. A golden thread which runs through all the common law jurisdictions is respect for the rule of law. Thus, when the Joint Declaration pronounced the principle of 'one country, two systems', and when the Basic Law preserves the laws previously in force in Hong Kong, what they retain is not just the rules and the provisions, but more importantly, the common legacy of the rule of law in all common law systems.
2. The rule of law embodies a number of fundamental principles in our system, including:
 - (1) the absence of arbitrary power;
 - (2) the independence of the judiciary;
 - (3) access to the courts;
 - (4) equality before the law; and
 - (5) respect for fundamental rights.

All of these are respected and protected by society as a whole.

3. In the last two years, there have been incidents which give cause for concern that the rule of law is being eroded. A major source of concern is the weak commitment of the Government to the rule of law.
4. In this connection, we have seen the Director of Immigration removing applicants just minutes before their application for leave to apply for judicial review against their removal order was to be heard by the court, thereby depriving them of their right of access to court.
5. We have also seen that the head of a public corporation not prosecuted even though subordinates were charged with conspiring with her to defraud others. The Secretary for Justice stated that the consequences of her being prosecuted would bring down a

large corporation, resulting in the unemployment of many staff, which was not in the public interest. This flies in the face of the notion of equality before the law embodied in the rule of law.

6. We have further seen that the Government refusing to appoint a date of operation to bring into legislation passed by the Legislative Council 2 years earlier simply because the Government opposed the legislation in the first place (see, for example, the Interception of Communications Ordinance 1997, the Crimes (Amendment)(No 2) Ordinance 1997). The rule of law requires that the Government abide by the law, whether it agrees with it or not. If the Government considers that the law is wrong, it should try to amend or to repeal the law, not to defer its operation indefinitely and hence place itself above the law.
7. We are still very concerned that a fully reasoned decision of the Court of Final Appeal articulating sound common law principles could be reversed by a political organ whose deliberations are characterised by a lack of transparency, a lack of participation in its decision-making process and a lack of intellectual and legal reasoning. Independence of the judiciary means more than an absence of interference with the process of adjudication in a particular case. If the system is such that a judge has to take into account the views of a political organ which has a veto power over the decision of the court, the independence of the judiciary is undermined. We urge the Government not to refer any question to the Standing Committee of the National People's Congress except through the judicial referral process set out in Article 158(3) of the Basic Law.
8. We believe that we have a strong judiciary which is committed to the rule of law. As a professional body, we will continue to play our part in upholding and defending the rule of law. However, unless the Government shows the same commitment and respect for the fundamental principles underlying the rule of law, it will be difficult to maintain this precious legacy of the common law, now entrenched by the Basic Law.

9. We urge the Government to re-affirm its commitment to the rule of law, and as part of that commitment, to take all necessary steps, including general legal education and adequate training of the civil services, to ensure the respect for the rule of law and to defend and uphold the rule of law.

14th April 2000