

**Measures to promote the rule of law and
judicial independence, and to enhance confidence in
Hong Kong's legal system**

Background

The rule of law and judicial independence are key elements in Hong Kong's legal system, and cornerstones of Hong Kong's way of life. However, concerns have been expressed that the request for an NPCSC interpretation of two articles in the Basic Law undermined confidence in the rule of law and judicial autonomy. Those concerns need to be addressed, and confidence in Hong Kong's legal system boosted.

2. The legal, constitutional and political arguments for and against the request for the NPCSC interpretation have been expounded at length since the request was made in May 1999. This paper does not seek to prolong that debate, but the Department of Justice repeats its firm view that the request was lawful and constitutional, and did not interfere with judicial independence. Indeed, the decision of the Court of Final Appeal on 3 December 1999 supports that position.

Perception

3. The right of abode issue has, nevertheless, created a perception amongst some people, both in Hong Kong and overseas, that the rule of law has been undermined and confidence in judicial independence impaired. The Department of Justice considers that confidence in Hong Kong's legal system can be boosted in the following ways –

- (1) by restating the Government's continued commitment to the rule of law and judicial independence, and ensuring scrupulous observance of those concepts;
- (2) by correcting some misconceptions about the right of abode issue;

- (3) by clarifying issues relating to judicial independence;
- (4) by defending the courts if they come under unwarranted attack;
- (5) by continuing to promote local and overseas awareness of the rule of law and of our legal system;
- (6) by reassuring the community about future resort to NPCSC interpretations.

Commitment and observance

4. The Chief Executive, Secretary for Justice and other senior officials regularly restate the SARG's commitment to the rule of law and judicial independence. They are well aware that these concepts are the cornerstones of Hong Kong's success, and of the protection of rights and freedoms.

5. This commitment is matched in practice by a scrupulous observance of those concepts. No one is above the law in Hong Kong. Equality before the law is guaranteed by Article 25 of the Basic Law, and judicial independence is guaranteed by Articles 2, 85, 88 to 93 of the Basic Law. It is the duty of members of the Department of Justice, when advising on government proposals or practices to ensure that these guarantees are observed.

Misconceptions

6. Many of the concerns expressed about the request for the NPCSC interpretation were based on a thorough understanding of the background facts, and of the legal and constitutional implications of the request. However, the issues involved were complex and, as they were reported both locally and overseas, many misconceptions arose. The effect of these misconceptions was to create unnecessary concern about our legal system. Listed below are some of the misconceptions that have come to the attention of the Department of Justice.

Misconceptions

True position

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| (1) The NPCSC can rule on any aspect of Hong Kong law. | The NPCSC can only interpret the Basic Law, and other national laws that apply to Hong Kong, but cannot interpret local legislation. |
| (2) A losing party to proceedings before the CFA could ask the NPCSC to overrule the decision. | An NPCSC interpretation does not undo a court decision in favour of a particular party to the proceedings. |
| (3) The CFA no longer has the power of final adjudication. | The CFA's decision in favour of a particular party remains final even if the NPCSC subsequently interprets the Basic Law in a different manner. |
| (4) An NPCSC interpretation takes away the courts' future power of adjudication in respect of the provision interpreted. | The NPCSC does not decide whether particular individuals have rights under the Basic Law, and the courts continue to do so. When adjudicating cases, the courts may need to determine the meaning of the NPCSC interpretation, and whether the interpretation applies to the cases before them. |
| (5) The SARG will seek a request whenever it loses a Basic Law argument in the CFA. | The SARG did not seek an NPCSC interpretation in respect of two Basic Law rulings by the CFA in January 1999. It would only seek such an interpretation in highly exceptional circumstances. |
| (6) The SARG sought the interpretation during the CFA hearing, and therefore | The request for the interpretation was made several months after the CFA decision, and did not affect the |

interfered with the right to a fair trial. right to a fair trial.

- (7) Counsel for the SARG did not refer to the CFA's obligations under BL 158(3). Counsel did address the CFA on this issue.

7. The Department of Justice has sought to correct these misconceptions through speeches, articles, letters to newspapers and briefings, both locally and overseas. It is our impression that those who study the issues closely are able to appreciate the true position. However, given the complexity of the legal issues involved, many people may still have a hazy idea of them. The Department of Justice will therefore continue its efforts to clarify the position.

Judicial independence

8. The Department of Justice accepts that the NPCSC interpretation does raise the issue of judicial autonomy. The fact that the interpretation was binding on SAR courts indicates that, in respect of interpretations of the Basic Law, the Hong Kong judiciary does not have the ultimate authority. However, this is a principle set out in the Basic Law, and no reduction in the courts' powers was created by the right of abode issue.

9. The independence of the judiciary is, of course, of vital importance. But there is no doubt that our judges continue to enjoy complete independence since –

- (1) they are appointed in accordance with the recommendation of an independent commission;
- (2) they enjoy security of tenure;
- (3) they decide cases impartially, and without fear or favour.

10. Two indications of the continuing independence of the judiciary may be given.

- (1) Last year, three senior judges (including two Vice Presidents of the Court of Appeal) gave interviews at the time of their retirement. They were Mr Justice Mortimer, Mr Justice Findlay and Mr Justice Nazareth. They all confirmed that there has not been any interference with judicial independence since the handover; they all agreed that the interpretation by the NPCSC was not in breach of the rule of law; and they all agreed that there was no threat to judicial independence. They spoke about the perception that the court's independence had been eroded, but they were of the view that such perception was wrong.
- (2) Out of a total of more than two thousand civil cases involving the SARG that were decided in 1998 and 1999, about 10% were decided against the Government. 183 of the cases decided in this period were applications for judicial review of government decisions, of which about 21% were decided against the Government.

11. The Department of Justice considers it unfortunate that discussion of the NPCSC interpretation may have unwittingly given rise to the perception that our judges no longer decide cases independently, and without fear or favour. Nothing could be further from the truth. The Department of Justice has been emphasizing this point in speeches, articles, letters to newspapers and briefings.

12. We would also urge commentators not to suggest that, if a particular case is decided in favour of the SARG, this will give rise to a perception that judicial independence has been undermined. It should not need to be explained that judges decide cases in accordance with the facts and law. Members of the community should not be encouraged to perceive that a decision in favour of the SARG was not reached impartially, or that the judiciary is vulnerable to political pressure. Instead, they should be encouraged to view the judiciary for what it is – a strong and independent body of judges who protect the rights of members of the community, regardless of political considerations.

13. Fortunately, opinion polls indicate that members of the public do have confidence in the judiciary.

- (1) According to a Gallup International and Asian Commercial Research in October last year, over 90% of respondents considered that, in Hong Kong, all were equal before the law and human rights were respected.
- (2) Surveys conducted by the Hong Kong Policy Research Institute indicate that public confidence in the judicial system in December 1999 (i.e. after the NPCSC interpretation) remained at about the same level as that in January 1999 (before the interpretation). The figures were 96.4 and 100.3 respectively.

14. Other indications of confidence in the independence of the judiciary are the numbers of applications for legal aid related to judicial review, and the numbers of applications made for judicial review. The figures are as follows.

(1) Applications for legal aid related to judicial review

	<u>Immigration related</u>	<u>Vietnamese Boat People</u>	<u>Others</u>	<u>Total</u>
1998	2923	429	36	3388
1999	8591	249	84	8924

(2) Applications for judicial review

1998	-	87
1999	-	132
2000 (Jan to March)	-	184

These figures demonstrate that those aggrieved by government decisions have confidence in the judiciary's commitment to the independent and impartial adjudication of claims against the government.

Defending the courts

15. At the Opening of the Legal Year this year, the Chief Justice, Mr Andrew Li, discussed the development of constitutional case law in 1999. He commented that -

‘where the courts come under unwarranted attack, it is the constitutional responsibility of the Government, that is the executive authorities, to explain and defend the fundamental principle of judicial independence, whether or not the decision in question is in its favour.’

He went on to say that he was sure that the Government understands and accepts the importance of that responsibility.

16. The Administration in general, and the Department of Justice in particular, does understand and accept the importance of that responsibility. For example, the Secretary for Justice included a discussion of judicial independence in her own speech at the Opening of the Legal Year, and the Acting Solicitor General responded positively to the Chief Justice’s comments in RTHK’s ‘Viewpoint’ programme on 30 January 2000. A copy of that response is at **annex 1**.

Promoting awareness of the rule of law

17. Notwithstanding the public confidence in our legal and judicial systems, the Department of Justice has in recent years pursued a vigorous public education programme to foster better understanding of Hong Kong’s legal system and to instill public support for the rule of law.

A list of the projects completed and planned is at **annex 2**.

18. Our latest initiative is a series of 13 articles to promote the rule of law, being published every two weeks in a Chinese language newspaper. These articles will cover such topics as the nature of judicial review, and the concept of judicial independence. Two articles have been published so far. We consider that public confidence in the rule of law, and in the judiciary’s ability to enforce it, will be enhanced by this continuing public education programme.

Assurance as to the future

19. The Administration has repeatedly emphasized that it would not seek an NPCSC interpretation save in highly exceptional circumstances; that the NPCSC has rarely exercised its power to interpret national laws; and that the NPCSC would not lightly decide to interpret the Basic Law. It should also be remembered that the decision to seek an NPCSC interpretation in respect of the right of abode issues in May 1999 was made in the following circumstances –

- (1) there were good grounds for seeking an NPCSC interpretation, rather than an amendment, of the Basic Law;
- (2) there was no other way in which the problems arising from the CFA's judgment could be resolved otherwise than with the assistance of the CPG; and
- (3) the CE considered it to be imperative in the public interest to seek the interpretation.

20. The Department of Justice hopes that the Administration will not again be faced with a problem of the magnitude of the right of abode issue, and that another request by the Chief Executive for an NPCSC Interpretation will not be necessary. There is no basis for the fear that such a request would be lightly made or accepted.

Judicial Independence**- a statement by Bob Allcock, SG(Ag), on
RTHK's 'Viewpoint' programme for 30 January 2000**

At the Opening of the Legal Year two weeks ago, the Chief Justice, Mr Andrew Li, discussed the development of constitutional case law in 1999. One of his comments received wide publicity. He said (and I quote) –

‘where the courts come under unwarranted attack, it is the constitutional responsibility of the Government, that is the executive authorities, to explain and defend the fundamental principle of judicial independence, whether or not the decision in question is in its favour.’

He went on to say that he was sure that the Government understands and accepts the importance of that responsibility.

2. I can assure listeners that the Administration in general, and the Department of Justice in particular, does understand and accept the importance of that responsibility. I will explain why.

Why does judicial independence matter?

3. Judicial independence is of vital importance. Unless the administration of justice is in the hands of impartial judges, who are part of an independent judiciary, legal rights and guarantees would be worthless. People must have the confidence of knowing that their disputes will be dealt with, on their merits, by independent and impartial judges free from outside influence or pressure.

How is judicial independence guaranteed?

4. The Basic Law guarantees the continuity of judicial independence. In particular, it provides that judges shall be appointed on the recommendation of an independent commission, and shall have security of tenure.

5. In practice, there is no doubt that every judge in Hong Kong, in deciding a case, does so according to his or her own judgment, and without fear or favour.

Constitutional controversies

6. Nevertheless, judgments are sometimes controversial. Courts and judges are not immune from criticism. Judgments on important issues should be vigorously debated in a society that values the freedom of expression. However, as the Chief Justice remarked in his speech, it is important that any such debate should be objective and rational. But what can be done if it is not?

Contempt of court

7. In extreme cases, criticism may amount to contempt of court. Where this is so, the Secretary for Justice can bring proceedings against those responsible, and the court can impose penalties on them. This happened in 1998, when a local newspaper carried out a campaign aimed at members of a tribunal and the judiciary. Its articles were published maliciously, in bad faith, and were ‘scurrilous, abusive, shocking and reprehensible’.

8. However, criticism must pass over a very high threshold before it amounts to contempt of court. It must be calculated to undermine public confidence in the administration of justice. Some comments on decisions of the Court of Final Appeal last year were highly critical. But the Department of Justice, having considered them very carefully, came to the view that none amounted to contempt of court.

What else can be done?

9. Where critical comments do not amount to contempt of court, what should be done about them? Some commentators have suggested that the Secretary for Justice should defend all court decisions. Does this mean that, if someone says a particular decision was wrong, the Secretary for Justice should publicly disagree, and state that it was correct? This cannot be right. It suggests that court decisions need the endorsement, or seal of approval, of the Secretary for Justice. Such a view undermines, rather than supports, the independence of the judiciary.

10. What, then, is the duty of the executive? According to the Chief Justice, its duty is ‘to explain and defend the fundamental principle of judicial independence.’

Defending judicial independence

11. If, for example, someone should suggest that only those

lawyers who support the government should be appointed as judges, or only those judges who give decisions favourable to the government should be promoted, this would clearly be an attack on judicial independence. The government would then be under a constitutional duty to explain that such suggestions were inconsistent with judicial independence, and to refuse to accept them.

12. The Administration accepts that it has this duty, and is alert to discharge it if necessary. For example, after the Court of Final Appeal's first decision in the right of abode cases, last January, some critics suggested that the court should be asked to 'rectify' its judgment. The Administration refused to ask the court to do so, although it did seek a clarification of its decision. As the Administration subsequently explained, there was no legal basis for asking the court to reverse its original judgment where there was no case before it, nor would it be acceptable to do so. It also explained that if, in another case, the court were invited to reconsider its decision, it would be unlikely to come to a different conclusion. It pointed out that, if the court did come to a different conclusion, it might be criticised as having yielded to political pressure instead of making a rational judicial decision. This would have damaged the court's credibility.

13. Instead, another way was found to resolve the problems arising from the decision. That was to request the Standing Committee of the National People's Congress to exercise its power to interpret the Basic Law. This solution was, of course, controversial. But it was lawful and constitutional, and it avoided subjecting the courts to political pressure.

14. Throughout the controversies of last year, the Department of Justice remained respectful of the judiciary. Indeed, members of that Department must do their best to inspire respect for the judiciary. As a former president of the American Bar Association said –

‘If respect for the courts and for their judicial process is gone or steadily weakened, no law can save us as a society. Lawyers, whatever their views on controversial decisions, must inspire respect for the judiciary.’

My colleagues in the Department of Justice and I have the greatest respect for members of the Hong Kong judiciary. And I urge you

all to share our confidence in their ability, integrity, impartiality and independence.

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**Programmes to promote
the rule of law and the legal system in Hong Kong**

In order to foster better understanding of Hong Kong's legal system and to instil public support for the rule of law, the Department of Justice has pursued a public education programme to explain the legal system in the past 3-4 years. Apart from various publications, the Department has also produced an education video on the legal system (1996, 1998 editions) and two series of TV docu-dramas, one screened before the Handover and one in 1998/99. Following is a summary of the projects completed before the end of 1999:

Publications:

1. "The Legal System in Hong Kong" – the publication was updated in 1998 and was widely distributed. The book is also available for sale at the Government Publications Centre;
2. Department of Justice 1998 – a biennial report that summed up the work of 1996 and 1997; and
3. The Prosecutions Division Yearly Review 1998 – a new initiative in 1998 on the part of the Prosecutions Division to increase the transparency of the work of the Division. Copies of the report were distributed to the legal sector and other interested bodies.

Reference materials:

A wide range of publications were produced by the Department which can be served as useful reference tool to the legal profession, academics, students and members of the public:

1. "Prosecution Policy – Prosecutions Guideline for Government Counsel" – an updated version of an existing publication (distributed to the legal sector and interested bodies for reference);
2. The 3rd edition of the English-Chinese Glossary of Legal Terms – a major updating of an earlier publication after Reunification (available for sale at the Government Publications Centre);
3. Basic Law Index – a new initiative by the Legal Policy Division which can be served as a quick reference to those who studied the Basic Law;

4. “Legislative Drafting in Hong Kong – Crystallization in Definitive Form” – a new initiative by the Law Drafting Division; and
5. The first edition of the Chinese-English Glossary of Legal Terms – second phase of the glossary project.

TV programme/VCDs

1. A 10-minute video on the Legal System in Hong Kong titled “Ranging free within the Law” and a VCD version was produced and had been distributed to schools, community organisations and civic education bodies in late 1999;
2. The 2nd series of docu-drama (10 episodes) produced by RTHK was screened on TV from November 1998 to March 1999;
3. A VCD containing 6 of the episodes of legal docu-drama was produced and had been distributed at the Law Week '99 and other events; and
4. Two information kiosks were set up at venues of the Law Week '99 organised by the Law Society of Hong Kong in December, 1999 (available at the kiosks were a BLIS demonstration and an interactive quiz designed to test the legal knowledge of participants).

New Initiatives for 2000/1 and 2001/2

A new programme for 2000/1 and 2001/2 has been planned to strengthen the understanding and appreciation of the rule of law, assure the public of the Government’s determination to maintain the rule of law and the existing legal system, and enhance understanding of the interface between the Hong Kong’s legal system and the Mainland system. Following are some of the projects planned:

Publications:

1. Department of Justice 2000 (Biennial Report) – summing up the work of the Department in 1998 and 1999 was published in April 2000, CD-Rom of the report was also produced for wide distribution ;
2. Prosecutions Division Yearly Review 1999 – a comprehensive review of the work of the Division was published in March, 2000, and
3. “Victim of Crime Charter” booklet/poster/TV API – an updated version was re-launched in April 2000

Video/VCD/TV drama series:

1. A video/VCD on law formulation and drafting process being produced by RTHK with the assistance of the Law Drafting Division is expected to complete in mid-2000.
2. The 3rd series of Docu-drama (13 episodes) is being produced by RTHK and is scheduled to be on air starting from April 23, 2000. A wide range of topics/concepts have already been identified (e.g. judicial review, corruption, contempt of court, counterfeit goods-related crime, computer crime etc.); and
3. Two other educational videos/VCDs have been planned for 2001/2: One on the legal interface between the Mainland and Hong Kong for distribution to secondary schools, visitors and for training purpose; and the other on various basic legal concepts for distribution to secondary schools.

Other Community Projects:

1. The Department and the Department's Local Government Counsel Association co-organised a series of 14 school talks to secondary schools from mid-February to mid-April 2000; and
2. The Department also contributed to the Basic Law 10th Anniversary roving exhibition to promote the understanding of the rule of law.

Homepage:

A full set of Bilingual Laws Information System and information on the Department are being updated regularly. Also available on the homepage are speeches and statements by SJ and other Law Officers on various occasions.

Other regular activities (local and overseas):

1. Counsel speaking at seminars organised for civil servants on Basic Law, and the national laws that apply in the HKSAR;
2. SJ and senior officers briefing overseas visitors, journalists and local consulates;
3. SJ, LOs and other senior officers making speeches regularly in press conferences, public functions, forums, TV/radio talk shows and luncheon talks;

4. SJ and other officers regularly contributing op-ed articles to the press and other professional publications (e.g. HK Lawyer); and
5. LOs taking part in overseas speaking engagements; and attending overseas conferences to explain the work and decision of the Department.

PR & I Unit
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