

LCQ1: White Paper on "The Practice of the 'One Country, Two Systems' Policy in the Hong Kong Special Administrative Region"

Following is a question by Hon Alan Leong and a reply by the Secretary for Justice, Mr Rimsky Yuen, SC, in the Legislative Council today (July 9):

Question:

Last month, the State Council published the White Paper on "The Practice of the 'One Country, Two Systems' Policy in the Hong Kong Special Administrative Region" ("White Paper"). Section 3 in Part V of the White Paper points out that "Hong Kong people governing Hong Kong" means that "Hong Kong must be governed by the Hong Kong people with patriots as the mainstay", and those who administrate Hong Kong (including 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" ("political requirements"). Subsequently, the Secretary for Justice told the media that "as judges have to swear in when assuming office, this is already a manifestation of 'loving the country and Hong Kong' from a legal perspective". However, the judicial oath to be taken by judges upon assumption of office does not include the political requirements mentioned in the White Paper. In this connection, will the Government inform this Council:

(1) whether the existing political system in Hong Kong requires judges and other judicial personnel to love the country and Hong Kong; whether it has examined how the requirement for such personnel to love the country and Hong Kong manifests from a legal prospective, including what other requirements such personnel must comply with, apart from

swearing in pursuant to Article 104 of the Basic Law when assuming office;

(2) whether it has examined the impacts of the aforesaid political requirements for judges and other judicial personnel, as put forward in the White Paper, on their discharge of official duties; whether they are required, in handling cases, to consider how to comply with such political requirements; and

(3) if it has examined where judges, in presiding over cases, have arrived at contradictory conclusions by interpreting the law according to the common law principles and by considering how to comply with the political requirements, whether they should deliver judgments on the basis of the former or the latter; whether judges are required to bear any consequence when their judgments delivered in accordance with the common law principles are regarded by the Central Government as jeopardising the country's sovereignty, security or development interests?

Reply:

President,

Since the establishment of the Hong Kong Special Administrative Region (HKSAR), the legal and the judicial systems of the HKSAR have achieved smooth continuity and development under the safeguards of the Basic Law (BL). Judicial independence and the rule of law are important core values of the Hong Kong society. The BL provides a solid legal basis for our judicial independence.

According to BL2 and BL19, the HKSAR enjoys independent judicial power, including that of final adjudication. Section 4 of Chapter IV of the BL contains the provisions concerning the Judiciary of the HKSAR. Amongst others, BL85 clearly states that the courts of the HKSAR shall exercise judicial

power independently, free from any interference. The appointment and security of tenure of judges are expressly provided for in the main provisions concerning the Judiciary in the BL. According to BL88 to BL90, the appointment and removal of judges shall follow established procedures. The remuneration and benefits enjoyed by judges are safeguarded by the law. Judgments made by judges are wholly based on the applicable law and relevant evidence, free from any interference by any person (including the executive authorities).

After China resuming the exercise of sovereignty, the Judiciary exercises its independent judicial power, including that of final adjudication, in accordance with the BL, and has made great contribution to the rule of law of the HKSAR. The HKSAR Government has all along attached great importance to the rule of law and judicial independence, and the Department of Justice will continue to endeavour to uphold the rule of law and judicial independence.

The White Paper published by the State Council last month on the practice of the "One Country, Two Systems" policy in the HKSAR aims to set out and summarise systematically the implementation of the "One Country, Two Systems" policy in the HKSAR. It has no intention of interfering with the rule of law or judicial independence of the HKSAR. Neither does it impose any new requirements on the Judiciary or its members on top of those contained in the BL. Instead, the White Paper repeatedly reiterates that the HKSAR enjoys independent judicial power, including that of final adjudication. For example, Section 2 of Part II clearly states that the courts of the HKSAR at all levels exercise their judicial power independently in accordance with the law.

Moreover, as emphasised by the spokesman of the Hong Kong and Macao Affairs Office of the State Council at a media interview on June 11, the "One Country, Two Systems" policy is a basic State policy; and that the basic policies of the

Central Government regarding the HKSAR remains unchanged. In other words, the basic policy of the Central Government that the HKSAR enjoys independent judicial power, including that of final adjudication, also remains unchanged.

My reply to the three-part question raised by Hon Alan Leong is as follows:

(1) Chapter IV of the BL makes detailed provisions for the political structure of the HKSAR. "Political Structure" includes the Chief Executive, the Executive Authorities, the Legislature, the Judiciary, District Organisations and Public Servants. As we understand, when Section 3 of Part V of the White Paper includes judges and members of the Judiciary among "those who administrate Hong Kong" and "Hong Kong's administrators", it only meant to say that judges and members of the Judiciary are part of the HKSAR's political structure as provided in Chapter IV of the BL, and not part of the executive authorities. In explaining the legal basis of the requirement that Hong Kong must be governed by patriots, the said Section points out that the taking of the oath by judges and members of the Judiciary upon assumption of office to uphold the BL and swear allegiance to the HKSAR of the People's Republic of China pursuant to the BL and the Oaths and Declaration Ordinance (Cap. 11) is already a legal manifestation of the requirement of "loving the country and Hong Kong". Considering the relevant parts in their proper context, the White Paper in this regard is clearly just an overall observation, and not an introduction of any new requirement for judges and members of the Judiciary, still less any interference of judicial independence.

(2) and (3) The duty of judges is to adjudicate cases and decide on the parties' rights and obligations in accordance with the relevant law and evidence. BL85 guarantees that judges can exercise judicial power independently, free from any interference. Judges will not be influenced by any political considerations or personal interests. This accords

with the judicial oath they take upon assumption of office.

As a matter of fact, since China resuming the exercise of sovereignty, Hong Kong residents have enjoyed the right to institute legal proceedings in the courts against the acts of the executive authorities and their personnel under BL35. In judicial review applications heard before the courts in Hong Kong, it is quite often that applicants seek a declaration by the court that a policy of an executive authority or a statutory provision enacted by the legislature is in contravention of the BL. The executive authority as a party to these cases will respect the judgments of the court and will endeavour to implement the judgments in an appropriate manner.

The White Paper does not demand members of the Judiciary or judges to take into account any political or other inappropriate considerations in adjudicating cases. As I have said at the outset, the White Paper aims at setting out the implementation of the "One Country, Two Systems" policy in the HKSAR and has not gone beyond the framework of the BL. Accordingly, the White Paper would not give rise to any adverse impact on the Judiciary or members of the Judiciary in the performance of their duties.

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