

**Keynote Address by Hon Rimsky Yuen SC
Secretary for Justice
at the 15th Hong Kong Forum – Keynote Luncheon
On 3 December 2014 (Wednesday)**

**CONSTITUTIONAL DEVELOPMENT
AND THE RULE OF LAW IN HONG KONG**

Ms. Margaret Fong, Ms. Esther Nägeli, Mr. Georges Legros, Distinguished
Guests, Ladies and Gentlemen,

1. First of all, may I express my gratitude to the Federation of Hong Kong Business Associations Worldwide for inviting me to this meaningful event and for giving me this opportunity to address such a distinguished gathering of business figures. For those who travelled from overseas to attend the 15th Hong Kong Forum, may I wish you an enjoyable and fruitful stay in Hong Kong.
2. In the past few months, various events in Hong Kong, including the so-called ‘Occupy Central’ movement, have attracted much attention and discussions both within Hong Kong and beyond. One of the matters underlying these events is the constitutional development of the Hong Kong Special Administrative Region (“SAR”), with focus on the selection of the Chief Executive (“CE”) through universal suffrage. In the course of the discussions and as events develop, issues concerning the rule of law have also been raised. In the circumstances, allow me to make use of this opportunity to share with you some of my thoughts on these two issues.

Constitutional Development

3. Let me begin with the selection of the CE through universal suffrage. One of the key issues, which has generated much debate,

is the nomination of candidates for the office of CE.

4. It is wholly understandable that issues concerning the nomination of candidates have given rise to debates (or even controversies), as many other issues concerning the design of an election regime. However, like many other constitutional issues, issues concerning nomination of candidates should not and cannot be considered in a vacuum. Instead, the questions of nomination of candidates should be considered in the proper legal and constitutional context of the Hong Kong SAR. This is, if I may stress, of fundamental importance since Hong Kong's status as a Special Administrative Region of the People's Republic of China pursuant to the 'One Country, Two Systems' policy is unprecedented in the history of constitutionalism as well as in the history of democratic development.
5. To navigate this uncharted territory of universal suffrage in the context of 'One Country, Two Systems', it is essential that we have a proper understanding of the CE office as well as the role of the Central People's Government ("CPG") of China. In this regard, the provisions in the Basic Law and the relevant Interpretation and Decisions made by the Standing Committee of the National People's Congress ("NPCSC") are highly pertinent.
6. Article 15 of the Basic Law provides that the CPG shall appoint the CE and the principal officials of the executive authorities of the Hong Kong SAR in accordance with the provisions of Chapter IV of the Basic Law. Chapter IV is the chapter in the Basic Law which deals with the political structure of the Hong Kong SAR, and the most relevant provisions for the present purpose are Articles 43, 45 and 48 thereof.
7. Article 43 stipulates that the CE, as the head of the Hong Kong SAR, is accountable to both the CPG and the Hong Kong SAR.
8. Article 45, which is the most pertinent provision for our present purpose, provides as follows:

“The Chief Executive of the Hong Kong Special Administrative Region shall be selected by election or through consultations held locally and be appointed by the Central People’s Government.

The method for selecting the Chief Executive shall be specified in the light of the actual situation in the Hong Kong Special Administrative Region and in accordance with the principle of gradual and orderly progress. The ultimate aim is the selection of the Chief Executive by universal suffrage upon nomination by a broadly representative nominating committee in accordance with democratic procedures.

The specific method for selecting the Chief Executive is prescribed in Annex I “Method for the Selection of the Chief Executive of the Hong Kong Special Administrative Region.”

9. Annex I, as it now stands, provides that the CE shall be elected by a broadly representative Election Committee comprising a total of 1,200 members from 4 sectors. Paragraph 7 of Annex I, which is also highly relevant, provides as follows:

“If there is a need to amend the method for selecting the Chief Executives for the terms subsequent to the year 2007, such amendments must be made with the endorsement of a two-thirds majority of all the members of the Legislative Council and the consent of the Chief Executive, and they shall be reported to the Standing Committee of the National People’s Congress for approval.”

10. Article 48, on the other hand, deals with the powers and functions of the CE. One can see from the various provisions in Article 48 that the powers and functions of the CE are very wide and extensive.

11. Based on the provisions of the Basic Law, the NPCSC has

previously dealt with the issue of universal suffrage by, firstly, an Interpretation made on 6 April 2004, a Decision made on 26 April 2004 and a further Decision made on 29 December 2007. Put shortly, the effect is that amendments to the method concerning the selection of CE have to go through a “Five-Step Process”:

- (1) The CE to make a report to the NPCSC, so as to invite the NPCSC to decide whether it is necessary to amend the method of selection or formation.
- (2) The NPCSC to make a determination on whether any such amendment shall be made.
- (3) If the NPCSC determines that amendments may be made, the Hong Kong SAR Government is to introduce to LegCo a resolution on the proposed amendments to be passed by a two-third majority of all LegCo members.
- (4) The CE to consent to the resolution as passed by the LegCo.
- (5) The CE to lodge the relevant bill to the NPCSC for approval.

12. From this brief survey of our constitutional regime, it is clear that the CPG has a role to play in the constitutional development of the Hong Kong SAR. Not only does the NPCSC have the power to decide whether to approve the bill for amending Annex I to the Basic Law which sets out the method for selecting the CE, the CE-elect ultimately has to be appointed by the CPG. This power of appointment is a substantive (as opposed to a nominal) one. This is because Hong Kong is not a sovereign or independent state, but a special administrative region of the PRC. Besides, as I noted above, the CE has to be accountable to both the CPG and the Hong Kong SAR.

13. Further, it is equally clear that there are two important dimensions to the future election regime. The first concerns the election by eligible voters pursuant to the ‘one person, one vote’ principle. The second concerns the appointment by the CPG. As pointed out just now, Article 45 of the Basic Law provides that any CE-elect shall be appointed by the CPG and that this power of appointment is a substantive one. In other words, the CPG may either appoint the

CE-elect or, in appropriate circumstances, decline to make an appointment.

14. Taking into account all these matters, the future system for selecting CE by way of universal suffrage has to address and handle these two dimensions in an appropriate and effective manner; failure to do so might turn the future system for selecting CE by way of universal suffrage into a recipe for constitutional crisis.
15. The Decision made by the Standing Committee of the National People's Congress provides the framework to deal with these two dimensions. Besides, it is crystal clear that both the people of the Hong Kong SAR and the CPG share the common aspiration to attain universal suffrage for the selection of CE in 2017. The challenge we now face is how to address the divergent views within the community so that we can agree on an election system which is acceptable to all the stakeholders.
16. When universal suffrage is put in place, it is estimated that around 5 million voters would be entitled to take part in the selection of CE. Viewed from any angle, the election of CE by 'one person one vote' will necessarily be a significant step forward, and will certainly be a system more democratic than the current system of election of CE by the Election Committee. Besides, the election of CE in 2017 by universal suffrage is just the first step. Paragraph 7 of Annex I to the Basic Law and the "Five-Step Process" mentioned earlier provide the legal avenue for future refinement of the system when sufficient support from the community exists.

The Rule of Law

17. Let me move on to the rule of law. Hong Kong, as we all know, is a jurisdiction which attaches great importance to the rule of law and the concept of judicial independence.
18. In this regard, I appreciate that comments (including sometimes adverse comments) have recently been made about the state of the

rule of law in Hong Kong. However, if I may be permitted to be blunt, all those assertions which sought to suggest that the rule of law and judicial independence in Hong Kong are being eroded are no more than mistaken perceptions. I would invite you to consider not just bare assertions, but to consider the objective circumstances which all point to the opposite direction.

19. From the constitutional perspective, the rule of law and judicial independence are firmly guaranteed by our Basic Law. Amongst others, Articles 2 and 19 of our Basic Law provide in no uncertain terms that Hong Kong enjoys independent judicial power, including that of final adjudication.
20. Further, Article 82 of our Basic Law provides that the power of final adjudication of Hong Kong shall be vested in the Court of Final Appeal. One important aspect to note is that Article 82 puts in place an unique arrangement which permits the invitation of judges from other common law jurisdictions to sit on the Court of Final Appeal.
21. Since the establishment of the Hong Kong SAR in July 1997, eminent judges and jurists from the United Kingdom, Australia and New Zealand have been invited to sit on our Court of Final Appeal. As a matter of fact, final appeals of all types of cases (including cases raising important constitutional issues, proceedings touching on important government policies as well as substantial commercial disputes) were and still are being heard by a panel of 5 judges, which invariably include one such overseas judge. At the moment, we are privileged to have a total of 12 such overseas judges sitting at our Court of Final Appeal from time to time. They include familiar names such as Sir Anthony Mason, Lord Neuberger and Lord Hoffmann.
22. It is beyond imagination that these eminent judges be willing to sit in our Court of Final Appeal if they do not enjoy judicial independence. It is equally absurd to suggest that these eminent judges remain silent if they ever felt any form of interference in the

discharge of their judicial duties.

23. The fact that Hong Kong can continue to attract such eminent overseas judges to sit in our Court of Final Appeal is a strong testimony to the state of judicial independence and the rule of law in Hong Kong. Besides, the judgments of our Court of Final Appeal are highly regarded in other common law jurisdictions. This is illustrated by the fact that its judgments are regularly cited and relied on in leading common law jurisdictions such as the United Kingdom and Australia.
24. The Hong Kong SAR Government fully appreciates the importance of the rule of law, whether for the purpose of her economic development or for the purpose of protecting fundamental human rights. The Hong Kong SAR Government will make every possible effort to maintain the rule of law and judicial independence.

Conclusion

25. Ladies and gentlemen, it is true that Hong Kong is currently facing significant challenges. However, as we would also recall, Hong Kong has in the past overcome many challenges including the SARS in 2003 and the various economic turmoil. With the strong fundamentals that Hong Kong enjoys and with the common aspiration to maintain Hong Kong's prosperity and stability, we have every confidence that Hong Kong will also overcome the current challenges, and continue to be one of the leading international financial and commercial centres.
26. On this note, may I wish the Federation of Hong Kong Business Associations Worldwide and each you every success in your future endeavours. And for our overseas guests, may I again wish you a pleasant and enjoyable stay in Hong Kong.

Thank you.