

**Speech by Mr Rimsky Yuen, SC  
Secretary for Justice, Hong Kong SAR  
at the Weatherhead East Asian Institute of Columbia University  
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**Basic Law of the HKSAR: A Macro View**

Professor Liebman, Madam Ho, Mr. Barnett, Distinguished Guests,  
Ladies and Gentlemen,

1. First of all, may I express my gratitude to the Weatherhead East Asian Institute for organizing this event, and also for giving me this opportunity to share with you some of my thoughts on the Basic Law of the Hong Kong Special Administrative Region (“HKSAR”). What I intend to do today within the limited time is to give you a macro view of the Basic Law with emphasis on three key aspects, namely, the genesis, the nature and the effect of the Basic Law.

**Genesis of the Basic Law**

2. From a constitutional and legal perspective, the genesis of the Basic Law is Article 31 of the Constitution of the People’s Republic of China (“PRC”). It is the very provision in the PRC Constitution which provides the legal basis for setting up special administrative region within the PRC territory, so as to implement the ‘One Country, Two Systems’ policy.

3. Further, Article 31 of the PRC Constitution stipulates that the systems to be implemented in the relevant special administrative region shall be regulated by the National People's Congress ("NPC") through legislation. In other words, a legislation regulating the systems to be implemented in the special administrative region is a mandatory requirement under Article 31 of the PRC Constitution.
4. In July 1985, the Drafting Committee for the Basic Law of the HKSAR (comprising representatives from both Hong Kong and Mainland China) was established and commenced work. In April 1988, a draft of the Basic Law was published for consultation both in Hong Kong and the Mainland. Extensive changes were made after the 5-month consultation, which led to another draft being published for further consultation in February 1989. After a further consultation for 8 months, the final version of the Basic Law was adopted and promulgated on 4 April 1990.

### **Nature of the Basic Law**

5. Moving on, if I may, to the nature of the document. Looking at it from the perspective of the Mainland legal system, the Basic Law is a piece of national legislation. In this sense, it essentially has the same legal status as the other pieces of national legislation passed by the NPC. Yet, whereas the overwhelming majority of the Mainland's national legislation do not apply to

the HKSAR, the Basic Law applies to and governs the affairs of the HKSAR.

6. On the other hand, if one looks at it from the perspective of the HKSAR, the Basic Law is its constitutional document as well as its highest law. This is made clear by Article 11 of the Basic Law, which provides that no law enacted by the legislature of the HKSAR shall contravene the Basic Law.
7. Another aspect is the unique and unprecedented nature of the Basic Law. The most obvious point is the creation of a special administrative region which continues its capitalist system to the exclusion of the socialist system within a country which practises the socialist system.
8. From the perspective of legal system, whilst it is a national legislation enacted under the Mainland legal system (which is primarily a continental or civil law system), the Basic Law stipulates the continuation of the common law system in Hong Kong.
9. Not only is the fact that a city within a country practising a legal system different to that of its country by itself unprecedented, the question of interpretation of the Basic Law raises further unprecedented issues. When issues concerning the Basic Law call for interpretation in the Courts of the HKSAR, the common law principles of statutory interpretation are adopted. As a result,

concepts which are familiar to common law lawyers, such as purposive interpretation, are frequently used in the HKSAR Courts to interpret the Basic Law, even though it is a piece of legislation enacted in the Mainland which implements the continental or civil law system.

10. Further, not only does the Basic Law authorize the HKSAR to enjoy independent judicial power, it confers the power of final adjudication which paved the foundation of the setting up of the Court of Final Appeal in Hong Kong (an aspect to which I shall return later). In my limited knowledge, I know of no other city or local administrative region in the world (except the Macao SAR, which is the only other special administrative region created pursuant to the ‘One Country, Two Systems’ policy) which enjoys such a power of final adjudication.

### **Effect of the Basic Law**

11. I have briefly outlined the genesis and nature of the Basic Law. So, what is the effect of the Basic Law? Amongst others, continuity, constitutional guarantee and a solid foundation for further development are the key effects of the Basic Law. This observation equally applies in different contexts, be it social, economic or otherwise. For our present purpose, let us focus on the impact of the Basic Law on our legal system.

12. As I said earlier, the Basic Law continues the common law system previously in place before 1997. This is achieved by various provisions in the Basic Law, which at the same time also provide the constitutional guarantee for the rule of law and for the healthy development of our legal system as the HKSAR moves forward.
13. In terms of continuity, Article 8 of the Basic Law states in no uncertain term that the laws previously in force in Hong Kong (that is to say, the common law, rules of equity, legislation and customary law) shall be maintained, unless they contravene the Basic Law or unless they are amended by the HKSAR's legislature.
14. Article 8 has to be read together with Article 18 of the Basic Law, which stipulates that national laws of the Mainland shall not be applied in the HKSAR except for those listed in Annex III. Annex III primarily includes matters concerning national flag, national emblem, garrison, consular privileges and immunities as well as territorial sea and the contiguous zone. Further, it is pertinent to note that Article 18 imposes strict conditions for changing the contents of Annex III. It provides that the laws listed in Annex III shall be confined to those relating to defence and foreign affairs as well as other matters outside the limits of the autonomy of the HKSAR as specified in the Basic Law. Further, it builds in a process of consultation, in that the

Standing Committee of the NPC may add to or delete from the list of laws in Annex III after consulting its Committee for the Basic Law of the HKSAR and also the HKSAR Government.

15. Put shortly, Article 8 of the Basic Law preserves the common law system, whilst Article 18 serves to prevent dilution of the common law system by the application of the national laws of the Mainland.
16. Having preserved the common law system, the Basic Law provides the constitutional guarantee for judicial independence and the healthy development of our common law system.
17. I have earlier mentioned that Article 2 of the Basic Law provides that the HKSAR enjoys independent judicial power, including that of final adjudication. This is reinforced by Article 19, which spells out the jurisdiction of the HKSAR Courts. Further, section 4 of Chapter IV of the Basic Law (which comprises Articles 80 to 96) sets out the provisions concerning the Judiciary of the HKSAR. A few features deserve attention.
18. To begin with, Article 85 reinforces judicial independence, in that it provides that the HKSAR Courts shall exercise judicial power independently, free from any interference, and that members of the judiciary shall be immune from legal action in the performance of their judicial duty. This, together with the other relevant provisions including Articles 88 and 89

concerning appointment and removal of judges, ensures the structural independence of the judiciary.

19. Article 82 provides that the power of final adjudication shall be vested in the Court of Final Appeal (“CFA”) of the HKSAR. Another feature which I always love to stress is that Article 82 provides that the CFA may invite judges from other common law jurisdictions to sit on the Court of Final Appeal.
20. Since the establishment of the CFA in July 1997, eminent judges and jurists from the United Kingdom, Australia and New Zealand have been invited to sit on the CFA. Final appeals of all types (including those raising important constitutional issues or other matters of great public importance) were and still are being heard by a panel of 5 judges, which invariably includes one such overseas judge. At the moment, we are privileged to have a total of 10 such overseas judges, including the retired and incumbent President of the UK Supreme Court (i.e. Lord Philip and Lord Neuberger). The continuous involvement of these overseas judges is a strong testimony of the quality as well as the independence of our judiciary. It also helps to enhance international confidence in the judicial system of the HKSAR.
21. Apart from the CFA, it is also pertinent to note that Article 92 allows the recruitment of other members of the judiciary from other common law jurisdictions. All these provisions concerning overseas judges, together with Article 84 of the Basic Law

(which expressly allows the reference to precedents of other common law jurisdictions), foster a truly independent judiciary and at the same time facilitate cross-fertilization with other common law jurisdictions. Indeed, authorities and precedents of other common law jurisdictions as well as decisions by the European Court of Human Rights are regularly cited, considered or followed by judges in the HKSAR. On the other hand, decisions of the CFA on various areas of law (such as defamation, shareholders protection and administrative law) are cited from time to time in the courts of other common law jurisdictions.

22. Against this background, it is not surprising that the judicial independence of the HKSAR enjoys good international rating. One recent example is the Global Competitiveness Report 2015-2016 published by the World Economic Forum on 30 September 2015, wherein the HKSAR is ranked 4<sup>th</sup> in judicial independence out of 140 jurisdictions around the world (only after New Zealand, Finland and Norway).
23. A robust legal system and an independent judiciary are two of the key aspects of the rule of law. Respect for human right is another. The time available today does not allow me to go into this aspect. But I would like to highlight Chapter III of the Basic Law which contains the key provisions concerning the fundamental rights of the people of the HKSAR. This chapter,



together with the Bill of Rights Ordinance as well as the relevant provisions of the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and international labour conventions as applied to Hong Kong (and which remain in force by reason of Article 39 of the Basic Law), ensure the protection of human rights in the HKSAR.

## **Conclusion**

24. Ladies and gentlemen, to conclude, the Basic Law is the single most important legal and constitutional document which underpins the implementation of the ‘One Country, Two Systems’ in the HKSAR. 25 years have passed since it was promulgated, and 18 years have lapsed since it commenced operation. As a constitutional document, 25 years is not a long period. However, notwithstanding the debates and controversies that we have experienced (and which is understandable given its unique and unprecedented nature), the design and operation of the Basic Law as well as the implementation of the ‘One Country, Two Systems’ in the HKSAR have proved to be a success and have been so regarded by the international community.

25. In the *Hong Kong Policy Report* submitted by the US Department of State to the US Congress earlier this year, the Department of State stated, amongst others, as follows:

*“[o]ur relationship with Hong Kong is based on the framework of “one country, two systems,” enshrined in Hong Kong’s Basic Law ... Under this system, Hong Kong exercises autonomy in all areas except foreign policy and defense affairs. Hong Kong participates actively and independently in a range of multilateral organizations and agreements ... with trade policy objectives that generally align with our own, and is recognized as a separate customs territory by the United States.*

*There are more than a dozen U.S.-Hong Kong agreements currently in force. Our day-to-day bilateral law enforcement cooperation is on par with many of our closest allies. Hong Kong’s strong traditions of rule of law, low levels of corruption, and high levels of public safety make it a preferred choice for American businesses in the region.”*

26. In the latest Six-Monthly Report on Hong Kong deposited to the UK Parliament by the UK Secretary of State for Foreign and Commonwealth Affairs, it is stated as follows:

*“[t]he rule of law and confidence in Hong Kong’s world-class legal and judicial system is a cornerstone of Hong Kong’s*

*success. We believe that the rule of law in Hong Kong has stood up well to the challenges in the reporting period.”*

27. Looking ahead, there are bound to be challenges, even formidable challenges. However, as Hong Kong’s history illustrates, we have the confidence and ability to overcome such challenges.

Thank you.