Speech by the Hon Rimsky YUEN, SC
Secretary for Justice of the Hong Kong SAR
at the Luncheon Event of the Law Society of NSW
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"The One Country, Two Systems" Policy and the Development of Common Law Jurisprudence in the Hong Kong SAR

Mr. Gary Ulman [President], Fellow Members of the Legal Profession, Distinguished Guests, Ladies and Gentlemen,

1. First of all, may I express my gratitude to the Law Society of New South Wales for inviting me to this luncheon event, and for giving me this opportunity to address such a distinguished audience.

2. This is my first official visit to Australia, and a visit that I have always wanted to make since I take up my current position as the Secretary for Justice of the Hong Kong Special Administrative Region ("HKSAR"). Both Australia and Hong Kong are common law jurisdictions. As I will be endeavouring to illustrate, the common law tradition has continued well and alive in the HKSAR and indeed has grown stronger than before. The HKSAR seeks to maintain close ties with other common law jurisdictions, and of course Australia is a jurisdiction which we very much wish to enhance our ties.

3. The topic that I have chosen for today is "*The One Country, Two Systems" Policy and the Development of Common Law Jurisprudence in the Hong Kong SAR*". I would first share with you the development of common law in the HKSAR since 1997, with emphasis on the role played by our Court of Final Appeal ("CFA"), and then venture to make a few observations which I hope would form the basis for further discussion.

The Constitutional Background

4. Let me start with a bit of background.

5. As you would know, before the People's Republic of China ("PRC") resumed exercise of sovereignty over Hong Kong in 1997, Hong Kong had been a British colony for over a century. At the start of its colonial day, Hong Kong received the laws of England as it existed on 5 April 1843[1]. This cut-off date (or the day of reception), however, was only relevant when one dealt with the application of Acts of Parliament to Hong Kong. This is because English common law, as expounded by decisions of English courts, continued to apply regardless of whether it had developed before or after 1843. Besides, decisions by the Privy Council and the House of Lords were regarded as binding, and the abolition of the cut-off date in 1966 made no difference to this situation[2]. Put briefly, during the colonial era, the final appeals from Hong Kong were dealt with by the Judicial Committee of the Privy Council and English common law cases were generally applied in Hong Kong.

6. On 1 July 1997, Hong Kong ceased to be a British colony and became a special administrative region of the PRC. This fundamental change in the constitutional status of Hong Kong was pursuant to the "One Country, Two Systems" policy, which was reflected in the Sino-British Declaration and which has its legal genesis in Article 31 of the PRC Constitution. To fortify the legal foundation for the establishment of the HKSAR, the Basic Law of the HKSAR ("the Basic Law") was enacted in April 1990 and came into effect on 1 July 1997.

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1 Supreme Court Ordinance (No. 2 of 1846), section 3.

2 See: Peter Wesley-Smith, 'The Common Law of England in the Special Administrative Region', Chapter 1, as contained in Raymond Wacks (ed.), *China, Hong Kong and 1997: Essays in Legal Theory* (HKU Press), at p. 5.

7. The Basic Law is the HKSAR's most important constitutional document. Indeed, some people regarded the Basic Law as essentially the written constitution of the HKSAR, although strictly speaking it is a piece of national legislation passed by the National People's Congress ("NPC") of the PRC. Apart from establishing the HKSAR, one of the central themes of the Basic Law is continuity.

8. This notion of continuity is clearly reflected in the provisions concerning the HKSAR's legal system. As regards judicial system, the Basic Law goes beyond continuity and empowers the Judiciary of the HKSAR to do more than it could do in the colonial days. The key relevant provisions are as follows.

9. Article 2 of the Basic Law stipulates that the HKSAR is authorized by the NPC to exercise a high degree of autonomy and enjoy, among others, independent judicial power, including that of final adjudication in accordance with the provisions of the Basic Law.

10. Article 8 of the Basic Law states that the law previously in force in Hong Kong, that is the common law, rules of equity, ordinances, subordinate legislation and customary law, shall be maintained, except for any that contravene the Basic Law, and subject to any amendment by the HKSAR's legislature.

11. Article 19(1) of the Basic Law reiterates the power of final adjudication, whilst Article 19(2) states that the courts of the HKSAR shall have jurisdiction over all cases in the HKSAR, except that the restrictions on their jurisdictions imposed by the legal system and principles previously in force in Hong Kong shall be maintained. Article 19(3) goes on to state that the courts of the HKSAR have no jurisdiction over acts of state such as defence and foreign affairs.

12. Articles 80 to 96 of the Basic Law (which are contained in Section 4 of Chapter IV) contain detailed provisions of the Judiciary. The theme of continuity is best illustrated by Article 81(2), which states that the judicial system previously practiced in Hong Kong shall be maintained except for those changes consequent upon the establishment of the CFA.

13. Then there is the unique provision in Article 82. Not only does Article 82 stipulate that the power of final adjudication of the HKSAR shall be vested in the CFA, it states that the CFA may invite judges from other common law jurisdictions to sit on the CFA.

14. To complete the picture, I shall also mention that Article 84 of the Basic Law states that the HKSAR courts shall adjudicate cases in accordance with the law applicable to the HKSAR prescribed in Article 8 (mentioned above) and may refer to precedents of other common law jurisdictions.

15. As a result of these provisions in the Basic Law, the legal and judicial systems of the HKSAR are unique in at least the following aspects.

16. First, notwithstanding the resumption of sovereignty by the PRC over Hong Kong, the HKSAR remains a common law jurisdiction. Indeed, it is and remains the only common law jurisdiction in the entire China.

17. Second, the HKSAR maintains its own judicial system which is vested with the power of final adjudication. The judicial system of the HKSAR has no connection with that of the Mainland, and is wholly separate and distinct from that of the Mainland.

18. Third, the CFA is empowered to invite judges from other common law jurisdictions to sit with the local judges. This

feature makes the CFA truly unique in that I know of no other final appellate court in the world which has this arrangement.

19. As a result of this unique arrangement, the CFA has three different categories of judges. The first category is the Permanent Judge ("PJ"), which are all locals (although not necessarily Chinese). The second category is known as local Non-Permanent Judge ("NPJ"), which essentially comprised retired or former judges of the Court of Appeal or the CFA. The third category is overseas Non-Permanent Judge ("Overseas NPJ"), which comprises judges from other common law jurisdictions.

20. The HKSAR in this regard is very lucky and blessed. Ever since the CFA was established in July 1997, we continuously enjoy the benefit of some of the most eminent jurists in the common law world sitting on the CFA as Overseas NPJ. Examples include Sir Anthony Mason, Mr. Justice Gleeson and Mr. Justice James Spigelman, who would be very familiar to all of you here. Other examples include Lord Hoffmann, Lord Nicholls, Lord Millett and Lord Neuberger, all of which are undoubtedly top judges from the UK Judiciary.

Article 82 – a Success

21. The provision in Article 82 which allows judges from other common law jurisdictions to sit on the CFA has proved to be a success. This is manifested in at least two aspects.

22. The first aspect concerns judicial independence. As I have said on quite a few other occasions and which I would love to briefly recap here (since I firmly believe that it is right), the fact that so many eminent judges from other common law jurisdictions are willing to sit on the CFA since 1997 speaks volumes of the independence enjoyed by the

Judiciary of the HKSAR. Indeed, in the latest Global Competitiveness Report 2015-2016 published by the World Economic Forum in September last year, the HKSAR is ranked 4th in terms of judicial independence out of 140 jurisdictions around the world.

23. The second aspect concerns the status of the CFA and its judgments. During the colonial era, putting aside Privy Council decisions which were on appeal from Hong Kong, decisions made by the Hong Kong courts were hardly cited by the final appellate courts in other common law jurisdictions, nor considered as leading authorities in textbooks for practitioners or students. Since the CFA was established, we have seen a significant change of scenario[3].

24. One of the best-known examples is probably the landmark CFA decision in the defamation case of *Cheng v Tse Wai Chun* (2000) 3 HKCFAR 339. This judgment, which dealt with the issue of 'malice' in the context of the defence of fair comment in defamation disputes, was quickly applied in England[4], and soon found its way into the leading text of *Gatley on Libel and Slander* (10th edn.).

25. In the context of criminal law, the CFA judgment in *Shum Kwok Sher v HKSAR* (2002) 5 HKCFAR 381 concerning the common law offence of misconduct in public office had triggered enlightening discussion in *AG's Reference (No. 3 of 2003)* [2005] QB 73. Thereafter, Sir Anthony Mason took the opportunity in the subsequent CFA case of *Sin Kam Wah v HKSAR* (2005) 8 HKCFAR 192 to reformulate the elements of the offence. Since then, the CFA decision in *Sin Kam Wah* became one of the often cited decisions in the common law world when the offence of misconduct in

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[3] For further discussion, see Chapter 22 ('Impact of jurisprudence beyond Hong Kong') (by P.Y. Lo) in Simon N.M. Young & Yash Ghai (ed.), *Hong Kong's Court of Final Appeal: The Development of the Law in China's Hong Kong* (Cambridge).

[4] *Sugar v Associated Newspapers Ltd.* (6 Feb 2001), referred to in *Branson v Bower* [2002] QB 737.

public office was dealt with by the court.

26. In the public law context, apart from cases concerning judicial review, there is the case of *Koo Sze Yiu v Chief Executive of the HKSAR* (2006) 9 HKCFAR 441, where Bokhary PJ held that the CFA has power, concomitant to the power to make a declaration of unconstitutionality, to suspend the operation of the declaration so as to allow the executive the opportunity of enacting corrective legislation[5].

27. In the company law context, the CFA in the case of *Waddington Ltd. v Chan Chun Hoo* (2008) 11 HKCFAR 370 held that a multiple derivate action could be brought under the common law in the HKSAR. Until then, whilst some English cases had assumed that such an action could be brought without argument, the only case which was decided outside the United States is *Ruralcorp Consulting Pty Ltd. v Pynery Pty Ltd.* (1996) 21 ACSR 161, where the Senior Master of the state of Victoria held that multi-derivative action could not be so brought under common law.

28. The cases mentioned above are but some of the cases decided by the CFA which have made a mark in the development of common law both within the HKSAR and in other common law jurisdictions. There are of course others which have also generated interest in the common law world. This brings me to the several points that I would like to put forward for discussion. These points may be inter-related or even over-lapped and yet they may have significance of their own.

A Few Observations

29. The first point concerns cross-fertilization. Viewed from the angle of the brief survey that I just did, Article 82 illustrates

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5 See the discussion by the UK Supreme Court in *HM Treasury v Ahmed* [2010] 2 WLR 378.

how cross-fertilization among jurists from different common law jurisdictions can enhance the further development of common law. If cross-fertilization amongst judges can generate such synergy, there is no question that cross-fertilization amongst legal practitioners and other sectors of the legal community may likewise generate the impetus to further develop common law for the general good of the common law world.

30. The second point concerns the importance of comparative law. One of the beauties of cross-fertilization is that one can learn from the other, and by so doing come up with innovative solution to legal problems. This is one of the essences of comparative law. In this globalized world, a legal problem faced by one jurisdiction may well emerge in the same or like manner in another jurisdiction. The study of comparative law can be one of the ways to see how other jurisdictions tackle similar legal problems, so as to pave the way of development of the common law in a particular jurisdiction. Amongst others, the HKSAR experience has shown that comparative law can be of great benefit in the context of constitutional law and the law concerning human right. In this regard, Sir Anthony Mason again provided good examples as to how the use of comparative law assisted him in resolving difficult legal issues.

31. The third and the last point I wish to make is the trans-nationalization of the common law. Lord Bingham forewarned a similar process in a speech delivered in 2003[6]. In the past thirteen years since Lord Bingham's speech, we have seen the continued process of globalization, regional integration as well as the growing popularity of multi-party international convention or treaties (such as those concerning cross-border child abduction, refugees and international arbitration). Such global development provides

[6] See Chapter 20, 'The Internationalization of the Common Law', contained in Tom Bingham, *Lives of the Law: Selected Essays and Speeches 2000-2010* (OUP).

reasons for us to ponder for the future development of the common law, and whether trans-nationalization (or internationalization, as Lord Bingham called it) is the key to the future development.

32. On this note, may I once again thank you for giving me this valuable opportunity to share with you the experience of the HKSAR as well as some of my thoughts, perhaps immature ones, on the future development of the common law.

Thank you.