

**Speech by The Honourable Chief Justice Geoffrey Ma
at the School of Law of the Seoul National University
Seoul, Korea
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**Understanding the Importance of the
Rule of Law in Society**

1. It has been over 40 years since I graduated from University. It is always a great pleasure to be in a law school again, particularly so when it is said to be the best law school in Korea in arguably the best university in Korea. It is my privilege and honour to be in SNU Law today. When I first came to Seoul in 1994, it was as a barrister meeting a Korean lawyer to discuss Korean shipping law in relation to a trial I was conducting on behalf of my client, Lotte. I remember discussing the assister principle and the principle of successive carriage under Article 138 of the Commercial Code of Korea. At the trial, I cross-examined a SNU Law

alumnus, Mr Kang Jong Ku, still in practice (I think) in the law firm, Bae, Kim & Lee.

2. However, it is not commercial law I have come today to discuss. The rule of law is an important part of the general legal education here at SNU Law. Discussions about the rule of law usually take place when the work of the courts comes under public scrutiny. I can illustrate this by events in Hong Kong:-

- (1) The 2014 Occupy protests in Hong Kong lasted 78 days from September to November that year.¹ The protests effectively ended when injunctions were ordered by the court arising out of private law suits based on public nuisance initiated by nearby building owners, and bus and taxi operators. The

¹ For this period of time, protesters occupied main roads in the centre of Hong Kong. The equivalent in Seoul would be the occupation of the streets in Jung-gu, Jongno-gu in the Central Business District or in the Gangnam Business District.

concerns expressed regarding the rule of law were that the protestors, although they were legally represented in the court proceedings, did not comply with the injunctions ordered by the court, waiting instead until the bailiffs enforced the court orders before vacating the streets.

- (2) The recent events in Hong Kong involving disturbances which are now into their fourth month.

- (3) Some pressure groups and others including some members of the press have continually been complaining publicly about the way the courts have dealt with cases that have emanated from these recent events. The underlying criticism seems to be that the courts have been acting against public opinion and against the public interest. There is

some inconsistency here: some complain that the courts have been too lenient, others complain the courts have been too harsh.

3. These matters have brought into focus the question of the rule of law in Hong Kong, as to whether it really exists, at least whether it has been undermined. The importance of the rule of law cannot be emphasised enough. One of the leading jurists of the common law world was the late Lord Bingham of Cornhill. In his seminal work “The Rule of Law”,² Lord Bingham had this to say about the rule of law:-

“But belief in the rule of law does not import unqualified admiration of the law, or the legal profession, or the courts, or the judges. We can hang on to most of our prejudices. It does, however, call on us to accept that we would very much rather live in a country which complies, or at least seeks to

² Allen Lane, 2010.

comply, with the principle I have stated than in one which does not. The hallmarks of a regime which flouts the rule of law are, alas, all too familiar: the midnight knock on the door, the sudden disappearance, the show trial, the subjection of prisoners to genetic experiment, the confession extracted by torture, the gulag and the concentration camp, the gas chamber, the practice of genocide or ethnic cleansing, the waging of aggressive war. The list is endless. Better to put up with some choleric judges and greedy lawyers.”³

4. But what is the rule of law? For me, the rule of law means not only respecting the law but in particular it encapsulates two important but related concepts:- first, there must exist laws which respect the dignity, rights and liberties of the individual in any society and secondly, there must exist an independent institution which enforces such rights, liberties and freedoms both in letter and, more important, in spirit.

³ The Rule of Law at page 9.

5. The first facet is a reference to the contents of the law. In the legal system with which I am familiar, the laws are contained of course in statutes; in the case of South Korea and Hong Kong, they are also in constitutional documents (the Constitution of the Republic of Korea and the Basic Law⁴) and in the cases decided by the courts which form the vast body of what are called legal precedents. The importance of case law in the common law system cannot be downplayed. It is case law that reflects the true spirit of the law. The reference to dignity in my definition may at first seem odd given the vagueness of the term. It is, however, a recognised concept in the human rights context. Thus, we see the word “dignity” used in a number of modern constitutions,⁵ in the Preamble to the Charter of the United Nations (1945) and the Universal Declaration of Human Rights (1948), in human

⁴ Hong Kong’s Basic Law was promulgated and adopted by the National People’s Congress under the Constitution of the PRC.

⁵ Including the Constitution of the Republic of Korea in which Article 10 states that “All citizens shall be assured of human dignity and worth and have the right to pursue happiness.”

rights conventions such as the International Covenant on Civil and Political Rights (1966).

6. The second part of my definition is a direct reference to an independent judiciary enforcing the law both in letter and in spirit. One may perhaps sometimes take this for granted and it certainly reflects the reality in many places – I certainly believe Hong Kong is such a place – but perceptions are important. A judiciary, even if in reality truly independent but which is not perceived as being independent, loses the confidence of the community and must do much to convince the population that it truly does deliver what is expected of it. It is easy to see why. If the rule of law is a cohesive force which binds a society enabling it to function as such, a lack of respect for it will obviously undermine this essential cohesion.

7. And so I return to the recent events in Hong Kong earlier outlined. Do they indicate that the rule of law in Hong Kong is at risk? To answer this, one of course needs to refer back to the definition of the rule of law and ask what I think is the fundamental question to be asked: how does one show objectively and empirically whether or not the rule of law exists in any place?

8. I ought to start by discussing a factor which, in my view, should be irrelevant to answering the fundamental question:- merely looking at the outcome of cases that go before the court. This is the fallacy that underlies most discussions on the rule of law, as to whether it exists or not. Many people including many lawyers and legal academics, however, regard the result of cases as a reliable barometer. A ready and simple example of this can be found in public law cases: whenever the government loses a case, it is said that the

rule of law is alive and well; the opposite when the government wins. It is clear that when it is said that the rule of law is undermined, what is really meant is that the outcome of the cases has not been to certain people's liking. And yet, if one is analysing cases determined by the courts, the more pertinent question must of course surely be whether the court has applied the law and acted in accordance with law, as opposed to applying extraneous factors (meaning non-legal matters such as political considerations). Put shortly, the existence or non-existence of the rule of law cannot be measured by the outcome of a case alone. After all, and this is particularly so in public law cases, the individual parties or a portion of the public (even the majority) may wish for a particular result, but whether or not the result is achieved is entirely dependent on the legal merits, and the result alone provides no clue as to whether the court has acted independently or in accordance with its constitutional mandate

of applying the law and its spirit, and nothing else. It is perhaps convenient at this point to make reference also to the Judicial Oath in Hong Kong⁶ which requires a judge to uphold the law, act in full accordance with the law, and safeguard the law and administer justice without fear or favour, self-interest or deceit.

9. In looking for objective indications of the existence of the rule of law comprising the two facets earlier identified, one starts with an examination of the legal infrastructure in place; in other words, the position on paper. This requires mainly looking at the protections guaranteed under the relevant constitution (if there is one) and relevant statutes. The constitutional document that applies to Hong Kong and your Constitution (in Chapter II) contain those rights we call

⁶ Similar in wording to all oaths commonly taken by all judges in most jurisdictions.

fundamental human rights and freedoms, such as the freedom of speech, the freedom of conscience etc.

10. I now deal with the second – and more important – half of the exercise to demonstrate, objectively, that the rule of law exists. Put bluntly, it really amounts to this: even with what I have referred to as a sound legal infrastructure exists, is the position on paper matched by the reality? In other words: do the courts in reality protect fundamental rights and are they truly independent?

11. In my view, there are six factors which are relevant to this exercise.

12. First, transparency of the legal system. The idea of open justice whereby most court proceedings are open to the

public to observe,⁷ is an obvious indication of the rule of law. The fact that any member of the public is able to observe court proceedings provides an effective supervision of the whole of the judicial process. Closely connected to this is the ability, save in exceptional and recognised circumstances, of the press to report.

13. Secondly and this for me provides a crucial indication of the existence of the rule of law, the reasoned judgment. This is an important characteristic of the common law as well as other legal systems. Reasoned decisions demonstrate not only to the parties to the particular suit but also to the world at large, the precise thought process of the court in arriving at any decision. It exposes for detailed analysis and scrutiny the reasons for a decision and, where these reasons are not convincing, the judgment will enable the

⁷ Save for the most sensitive cases, such as certain matrimonial proceedings (especially where children are concerned).

losing party to consider an appeal. In jury trials, there is of course no requirement on a jury to provide reasons but a jury's verdict is always preceded by a detailed summing-up, from which one can often work out the reasons to justify or explain a jury's verdict. A reasoned judgment will demonstrate that a court has discharged its responsibility of determining the outcome of cases strictly according to law, and legal principles, and has acted independently. Put another way, where the decision of a court is not accompanied by any reasons at all or wholly inadequate reasons, this may give rise to speculation as to whether a court has really acted strictly according to the law or whether it has instead taken into account extraneous and illegitimate factors. Of course, it does not follow that where judgments do not contain reasons or have inadequate reasons that the court is not independent but certainly, the existence of the reasoned judgment will go a long way to dispel any such speculation. And if the relevant

proceedings are behind closed doors, adverse speculation is even more intense.

14. Thirdly, connected to the second factor just discussed, a reasoned judgment will indicate clearly the court's approach to the law. In the area of human rights, one can then see the approach of the courts as to whether human rights are generously construed and applied, or not. In Hong Kong, numerous cases, some of which have resulted in statutory provisions being declared void for unconstitutionality, have stated and reiterated that in dealing with fundamental rights, they are to be purposively and generously interpreted so as to give persons the full benefit of constitutionally guaranteed fundamental rights and freedoms. Correspondingly, any restrictions on rights should be narrowly construed.

15. Fourthly, the appointment process of judges is also a relevant consideration in determining the independence of the Judiciary. Our Basic Law mandates that judges should be appointed on the basis of their judicial and professional qualities. In other words, factors such as politics have no relevance at all.

16. Fifthly, effective access to the courts or justice. The second facet of the rule of law, namely, the existence of an independent institution (the court) to enforce laws, implicitly carries with it the necessity of ensuring effective access to justice.

17. Sixthly and lastly, and this is perhaps the most nebulous factor in relation to the determination of the existence of the rule of law, the views of the users of the courts (mainly being perhaps the lawyers) towards the courts

and their confidence in the system, provide some indication to support (or, as the case may be, not support) the existence of the rule of law.

18. I would like to think that Korea and Hong Kong pass the test after these six indicators have been properly considered. But that is of course not really for me to say but for the public to decide for itself. It is essential that the community does take a stand on this, for, as I have said earlier, public confidence in and respect for the rule of law is critical. If a jurisdiction passes this test, it will then have earned the respect that the rule of law needs. And where the rule of law does exist, it is undoubtedly a strength and becomes an institution that will have a long term future. This is by no means to say that it is not healthy to have concerns from time to time about the rule of law. I am not saying that, quite the contrary. Discussions and debates over such an important

topic are healthy; after all, to adopt an old saying, the price for enjoying the rule of law is eternal vigilance. And you, the students at SNU Law should actively have debates and discussions about the law.

19. Finally, I profoundly thank SNU Law for this opportunity to address you today. It has been a real privilege and honour to be invited.

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