

Judges, Access to Justice, the Rule of Law and the Court of Final Appeal under “One Country Two Systems”

1. The unique “One Country Two Systems” arrangement proposed by Deng Xiaoping in the early 1980s, and formalised in the 1984 Sino-British Joint Declaration, has now been in place in Hong Kong for twenty years. Perhaps particularly from the perspective of a judge, particularly a Non-Permanent Judge of the Hong Kong Court of Final Appeal, this unique arrangement is not only interesting in itself, but it casts a slightly unusual shaft of light on the close to universal, if somewhat more elusive, topic of the rule of law.

2. I refer to the rule of law as being close to universal, because I think that virtually all sensible people would agree that the rule of law is fundamental to any civilised society. I refer to it as elusive because there is considerable room for disagreement as to what the rule of law actually means or how far it goes. This is unsurprising, given that it is a commonly used expression with a variety of potential different meanings, and different countries have different traditions and different experiences. Indeed, what is taken for granted as part of the rule of law in one country today may well have been thought to be revolutionary or even ridiculous in the same country centuries, or sometimes even decades, earlier.

3. Nonetheless, I would suggest that, in the 21st century there is a virtually universal basic minimum set of requirements to the rule of law. In a nutshell, that set of requirements can be encapsulated in the proposition that a society must be governed by laws which are (i) properly enacted, (ii) clearly expressed, (iii) publicly accessible, (iv) generally observed, and (v) genuinely enforceable. The laws by which people are expected to live their personal and commercial lives must be created in a coherent and proper way and written in a way in which they can be understood, and also, once created, these laws must be available to be read by everyone. It cannot be consistent with the rule of law to have laws which are incomprehensible

or inaccessible, because it would mean that people would not be able to find out what their legal rights or legal duties were. We live in a world which is technologically, commercially and socially increasingly complex and increasingly fast-moving, and this renders it ever more challenging to draft laws in a coherent way and in clear terms. The fast pace of change also means that laws are frequently amended which makes accessibility more difficult to achieve.

4. The suggestion that the rule of law requires laws which are generally observed is justifiable essentially for two connected reasons. First, if a law is not generally observed, then that brings the rule of law into disrepute. Secondly, more obviously in a democratic society, but also I think in a non-democratic society, the long-term survival of a governmental system depends on a sort of implicit contract, or at least a sort of implicit mutual understanding, between the governing and the governed. If those responsible for making laws create a law which is not generally observed, it can be a pretty good indication that this mutual understanding, and with it the basic compact on which society depends, is being undermined.

5. Having briefly discussed the first four ingredients of the rule of law, I turn to the fifth of the five requirements, enforceability, and it is that ingredient with which I am predominantly concerned this evening. Enforceability involves access to an institution, which almost invariably will be a court or tribunal, to enable people to enforce their rights and to defend themselves. If rights, whether against other people or against the state, are not in practice enforceable, that is as bad as having no rights at all. Indeed, it can fairly be said that it is better to give people no rights than to give them rights which they cannot enforce: a government that gives people no rights is at least not hypocritical or dishonest when it comes to rights, whereas a government which gives people rights on paper without the ability to enforce them, makes a mockery of the rule of law.

6. Of course, enforceability not only requires that rights granted to people are realisable: it also requires effective protection granted to people is also available, most obviously to those

who are being pursued by the state, perhaps especially alleged criminals, who are entitled to enjoy the reality of principles such as the presumption of innocence. And accessibility involves ensuring that people can actually get to court, but it also involves ensuring that they can get legal advice ahead of going to court. I have already referred to the fact that modern legislation is complex, and it is not sensibly possible to expect non-lawyers to appreciate their legal rights and obligations without being able to consult lawyers.

7. It follows from this that the rule of law requires people to have access to lawyers who can advise them competently and impartially, and it requires the honest, fair, efficient and open dispensation of justice in the courts. Indeed, in Hong Kong, access to justice is expressly required by the Basic Law. Access to lawyers for legal advice and representation presents a problem in many countries where lawyers cost a disproportionate amount in relation to modest cases. At least in the United Kingdom, this is due to a combination of factors, including in particular lawyers having high overheads and high professional standards, and disproportionately elaborate legal procedures. We should watch out, as if ordinary people are denied affordable legal advice and legal representation, they are not being afforded access to justice and the rule of law is being undermined. Governments must ensure access to justice not merely by providing a court system which is fit for purpose, but also by ensuring, within reason and subject to other demands on public finances, that people can get competent legal advice and representation. Judges and lawyers must ensure access to justice by doing their best to ensure that legal advice is provided, and legal proceedings are conducted, as cost-effectively and proportionately as possible. This is easy to say, but difficult to achieve in an increasingly complex and fast-changing world. But the very fact that access to justice represents such a challenge serves to underline why it must be properly addressed.

8. At the other end of the justice process, it is no good enabling people to go to court and have their rights determined if the court's decisions are not then put into effect. Again, it would

make a mockery of the rule of law to give people the right to go to court to vindicate their rights or identify their duties if the order of the court was no more than words written on a piece of paper with no practical effect.

9. I turn to the courts themselves, and what is required of the judges. There is no hope for the rule of law unless we have judges who are not only accessible, but who are honest, impartial, and competent, and who are seen to be honest, impartial, and competent. It is self-evident that if judges are dishonest, if the judiciary can be bribed or suborned, the rule of law will be fatally undermined. If judges break the law, what possible hope is there that anyone else will bother to observe it? Similarly, competence and impartiality are essential requirements of a judge. An incompetent or unfair judge is almost as much of a contradiction in terms as a dishonest judge. Competence is a prerequisite for judicial office. So is impartiality, which involves judges making sure that the law is applied equally and fairly to all litigants, irrespective of their means, gender, age and other characteristics, in particular social, political or economic status. It is why justice is traditionally portrayed in western art as blind. These judicial qualities are reflected by the fact that, in both England and Hong Kong, when he or she first takes office, a judge swears a solemn oath to “do right to all manner of people after the laws and usages of this realm, without fear or favour, affection or ill-will”.

10. In many countries, including the UK, judicial diversity is seen as a very important factor as well. While it is not as inherently fundamental to the rule of law as judicial honesty, competence and fairness, it is an important factor in my view. An undiverse judiciary is indicative of unfairness, a pretty serious criticism of a group of people constitutionally charged with being fair. Lack of diversity also inevitably means that some of the best potential judges are being missed, which is of obvious concern. And in a diverse society, people understandably expect the judiciary, like any other influential group, to be, within reason, roughly reflective of the population as a whole. It is only fair to add that in places such as the UK and Hong Kong,

where the judiciary is almost exclusively selected from the legal profession, a diversity deficit at the top of the profession will virtually inevitably lead to a diversity deficit in the judiciary. But that does not absolve everyone involved with the selection of judges from doing their best to improve diversity. And, of course, the legal profession should be doing everything it properly can to improve its diversity.

11. Apart from honesty, competence, impartiality and diversity, in countries which may be described as liberal democracies, judges have an additional and important feature, namely that of judicial independence. Although it may be confused with, indeed although it may sound like, judicial impartiality, judicial independence is very different. Judicial impartiality is an attribute which an individual judge should have in every case: it is embodied in the notion that judges administer justice “without fear or favour, affection or ill-will”; it means lack of bias. Thus, it is a judicial attribute which applies to judges on an individual basis. By contrast, judicial independence is as much an institutional, as opposed to an individual, judicial attribute.

12. In a system such as that which has developed in almost all liberal democracies, the basic constitutional arrangement is traditionally seen as involving three branches of the state, and they each have different complementary functions, which, at the risk of verging on oversimplification, can be fairly simply expressed. There is the legislature, which makes and develops the law; there is the executive, which carries out and enforces the law; and there is the judiciary, which interprets and gives effect to the law (and in our common law system, which also develops the law). Under that arrangement, the rule of law requires the three branches to be generally independent of each other, because their functions should be distinct. Those who make the law should not be involved with interpreting or carrying it out; those who carry the law out should not make it or interpret it; and those who interpret the law should not make it or it or put it into effect.

13. Independence for the judiciary does not mean ignoring the legislature or the executive; it does not even mean having no discussions with the legislature or the executive. It means that the legislature and the executive should not be able to exert improper influence over the judges. It means in particular that neither the legislature nor the executive should be able (i) to interfere with, or influence, judicial decision-making (other than by advancing normal legal argument in cases) or (ii) to remove judges from office (save in those almost vanishingly rare cases where a judge has acted improperly and refuses to go). Judicial independence has long been regarded in countries with traditions such as those in the UK as not only as particularly precious, but also as particularly precarious. The precariousness was very well explained by Alexander Hamilton, one of the founding fathers of the United States in 1788 in one of the famous Federalist Papers which did so much to formulate the philosophical basis of the US Constitution. Hamilton wrote that the judiciary “is beyond comparison the weakest of the three departments of power”, having as he graphically put it “no influence over either the sword or the purse”; accordingly, as he went on to say, “all possible care is requisite to enable [the judiciary] to defend itself against attacks” from any quarter, including the executive or the legislature.

14. At least in a democratic society, the legislature is often seen to have the greatest legitimacy of the three branches because, unlike the executive or the judiciary, its members are democratically elected. However, even to those who believe in democracy, that very fact means that it should respect the independence of the judiciary. Democracy is not faultless and it can lead to the tyranny of the majority – and, in extreme cases, it can lead to vicious tyrants or worse; as it did, for example, in Italy and in Germany in the 20th century. Furthermore, politicians are frequently driven to make decisions which are based on expediency, and, particularly perhaps in a democratic system, to make decisions which are based on relatively short term electoral considerations, and sometimes they avoid making decisions for such

reasons: that is not intended to be a criticism, it is inherent in the nature of the role. The courts can therefore usefully act as a brake on political calculation and short termism. Furthermore, the very fact that judges do not have to worry about being re-elected or losing their jobs means that they can and should sometimes make the difficult, unpopular decisions which are understandably very difficult for politicians. There are occasions when judges have a duty to make a policy decision because legislation requires them to do so – in which case, in making a policy decision, a judge is simply carrying out the democratic will as expressed by the legislature. But there are also cases where, because of the legislature's failure to act and resolve a policy issue, judges may feel that it is incumbent on them to resolve it, to fill the gap. And in such cases, judges should do just that, but where they have the power to make a policy decision, it is a power which judges should exercise diffidently and cautiously.

15. As for the executive, a judge has no more important function than to protect citizens against abuses of power (the great majority of which may not be in any way intentional or malicious) committed by the increasingly mighty executive branch of government. So, the separation of powers which is to be found in the governments of what I have called liberal democracies is based on the perceived desirability of avoiding the concentration of power in the hands of any one group, and this is achieved through the means of checks and balances between the three arms of government.

16. However, even countries governed according to a liberal democratic system, with separation of powers and an independent judiciary, have significant differences in the way in which they function. Most such countries have a written constitution which the courts will enforce even against the legislature. Thus, as is well known, the US Supreme Court can strike down as unconstitutional even when it has been passed by a democratically elected Senate and a democratically elected House of Representatives and approved by a democratically elected President. The German Constitutional Court can also effectively strike down primary

legislation if they consider it unconstitutional. And, of course, the same is true of the Hong Kong courts. But in the United Kingdom, where Parliamentary sovereignty applies, judges have no right or power to overrule, or even to refuse to apply, a statute enacted by the House of Commons, the House of Lords and signed into law by the Queen. Such different constitutional arrangements represent different experiences. Thus, over the past 100 years, the UK has enjoyed democracy, without any tyranny, whereas, by contrast, within the past century, the German people saw Hitler come to power as a result of democratic elections.

17. The system of government which I have been discussing and which involves judicial independence is currently very common, but of course it is not universal. It does not exist in China, where the system of government is more monolithic or unitary. The party embraces all aspects of government, including the judiciary. While that means that judges in the PRC do not have institutional judicial independence as in a liberal democracy, it does not detract from the fact that, just as judges in liberal democracies are expected to be honest, competent and impartial, so are judges in China.

18. Now, I cannot claim any expertise when it comes to the detailed working of the Chinese system of justice, let alone to the finer details of Chinese culture. What I can say is that, bearing in mind its political, cultural and economic experiences over the past thousand years and more particularly over the past century, it is unsurprising that China has evolved a somewhat different system of government from that of western Europe, the Commonwealth or the United States. As a UK and Hong Kong judge, it is not for me to assess, let alone to say, how China can or should be governed, but, as an intelligent (I hope) and interested observer, I can properly say that it is easy to appreciate how it can be argued that there is a need for a greater degree of central control in the governance of China than in many other countries.

19. Where I can speak with more authority and justification is in relation to what is part of China, namely Hong Kong. Its system of government, like that of any country, is of course a

product of its political, economic and cultural history. For nearly 100 years up to 1997, it had been a colony of the United Kingdom, with no democracy but with its own independent judiciary, albeit that the final appeal court was physically in the UK with largely UK judges. And then in 1997, Hong Kong reverted to China, but, instead of the monolithic party-based governmental system which applies in the rest of China, it has a system which generally accords with that of liberal democracies. Uniquely the PRC has introduced and maintained in Hong Kong (and of course Macau) the one country two systems arrangement.

20. Now, I am of course aware that there is disquiet in some quarters about aspects of the way this unique system works, and in particular Beijing's right not to appoint a democratically elected candidate under the Basic Law, Beijing's right to interpret the Basic Law bindingly on the Hong Kong Courts, and some actions in Hong Kong allegedly taken by Beijing. I will turn to them in due course, but they are not my primary concern this evening, and nor should they be the primary concern of a judge, at any rate when talking publicly out of court. I mentioned earlier that judges in liberal democratic countries making policy decisions in court should proceed with caution and diffidence, because policy issues are primarily for the legislature. Even more, judges should be careful about what they say in public out of court. Fifty years ago in the UK, judges hardly ever spoke publicly and when they did, their talks were normally limited to technical legal matters. The world is now a very different place: judges, or at least senior judges, are expected to speak more, and it is right and proper that we explain to the public what we do, and how and why we do it, and as guardians of the rule of law, we have a duty to speak more widely. But, whenever we speak publicly, we have to remember the separation of powers: just as we expect politicians and civil servants to keep out of the judicial area, so we should respect their territory and not pontificate on issues which are not properly for the judges. Having said that, unlike most territorial boundaries, the boundaries between the three branches of government are not precise: they can be porous and there are undoubtedly

areas of overlap, but none of that undermines the point that judges must be careful not to stray out of their prescribed constitutional area when speaking in public.

21. So it is right and proper that, when discussing, the rule of law in Hong Kong, I focus on the role of the judges, and in particular the role of the Court in which I sit as a Non-Permanent Judge, the Hong Kong Court of Final Appeal. In that connection, I have read suggestions that at least when it comes to some decisions, the Hong Kong judges are not independent in that they are somehow leant on by the authorities in Beijing, or they are not impartial, in that they are somehow anxious to please the authorities in Beijing. I can say from my own direct experience as a judge who has sat in the Court of Final Appeal on a part time basis since 2010 that there is absolutely nothing in such suggestions. It is quite clear to me from first hand direct experience that the Permanent Judges of the HKCFA are as institutionally independent and as personally impartial as their equivalents in the United Kingdom, the Justices of the UK Supreme Court. While I cannot speak from first-hand, direct experience, I have every reason to believe that this is equally true of the judges in the other courts of Hong Kong. I have seen or heard nothing to suggest that they are not as impartial and as independent as is demonstrated by their reputations, their apparent character on meeting, and the contents of their judgments. Again, my view is based on much the same evidence as leads me to the same conclusion about the judges in the courts England and Wales, Scotland and Northern Ireland.

22. If I had any serious concerns about judicial independence or judicial impartiality in Hong Kong, I would not be sitting in the HKCFA, and the same is I am sure true of the other common law jurisdiction Non-Permanent Judges, NPs as they are known. They include a number of former and present members of the UK Supreme Court, a number of former members of the Australian High Court or State Supreme Courts, and I am sure that they adopt the same position as I do on this issue.

23. Coal mining can be a dangerous exercise, but in the past it was more dangerous than it is today, partly due to the escape of poisonous, but colourless and odourless gases, in particular carbon monoxide, which regularly used to kill miners. About 100 years ago, someone came up with the idea of miners taking a cage with a little bird, normally a canary, down the mine, on the basis that the canary would be visibly affected by any poisonous gas before the gas could have any fatal effect on a human. This ingenious idea worked: miners would keep an eye on the canary, and if it started to droop, they would vacate the mine and save their lives. On a previous occasion, I have suggested that the foreign NPJs are the canaries in the mine: so long as they are happy to serve on the HKCFA, then I think you can safely assume that all is well with judicial independence and impartiality in Hong Kong, but if they start to leave in droves, that would represent a serious alarm call. It has been pointed out to me that this suggestion may be a bit insulting to the full-time Judges of the HKCFA, as they should be equally unprepared to be a member of a judiciary which was not genuinely independent. That is a fair point. It is also fair to say, as was suggested in a question following the giving of this talk, that it may be right for a NPJ to speak out if the independence of the Hong Kong judiciary is under attack – a singing canary rather than a drooping canary.

24. It is perhaps right to go a little further when discussing the NPJs and record my admiration for the introduction of the innovative idea of having a foreign judge sitting in a top court. I do not say that simply because I greatly enjoy and learn from my judicial visits to Hong Kong. As Mr Justice Fok PJ has explained in a lecture last year, there are a number of benefits of such an arrangement. In addition to reinforcing the credibility of the Hong Kong judiciary as already described, the NPJs bring considerable general judicial experience as well as often bringing specialist legal expertise to the CFA, and, in an increasingly global world, the NPJs help ensure that Hong Kong law benefits from developments elsewhere in the common law world. Interestingly, Singapore has taken up the idea of foreign judges sitting in its courts, and

a number of judges or former judges from the UK and other countries now sit in the Singapore International Commercial Court. Of course, because the CFA is a national court, it is quite rightly provided that only one foreign NPJ can ever sit on a particular appeal, so the national Hong Kong judges are always in a very substantial majority. So the NPJs do much more than act as a visible guarantee of the independence and impartiality of the Hong Kong judiciary.

25. Despite this confidence in judicial independence and judicial impartiality in Hong Kong, there are, as I have said, allegations in the media that judicial independence and judicial impartiality are being eroded. Such suggestions are raised from time to time in many jurisdictions, particularly when cases with a political flavour come before the courts. Every judge will have had to face an allegation of bias or corruption from a litigant in person who has lost a case. If a litigant is convinced of the rightness of his case, which the judge then rejects, it is very tempting for the litigant to believe that the judge must have been got at in some way. Similarly, it is only too tempting for a politically committed person who believes that a judge has wrongly decided a case with some sort of political implications to conclude that the judge must have been leant on in order to explain why he decided the case the way that he did. In politics, feelings often run high, and neither intemperate thoughts nor intemperate language is unusual. At any rate in the legal traditions of Hong Kong and the United Kingdom, intemperate language is discouraged and indeed is very rare, as are intemperate thoughts – or so I like to think. It is unfortunate if public figures and journalists see fit to allege that judicial independence is being eroded without any evidence save a judicial decision or two with which they disagree.

26. It is unfortunate not merely because it is unfair. It is also unfortunate because it risks undermining the judiciary, both in the sense of reducing public confidence in the judiciary and in the sense of causing the judiciary to be a less attractive career for able lawyers. Public confidence in the judges is vital the rule of law: as well as being done, justice has to be seen to

be done. Getting able lawyers to become judges is essential if we are to have a good quality judiciary, which is also vital for the rule of law.

27. The United Kingdom judiciary suffered from misconceived attacks in the media and from a few politicians towards the end of last year in connection with the Brexit, or *Miller*, case. As you may know, a UK-wide referendum in June 2016 produced a majority in favour of leaving the European Union. In order to give effect to this, the UK had to give a formal notice to the EU. The Government made it clear that the notice would be given without seeking the formal sanction of Parliament. The question which was raised by Mrs Miller, as an interested citizen, was whether it would be lawful to serve this notice without formal legislative authority. The case came before three judges in the Divisional Court of the High Court, who decided that it would not be lawful. This produced something of a furore. In what was already a highly charged political atmosphere, the case was seen as a sort of proxy war between those who wanted to leave the EU and those who wanted to remain. The Daily Mail ran a shameful front page with headshots of the three judges, and in large letters underneath the words “Enemies of the People”. It was not the only national newspaper to damage the reputation of the newspaper industry, but it was the worst. A few politicians, who should have known better, joined in the attack, and many more senior politicians including the then-Lord Chancellor failed in their duty to stand up for the judges. This sorry story shows that misconceived attacks on the judges can happen anywhere and are particularly likely to occur in relation to politically charged issues.

28. Of course, it can fairly be said that any individual or group of individuals will be prone to unjustified attacks in a society where freedom of expression is respected, and the judiciary can be no exception. So, too, it can fairly be said that judges should be robust enough to rise above unjustified attacks. But those arguments fail to address the real concern about unjustified attacks on the judges, namely that they undermine the rule of law. Like almost every right, freedom of expression involves responsibilities as well as rights, and there is a real

responsibility on every citizen, especially those in positions of power and influence, notably politicians and journalists, not to undermine the rule of law.

29. Just as the judges have the right to expect that the judiciary will not be subjected to baseless attacks, so do we have the duty to explain as well as we properly what we actually do and how we actually do it. Much is made of the importance of open justice, and rightly so. If judges hear cases in courts open to the public and give reason for their decisions which are publicly available, that should go a long way to satisfying members of the public that judges are performing their roles properly, and in particular are conducting their hearings and making their decisions in accordance with the law, and in an independent and impartial way. The UK Supreme Court has gone somewhat further. In relation to hearings all appeals are filmed and the recordings are live-streamed on the Court's website, and copies are available for a year, or even later if asked for. When the Court gives judgment, not only are paper copies available at the court and electronic copies on the website, but the Court publishes two-page summaries with the judgment so that journalists and other non-lawyers can see what the case decides without ploughing through judgments which are often long, detailed and technical. The Court also arranges for the Justice who gave leading judgment to read out an even briefer oral summary of the decision which is broadcast.

30. I think that the fact that the *Miller* case hearing in the Supreme Court was streamed and publicly watchable from start to finish and a summary of the Court's decision was broadcast when the judgment was given helped to ensure that a much more appropriate media and political reaction to our decision (which was to uphold the Divisional Court) than the reaction to the Divisional Court decision. Watching the hearing made people realise that the case involved constitutional issues which were being seriously considered and discussed by lawyers and judges. The written and oral summaries of the decision not only enabled people to understand what the issues were, how we had resolved them, and what our reasons were. It also

enabled the Court to explain the nature and effect of the decision succinctly to journalists anxious to get their report before the public as soon as possible. It is only fair to add that I think there were a number of other factors which helped – a degree of appreciation by the media that they had acted inappropriately before, a slight cooling off in the political atmosphere, and the fact that three of the eleven Justices who hear the case dissented meant that the press could praise three judicial heroes rather than attack the judicial villains.

31. Now, it is not for me to say whether filming proceedings in the CFA would be appropriate in principle or proportionate in terms of cost. It has worked in the UK Supreme Court and it is being considered in the UK for the Court of Appeal, but not for first instance trials where the presence of cameras could be unfair on witnesses and jurors and might encourage some witnesses to play to the gallery. It is fair to say that, at least in the face of it, cameras in court can be seen as a logical extension to open justice, and open justice is a fundamental aspect of the rule of law, as I have mentioned.

32. Open justice, and indeed judicial independence, like all the other aspects of the rule of law I have mentioned, namely having laws which are duly enacted, expressed, accessible, observed, and enforceable, are essentially procedural in nature. They are not concerned with the actual substance of the laws. That is why the version of the rule of law I have so far been discussing is sometimes known as the narrow or thin rule of law, or rule by law. The broad, or thick, version of the rule of law goes much wider and includes substantive principles of law. To many judges and practising lawyers in the United Kingdom it is most famously discussed in a shortish book called *The Rule of Law* written by Lord Bingham, the sadly deceased former senior Law Lord, and published in 2010. This version of the rule of law includes many of the fundamental rights which are to be found in documents such as the United Nations Universal Declaration of Human Rights and the Council of Europe's Convention on Human Rights, the

Hong Kong Basic Law and indeed in many, I suspect most, constitutions of countries throughout the world.

33. The broader version of the rule of law thus includes rights and freedoms such as freedom from torture, freedom of expression, freedom from arbitrary imprisonment, respect for family life, respect for privacy, freedom of religion, freedom to marry, and freedom from discrimination to name some of these rights and freedoms. To a person, perhaps particularly a person with legal training, brought up and living in a liberal democracy today, it is hard to quarrel with the notion that these rights and freedoms are an inherent and very important aspect of the fabric of our society.

34. But it is right to refer back to a point I briefly touched on at the beginning of this talk, namely that, unlike the fundamental ingredients of the narrow rule of law, which are mostly close to universal geographically and temporally, what are regarded under the UN Declaration and the European Convention as fundamental ingredients of the broad rule of law cannot, mostly at least, be claimed to be timeless or universal. Five hundred years ago in the England of King Henry VIII, hardly any of the rights which are taken for granted today in the UK, such as freedom of expression, of religion, to marry, from discrimination, even from torture, would have been recognised by the great majority of educated and civilised people. And in many countries in the Middle East and Africa, some of these rights, and some important aspects of other rights would not be recognised today by the majority of the population.

35. I can be accused of being a moral relativist, and, depending on your definition of that expression, I may well be one, but it does seem to me that, while I personally believe very strongly in the existence and importance of these sort of rights and freedoms, it must be acknowledged that they are not necessarily timeless or universal. And, with one or two exceptions, they are not absolute – as is recognised in the terms in which some of them are expressed (e.g. freedom of expression and respect for privacy). Even apparently absolute rights

like freedom of religion or freedom to marry have obvious limits (you cannot kill someone simply because your religion requires it; you cannot marry a child or someone already married). Indeed, there is an arguable, if hotly contested, view that even torture may be justified in very extreme and exceptional circumstances.

36. Right from its inception as a Special Administrative Region of the PRC, Hong Kong has had the broader version of the rule of law expressly included as part of its law through the Basic Law and the Hong Kong Bill of Rights. The position in the United Kingdom is slightly different. The UK is almost unique among the liberal democratic countries of the world in not having a written coherent constitution (almost unique because New Zealand and Israel do not have written constitutions either). So there appears to be a powerful case for saying that it was only when Parliament enacted the Human Rights Act in 1998, and effectively incorporated the Human Rights Convention into domestic law, so that UK judges could give effect to it, that the UK had the broader version of the rule of law. However, because much of the UK's constitution is ultimately accepted convention and unwritten, the position is a bit more murky. Indeed, many English political philosophers and legal thinkers like to say that English thinkers and law-makers were really the modern originators of human rights. Certainly, most of the objections which are raised in the UK to the Human Rights Act are and were ultimately founded on the fact the Convention which the Act effectively incorporated was European rather than simply British. That is why proposals for the repeal of the Act are normally accompanied with an assurance from the would-be repealers that the Human Rights Act would be replaced by a so-called British Bill of Rights.

37. This is not the occasion to discuss such issues. But it is relevant for my talk this evening that the UK, which has always been my home, sees itself as being in the vanguard of the movement for fundamental rights. While I acknowledge that I can be characterised as a human rights relativist in objective terms, I would be profoundly uncomfortable about living in a

society which did not, at least to a very substantial extent, unhesitatingly subscribe to the broader version of the rule of law. And I would be simply unprepared to be a judge in such a society. Having said that, it is right to acknowledge that virtually nobody, however patriotic, can realistically expect to agree with every law of the country in which they live. And if people could only become judges if they agreed with every law they had to administer, hardly any country would have a judge. More broadly, particularly in today's highly legislated and regulated world, there will almost inevitably be aspects of legislative and executive decisions or actions with which a judge will be unhappy, sometimes even actions or decisions which have substantial impact on the rule of law. But that does not mean that such a judge should step down in the face of having to administer such legislation. Thus, probably almost all English and Welsh judges strongly disagreed with, and regretted, the UK Government's decision at the end of the last century drastically to curtail civil legal aid and replace it with a highly questionable new system, which undoubtedly impinged detrimentally on access to justice. But no judge resigned as a result of the passing of the ironically named Access to Justice Act 1999. Nor should they have done so.

38. The exigencies and realities of modern political and economic life are such that the law-makers and members of the executive have to make compromises, and it is inevitable not merely that those compromises will not satisfy everyone, but that they will sometimes turn out to be unsatisfactory: often the art is to find the least unsatisfactory solution to a problem. Accordingly, it is unrealistic for anyone, including a judge, to expect that the system under which they live and operate will be satisfactory or even justifiable in all respects.

39. Having said that, a point may come where the laws or executive actions are such that a judge feels that he or she can no longer in all conscience continue in office: that it is no longer appropriate to continue to be part of the system. To that extent, it is right for a judge who strongly believes in the existence and maintenance of fundamental rights to be concerned about

the maintenance of the rule of law in the broader sense in the place where he or she is administering justice. It is almost inevitable that there will be aspects of the law or executive actions in Hong Kong about which I am concerned, just as there have been and are aspects of the law or executive actions in the United Kingdom about which I am or have been concerned. But, just as there was no question of my concerns causing me to resign as a UK judge (although the fact that I am about to reach a mandatory retirement age has caused me to step down this month), so there is no question of my present concerns causing me to resign as a Hong Kong judge.

40. I have concentrated in this talk on the role of the judiciary, but, not least because I am speaking at a University, it would be wrong to end without paying tribute to the contribution of legal academics to the rule of law. The importance of the role of academic lawyers in considering issues about the rule of law, in discussing and criticising judicial decisions, and in teaching future generations of lawyers cannot be over-estimated. There are inevitably differences of approach between judges, who have the benefit of practical decision-making and focused adversarial argument, and academics, who can take a broader and more in-depth view, but that reinforces the view that they should be able to learn from each other. I have discussed in a previous lecture the historic reluctance of judges in the UK to take into account the writings of academic lawyers and how this has fortunately changed over the past forty years. The cross-fertilisation between judges and academics is as valuable when it comes to the rule of law as it is on any other legal issue, and in a place as vibrant as Hong Kong it is particularly valuable.

41. Thank you very much.

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