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Global Economy and the Rule of Law

It is entirely appropriate for Sir Jeffrey Jowell to start the session with a reference to Lord Bingham of Cornhill and to his book “The Rule of Law”. For Lord Bingham was the modern personification of the clear linkage between economic considerations and the rule of law. Just as centuries before, this link was personified by William Murray – Lord Mansfield – Lord Bingham (whom I first met when I was a pupil) followed a long line of commercial lawyers who clearly saw this connection. Lord Mansfield, who was Chief Justice for 32 years, is often said to be the father of English commercial law. It was he who said, famously,¹ “In all mercantile transactions, the great object is certainty Because [investors, traders and businesspersons] then know what ground to go upon”. As an aside, English commercial law has in my view provided for the past century the modern *lex mercatoria* and has generated principles of law which have been adopted around the world, whether by courts or contained in commercial conventions. But, as I shall touch upon later, Lord Mansfield was acutely aware that alongside the development of commercial law there had to be a respect for human rights.

The link between economic considerations on a global scale (meaning business, trade and investment) – global economy – and the rule of law is not initially an easy concept to grasp. When I was a barrister, practising mainly in commercial law, I saw the link as many still regard it today, in somewhat narrow terms; that the relevance of the rule of law to economics was merely the existence of an economic or business friendly legal environment in any given jurisdiction. Accordingly, a jurisdiction that had the rule of law was one in which laws were certain and where the law complemented economic activities. Characteristics of such jurisdictions then included the following:-

Sound commercial principles developed by the courts which not only determined in a just way disputes between parties at odds with one another but also which provided invaluable precedents to guide the way commercial people should conduct their affairs. It is this guidance given to the commercial community, particularly from the 1950’s through to today, that has led me to my belief that English commercial law has in substance provided the modern *lex mercatoria*.

Statute and laws relevant to business are publicly made and accessible.

The existence of courts which meet the needs of the business community so that, in the words of Lord Devlin (one of the greatest commercial judges in England), the courts “may solve the disputes of commercial [persons] in a way which they understand and appreciated.”² The Commercial Court in

¹ In *Vallejo v Wheeler* (1774) 1 Cowp. 143, at 153 (a case dealing with the meaning of barratry).

² *St John Shipping Corporation v Joseph Rank Ltd* [1957] QB 267, at 289.

England needs no introduction. Singapore has developed its own International Commercial Court. Hong Kong has a specialist list for commercial cases.

Further, not only should there exist a sophisticated court structure for the effective resolution of commercial disputes, there should also be in tandem alternative forms of dispute resolution. Arbitration and mediation are the principal institutions in this regard.

So far, in terms of legal philosophy, what I have just enumerated accords broadly speaking with what Lord Bingham has described as the “thin type” of the rule of law. However, is this really the full extent of what the business community or the international investor expects from the rule of law? Well, one supposes just as there will be different types of businesspersons or investors (some are short term speculators, others medium term, still some others into long term investments), different points of view will be held. But this is an unsatisfactory answer and really provides very little insight into the topic we address today.

It is at this point we should first set out a definition of the rule of law. My own working definition of the rule of law encompasses two connected facets: for me, the rule of law presupposes first, the existence of laws that respect the dignity, rights (including economic rights) and liberties of the individual and corporations, and secondly, the existence of an institution (we of course mean here an independent judiciary) to enforce these rights and liberties, and there is effective access to that institutions. The references to dignity and liberties in the context of rights are important; they underline the point that laws must themselves be just and respect what we term “human rights”. The reference to access (some refer to this as access to justice) is also important. Perfect laws and a perfect judiciary (assuming perfection can ever be achieved) are one thing but they are not enough: one must get to them in order to be in a position to enjoy rights and liberties.

I believe that any global economy, and any place within it where businesspersons, traders and investors are to be found, must have a sound legal foundation. Such legal foundation clearly means the existence of the rule of law in the relevant place. And the rule of law in this context means primarily the existence of those facets I have earlier identified – the existence of laws that respect the dignity, rights and liberties of the individual (and this includes in particular human rights and fundamental freedoms) and an independent judiciary which will effectively enforce them. I return briefly to Lord Mansfield. Apart from his reputation in the context of commercial law, he very much understood the concept of the rule of law. He was responsible for the judgment in the famous case of *R v Knowles ex parte Sommersett*.³ It was this case that firmly established the principle that slavery was prohibited in England and

³ (1771-2) State Tr. 1.

Wales.⁴ Cases like *Sommersett's Case* feature prominently in any discussion on the rule of law, and such cases do matter.

The respect for human rights and fundamental freedoms, and their enforcement, are important to global economic development for the following reasons:-

Economic development in today's world requires international participation and that means, as an important part of this, international investment. International investment requires a sound legal foundation in the relevant place where the investment is to be made.

The legal system of that place then assumes immense importance. In a jurisdiction like the United Kingdom and Hong Kong where the principle of equality before the law is a key concept, due recognition of this in reality will inevitably promote economic development and investment. The reason for this is easy to grasp. A foreign investor, just like the citizens of a place, will be subject to the laws of that place. It is therefore only natural for that investor to compare himself or herself with other people who are subject to the law. If others who, like the investor, also have rights and liberties find themselves being treated arbitrarily, or their rights and liberties are not in reality enforced, then the same fate might one day be suffered by the investor. Where there is arbitrariness or a lack of respect for rights, this breeds inequality. A person treated advantageously one day can quite easily be treated in the opposite way the next. This is the exact reverse of what the rule of law seeks to achieve.

The enforcement of rights lies with the courts. The litigants before the courts include a multitude of people, corporations and entities, each with different backgrounds and issues, each with a different problem to be solved. And yet each is – or at least should be – treated in exactly the same way by the courts. In the same way as the law applies equally to all, it is the same courts which deal with the disputes before them, whatever the nature of the dispute and whatever the identity of the parties. There may be minor differences in the procedures of different tribunals or in the monetary jurisdiction of different levels of courts, but fundamentally the courts will apply the same rules to everyone before them, both the law and the spirit of the law. No litigant or class of litigant has any preferential treatment. In the resolution of any dispute, courts may have to balance a variety of diametrically opposed interests that come before them, but all parties are treated equally.

The enforcement of rights and respect for them also lie with those who wield the most power and influence. In all jurisdictions, this means in particular the government. To everyone subject to the law, and this includes of course our international investor, it is important that the government respects rights and

⁴ Said by Lord Mansfield to be “odious”.

fundamental freedoms, the law and its spirit. It is also of importance that the government is itself subject to the law, and is treated equally with other litigants in the courts.

I have already made reference to the importance of an independent judiciary. This is crucial to the rule of law. Apart from enforcing the rights of persons and resolving the very many disputes that come before them, courts in discharging the constitutional duty on them also ensure that those in power do not abuse their position and at all times act in accordance with the law. If there is one lasting, timeless significance of Magna Carta, which this Global Law Summit celebrates, this is it. In addition, in the discharge of their constitutional duty, judges must act with transparency. Court procedures and court proceedings must be open to the public (save in exceptional circumstances). Judgments must be properly reasoned in order to demonstrate clearly that the court has applied the law and its spirit – and only these matters – and has not been influenced by anything else. Judgments must also be easily accessible. Access to justice is important and in this context, the existence of the legal aid, while not as important to the businesspersons or international investors, will often be of crucial importance to many others.

To conclude, it must be uncontroversial that a jurisdiction committed to the ideals and practicalities of the rule of law is a jurisdiction which is critical to a global economy. After all, global economies through the ages have depended on the efficacy of the *lex mercatoria* and the *lex mercatoria* depends entirely on the existence of the rule of law in practice.

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